STATE CONSTITUTIONAL LAW — EDUCATION CLAUSE — WEST VIRGINIA SUPREME COURT DEEMS EDUCATION SAVINGS ACCOUNTS CONSTITUTIONAL. — *State v. Beaver*, No. 22-616, 2022 WL 17038564 (W. Va. Nov. 17, 2022).

School choice has reawakened. A movement formerly on the verge of slow erosion[1] is now back on state legislative agendas.[2] Its current iteration advances a dramatic vision, calling not only for a variety of school options but also for public funding to "build an educational experience from scratch."[3] Recently, in *State v. Beaver*,[4] the West Virginia Supreme Court upheld the constitutionality of the Hope Scholarship Act,[5] a 2021 state law creating education savings accounts for public school students.[6] In doing so, the court undermined the West Virginia Constitution's guarantee of a fundamental right to education. The court emphasized alluring connotations of "choice" — including voluntariness, parental autonomy, and curricular individualization — to discount the Act's serious risks of educational harm as merely hypothetical. Yet, due to West Virginia's unique educational context and the Act's deliberate breadth, increased segregation and diminished school funding are all but inevitable. Instead of addressing this projected impact, the court focused on defending its narrow reading of the state constitution's Education Clause. As a result, West Virginian students will suffer further injury as they wait to bring an as-applied challenge within an increasingly privatized educational landscape.

Over the last two years, eighteen states have either created or expanded educational choice programs in the form of vouchers, tax credits, and education savings accounts (ESAs).[7] ESAs are "flexible-use spending accounts" from which parents can withdraw funds to subsidize private school tuition, tutoring, or other educational resources.[8] Since ESAs do not require students to exchange a voucher or tax-credit

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[1] *See* Greg Toppo, *School Choice Backers See Opening in COVID Chaos, Even as Culture War Issues Threaten to Fracture Coalition*, THE74 (Jan. 24, 2022), https://www.the74million.org/article/school-choice-backers-see-opening-in-covid-chaos-even-as-culture-war-issues-threaten-to-fracture-coalition [https://perma.cc/8KFT-YSX6].

[2] *See* Jason Bedrick & Ed Tarnowski, *How Big Was the Year of Educational Choice?*, EDUC. NEXT (Aug. 19, 2021), https://www.educationnext.org/how-big-was-the-year-of-educational-choice [https://perma.cc/A5AM-6P2V].

[3] Evie Blad, *Betsy DeVos Tests a Rhetorical Twist on "School Choice,"* EDUCATIONWEEK (Oct. 1, 2019), https://www.edweek.org/policy-politics/betsy-devos-tests-a-rhetorical-twist-on-school-choice/2019/10 [https://perma.cc/UA7J-W52H].

[4] No. 22-616, 2022 WL 17038564 (W. Va. Nov. 17, 2022).

[5] W. VA. CODE § 18-31-1 (2022).

[6] *Id.* § 18-31-5(b).

[7] Toppo, *supra* note 1; Bedrick & Tarnowski, *supra* note 2.

[8] Mike McShane, Opinion, *Oh, What a Year for School Choice*, FORBES (May 24, 2021, 9:48 AM), https://www.forbes.com/sites/mikemcshane/2021/05/24/oh-what-a-year-for-school-choice [https://perma.cc/3GAP-E9C5].

scholarship at a particular school, they appeal to school choice advocates who seek full customization of the educational experience.[9]

Enacted in March 2021, the Hope Scholarship Act is an "absolutely massive" ESA bill.[10] At the time of its adoption, it had the "broadest eligibility of any school choice program in the nation."[11] The West Virginia legislature created a special revenue fund equal to "the prior year's statewide average net state aid share allotted per pupil based on net enrollment"[12] and vested a nine-member board with administrative power over the program.[13] Under the Act, parents can utilize ESA funds on a variety of educational resources as well as "[a]ny other qualified expenses" pursuant to approval by the board.[14]

On January 19, 2022, three public school parents filed suit in Kanawha County Circuit Court, challenging the Act under the West Virginia Constitution.[15] Their complaint alleged unconstitutionality on five independent grounds: the Act surpassed the legislature's duty to establish a free *public* school system, decreased funding for public schools without a compelling state interest, misappropriated funding expressly designated for public schools, usurped the authority of the Board of Education, and excluded program recipients from antidiscrimination protections.[16] Plaintiffs later filed a motion for a preliminary injunction.[17]

Following an initial hearing on July 6, Judge Tabit not only granted the motion but also extended a permanent injunction, finding the statute facially unconstitutional.[18] While Judge Tabit identified five relevant provisions, two were most salient: First, the West Virginia Constitution directs the legislature to provide "a thorough and efficient system of free schools."[19] Second, it asserts that public monies in the school fund must be applied to public schools and "to no other purpose whatever."[20]

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[9] Former Secretary of Education Betsy DeVos describes ESAs as her "favorite, thus far" of the mechanisms that facilitate what she calls "education freedom." *School Choice*, BETSY DEVOS, https://betsydevos.com/issues/school-choice [https://perma.cc/LVF6-8AHU].

