

April 1983

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## Recommended Citation

Jacqueline A. Kinnaman, *Pauley v. Bailey: Towards a Thorough and Efficient School System*, 85 W. Va. L. Rev. (1983).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol85/iss3/5>

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## PAULEY V. BAILEY: TOWARDS A "THOROUGH AND EFFICIENT" SCHOOL SYSTEM

JACQUELINE A. KINNAMAN\*

The decisions of the West Virginia Supreme Court of Appeals and the Circuit Court of Kanawha County in the *Pauley v. Kelly*,<sup>1</sup> now the *Pauley v. Bailey*,<sup>2</sup> case respecting the validity of our system of financing public education are based on a legal theory proposed and developed by commentators and courts in the last fifteen years. The theory provides a structural framework for understanding the decisions of both West Virginia courts. Contrary to charges made by critics of the decision, the *Pauley* case reflects a judicious attempt to reconcile fundamental philosophical differences between those who emphasize judicial activism and educational equality on the one hand and those who favor judicial restraint and educational competition on the other. Furthermore, the West Virginia courts have demonstrated a sensitivity to executive and legislative prerogative which is also unique. Clearly, our courts have profited from the experience of other state courts which have already grappled with the problem of school finance.

The theories upon which the *Pauley* case is based have been characterized as the "fiscal neutrality principle": "the quality of public education may not be a function of wealth other than the wealth of the state as a whole."<sup>3</sup> This thesis was developed following a study of eight state school systems which showed that, in general, poorer school districts tend to make a greater tax effort in behalf of education than do richer districts, while at the same time rating significantly lower in terms of educational offerings.<sup>4</sup>

The thesis is basically grounded upon an equal protection theory. The argument is that where disparities in tax effort and educational offerings are attributable to the statutory school finance structure, the structure violates the equal protection guarantee because it involves a classification which is not justified by a rational purpose. As a correlative approach, the contention is made that since education is such a "fundamental" right, the state finance structure must produce sufficient money to provide educational opportunities which meet judicial standards defining the nature of that right.<sup>5</sup> Thus, the thesis has both egalitarian and qualitative aspects. The *Pauley* decisions reflect both aspects of the theory by defining the extent of the equal protection guarantee's

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\* Staff Counsel, West Virginia Education Association. Opinions expressed here are those of the author and not necessarily the West Virginia Education Association.

<sup>1</sup> *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

<sup>2</sup> *Pauley v. Bailey*, No. 75-1268 (Cir. Ct. of Kanawha Co., May 11, 1982) (and supplemental opinions of May 24, 1982 and final order of March 4, 1983).

<sup>3</sup> Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 311 (1969) [hereinafter cited as *Educational Opportunity*].

<sup>4</sup> *Id.* at 316-17.

<sup>5</sup> *Id.* at 322.

application to educational opportunity<sup>6</sup> and the elements of a "thorough and efficient" educational system.<sup>7</sup>

The question of whether it is appropriate for the courts to address the area of school finance at all has remained an issue in all school finance litigation. West Virginia is no exception. In *Pauley v. Kelly*, the supreme court of appeals reversed a trial court order dismissing plaintiff's complaint for declaratory judgment. The majority of the supreme court of appeals did not address the justiciability issue in *Pauley v. Kelly*, except in relation to the trial court's action dismissing the complaint. Only Justice Neely dissented, arguing that courts should not become involved in resolving basically political questions unless the responsible agency or the government as a whole has totally neglected "the needs of a constituency entirely devoid of an effective political voice."<sup>8</sup> Even then, courts should only address those problems which are "susceptible to judicial management."<sup>9</sup> Justice Neely made this argument despite the fact that school children have no political power except through their parents; nor did he show that the majority approach in *Pauley* was "unmanageable."

To the contrary, the question of whether and how courts should act when presented with school finance challenges can be resolved by reference to a less restrictive test which requires: 1) that the court articulate intelligible standards regarding the locus and nature of a constitutional defect in the school finance structure; 2) that the court intervene in behalf of a powerless constituency such as school-age children or their parents and then only to impose minimal proscriptions on legislative prerogatives; 3) and that the court remain sensitive to both the legislative and popular consensus regarding education so that its decision is enforceable.<sup>10</sup> As the *Pauley* case has developed, the West Virginia courts clearly have been sensitive to these issues. In fact, one of the chief criticisms of the West Virginia courts has been the specificity with which weaknesses in our system of school finance have been identified. The courts, moreover, have been consistent in recognizing that the legislature has ultimate responsibility for providing for education.<sup>11</sup> This test not only pays proper deference to the role of the legislature, but also guarantees courts the freedom to protect the interests of one unrepresented constituency, school children, and their constitutional rights.

