

Marquette Law Review

Volume 100
Issue 3 *Spring* 2017

Article 7

Wisconsin Law in the Age of Individualism

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Joseph A. Ranney, *Wisconsin Law in the Age of Individualism*, 100 Marq. L. Rev. 923 (2017).
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WISCONSIN LAW IN THE AGE OF INDIVIDUALISM

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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 support² 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

1. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 558-65 (1972); ROBERT MICHAELSEN, *PIETY IN THE PUBLIC SCHOOL* 69-74, 87-89 (1970).

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).

3. WIS. STAT. § 40.53(1) (1962).

4. See *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

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 Hallows), 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. *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.

8. J. Res. 46, 77th Leg., Reg. Sess. (Wis. 1965); J. Res. 13, 78th Leg., Reg. Sess. (Wis. 1967); WIS. CONST. art. I, § 23 (amended 1967).

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 cases¹⁰ — 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.

9. 1989 Wis. Act 336.

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).

12. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

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,¹⁸ 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.¹⁹ 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

17. *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602, 621 (1998), *cert. denied*, 525 U.S. 997 (1998).

18. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 12–13 (1993).

19. JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 47–52, 69–75 (2005); FRIEDMAN, *supra* note 18, at 12–13.

20. DANIEL T. RODGERS, *AGE OF FRACTURE* 3 (2011).

21. PATTERSON, *supra* note 19, at 42–49; RODGERS, *supra* note 20, at 4–8.

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.²⁴ Expressive individualism has also "etched a vivid trail of anger and memory"²⁵ 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.²⁶

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.²⁷ 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.
Id.

24. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 66-68 (2010); PATTERSON, *supra* note 19, at 81-83, 167-70.

25. RODGERS, *supra* note 20, at 4.

26. See RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 1-48, 119-222 (Pietro S. Nivola & David W. Brady eds., 2006); CAHN & CARBONE, *supra* note 24, at 62-65.

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.

30. See *infra* notes 219-20, 236-38, 241-46, and accompanying text.

31. 410 U.S. 113 (1973).

32. See *infra* notes 219-20, 236-38, 241-46, 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,³⁵ 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.³⁶ 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.³⁷ In 1981, Wisconsin became the first state to prohibit employment discrimination based on sexual orientation;³⁸ by 2010, twenty-one states had followed suit and governors in nine other states had issued orders prohibiting such discrimination in government employment.³⁹ 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.⁴⁰

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.⁴¹ 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-

35. See WALTER FRANK, *LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY* 8–20 (2014).

36. See *Kerma Rest. Corp. v. State Liquor Auth.*, 233 N.E.2d 833 (N.Y. 1967); *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12 (N.J. 1967); *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951).

37. FRANK, *supra* note 35, at 28–44.

38. 1981 Wis. Act 112.

39. JEROME HUNT, CENTER FOR AMERICAN PROGRESS ACTION FUND, *A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES*, 3–4, 22–80 (2012).

40. FRANK, *supra* note 35, at 44–48, 75–77.

41. See William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 281–82 (2013).

friendly.⁴² In the early 1990s Hawaiian activists mounted a new challenge and in *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.⁴³ *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.⁴⁴ The DOMAs varied in scope: ten referred only to marriage;⁴⁵ sixteen, including Wisconsin's, referred to marriage and civil unions;⁴⁶ and four broadly prohibited all relationships containing any elements of marriage.⁴⁷

Although the activists who filed suit in *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.⁴⁸ Hawaii's legislature opened the door a bit more: in 1998 it enacted the nation's first domestic partnership law

42. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); FRANK, *supra* note 35, 51-55.

43. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); see also *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

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). See *Research Guides: Same-Sex Marriage Laws*, MORITZ COLL. OF L., <http://moritzlaw.osu.edu/library/samesexmarriagelaws.php> [<https://perma.cc/LDS9-MWJK>] (last visited Apr. 24, 2017).

45. Those of Alaska, Arizona, California, Colorado, Missouri, Mississippi, Montana, Nevada, Oregon, and Tennessee. See *id.*

46. Those of Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and Wisconsin. See *id.*

47. Those of Michigan, Nebraska, South Dakota, and Virginia. See *id.*

48. Eskridge, *supra* note 41, at 282-85.

extending certain inheritance rights, hospital visitation rights, and government benefits to registered partners.⁴⁹ A year later, Vermont's supreme court opened the door still wider: in *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."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.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.⁵² The legislature complied by enacting a civil-unions law in 2000.⁵³

Efforts in Vermont to overturn *Baker* and the civil-unions law through enactment of a DOMA failed,⁵⁴ and another turning point soon arrived: in *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.⁵⁵ Vermont's justices had phrased their decision in soft terms, as "a recognition of our common humanity,"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."⁵⁷ The *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

49. Act effective July 8, 1997, H.B. 118, 1997 Haw. Sess. Laws, 1211, 1211-12.

50. *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.

51. *Baker*, 744 A.2d at 882.

52. *Id.* at 884-87.

53. Act effective July 1, 2000, H. 847, 2000 Vt. Acts & Resolves 72-88.

54. Eskridge, *supra* note 41, at 285-86.

55. *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 *Goodridge's* holding).

56. *Baker*, 744 A.2d at 889.

57. *Goodridge*, 798 N.E.2d at 968.

couples encouraged procreation,⁵⁸ 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.⁵⁹ 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.⁶⁰

Efforts in the Massachusetts legislature to overturn *Goodridge* through a constitutional amendment failed narrowly,⁶¹ but the case provided fuel for a new wave of DOMAs in other states.⁶² In Wisconsin, constitutional amendments must be approved by two consecutive legislatures and then ratified by voters.⁶³ The legislature approved a DOMA in 2003 and again in 2005.⁶⁴ 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 2006.⁶⁵

Goodridge also gave rise to a wave of lawsuits, mostly in the Northeast, seeking judicial declarations of a constitutional right of gay marriage.⁶⁶ They produced mixed results.⁶⁷ 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).

61. H. JOURNAL, 183d Sess. 1308-11 (Mass. 2004).

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).

