

No. 21829 -- William S. E. Winkler and Diane Hickle v. State of West Virginia School Building Authority, and United National Bank

Neely, J., concurring:

I concur separately because, as Justice John Marshall once said, ". . . we must never forget that it is a constitution we are expounding." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). The twenty years I have been on the court have seen numerous bond cases. What instructed our understanding of these cases was the spirit as well as the exact text of our Constitution.

Our constitutional framers well understood that political leaders become wildly popular by spending money and wildly unpopular by taxing. Thus, political leaders, if left to their own devices, will inevitably reward supporters with jobs, contracts and public works without raising taxes whenever possible. This, of course, can usually be done only by borrowing money that future generations must repay.

American electoral democracy has two components--voter numerosity and voter intensity. Although taxpayers are numerous, they are not intense. It is the providers of government services who are intense, because their entire livelihoods depend on government largesse. Provider intensity translates directly into political campaign contributions, organized election day support and constant badgering from the providers' influential lobbyists.

Counter-intuitive as it may seem, the means invariably overwhelm the ends in the world of practical politics. Political battlefields are perennially littered with the mangled corpses of officials who believed government could be run like a business. But government and business run on completely different principles: business thrives on efficiency; government thrives on patronage. Business always lowers costs as a means to an end, while in government the means are the end. That's why the back-slapping, log-rolling, pork-barrelling, job-giving, vote-buying and deal-making M. M. Neelys, Dick Daleys (senior) and Alfonse D'Amatos of this world are so wildly successful in politics, while the narrow,

clean-cut, honest, technocratic, humorless Michael Dukakises, Jerry Browns and Richard Lamms are such stupendous failures.

None of politics' exotic considerations come into play in private business where most voters dwell. When a person sells swimming pool cleaner, for example, he doesn't worry about things like inherited political party preference or low primary election voter turn out. No customer boycotts Brand X pool cleaner because Mrs. X looks like an unmade bed or hires illegal aliens, nor does he boycott because Mr. X isn't black or a woman or more actively against abortion. Most importantly, no customer's purchase of Brand X pool cleaner depends upon some cockamamie formula by which one customer gets pool cleaner free while another customer pays three times the market price.

Government, however, does have a cockamamie scheme whereby some customers get goods free while others pay three times the market price. The big difference between government and business, then, is that in business every customer must purchase his own goods and services with his own money, while in government a customer quite possibly may obtain a valuable good or service and have somebody else pay for it. In government, the sale of bonds without a constitutional amendment or dedicated revenue source is the ultimate shell game; under that scheme, even those who actually will pay are more or less led to believe that the goods are free. Such a mechanism, therefore, is exactly what W.Va. Const. art. X, § 4 prohibits.

Notwithstanding all of the free-market rhetoric of the Reagan era, the longest peacetime boom in recorded history (1982-1990) was fueled by the largest peacetime deficit in recorded history, much of which went into a massive defense build-up. Instead of the old Roosevelt "tax tax, spend spend, elect and elect," the stolid Republicans of the 1980s improved upon the New Deal vote buying formula with "borrow borrow, spend spend, elect and elect." This worked for quite awhile, but only because Reaganomics was really Keynes as restated by Kafka. Now, however, having stretched ourselves to the breaking point, only big tax hikes will give us more government programs. Roughly six percent of our gross national product (not our federal budget) is devoted exclusively to paying the interest on the national debt.

States and cities are now approaching the same funding problems that vex the federal government, but with two notable differences: States and cities cannot print money or borrow for decades without repayment with near impunity. In fiscal year 1992-

93, California had over a \$14 billion budget gap, the budget gap of the state of New York exceeded \$6 billion, and most other state governments-- including Illinois, Pennsylvania, Massachusetts and Maryland-- experienced serious financial problems.

Indeed, failure to exert responsible controls on borrowing may be the downfall of New York City. Between 1989 and 1992 debt service payments rose faster than any other major expense, growing by 47.7 percent after adjusting for inflation, versus only 9.2 percent in the preceding three years. Debt service accounted for three-fourths of the net real increase in city spending between 1989 and 1992. This recent growth occurred because the city deferred interest payments by refinancing debt during the 1980s. This brought debt service costs down momentarily: They consumed 11.0 percent of the general fund in 1983, versus only 6.3 percent in 1990. But the bill is coming due today, just as the city is experiencing severe recession. The wisdom of our West Virginia constitutional framers, then, appears to be timeless. We must profit from the mistakes of others like New York City who failed to discipline themselves.