[10] McShane, *supra* note 8.

[11] *Id.* Eligible recipients include any resident child enrolled in a West Virginia public school for at least forty-five days at the time of application or during a previous instructional term. Also included is any child eligible to enroll in kindergarten at the time of application. W. VA. CODE § 18-31-2(5)(B).

[12] W. VA. CODE § 18-31-6(b). The initial cohort of program recipients will each receive approximately $4,600. For the fiscal year 2023, the estimated total cost is $30 million, and upon full implementation by 2027, the cost per fiscal year may exceed $100 million. *See* PETER SHIRLEY, W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021), https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799669695 [https://perma.cc/4HXL-65GZ].

[13] W. VA. CODE § 18-31-3.

[14] *Id.* § 18-31-7(a)(12).

[15] Complaint at 1, 4–5, Beaver v. Moore, No. 22-P-24/26 (W. Va. Cir. Ct. July 22, 2022).

[16] *See id.* at 2–4.

[17] Beaver v. Moore, No. 22-P-24/26, 2022 WL 4868661, at *2 (W. Va. Cir. Ct. July 22, 2022).

[18] *See id.* at *9.

[19] W. VA. CONST. art. XII, § 1.

[20] *Id.* § 4.

Applying the semantic canon of *expressio unius*, Judge Tabit took these provisions together to require the State to "fund, and maintain *only* a thorough and efficient system of *free* schools."[21] In subsidizing an unregulated system of private education at the expense of the public, the Act impinged on the fundamental right to education without meeting strict scrutiny.[22] It was also an unconstitutional special law,[23] creating "separate classes of students with different benefits and protections."[24] Defendants appealed the decision to the Intermediate Court of Appeals, but the West Virginia Supreme Court exercised its discretion to obtain immediate jurisdiction.[25] On October 6, 2022, two days after initial oral arguments, it issued an expedited order reversing and lifting the permanent injunction.[26]

A month later, writing for the court, Justice Armstead[27] held that the circuit court abused its discretion by enjoining the State from implementing the Hope Scholarship Act.[28] The court first defined its constitutional framework, casting the West Virginia Constitution as a "restriction of power rather than a grant thereof."[29] The affirmative obligation set forth by the Education Clause thus functioned as a floor, not a ceiling. The legislature was indeed required to provide a "thorough and efficient system of free schools," but it was also not prohibited from "enacting additional educational initiatives."[30] Second, the circuit court's reliance on *expressio unius* was seemingly "misplaced."[31] The court asserted that the canon should be applied sparingly in construing state constitutional provisions.[32] Therefore, in the absence of an explicit "only" within the text of the Education Clause,[33] the court invalidated any restriction on the legislature that might be implied by *expressio unius*.[34] In sum, the court advanced an "almost plenary" conception of legislative power that operated under a presumption of constitutionality against facial challenges and judicial deference on matters of policy.[35]

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21 *Moore*, 2022 WL 4868661, at *6 (emphases added).

22 *Id.* at *7.

23 *See* W. VA. CONST. art. VI, § 39. The purpose of the presumption against special laws is to prevent the "arbitrary creation of special classes, and the unequal conferring of statutory benefits." State *ex rel.* City of Charleston v. Bosely, 268 S.E.2d 590, 595 (W. Va. 1980).

24 *Moore*, 2022 WL 4868661, at *9.

25 State v. Beaver, No. 22-616, slip op. at 1 (W. Va. Oct. 6, 2022); *see* W. VA. CODE § 51-11-4(b)(1) (2022).

26 *Beaver*, slip op. at 1–2.

27 Justice Armstead was joined by Justices Walker and Bunn.

28 *Beaver*, 2022 WL 17038564, at *3.

29 *Id.* at *10 (quoting Foster v. Cooper, 186 S.E.2d 837, 839 (W. Va. 1972)).

30 *Id.*

31 *Id.* at *11.

32 *Id.*

33 *See id.* at *9.

34 *Id.* at *11.

35 *Id.* at *8 (quoting State *ex rel.* Appalachian Power Co. v. Gainer, 143 S.E.2d 351, 357 (W. Va. 1965)).

