Foreword: Pauley - and "The Recht Decision" - at Forty

John E. Taylor
West Virginia University College of Law, john.taylor@mail.wvu.edu

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I. INTRODUCTION

Pauley v. Kelly\(^1\) was a decision ahead of its time. The West Virginia Supreme Court of Appeals' 1979 articulation of the state constitutional right to education effectively blended the demands of quality education and reasonably equal education in ways that anticipate a scholarly consensus that would fully emerge only decades later.\(^2\) The court aimed high, sketching the contours of a

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\(^1\) 255 S.E.2d 859 (W. Va. 1979).

\(^2\) See infra notes 125–138 and accompanying text. Scholars have long drawn a contrast between aiming at equality or equity of educational resources and aiming at achieving some level of educational quality or adequacy. See generally Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 VAND. L. REV. 101 (1995); Joshua E. Weishart, Transcending Equality Versus Adequacy, 66 STAN. L. REV. 477 (2014) [hereinafter Weishart, Transcending]. I characterize Pauley as insisting on both “quality” and “equality” rather than the
"thorough and efficient" education\(^3\) that would develop the capacities of the state's youth "as best the state of education expertise allows."\(^4\) Indeed, *Pauley* offered the most detailed and sophisticated conception of the right to education that any court had offered at the time, and it remains one of the most insightful accounts even today.

These points would make the *Pauley* decision worthy of remembrance in its own right, but the full legacy of *Pauley* includes the education policy dialogue it spawned between the courts, the elected branches, and the people of West Virginia—a dialogue that lasted nearly a quarter of a century in the courts and that continues to shape education policy in West Virginia today. The key actor in much of this dialogue was Judge Arthur M. Recht, who passed away in October 2018 and is memorialized elsewhere in this volume. Although other judges\(^5\) took charge of the circuit court litigation at various points, Judge Recht was there at both the beginning and the end of the post-*Pauley* dialogue. Most famously, he translated *Pauley's* constitutional principles into a detailed framework for what a thorough, efficient, and reasonably equal system of West Virginia schools would look like. Known as "the Recht Decision" since it came down on May 11, 1982, the judge's 244-page opinion on remand from *Pauley* put the ball in the legislature's court.\(^6\) It challenged other state actors and the people of West Virginia to adopt its educational vision or some alternative one that courts could recognize as responsive to West Virginia's constitutional mandates. Even more clearly than *Pauley* itself, the Recht Decision was ahead of its time in holding that the right to education must be understood to include both quality standards and a commitment to reasonable equality that includes recognition of the greater educational needs of poor students.\(^7\)

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\(^3\) W. VA. CONST. art. XII, § 1.

\(^4\) *Pauley*, 255 S.E.2d at 877.

\(^5\) The other Circuit Court judges who oversaw various stages of the case were the Honorable Jerry W. Cook, the Honorable Robert G. Chafin, and the Honorable Dan Robinson.


\(^7\) Scholars who emphasize the importance of equality in school financing schemes make a variety of subsidiary distinctions, including one between horizontal equity (equal dollars expended for the education of each student) and vertical equity (providing more dollars to students with greater educational needs). See, e.g., William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L. J. 545, 553.
Both Pauley and the Recht Decision were also ahead of their time in a less celebratory sense because West Virginia was not yet ready to prioritize educational quality and equality to the degree that these decisions demanded. The Recht Decision had insisted that eliminating the school “excess levy”—additional property taxes that school districts can impose on themselves through special elections—was critical to promoting equal rights to meaningful educational opportunity in West Virginia. Eliminating the excess levy, however, would have required new sources of state funding that West Virginia was unable and/or unwilling to provide. By the time Judge Recht relinquished jurisdiction over the Pauley litigation in 2003, the excess levy seemed more invulnerable than ever.

Still, the Pauley litigation produced significant change despite falling short of its most ambitious goals. In his final order in the case, Judge Recht stressed that even though the state had never fully implemented the vision of the Recht Decision and the Master Plan for Education that followed it, the legislature had finally articulated its own constitutionally sufficient vision of a thorough and efficient education through the adoption of House Bill 4306 in 1998. Going forward, the accountability standards outlined in the 1998 legislation would define a thorough and efficient education based on educational outputs (i.e. tests demonstrating mastery of state-defined content standards) rather than inputs (i.e. resources like curriculum, teachers, and facilities). Perhaps this was not the courts’ original vision of a thorough and efficient education, but the education duty rests with the legislature, not the courts. And Judge Recht could fairly claim that, for the first time, the legislature had addressed that duty with the appropriate seriousness.

Pauley’s end may seem somewhat anticlimactic in its deference to the legislature, especially for a case sometimes regarded as a monument to judicial
overreach, but West Virginia courts were always at least slightly more ambivalent about their own role than conventional wisdom would suggest. Pauley’s end was consistent with one—though certainly not all—of the conceptions of judicial review that ran through the litigation: a conception in which the main purpose of judicial review is to prompt the legislature to develop its own standards defining the type of education state constitutions require. Even on this more modest conception, though, questions remain about whether the legislature has lived up to the goals it set for itself in 1998. The state still does not appear ready to fully embrace Pauley’s aspirations—even in the more modest form accepted by Judge Recht in 2003. Whether that is the fault of the courts or the state remains very much open to debate. Indeed, this spring’s controversy over the Senate’s proposed education reform bill, Senate Bill (“S.B.”) 451, and the West Virginia teachers’ strikes of 2018 and 2019 were in part a contest over Pauley’s legacy.

In this Foreword, I provide an overview of Pauley’s story and offer some reflections on its complex legacy. Part II describes the legal context in which the Pauley litigation arose, situating the case in relation to early school finance litigation and describing the features of the West Virginia school finance system challenged by the Pauley plaintiffs. In Part III, I review the Pauley opinion with particular attention to the court’s conceptions of the right to education and of its authority to engage in judicial review of the legislature’s efforts to honor that right. Part IV shows that the conventional division of school finance litigation into “equity” and “adequacy” waves fails to do justice to Pauley. In fact, Pauley’s approach anticipates contemporary scholarship recognizing that the contrast between equity and adequacy in school finance litigation is a false
opposition. In Part V, I examine the Recht Decision, which offered a strikingly detailed blueprint for the future of education in West Virginia and gave greater specificity to Pauley's understanding of the right to education.\textsuperscript{20} As my main purpose here is to contextualize Pauley and the Recht Decision, I cannot explore all the steps in the continuing dialogue between the courts, other government actors, and the public that stretched over the next two decades. In Part VI, however, I quickly review what I regard as the most critical moment in that dialogue: the Supreme Court of Appeals' ruling in Board of Education v. Chafin\textsuperscript{21} that the excess levy is outside the scope of Pauley's mandate.\textsuperscript{22} This decision effectively transformed Pauley into an adequacy case and thus lowered the bar that the legislature would need to clear to satisfy Pauley's demands. Part VII discusses Judge Recht's decision in 2003 to relinquish jurisdiction over the case in response to the legislature's adoption of a school accountability plan in 1998 and raises questions about whether the legislature has lived up to Judge Recht's expectations.\textsuperscript{23} Part VIII briefly reflects on Pauley's accomplishments and its unfinished business.\textsuperscript{24}

In telling the story of Pauley v. Kelly, I make a number of thematic claims that I will preview here. First, Pauley emphasized educational quality and equality, seeing both as critically important. It was perhaps not wholly clear on the exact relationship between them, but the basic insight was there from the beginning, and consequently the case deserves more attention than most scholars have given it. Second, Pauley wrestled forthrightly with the thorny question of the scope of judicial review in school finance litigation but never completely resolved it. Uncertainty about the respective roles of the legislature and judiciary in defining the right to education would persist throughout the Pauley saga. Third, the Recht Decision did much more than apply Pauley's principles to the facts developed at trial. Judge Recht further refined Pauley's mandate to specify that West Virginia students have a constitutional right to a high-quality education with roughly equal resources. While the Recht Decision is best known for the detail with which it spelled out demanding quality standards, its focus on eliminating the local school excess levy showed that even the highest standards would not be enough if some districts retained the ability to provide their children with advantages that others could never enjoy. In Judge Recht's conceptualization, the excess levy had to be replaced in order to tie the fortunes of all West Virginians together by placing nearly the entire burden of education funding on the state. As things turned out, elimination of the excess levy proved to be the Recht Decision's white whale. Fourth, the Recht Decision appeared to embrace an aggressive vision of judicial review that authorized courts to define

\textsuperscript{20} See infra notes 140–182 and accompanying text.
\textsuperscript{21} 376 S.E.2d 113 (W. Va. 1988).
\textsuperscript{22} See infra notes 183–200 and accompanying text.
\textsuperscript{23} See infra notes 201–267 and accompanying text.
\textsuperscript{24} See infra notes 268–286 and accompanying text.
the parameters of a thorough and efficient education on their own, yet Judge Recht also carried forward some of Pauley’s ambivalence about the judicial role. He appears to have seen himself—at least part of the time—as prompting legislative action without dictating its specific content. Fifth, the Chafin case transformed the goals of the Pauley litigation by ruling that the excess levy was constitutionally untouchable. Post-Chafin, educational quality would have to be the driving goal of Pauley since the excess levy would always allow those in property-rich counties to confer additional advantages on their own children. At most, West Virginia schools would provide a high-quality educational “floor” for all while recognizing the greater educational needs and costs of poor counties. To borrow a phrase from the literature, Pauley’s mandate became one of “adequacy,” which in turn implied some commitment to “vertical equity.”

