Wisconsin Law in the Age of Individualism

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WISCONSIN LAW IN THE AGE OF INDIVIDUALISM

JOSEPH A. RANNEY*

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I. INTRODUCTION

As European Catholics flowed into Wisconsin during the mid-19th century, they established parochial schools as part of an effort to preserve their religion and culture in their new homeland. Many resisted old-stock Wisconsinites’ vision of the state’s public schools as common

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ground for educating and assimilating Wisconsin children of all backgrounds.\(^1\) Over the course of the next century, Wisconsin lawmakers rejected parochial school supporters’ efforts to obtain state financial support\(^2\) but in 1961, supporters finally triumphed when the legislature agreed to fund busing of parochial as well as public-school students.\(^3\) Their victory was short-lived, however: later that year, Wisconsin’s supreme court struck down the funding law as a breach of the constitutionally-required separation between church and state.\(^4\)

Supporters had hoped they would have at least some judicial allies in an era when Catholics were increasingly finding their political and legal voice, but they failed to take into account the court’s culture of uniformity. The justices’ backgrounds were similar: all were men who had risen from relatively modest origins and had spent most of their lives in law and government.\(^5\) Dissent was not unknown among the justices but they strove to avoid it.\(^6\) Since the late 19th century the court had honored the old-stock assimilationist vision of education and had consistently rejected efforts to subsidize parochial schools.\(^7\) The justices were not about to change course now.

But during the next three decades the culture of assimilation and consensus eroded badly. Voters overrode the court’s decision in 1967 by amending the state constitution to authorize public funding of parochial busing;\(^8\) they then turned their attention to racial assimilation in the Milwaukee public school system (MPS). By 1990 many Wisconsinites, black and white alike, had concluded that school integration was a failure and in the spring of that year the legislature struck another blow

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2. See Costigan v. Hall, 249 Wis. 94, 23 N.W.2d 495 (1946); State ex rel. Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923).
5. As to the justices’ religion and background, see PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT’S FIRST 150 YEARS (Trina E. Gray et al. eds., 2d ed. 2003), 57–58 (Timothy Brown), 59–60 (George Currie), 72 (Thomas Fairchild), 63–64 (E. Harold Hallowes), 64–65 (William Dieterich), 73 (Myron Gordon), 65–66 (Horace Wilkie).
6. In 1940, 92% of the court’s decisions were unanimous; in 1960 the figure was 88%. Figures in author’s possession; see infra note 254 and accompanying text.
7. See State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of Edgerton, 76 Wis. 2d 177, 44 N.W. 967 (1890); Costigan, 249 Wis. 94; State ex rel. Van Straten, 180 Wis. 109.
against assimilation by enacting the nation’s first school-voucher law, providing public subsidies to parents and students who wished to leave MPS for private schools.\(^9\) Two years later, a challenge to the law reached a supreme court that had changed dramatically since 1962. Judicial consensus was declining—by the end of the 1990s the court would divide in more than half of its cases\(^{10}\)—and the court had also become less monolithic in other ways. It now included Shirley Abrahamson, who had become Wisconsin’s first female justice in 1976, and William Bablitch and Louis Ceci, former legislators whose perspectives had been heavily influenced by their time in the political arena.\(^{11}\)

In *Davis v. Grover* (1992) the court narrowly upheld the school voucher law, and it also showcased the demise of the culture of consensus.\(^{12}\) Both the majority and the dissenters viewed *Davis* as a victory of individual choice over assimilationism; the contentiousness of their language mirrored the political controversy that had surrounded the law’s enactment and marked an end to a core consensus-era value, namely circumspection of language and avoidance of personal attacks. Justice Ceci, who was part of the majority, bluntly attacked MPS as a failure and urged the dissenters to “give choice a chance!”\(^{13}\) The dissenters fired back: Justice Bablitch labeled Ceci’s opinion “totally inappropriate and judicially indefensible,”\(^{14}\) and Justice Abrahamson criticized the majority for “permit[ting] the legislature to subvert the unifying, democratizing purpose of public education.”\(^{15}\) The majority responded to Abrahamson by praising school choice as an “illustration of Wisconsin’s innovation and willingness to . . . further improve the quality of education and life.”\(^{16}\) In 1995 the legislature allowed use of vouchers in parochial schools for the first time, but opponents’ hopes that the court would strike down the law based on its 1962 ruling were soon dashed.

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10. In 1980, 75% of the court’s decisions were unanimous; in 2000 and 2010 the figures decreased to 47% and 18% respectively. See *infra* note 254 and accompanying text.
11. *See* PORTRAITS OF JUSTICE, *supra* note 5, at 78 (Ceci), 81 (Abrahamson), 82 (Bablitch); see also *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 1 (Roger K. Newman ed., 2009), 1 (Abrahamson).
13. *Id.* at 546 (Ceci, J., concurring).
14. *Id.* at 565 n.1 (Bablitch, J., dissenting).
15. *Id.* at 562 (Abrahamson, J., dissenting).
16. *Id.* at 512 n.2.
The old rule of strict separation between church and state, said the majority, had been superseded by a new Wisconsin "tradition[] . . . [—]accord[ing] parents the primary role in decisions regarding the education and upbringing of their children." 17

The Wisconsin court’s shift mirrored a larger American shift away from the traditional view of liberty, a view that tolerated divergence only within a finite universe of acceptable discourse, toward a view of liberty as "expressive individualism" that eliminated the boundaries of that universe and promoted Americans’ right to shape their own lives and views without limit. 18 In the words of one observer, expressive individualism caused “conceptions of human nature that . . . had been thick with context, social circumstance, institutions and history [to] g[i]ve way to conceptions of human nature that stress[ ] choice, agency, performance, and desire.” 20 The shift first became apparent during the turbulent 1960s and 1970s, and it has been a force behind nearly every important social movement of the past half century. 21

Expressive individualism has proven to have a darker side, one which has "conjured up . . . something smaller, more voluntaristic, fractured, easier to exit, and guarded from others." 22 Since the 1960s many Americans have shifted away from communal forms of activity such as churchgoing and participation in social and civic organizations; they now spend much of their time alone or interacting with small groups, usually of like-minded people, leading historian Daniel Rodgers to label the modern era the “Age of Fracture.” 23

22. RODGERS, supra note 20, at 220.
23. See PATTERSON, supra note 19, at 59–63, 75–85, 167–70; ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 173–80, 283–85 (2000). The causes of this fracture cannot be neatly identified but they include increasing distrust of government, first generated by the Vietnam War (1963–75) and by the Watergate scandal that led to President Richard Nixon’s resignation (1973–74), and the transition away from a mid-century economy dominated by large corporations and unions to a more changeable, less predictable economy in which wealth and success depend more on individual initiative than on teamwork. The electronic revolution that began in the late 1970s has also been a contributor: Much of the time that Americans formerly spent communicating face-to-face is now spent...
Expressive individualism has produced an increasingly polarized nation: Americans with similar education and income levels increasingly share each other’s political and cultural viewpoints, seek each other out and have minimal interaction with people at other levels. Expressive individualism has also “etched a vivid trail of anger and memory” and elicited a powerful conservative reaction that has influenced modern American society fully as much as the forces it opposes. Modern conservatism has many sides but its common hallmarks include a desire for clear codes of morality and behavior; a basic skepticism of the value of social change; and a fear that toleration of deviance from traditional mores will lead to irretrievable loss of all ideals.

This Article uses Wisconsin as a lens to examine ways in which the struggle between expressive individualism and its opponents has shaped modern American state law. Wisconsin is a useful lens because it has made important contributions to legal expressive individualism, most notably by adopting the nation’s first voucher system, and because modern Wisconsin law has reflected the course of other struggles over expressive individualism.

The Article begins by examining the role that state lawmakers in Wisconsin and elsewhere played in the meteoric rise of gay and lesbian rights after 1970, an unambiguous triumph for expressive individualism and perhaps its most important contribution to American law. The Article then turns to several fields in which the struggle between expressive individualism and its opponents continues. First, during recent decades Wisconsin and other states have established new constitutional rights promoting individual expression including the right to bear arms, to hunt and fish, and to gamble, but other state constitutional amendments have been used to promote modern conservative values, particularly defense-of-marriage (DOMA) amendments enacted in order to block legalization of gay marriage and amendments restricting use of sitting alone with a computer, communicating with others remotely and often anonymously.


25. RODGERS, supra note 20, at 4.


27. See infra note 41 and accompanying text.
languages other than English in official settings. The Article examines the historical origins and the modern course of each amendment movement.28

Second, the Article examines expressive individualism as manifested in the voucher movement and in courts’ increasing preferment of parental over public authority. Assimilationists have given ground in these fields but they continue stoutly to oppose voucher programs and other individualist reforms; the Article explains how, in the end, the fate of voucher programs in Wisconsin and elsewhere may turn on variations in state constitutional provisions regarding education.29 Third, the Article examines the struggle in Wisconsin and other states over laws limiting women’s access to abortion.30 It explains how abortion opponents, after failing in their quest to overturn Roe v. Wade,31 turned to indirect legal restrictions which have enjoyed much success but continue to meet with steady opposition, and it examines the evolution of legal boundaries between permissible and impermissible restriction of women’s ability to control abortion decisions.32

The Article concludes by examining how expressive individualism has penetrated the culture of state courts. The decline of judicial consensus has not been limited to Wisconsin: rates of dissent and rhetorical vitriol have risen within many state supreme courts.33 Since the late 1970s a number of state judges and courts, including Wisconsin’s Shirley Abrahamson, have espoused a “new federalism” doctrine which holds that state courts should express their individualism by reading state constitutions expansively to protect and expand civil rights independent of federal constitutional precedent; however, the doctrine has elicited much popular and judicial opposition.34 Expressive individualism clearly has been the central theme of late 20th century and early 21st century American law; how long that will remain the case, and how permanent a mark expressive individualism will leave on American law, remain to be seen.