In explaining its willingness to tackle the school finance question in *Serrano v. Priest*,<sup>12</sup> the California Supreme Court rejected the argument that the state legislature should be allowed to structure the school finance system in any manner it chooses solely because the state constitution authorized the leg-

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<sup>6</sup> W. VA. CONST., art. III, § 10.

<sup>7</sup> W. VA. CONST., art. XII, § 1.

<sup>8</sup> *Pauley v. Kelly*, 255 S.E.2d at 898.

<sup>9</sup> *Id.*; see also *State ex rel. Bd. of Educ. v. Rockefeller*, 281 S.E.2d 131 (W. Va. 1981) and R. NEELY, *HOW COURTS GOVERN AMERICA* (1981).

<sup>10</sup> *Educational Opportunity*, *supra* note 3, at 323.

<sup>11</sup> *Pauley v. Kelly*, 255 S.E.2d at 878; *Pauley v. Bailey*, slip op. at 212; Supp. opinion at 9; final order at 2.

<sup>12</sup> 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976), *cert. denied*, 432 U.S. 907 (1977).

islative branch to finance schools by way of local levies. "A constitutional provision creating the duty and power to legislate in a particular area always remains subject to general constitutional requirements governing all legislation unless the intent of the Constitution to exempt it from such requirements plainly appears . . . ."<sup>13</sup> Judge Recht echoed this sentiment in *Pauley v. Bailey* when he pointed out that "[i]t is a *judicial* function to determine if this legislative responsibility [for education] is being exercised in conformity with the language of the Constitution."<sup>14</sup> The "fiscal neutrality principle," incorporating both the "equal protection" and "thorough and efficient" guarantees of the constitution, provides the basis for judicial intervention. The justiciability issue which raises familiar arguments regarding separation of powers and judicial review is therefore not the real issue.

Theorists on both sides of the school finance controversy recognize that this debate inevitably involves concepts of justice.<sup>15</sup> While perhaps on oversimplification of the respective positions, in general, those who favor full state funding of education argue that justice in the allocation of school resources to children is most likely to be achieved if distribution and revenue questions are separated so that financial decisions are made by a unit of government which is less responsive to direct pressure by parents.<sup>16</sup> The disadvantage of this approach, according to one opponent, is that "[m]andating equal expenditures deprives affluent parents, as well as districts, of the ability to give their children special advantages. . . . It is a clash between equality and quality, a question whether there should be 'some improvement of the worst at the expense of the best.'"<sup>17</sup>

Probably, this clash of values has created the controversy in the *Pauley* case. Legal concepts cannot be separated from their social consequences; the legal nature of a citizen's right to an education is directly related to the role of education in our society. The West Virginia Supreme Court of Appeals has endorsed the view of the California court that education is a "fundamental" interest because of its importance in determining an individual's chances for economic and social success and in influencing a child's development as a citizen and participant in political and community life.<sup>18</sup>

Educational inequality and insufficiency in West Virginia have remained uncorrected by the legislature for years; the adherence to a strict justiciability test would have allowed these deficiencies to continue. The problems are not only educational, but also relate to whether the state's tax structure produces

<sup>13</sup> *Id.* at 773, 135 Cal. Rptr. at 372, 557 P.2d at 956.

<sup>14</sup> *Pauley v. Bailey*, Supp. opinion at 9 (original emphasis).

<sup>15</sup> Michelson, *Reform Through State Legislatures: What is a "Just" System for Financing Schools? An Evaluation of Alternative Reforms*, 38 LAW AND CONTEMPORARY PROBS. 436, 458 (1974).

<sup>16</sup> *Id.* at 457.

<sup>17</sup> Areen and Ross, *The Rodriguez Case: Judicial Oversight of School Finance*, 1973 SUP. CT. REV. 33, 45 (quoting Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 590 (1968)).