Sixth, Judge Recht ultimately withdrew from the case not just because he recognized the limits of judicial power, but also because he believed the legislature had finally made a meaningful commitment to provide a thorough and efficient school system by adopting an accountability system that would both define the goals of education and precisely identify where additional resources should be directed so that all might have a fair opportunity to attain those goals. In other words, the legislature had adopted a defensible vision of what Pauley’s mandate might mean in the wake of Chafin. While I acknowledge that there is a hint of the white flag in Judge Recht’s decision, his exit can also be seen as consistent with a relatively modest conception of judicial review that had been present in the Pauley litigation all along. Seventh, I suggest that even on a theory of judicial review where the courts’ job is mainly to ensure that legislatures aim at their constitutionally appointed ends, there is room to wonder whether the West Virginia courts left the battlefield prematurely.

II. THE ROAD TO PAULEY V. KELLY AND THE RECHT DECISION

A. The Early Days of School Finance Equity Litigation

The story of school finance equity litigation spans half a century at this point, and it is still ongoing. In the late 1960s, using the courts to reform school financing seemed a logical extension of the still-unfinished project of Brown v. Board of Education. Brown had spoken eloquently of the foundational importance of education in American society, and it had ruled that depriving some students of educational opportunity on the basis of race was unconstitutional. It was obvious, of course, that race was not the only basis on which educational opportunity was unfairly distributed. Anyone could see that

27 See id. at 493.
public schools in different communities differed widely in quality and that these qualitative differences were highly correlated with differences in the financial resources supporting those schools. The resource disparities, in turn, were a function of state decisions to require localities to supply a significant amount of school funding through local property taxes. Since property tax revenues depended on the property wealth of the district, reliance on local property taxes guaranteed that schools would not be funded equally. If it was arbitrary and unconstitutional for a child to receive a substandard education because of the color of her skin, surely it was just as arbitrary and unconstitutional for a child to receive a substandard education because of the property wealth of the district in which she lived. The intuitive case for school finance reform as an extension of Brown, then, was a strong one. And as the Court backed away from full commitment to Brown in Milliken v. Bradley,\(^{28}\) school finance litigation assumed still greater importance as a partial substitute for integration.\(^{29}\)

Early school finance equity cases relied on the federal Equal Protection Clause. After school finance reformers had scored what seemed a bellwether victory with the California Supreme Court’s 1971 decision in Serrano v. Priest (Serrano I)\(^{30}\) the strategy of relying on federal equal protection principles came to an abrupt end with the U.S. Supreme Court’s 1973 decision in San Antonio Independent School District v. Rodriguez.\(^{31}\) The Rodriguez plaintiffs challenged Texas’s school finance system and its reliance on local property taxes as violating equal protection principles by making the quality of a child’s education depend on the property wealth of her school district. This system, the challengers argued, should be subjected to strict scrutiny review because its reliance on local property taxes discriminated against the poor as a suspect class and also affected the right to education, a fundamental right under the U.S. Constitution. The Supreme Court rejected both claims. First, it concluded that there was an insufficient correlation between being poor and living in a district with a low-property tax base, thus the system was not truly a classification based on poverty.\(^{32}\) Further, the Court’s precedents suggesting that poverty was a suspect class had all involved total deprivation of the item sought, but the students at issue in Rodriguez had not been totally deprived of education.\(^{33}\) Accordingly, the “suspect class” inquiry failed to yield a strict scrutiny standard of review. The Court further ruled that “fundamental rights” for equal protection purposes must

\(^{29}\) See James E. Ryan, Schools, Race, and Money, 109 Yale L. J. 249, 258–66 (1999) [hereinafter Ryan, Schools, Race, and Money].
\(^{30}\) 487 P.2d 1241 (Cal. 1971).
\(^{32}\) Id. at 22–23.
\(^{33}\) Id. at 23–25.
be rooted in constitutional text, an approach that doomed the challengers' claim since there is no textual right to education in the federal constitution. Applying rational basis review, the Court readily upheld Texas's scheme as justified by the traditional interest in local control of education. Apart from the equal protection doctrinal analysis just recited and general concerns about the competence of courts to second-guess complex legislative judgments about funding schools, federalism concerns doubtless influenced the Court as well. Texas’s funding scheme was quite typical of state schemes across the country, and a contrary ruling would have set up the federal courts for a second round of supervising state and local decision making when the first round of desegregation cases was still in full swing.

While Rodriguez marked the (apparent) end of the federal chapter, the story of school finance litigation was really just beginning. Only thirteen days after Rodriguez was handed down, the New Jersey Supreme Court ruled in Robinson v. Cahill that New Jersey's method of financing its public schools violated the Education Clause of the New Jersey Constitution. This state constitutional claim, like the federal claims in Rodriguez, raised serious questions about the separation of powers and the judicial role. Yet the absence of federalism concerns and the possibility of states adopting different paths (rather than the Supreme Court mandating one solution for the entire country) gave school reformers a fighting chance. In addition, because every state constitution confers a right to free public education, claims based on the fundamental rights strand of equal protection promised to be stronger at the state than at the federal level. In Robinson's wake, challenges were brought in a number of other states with mixed results. Prior to Pauley, state supreme courts in California (1976), Connecticut (1977), and Washington (1978) had joined

\[\text{34 Id. at 33-35.}\]
\[\text{35 Id. at 49-53.}\]
\[\text{36 Id. at 44.}\]
\[\text{37 I say "apparent" because there has been some renewed interest of late in establishing a limited federal constitutional right to education. See, e.g., Derek Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059 (2019); Barry Friedman & Sara Solow, The Federal Right to an Adequate Education, 81 Geo. Wash. L. Rev. 92 (2013). Recent litigation invoking education rights under the federal constitution has been unsuccessful. See Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018); Martinez v. Malloy, 350 F. Supp. 3d 74 (D. Conn. 2018).}\]
\[\text{38 303 A.2d 273 (N.J. 1973).}\]
\[\text{40 Enrich, supra note 2, at 105. Enrich explains that there is room for debate on whether Mississippi has this constitutional guarantee, but at least 49 states do.}\]
\[\text{41 Serrano v. Priest (Serrano II), 557 P.2d 929 (Cal. 1976).}\]
\[\text{42 Horton v. Meskill, 376 A.2d 359 (Conn. 1977).}\]
\[\text{43 Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978).}\]
Robinson in striking down school financing systems under their state constitutions.

B. Pauley Begins: The Lincoln County Schools and How They Got That Way

As with all school finance equity litigation, Pauley was born of parents’ outrage about the poor quality of their children’s schools—in this case, the schools of Lincoln County, West Virginia. The Supreme Court of Appeals’ Pauley opinion kept its description of the facts brief, though it did characterize the schools as “woefully inadequate,” and it recited the trial court’s factual findings in a footnote. In his opinion on remand, Judge Recht provided more detail. Commenting on the school facilities in Lincoln County, he wrote:

Conditions at many of the facilities in Lincoln County pose an immediate and serious health hazard. Two schools should be closed immediately and most others need substantial repair to meet state health standards. The water supply at many schools is unhealthful. At two schools, sewage disposal systems are periodically saturated and sewage surfaces. At another school, untreated sewage discharges into a stream. At most schools in the county, water pools are in the playground area, roofs leak, ceilings are in poor repair, floors are worn, and lighting is inadequate. These conditions threaten the health and safety of students in Lincoln County and adversely affect the ability of students to concentrate in school.