While the court acknowledged that education is a fundamental right under the West Virginia Constitution, it found that the Hope Scholarship Act did not impinge upon that right. In conducting its statutory analysis, the court drew on the "entirely voluntary" nature of the program.[36] Since public schools remained free and the Act did not require students to leave those schools, the court concluded that the educational right was not being traded for a "sum of money."[37] It again highlighted the text (this time, of the statute), noting that the Act did not explicitly reduce public school funding.[38] The Act's alleged ramifications — segregating vulnerable students in the public school system and undermining current school funding — were deemed too speculative, merely "hypothetical harms that the Act *could possibly* produce."[39] Hence, strict scrutiny did not apply.[40] Finally, the court readily dismissed the arguments regarding the Act's usurpation of the Board of Education's authority and circumvention of antidiscrimination laws.[41]

Justice Wooton concurred.[42] He agreed that the Act was not facially unconstitutional but wrote separately to note his concern with its ambiguous language.[43] First, he chided the drafters for textual inconsistencies (using "ratio" in one sentence and "tuition" in the next).[44] Second, he took issue with the Hope Board's ill-defined powers but leaned toward reading the statute as establishing a "mechanism for consultation" with the Board of Education.[45] Still, he warned that "time will tell whether the Act . . . is subject to an as-applied challenge."[46]

Chief Justice Hutchison dissented.[47] He reiterated the vitality of the education right and its "constitutionally preferred status."[48] And whereas the majority had minimized *expressio unius*, Chief Justice Hutchison would have adopted the circuit court's application of this "well-accepted"[49] canon. Critically, he viewed the Act's alleged diminution of public school funding as a constitutional violation "here and now,"[50] refusing to cosign the majority's deference to "what the Legislature might do to amend [the state's funding formula] in the future."[51]

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[36] *Id.* at *14.
[37] *Id.*
[38] *Id.* at *15.
[39] *Id.*
[40] *Id.* at *16.
[41] *Id.* at *17–19.
[42] *Id.* at *19 (Wooton, J., concurring) (published Nov. 18, 2022).
[43] *Id.*
[44] *Id.* at *20. For the purposes of reimbursement, a "ratio" of educational services provided to total received is markedly different from the "tuition" rate.
[45] *Id.* at *22.
[46] *Id.*
[47] *Id.* (Hutchison, C.J., dissenting).
[48] *Id.* at *24 (quoting State *ex rel.* Bd. of Educ. v. Rockefeller, 281 S.E.2d 131, 135 (W. Va. 1981)).
[49] *Id.* at *26 (quoting State *ex rel.* Riffle v. Ranson, 464 S.E.2d 763, 770 (W. Va. 1995)).
[50] *Id.* at *28.
[51] *Id.*

In *State v. Beaver*, the West Virginia Supreme Court failed to protect a constitutionally mandated right to education. By emphasizing the supposed voluntariness of the newly enacted program, it recast projected educational harms as hypothetical. It gave short shrift to arguments that the Act would increase segregation and reduce school funding. And it utilized a narrow textualist reading of the Education Clause to weaken the state's affirmative obligation to provide a thorough and efficient education. Taken together, the court all but ensured a renewed challenge to the statute — but only once students and public schools have already been harmed.

By focusing on "choice" in its statutory analysis, the court was able to dismiss the substantial harms imposed by the Act as conjectural. The concept of choice is undoubtedly "neutral and appealing."[52] To that end, the *Beaver* majority reiterated that no student is "forced to participate" in the Hope Scholarship Program.[53] By thus alluding to voluntariness and parental autonomy, the court effectively advanced the "apparently innocuous" rhetoric of choice.[54] Because parents presumably *choose* whether to participate, the Act did not require but "*could* cause students to leave the public school system."[55] This decrease in enrollment "*could* render the current school funding formula inadequate," and the legislature "*could* fail to adjust the school funding formula or *could* fail to supplement school funding."[56] According to the court, then and *only* then would the state constitution be violated. In the meantime, because these projected events turned on "voluntary" decisions, the court characterized their associated harms as speculative.

But each entry in the court's "series of hypothetical harms" is, in fact, inevitable. First, the Act's deliberate breadth *will* cause certain students to leave the public school system. The program does not limit eligibility by family income, school performance, or educational need; nor does it cap the number of recipients or amount of public funds.[57] Over time, eligibility will theoretically extend to every child in the state, as each year, students "newly eligible for kindergarten become[] eligible to receive [ESA funding]."[58] Moreover, these ESAs may be used for nearly *any* educational resource, not just schooling.[59] Therefore, even students from middle- and high-income households who are already attending high-performing schools can take advantage of the program. Indeed, why would they not?