28. See infra notes 42, 44, 80–84, 87, and accompanying text.
29. See infra note 180 and accompanying text.
33. See infra note 250 and accompanying text.
34. See infra notes 267–71, 281–82, and accompanying text.
II. INDIVIDUALISM ASCENDANT: THE GAY MARRIAGE REVOLUTION

Mid-20th-century law reflected prevailing social attitudes toward gays. Most Americans considered gay lifestyles distasteful at best; gay sex was subject to prosecution under the sodomy laws in force in nearly every state and many believed that gays should be barred from congregating in bars and other public places, although in the 1950s California’s supreme court and several eastern state courts held that constitutional rights of association protected gays as much as other Americans. Following the 1969 Stonewall incident, in which a police raid on a New York City gay bar triggered one of the first mass protests and expressions of gay pride, a movement began to expand gays’ civil rights. In 1981, Wisconsin became the first state to prohibit employment discrimination based on sexual orientation; by 2010, twenty-one states had followed suit and governors in nine other states had issued orders prohibiting such discrimination in government employment. The road to social and legal acceptance was long. Early antidiscrimination ordinances elicited strong reactions and some successful repeal efforts by opponents, but reform continued to inch forward in other areas and public opinion gradually softened.

Gay activists envisioned a gay-marriage campaign as early as 1970, although they were divided over the wisdom of pursuing that goal so early in the new movement. During the early 1970s three state supreme courts rejected arguments that constitutional equal-protection clauses required that marriage rights be extended to homosexual as well as heterosexual couples; national gay-rights groups then counseled against further challenges until public opinion became more gay-
friendly.\textsuperscript{42} In the early 1990s Hawaiian activists mounted a new challenge and in \textit{Baehr v. Lewin} (1993), Hawaii’s supreme court surprised the nation by holding based on the state’s equal-protection clause (which it concluded was broader than the federal clause) that denial of the right of marriage to gay couples constituted unconstitutional gender-based discrimination.\textsuperscript{43} \textit{Baehr} went too far for most Americans: between 1993 and 2008 more than half the states, including Wisconsin, enacted defense-of-marriage constitutional amendments (DOMAs) barring gay marriage and prohibiting recognition of gay marriages performed in other states.\textsuperscript{44} The DOMAs varied in scope: ten referred only to marriage;\textsuperscript{45} sixteen, including Wisconsin’s, referred to marriage and civil unions;\textsuperscript{46} and four broadly prohibited all relationships containing any elements of marriage.\textsuperscript{47}

Although the activists who filed suit in \textit{Baehr} failed in their quest to marry, they succeeded better than they knew. Hawaii’s supreme court had opened the door to hope that arguments for a constitutional right of gay marriage might prevail someday, and movement leaders began to cultivate political support in other states where they believed gay marriage might have a chance.\textsuperscript{48} Hawaii’s legislature opened the door a bit more: in 1998 it enacted the nation’s first domestic partnership law

\begin{itemize}
\item \textsuperscript{43} See \textit{Baehr v. Lewin}, 852 P.2d 44 (Haw. 1993); \textit{see also} \textit{Baehr v. Miike}, 994 P.2d 566 (Haw. 1999); \textit{Baehr v. Miike}, 950 P.2d 1234 (Haw. 1997).
\item \textsuperscript{44} DOMAs were enacted in Alaska (1998); Nevada and Nebraska (2000); Michigan, Arkansas, Georgia, Kentucky, Louisiana, North Dakota, Ohio, Oklahoma, Utah, Missouri, Mississippi, Montana, and Oregon (2004); Kansas and Texas (2005); South Dakota, Virginia, Alabama, Idaho, South Carolina, Wisconsin, Colorado, and Tennessee (2006); Florida, Arizona, and California (2008); and North Carolina (2012). \textit{See Research Guides: Same-Sex Marriage Laws, \textsc{Moritz Coll. of L.}}, \url{http://moritzlaw.osu.edu/library/samesexmarriagelaws.php} (last visited Apr. 24, 2017).
\item \textsuperscript{45} Those of Alaska, Arizona, California, Colorado, Missouri, Mississippi, Montana, Nevada, Oregon, and Tennessee. \textit{See id.}
\item \textsuperscript{46} Those of Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and Wisconsin. \textit{See id.}
\item \textsuperscript{47} Those of Michigan, Nebraska, South Dakota, and Virginia. \textit{See id.}
\item \textsuperscript{48} Eskridge, supra note 41, at 282–85.
\end{itemize}
extending certain inheritance rights, hospital visitation rights, and government benefits to registered partners.\textsuperscript{49} A year later, Vermont’s supreme court opened the door still wider: in \textit{Baker v. State} (1999) it held that the Vermont constitution’s “common benefits” clause mandated that gay couples receive the “common benefit, protection, and security that Vermont law provides opposite-sex marriage couples.”\textsuperscript{50} The court rejected opponents’ arguments that excluding gay couples from the benefits of marriage promoted the state’s interest in encouraging procreation, noting that childbearing was not a requirement of marriage and that many married couples were childless.\textsuperscript{51} It stopped short of requiring that gay couples be allowed to marry, but it made clear that they must be given all the legal benefits of marriage.\textsuperscript{52} The legislature complied by enacting a civil-unions law in 2000.\textsuperscript{53}

Efforts in Vermont to overturn \textit{Baker} and the civil-unions law through enactment of a DOMA failed,\textsuperscript{54} and another turning point soon arrived: in \textit{Goodridge v. Department of Public Health} (2003) Massachusetts’s supreme court held by a 4-3 vote that its state constitution’s equal-protection clause required that the title as well as the incidents of marriage be extended to gay couples.\textsuperscript{55} Vermont’s justices had phrased their decision in soft terms, as “a recognition of our common humanity,”\textsuperscript{56} but Chief Justice Margaret Marshall and others in the Massachusetts majority were more hard-edged. Marshall denounced opposition to gay marriage as being “rooted in persistent prejudices”; the state constitution, she said, “cannot control such prejudices but neither can it tolerate them.”\textsuperscript{57} The \textit{Goodridge} dissenters laid out the basic arguments that gay-marriage opponents would raise throughout the ensuing decade of litigation: in addition to arguing that confining marriage to heterosexual

\begin{itemize}
\item \textsuperscript{50} \textit{Baker v. State}, 744 A.2d 864, 886 (Vt. 1999). Article I, § 7 of the Vermont constitution provides that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single person, family, or set of persons.” Vt. CONST. of 1777, ch. I, § 7.
\item \textsuperscript{51} \textit{Baker}, 744 A.2d at 882.
\item \textsuperscript{52} Id. at 884–87.
\item \textsuperscript{54} Eskridge, supra note 41, at 285–86.
\item \textsuperscript{55} \textit{Goodridge v. Dep’t of Pub. Health}, 798 N.E.2d 941 (Mass. 2003); see also Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (advising the Massachusetts legislature that a civil-union law would not suffice to comply with \textit{Goodridge}’s holding).
\item \textsuperscript{56} \textit{Baker}, 744 A.2d at 889.
\item \textsuperscript{57} \textit{Goodridge}, 798 N.E.2d at 968.
\end{itemize}
couples encouraged procreation, they argued that the court was “transform[ing] its role as protector of individual rights into the role of creator of rights” that had never before been discerned in Massachusetts’s constitution. More practically, they stressed that gay marriage could not last without popular support and, thus, should be achieved through the political process rather than judicial fiat.

Efforts in the Massachusetts legislature to overturn Goodridge through a constitutional amendment failed narrowly, but the case provided fuel for a new wave of DOMAs in other states. In Wisconsin, constitutional amendments must be approved by two consecutive legislatures and then ratified by voters. The legislature approved a DOMA in 2003 and again in 2005. After a vigorous campaign in which supporters averred that the amendment’s only purpose was to limit the institution of marriage to heterosexual couples and that it was not intended to deny other legal rights to gay Wisconsinites, voters ratified it by a 59%-41% margin in late 2006.

Goodridge also gave rise to a wave of lawsuits, mostly in the Northeast, seeking judicial declarations of a constitutional right of gay marriage. They produced mixed results. In 2006 New Jersey’s supreme court followed Baker and held that the state’s equal protection and due

58. Id. at 1002 n.34 (Cordy, J., dissenting).
59. Id. at 974 (Spina, J., dissenting).
60. Id. at 990 (Cordy, J., dissenting).
62. See Eskridge, supra note 41, at 302–03.
63. Wis. Const. art. XII, § 1.
64. Id. art. XIII, § 13; J. Res. 29, 96th Leg., Reg. Sess. (Wis. 2004); S. J. Res. 30, 97th Leg., Reg. Sess. (Wis. 2005).
process clauses mandated civil unions; three dissenters would have followed Goodridge. The supreme courts of New York (2006) and Maryland (2007) refused by narrow margins to read a right to gay marriage into their state’s constitutions but in 2008 a closely-divided Connecticut Supreme Court followed Goodridge. A wave of legal challenges to state DOMAs also began in 2006. Challengers argued that the DOMAs contravened federal and state equal-protection and due-process clauses; the Washington, Ohio, and Michigan supreme courts rejected such challenges but California’s and Iowa’s supreme courts struck down their states’ DOMA statutes in 2008 and 2009 respectively, based on their state constitutions’ equal-protection clauses. Both decisions triggered backlashes: California voters responded by approving a DOMA and in 2010 Iowa voters ousted three justices who had voted for gay marriage.