"Budget gaps" are not "deficits." Through a combination of cuts in services and blue smoke and mirrors, California and New York theoretically spent no more than they took in. But, in order to prevent the "budget gaps" from becoming "deficits" the governments cut important existing services. The budgets for police protection, fire protection, road maintenance, and other traditional, desirable, valuable local government services have been reduced to prevent the state governments from running actual deficits. Given the limited potential for states significantly to increase their revenues in the near future, the decision of which services are provided by the states has increasingly become a zero-sum game. Debt today, then, leads directly to cuts in services tomorrow.

W.Va. Const. art. X, §§ 4 and 6, are designed to prevent one generation of politicians from helping their friends whilst leaving the next generation of taxpayers to foot the bill. Any given project that effectively bestows government benefits today and postpones taxpayer pain until tomorrow is prohibited by W.Va. Const. art. X, §§ 4 and 6, unless the voters approve the project with a constitutional amendment. That is what explains the results in the cases duly cited and discussed by the majority.

Among the instances where we have allowed bonds to be issued without voter approval, the easiest cases to explain are the

real "revenue bond" cases where bond proceeds were to be used to build projects like toll bridges, the West Virginia Turnpike or state college buildings. In these cases, the projects generate cash revenue from third parties. The government revenue bond scheme is simply a straight-up business deal involving government in its proprietary capacity: Lenders conclude that the income from the project will be sufficient to cover repayment of interest and principle; when lenders are wrong, lenders, not taxpayers, take a bath.

Then, there are the quasi-revenue bond cases where the government agrees to pay rent on a new building that is technically owned by the bondholders. Well, the security for the bondholders is the building, and if the government can find cheaper alternative facilities, the government is technically entitled to depart, leaving the bondholders holding the bag. However, the distinction between what the bondholder's security is-- building versus general credit-- is not really the most important distinction. The important distinction is that in office building cases there is a measurable need that can be met efficiently and cheaply through the issuance of quasi-revenue bonds. Furthermore, office buildings, unlike schools, have a non-governmental use and can be rented to non-government tenants although, perhaps, at a loss.

The same can be said for the power generating plant at West Virginia University; this plant was designed to earn a fair market return from the outset. The plant had a narrow purpose and the scheme's economic viability was never any more in doubt than the best laid plans of successful private corporations.

School bonds, on the other hand, are for the purpose of building structures whose revenue returns are nonexistent. While thousands of jobs and millions of dollars in contractor profits will emerge from school construction, there appears to be little correlation between the quality of school buildings and the achievement level of students leaving the system. The big correlations in education are between school success on the one hand and the student's family structure, the student's parents' social class, and student's parents' educational level on the other. Both our current high rate of divorce and our rapidly rising rate of illegitimate births have the effect of ratcheting down the social class of the households in which a larger and larger percentage of our school-aged children live. The following chart prepared by the Centers for Disease Control presents the point clearly.

[HERE INSERT FIGURE I]

The child of a never-married mother is roughly three times more likely to be expelled from school than the child of a two-parent family and the child of a never-married mother is almost three times more likely than the child of a two-parent family to repeat a grade. The sequence of divorce followed by a succession of boy or girlfriends, a second marriage, and frequently another divorce and another turnover of partners produces a totally disrupted life for a child which makes any educational endeavor entirely problematic.

States that spend more per pupil in the public schools do not generally have any better educational performance to show for it. The correlation between financial inputs and educational outputs is nearly nonexistent because any positive contribution to educational performance that emanates from improved facilities, better teachers, or superior equipment is more than offset by our meteorically rising rates of illegitimacy, divorce and parental neglect. In Clay County, West Virginia the black population is one-tenth of one percent while the illegitimacy rate is 29.5 percent. White illegitimacy alone in the United States today exceeds 19 percent.