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[52] Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 844 (2011).

[53] *Beaver*, 2022 WL 17038564, at *14; *see id.* at *15, *18–19 (emphasizing voluntariness).

[54] Minow, *supra* note 52, at 816.

[55] *Beaver*, 2022 WL 17038564, at *15.

[56] *Id.*

[57] *See* W. VA. CODE § 18-31-2(5)(B) (2022).

[58] Brief of Respondents Travis Beaver & Wendy Peters at 10, *Beaver*, No. 22-616.

[59] *See* W. VA. CODE § 18-31-7(a)(12).

While some students will utilize ESAs to subsidize their private education, others simply cannot. The Act's eligibility is not universal in practice, and the "choice" to participate is an illusory one. Many disadvantaged students are not "equipped to navigate the increasingly complex process of selecting among educational options."[60] More critically, public school is often the only school some students have real access to. For instance, the plaintiffs in *Beaver* were parents to children with specialized educational needs, such as ADHD and autism.[61] No private institutions in their geographical areas could properly support their children or provide legally mandated individualized educational programs.[62] Even if these students were to expend ESA funds on other educational options, the Act requires virtually no standards or expertise from providers — a recipe for abuse and fraud.[63] In addition, of the fifty-five counties in West Virginia, thirty-five have either "sparse" or "low" student density.[64] Due to remote locations, lack of transportation or internet, and insufficient instructor-certification standards,[65] poor students from these rural communities face unique barriers to accessing the purported benefits of ESAs — whether those benefits be private schooling, tutoring, or other resources. Thus, as certain students, often already affluent, use their ESAs to pursue private educational alternatives, students who are poor, rural, or have disabilities will be forced to opt out.

The second hypothetical harm in the *Beaver* court's list is also imminent: decrease in public school enrollment *will* render the current funding formula inadequate. West Virginia is among a minority of states that determine school funding primarily based on the costs of resources per student *enrollment* (rather than by differentiated student need).[66] The state's formula does not allocate "additional weights for gifted, low-income, or at-risk students," nor "does it sufficiently reimburse districts for the costs of educating students with disabilities or other special needs."[67] Thus, the circuit court properly recognized the causal connection between decreased student enrollment and decreased school funding,[68] which, when the ESA program is "at full scale, will leave many

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60 Minow, *supra* note 52, at 833.

61 Complaint at 4–5, Beaver v. Moore, No. 22-P-24/26 (W. Va. Cir. Ct. July 22, 2022).

62 *Id.*; *see* Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(2)(A).

63 *See* Brief Amici Curiae of Pastors for Children et al. in Support of Respondents at 14–16, *Beaver*, No. 22-616; W. VA. CODE § 18-31-11(c) ("Education service providers shall be given maximum freedom to provide for the educational needs of Hope Scholarship students without governmental control.").

64 W. VA. DEP'T OF EDUC., FINAL COMPUTATIONS: PUBLIC SCHOOL SUPPORT PROGRAM FOR THE 2021–22 YEAR 13 (2021), https://wvde.us/wp-content/uploads/2021/04/COMPS22.pdf [https://perma.cc/T7UH-LTBW].

65 Amicus Curiae Brief of Arc of West Virginia et al. in Support of Respondents at 4, *Beaver*, No. 22-616.

66 JOSHUA E. WEISHART, LONG OVERDUE: AN ADEQUACY COST STUDY IN WEST VIRGINIA 10–11 (2019), https://ssrn.com/abstract=3361212 [https://perma.cc/MJM8-V99R].

67 *Id.* at 11.

68 Beaver v. Moore, No. 22-P-24/26, 2022 WL 4868661, at *7 (W. Va. Cir. Ct. July 22, 2022).

counties unable to meet fixed costs."[69] The *Beaver* court, however, failed to address the particularities of West Virginia's funding scheme. Furthermore, the court presumed that even in the case of funding reduction, the Hope Scholarship Act could be amended into constitutionality through future legislative measures.[70] But the issue was not that the legislature merely "*could* fail to adjust the . . . formula or *could* fail to supplement school funding."[71] It already had. Faced with the foreseeable risk of declining enrollment, the legislature passed the Act without a "single safeguard" to shore up funding.[72]

Instead of addressing these projected harms, the *Beaver* court diminished the fundamental right to education. West Virginia has long regarded public education as the state's affirmative obligation, even dating back to its founding: one of the grievances of the seceding western counties was Virginia's "failure to provide a system of free public education."[73] The framers of West Virginia's first constitution thus emphasized the state's *duty* to educate its children.[74] When the constitution was amended, the education provision was further strengthened, lending public education a "constitutionally preferred status."[75] Subsequent court decisions have firmly enshrined education as a heightened, "first-order" state obligation.[76]