65. See *Appling v. Walker*, 2014 WI 96, ¶¶ 22-37, 358 Wis. 2d 132, 853 N.W.2d 888. The vote was 1,264,310 in favor of the amendment and 862,924 against. STATE OF WISCONSIN, BLUE BOOK 2009-2010, at 240 (2009).

66. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Shulman v. Attorney Gen.*, 850 N.E.2d 505 (Mass. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. App. Div. 2005).

67. Alaska and Oregon voters enacted DOMAs that overturned early decisions by lower-level courts in those states holding that their state constitutions mandated marriage or civil unions for gay couples. See *Brause v. State Dep’t of Health & Social Servs.*, 21 P.3d 357 (Alaska 2001); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (D. Alaska 1998); *Revised Limited Judgment, Li v. State*, 2004 WL 4963162 (Or. Cir. Ct. 2004), *vacated*, 110 P.3d 91 (Or. 2005).

process clauses mandated civil unions; three dissenters would have followed *Goodridge*.⁶⁸ 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 constitutions⁶⁹ but in 2008 a closely-divided Connecticut Supreme Court followed *Goodridge*.⁷⁰ 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 challenges⁷¹ 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.⁷² Both decisions triggered backlashes: California voters responded by approving a DOMA⁷³ and in 2010 Iowa voters ousted three justices who had voted for gay marriage.⁷⁴

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,⁷⁵ 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.⁷⁶ 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. *Hernandez*, 855 N.E.2d 1; *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

70. *Kerrigan*, 957 A.2d at 457-60, 482.

71. *Nat'l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524 (Mich. 2008); *State v. Carswell*, 872 N.E.2d 547 (Ohio 2007); *Andersen v. King Cty.*, 138 P.3d 963 (Wash. 2006).

72. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

73. CAL. CONST. art. I, § 7.5 (amended 2008).

74. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

75. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

76. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013).

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 2014⁸¹ and three states in 2015;⁸² the New Mexico and New Jersey supreme courts did the same,⁸³ 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

77. *Id.*

78. For a list of the court decisions in question, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-12 (2015).

79. See Jeffrey M. Jones, *Six in 10 Say Obama Same-Sex Marriage View Won't Sway Vote*, GALLUP (May 11, 2012), <http://www.gallup.com/poll/154628/six-say-obama-sex-marriage-view-won-sway-vote.aspx> [<https://perma.cc/T83Q-ZT54>].

80. Illinois, Utah, and Ohio. See *Obergefell*, 135 S. Ct. at 2607-12.

81. Oklahoma, Kentucky, Virginia, Texas, Tennessee, Michigan, Idaho, Oregon, Pennsylvania, Wisconsin, Indiana, Colorado, Florida, North Carolina, Alaska, Arizona, Wyoming, Kansas, Missouri, West Virginia, South Carolina, Montana, Arkansas, and Mississippi. See *id.*

82. South Dakota, Alabama, and Nebraska. See *id.*

83. *Garden State Equal. v. Dow*, 79 A.3d 1036 (N.J. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

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.

85. 2009 Wis. Act 28; *Appling v. Walker*, 2014 WI 96, ¶¶ 22-37, 358 Wis. 2d 132, 853 N.W.2d 888.

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 BATTLEFIELDS: 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.

88. *Id.* at 2611-26 (Roberts, C.J., dissenting), 2626-40 (Scalia, J., dissenting), 2640-43 (Alito, J., dissenting).

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.").

90. G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 741.

91. JOHN LYMAN MASON & MICHAEL NELSON, GOVERNING GAMBLING: A CENTURY FOUNDATION REPORT 44-45 (2001); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-204 (2006) (state constitution amendments expanding the right to bear arms).

amendments, most notably DOMA amendments and amendments giving the English language official status.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.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.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.⁹⁵ Hunting and fishing was less of a sore subject because the Crown and colonial proprietors had liberally extended such rights to colonists.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.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.⁹⁸ Neither subject came up at Wisconsin's constitutional conventions (1846, 1847-48).⁹⁹ A few states worded their right-to-bear-

92. See generally John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105 (2013).

93. Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177, 180-83 (1982); Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 63-65 (2009).

94. An Act for the Better Preservation of the Game, and for Secureing Warrens not Inclosed, and the Severall Fishings of this Realme (1671) 5 STATUTES OF THE REALM (Eng.) <http://www.british-history.ac.uk/statutes-realm/vol5/pp745-746> [<https://perma.cc/7CNF-8MS8>] (last visited Apr. 24, 2017); Usman, *supra* note 93, at 60-66; Dowlut & Knoop, *supra* note 93, at 180-81.

95. Dowlut & Knoop, *supra* note 93, at 181-82.

96. *Id.* at 182; Usman, *supra* note 93, at 67-69.

97. PA. CONST. of 1776, Decl. of Rights, clause XIII; VT. CONST. of 1777, ch. I, § 15; see also Sayres v. Commonwealth, 88 Pa. 291 (Pa. 1879); State v. Rosenthal, 55 A. 610 (Vt. 1903); Volokh, *supra* note 91.

98. See Volokh, *supra* note 91, at 206-17.

99. See generally [27 COLLECTIONS, 2 CONSTITUTIONAL SERIES] THE STATE HIST. SOC. OF WIS., THE CONVENTION OF 1846 (Milo M. Quaife ed., 1918); [29 COLLECTIONS, 4

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

CONSTITUTIONAL SERIES] THE STATE HIST. SOC. OF WIS., THE ATTAINMENT OF STATEHOOD (Milo M. Quaipe ed., 1928).

100. See Dowlut & Knoop, *supra* note 93, at 207 n.123; see generally Volokh, *supra* note 91.

101. See Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L. J. 1449, 1497-99 (2012); Dowlut & Knoop, *supra* note 93, at 184-91; see also, e.g., Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 228; Act of Oct. 22, 1968, Pub. L. No. 90-618, 82 Stat. 1234; Act of May 19, 1986, Pub. L. No. 99-308, 100 Stat. 451; Act of Aug. 28, 1986, Pub. L. No. 99-408, 100 Stat. 920.