The backlash in California unexpectedly opened the final, federal phase of the legal debate over gay marriage. After California’s supreme court rejected a challenge to the state’s new DOMA, California gay-marriage advocates turned for the first time to the federal equal-protection clause and the federal courts. In Perry v. Schwarzenegger (2010) federal judge Vaughn Walker conducted a lengthy, nationally-publicized trial to determine whether there were facts to support gay-marriage opponents’ arguments that limiting marriage to heterosexual couples promoted procreation and children’s welfare. After hearing all the evidence Walker issued a detailed, methodical opinion concluding that opponents had not proven their case and that California’s DOMA violated the federal equal-protection clause. His decision was upheld on appeal; the U.S. Supreme Court then vacated it but declined to address the merits, holding only that the gay-marriage opponents who had

68. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).
69. Hernández, 855 N.E.2d 1; Conaway v. Deane, 932 A.2d 571 (Md. 2007).
70. Kerrigan, 957 A.2d at 457–60, 482.
joined as parties to defend the DOMA after California’s attorney general declined to do so did not have standing.77 Gay-marriage litigation then steadily shifted from state to federal courts, nearly all of which agreed with Judge Walker that gay couples had the right to marry under the federal equal-protection clause.78 Walker’s decision played a crucial role in the shift but so did rapidly-changing popular attitudes: beginning in 2009 opinion polls consistently began to show more support than opposition to gay marriage, and in 2012 President Obama formally endorsed it.79 Federal courts upheld gay couples’ right to marriage in three states in 2013,80 twenty-four states in 2014 and three states in 2015,81 the New Mexico and New Jersey supreme courts did the same,82 leaving only a handful of states in which gay marriage remained illegal.84 The tide of change reached Wisconsin in 2014. In Appling v. Walker, decided in July, Wisconsin’s supreme court construed the state’s 2006 DOMA as limited strictly to marriage and it refused to overturn a law extending marital benefits to registered domestic partners that the legislature had enacted during a brief period of Democratic control in 2009.85 In Wolf v. Walker, decided in October, federal judge Barbara Crabb struck down Wisconsin’s DOMA in its entirety, concluding that it violated the federal equal-protection clause.86

In June 2015, the U.S. Supreme Court closed the legal debate over

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77. Id.
78. For a list of the court decisions in question, see Obergefell v. Hodges, 135 S. Ct. 2584, 2607–12 (2015).
80. Illinois, Utah, and Ohio. See Obergefell, 135 S. Ct. at 2607–12.
82. South Dakota, Alabama, and Nebraska. See id.
84. See DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 1994); Merritt v. Attorney Gen., 2013 WL 6044329 (M.D. La. 2013); Ex parte State ex rel. Ala. Policy Instit., 200 So. 3d 495 (Ala. 2015). Between 2000 and 2015 eleven states also legalized gay marriage through enactment of statutes or constitutional amendments. See Obergefell, 135 S. Ct. at 2611.
86. Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis.), aff’d, 766 F.3d 648 (7th Cir. 2014).
gay marriage when it held by a 5-4 vote that marriage was a fundamental liberty protected by the federal Constitution, one closely associated with constitutional rights of freedom of association and of privacy, and one that extended to all couples regardless of sexual orientation. 87 Four dissenting justices sounded, with varying degrees of sharpness, the theme of deference to democratically-elected legislatures first sounded by the Goodridge dissenters. 88 Within the space of seventeen years, gay Americans’ right of self-expression through marriage had gone from universal rejection to the law of the land.

III. MODERN BATTLEGROUNDS: STATE CONSTITUTIONS

The U.S. Constitution was designed to be an organic document, one confined to general governmental principles and not cluttered with policy details. Despite occasional arguments that state constitutions should emulate that goal, they have been stuffed with social policy provisions and have regularly been amended as social and political tides have shifted in the states. 89 During the late 20th century a wave of constitutional populism led to passage of amendments designed to rein in governments perceived as “overly expensive and powerful . . . insulated from popular concerns and popular control.” 90 The populist impulse was closely connected to expressive individualism, a connection most directly expressed in amendments guaranteeing and expanding the right to bear arms, the right to hunt and fish, and gambling. 91 Opponents of expressive individualism also made their voices heard through

87. Obergefell, 135 S. Ct. at 2590.
89. See, e.g., McCulloch v. Maryland, 17 U.S. 316, 415 (1819) (referring to a “constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs”); CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS xv, 24–30 (G. Alan Tarr ed., 1996). Cf. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 34 (1868) (“How far the constitution of a State shall descend into the particulars of government is a question of policy addressed to the convention which forms it.”).
amendments, most notably DOMA amendments and amendments giving the English language official status.\textsuperscript{92}

A. Expressive Constitutionalism: The Right to Bear Arms and to Hunt and Fish

The view of personal weapons as an emblem of liberty has been deeply imbedded in American culture since colonial times. Hunting and use of weapons for hunting were considered basic rights by all English classes.\textsuperscript{93} The Crown made no serious effort to restrict those rights until Charles II induced Parliament to pass the Game Act (1671) which drastically reduced the number of commoners permitted to hunt on Crown lands.\textsuperscript{94} The Act was deeply resented by the English populace and by American colonists who, as the Revolution approached, came to view arms restrictions as part of an effort to impose tyranny by eliminating the means of self-protection.\textsuperscript{95} Hunting and fishing was less of a sore subject because the Crown and colonial proprietors had liberally extended such rights to colonists.\textsuperscript{96} Pennsylvania and Vermont inserted provisions in their Revolutionary-era constitutions providing that citizens had a right to bear arms and to hunt and fish.\textsuperscript{97} Many states that came into the Union during the early 19th century included right-to-bear-arms clauses in their constitutions, but few included hunting-and-fishing clauses.\textsuperscript{98} Neither subject came up at Wisconsin’s constitutional conventions (1846, 1847-48).\textsuperscript{99} A few states worded their right-to-bear-
arms provisions to make clear that the right was not limited to collective use of arms in defense of the state (for example, as part of militia service) but was individual and extended to self-defense; courts in states with ambiguous clauses almost uniformly took the same position.100

Following the assassination of President John F. Kennedy in 1963, gun-control advocates gained a prominent place on the American political stage. Concerns about increasing urban violence and crime prompted Congress to enact laws regulating purchase and use of firearms; some cities went further and prohibited or drastically limited possession of firearms within their limits.101 These developments elicited a strong backlash including a new wave of right-to-bear-arms amendments: for example, after Maine’s supreme court suggested that the right to bear arms was collective only, Maine voters promptly enacted an amendment affirming an individual right to bear arms.102 Between 1970 and 1998 thirteen other states did also,103 including Wisconsin (1998).104 Support for such amendments cut across traditional political lines: U.S. Senator Russell Feingold, a Wisconsin Democrat sympathetic
to government regulation in many areas, supported his state’s amendment as necessary to protect what he viewed as an essential civil right. A closely-divided U.S. Supreme Court held in 2008 and 2010 that the federal Second Amendment also created an individual right to bear arms. Gun-related violence continues to elicit calls for increased regulation and those who view guns as fundamental to liberty continue their vigil against such regulation.

After 1970, efforts to eliminate certain types of hunting altogether appeared for the first time. Many modern conservationists focused on animal protection and looked askance at hunting; between 1970 and 2000 they secured laws banning all trapping in several western states and bans on hunting certain types of birds and animals in other states. Traditional conservationists, already concerned about the shrinking of hunting and fishing places due to urbanization, viewed such measures as a direct infringement of personal liberty and as a harbinger of additional bans in the future. As a result, between 1996 and 2015 eighteen states including Wisconsin (2003) added clauses to their constitutions establishing hunting and fishing as basic rights.

**B. Expressive Constitutionalism: Gambling**

American gambling law has had a long and shifting history. Old-stock pietistic Protestants viewed gambling as sinful and discouraged

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110. Id.

Lotteries were tolerated if they used their proceeds for pious or socially worthy causes but in the 1830s, following a rash of corruption scandals, several states enacted constitutional amendments prohibiting lotteries. Many states that subsequently entered the union, including Wisconsin, followed suit. Gambling never disappeared: the urge to risk small amounts in the hope of great fortune remained strong, and most law enforcement officials looked the other way if gambling was done discreetly and on a small scale. The fortune-seeking urge sharpened during the Depression, as did states’ searches for new sources of revenue, and during the 1930s many states legalized horse racing and pari-mutuel betting in the hope of meeting both needs. The pattern repeated itself in the late 20th century, this time with a distinct stamp of expressive individualism. Starting in the late 1970s voters in many states complained of rising taxation and forced tax reductions, thus creating an acute need for new revenue sources. By then, traditional disapproval of gambling had largely been replaced by an individualist view of gambling as merely another lifestyle choice. As a result, many states replaced their 19th-century anti-lottery clauses with clauses explicitly authorizing lotteries and other forms of gambling. New Hampshire (1964) and New York (1967) were the first states to enact lottery amendments; twelve states followed suit in the 1970s, seventeen in the 1980s, and six more in the 1990s. The lottery amendments were accompanied by a steady stream of amendments authorizing other forms of gambling.