Janet Pauley had moved to Lincoln County from Chicago in 1971. She later described her experiences at her first Lincoln County PTA meeting: “So I went down to the meeting, and I happened to look and the seats were broken in the school. You couldn’t even sit down. I bet there were 21 windows broken out in that school. And, most of all, the smell. Oh, you couldn’t stand it.” Pauley reported that when she asked about the smell, the elementary school principal responded, “It’s the sewer out there,” and pointed to a stream of wastewater running through a play area at the back of the school.
Poor facilities were not the only problem. Linda Martin, a parent who transferred her children from Kanawha County into the Lincoln County schools, described the change:

It blew my mind to see the difference between Kanawha County schools and the ones [in Lincoln County]. I couldn’t believe the conditions: 47 kids in a classroom, ten-year-old textbooks, no written curricula, unqualified teachers, blatant discrimination against poor kids... The county ranked 54th out of 55 in the state in basic skills test scores. My husband [a high-school science teacher in Lincoln County] found that half his ninth graders couldn’t read.49

Nor were the facilities issues and the classroom problems unconnected: “The School Board was putting all of its resources into buildings and administrators instead of putting most of them into the classroom,” Martin added.50

To understand the problems Lincoln County faced, one has to reach back to the Tax Limitation Amendment of 1932, which amended Article X, § 1 of the West Virginia Constitution. The original version of the section had simply called for “equal and uniform” taxation,51 but the 1932 Amendment divided property into four classes and set relatively low rate ceilings for ad valorem taxes on each class of property.52 As Professor Bastress explains, the Amendment’s purpose was to reduce the tax burden for farmers and homeowners at the expense of industrial and commercial interests. Yet because local governments raise revenues primarily through property taxes, the low rates put serious strain on local government budgets. Professor Bastress notes that the property tax limitations “had the effect of shifting the support of public schools and governmental services away from reliance on property taxes and toward more progressive taxes—especially the income tax—imposed at the state level.”53

49 Id. at 9.
50 Id.
52 The four classes of property and their respective rates are Class I (personal property), Class II (residential and agricultural property), Class III (other property—i.e. commercial and industrial property, located outside municipalities), and Class IV (other property located inside municipalities). The maximum rates are stepped up in $0.50 increments from $.50 per $100 dollars of assessed value for Class I property up to $2.00 per $100 of assessed value for Class IV property.
53 BASTRESS, CONSTITUTION, supra note 51, at 285.
Because property taxes are regressive as compared to income taxes and because shifting school funding to the state generally increases equity across districts, the consequences of the Tax Limitation Amendment might seem positive, and perhaps they would have been had the state taken upon itself the entire burden of education financing. This, however, did not happen. Instead, the school funding structure that existed at the start of the Pauley litigation—and, in modified form, today—makes local property taxes an important part of school funding. West Virginia’s Public School Support Plan (a.k.a. the school funding formula) calculates the resources needed by each county school district in seven specified categories in order to arrive at the “basic foundation program.”

Funding for the basic foundation program is split between the state and counties/school districts. The county’s “local share” is a function of its “regular levy,” i.e. property taxes collected on county real property across all districts at a uniform rate determined by the legislature. The state supplies the difference between the basic foundation program amount and the local share. As the regular levy rates on the different classes of real property are the same for all districts, the size of the local share contribution is a function of district property wealth. Property-rich districts contribute a greater portion of their basic foundation support than property-poor ones. The school funding formula, then, actively seeks to equalize educational funding such that the resources supporting a given child’s education are not determined by the property wealth of her district.

State aid and local share, however, are not the whole story. The West Virginia Constitution and implementing statutes allow counties to approve an

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54 Id. (citing Killen v. Logan Cty. Comm’n, 295 S.E.2d 689, 712–13 (W. Va. 1982) (Neely, J., dissenting)).
57 Since 1933 legislation, each of West Virginia’s 55 counties constitutes one school district. See Bastress, Constitution, supra note 51, at 331.
58 The statutory maximum rate for county boards of education is 22.95 cents per one hundred dollars of assessed property valuation for Class I property. W. Va. Code Ann. §§ 11-8-6c(1)–(3) (West 2019) (adding rates in (1)–(3) for total figure of 22.95 cents). The maximum statutory rate for Class II property is twice this base rate, and the rate for Class III and IV property is four times the base rate. Id. As applying the same rate to Class III and Class IV seems plainly inconsistent with the constitutional text, see W. Va. Const. art. X, §1, this feature of the school finance code is somewhat mysterious.

Because West Virginia law prohibits total state property tax revenues from increasing more than two percent from year to year, W. Va. Code Ann. § 11-8-6f (West 2019), the regular levy rate is usually set at some level slightly below the statutory maximum. In recent years, the rate for Class I property has been 19.40 cents per one hundred dollars of assessed valuation. See West Virginia Dep’t. of Educ., Sourcebook 2015, supra note 56, at 3.
59 For this reason, the Pauley court rejected any facial challenge to the state’s foundation formula. See Pauley v. Kelly, 255 S.E.2d 859, 879 (W. Va. 1979).
“excess levy” that can double the maximum tax rates for the various classes of district property. School excess levies must be approved by a majority of county voters and are valid for up to five years. The proceeds from excess levies are not included within the state financing formula, and so differences in the property tax bases of different districts can produce dramatically different levels of excess levy revenue. Further, the political feasibility of passing excess levies is not uniform across districts, and at most times ten or more West Virginia districts have no excess levy in effect. As Professor Bastress has explained, the excess levy system disadvantages the state’s rural counties:

First, those counties have less expensive housing, the terrain is more mountainous and less “useable,” and communities are (by definition) more isolated—all of which contribute to lower property values and, thus, a lower tax base. Second, rural counties have less Class IV property—that is, commercial and industrial property, which can be taxed at twice the rate of residential and farm property. That too, makes for a lower tax base, and it also means that any increases in taxes or excess levies would have to be disproportionately borne by individuals (i.e., voters), rather than businesses. Unemployment, poverty, and free and reduced school lunch rates all run higher in West Virginia’s rural counties than in its more populous areas, and the rural populations tend to be older and are diminishing. As a consequence of those factors, the sparsely populated counties encounter a much more difficult time passing bonds and excess levies to supplement their budgets.

When the Pauley case began, Lincoln County had consistently passed excess levies at the maximum allowable rates for the prior two decades, but its relatively low tax base limited the amount of revenue these excess levies generated. The state foundation program was not enough on its own to adequately support the schools, so the need to rely on the excess levy led to the conditions that so appalled Janet Pauley and Linda Martin. The Pauleys decided to do something about the Lincoln County schools. With the aid of Dan Hedges, then a young lawyer at the Appalachian Research and Defense Fund, they filed suit in the Kanawha County Circuit Court in 1975. The lead defendant was John Kelly, at that time the State Treasurer.

60 W. VA. CONST. art. X, § 10.
61 In 2015, 43 of 55 districts had excess levies in effect, and 22 of those 43 set their rates at the statutory maximum. WEST VIRGINIA DEP’T. OF EDUC., SOURCEBOOK 2015, supra note 56, at 4.
63 Pauley v. Bailey (Recht Decision), No. 75-1268, slip op. at 153 (Kanawha Cty. Cir. Ct., May 11, 1982).
The *Pauley* plaintiffs, like those in other school finance challenges, argued to the trial court that West Virginia’s financing structure deprived students in property-poor counties like Lincoln of both the equal protection of the laws and their right to be educated in a “thorough and efficient system of free schools” under Article XII, Section 1 of the West Virginia Constitution. Although the circuit court agreed that students in Lincoln County were not receiving a “thorough and efficient” education and made a number of factual findings that supported the Pauleys’ claims, the court granted the defendants’ motion to dismiss in 1977. It reasoned that the state equal protection claim failed for the same reasons given in *Rodriguez*: there was no suspect classification because there was no correlation between poor children and property-poor districts. While the court agreed that the Lincoln County schools were not delivering a thorough and efficient education, it ruled that the plaintiffs had failed to show that the school financing system had caused the sorry state of the Lincoln County schools.

### III. The *Pauley* Opinion

When the Supreme Court of Appeals issued its opinion in *Pauley v. Kelly* on February 20, 1979, this last part of the trial court ruling provided a ready ground for reversal. Perhaps the plaintiffs had not convinced the trial court that the school financing system was the cause of the problems in the Lincoln County schools, but that was a question of material fact, not a shortcoming in the plaintiffs’ legal theory. Writing for the court, Justice Harshbarger quickly concluded that a remand was necessary. But he did not stop there. Recognizing the significance of the case, he offered guidance for the circuit court to follow on remand by analyzing the relevant constitutional provisions and identifying areas that would require further evidentiary development.

After expressing some initial concern that an equal protection approach might deprive the state of needed flexibility, the court turned to a detailed examination of West Virginia’s Education Clause, which states: “The legislature shall provide, by general law, for a thorough and efficient system of free

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65 This is the report of the Supreme Court of Appeals. *Pauley v. Kelly*, 255 S.E.2d 859, 863 (W. Va. 1979). The trial court’s factual finding (i) as quoted at 862 n.4 of *Pauley* seems to imply a causal relationship, however, so the characterization is a bit puzzling. Suffice it to say that whatever the trial court’s precise reasoning, the court apparently combined sympathy for plaintiffs’ factual claims with rejection of their legal arguments.

