School Districts' Alliance for Adequate Funding of Special Education v. State, et al.

No. 82961-6

Stephens, J. (concurring)—I concur in the result reached by the majority. Properly understood and considered as a whole, the State funding mechanism for special education satisfies the mandate of article IX, section 1 of the Washington Constitution.

Given the majority's analysis of the statutory scheme and the limited evidence offered by the petitioners, the entire discussion of the "beyond a reasonable doubt" standard is unnecessary and distracting. The majority holds: "'Beyond a reasonable doubt' in this context merely means that based on our respect for the legislature, we will not strike a duly enacted statute unless we are 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'" Majority at 8 (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)). I take the majority at its word. To the extent the concurrence and dissent criticize use of the "beyond a reasonable doubt" standard as a constitutional burden or level of scrutiny, such criticism overstates the majority's holding. Recognizing the

importance of deference to the legislature in this context no more defines the level of scrutiny than, for example, when we recognize deference to a statute affecting speech rights, yet apply a level of exacting scrutiny that requires a compelling justification to uphold the statute. *See State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 156 Wn.2d 543, 130 P.3d 352 (2006), *abrogated by Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

The debate between the majority and the dissent and concurrence nonetheless highlights what has been described as the "elephant in the room." *See generally* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 Ala. L. Rev. 701 (2010). There is an inherent tension between the court's duty to construe our state constitution, on the one hand, and appropriate deference to legislative policy-making, on the other. This tension is especially palpable in the education context because article IX expresses an *affirmative* obligation of the State that we have recognized corresponds to a positive right held by school children. *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 510-14, 585 P.2d 71 (1978). We observed in *Seattle School District* that

> [b]y imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme, preeminent or dominant. Flowing from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" permitting control of another's

conduct."

Id. at 511-12 (footnotes omitted).

The unique stature of the positive right under article IX should cause us to look carefully before repeating general precepts of constitutional interpretation from other contexts. In the typical case in which legislation is challenged on constitutional grounds, the question is whether the legislature has overstepped the bounds of its authority or impermissibly encroached on a recognized individual liberty. *See, e.g., Island County*, 135 Wn.2d 141 (holding statute authorizing creation of "community councils" in certain counties was unconstitutional "special law"). In contrast, protection of a positive or "true" right, *Seattle Sch. Dist.*, 90 Wn.2d at 513 n.13, may require judicial enforcement of an affirmative obligation of the State, with a view toward "whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end . . . . " Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1137 (1999). This follows from the recognition that state constitutions are more than a set of negative restraints on governmental power. Provisions such as article IX declare and serve important normative goals.

I offer these observations to emphasize that we make no decision today about the proper constitutional lens through which to examine positive rights, generally, or the mandate of article IX in particular. The fundamental difference between such rights and other, negative rights or liberties is something we touched upon in *Seattle*

School District and have not returned to since. It raises important questions that must be considered, but that consideration awaits another day.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Mary E. Fairhurst