102. ME. CONST., art. I, § 16 (amended 1987); *State v. Friel*, 508 A.2d 123 (Me. 1986); see David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827 (2002); David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMPLE L. REV. 1177 (1995); see also *State v. Knight*, 218 P.3d 1177 (Kan. Ct. App. 2009); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976).

103. ALA. CONST. art. I, § 27 (1994); DEL. CONST. art. I § 20 (1987); ILL. CONST. art. I, § 22 (1970); LA. CONST. art. I, § 11 (1974); ME. CONST. art. I, § 11 (1987); NEB. CONST. art. I, § 1 (1988); NEV. CONST. art. I, § 11(1) (1982); N.H. CONST. pt. 1, art 2-a (1982); N.M. CONST. art. II, § 6 (1971); N.D. CONST. art. I, § 1 (1984); UTAH CONST. art. I, § 6 (1984); VA. CONST. art. I, § 13 (1971); W. VA. CONST. art. III, § 11 (1986); WIS. CONST. art. I, § 25 (1998).

104. The states were: Illinois (1970), New Mexico and Virginia (1971), New Hampshire and Nevada (1982), Louisiana, North Dakota, and Utah (1984), West Virginia (1986), Maine and Delaware (1987), Nebraska (1988), Alabama (1994), and Wisconsin (1998). Volokh, *supra* note 91, 193-204. See WIS. CONST. art. I, § 25 (amended 1998) (providing that: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose"). See also J. Res. 27, 92d Leg., Reg. Sess. (Wis. 1996); J. Res. 21, 93d Leg., Reg. Sess. (Wis. 1998).

to government regulation in many areas,¹⁰⁵ supported his state's amendment as necessary to protect what he viewed as an essential civil right.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ As a result, between 1996 and 2015 eighteen states including Wisconsin (2003) added clauses to their constitutions establishing hunting and fishing as basic rights.¹¹¹

B. Expressive Constitutionalism: Gambling

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

105. See John Nichols, *Russ Feingold Wants to Lead a New Progressive Era in the Senate*, NATION, (Sept. 8, 2016), <https://www.thenation.com/article/russ-feingold-wants-to-lead-a-new-progressive-era-in-the-senate/> [<https://perma.cc/6KTK-KY65>].

106. Joseph A. Scolaro, *Feingold Backs Gun Amendment*, RACINE (Wis.) J.-TIMES, Sept. 24, 1998.

107. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

108. See, e.g., Michael D. Shear & Eric Lichtblau, *Obama to Expand Gun Background Checks and Tighten Enforcement*, N.Y. TIMES (Jan. 4, 2016), www.nytimes.com/2016/01/05/us/politics/obama-says-he-will-act-on-gun-control-in-coming-days.html?_v=0.

109. Usman, *supra* note 93, at 77–80. Trapping bans were enacted in California, Arizona, Colorado, Washington and Massachusetts (1994–2001); New Jersey prohibited bear hunting (2008) and Iowa prohibited dove hunting (2010). *Id.*

110. *Id.*

111. J. Res. 16, 95th Leg., Reg. Sess. (Wis. 2001); J. Res. 8, 96th Leg., Reg. Sess. (Wis. 2003). See WIS. CONST. art. I, § 26 (providing that: “The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.”). See also *State Constitutional Right to Hunt and Fish*, NAT’L CONF. OF STATE LEGISLATURES, www.ncsl.org/research/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish.aspx#5 (last visited Apr. 24, 2017).

it.¹¹² 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.¹¹³ Many states that subsequently entered the union, including Wisconsin, followed suit.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ By then, traditional disapproval of gambling had largely been replaced by an individualist view of gambling as merely another lifestyle choice.¹¹⁸ As a result, many states replaced their 19th-century anti-lottery clauses with clauses explicitly authorizing lotteries and other forms of gambling.¹¹⁹ 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 1990s¹²⁰ The lottery amendments were accompanied by a steady stream of amendments authorizing other forms of gambling.¹²¹

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.

114. WIS. CONST. art. IV, § 24; MASON & NELSON, *supra* note 91, at 8-10; DOUGLASS CHARLES ELLERBE FARNSELY, *GAMBLING AND THE LAW: THE WISCONSIN EXPERIENCE, 1848-1980*, at 58-59 (1980) (unpublished LL.M. thesis, University of Wisconsin).

115. FARNSELY, *supra* note 114, at 61-72; MASON & NELSON, *supra* note 91, at 8-9; *see* Douglass Charles Ellerbe Farnsley, *Gambling and the Law: The Wisconsin Experience, 1848-1980*, 1980 WIS. L. REV. 811, 856-59.

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)¹²² and then to allow charitable raffles (1977).¹²³ Initial efforts to repeal the constitutional ban on lotteries failed but lottery supporters finally prevailed in 1987.¹²⁴ Voters then authorized a state lottery and pari-mutuel betting.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.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.¹²⁷ Prior to the Supreme Court's 2015 *Obergefell*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.¹²⁹ State courts, including Wisconsin's supreme court in the 2014 *Appling* case, generally refused expansive interpretation.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.¹³¹

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).

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).

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

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).

126. See *supra* note 44 and accompanying text.

127. See *supra* notes 45-47 and accompanying text.

128. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

129. *Infra* note 131.

130. *Appling v. Walker*, 2014 WI 96, ¶¶ 22-37, 358 Wis. 2d 132, 853 N.W.2d 888.

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.¹³² After the U.S. Supreme Court struck down several English-only laws in *Meyer v. Nebraska*¹³³ 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.¹³⁴ 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.¹³⁵ As in earlier eras of heavy immigration,¹³⁶ 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.¹³⁷

Illinois enacted the first modern English-only statute in 1969.¹³⁸ The

Superior Court, 26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005) (including a discussion similar to the *Applying* case), with *Nat'l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524 (Mich. 2008) (holding that Michigan's DOMA, Mich. Const. art. I, § 25 (amended 2004), which provided that heterosexual marriages "shall be the only agreement[s] recognized as a marriage or similar union for any purpose," precluded domestic partnership benefits for members of gay couples).