66 *Id.* at 863.

67 If he had, we probably would not be remembering *Pauley’s* 40th anniversary.
schools." The "thorough and efficient" language is a common quality standard in state education clauses, so the court did not have to do its interpretive work in a vacuum. It launched into a systematic examination of constitutional debates (in West Virginia and Ohio, mostly) preceding the adoption of "thorough and efficient" clauses, case law from other states interpreting such clauses, and finally dictionary definitions. Yet before the court could address what "thorough and efficient" means, it needed to explain why it had the authority to decide what "thorough and efficient" means and to judge the legislature's conformity to that standard.

The Education Clause, after all, says that "the legislature shall provide . . . for a thorough and efficient system of free schools." All courts have read such language to conclude that the legislature must have some discretion in performing its constitutional duties, and some courts have read it to imply that the meaning of a state education clause is a "political question," i.e. a question where the legislature and not the judiciary has the last word regarding constitutional meaning. Justice Neely reached just this conclusion in his Pauley dissent, and prima facie there is a plausible case that Baker v. Carr's key criteria for political questions are met: the language arguably suggests a "textually demonstrable constitutional commitment of the issue to a coordinate political department," and there may also be "a lack of judicially discoverable and manageable standards." How are courts to decide when schools are good enough to meet the thorough and efficient standard?

Proceeding cautiously on this threshold question of judicial enforceability, Justice Harshbarger began by emphasizing the points agreed upon by all the courts that had considered "thorough and efficient" clauses: First, these clauses impose real legal duties—they are not merely hortatory. Second, these duties fall on the state, and they may not be escaped through delegation to local governments. Third, courts have acknowledged that the legislature must have broad discretion and perhaps even "plenary power" in deciding when the thorough and efficient mandate has been fulfilled. Indeed, the West Virginia Supreme Court of Appeals had itself said in 1871 that the legislature is "to judge of the thoroughness and efficiency."

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68 W. VA. CONST. art. XII, § I.
69 Id. (emphasis added).
71 Pauley, 255 S.E.2d at 897–900 (Neely, J., dissenting).
72 369 U.S. 186 (1962).
73 Id. at 217.
74 Id.
75 Pauley, 255 S.E.2d at 869.
76 Id. at 870 (quoting Kuhn v. Bd. of Educ. of Wellsburg, 4 W. Va. 499, 509 (1871)).
And yet, one must pay attention not just to what courts say, but also to what they do. As the court put it:

"We need not reflect upon the conundrum presented by these several cases that the judiciary, bowing to legislative branches' plenariness, hardly ever has refused to speak its approval or disapproval of the legislatures' plenary acts. However, courts have not stopped there. Nearly every one has intervened when an act by a legislature or a proceeding by a local school board, as agent of the legislature, is offensive to judicial notions about what a thorough and efficient system of education is."^{77}

A fair point, and the court backed it up with examples. Plenary legislative power over the public schools can coexist with some degree of judicial review of compliance with the thorough and efficient mandate. Other state courts had shown this.^{78}

The *Pauley* court, however, never fully specifies the proper balance between legislative deference and independent judgment in its vision of judicial review. The court quotes cases from other jurisdictions that use a rational basis standard, asking simply whether the legislature's educational program can be seen as bearing a reasonable relationship to the educational goals mandated by the state constitution.^{79} That relatively deferential standard was probably enough to invalidate West Virginia's educational system at the time, and arguably this is all the *Pauley* court really intended, but the court is never completely clear about what the standard of review should be. Perhaps this was intentional. Professor Koski has argued that courts may benefit strategically from adopting vague standards, which provide the courts with the flexibility they may need to push the legislature toward reform without threatening their own legitimacy.^{80} Whether intentional or not, the lack of clarity about the relative roles of the legislature and the judiciary in defining the contours of a thorough and efficient education would be an issue throughout the *Pauley* litigation.

Having decided that it had a (vaguely specified) role to play in policing legislative compliance with West Virginia's Education Clause, the court then set out to define the key terms in that clause: "thorough," "efficient," and "education."

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^{77} *Id.* at 871.

^{78} *Id.* at 874 ("There is therefore ample authority that courts will enforce constitutionally mandated education quality standards.").

^{79} *Id.* at 869–70 (citing Malone v. Hayden, 197 A. 344 (Pa. 1938), for the proposition that "courts can only decide whether legislation has a reasonable relation to the thorough and efficient mandate").

Drawing on dictionary definitions, accounts from other courts, and legislative history, the court read the word “thorough” to set a high bar. A thorough education is “absolutely complete, attentive to every detail, extending beyond ordinary parameters.”

The West Virginia Constitution’s drafters wanted a high-quality education system; for during the 1972 convention they rejected an amendment to add “common” as a description of the schools the legislature is required to provide. Significantly, the court noted that other courts had recognized equality as a component of a school system’s thoroughness and efficiency. In addition, the court cited Dr. Ambler’s commentaries for the proposition that “wealthy schools situated among poor schools did not make a thorough and efficient system.”

The words “efficient” and “education” were defined using the same methodology, leading to the court’s definition of a thorough and efficient system of schools: “It 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.”

Other courts had said things of this kind. For example, Robinson had said that New Jersey’s constitution required schools that would “equip a child for his role as a citizen and as a competitor in the labor market.”

Pauley, however, read more into “thorough” than had the New Jersey Supreme Court. “Thorough” didn’t simply mean education sufficiently complete for political and economic citizenship. In Pauley, it meant the educational state of the art—an interpretation that Judge Recht would take very seriously on the remand. Further,

81 Pauley, 255 S.E.2d at 874.
82 Id. at 875.
83 Id. at 876. This point initially seems unpersuasive, for the idea of “common schools” in the nineteenth century signaled not a commitment to mediocrity, but a determination that students of varied classes would be educated together. See, e.g., Molly O’Brien & Amanda Woodrum, The Constitutional Common School, 51 CLEV. ST. L. REV. 581, 599 (2004). Yet as the framers of the West Virginia Constitution obviously envisioned “common schools” in this sense, Justice Harshbarger’s inference that they took “common” to be setting too low a bar and struck it for that reason is not implausible.
84 Pauley, 255 S.E.2d at 875.
85 Id. at 876.
86 The words “efficient” and “education” were defined mainly from dictionaries, with a few references to case law. “Efficient,” the court said, means “marked by ability to choose and use the most effective and least wasteful means of doing a task or accomplishing a purpose.” Id. at 874. “Education” is “the development of mind, body, and social morality (ethics) to prepare persons for useful and happy occupations, recreation, and citizenship.” Id. at 877.
87 Id. at 877. The court’s well-known “definition” is presented almost as an exercise in cutting and pasting, as though the court were asking rhetorically, “Who can quarrel with dictionaries?” The move from “thorough” to “as best the state of education expertise allows” is, however, more significant than the court lets on.
Pauley was the first court to spell out in detail what capacities were needed for citizenship, as well as the supports needed to develop those capacities:

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 materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.89

By defining a thorough and efficient education so specifically, the court made clear that its words were not merely aspirational. The standard would have teeth. Indeed, the court strikingly noted that on remand expert testimony would be needed because “[m]ere rote comparison [of systems like Lincoln County’s] with other more affluent counties does not necessarily serve to define the values of a [thorough and efficient school] system.”90 In other words, experts might convince the trial court on remand that none of West Virginia’s schools were “thorough and efficient” because none reflected the educational state of the art.

These aspects of the Pauley opinion are remarkable. Though Pauley was laudably ambitious in its goals, one can also understand why critics (including Justice Neely) claimed that the court had forgotten its place.91 The tone here suggests that courts, guided by the opinion of educational experts, will decide for themselves what constitutes a constitutionally adequate education: de novo review. And yet—the very next sentence strikes a different, and seemingly more deferential, note: “[W]e emphasize that great weight will be given to legislatively established standards, because the people have reposed in that department of government ‘plenary, if not absolute’ authority and responsibility for the school

89 Pauley, 255 S.E.2d at 877.
90 Id. at 878.
91 Id. at 899 (Neely, J., dissenting) (“I have my own ideas of what constitutes ‘thorough and efficient’ education; nonetheless, I am constitutionally constrained not to force them down the throats of other equally well-informed persons who have different values merely because I am a judge.”).
system."

Is the judge’s role to decide what constitutes a thorough and efficient education, or is it merely to force the legislature to decide that question and then to police the legislature’s compliance with its own definition? Pauley never fully resolves this question.