Wisconsin’s experience was typical. Starting in the early 1970s voters repeatedly amended the state’s constitution, first to allow bingo for

112. MASON & NELSON, supra note 91, at 7–8.
113. Id. at 8.
116. MASON & NELSON, supra note 91, at 8–9.
117. PATTERSON, supra note 19, at 67–69.
118. MASON & NELSON, supra note 91, at 9–16.
119. Id. at 9–12.
120. Id. at 9–10.
121. Id. at 8–13, 15–18; FARNSELY, supra note 114, at 61–68.
charitable fundraising purposes (1973)\textsuperscript{122} and then to allow charitable raffles (1977).\textsuperscript{123} Initial efforts to repeal the constitutional ban on lotteries failed but lottery supporters finally prevailed in 1987.\textsuperscript{124} Voters then authorized a state lottery and pari-mutuel betting.\textsuperscript{125} During the course of three decades, gambling went from a morally suspect and legally prohibited form of individual expression to near-universal social and legal acceptance.

C. Conservative Constitutionalism: DOMAs and English-Language Amendments

Constitutional amendments have been used to check expressive individualism as well as to serve it. The wave of DOMAs enacted between 1998 and 2006 as a firewall against gay marriage, discussed above, is the most prominent example.\textsuperscript{126} Some DOMAs were worded to bar only marriage, some barred marriage and civil unions, and others explicitly prohibited legislatures from conferring any rights associated with marriage on gay couples.\textsuperscript{127} Prior to the Supreme Court’s 2015 Obergefell\textsuperscript{128} decision, disputes arose in several states with limited DOMAs whether such DOMAs should be interpreted expansively to deny gay citizens all marriage-related rights.\textsuperscript{129} State courts, including Wisconsin’s supreme court in the 2014 Appling case, generally refused expansive interpretation.\textsuperscript{130} Traditional principles of statutory construction, together with the fact that during some ratification campaigns, including Wisconsin’s, DOMA advocates had told voters that their DOMAs would apply to marriage only, made the decisions relatively easy.\textsuperscript{131}

\textsuperscript{122} J. Res. 31, 80th Leg., Reg. Sess. (Wis. 1971); J. Res. 6, 81st Leg., Reg. Sess. (Wis. 1973); WIS. CONST. art. IV, § 24 (amended 1973).

\textsuperscript{123} J. Res. 19, 82d Leg., Reg. Sess. (Wis. 1976); J. Res. 6, 83d Leg., Reg. Sess. (Wis. 1977); WIS. CONST. art. IV, § 24 (amended 1977).

\textsuperscript{124} DAN RITSCHES, STATE OF WIS. LEGIS. REFERENCE BUREAU, LRB-00-RB-1, THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN (2000).

\textsuperscript{125} J. Res. 35-36, 87th Leg., Reg. Sess. (Wis. 1986); J. Res. 3-4, 88th Leg., Reg. Sess. (Wis. 1987); WIS. CONST. art. IV, § 24 (amended 1987).

\textsuperscript{126} See supra note 44 and accompanying text.

\textsuperscript{127} See supra notes 45–47 and accompanying text.

\textsuperscript{128} Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

\textsuperscript{129} infra note 131.

\textsuperscript{130} Appling v. Walker, 2014 WI 96, ¶¶ 22–37, 358 Wis. 2d 132, 853 N.W.2d 888.

\textsuperscript{131} Appling, ¶¶ 22–37 (interpreting Wisconsin’s DOMA, WIS. CONST. art. XII, § 1 (amended 2006), which provided that “a legal status identical or substantially similar to that of marriage” would not be recognized for gay and unmarried couples). Compare Knight v.
During the late 19th and early 20th centuries, courts in several states, including Wisconsin, attempted to force cultural assimilation by prohibiting the use of all languages except English for classroom instruction in schools. After the U.S. Supreme Court struck down several English-only laws in *Meyer v. Nebraska* such laws were thought to be dead, but in the late 1960s they began to surface once again in response to a new wave of immigration that began after Congress relaxed immigration constraints and a changing world economic picture increased incentives for Hispanic migrants to enter the United States both legally and illegally. America’s Hispanic population grew dramatically, increasing from 3.2% of the total population (1960) to 6.4% (1980) and to 16.3% in 2010. The number of American residents with a primary language other than English or Spanish also rose: in 2010, about 21% of all American residents spoke a language other than English in their homes. As in earlier eras of heavy immigration, many Americans viewed the new immigrants’ expressions of cultural diversity, particularly use of their native languages rather than English in everyday life, as a threat to the nation’s well-being.


133. 262 U.S. 390 (1923).

134. See Patterson, supra note 19, at 26–28, 292–303.


statute was little more than a symbolic endorsement of assimilation: it
designated English as the state’s official language without more. But in
1978 Hawaii enacted the first English-only laws with specific limits: it
required that government business be conducted in English and speci-
fied that government officials were under no obligation to provide
Spanish or other foreign-language translations. A steady stream of
English-only laws followed: thirteen states enacted such measures in the
1980s, six in the 1990s, and eight in the 2000s. A handful of states
including Wisconsin have resisted the tide. Most early measures fol-
lowed Illinois’ symbolic model; a few contained vaguely-worded
clauses authorizing state legislatures to enact “appropriate” implement-
ing legislation. Since 1995, however, nearly all legislatures enacting
English-only laws have inserted specific limits in those laws, usually
limited to the conduct of government business but in some cases requir-
ing that school instruction be in English notwithstanding the Supreme
Court’s holding in Meyer.

Opponents have not challenged the laws’ central premise that as-
similation has value; instead, they have argued that the laws discrimi-
nate against non-English speakers and hamper rather than promote as-
similation. The two sides joined battle in Alaska and Arizona, whose
laws were among the most draconian English-only laws. Both states’

139. Haw. Const. art. XV, § 4 (amended 1978); Act effective May 22, 1979, S.B. No. 45,

140. Virginia (1981, statute with specific limits); Indiana and Kentucky (1984, symbolic
statutes); Tennessee (1984, specific limits); California (1986, constitutional amendment au-
thorizing appropriate legislation); Georgia (1986, specific limits); Arkansas, Mississippi,
North Carolina, North Dakota, and South Carolina (1987, symbolic); Colorado and Florida
(1988, authorizing appropriate legislation). See Language Legislation in the U.S.A., LANGUAGE
POL’Y, http://www.languagepolicy.net/archives/langleg.htm [https://perma.cc/GJY5-
43JM] (last visited Apr. 24, 2017), and statutes linked thereto.

141. Alabama (1990, authorizing appropriate legislation); Montana, New Hampshire

142. Utah (2000, specific limits); Iowa (2002, same); Arizona (2006, symbolic); Idaho and
Kansas (2007, specific limits); Missouri (2008, same); Oklahoma (2010, same). See id.

143. See, e.g., Hill, supra note 135, at 681–83.

144. See supra notes 133–34, 138–42; Hill, supra note 135, at 673–74.

145. See, e.g., Jennifer Bonilla Moreno, “Only English? How Bilingual Education Can Mit-
against the English-only laws that apply to school instruction); McAlpin, supra note 137 (ar-
guing that adoption of a universal language is necessary to national greatness and that Eng-
lis-only laws, particularly those that prohibit bilingual instruction in schools, have helped
recent immigrants by forcing them to assimilate more quickly).

146. Arizona law required that government employees “act” only in English. Ariz.
supreme courts gave cautious deference to the laws, emphasizing that promotion of a common English language is a legitimate governmental goal; both courts held that government has no obligation to communicate with non-English speakers in their native language but that government employees who speak languages other than English may not be barred from using them.\textsuperscript{147} To do so, said Arizona justice James Moeller, would “effectively cut[ ] off governmental communication” with residents who have no English or limited English and would violate their rights of free speech and equal protection of the laws.\textsuperscript{148} Alaska’s supreme court also held that such restrictions would violate non-English speakers’ constitutional right to petition government.\textsuperscript{149}

**IV. MODERN BATTLEGROUNDS: THE DECLINE OF EDUCATIONAL ASSIMILATIONISM**

During the years following the U.S. Supreme Court’s decision in *Brown v. Board of Education* (1954)\textsuperscript{150} that school segregation was unconstitutional, the assimilationist vision of public schools appeared to have reached its zenith: black Americans, it was thought, would now be able to partake fully of the educational melting pot and the opportunities it held. But implementation of that vision remained stubbornly elusive.\textsuperscript{151} During the ensuing decades, the rise of expressive individualism and the decline of assimilationism in education manifested themselves in

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\textsuperscript{147} ARIZ. CONST. art. XXVIII; ALASKA STAT. §§ 44.12.300–.398 (2016).


\textsuperscript{149} Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 187 (Alaska 2007). In 2002, Oklahoma’s supreme court gave an advisory opinion that a similar prohibition in that state’s proposed English-only amendment was unconstitutional. The proposed amendment was withdrawn but was eventually adopted in a revised form that did not prohibit government officials from communicating in languages other than English. *In re Initiative Petition No. 366*, 46 P.3d 123 (Okla. 2002); OKLA. CONST. art. XXX, §1 (2010); see Hill, *supra* note 135, at 872–73.