Connecticut spent more than \$4,000 per pupil in 1984 but student test scores were lower than those in Vermont, which spent just under \$3,000 per pupil. Rhode Island also spent close to \$4,000 per pupil and had the lowest average test scores of the three. New York state which spent more than \$5,000 per pupil that year, finished just barely ahead of Rhode Island and significantly behind Vermont. There are, of course, cases where high expenditures correlate perfectly with high academic performance as in our great private preparatory schools like Groton, St. Paul's and Taft or upper-middle-class public schools like Greenwich High School and Bethesda-Chevy Chase. More affluent communities and more affluent parents, however, are typically of higher social class, less likely to be divorced and better-educated. When parents emphasize education to their children, the children do well.

The consistently poor performance of American grade school, middle school and high school students vis à vis the same students from European and Pacific Rim countries demonstrates that we are doing something very wrong in the schooling process between the first and twelfth grades. However, what we are doing wrong has nothing to do with the amount of money we are willing to spend. Objective criteria like funding levels, construction budgets, and teacher competency, demonstrate that we are highly committed to education and freely willing to pay for superior quality. So far,

however, more money has not helped us a bit in comparison to societies that spend far less money but have far fewer family-related pathologies stemming from rampant illegitimacy and divorce.

My decidedly unpleasant conclusions are borne out by a comparison of America to our seeming economic nemesis, Japan. On standard tests of mathematical skills the United States ranks well below Japan, Korea, Taiwan and most of Western Europe. Yet, the superior performance of students outside the United States is entirely unrelated to superior education systems, at least if education systems are measured by teacher credentials, teacher to student ratios, absolute expenditures per student, or education expenditures as percentages of Gross National Product. The charts below compare Japanese and American education. Western European countries that out-perform the United States spend slightly more per pupil than Japan while Pacific Rim countries (Korea and Taiwan) that out-perform the United States spend substantially less than Japan. Japanese students, however, out-perform everyone on standard tests, which is why I have chosen to compare us to the Japanese.

JAPAN EDUCATION

	Schools	Teachers	Students	Students per Teacher
Primary	24,852	445,000	9,607,000	22
Secondary	16,774	570,000	11,265,000	20
Third Level	1,145	145,000	2,581,000	18
GNP for Education: 5.0%				
Literacy Rate: 99%				

UNITED STATES OF AMERICA EDUCATION

	Schools	Teachers	Students	Students per Teacher
Primary	71,608	1,306,001	25,506,170	20
Secondary	29,442	977,079	14,786,138	15
Third Level	3,406	772,000	7,117,000	10
GNP for Education: 6.7%				
Literacy Rate: 97%				

Compared to the United States, the Japanese spend 25.4 percent less money as a proportion of their GNP on education, have a substantially higher student to teacher ratio, and send only 23 percent of their secondary students on to third level education as

opposed to our 48 percent. Japanese primary school teachers, on average, have several years less formal education than American primary teachers; Japanese school buildings do not compare favorably with American school buildings; and many schools and classrooms in Japan are substantially more overcrowded than average class size would indicate. In the United States, in contrast, student to teacher ratios are set by law and enforced by teacher unions through the courts-- a situation that would never exist in Japan.

The top end of American education-- namely, college and graduate school education-- is the best in world. That our problem lies in educating children rather than adults alone implies that our crisis in primary and secondary education is fundamentally a function of the students. The quality of our schools in comparison to the schools of other countries is roughly the same at all levels, but as soon as the American system is given motivated students (i.e., adults who want to be in class), America's performance skyrockets to stellar heights, leaving every other system in the world far below.

The first six grades of school are not only hard, but are also supremely boring. Learning to read, write, calculate and spell requires drill, drill, drill and more drill. Good teachers try to make this drill as much fun as possible, but nobody ever disguised school's tedious nature for me. Until the seventh grade (when school finally began to deal with ideas) I hated school as much as Huckleberry Finn did. My father hated school, my wife hated school, and now my son hates school. Indeed, among my friends it is hard to find someone who did not hate at least the "school" part of school, even if he or she enjoyed going to school for the social distraction.