Having devoted most of the constitutional analysis to the Education Clause, Justice Harshbarger finished by concluding that both equal protection and the “thorough and efficient” standard could be “harmoniously” applied to West Virginia’s school financing system. Although the opinion opened with praise for Robinson’s reluctance to adopt an equal protection approach, in the end Pauley took the very step Robinson had declined. It declared that education was a fundamental right in West Virginia and thus held that any discriminatory classification in the school financing system must be reviewed under strict scrutiny. Perhaps the key difference from Robinson was that the West Virginia Supreme Court of Appeals had already made clear that education was special in West Virginia. As Pauley put it, “Our basic law makes education’s funding second in priority only to payment of the State debt, and ahead of every other State function. Our Constitution manifests, throughout, the people’s clear mandate to the Legislature, that public education is a Prime function of our State government.”

Robinson had worried that applying strict equal protection scrutiny to local educational decisions would bleed over into extensive judicial review of a wide range of local government decisions about the allocation of limited resources. Pauley answered that in West Virginia, education had already been singled out as distinctive, thereby limiting spillover effects.

The rest of the Pauley opinion outlined a variety of issues for the trial court to explore on remand. Most notably for present purposes, the court stated that excess levy revenues would not be subject to attack under West Virginia’s Equal Protection Clause. This observation was doubtless meant to provide guidance to the trial court on remand, but what was the message? That the excess

92 Id. at 878.
93 The rhetorical question in the text is not meant to imply that these two ways of thinking about judicial review are the only options.
94 Id.
95 Id.
96 Id. at 884.
98 For a concise summary of Pauley’s directions to the circuit court, see Pauley v. Bailey, 324 S.E.2d 128, 130 (W. Va. 1984).
99 The court’s reasoning was unconvincing. It explained that equal protection principles apply to legislative action, whereas “excess levies are determined by the vote of the people.” Pauley, 255 S.E.2d at 880. Yet the legal structure that makes it possible for voters to approve excess levies is itself state action, so this explanation makes little sense. The court’s later decision in Board of Education v. Chafin, 376 S.E.2d 113, 118–20 (W. Va. 1988), provided better reasons for treating the excess levy as constitutionally untouchable. See infra notes 196–199 and accompanying text.
levy may not be challenged on equal protection grounds does not mean that it may not be challenged on other grounds. Indeed, the court went on to say that while excess levies might be considered in determining whether the state had provided financial resources sufficient to underwrite a thorough and efficient educational system, their role had to be limited because the primary responsibility to assure constitutional compliance rested on the state. Accordingly, the Pauley opinion appeared to leave sufficient room for a constitutional challenge to the excess levy under West Virginia’s Education Clause.

IV. PAULEY AND THE WAVES OF SCHOOL FINANCE LitIGATION

The Pauley opinion, then, established a demanding and unusually detailed conception of the legislature’s duties under the Education Clause. In addition, it ruled that education was a fundamental right in West Virginia and thus subjected classifications affecting education to strict scrutiny. It treated equal protection and Education Clause standards as harmonious and as judicially enforceable, though the court seemed to speak in multiple voices on the question of how stringent judicial review would be.

Before proceeding to the next stage of Pauley’s story, I want to situate the Pauley opinion within the broader history of school finance litigation. The standard account—now generally recognized as inaccurate in some respects, yet still a useful starting point—divides this history into “waves.” In sketching the “waves” account, my primary goal is to suggest that Pauley cannot be fit neatly into that account. Instead, Pauley anticipates all the reasons why the waves account, though quite useful in its day, seems oversimplified in hindsight.

In the standard story, Rodriguez marks the end of the first-wave cases based on the federal Equal Protection Clause. The dividing line between the second and third wave cases is 1989, and the critical difference between the two eras is said to be that the second wave pursued educational equity, while the third wave (more successfully) focused on educational adequacy. Second-wave cases—from Robinson in 1973 to 1989—are said to have made essentially the same arguments that had been rejected in Rodriguez, but under state rather than federal equal protection law. While some second-wave cases, notably the California Supreme Court’s 1976 decision in Serrano v. Priest

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100 See, e.g., Enrich, supra note 2; William E. Thro, The Third Wave: The Implications of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J.L. & EDUC. 219 (1990). Professor Thro’s 1990 article appears to be the first to describe school finance litigation as consisting of three waves.


102 Id. at 601–04.
(Serrano II), do fit the ideal type of a second-wave case quite closely, others—like Pauley—do not. School reformers won some victories in second-wave litigation, but the majority of courts during this period rejected school finance equity challenges.

Reformers scored a number of victories in the period from 1989 to 1993, starting with the Kentucky Supreme Court's decision in Rose v. Council for Better Education in 1989. Seeking to explain this change of fortune in school finance litigation, scholars pointed to Rose as the archetype for a new type of school finance lawsuit—one based not on a right to equal funding, but on a right to an adequate education guaranteed by the Education Clauses in state constitutions. The Rose court considered Kentucky's Education Clause, which reads: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Rose read this language to mean that the legislature must "provide[] an equal opportunity for children to have an adequate education." Further, the court specified that an adequate education must aim at providing each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

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103 557 P.2d 929 (Cal. 1976).
104 See Koski, Fuzzy Standards, supra note 80, at 1242 (stating that between Robinson in 1973 and the end of 1988, plaintiffs won only 5 of 20 school finance reform lawsuits decided in state supreme courts).
105 790 S.W.2d 186 (Ky. 1989).
106 See Koski, Fuzzy Standards, supra note 80, at 1251.
107 Ky. Const. § 183.
108 Rose, 790 S.W.2d at 211.
109 Id. at 212.
In the standard account, Rose's emphasis on adequacy is critical to the case's success. Aiming at equality under equal protection principles, it is said, makes it too difficult for courts to accept the arguments of school reformers. One problem confronted by any equality theory is to answer the question: equality of what? Should courts look to equal per student spending (i.e. horizontal equity), equal resources (i.e. educational inputs), equal opportunities to learn relative to student need (i.e. vertical equity), or fiscal neutrality (i.e. the principle that equal tax effort should yield equal dollars, regardless of variations in local property wealth)? These questions have no easy answers. More significantly, equality theories confront formidable political obstacles. Schools will never be fully equal, and to move them toward equality requires either leveling up or leveling down. A pure leveling-up strategy would require giving every school district the level of resources enjoyed by the wealthiest districts and so carries a price tag too high for most voters. Yet anything less requires the leveling down of at least some districts, with the degree of leveling depending on the baseline chosen as the benchmark for equality. Wealthier districts typically have outsized political influence, and thus the political costs of any leveling-down strategy are high. These dynamics, it is thought, help to explain the relatively limited success of second-wave litigation.

Rose seemed to offer a way out. Courts could require legislatures to level up school funding to the benchmark needed for an adequate education without requiring any districts to level down. Of course, there was still a need to set the level of adequacy by striking an appropriate balance between pedagogical ambition and cost. But courts could leave that balance to the legislature in the first instance, just as the Rose court did. When seen in this light, the Rose court’s fairly detailed (and ambitious) definition of educational adequacy laid the groundwork for judicial review in case the legislature responded by aiming at a level of educational attainment the court was unwilling to see as “adequate.” This made sense in theory, and in fact it appeared to work like a charm. Within a year

110 See generally Enrich, supra note 2 (discussing the reasons why courts may be more sympathetic to adequacy than to equity theories).
111 See Ryan, Five Miles Away, supra note 28, at 130–35 (discussing various theories of equality advanced in early school finance litigation).
112 Realistic equality advocates might aim for a resources benchmark that falls between the best and worst funded schools in order to avoid the sticker shock of a pure leveling-up strategy. Yet any compromise benchmark will require some leveling down of the wealthiest districts. Consequently, efforts to appeal to some constituencies by reducing the overall cost of an equality strategy will predictably alienate powerful constituencies who do not want to see their schools “leveled down.”
114 Rose, 790 S.W.2d at 212 (“We do not instruct the General Assembly to enact any specific legislation . . . It is their decision how best to achieve efficiency.”).
after *Rose* was handed down, Kentucky had passed a comprehensive educational reform statute that substantially increased educational funding. With the benefit of hindsight, it seems apparent that *Rose*’s transformative effects had more to do with a pre-existing consensus about the need for education reform among Kentucky elites than with the court’s legal analysis, but it’s hard to argue with success, and *Rose* became the bellwether “third wave” case.

To briefly finish out the standard account: third-wave cases have, on the whole, enjoyed more success than second-wave cases, but results remain mixed as school finance litigation enters its sixth decade. New cases continue to be brought, and even where state law seems relatively settled, stunning reversals sometimes occur. Some suggest that we have now entered—or need to enter—a “fourth wave” of school reform litigation that pursues a more comprehensive menu of remedies including racial and/or socioeconomic integration, preschool programs, literacy programs, school choice, and teacher-tenure reform.