132. See RICHARD N. CURRENT, *THE HISTORY OF WISCONSIN VOL. II: THE CIVIL WAR YEARS, 1848-1873*, at 548-49 (1976); Louise P. Kellogg, *The Bennett Law in Wisconsin*, 2 WIS. MAG. OF HIST. 3, Sept. 1918; AHLSTROM, *supra* note 2, at 828-33.

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

134. See PATTERSON, *supra* note 19, at 26-28, 292-303.

135. CAMILLE RYAN, U.S. CENSUS BUREAU, *LANGUAGE USE IN THE UNITED STATES: 2011*, AM. CMTY. SURV. REP. (2013), www.census.gov/prod/2013pubs/acs-22.pdf (last visited Apr. 24, 2017). See Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Politics*, 57 KAN. L. REV. 669, 671-72 (2008).

136. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1963); LA VERN J. RIPPLEY, *THE GERMAN-AMERICANS 99-128* (1976); KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY 30-95* (2014).

137. See K.C. McAlpin, *Why English Should Be the Official Language of the United States?*, PROENGLISH.ORG, www.proenglish.org/official-english/why-official-english.html (last visited Apr. 24, 2017) (characterizing increase in non-English-speaking population as "ominous[] for the nation's linguistic unity" and criticizing the late-20th-century shift away from the melting-pot ideal toward multiculturalism).

138. 5 ILL. COMP. STAT. 460/20 (1969).

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 specified that government officials were under no obligation to provide Spanish or other foreign-language translations.¹³⁹ A steady stream of English-only laws followed: thirteen states enacted such measures in the 1980s,¹⁴⁰ six in the 1990s,¹⁴¹ and eight in the 2000s.¹⁴² A handful of states including Wisconsin have resisted the tide. Most early measures followed Illinois' symbolic model; a few contained vaguely-worded clauses authorizing state legislatures to enact "appropriate" implementing legislation.¹⁴³ 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 requiring that school instruction be in English notwithstanding the Supreme Court's holding in *Meyer*.¹⁴⁴

Opponents have not challenged the laws' central premise that assimilation has value; instead, they have argued that the laws discriminate against non-English speakers and hamper rather than promote assimilation.¹⁴⁵ The two sides joined battle in Alaska and Arizona, whose laws were among the most draconian English-only laws.¹⁴⁶ Both states'

139. HAW. CONST. art. XV, § 4 (amended 1978); Act effective May 22, 1979, S.B. No. 45, 1979 Haw. Sess. Laws 189.

140. Virginia (1981, statute with specific limits); Indiana and Kentucky (1984, symbolic statutes); Tennessee (1984, specific limits); California (1986, constitutional amendment authorizing 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 and South Dakota (1995, specific limits); Wyoming (1996, same); Alaska (1998, same). See *id.*

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 Mitigate the Damage of English-Only*, 20 DUKE J. GENDER L. & POL'Y 197, 197–99 (2012) (arguing against the English-only laws that apply to school instruction); McAlpin, *supra* note 137 (arguing that adoption of a universal language is necessary to national greatness and that English-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.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.¹⁴⁸ Alaska’s supreme court also held that such restrictions would violate non-English speakers’ constitutional right to petition government.¹⁴⁹

IV. MODERN BATTLEFIELDS: THE DECLINE OF EDUCATIONAL ASSIMILATIONISM

During the years following the U.S. Supreme Court’s decision in *Brown v. Board of Education* (1954)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.¹⁵¹ During the ensuing decades, the rise of expressive individualism and the decline of assimilationism in education manifested themselves in

CONST. art. XXVIII. Alaska law required that English be used in all government transactions and that government records be maintained in English. ALASKA STAT. §§ 44.12.300–.398 (2016).

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

148. *Ruiz v. Hull*, 957 P.2d 984, 987 (Ariz. 1998).

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 684–87.

150. 347 U.S. 483 (1954).

151. See, e.g., TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963, at 222–24, 633–72, 821–23 (1988); KEVIN MICHAEL KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005); J. ANTHONY LUKAS, COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES (1985); MARK T. MULDER, SHADES OF WHITE FLIGHT: EVANGELICAL CONGREGATIONS AND URBAN DEPARTURE (2015); WITH ALL DELIBERATE SPEED: IMPLEMENTING BROWN V. BOARD OF EDUCATION 1–18, 27–28, 44–58 (Brian J. Daugherty & Charles C. Bolton eds., 2008); PATTERSON, *supra* note 19, at 388–95, 477–81.

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

152. See BENJAMIN MICHAEL SUPERFINE, EQUALITY IN EDUCATION LAW AND POLICY, 1954-2010, at 199-200 (2013).

153. *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539, 540 (1971), *aff'd*, 406 U.S. 205 (1972).

154. *Id.*

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

156. JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM 34-35 (2000); see James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 459-61.

157. See 6 WILLIAM F. THOMPSON, HISTORY OF WISCONSIN: CONTINUITY AND CHANGE, 1940-1965, at 323-26 (1988); JOE WILLIAM TROTTER JR., BLACK MILWAUKEE: THE MAKING OF AN INDUSTRIAL PROLETARIAT, 1915-1945, at 30-32, 186-97, 215-20 (1985); WITH ALL DELIBERATE SPEED: IMPLEMENTING BROWN V. BOARD OF EDUCATION, *supra* note 151, at 221-22.

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 system would only lead to white flight and more segregation.¹⁵⁹ "The Constitution 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 students' achievement levels continued to lag badly behind those of white students, racial conflicts in MPS schools were increasing, and anti-assimilation 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 minority-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 program only after Thompson and Williams assured them that it was a temporary 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 ineligible.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 Tension 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

165. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

166. 1995 Wis. Act 27 §§ 4002-4009.

167. WITTE, *supra* note 156, at 43-44.

168. *Id.* at 198.

169. OHIO REV. CODE ANN. §§ 3313.974-3313.979 (1995).

170. *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602, 621 (1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), *aff'd*, 536 U.S. 639 (2002).