School doesn't work very well without homework, yet children uniformly hate homework and even geniuses like Albert Einstein and Winston Churchill adamantly refused to do homework without coercion. Children commonly can't do their homework alone because they can't understand it. This is particularly true when reading skills have not developed to the point where children can grasp written directions. Parents, consequently, must supervise homework, which in most cases means actually doing the homework with (if not for) the child. As educators are now coming to appreciate, homework can be the most divisive element in family life. Overworked, indifferent or self-absorbed parents can't cope with the stress inherent in coaxing and coercing children to do homework, so grade schools, middle schools and high schools aren't nearly as successful as the money we pour into them would seem to

warrant. Colleges and graduate schools, in contrast, are overwhelmingly successful because parental supervision is no longer the cynosure of student success.

A few years ago my editor at the Free Press was Grant Ujifusa, a Nisei Japanese from Wyoming who wears cowboy boots and went to Harvard. Grant told me about one of his sister's friends, a middle-aged woman who first came to the United States fifteen years ago with her husband, a prominent young Japanese executive. Living immediately outside New York City, the Japanese woman witnessed her Anglo women friends being abandoned by their husbands (who typically ran off with younger women), Anglo children being sent off to third rate boarding schools because dual career parents didn't have time to care for them at home, and Anglo women abandoning both husbands and children to run off with lovers. Commenting on what she had been seeing to Grant's sister, she asked rhetorically: "What are these people, animals?"

Thus, the prime fact of education that the Japanese well understand but most Americans ardently deny: Primary and secondary education depend about 60 percent on students and parents, and only about 40 percent on teachers and schools. Of course, when highly motivated students are combined with superior teachers, as they are in the great upper-middle class public schools or in the great private boarding schools, the results are spectacular. These spectacular results, however, are because of the students, not because of the teachers or schools. Seldom accepting candidates below the 50th percentile on the SSAT (the secondary school scholastic aptitude test), Groton, St. Paul's and Taft populate their schools with students having an ability rating well above the 95th percentile as compared to all children that age in the United States.

In the 1950s I went to a private school that had moved from Europe to the United States to escape the Nazis. The school was located on the old Winthrop estate in Lenox, Massachusetts, very close to the Boston Symphony Orchestra's Tanglewood property. Old Man Winthrop had loved exotic birds, so he had built a large structure in which to house his bird collection. The ceiling of this structure was higher than the ceiling of a traditional chicken coop, but lower than the ceiling of a house, and about every ten feet there was a little round door about fifteen inches high at ground level so the birds could go in and out. My school had converted this bird palace into what we called the "class house"--the building where our classes were held. The class house had a primitive heating system, and when the temperature went below zero, we all needed to wear our jackets inside. Steam emanated from the

teachers' mouths as they lectured.

Although the Lenox public library was extraordinarily well-stocked, my school's library was a disaster and the dormitories would never have passed inspection if the place had been a state-operated school for juvenile delinquents. And while the campus was beautiful and the food better than average, the place was otherwise a dump. Nonetheless, the teachers knew their subjects and were surpassingly enthusiastic, so the school radiated with excitement for the arts, music, literature, politics and science. Enough students studied hard that peer pressure worked generally in a positive direction. The top half of my small graduating class had college board scores well over 1200, and it was a rare student who scored under 1000. Yet the facilities of this school would be officially condemned today in any public school district.

Good students perform two functions. They make it possible for the teachers to be enthusiastic and they inspire their classmates. The single most important element in a person's education is expectations; when a person is expected by his or her parents, teachers, and peers to do well, he or she usually does well. When parents and peers expect bad performance, the student performs badly.

The leading article on the effects of low expectations on minority children was written by Claude M. Steele, a sociologist at Stanford. According to Professor Steele, more than half of black college students fail to complete their degree work for reasons that have little to do with innate ability or environmental conditioning. The problem, according to Professor Steele, is that black students from the outset of their school days are undervalued in malevolent, racist ways as well as in subtle, unconscious ways. Yet the class valedictorian of my own high school graduating class was a black student whose father was a professor of physics at Howard University. He went on to MIT, and thence became a high ranking executive at Ford Motor Company because that is what his family, his peers, and his school expected of him.