In this standard “waves” narrative, *Pauley* plays a minor role as one of a handful of second-wave plaintiff victories based on an equity theory, a mere “see also” cite to supplement descriptions of cases like *Robinson v. Cahill*, *Horton v. Meskill*, and *Serrano v. Priest* (*Serrano II*). While *Rose* is uniformly treated as a case of first-order significance, most commentators have paid little attention to *Rose*’s obvious debt to *Pauley*.

The “waves” account has proved useful in many respects, and that I have felt the need to sketch it is a testament to its continuing authority. But the account

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115 See Werner, supra note 13, at 65–66.
116 See Koski, *Fuzzy Standards*, supra note 80, at 1270–73.
118 See Abbeville Cty. Sch. Dist. v. South Carolina, No. 2007-065159 (S.C. 2017) (relinquishing jurisdiction on separation of powers grounds only three years after a differently constituted court had ruled at 767 S.E.2d 157 (S.C. 2014) that the state’s school financing system violated South Carolina’s Education Clause); William Penn Sch. Dist. v. Pennsylvania Dep’t. of Educ., 170 A.3d 414, 457 (Pa. 2017) (ruling that school financing challenges are justiciable despite long-standing Pennsylvania precedents that had treated these challenges as political questions).
122 376 A.2d 359 (Conn. 1977).
123 557 P.2d 929 (Cal. 1976).
124 For an exception, see Koski, *Fuzzy Standards*, supra note 80, at 1249–52 (explaining that *Pauley* used an adequacy analysis ten years prior to *Rose*, even if *Pauley* did not use the word).
was first formulated in the early years of the third wave, and historical perspective has now made clear that the account exaggerates the division between second-wave equity cases and third-wave adequacy cases. Professor Koski questioned this division in 2003, and Professor Ryan in 2008 pointed out that even when courts say they are doing a stand-alone adequacy analysis, they actually pay considerable attention to comparing the resources of different districts. While the point can be developed with great theoretical sophistication, the idea that equity and adequacy are each incomplete on their own is fairly intuitive. An emphasis solely on equity would bless a regime in which all students receive an equally poor education—hardly an attractive prescription, and it is difficult to believe that this was the result the framers of state education clauses intended. The value of adequacy as a standard depends in part, of course, on where the bar is set. But even assuming the adequacy bar is set at a reasonable height, an understanding of educational adequacy with no comparative dimension is still problematic. As the point is often put, education is a “positional good.” Its value depends in part on how much education others have, so if the goal of education is to prepare students to meaningfully participate in social and economic life, we cannot know what sort of education is adequate without knowing what level of education others are receiving. In other words, education is functionally “adequate” only if sufficiently equal. The interdependence of equity and adequacy is confirmed if we consider the role of public education in legitimizing social inequality. It is, more than anything else, the principle that every child is entitled to a free public education of acceptable quality that explains why we regard the economic “race” in our society as sufficiently fair that we can accept its outcomes as legitimate. For these reasons, it is a mistake to proceed as though equity and adequacy are mutually exclusive. Rather, courts can and should require that education be both “equally adequate” and “adequately equal.”

The conventional “waves” account obscures these points generally, as has now been widely appreciated. My particular concern here, however, is...
with the way in which the conventional narrative slights Pauley’s contributions to the law. To see Pauley as a plain vanilla second-wave equity case is not to understand it at all. As will be clear from my prior discussion, the heart of the Pauley opinion was its account of the qualitative standard imposed by West Virginia’s Education Clause. Indeed, nearly every feature of Rose’s adequacy analysis that has drawn praise was already present in Pauley,\(^{133}\) even if Pauley didn’t use the word “adequacy” because it wanted to contrast a “thorough” education with one that was merely “minimal.” Yes, Pauley cared about equity too, but so did Rose.\(^{134}\) In fact, both cases anticipate the belatedly emerging scholarly consensus that equality and adequacy must be seen as interrelated goods in the context of the right to education. Rose has gotten more attention because it produced greater and more immediate political results than Pauley, and there are lessons to be learned from that difference. But in conceptual terms, Pauley got there first.\(^{135}\)

Pauley saw that mere equality is not enough: “our thorough and efficient constitutional mandate requires something more than a mere equality of educational funding to the counties.”\(^{136}\) Nor is mere adequacy enough. One problem with pure “adequacy” accounts—and likely the reason the Pauley court never used the word—is the suggestion that the constitution merely sets a floor. For example, the North Carolina Supreme Court has read that state’s education clause to require a “sound basic education,”\(^{137}\) a phrase the Pauley court would never have used. A second problem is the suggestion that once all students have a reasonable opportunity to reach the floor, the heights to which others might climb are irrelevant. This eliminates the threat of leveling down and thus heightens adequacy’s political appeal, but as already explained, allowing too much inequality undermines genuine adequacy because education is a positional good. Pauley saw this too. Differential treatment in education must survive strict scrutiny, so the distribution of educational opportunity in West Virginia must meet both a quality standard and a distributional standard. The mandates of the

\(^{133}\) To be clear, the Kentucky Supreme Court acknowledged its debt to Pauley quite explicitly. See Rose v. Council for Better Educ., 790 S.W.2d 186, 209–10 (Ky. 1989). It is the commentary that has (mostly) slighted Pauley, not the Kentucky Supreme Court.

\(^{134}\) For example, Rose said that “[e]ach child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here.” Id. at 211. In a similar vein, Rose emphasized state responsibility by explaining that local property taxes “may not be used by the General Assembly as a substitute for providing an adequate, equal and substantially uniform educational system throughout this state.” Id. at 212.

\(^{135}\) Professor Weishart makes similar observations about Pauley and Rose in Weishart, Legacy, supra note 2.


\(^{137}\) Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997). Further, some courts have rejected equality claims by reasoning that equality of funding and educational opportunity is irrelevant so long as all children are receiving a minimally adequate education. See Koski, Fuzzy Standards, supra note 80, at 1262–64 (collecting cases).
Equal Protection Clause and the Education Clause function “harmoniously” in Pauley, and this is so in part because the “thorough and efficient” standard includes elements of equality within itself.\footnote{See supra text accompanying notes 84–85; cf. Paul L. Tractenberg, Robinson v. Cahill: The “Thorough and Efficient” Clause, 38 L. & CONTEMP. PROBS. 312, 322 (1974) (explaining that although the Robinson court failed to find a requirement of equal education in either federal or state equal protection law, it nevertheless read an equality requirement into New Jersey’s Education Clause requiring a “thorough and efficient” education).}

Pauley, then, was ahead of its time in seeking to harmonize equality and quality in the right to education. This is not to say, however, that the Pauley court had fully worked out the relationship between the two.\footnote{Cf. Koski, Fuzzy Standards, supra note 80, at 1187–88, 1235–37 (suggesting that second-wave courts often wove together equity and adequacy concerns in imprecise ways and illustrating the point with respect to Robinson v. Cahill, an opinion that significantly influenced Pauley).} Its solution appeared to involve setting the constitutional quality floor so high—so close to the ceiling, if you will—that there would be little room for inequality to creep in. Who would want more for their children than development of key capacities as best the state of educational expertise would allow? But if that is Pauley’s harmonization of quality and equality, the solution brings problems of its own. As a practical matter, this insistence on an exceptionally high quality floor has the same problem as an equity approach that only levels up: extremely high cost. Further, it may be naïve to think there is any upper bound on parental desires to obtain educational advantages for their children. The well off understand that education is a positional good at least as well as the poor, so the ceiling of educational aspiration may rise at least as quickly as the floor of educational quality. It is unclear what the Pauley court would have said about this last scenario, but the court understood that any fully developed theory of the relationship between educational quality and equality in West Virginia would have to tackle the excess levy. Was the excess levy an affront to equal educational opportunity, or was it instead a constitutionally protected way for some districts to secure educational advantages for their own? Both the cost of Pauley’s mandate and the excess levy took center stage in the next phase of the Pauley story.

V. THE RECHT DECISION

The Pauley court knew just the man to handle the case in the circuit court: Judge Arthur Recht. Judge Recht conducted a 40-day bench trial, which exhaustively explored the agenda the Supreme Court of Appeals had laid out in Pauley. Dan Hedges and his team assembled an impressive set of educational experts, who testified at length about what an education consistent with the current state of educational expertise would look like. Instead of putting forward its own experts to advance a less ambitious vision of a thorough and efficient education, the government aggressively cross-examined the Pauleys’ witnesses
and argued that the state's financing system was not the cause of Lincoln County's problems.  