\textsuperscript{150} 347 U.S. 483 (1954).

several ways. First, an increasing number of Americans came to view education as a matter of customization and personal choice, and the courts supported that trend.152 Wisconsin provided one of the leading examples: in *State v. Yoder* (1971) Amish parents, whose religious beliefs called for termination of schooling after eighth grade (by which time, they believed, their children would have the skills necessary to lead the simple life that their faith called for), challenged attempts to enforce against them a Wisconsin law requiring attendance to age sixteen.153 The state’s supreme court held that compulsory education did not constitute a compelling state interest and that the parental right of control, at least in matters implicating religion, was paramount; the U.S. Supreme Court agreed.154

The school voucher movement has been the most important and most controversial manifestation of expressive individualism in American education law. Voucher systems directly promote educational individualism and represent an implicit (or in the case of supporters such as Justice Ceci, an explicit) rejection of educational assimilationism.155 Libertarian economist Milton Friedman first proposed vouchers in the 1950s as a way of extending the free market to education but it took several decades of rising individualism and frustration with the difficulties of school integration to create the critical mass necessary for vouchers’ political success.156

Critical mass was first reached in Wisconsin. In the early 1960s, residential segregation was firmly entrenched in Milwaukee and as a result, MPS’s long-standing policy of sending pupils to neighborhood schools created severe school segregation.157 After more than a decade of political and legal efforts by the Milwaukee branch of the NAACP to

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154. *Id.*

155. *See supra* note 14 and accompanying text.


end segregation, federal judge John Reynolds held in Amos v. Board of
School Directors of City of Milwaukee (1976)\(^{158}\) that MPS’s policies violated
black pupils’ equal-protection rights, and he ordered the plaintiffs and
MPS to develop a remedial plan. Reynolds took a firmly assimilationist
view, rejecting protests that breaking up the neighborhood school sys-
tem would only lead to white flight and more segregation.\(^{159}\) “The Con-
stitution does not guarantee one a quality education,” he reasoned; “it
guarantees one an equal education, and the law in this country is that a
segregated education system that is mandated by school authorities is
inherently unequal.”\(^{160}\) As opponents had predicted, white flight from
Milwaukee to its suburbs frustrated all efforts to integrate MPS: by the
late 1980s, those efforts were widely judged a failure. Black MPS stu-
dents’ achievement levels continued to lag badly behind those of white
students, racial conflicts in MPS schools were increasing, and anti-as-
similation voices arose within Milwaukee’s black community for the
first time.\(^{161}\)

When a proposal by black leaders, including educator Howard
Fuller and state representative Polly Williams, to create a separate mi-
nority-oriented school district failed they made common cause with
Governor Tommy Thompson and Catholic leaders who saw in MPS’s
troubles a new opening for public support of private schools, and in
1990, Wisconsin’s legislature narrowly approved the nation’s first
voucher program.\(^{162}\) Many wavering lawmakers supported the pro-
gram only after Thompson and Williams assured them that it was a tem-
porary experiment intended to help close the racial achievement gap,\(^{163}\)
and they made the 1990 program a modest one: it was limited to 1% of
MPS’s student population, limited eligibility to families earning up to
175% of federal poverty-level income, and made parochial schools inel-
gible.\(^{164}\) Even in its modest form the law represented a breakthrough;

\(^{158}\) 408 F. Supp. 765 (E.D. Wis. 1976), aff’d sub nom. Armstrong v. Brennan, 539 F.2d 625
(7th Cir. 1976), remanded, 433 U.S. 672 (1977).
\(^{159}\) Id. at 821.
\(^{160}\) Id.
\(^{161}\) Wis. Advisory Comm., Report to U.S. Comm. on Civil Rights, Impact of School
Desegregation in Milwaukee Public Schools on Quality Education for
Minorities . . . 15 Years Later 2–5, 22–25 (1992); Lawrence Sussman, Judges Say Racial Ten-
sion May Be Rising – They Ask Schools to Help Foster Understanding, Milwaukee J., May 22,
1990, at B1; Witte, supra note 156, at 43–44.
\(^{162}\) 1989 Wis. Act 366 § 228.
\(^{163}\) Witte, supra note 156, at 43–44.
\(^{164}\) 1989 Wis. Act 366 § 228.
it survived constitutional challenge by the narrowest of margins but the supreme court’s Davis decision, although close, made clear that the era of judicial support for assimilationism was over. 165

After Davis was decided Milwaukee business leaders and Catholic leaders persuaded the 1995 legislature to expand the number of eligible students (to 15% of MPS’s student population) and to include parochial schools in the program.166 Williams objected to the shift of emphasis toward educational privatization and away from aiding black students and she withdrew her support,167 but Fuller continued to believe that vouchers were the best option for Milwaukee’s black community. “Choice,” he said, “is like a bomb that needs to be thrown into a system that is so bad, so rotten, that nothing else will work.”168 In the same year, Ohio enacted the nation’s second voucher program, targeting another ailing big-city school system (Cleveland’s).169 Both states’ supreme courts rejected challenges to the inclusion of parochial schools in voucher programs based on federal and state constitutional clauses against state support of religion.170 In Jackson v. Benson (1998) Wisconsin justice Donald Steinmetz, speaking for the majority, held that the fact that the law did not prohibit use of funds for sectarian purposes was not constitutionally fatal: The voucher law provided that state funds would go to parents, not directly to sectarian schools, and that satisfied recent U.S. Supreme Court holdings that all relationships that avoided “excessive entanglement” between church and state were permitted under the federal First Amendment.171 The law was also consistent with Yoder: It comported with “Wisconsin tradition and past precedent . . . according parents the primary role in decisions regarding the education and upbringing of their children.”172 Ohio’s court was somewhat more cautious, warning that private schools’ “success . . . should not come at the expense of our public education system” and hinting that a voucher program that deprived public schools of funds to a harmful extent might

167. Witte, supra note 156, at 43–44.
168. Id. at 198.
171. Jackson, 218 Wis. 2d at 853–76.
172. Id. at 879.
violate state constitutional provisions mandating a public school system.\textsuperscript{173}

Some voucher supporters hailed the Wisconsin and Ohio decisions as the dawn of an era in which vouchers and privatization would eclipse public education, and voucher programs began to proliferate; but the dream of broad educational privatization proved as elusive as the post-

\textit{Brown} dream of full racial assimilation.\textsuperscript{174} Ten additional states enacted voucher or tax-credit programs for private-school tuition payments between 1997 and 2010,\textsuperscript{175} and another wave of thirteen states enacted such programs between 2011 and 2015.\textsuperscript{176} Most programs were limited to children living below a fixed income level, to children in special-education programs, to children in schools designated “failing” by state or federal authorities, or some combination of the three.\textsuperscript{177} Voucher opponents continued to challenge the new laws on a regular basis, now relying heavily on their state constitutions’ educational provisions rather than federal and state religious-establishment clauses.\textsuperscript{178}

Opponents won some victories: the Florida, Arizona, and Colorado supreme courts struck down their states’ voucher laws in 2006, 2009, and 2015 respectively.\textsuperscript{179} The three decisions made clear that ultimately,

\begin{itemize}
  \item \textsuperscript{173} Simmons-Harris, 711 N.E.2d at 212.
  \item \textsuperscript{174} See Julie F. Mead, \textit{The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees}, 42 FORDHAM URB. L. J. 703, 714–27 (2015).
  \item \textsuperscript{176} \textit{Vouchers}: Arizona, Colorado, Indiana (2011); Mississippi (2012), North Carolina (2013), Arkansas (2015). \textit{Tax credits}: Oklahoma (2011), New Hampshire, Virginia and Louisiana (2012); South Carolina and Alabama (2013), Kansas (2014), Montana, Nevada, Tennessee, and Mississippi (2015). See also Mead, supra note 174, at 707–13; \textit{School Voucher Laws: State-by-State Comparison}, supra note 175. In 2011, the income eligibility ceiling for Wisconsin’s program was raised and the cap on the number of eligible students was eliminated and the program was extended to certain other Wisconsin school districts with low property values or other indicia of poverty. 2011 Wis. Acts 32, 47.
  \item \textsuperscript{177} Mead, supra note 174, at 715–27; \textit{School Voucher Laws: State-by-State Comparison}, supra note 175.
  \item \textsuperscript{179} Cain, 202 P.3d 1178; \textit{Taxpayers for Pub. Educ.}, 351 P.3d 461; Bush, 919 So. 2d 392.
\end{itemize}
the fate of voucher programs in all states will depend on the wording of their state constitutions’ education provisions, which vary widely. The Arizona and Colorado courts relied heavily on “Blaine clauses” in their states’ constitutions, enacted in the late 19th century in response to a nativist-fueled revolt against immigrants’ efforts to secure public funding for parochial schools. Arizona’s Blaine clause provided that “no . . . appropriation of public money [shall be] made in aid of any church, or private or sectarian school”; Colorado’s clause provided that state and local governments may not do “anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination.”

Florida’s court went the farthest, relying not on a Blaine clause but on a constitutional provision requiring the state to provide a “uniform, efficient . . . and . . . high quality system of free public schools.” The court reasoned that the clause implicitly barred any public support of private schools because in an era of severe state budgetary constraints, financial support of private schools would necessarily deprive public schools of funds. The Florida court’s decision put it at odds with the Indiana and North Carolina supreme courts, which in 2013 and 2015 respectively held that similar clauses in their states’ constitutions did not foreclose public funding of voucher systems. One Wisconsin voucher critic has suggested, consistent with the Florida court’s reasoning and with the Ohio supreme court’s warning in Simmons-Harris about private-school competition for scarce public funds, that if Wisconsin’s legislature continues to expand voucher funding and cut state public-

180. Cain, 202 P.3d at 1185; Taxpayers for Pub. Educ., 351 P.3d at 469–75; Bush, 919 So. 2d at 402–05.
182. ARIZ. CONST. art. IX, § 10.
183. COLO. CONST. art. IX, § 7; see generally SUPERFINE, supra note 152, at 147–50; Mead, supra note 174.
184. FLA. CONST. art. IX, § 1(a); Bush, 919 So. 2d at 415.
185. Bush, 919 So. 2d at 408–09 (interpreting FLA. CONST. Art. IX, § 1).
186. Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013) (interpreting Hart v. State, 774 S.E.2d 281 (N.C. 2015) (interpreting N.C. CONST. art. I, § 15 (“[t]he people have a right to the privilege of education”), art. V, § 2 (no law except for public purpose) and art. IX, § 6 (certain state funds “shall be . . . used exclusively for establishing and maintaining a uniform system of free public schools”)).
school funding it may eventually run afoul of the state constitution.187 Ironically, throughout the voucher controversy the public schools’ share of total student population has remained steady, and vouchers have received a cool reception from many wealthier, predominantly white districts whose parents worry that vouchers might result in increased interdistrict student transfers and dilution of their districts’ levels of achievement.188