171. *Jackson*, 218 Wis. 2d at 853-76.

172. *Id.* at 879.

violate state constitutional provisions mandating a public school system.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-*Brown* dream of full racial assimilation.¹⁷⁴ Ten additional states enacted voucher or tax-credit programs for private-school tuition payments between 1997 and 2010,¹⁷⁵ and another wave of thirteen states enacted such programs between 2011 and 2015.¹⁷⁶ 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.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.¹⁷⁸

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

173. *Simmons-Harris*, 711 N.E.2d at 212.

174. See Julie F. Mead, *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).

175. *Vouchers*: Arizona (1997), Florida (1999), Utah (2005), Georgia (2007), Louisiana (2008), Oklahoma (2010). *Tax credits*: Pennsylvania and Florida (2001), Iowa, Rhode Island, Arizona and Georgia (2006), Indiana (2009). See Mead, *supra* note 174, at 707–13; *School Voucher Laws: State-by-State Comparison*, NAT’L CONF. OF STATE LEGISLATURES, www.ncsl.org/research/education/voucher-law-comparison.aspx (last visited Apr. 24, 2017).

176. *Vouchers*: Arizona, Colorado, Indiana (2011); Mississippi (2012), North Carolina (2013), Arkansas (2015). *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; *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.

177. Mead, *supra* note 174, at 715–27; *School Voucher Laws: State-by-State Comparison*, *supra* note 175.

178. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015).

179. *Cain*, 202 P.3d 1178; *Taxpayers for Pub. Educ.*, 351 P.3d 461; *Bush*, 919 So. 2d 392.

the fate of voucher programs in all states will depend on the wording of their state constitutions' education provisions, which vary widely.¹⁸⁰ 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.¹⁸¹ Arizona's Blaine clause provided that "no . . . appropriation of public money [shall be] made in aid of any church, or private or sectarian school";¹⁸² 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."¹⁸³

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."¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ 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.

181. See Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STANFORD L. REV. 479, 488-90 (2015); DONALD E. BOLES, *THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS* 30-37 (1965).

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 inter-district 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

187. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); Mead, *supra* note 174, at 736–37.

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>].

189. SUPERFINE, *supra* note 152, at 12–15, 75–77; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 267–68 (1999).

190. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

191. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

192. *Serrano v. Priest*, 557 P.2d 919 (Cal. 1976).

193. SUPERFINE, *supra* note 152, at 75, 100–06, 120–24; Ryan, *supra* note 189, at 268–72.

194. Ryan, *supra* note 189, at 271–72.

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.¹⁹⁵ 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.¹⁹⁶ 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."¹⁹⁷

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.¹⁹⁸ In *Kukor v. Grover* (1989), reformers mounted a new challenge based on the state's uniformity clause as well as its equal-protection clause.¹⁹⁹ 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.²⁰⁰ 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.

197. Ryan, *supra* note 189, at 271–72.

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").

200. *Kukor*, 148 Wis. 2d 469; *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

control.²⁰¹ 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.”²⁰² 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.²⁰³ 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.²⁰⁴

V. MODERN BATTLEFIELDS: 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.²⁰⁵ In addition, many opponents view abortion as murder, an issue as to which any compromise or slackening of effort would be profoundly immoral.²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ In *Casey* the high Court disappointed abortion opponents by making

201. *Kukor*, 148 Wis. 2d at 490-95.

202. *Id.* at 525 (Bablitch, J., dissenting). See Suzanne M. Steinke, Comment, *The Exception to the Rule: Wisconsin’s Fundamental Right to Education and Public School Financing*, 1995 WIS. L. REV. 1387.

203. *Vincent v. Voight*, 2000 WI 93, ¶¶ 48-78, 236 Wis. 2d 588, 614 N.W.2d 388.

204. *Id.* ¶¶ 190-92, 197-98, 202 (Sykes, J., concurring and dissenting).

205. CAHN & CARBONE, *supra* note 24, at 62.

206. *Id.* at 91-95; Kelefa Sanneh, *The Intensity Gap: Can A Pro-Life Platform Win Elections?*, NEW YORKER, Oct. 27, 2014; Jon Perr, *How Anti-Abortion Intensity Wins in Pro-Choice America*, DAILY KOS, www.dailykos.com/story/2015/04/26/1379912 (last visited Apr. 24, 2017).

207. CAHN & CARBONE, *supra* note 24, at 92-93.

208. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

clear that it would not overturn the zone of abortion rights it had created in *Roe v. Wade* (1973),²⁰⁹ 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.²¹⁰ The *Casey* Court also held that making it more difficult for eligible women to obtain abortions was not necessarily an undue burden.²¹¹ 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 2010.²¹²

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,²¹³ together with laws requiring parental consent for minors to have an abortion;²¹⁴ (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;²¹⁵ (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;²¹⁶ (iv) laws prohibiting public

209. 410 U.S. 113 (1973).

210. *Casey*, 505 U.S. at 876–79. *Roe* held that: (i) during the first trimester of pregnancy, states could not interfere with a woman's choice to have an abortion; (ii) from the end of the first trimester until quickening, states could regulate abortion but only in order to protect maternal health; and (iii) from that point until birth, the state could regulate abortion in order to protect "potential[] . . . life." *Roe*, 410 U.S. at 163–65.

211. *Casey*, 505 U.S. at 877–78, 880–84. Three members of the majority retreated from post-*Roe*, pre-*Casey* decisions that had suggested the Court would look at such regulations with a skeptical eye. *Id.*

212. See David Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 846–48 (1999); Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 83–84 (2013).