Given the evidence before the trial court, Judge Recht had little choice but to take seriously Pauley's definition of a thorough and efficient education as one that develops students' capacities "as best the state of education expertise allows." Just how seriously he took it became apparent on May 11, 1982, when the trial court released the 244-page opinion now known as "the Recht Decision." Judge Recht laid out specific standards for a thorough and efficient education in extraordinary detail, then compared the West Virginia schools to those standards and found them wanting. He concluded that no school system in the state met all of the quality standards he laid out and that many systems (including Lincoln County) met none. In case the matter was in any doubt, Judge Recht characterized his decision as "no less than a call to the Legislature to completely reconstruct the entire system of education in West Virginia.

Judge Recht explicitly found that the deficiencies in West Virginia schools were a function of the school financing system, and he identified three main culprits: the excess levy, the lack of an adequate state-level mechanism that would assist property-poor counties in financing new school construction, and a system of property appraisals in which much property was being assessed at a fraction of actual market value. The excess levies are my primary concern

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140  Meckley, Bombshells, supra note 8, at 410 (describing the trial and characterizing the government as arguing that "there are too many other mitigating variables such as nepotism, inbreeding [sic], parental apathy, and political manipulation which are probably more related to student achievement than level of funding"). I do not know whether Meckley's is a fair characterization of the state's approach. (One hopes not.) What is clear is that the state did not make any significant attempt to counter the Pauleys' experts through direct testimony and that Judge Recht found that the state financing system was a significant cause of the problems in the Lincoln County Schools. Pauley v. Bailey (Recht Decision), No. 75-1268 (Kanawha Cty. Cir. Ct., May 11, 1982), supplemented by No. 75-1268, slip op. at 7 (Kanawha Cty. Cir. Ct., May 22, 1982).

141  Pauley, 255 S.E.2d at 877.

142  To give just two examples, Judge Recht concluded that a thorough and efficient education requires that every elementary student should receive 100 minutes of music instruction per week, Recht Decision, slip op. at 52, and that the normal maximum ratio of 20 children per teacher in early childhood education classes should be lower when the children come from isolated areas, id. at 24–25.

143  Id. at 100, 219.

144  Id. at 234.


146  While I do not have the space for a full discussion of property appraisal in West Virginia, the story is fascinating, and Judge Recht's role in that story is arguably one of the Recht Decision's more important legacies. To provide a thumbnail sketch: Judge Recht had identified the problem of very low property appraisals, which deprived the schools of much needed revenue. Less than
here, and Judge Recht was clear in holding that the state must provide funding sufficient to finance a thorough and efficient system of education in every district without reliance on the district's ability to pass an excess levy.\textsuperscript{147}

Many of the Recht Decision's key themes are present in the following passage:

The state has a legal duty to provide equal educational opportunities by allocating resources to counties according to criteria substantially related to educational needs and costs. The requirement of a thorough and efficient system of schools imposes the same duty on the state. Since equality of substantive educational offerings is guaranteed by the constitutional equal protection guarantee, it is the resources (that is, the specific inputs in terms of curriculum offerings, personnel, facilities and materials and equipment, not the outcomes in terms of achievement test scores) by which the constitutional adequacy of the school system must be measured. . . . Differences in need must be incorporated into the financing structure. The State has a legal duty to insure that school systems with greater educational needs and costs receive efficient educational resources to meet those needs so that all children with similar needs are treated equally and receive a quality education.\textsuperscript{148}

This is a rich passage, but several points stand out. First, Judge Recht hewed to \textit{Pauley}'s conception of a thorough and efficient system of schools as marked by both quality \textit{and} equality: the legal duty to provide equal educational opportunity is \textit{also} imposed the thorough and efficient standard. They are harmonious. Second, Judge Recht stressed that the state must aim to allocate resources in a manner tied to the needs of each school district. If financing criteria are not related to student need, the state is not even aiming at the proper goal.

\footnotesize{four months later, the Supreme Court of Appeals held that the West Virginia Constitution required that all property be appraised at full market value. \textit{See} Killen v. Logan Cty. Comm'n, 295 S.E.2d 689, 701 (W. Va. 1982). The public and Governor Rockefeller greeted \textit{Killen} with outrage, and it was quickly overruled by a constitutional amendment directing that property be assessed at 60\% of its appraised value. \textit{See} W. VA. CONST. art. X, § 1b (Property Tax Limitation and Homestead Exemption Amendment of 1982); \textit{see also} Meckley, Bombshells, supra note 8, at 413. Efforts to implement consistent property assessment at the 60\% level were unsuccessful for a time, see Jack L. Flanigan, \textit{West Virginia's Financial Dilemma: The Ideal School System in the Real World}, 15 J. EDUC. FIN. 229, 234--36 (1989), but eventually bore fruit, see Amy Higginbotham, \textit{Property Tax Assessment Procedure Changes Effect on School Resources and Student Performance}, in 101 PROCEEDINGS OF THE ANNUAL CONFERENCE ON TAXATION AND MINUTES OF THE ANNUAL MEETING OF THE NATIONAL TAX ASSOCIATION 306, 306--308 (2008) (discussing the effects of the Appraisal Act in 1990, which required that all property be assessed at 60\% of its market value by 1994). As Professor Higginbotham explains, improved property tax assessment practices generated increased revenues for public education starting in the early 1990s. \textit{Id.}}

\textsuperscript{147} \textit{See} Recht Decision, slip op. at 221.

\textsuperscript{148} \textit{Id.} at 218.
Further, Judge Recht emphasized what scholars call "vertical equity." Some children face greater challenges, so greater resources may be needed to give those children the thorough and efficient education they deserve. Funding criteria that do not acknowledge this point fail to allocate resources in a manner "substantially related to educational needs and costs." Third, Judge Recht understood equality and quality not in terms of dollars or test scores, but in terms of education inputs: curriculum, personnel, facilities, etc. Money is important, but the right to education is about more than money. The state constitution demands that each child receive the resources she needs to have a fair opportunity to attain a thorough and efficient education. As Judge Recht would later explain, he framed the discussion in terms of educational inputs because all the evidence put before him was framed in this way.

Like Pauley, the Recht Decision set a high quality bar and embraced the importance of equality as well. Judge Recht, however, had no choice but to grapple with Pauley's uncertainties about the relationship between quality and equality because he had to take a stand on the excess levy. If he read Pauley to exempt the excess levy from constitutional scrutiny, Pauley was primarily a quality/adequacy decision, albeit an exceedingly demanding one. Comparative equality of resources could be a constitutional hope, but without some taming of the excess levy, there could be no guarantee that educational opportunity would be comparatively equal. If he read Pauley to mean that a thorough and efficient education must be both equally adequate and adequately equal, the excess levy had to be addressed. Judge Recht opted for the latter path.

Pauley had arguably left open the possibility that the excess levy violated the Education Clause. On remand, Judge Recht held that it did. Some of his reasoning was an uncontroversial extension of Pauley: Education is a duty of the state, and to make the provision of a thorough and efficient education dependent on the ability of local districts to raise money through the excess levy is an abdication of that duty—especially when property-poor districts cannot raise

149 See supra note 7 (defining vertical equity).
150 See Recht Decision, slip op. at 218 ("Equal means that all factors contributing to differences in curriculum needs and costs among counties; including concentrations of educationally disadvantaged and culturally isolated students; differences in concentrations of children needing services to address specific handicapping conditions . . . . The State has a legal duty to insure that school systems with greater educational needs and costs receive sufficient educational resources to meet those needs so that all children with similar needs are treated equally and receive a high quality education.").
152 Cf. Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) ("We deal with the problem [in terms of dollar input per pupil] because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate.").
153 See Recht Decision, slip op. at 220–21.
adequate funds even if they pass an excess levy.\footnote{Id.} The argument is sound, but it is still compatible with the view that districts may advantage their own students via the excess levy so long as state funding assures that all districts can meet the constitutional (and, for Judge Recht, very high) quality floor of educational resources. Judge Recht went further in stating these conclusions of law:

33. The State has a legal duty to design a system of school finance which eliminates all expenditure inequalities and inadequacies resulting from the use of the excess levy to fund public education.

34. Under no circumstances may the funding system rely on the excess levy to raise more than an insignificant amount of revenue for the public schools in any county. Any excess levy so permitted must be fully equalized among counties so that any given excess levy rate raises the same amount of revenues in each county in which it is levied.\footnote{Id. at 225–26 (emphasis added).}

Here we have a more direct emphasis on equality and a consequent commitment to taming the excess levy by limiting the total amount of revenue it could provide and requiring “fiscal neutrality,” i.e. insuring that all districts with the same excess levy rates will raise the same amount of revenue, regardless of district property wealth. Perhaps more strikingly still, Judge Recht’s conclusions of fact tentatively endorsed suggestions from expert witnesses that the state should discourage the use of excess levies by, e.g., including excess levies in the calculation of a district’s local share.\footnote{Id. at 190–91.} This approach would make it pointless for districts to pass excess levies because each additional dollar raised would result in one less dollar of state education funding.