Another area of education in which individualism and assimilationism have clashed is public-school financing. The fact that states finance schools primarily through local property taxes has given wealthy districts a substantial advantage over poorer districts in providing high-quality education, and in the late 1960s assimilationists began challenging property-tax-based school finance systems as violative of the federal equal-protection clause.189 They gained an important early victory when California’s supreme court struck down its state’s school-finance system (1971)190 but two years later, in San Antonio Independent School District v. Rodriguez (1973) the U.S. Supreme Court held that funding discrepancies based on local wealth do not violate the federal equal protection clause.191 The California court responded by striking down California’s school-finance system again, this time based on the state constitution’s equal-protection clause.192 Assimilationists then turned (1973–84) to state constitutional equal-protection and education clauses, particularly those that required states to provide a “thorough” or “efficient” school system or the like.193 They had some success but even when courts took a communitarian view of school financing, crafting and implementing solutions proved to be as difficult as it had for segregation.194 Courts preferred to leave that task to legislatures and many

188. SUPERFINE, supra note 152, at 147–48. From 1995 to 2007, approximately 93% of all schoolchildren attended public schools, 6% attended private schools, and 1% were home schooled; the figures changed little during that period. U.S. DEP’T OF EDUC., NAT’L CENTER FOR EDUC. STATS., THE CONDITION OF EDUCATION 2009, at 126, 130, 134 (2009), https://nces.ed.gov/pubs2009/2009081.pdf [https://perma.cc/RB5P-BBW5].
193. SUPERFINE, supra note 152, at 75, 100–06, 120–24; Ryan, supra note 189, at 268–72.
legislatures resisted or were simply unable to find good solutions. Wealthy districts often responded to equalization efforts by levying supplemental taxes in order to maintain their children’s competitive advantage. In the late 1980s, assimilationists began to shift away from equality as a goal and to argue that state education clauses required states to provide sufficient funds for an “adequate” education in all districts. The shift represented a triumph of sorts for individualism: in the words of one commentator, “that poor and minority schools will remain separate from white and wealthier schools [now] appears to be taken as a given.”

The course of the school-finance controversy in Wisconsin was typically bumpy. In Buse v. Smith (1976), a divided supreme court struck down a law that used some property taxes collected from wealthy districts to subsidize education in poorer districts; the court relied heavily on an unusual Wisconsin constitutional provision that required local districts to provide a portion of all school funding. In Kukor v. Grover (1989), reformers mounted a new challenge based on the state’s uniformity clause as well as its equal-protection clause. The Kukor court’s decision foreshadowed Davis in some respects: the majority held that the state constitution required only equality of basic educational opportunity and rejected the new “adequacy” theory, again based heavily on the state constitution’s local-finance provision. Local responsibility, the majority reasoned, carried with it a measure of local discretion and

195. SUPERFINE, supra note 152, at 147–49. See generally Michael Heise, Litigated Learning and the Limits of Law, 57 VAND. L. REV. 2417, 2437–45 (2004); Ryan, supra note 189, at 266–69.

196. Court decisions in Kentucky and Montana accepting this argument inaugurated the new phase and were influential in persuading other state courts to do likewise. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989). For the period 1989–2000, Ryan has identified eleven court decisions adopting this argument and eleven decisions rejecting it. Ryan, supra note 189, at 268–69, nn.84–85; see also SUPERFINE, supra note 152, at 120–24.


198. WIS. CONST. art. X, § 4 (providing that “Each town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund.”); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

199. 148 Wis. 2d 469, 484–94, 436 N.W.2d 568, 575–78 (1989); WIS. CONST. art. X, § 3 (providing in part that “the legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years”).

control. The same justices who would defend assimilationism in *Davis* dissented in *Kukor*, arguing that the existing aid formula was a “disgrace” to the ideal of “free public education for rich and poor alike.” In *Vincent v. Voight* (2000) the court joined the shift from equality to adequacy by holding that the state’s equal-protection clause encompassed the right to an adequate education, although the justices differed on whether the aid formula then in effect met the new standard. One dissenter, Justice Diane Sykes, argued that past difficulties in implementing equality of opportunity through equalized funding showed that school funding was primarily a policy matter for individual school districts in which courts had no business intervening.

V. MODERN BATTLEGROUNDS: ABORTION AND REPRODUCTIVE CHOICE

Abortion has been a central battleground in the struggle over expressive individualism. Abortion elicits passionate opposition because it, like expressive individualism generally, clashes with many Americans’ core desire for “clear, unbending moral and behavioral codes” enforced through group unity and strong social leadership. In addition, many opponents view abortion as murder, an issue as to which any compromise or slackening of effort would be profoundly immoral. By contrast, many abortion-rights supporters give first priority to access to contraception: they view abortion not as a positive good but as a “regrettable but necessary fallback” to be used when contraception fails. The greater passion that abortion opponents have brought to the battle has given them success out of proportion to their numbers.

The Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) was a transitional moment for both sides. In *Casey* the high Court disappointed abortion opponents by making

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201. *Kukor*, 148 Wis. 2d at 490–95.
204. Id. ¶¶ 190–92, 197–98, 202 (Sykes, J., concurring and dissenting).
clear that it would not overturn the zone of abortion rights it had created in *Roe v. Wade* (1973), but it also replaced *Roe’s* simple three-part test of legality with a more generalized standard that states could not place an “undue burden” on a woman’s right to abort a non-quickened fetus. The *Casey* Court also held that making it more difficult for eligible women to obtain abortions was not necessarily an undue burden.

This encouraged opponents in their efforts to restrict abortion through extensive regulation of abortion procedures, an effort that has continued without letup since *Casey* and has accelerated dramatically since 2010.

Abortion opponents have procured passage of a wide variety of anti-abortion measures since *Casey* including, most commonly, (i) informed-consent laws requiring abortion providers to provide information to patients emphasizing the physical and psychological risks of abortion and promoting alternatives, together with laws requiring parental consent for minors to have an abortion; (ii) waiting-period laws requiring that patients wait a certain period, usually twenty-four or forty-eight hours, after counseling before an abortion is performed; (iii) targeted-regulation-of-abortion-provider (TRAP) laws that, for example, require doctors performing abortions to have admitting privileges at a local hospital or require abortion clinics to have facilities and staff equivalent to a full-service ambulatory surgical center; (iv) laws prohibiting public
funding of abortions through Medicaid and other medical insurance programs; and (v) deadline laws that test the limits of *Roe* by prohibiting all abortions after a period of time close to (and sometimes before) the end of the first trimester, the period during which, under *Roe*, a woman’s right to choose abortion is absolute. As the graph below illustrates, the number of restrictive laws has grown steadily since *Casey*.

Abortion-rights advocates have mounted constitutional challenges to many of the post-*Casey* laws. Results have been mixed. Courts

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217. As of 2015, thirty-three states prohibited use of public funds to perform abortions except (in some states) in cases of danger to the mother’s life or pregnancies resulting from rape or incest. *An Overview of Abortion Laws*, supra note 213.

218. As of 2015, twelve states prohibited abortions after twenty weeks of pregnancy (with exceptions where an abortion is necessary to save the mother’s life or preserve her health); eight states prohibited abortions after twenty-four weeks; twenty states prohibited abortions after fetal viability, the earliest point at which *Roe* allowed state restriction of abortion; and three states prohibited abortions from the beginning of the third trimester. *Id.*


220. *See infra* notes 221, 223–27.
faced with challenges to laws prohibiting abortion at twenty weeks or at any time prior to fetal viability have universally adhered to the *Roe* framework and have struck down the laws.221 The *Casey* Court indicated that informed-consent and waiting-period requirements did not automatically create an undue burden on abortion rights222 and accordingly, both federal and state courts have struck down such laws sparingly and have trimmed them only at the edges.223 The fate of informed-consent laws often has depended on how openly they were promoted as anti-abortion measures at the time of enactment.224 Federal and state courts have almost universally upheld waiting-period laws, although many have indicated that in order to pass constitutional muster such laws must contain exceptions where a woman’s life or health is in immediate peril.225 Public-funding restrictions and TRAP laws have generated the most legal controversy. In *Harris v. McRae* (1980) the Supreme Court held that the Hyde Amendment, prohibiting federal funding of abortions except where necessary to preserve the mother’s health or life, was constitutional; it rejected arguments that singling out abortion services for defunding violated the federal equal-protection clause.226 Abortion-rights supporters attempted with some success to combat similar funding restrictions at the state level by turning to a variety of state constitutional provisions. At least seven supreme courts have interpreted their states’


223. See, e.g., Karlin v. Foust, 975 F. Supp. 1177 (W.D. Wis. 1997), aff’d in part and rev’d in part, 188 F.3d 446 (7th Cir. 1999).


225. See, e.g., Pro-Choice Miss. v. Fordice, 716 So. 2d 645 (Miss. 1998); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 24 (Tenn. 2000) (striking down law providing for forty-eight-hour waiting period because the court felt that the emergency exception was not broad enough). See generally Christine L. Raffaele, Annotation, *Validity of State ‘Informed Consent’ Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion With Certain Information*, 119 A.L.R. 5th 315 (2016).

equal-protection and due-process clauses expansively to prohibit funding discrimination of any sort as to abortion, and a handful of courts have reached the same result through invocation of state right-to-privacy, ERA, and public-safety clauses. Other courts have rejected such challenges.