<sup>18</sup> *Serrano v. Priest*, 5 Cal. 3d 584, 605, 96 Cal. Rptr. 601, 615-16, 487 P.2d 1241, 1255-56 (1971), *cert. denied*, 432 U.S. 907 (1977); *Pauley v. Kelly*, 255 S.E.2d at 877.

sufficient revenue to finance a "thorough and efficient" school system. Those who have enjoyed a quality education are understandably reluctant to pay additional taxes to improve the educational opportunities of children in poorer districts. But prevalent judicial consensus favors equality of opportunity and the West Virginia court has joined in endorsing the concept. The *Pauley* case, at both the trial and appellate level, will require massive changes in our state's education system and tax structure and says more about the extent of present inequalities than judicial activism.

In fact, the West Virginia Supreme Court of Appeals drew on the experience of other state courts in developing its decision in the *Pauley* case. The California Supreme Court was the first to address the educational equality issue and to adopt the "fiscal neutrality" principle<sup>19</sup> when it held that discrimination in educational opportunity on the basis of school district wealth involves a suspect classification which may be justified only by a compelling state interest.<sup>20</sup> The court defined the California state constitutional provisions requiring the legislature to provide a "system of common schools" in equal protection terms as well, holding that the constitution mandated "one system, which shall be applicable to all the common schools within the state."<sup>21</sup> The court did not announce any qualitative standards by which to measure the state's success in protecting the "fundamental interest" of its citizens in education beyond the requirement that "the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade."<sup>22</sup>

This educational quality issue was developed in *Robinson v. Cahill*<sup>23</sup> where the New Jersey Supreme Court interpreted a state constitutional requirement, similar to that of the West Virginia Constitution, which requires the legislature to provide for "a thorough and efficient system of free public schools."<sup>24</sup> While the New Jersey court declined to find that the state's school finance statute violated the equal protection clauses of either the state or federal constitutions, it held that if the quality of the educational program of any district falls below the "thorough and efficient" standard, the state has a duty to upgrade that program.<sup>25</sup> Equality of educational opportunity was implicit in the court's decision. The court then provided guidelines by which to measure educational quality and to assist the legislature in defining "thorough and efficient."

Both the quality and equality aspects of the "fiscal neutrality" principle were concerns of the West Virginia courts in *Pauley*. The West Virginia Constitution establishes education as one of the basic functions of state govern-

<sup>19</sup> *Id.* at 614-15, 5 Cal. Rptr. at 623, 487 P.2d at 1263.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 595, 96 Cal. Rptr. at 608-09, 487 P.2d at 1248-49 (quoting *Kennedy v. Miller*, 97 Cal. 429, 432, 32 P. 558, 559 (1893)) (original emphasis).

<sup>22</sup> *Id.* at 596, 96 Cal. Rptr. at 609, 487 P.2d at 1249 (quoting *Piper v. Big Pine School Dist.*, 193 Cal. 664, 669, 226 P. 926 (1924)).

<sup>23</sup> *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

<sup>24</sup> N.J. Const., art. 8, § 4.

<sup>25</sup> *Robinson v. Cahill*, 303 A.2d at 294.

ment and a fundamental constitutional right. The first section of our constitutional provisions relating to education establishes a qualitative standard by requiring that "[t]he legislature shall provide, by general law, for a thorough and efficient system of free schools."<sup>26</sup> Two sections of our state constitution guarantee West Virginians equal protection of the law; the supreme court of appeals has previously dealt with each of these.<sup>27</sup>

First, the court acknowledged plaintiff's allegations of inequities in educational opportunity inherent in the school finance structure. However, the court followed the approach used by the New Jersey Supreme Court<sup>28</sup> by refusing to place total reliance on the equal protection clause of the state constitution to judge the adequacy of the state school aid formula.<sup>29</sup> The West Virginia court agreed that "there may be instances where the state must spend unequal amounts among the various school districts or counties"<sup>30</sup> and then remanded the case for the trial court to hear evidence regarding plaintiff's allegations of inequities in the school finance formula.<sup>31</sup>

After hearing the evidence, trial court Judge Recht concluded that since the school finance system made the quality of education dependent upon a county's wealth, the legislature had failed to meet its constitutional obligation to guarantee all citizens the equal protection of the laws.<sup>32</sup> The trial court further found that the present school finance structure does not base its funding on the degree of educational need.<sup>33</sup> The court defined "equal" to mean that "all factors contributing to differences in curriculum needs and costs among counties, including concentration of educationally disadvantaged and culturally isolated students, differences in concentrations of children needing services to address specific handicapping conditions, differences in the need for vocational education programs must be incorporated into the financing structure."<sup>34</sup> The trial court, like the supreme court of appeals, accepted the idea that the issue was one of educational opportunity and that the expenditures necessary to guarantee that opportunity to all may not be equal.