The court's focus on a subset of the constitutional text unnecessarily narrowed this potent constitutional right. The *Beaver* majority fixated upon the inapplicability of the semantic canon and lack of the word "only" in the Education Clause. But under the majority's favored textualist framework, the interpretive exercise is rather simple: the text of the West Virginia Constitution contains a "clear-cut policy choice in favor of public schools"[77] as the preferred mechanism for satisfying the state's educational mandate.[78] *Expressio unius* was thus not dispositive. At the very least, the court should have acknowledged the import placed

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[69] Brief of Amici Curiae Constitution & Education Law Scholars in Support of Respondents at 7, *Beaver*, No. 22-616 [hereinafter Amici Curiae Brief of Education Law Scholars].

[70] *Beaver*, 2022 WL 17038564, at *15.

[71] *Id.*

[72] Amici Curiae Brief of Education Law Scholars, *supra* note 69, at 8.

[73] ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 270 (1995).

[74] *See, e.g.*, *Debates and Proceedings of the First Constitutional Convention of West Virginia*, W. VA. ARCHIVES & HIST. (Jan. 27, 1862) (statement of P.G. Van Winkle), https://archive.wvculture.org/history/statehood/cco12762.html [https://perma.cc/4KFX-ASJE].

[75] BASTRESS, *supra* note 73 (quoting W. Va. Educ. Ass'n v. Legislature, 369 S.E.2d 454, 455 (W. Va. 1988)).

[76] *See* Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1405 (2018); Pauley v. Kelly, 255 S.E.2d 859, 884 (W. Va. 1979) ("Our Constitution manifests, throughout, the people's clear mandate to the Legislature, that public education is a *prime* function of our State government.").

[77] Steven G. Gey, *School Vouchers and the Problem of the Recalcitrant Constitutional Text*, 37 J.L. & EDUC. 87, 96 (2008).

[78] *Cf. id.* (stating the same about Florida's education clause).

on *public* education by its own precedent and not diminished that duty's constitutional primacy over private alternatives.

Furthermore, the majority's focus on rebutting *expressio unius* came at the expense of engaging with the rest of the Education Clause. The clause mandates a "thorough and efficient system of free schools."[79] Therefore, to conduct a complete textual analysis, the majority should have also probed the meanings of "thorough," "efficient," and "free." Yet had it done so, the court would have been compelled to confront the substantive impact of the Act on the "thorough" and "efficient" quality of West Virginia public schools. Admittedly, such nebulous standards are difficult to apply.[80] But even those who characterize education clauses as potential "jurisprudential cancer"[81] acknowledge that a constitutional guarantee must be judicially enforceable if it is "to be more than a chimera."[82] And here, contrary to the court's concern over acting as a "superlegislature,"[83] there was no need to argue over statistical minutiae or expert policy considerations. The Hope Scholarship Act was and remains a blunt instrument of school choice that will undermine the fundamental right to education.

Ultimately, whether one views state constitutional education clauses as "effective safety net[s]" for students under school choice regimes depends "on one's faith in litigation as an avenue for social change."[84] Certainly, there are other ways to address the shortcomings of West Virginia schools.[85] Nevertheless, the West Virginia Supreme Court failed to uphold its duty to effectuate a constitutionally guaranteed right to education. The court obfuscated the inevitable harms of the Hope Scholarship Act under the pretext of choice and deployed a narrow textualist approach that failed to analyze the plain language of the Education Clause. In doing so, it all but ensured a renewed challenge to the statute — but only once injury has been inflicted.

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[79] W. VA. CONST. art. XII, § 1.

[80] *See* Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1439 (2019).

[81] Clint Bolick, *The Constitutional Parameters of School Choice*, 2008 B.Y.U. L. REV. 335, 348.

[82] *Id.* at 349.

[83] *Beaver*, 2022 WL 17038564, at *3 (quoting Huffman v. Goals Coal Co., 679 S.E.2d 323, 327 (W. Va. 2009)).

[84] Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2019 (1996).

[85] *See* Ryan Quinn, *I Wrote About West Virginia Public Schools for Eight Years. Here's What I Saw*, MOUNTAIN ST. SPOTLIGHT (Feb. 8, 2023), https://mountainstatespotlight.org/2023/02/08/wv-public-schools-reporter-ryan-quinn [https://perma.cc/DX8N-BL3Y].