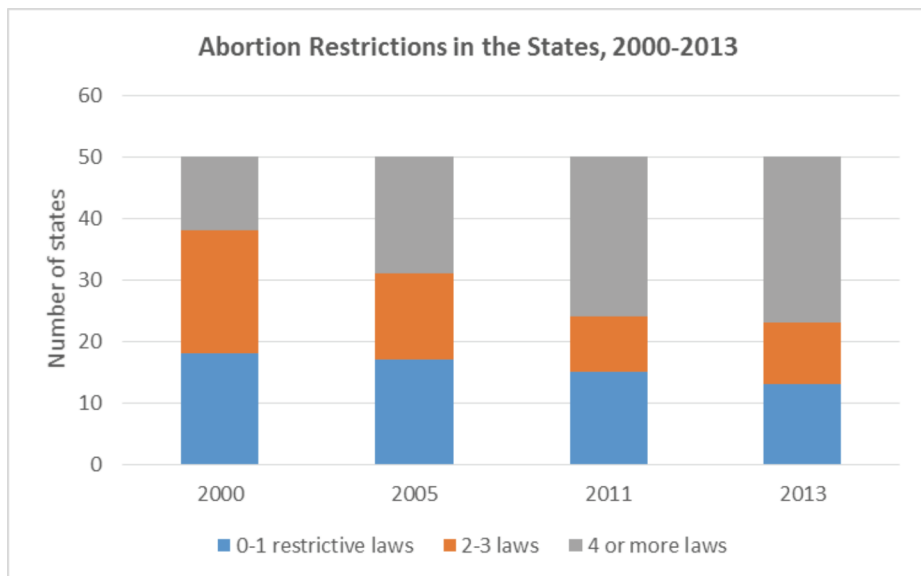
213. In 2015 nearly all states had informed-consent law, although the details of the laws varied extensively. *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/H4FC-XEQS>] (last visited on Apr. 24, 2017).

214. As of 2015, twenty-five states required parental consent for an abortion; thirteen states required only that parents be given notice before the abortion. *Id.*

215. As of 2015, four states required a seventy-two-hour waiting period, three states a forty-eight-hour period, twenty states a twenty-four-hour period, and one state an eighteen-hour period. *Id.*

216. See *infra* notes 230–31 and accompanying test.

funding of abortions through Medicaid and other medical insurance programs;²¹⁷ 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.²¹⁸ As the graph below illustrates, the number of restrictive laws has grown steadily since *Casey*:²¹⁹



Abortion-rights advocates have mounted constitutional challenges to many of the post-*Casey* laws.²²⁰ Results have been mixed. Courts

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.*

219. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – and the Women They Serve – in the Crosshairs*, 17 GUTTMACHER POL'Y REV. 9 (2014) (giving the 2013 statistics); Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 14 (2012) (giving the 2000, 2005, and 2011 statistics).

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'

221. See, e.g., *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013); Dawn E. Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 61–62 (2015).

222. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 881–84 (1992).

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).

224. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (striking down sonogram provision); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (upholding a more circumspectly-enacted provision); *Planned Parenthood of the Heartland v. Iowa Bd. of Med.*, 865 N.W.2d 252 (Iowa 2015).

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).

226. *Harris v. McRae*, 448 U.S. 297, 302–03 (1980); see *Maher v. Roe*, 432 U.S. 464 (1977) (holding that federal funding could be limited to medically necessary abortions).

equal-protection and due-process clauses expansively to prohibit funding discrimination of any sort as to abortion,²²⁷ and a handful of courts have reached the same result through invocation of state right-to-privacy, ERA, and public-safety clauses.²²⁸ Other courts have rejected such challenges.²²⁹

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.²³⁰ 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.²³¹

227. See *State Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984); see also *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986).

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).

229. See, e.g., *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *Doe v. Dep't of Soc. Servs.*, 487 N.W.2d 166 (Mich. 1992); *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002). See generally Tracy Bateman Farrell, Annotation, *Validity of State Statutes and Regulations Limiting or Restricting Public Funding for Abortion Sought by Indigent Women*, 118 A.L.R. 5th 463 (2016).

230. See, e.g., *Christensen v. Wis. Med. Bd.*, 551 F. Supp. 565, 569 (W.D. Wis. 1982) (indicating that a Medical Board regulation requiring that second-trimester abortions be performed in surgical hospitals except in an emergency was presumptively unconstitutional); *Women's Med. Ctr. of Providence, Inc. v. Cannon*, 463 F. Supp. 531 (D.R.I. 1978); *State v. Presidential Women's Ctr.*, 884 So. 2d 526 (Fla. Dist. Ct. App. 2004); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000). Several decisions striking down anti-abortion laws have generated substantial backlash. See also Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1144-46 (1997).

231. See Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1509-15 (2012); Manian, *supra* note 212, 101-14.

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*

232. 2013 Wis. Act 37; 2013 Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, 2013 Tex. Sess. Law Serv. 4795, 4795-802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-048, 171.061-064, amending 245.010-011 (West 2015); TEX. OCC. CODE ANN. amending §§ 164.052, 055 (West 2015)).

233. *Whole Women's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014), *rev'd in part*, 790 F.3d 563 (5th Cir.), *rev'd*, 579 U.S. —, Slip. Op., Docket No. 15-274 (June 27, 2016); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949 (W.D. Wis. 2015), *aff'd*, 806 F.3d 908 (7th Cir.), *cert. denied*, 134 S. Ct. 2841 (2015).

234. *Van Hollen*, 94 F. Supp. 3d 949.

235. *Lakey*, 46 F. Supp. 3d 673.

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

240. *Karlin v. Foust*, 975 F. Supp. 1177, 1217–18, 1224–26 (W.D. Wis. 1997), *aff'd in part and rev'd in part*, 188 F.3d 446, 491–93 (7th Cir. 1999).

241. 1995 Wis. Act 309.