The standard of educational quality guaranteed by the "thorough and efficient" clause was of equal importance and neither the supreme court of appeals nor the trial court limited its analysis to the equal protection issue. The supreme court of appeals found that the framers of the West Virginia Constitution envisioned an educational system "of the highest quality educators

<sup>26</sup> W. VA. CONST., art. XII, § 1.

<sup>27</sup> *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W. Va. 1977); *O'Neil v. City of Parkersburg*, W. Va., 237 S.E.2d 504 (W. Va. 1977) (W. VA. CONST., art. III, § 10 forbids invidious classifications); and *State ex rel. Piccirillo v. City of Follansbee*, 233 S.E.2d 419 (W. Va. 1977) (W. VA. CONST., art. III, § 17 implies equal protection guarantee).

<sup>28</sup> See *supra* note 21 and accompanying text.

<sup>29</sup> *Pauley v. Kelly*, 255 S.E.2d at 865.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 879.

<sup>32</sup> *Pauley v. Bailey*, No. 75-1268 (Cir. Ct. of Kanawha Co., May 11, 1982) at 220.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 218.

could devise,"<sup>36</sup> rejected all proposals which would dilute this mandate<sup>36</sup> and proceeded to define the standards of quality imposed by the Constitution. The court's review of the decisions of other courts which had applied thorough and/or efficient clauses demonstrated both a judicial deference to legislative policy-making authority on education issues and a willingness to develop standards by which to test legislative action.<sup>37</sup> While other courts have ruled that the thorough and/or efficient clause of the respective state constitutions was mandatory, thus making education a state, rather than local responsibility,<sup>38</sup> none had imposed an absolute equality of funding requirement.<sup>39</sup>

In order to define the "thorough and efficient" clause in qualitative terms, the court interpreted the clause to require the legislature to provide not just school buildings but a comprehensive educational program. The court described a thorough and efficient educational system as one which

. . . develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract; to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional material and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.<sup>40</sup>

Having provided a judicial standard by which to measure our state's school system, the supreme court of appeals remanded the case to the Circuit Court of Kanawha County for fact finding,<sup>41</sup> emphasizing that "great weight will be given to legislative established standards, because the people have reposed in that department of government 'plenary, if not absolute' authority and responsibility for the school system."<sup>42</sup> The circuit court was further required to determine whether the newly-defined "thorough and efficient" standard had been met and whether educational services were being provided in a manner which complied with the equal protection clause of the state constitution.<sup>43</sup>

<sup>36</sup> Pauley v. Kelly, 255 S.E.2d at 876.

<sup>36</sup> *Id.* at 868.

<sup>37</sup> *Id.* at 869 & n.23.

<sup>38</sup> *Id.* at nn.21 & 22.

<sup>39</sup> *Id.* at 870.

<sup>40</sup> *Id.* at 877.

<sup>41</sup> *Id.* at 884.

<sup>42</sup> *Id.* at 878.

<sup>43</sup> *Id.*

Following a forty day trial, the trial court found the state school system to be inadequate. The decision points out the weaknesses in the present system, outlines the elements of a "thorough and efficient" education system and calls upon the legislature to begin the task of restructuring the state's school system. Judge Recht's emphasis is on educational quality, but his conclusions reflect the evidence presented at the trial. Coupled with his conclusions regarding inequities in the school finance structure, Judge Recht's findings regarding educational quality also reflect the two-pronged approach first proposed by the "fiscal neutrality" theorists and adopted by the West Virginia Supreme Court of Appeals. As a result all school children in West Virginia will benefit from full implementation of his decision.

The school finance problem became and now remains a lawsuit, raising legal issues which only a court can resolve. Some of those issues have not been fully decided: either party may again appeal the trial court's decision to the supreme court of appeals. The implementation process has already begun: the trial court has accepted the recommendations of the State Department of Education with minor modifications; the State Tax Commissioner's recommendations remain under review. This process will no doubt be highly political, involving the executive and legislative branches of state government as well as various interest groups. Yet because implementation involves the translation of judicial standards into public policy, the legal theory relied upon and legal principles enunciated by the courts will remain the structural foundation upon which policy decisions must be based. The "fiscal neutrality principle" will thus guide the development of educational policy in West Virginia as it has guided the development of the law.<sup>44</sup>

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<sup>44</sup> Pauley v. Bailey, No. 75-1268 (Cir. Ct. of Kanawha Co., March 4, 1983).