Most parents understand the power of peer pressure, but only a minority of parents understand the relationship between parental nurture and peer pressure. In general it is not true that children identify with their peers more than with their parents. When parents are actively involved in their children's lives and behave reasonably, children identify primarily with their parents. Thus, almost all children adopt both their parents' religion and

their parents' political party affiliation. This is not to say that there isn't a constant battle for a child's soul between concerned parents and peers; it is only to say that most of the time concerned parents win handily.

None of this should be taken to imply that either I or any of the other judges of this court would not vote for a constitutional amendment to pass \$338 million in school bonds; we would. Nonetheless, schools do not have the same direct revenue-producing ability a turnpike, college building for fee-paying students, power generating plant, or even a state or county office building have. Although the office buildings are, perhaps, the hardest cases to distinguish, what goes on in state and municipal offices is largely routine work that is important to the smooth functioning of the economy. Unlike schools, there is no political debate about what a county clerk ought to do in filing deeds, liens, financing agreements, etc., and there is little debate about what circuit courts, circuit clerks, zoning boards, and assessors ought to do. Efficiency in the operation of these offices does, indeed, enhance a county's or city's economic performance and, most importantly, the cost to taxpayers of new facilities bought through a bond financing device may not be substantially higher than the cost of worker inefficiency, maintenance and repairs with continued use of old facilities.

At a minimum, then, W.Va. Const. art. X, § 4 requires that bonds of any sort issued without a constitutional amendment be secured ONLY by the project the bonds are issued to build, and that there be a definitely ascertainable special revenue source from which the bonds are to be retired. That, at least, inspires lenders to inquire carefully into whether the project is built for a specific and measurably profitable end and whether the revenue source is adequate to retire the bonds.

However, as I have attempted to make clear in this concurrence, I do not believe that a cosmetic change of what amounts to general obligation school bonds to a lease purchase arrangement using a revenue bond format would permit the scheme to pass constitutional muster unless a new, fiscally sound, dedicated tax were enacted. In general, the bond-funded projects that have been approved without a constitutional amendment created measurable benefits that directly translated into earned or saved tax dollars. This cannot be said for schools by any stretch of the imagination. Borrowing money for consumption (like New York City) or to build projects that will give no tax dollar return is fiscal idiocy. For those projects, the voters must either approve the project at the

polls or the legislature must muster the resolve immediately to enact a new, dedicated tax.

At the beginning of this opinion I discussed the plight of New York City because of the city's rapidly accelerating debt. One reason that borrowing has gotten out of hand there is that provider lobbies have successfully argued that such things as health care should be funded through the capital budget. All providers will always make the argument that health care, education, drug treatment facilities, shelters for run away children, etc. are actually "investments" in human capital. This may be true, but then again it may not be true. Certainly it doesn't seem to be true in education at this particular moment. Therefore, any time the credit of the State is even implicitly pledged, as it would be whenever a project has no measurable revenue-generating potential, the specter of means overwhelming ends becomes sufficiently prominent that the spirit of W.Va. Const. art. X, § 4 is confounded and the proposed project must be taken to the people.

Therefore, it seems to me that in order for a bond issue to survive W.Va. Const. art X, § 4 scrutiny, there are three criteria that must be met. First, the project must be reasonably calculated either to earn or save money, not enhance quality of life or increase some speculative "investment" in human capital. Second, the financing scheme must rely on a lease/purchase structure where the bonds are secured only by the project the bonds are issued to construct and not even implicitly by the credit of the State. And, third, there must be some special fund, preferably from third party payors, but also possibly a dedicated tax or portion of existing budgets (such as the portion for maintenance) that can be pledged to the retirement of the bonds. Thus, we have a situation analogous to a mathematical equation where $X \cdot Y \cdot Z = k$. If X is very large, then perhaps Y and Z can be a little smaller, and if Z is large, then perhaps X and Y can be a little smaller.

In all of this each branch of government has its place. It is the proper role of the governor to be forward-looking, imaginative, enthusiastic and optimistic. Similarly, it is the role of the legislature to make sure that if there is political pork, that pork will be equitably distributed. It is also the role of the legislature to temper the enthusiasm of the governor whenever his zeal threatens even narrow constituent interests, including the interest in lower taxes. (Thus the war cry of the priests and barons who composed the first legislatures in the 12th and 13th centuries: "Nolumus leges anglicae mutare!")

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