242. *Id.*

243. 1997 Wis. Act 219. The U.S. Supreme Court subsequently held that states could prohibit partial-birth abortions, although it indicated it might hold such prohibitions unconstitutional under some circumstances. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

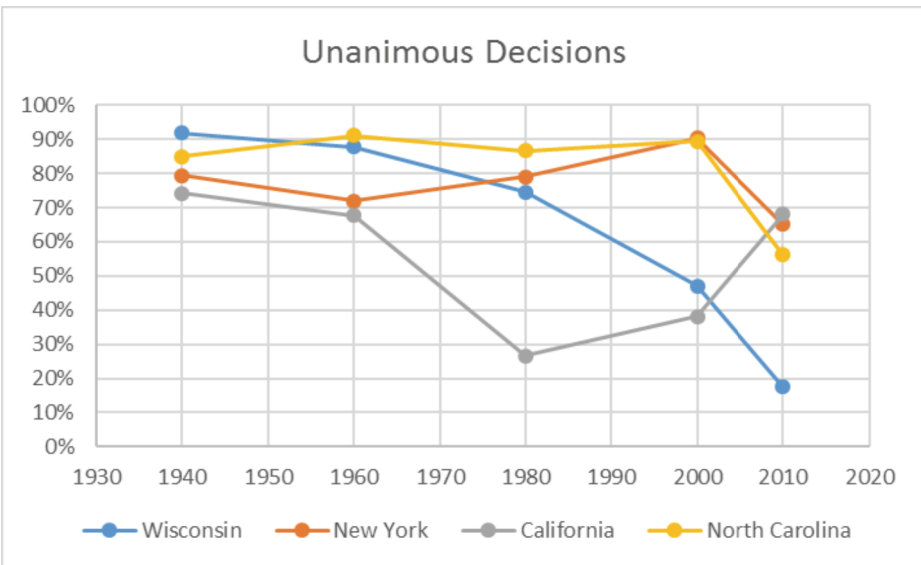
244. 1995 Wis. Act 27.

245. *Planned Parenthood of Wis., Inc. v. Doyle*, 162 F.3d 463 (7th Cir. 1998).

246. *Karlin v. Foust*, 975 F. Supp. 1177 (W.D. Wis. 1997), *aff'd in part, rev'd in part*, 188 F.3d 491 (7th Cir. 1999) (waiting period and informational requirements); *Doyle*, 162 F.3d 463 (striking down law banning partial-birth abortion because it provided no emergency exception and also extended to other types of abortion). See Carolyn Bower, Annotation, *Validity, Construction, and Application of Statutory Restrictions on Partial Birth Abortions*, 76 A.L.R. 5th 637 (2000; updated 2016).

247. See *supra* notes 232 and accompanying text.

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.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.²⁴⁹



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.

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.²⁵⁰ 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.²⁵¹ 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.²⁵² 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%.²⁵³ Dissent has not been confined to individual judges: by 2010, half of all Wisconsin cases elicited dissents from two or more justices.²⁵⁴

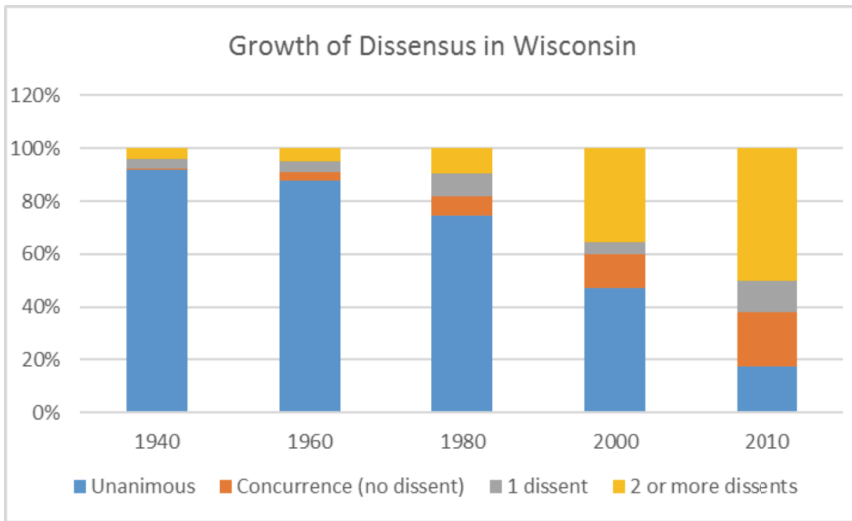
250. The figures were compiled from each court's case reports for 1940, 1960, 1980, 2000, and 2010 and are on file with the author.

251. Uelmen, *supra* note 230, at 1136–39.

252. *Political Polarization in the American Public*, PEW RESEARCH CTR., www.people-press.org/2014/06/12/political-polarization-in-the-american/public/ (last visited Apr. 24, 2017); RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS, *supra* note 26, at 1–48, 119–222; Craig Gilbert, *The Red, the Blue: Political Polarization Through the Prism of Metropolitan Milwaukee*, MARQ. LAW., Fall 2014, at 9.

253. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1483–84 (2009). Wisconsin's unanimity rate that year was 50.5%. *Id.*

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.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.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.²⁵⁷ One dissenter protested that "[i]t is simply unfair to conflate opposition to same sex marriage with bigotry"²⁵⁸ and that democracy "is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution."²⁵⁹ 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,"²⁶⁰ and the majority retorted that her position was "astonishing."²⁶¹

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.²⁶² 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.²⁶³

their policy preferences into state constitutional law." Diane S. Sykes, *The 'New Federalism': Confessions of a Former State Supreme Court Justice*, 38 OKLA. CITY U. L. REV. 367, 381, 390 (2013) [hereinafter Sykes, *The 'New Federalism'*].

257. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 454–58, 481 (Conn. 2008).

258. *Id.* at 494 (Zarella, J., dissenting).

259. *Id.* at 526 (Zarella, J., dissenting).

260. *Andersen v. King Cty.*, 138 P.3d 963, 1012–13 (Wash. 2006).

261. *Id.* at 979.

262. 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).

