

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, Katie Switzer, and Jennifer Compton v. Travis Beaver, Wendy Peters, David L. Roach, State Superintendent of Schools, and L. Paul Hardesty, President of the West Virginia Board of Education

State of West Virginia v. Beaver · No. No. 22-616 · Decided November 17, 2022

SUMMARY

This document is a dissenting opinion by Chief Justice Hutchison in a West Virginia Supreme Court of Appeals case concerning the constitutionality of the Hope Scholarship Act. The dissent argues that the West Virginia Constitution requires the Legislature to provide education through a system of free public schools and therefore prohibits subsidizing private education through the program. It further contends that the Act should be subject to, and fails, strict-scrutiny review.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Hutchison, Chief Justice
JURISDICTION	West Virginia
DECIDED	November 17, 2022
DOCKET	No. 22-616
DISPOSITION	other
PROCEDURAL POSTURE	The Supreme Court of Appeals of West Virginia reviewed a constitutional challenge to the Hope Scholarship Act. The supplied text is Chief Justice Hutchison's dissent from the majority's decision upholding the Act; the dissent would have affirmed the circuit court's ruling that the Act was unconstitutional.
STANDARD OF REVIEW	Constitutional review of a facial challenge to state legislation; the dissent would apply strict scrutiny because education is a fundamental right under the West Virginia Constitution. The dissent also discusses, but rejects as controlling in this state-constitutional challenge, the federal Salerno facial-challenge formulation.
PRECEDENTIAL VALUE	dissenting opinion; nonbinding

PARTIES

State of West Virginia, Katie Switzer, Jennifer Compton v. Travis Beaver, Wendy Peters, David L. Roach, State Superintendent of Schools, L. Paul Hardesty, President of the West Virginia Board of Education

TOPICS

constitutional law

statutory interpretation

expressio unius

strict scrutiny

federal spending

PRACTICE AREAS

constitutional law

education law

school vouchers

state constitutional law

statutory interpretation

QUESTIONS PRESENTED

1. Whether the Hope Scholarship Act violates Article XII, Section 1 of the West Virginia Constitution by funding private education rather than providing education through a system of free public schools.
2. Whether the Hope Scholarship Act infringes the fundamental constitutional right to a thorough and efficient system of free public schools and therefore must satisfy strict scrutiny.
3. Whether the federal 'no set of circumstances' standard from *United States v. Salerno* governs a facial challenge under the West Virginia Constitution.
4. Whether the *expressio unius est exclusio alterius* canon supports the conclusion that the West Virginia Constitution's specification of a system of free schools excludes public subsidies for private educational systems.

HOLDINGS

1. In the dissent's view, Article XII, Section 1 of the West Virginia Constitution requires the Legislature to provide education through a system of free schools and therefore prohibits the Hope Scholarship Act's diversion of public funds to subsidize privately owned schools.
2. In the dissent's view, governmental action that denies or infringes West Virginia's fundamental constitutional right to education is subject to strict scrutiny, requiring the government to establish that the challenged law uses the least restrictive means of achieving a compelling state interest.
3. The dissent would reject the federal *Salerno* 'no set of circumstances' formulation as controlling in a facial challenge based on the West Virginia Constitution and would instead apply the substantive constitutional test dictated by the nature of the challenge.

KEY QUOTATIONS

"The provisions of Article XII, Section 1 et seq., as well as Article X, Section 5 of the West Virginia Constitution, when construed in the light of our prior cases, gives a constitutionally preferred status to public education in this State." (at 4)

"Consequently, the West Virginia Constitution provides that the Legislature's obligation to provide a thorough and efficient education is limited to doing so only by a system of free schools, not through subsidizing private

educational systems.” (at 10)

“The Hope Scholarship Act is unconstitutional here and now and claims that it can somehow be amended into constitutionality by some future actions of the Legislature are untenable.” (at 16)

FACTUAL BACKGROUND

The Hope Scholarship Act establishes education savings accounts funded with public money for eligible students to use for private-school tuition, homeschooling, or other private-education expenses. The program is funded from general state revenue and transfers an amount tied to the prior year's statewide average net state aid share per pupil. Eligibility initially depends on public-school enrollment or kindergarten eligibility, but may expand to any West Virginia child of public-school age if participation remains below a specified threshold. The dissent reasoned that students leaving public schools could reduce School Aid Formula funding available to those schools and their remaining students.

PROCEDURAL HISTORY

The circuit court held that the Hope Scholarship Act violated the West Virginia Constitution. The Supreme Court of Appeals of West Virginia's majority reached the opposite conclusion and found the Act constitutional. Chief Justice Hutchison dissented, agreeing with the circuit court and stating that the Act should have been invalidated.

DISPOSITION

other

CASES CITED

- Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha, 231 W. Va. 386, 745 S.E.2d 424 (2013)
- Brown v. Bd. of Educ., 347 U.S. 483 (1954)
- Randolph Cnty. Bd. of Ed. v. Adams, 196 W. Va. 9, 467 S.E.2d 150 (1995)
- Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979)
- State ex rel. Bd. of Ed. v. Rockefeller, 167 W. Va. 72, 281 S.E.2d 131 (1981)
- State ex rel. Metz v. Bailey, 152 W. Va. 53, 159 S.E.2d 673 (1968)
- Bush v. Holmes, 919 So. 2d 392 (Fla. 2006)
- Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984)
- State ex rel. Riffle v. Ranson, 195 W. Va. 121, 464 S.E.2d 763 (1995)
- Lane v. Bd. of Ed. of Lincoln Cnty., 147 W. Va. 737, 131 S.E.2d 165 (1963)
- State ex rel. Downey v. Sims, 125 W. Va. 627, 26 S.E.2d 161 (1943)
- Harbert v. Harrison Cnty. Ct., 129 W. Va. 54, 39 S.E.2d 177 (1946)
- State ex rel. Battle v. Hereford, 148 W. Va. 97, 133 S.E.2d 86 (1963)
- Gissy v. Bd. of Educ. of Freeman's Creek Dist., 105 W. Va. 429, 143 S.E. 111 (1928)
- Cathe A. v. Doddridge Cnty. Bd. of Educ., 200 W. Va. 521, 490 S.E.2d 340 (1997)
- United States v. Salerno, 481 U.S. 739 (1987)

- City of Chicago v. Morales, 527 U.S. 41 (1999)
- Doe v. City of Albuquerque, 667 F.3d 1111 (10th Cir. 2012)
- Utah Pub. Emps. Ass'n v. State, 131 P.3d 208 (Utah 2006)
- Commonwealth v. Ickes, 873 A.2d 698 (Pa. 2005)
- Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021)
- San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)
- Wells v. One2One Learning Found., 141 P.3d 225 (Cal. 2006)

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