Several early TRAP laws, including efforts to limit abortion-related services by non-physicians and to impose extensive certification requirements on physicians performing abortions, had hard going in the courts: they were struck down on the ground that they added little or no margin of safety to abortion procedures and could only be viewed as efforts to restrict abortion. After anti-abortion forces made large gains in state legislatures in the 2010 election, they turned their attention to hospital-equivalency laws requiring abortion providers to have admitting privileges at a nearby hospital and requiring abortion clinics to provide the same staff and facilities required of full-service ambulatory surgical centers. The hospital-equivalency laws have had bite: they have produced a sharp decline in the number of abortion clinics and providers nationwide and have limited access for many American women.

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228. See, e.g., Simat Corp., 56 P.3d 28; Myers, 625 P.2d 779; Gomez, 542 N.W.2d 17; see also Maher, 515 A.2d 134; Women’s Health Ctr. of W.V., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993).


The hospital-equivalency laws have roused abortion-rights supporters and have raised the question: how far can such requirements be extended before they cross Casey’s “undue burden” threshold?

The leading test cases for hospital-equivalency laws originated in Wisconsin and Texas. In 2013 both states enacted laws requiring abortion providers to have admitting privileges at a hospital within thirty miles of their practice location;232 opponents challenged the laws as a violation of patients’ and abortion providers’ due-process rights and of the right of privacy implied in the federal due-process clause.233 Federal judges in both states conducted trials designed, like the Perry trial, to allow a full airing of whether the laws genuinely promoted public health and safety or served only to limit otherwise-legal abortions. Wisconsin federal judge William Conley concluded that the Wisconsin law’s primary purpose was to restrict access to abortion and struck it down, and a divided appeals court agreed.234 A Texas district judge concluded that Texas’s law imposed an undue burden, particularly in that it would require some Texas women to travel hundreds of miles to reach a compliant abortion facility; Texas’s federal appeals court disagreed in part but in 2016 the U.S. Supreme Court agreed with the district judge.235

Wisconsin has been solidly in the mainstream of the movement toward restrictive abortion laws. The state enacted several restrictive laws prior to Casey, including a law prohibiting abortion after fetal viability (1985);236 a detailed informed-consent law (1985);237 and a law requiring parental consent to a minor’s abortion (1991).238 All of Wisconsin’s pre-Casey laws created exceptions where the restrictions would endanger the mother’s life or health or where, because of family tensions or for other reasons, parental consent was not practicable.239 In Karlin v. Foust

236. 1985 Wis. Act 56.
237. Id.
238. 1991 Wis. Act 263.
239. See supra notes 237–38.
(1997), Judge Crabb upheld most parts of the 1985 informed-consent law except for provisions requiring abortion providers to inform patients of the availability of services for listening to the fetal heartbeat and requiring providers to pay for informational materials; on appeal, the heartbeat-information provision was also upheld.240 The legislature became more active after *Casey*: in 1996 and 1997 it established a twenty-four-hour waiting period,241 expanded the informed-consent law,242 prohibited partial-birth abortion,243 and prohibited state funding of abortions without exception.244 The 1996–97 laws drew challenges but all survived except the partial-birth abortion law, which was struck down because it also prohibited an abortion method that was more commonly used and thus deemed more essential.245 Abortion providers were also allowed to omit information if, in their judgment, providing that information would jeopardize the mother’s health.246 After a period of stalemate (2003–10) during which a Democratic governor repeatedly vetoed anti-abortion measures, Republicans gained control of the legislature and the governorship in the 2010 election and initiated a new series of restrictive laws, the centerpiece of which was the 2013 hospital-equivalency law previously discussed.247

VI. COURTS IN THE AGE OF EXPRESSIVE INDIVIDUALISM

A. The Erosion of Consensus

Expressive individualism also permeated the institutional structure of American state courts. Prior to 1960, dissent in state supreme court
decisions was far from unknown but consensus was the clear norm. This was due in part to the heavy caseloads borne by supreme courts in the many states that lacked intermediate appellate courts. Most cases were routine and decisions had to be turned out in quantity.\textsuperscript{248} There was little time available for lengthy opinions elaborating judicial differences of view; such opinions were reserved only for the most important and controversial cases. There were also cultural constraints: consensus and collegiality were valued in a society that placed communitarian bounds on acceptable concepts of liberty and conduct, and particularly by a mid-20th century legal culture that placed a premium on legal uniformity.\textsuperscript{249}

\begin{center}
\textbf{Unanimous Decisions}
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\textsuperscript{248} For example, the Wisconsin Supreme Court issued 284 decisions in 1940; 181 in 1980; 87 in 2000; and 68 in 2010. North Carolina’s supreme court issued 420 decisions in 1940 and 57 in 2010; New York’s highest court issued 608 decisions in 1940 and 186 in 2010; California’s supreme court issued 163 decisions in 1940 and 109 in 2010. The Wisconsin and North Carolina drops can be explained in part by the fact that each state created an intermediate court of appeals in the late 20th century (North Carolina in 1967 and Wisconsin in 1977), but that factor does not explain the drops in New York and California (which created intermediate courts of appeals in 1896 and 1904 respectively). The figures were compiled from each court’s case reports for the years in question and are on file with the author. New York’s and California’s highest courts were chosen for study because they are commonly considered to be among the most influential state courts of the period. North Carolina’s court was chosen because it is a leading court from a different region of the country.

\textsuperscript{249} See supra notes 5–6, 18–26 and accompanying text.
Consensus began eroding in many states during the late 20th century. Patterns of erosion differed, as illustrated by results for four sample states shown in the graph above. California’s consensus rate plunged earlier and more rapidly than that of other states due largely to divisions among its justices over the death penalty and criminal procedural rights. A catharsis was reached in 1986 when voters removed three justices perceived as too liberal on those issues, and thereafter the court was more cautious about showing open division. In other states such as New York and North Carolina, consensus did not begin to drop until the 21st century when political polarization began to increase rapidly throughout the nation. Wisconsin’s consensus rate has plunged more deeply and steadily than that of the other states, although a national survey conducted in 2003 suggests that Wisconsin’s supreme court is not the most divided: in that year, unanimity rates ranged from 97.9% (Oregon) to 21.1% (Mississippi), with a median rate of 74%. Dissent has not been confined to individual judges: by 2010, half of all Wisconsin cases elicited dissents from two or more justices.

250. The figures were compiled from each court’s case reports for 1940, 1960, 1980, 2000, and 2010 and are on file with the author.
254. The figures were compiled from the Wisconsin case reports for 1940, 1960, 1980, 2000, and 2010 and are on file with the author.
Judicial intemperance has grown as consensus has eroded. Dissenting justices have felt increasingly free to vent their feelings about the consequences of their colleagues’ decisions and to find personal as well as logical fault with their opponents, and prevailing justices have responded in kind.\(^\text{255}\) Not surprisingly Wisconsin, a leader in the trend away from consensus, has also provided conspicuous examples of the trend toward vitriol. The 1992 *Davis* case, in which members of the majority denounced opponents of school vouchers as enablers of MPS’s failure and were in turn denounced for “judicially indefensible” behavior and charged with enabling an effort to “subvert” the state’s educational system, was an early example.\(^\text{256}\) Heated rhetoric also became

\(^{255}\) See, e.g., *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 51, 358 Wis. 2d 1, 851 N.W.2d 337 (“The dissent sidesteps this fact by asserting there is a constitutional right to organize in a collective bargaining unit, but leaves unanswered whether the employees are associating for the purpose of engaging in an expressive activity accorded First Amendment protection.”); *id.* ¶ 189 (“By twisting the definition of benefits to exclude pension contributions, the majority thereby avoids any substantive analysis of the Contract Clause.”) (Bradley, J., dissenting).

\(^{256}\) See supra notes 12–17 and accompanying text. The 2000 *Vincent* school-financing case provided another example. Justice Diane Sykes tempered her dissent but expressed her feelings more bluntly after leaving the court to become a federal appellate judge. In a 2006 law review article she charged the court with lacking “modesty” and “restraint”—the watchwords of today’s judicial mainstream” and of “manifest[ing] a cavalier, almost dismissive attitude” toward precedent.” Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 737 (2006) [hereinafter Sykes, *Reflections*]. Later, with fervor unabated, she argued that the *Vincent* court had “made up” the constitutional right to adequate funding and had exposed the “new federalism” as mere “intellectual cover for state judges to embed
more common in cases in other states, particularly in high-profile cases. The early gay-marriage cases provided several examples. A majority of Connecticut’s justices, unwilling to limit themselves to a legal affirmation of the right of gay marriage, suggested that opposition to gay marriage was analogous to earlier opposition to interracial marriage.\footnote{Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 454–58, 481 (Conn. 2008).} One dissenter protested that “[i]t is simply unfair to conflate opposition to same sex marriage with bigotry”\footnote{Id. at 494 (Zarella, J., dissenting).} and that democracy “is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.”\footnote{Id. at 526 (Zarella, J., dissenting).} Washington’s supreme court generated similar heat in upholding its state’s DOMA: a dissenter criticized the majority for “condon[ing] blatant discrimination against Washington’s gay and lesbian citizens” and using “excuse[s]” to “perpetuate the existence of an unconstitutional and unjust law,”\footnote{Andersen v. King Cty., 138 P.3d 963, 1012–13 (Wash. 2006).} and the majority retorted that her position was “astonishing.”\footnote{Id. at 979.}