263. 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.²⁶⁴ 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.²⁶⁵ 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 counterpart²⁶⁶ – 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.²⁶⁷ 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.²⁶⁸ Mosk was nearly as enthusiastic,²⁶⁹ 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-

264. See, e.g., ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 914–1064 (4th ed. 1970); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

265. Brennan, *supra* note 264; see Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1147–50 (1985).

266. *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

267. See Shirley Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Hans A. Linde, *Without ‘Due Process’: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

268. Linde, *supra* note 267; see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

269. See Mosk, *supra* note 267; Stanley Mosk, *States’ Rights – And Wrongs*, 72 N.Y.U. L. REV. 552, 561 (1997). New Jersey’s supreme court has also been active in the new federalism movement. See Marie L. Garibaldi, *The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 81–82 (1998); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Deborah T. Poritz, *The New Jersey Supreme Court: A Leadership Court in Individual Rights*, 60 RUTGERS L. REV. 705 (2007).

quences 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.²⁷⁰ In Abrahamson's view, "[b]oth the proponents and critics of the new judicial federalism should be careful what they wish for."²⁷¹

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,²⁷² 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.²⁷³

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,²⁷⁴ and several state courts held that their constitutions prohibited other abortion restrictions that would have passed constitutional muster under *Casey*.²⁷⁵ 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

270. See Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 349 (2004).

271. *Id.*; see Abrahamson, *supra* note 267; Garibaldi, *supra* note 269, at 81–82.

272. See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); *Dist. Attorney for Suffolk Cty. v. Watson*, 411 N.E.2d 1274 (Mass. 1980); *State v. Mata*, 745 N.W.2d 229 (Neb. 2008); *State v. Gerald*, 549 A.2d 792 (N.J. 1988); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004); *State v. Quinn*, 623 P.2d 630 (Or. 1981).

273. See CAL. CONST., art. I, § 17 (1972); FLA. CONST., art. I, § 17 (1998); MASS. CONST., art. XXVI (1982); OR. CONST., art. I, § 40 (1984); N.J. CONST., art. I, § 12 (1992); Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2070–71, 2080–83 (2013); Uelmen, *supra* note 230, at 1136–39.

274. *Harris v. McRae*, 448 U.S. 297 (1977); Miller, *supra* note 273, at 2074–75, nn.102–14.

275. See, e.g., *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (parental-notice statute struck down on state right-of-privacy grounds); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (same); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003) (same); Miller, *supra* note 273, at 2074–75.

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.

277. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003).

278. 78 Wis. 2d 161, 254 N.W.2d 210 (1977).

279. See, e.g., *State v. Agnello*, 226 Wis. 2d 164, 593 N.W.2d 427 (1999) (right against self-incrimination); *State v. Guy*, 172 Wis. 2d 86, 492 N.W.2d 311 (1992) (right to be free from double jeopardy for criminal offenses); *State v. Kramsvogel*, 124 Wis. 2d 101, 369 N.W.2d 145 (1985) (same); *Thompson v. State*, 83 Wis. 2d 134, 265 N.W.2d 467 (1978) (right to be free from unreasonable search and seizure).

280. *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (Miranda warnings); *State v. Dubose*, 2006 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (lineups).

281. Sykes, *The 'New Federalism,' supra* note 256, at 381, 390.

282. *State v. Luedtke*, 2015 WI 42, ¶ 87, 362 Wis. 2d 1, 863 N.W.2d 592 (Abrahamson, J., concurring).

ever renounce the doctrine altogether.²⁸³

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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶ 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 2015,²⁸⁷ the court's conservative wing immediately demoted Abrahamson and selected one of its own members as chief justice by a 4-3 vote,²⁸⁸ an act that

283. *State v. Delebreau*, 2015 WI 55, ¶ 82, 362 Wis. 2d 542, 864 N.W.2d 852 (Abrahamson, J., dissenting); *Luedtke*, 2015 WI 42, ¶ 87 (Abrahamson, J., concurring); Sykes, *The 'New Federalism'*, *supra* note 256, at 390-93; Sykes, *Reflections*, *supra* note 256, at 737.

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

285. See *supra* notes 11, 15-16, 267, 270-71, 280, 283, and accompanying text; THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 11, at 1; Christian Schneider, *Let Wisconsin Supreme Court Justices Pick Their Own Chief*, MILWAUKEE J.-SENTINEL, Dec. 10, 2013, [www.jsonline.com/news/opinion/let-wisconsin-supreme-court-justices-pick-their-own-chief-69916014921-235327371.html](http://www.jsonline.com/story/news/opinion/let-wisconsin-supreme-court-justices-pick-their-own-chief-69916014921-235327371.html).

286. Schneider, *supra* note 285.

287. WIS. CONST. art. VII, § 4 (amended 2015); J. Res. 1, 102d Leg., Reg. Sess. (Wis. 2015); J. Res. 2, 102d Leg., Reg. Sess. (Wis. 2015). The amendment passed by a 53% margin (433,533 votes for, 384,503 against).

288. See Scott Bauer, *Patience Roggensack Elected Chief Justice; Shirley Abrahamson Says She Still Holds Post*, WIS. ST. J. (Apr. 29, 2015), <http://host.madison.com/wsj/news/local/govt-and-politics/patience-roggensack-elected-chief-justice-shirley-abrahamson-says-she>

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

still/article_76ebef79-7e77-54de-823b-f4fb74f0895d.html [https://perma.cc/B7RA-3KZZ]. Abrahamson was in good company: in New York's 1821 constitutional convention political opponents of Chancellor James Kent, a seminal figure in early American state law and perhaps the greatest American state judge, inserted a provision requiring all judges to retire at age sixty, thus forcing Kent from the bench two years later. N.Y. CONST. of 1821, art. V, § 3; JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM 1763-1847, at 249-50, 259-61 (1939). Kent and Abrahamson are the only two American judges who have elicited their own constitutional amendments.

289. See Molly Beck, *Shirley Abrahamson Drops Lawsuit to Regain Chief Justice Title*, WIS. ST. J. (Nov. 10, 2015), http://host.madison.com/wsj/news/local/govt-and-politics/shirley-abrahamson-drops-lawsuit-to-regain-chief-justice-title/article_12e46c97-7549-5b3c-a7d0-8d748b4a4d75.html [https://perma.cc/E2MB-C4ZB].

290. See *supra* note 38 and accompanying text.

291. See *supra* notes 65, 85-86 and accompanying text.

292. See *supra* note 162 and accompanying text.

293. See *supra* notes 104, 111, 124-25, and accompanying text.

294. See *supra* note 231 and accompanying text.

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.

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