



# TEXT, HISTORY, AND TRADITION VERSUS VALUES AND FEELINGS

## OVERVIEW

A judge's job is to apply the law to the facts, no more and no less. Oftentimes judges are called upon to interpret the laws, whether as provisions of the constitution, statutes, or regulations. Some constitutional provisions in particular reflect broad principles—"due process," "free exercise," "cruel and unusual." How is a judge to decide on the meaning of these phrases? Some judges rely on text, history, and tradition. Other judges rely on their personal "values" and beliefs about public policy.

## WHAT YOU SHOULD KNOW

From 2005-2008, the Wisconsin Supreme Court went on a bender of judicial activism. Here's how former Wisconsin Supreme Court Justice Diane Sykes described it in a speech at Marquette University Law School:

Together, these five cases mark a dramatic shift in the court's jurisprudence, departing from some familiar and long-accepted principles that normally operate as constraints on the court's use of its power: the presumption that statutes are constitutional, judicial deference to legislative policy choices, respect for precedent and authoritative sources of legal interpretation, and the prudential institutional caution that counsels against imposing broad-brush judicial solutions to difficult social problems. I will concede (as I must) that a court of last resort has the power to throw off these constraints, revise the rules of decision, and set the law on a new course. But when it does so, we ought to sit up and take notice, and question whether that power has been exercised judiciously...

The Wisconsin Supreme Court has enormous influence over the legal order and the political, social, and economic future of this state. These cases from the last term reflect a court quite willing to aggressively assert itself to implement the statewide public policies it deems to be most desirable. The court is loosening the usual constraints on the use of its power, freeing itself to move the law essentially as a legislature would, except that its decisions are for the most part not susceptible of political correction as the legislature's would be.

In her first paragraph, Judge Sykes defines the principles of good judging: a presumption of deference to elected policy makers, respect for precedent, and judicial humility when approaching difficult social problems. The Wisconsin Supreme Court abandoned those principles in that period from 2005-2008, and we are perched on the precipice of a return to that attitude.

## WHAT COULD HAPPEN

The Court will soon consider 2011 Act 10, which will expose whether respect for precedent and the legislature's policy decisions will be preempted by the majority's "values" and policy preferences. The Wisconsin Supreme Court has already upheld Act 10, and the U.S. Court of Appeals has rejected this exact same argument about equal protection. Moreover, the Wisconsin Supreme Court recently reiterated in *AMB v. Circuit Court for Ashland County* the limits of its power when applying "rational basis" scrutiny, the lowest version of judicial review for an act of the legislature. Will it stick with that deference to the legislature's policy choices in the Act 10 case?

## LEGAL BACKGROUND

As IRG adjunct fellow Daniel Suhr [wrote](#) last year in the Wisconsin State Journal, retiring Justice Ann Walsh Bradley was historically a strong respecter of precedent:

In *State v. Lindell* (2001), she railed against the majority for overturning a case that she herself had dissented on when it was originally considered. "I happen to be among those who believe *Ramos* was wrongly decided. . . . However, despite my disagreement, because of the many and consistent affirmations of *Ramos* by this court I eventually had to acknowledge it as valid precedent." When given the opportunity to overturn *Ramos*, then, she declined it, "[o]ut of respect for the law and this court as an institution."

More recently, in *State v. Prado* (2021), she [wrote](#), "Stare decisis, the principle that courts must stand by things decided, is fundamental to the rule of law. Any departure from stare decisis requires special justification." Whatever is sufficient under that standard, one thing clearly [fails](#) it: "The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed."

Unfortunately, Justice Bradley abandoned that respect for precedent when she considered the ballot drop box and redistricting decisions last year. The replacement of retiring justice Pat Roggensack by Janet Protesawicz was nothing more than a change in the composition of the Court, yet that principle did not stop the new majority (including Ann Walsh Bradley) from overturning those two cases.

## ZOOM IN

When judges follow the text, history, and tradition, they are tied down to concrete, objective principles that limit their discretion and force them to respect their appropriate role, which includes respecting the role of the governor and legislature to make policy choices as the political branches.

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