Regrettably, Wisconsin’s supreme court continued to be a leader in the march toward dissensus and vitriol. A series of closely-divided decisions addressing ethics charges against several of its members and the validity of several highly controversial measures enacted after Republicans won the 2010 state election elicited regular heated exchanges.\footnote{See, e.g., Madison Teachers, Inc. v. Walker, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (upholding 2011 act restricting public employees’ collective bargaining rights); Milwaukee Branch of the NAACP v. Walker, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262 (upholding 2013 voter-ID law); see also League of Women Voters v. Walker, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302 (same).} In 2011 rising tensions led to a physical altercation between two justices, which resulted in substantial negative publicity for the court and disciplinary charges against one of the justices, which died after the court deadlocked over them.\footnote{Dee J. Hall, Gableman Says He Had Date Wrong in Account of Alleged Bradley Head-Smack, WIS. STATE J., Sept. 2, 2011; Sandy Cullen, Sheriff’s Report Shows Dysfunction in, Pressure on Supreme Court, WIS. STATE J., Aug. 26, 2011.}

B. The New Federalism

Elements of expressive individualism also surfaced in the judicial “new federalism” movement. From roughly 1925 to 1970 the U.S. Supreme Court actively expanded the scope of civil and criminal procedural rights guaranteed by the federal Constitution, particularly during Chief Justice Earl Warren’s tenure (1953–69), but after Warren’s retirement there was concern that the high Court would trim back its recent rights extensions. In 1977 Warren’s colleague William Brennan suggested in a widely-read article that state supreme courts could meet that risk by looking to their own constitutions as sources of criminal and civil rights broader than those conferred by the federal Constitution. The new judicial federalism did not originate with Brennan—in People v. Anderson (1972), California’s supreme court had struck down existing death penalty laws by interpreting its state’s constitutional clause against cruel and unusual punishment more broadly than the clause’s federal counterpart—but Brennan’s article attracted national attention and elicited support from several prominent state judges, most notably California’s Stanley Mosk, Oregon’s Hans Linde and Wisconsin’s Shirley Abrahamson. Linde took an openly activist position, arguing that state courts should affirmatively seek to give their states’ bills of rights a broader scope than the federal Bill of Rights. Mosk was nearly as enthusiastic, but Abrahamson was more cautious. She felt that the new federalism could be useful in shoring up civil and criminal procedural rights but that unbridled use could lead to unintended conse-

sequences in other areas, for example, unwarranted expansion of government’s eminent domain powers, and could also lead to problems associated with lack of national uniformity. In Abrahamson’s view, “[b]oth the proponents and critics of the new judicial federalism should be careful what they wish for.”

Most state courts gave at least lip service to the new federalism: to renounce it would have meant giving up the right to interpret their own constitutions independently of the federal constitution, which they were not willing to do. Actual application of the doctrine was another matter, however. Use of the doctrine sometimes led to backlash: several courts followed California’s lead in interpreting their constitutions’ bills of rights to prohibit the death penalty, but voters in California and four other states eventually approved constitutional amendments overturning such decisions and in 1986 California voters turned three justices out of office based on a perception that the justices were “soft” on crime and had bent the state constitution to fit their views.

Abortion rights and gay marriage also put a spotlight on the new federalism. After the Supreme Court held that the federal equal-protection clauses did not compel Congress or the states to cover abortion in publicly-funded health programs, at least thirteen state courts held that their constitutions did require such coverage, and several state courts held that their constitutions prohibited other abortion restrictions that would have passed constitutional muster under Casey. Gay-marriage advocates initially put state constitutions at center stage because of concerns that the Supreme Court would not find a right of gay marriage in

271. Id.; see Abrahamson, supra note 267; Garibaldi, supra note 269, at 81–82.
the federal Constitution, and each of the pioneering gay-marriage cases—*Baehr* (1993), *Baker* (1999), and *Goodridge* (2003)—relied on state and not federal constitutional provisions.276 In *Baker*, Vermont’s supreme court supported its decision with an extensive discussion of the state’s “common benefits” clause and its distinctive concept of liberty; the *Goodridge* majority did the same for Massachusetts’s equal-protection clause.277

The Wisconsin supreme court’s approach to the new federalism was understated but not untypical. In *State v. Doe* (1977),278 decided shortly after Brennan’s article appeared, the court announced that it reserved the right to apply the new federalism in appropriate cases but in *Doe* and in subsequent criminal-procedure cases the court generally followed a “lockstep” approach, finding congruence between state and federal constitutional provisions notwithstanding Justice Abrahamson’s advocacy of a more expansive view of state rights.279 In 2004–2005 the court briefly returned to the new federalism, holding in two decisions that Wisconsin’s constitution embodied a more expansive view of the right against self-incrimination than the federal Constitution.280 Those decisions attracted little public attention but raised the ire of Justice Diane Sykes, who subsequently charged that the court had “exposed the ‘new federalism’ as mere ‘intellectual cover for state judges to embed their policy preferences into state constitutional law.’”281 In recent years the court has returned to the lockstep approach, to the point where Justice Abrahamson has complained of its “persistent antipathy” to the doctrine, but it has not renounced the new federalism altogether.282 Given the doctrine’s deep historical roots and its usefulness as a reserve instrument of state power, it is unlikely that any state will

276. See supra notes 43–65 and accompanying text.
278. 78 Wis. 2d 161, 254 N.W.2d 210 (1977).
ever renounce the doctrine altogether.  

V. CONCLUSION

Judicial individualism achieved an apotheosis of sorts in early 2015 when Wisconsin voters narrowly ratified a constitutional amendment changing the method of selecting the state’s chief justice. The old method, which had automatically assigned the position to the court’s senior justice, had been enacted in the 1870s as part of an effort to decrease partisanship in the judiciary. It had never attracted attention or controversy, and through it Shirley Abrahamson had ascended to the chief justiceship in 1996. A sometime individualist (as in her advocacy of the new federalism), a sometime communitarian (as in her opposition to school vouchers), and almost always a forceful presence among her colleagues and the public, Abrahamson had led the court through one of its most turbulent periods and in some ways had become an emblem of that turbulence. After Republicans gained control of Wisconsin’s legislature in 2011 they conceived the amendment, which provided for election of the chief justice by the court’s members, as a means of giving the court’s conservative wing titular as well as de facto control of the court. In the process they replaced an automatic selection mechanism, enacted in a more communitarian age in order to reduce conflicts, with one that gave the court’s members a new means of expressing themselves. After voters narrowly ratified the amendment in 2015, the court’s conservative wing immediately demoted Abrahamson and selected one of its own members as chief justice by a 4-3 vote, an act that


284. J. Res. 10 (Wis. 1876); J. Res. 1 (Wis. 1877); 1877 Wis. Act 48; Wis. Const. art. VII, § 4 (amended 1877).


286. Schneider, supra note 285.


elicited an unsuccessful court challenge from the former chief justice. 289

Justice Abrahamson continues as a member of the court, and the struggle between expressive individualism and opposing forces that her career and the American Age of Individualism have embodied also continues. Will the struggle continue indefinitely, or will the nation’s increasing economic and cultural diversification ultimately produce new frameworks of social and legal consensus that can accommodate and even celebrate those conflicting forces?

The evolution of law in Wisconsin and other states during the Age of Individualism does not provide a clear answer to that question. That is not surprising, for the law has not evolved in a neat linear pattern either within or across the states. Take Wisconsin as an example: it was the first state to enact a law protecting its gay citizens from employment discrimination290 but it later attempted to block gay marriage through its DOMA and it joined the parade of courts blessing gay marriage relatively late.291 Wisconsin pioneered school vouchers, an important and innovative form of expressive individualism,292 but it has not been a leader in other individualistic movements such as expansion of firearm, hunting, fishing, and gambling rights,293 and it has been more active than many states in the movement to restrict women’s ability to choose abortion, most notably through its recent and controversial hospital-equivalency law.294 Wisconsin’s justices have consistently led the way in expressing judicial individualism through dissensus, but there are signs that the adverse publicity that dissensus produced between 2008 and 2011 has encouraged the court to moderate its rhetoric if not the
ideological divisions underlying that rhetoric. 295

The evolution of state law during the Age of Individualism does provide some clues to the future. Expressive individualism has won some notable victories in the face of fierce opposition, and it has underscored the importance of state constitutions and of the new-federalism doctrine as vehicles for developing the law. Prior to the 1960s civil rights advocates relied heavily on the federal Constitution and federal courts as the most promising forums for expanding rights296 but the gay-marriage experience;297 the proliferation of state constitutional amendments expanding individual rights;298 the reciprocal efforts to use state amendments, particularly DOMAs and English-only amendments, to cabin expressive individualism;299 the pivotal role that state constitutions are playing in the resolution of the legality of voucher programs;300 and the less-pivotal but nonetheless important role that state bills of rights have played in delineating the constitutional limits of abortion restriction,301 suggest that state constitutions and courts have moved to the forefront and will remain there as the Age of Individualism goes forward. Given the active role that Wisconsin’s lawmakers and judges have played at many parts of the battlefield, it is a good bet that in the coming years they will be found in the lead on at least some parts of that field.

295. See supra notes 256, 263, and accompanying text.
296. See Kelly & Harbison, supra note 264, at 913–1063; Brennan, supra note 265.
297. See supra notes 36–38 and accompanying text.
298. See supra notes 103–04, 110–12, 120–22, and accompanying text.
299. See supra notes 126–49 and accompanying text.
300. See supra notes 155–204 and accompanying text.
301. See supra notes 205–47 and accompanying text.