These passages suggest that the Recht Decision declared war on the excess levy. Others certainly read the decision that way,\footnote{The legislature acted on this understanding early on. While the Property Tax Limitation and Homestead Exemption Amendment of 1982 was principally a response to the \textit{Killen} decision, see \textit{supra} note 146, subsection E of the Amendment authorized a statewide excess levy if approved by the voters. W. VA. CONST. art X, § 1(b)(E). Voter approval turned out to be difficult to obtain. See \textit{infra} notes 184–195 and accompanying text.\footnote{Id.}} as will become clear in the pages that follow. For now, the critical point is that Judge Recht did so because he gave \textit{Pauley’s} commitment to equality as much emphasis as its commitment to high quality standards. And by understanding equality to require the taming or elimination of the excess levy, Judge Recht embraced a key tenet of the lawyers who fought the foundational battle for educational equality: school desegregation. Eliminating the excess levy, like desegregation, was a classic
tying strategy.\textsuperscript{158} Just as desegregation meant that white parents could not gain greater resources for their children without helping black children, parents in property-rich districts would no longer be able to provide greater resources to their own without helping students in property-poor districts as well. As explained above, \textit{Pauley} is often described as a second-wave equity case\textsuperscript{159}—a description that does not fit both because \textit{Pauley} emphasized equity \textit{and} adequacy and because, if anything, \textit{Pauley}'s commitment to adequacy/quality was the deeper one. By taking on the excess levy, the Recht Decision made a full commitment to both quality and equality.

In addition to fleshing out \textit{Pauley}'s substantive conception of the West Virginia Constitution's right to education, Judge Recht also had to wrestle with the vagueness in \textit{Pauley}'s conception of judicial review. His opinion often reads as though he has resolved the tensions in \textit{Pauley} by coming down firmly on the side of de novo review: courts will decide what a thorough and efficient education is, and the legislature must follow.\textsuperscript{160} In context, however, the Recht Decision reads this way in part because the court believed it was operating in a vacuum regarding educational standards. Judge Recht lamented that while \textit{Pauley} had directed that legislative standards should be given "great weight," nothing the state had adopted or considered adopting at the time was recognizable as an effort to articulate meaningful standards for a thorough and efficient education.\textsuperscript{161} In the absence of any legislative effort, the trial court would make the first attempt to articulate real standards. Accordingly, Judge Recht planned the appointment of a Commissioner to work with the legislature, the executive branch, and other stakeholders to develop a "Master Plan" for implementing the court's decision. The Plan would have to be extensive, including "educational standards, resources to fund those standards, and public taxation."\textsuperscript{162} Yet if the legislature were to one day adopt meaningful standards, perhaps those standards would be accorded "great weight" after all. Judge Recht

\textsuperscript{158} See \textit{Ryan, Five Miles Away}, supra note 28, at 28:

The best and perhaps only way for blacks to receive an education equal to whites was to attend the same schools. That way, white-dominated legislatures and school officials could not benefit white students without also benefitting black ones, or harm black students without also harming whites. Desegregation, from this perspective, was not so much an end in itself as a means to an end. It was a tying strategy, essentially, where black students would tie their fates to white students because, as the saying went, green follows white.

\textsuperscript{159} See supra notes 132–139 and accompanying text.

\textsuperscript{160} See, e.g., \textit{Recht Decision}, slip op. at 216 ("Based on the extensive testimony and documentary evidence presented in this case, this Court concludes as a matter of law that all elements of the educational services and programs set out in [factual] findings 19 to 91 [which describe the state of the art for various education programs] comprise the essential standards of a thorough and efficient education.").

\textsuperscript{161} See \textit{id.} at 92–99.

\textsuperscript{162} \textit{Id.} at 235.
agreed to wait sixty days before appointing a Commissioner in order to give the State an opportunity to appeal.

In an extraordinary “Epilogue” to his opinion, Judge Recht candidly described his doubts about the scope of judicial authority to demand wholesale reform of West Virginia’s public education system. After explaining his worries that Judge Neely might have been right to conclude that the Pauley case did not belong in the courts, Judge Recht wrote:

Slowly, however, as more witnesses testified and more exhibits [were] considered, that original thought dissipated and gave way to the realization of—if not the judicial branch of government—then who?
The other branches have over these many years [had] not only the duty, but obviously the opportunity to have made the standards set forth herein a reality. . . . However, as occasionally occurs, despite the rather precise constitutional mandates, other branches of government need the judicial direction to assist them in discharging their oath. This is the genius written [into] the concept of separation of power[s], and judicial review. 163

Though Judge Recht may well have been right that only the courts could goad the political branches into serious educational reform, it is not hard to see how passages like this one would prompt cries of judicial overreach. State Attorney General Chauncey Browning described the Recht Decision as an “outrageous intrusion into the legislative and executive branches of government,” and House Majority Leader Roger Tompkins added that the decision “specifically directs the legislature to reconstruct the system of education in West Virginia and in incredible detail purports to tell us exactly how.”164 Then there was the anticipated cost of compliance, which was estimated to be as high as $1.6 billion.165 Speaker Tompkins complained that Judge Recht’s decision could “wreck the state budget” and “increase property taxes 400 percent or more.”166 It did not help that the decision came when the state was mired in recession and struggled with the highest unemployment rate in the nation.167 Summing up the reactions to the Recht Decision, one out-of-state school finance expert remarked,

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163 Id. at 238–39.
164 Meckley, Bombshells, supra note 8, at 412 (citations omitted).
165 Id. at 410.
166 Id. at 412 (citation omitted).
167 See Roy Truby, Pauley v. Bailey and the West Virginia Master Plan, 65 PHIL DELTA KAPPAN 284, 284 (Dec. 1983). Governor Rockefeller initially opposed Judge Recht’s ruling for this reason, saying that the state “can’t have more than we can reasonably expect people to pay for, particularly when so many people aren’t working.” Helen M. Hazi, Co-Rechting West Virginia’s Schools, 42 EDUC. LEADERSHIP 75, 76 (1985) (citation omitted).
“They had a Yugo . . . and maybe they should have had a Lumina. But what they asked for was a Mercedes.”

In response to the initial blowback, Judge Recht issued a supplemental opinion on May 22, 1982—11 days after the initial decision—in which he advanced a more chastened vision of the judicial role: “this Court cannot and does not have the power—authority—or jurisdiction to DEMAND that the West Virginia Legislature adopt this particular plan or for that matter, any single piece of legislation.” Instead, the envisaged Master Plan would merely be a set of suggestions to the legislature that it might adopt if it wished. The court’s role could only be to assess whatever the legislature ultimately did and to compare the legislative product with the standards set out in Pauley v. Kelly. When the state decided not to appeal the Recht Decision, the trial court granted a request by the State Superintendent of Schools and the Board of Education to appoint a 99-member commission (instead of a single commissioner) to develop a Master Plan. The Plan was submitted to Judge Recht in December 1982, and he substantially approved it in an order dated March 4, 1983. Significantly, the Master Plan accepted Judge Recht’s criticisms of the local excess levy and called for its replacement with a statewide excess levy. The March 4, 1983 order continued to send somewhat mixed messages about the relative authority of the legislature and the courts by describing the Master Plan as “a recommendation to the Legislature as an example of a thorough and efficient system as defined in Pauley v. Kelly.” If the legislature chose not to follow the Master Plan, the court would determine whether its approach was a “good faith implementation of the governing constitutional principles.” The latter statement seems consistent with a common remedial approach in which courts “veto” the state’s current educational system, then leave the legislature some range of remedial options that will in turn be vetoed or affirmed by the courts. Yet the Master Plan was
unusually ambitious and specific. In this context, did “good faith” mean merely
the adoption of an approach that could be seen as reasonably related to the goals
set out in Pauley, or was “good faith” a signal that any deviation had to be as
fully satisfactory to the courts as the Master Plan itself?

In the end, the Recht Decision and Judge Recht’s orders and
supplemental opinions in the following year retained some of Pauley’s
vagueness about judicial review, but on the whole the message seems to be that
courts will extensively supervise the political branches’ efforts to reconstruct
West Virginia’s education system. Where Judge Recht’s orders sound most
deferential, it is tempting to view them as efforts to maintain the courts’
legitimacy in deference to separation of powers concerns raised by the other
branches and the public. But whether Judge Recht’s notes of deference were
strategic or reflected genuine ambivalence, the Supreme Court of Appeals
seemed to dispense with deference when it addressed the Master Plan in late
to the Master Plan calling for, among other things, a specific timetable for
implementation. Although the court noted that the Master Plan itself was not
before the court for review, it nonetheless held that the Board of Education and
the State Superintendent of Schools had

a duty to ensure the complete executive delivery and
maintenance of a “thorough and efficient system of free
schools” in West Virginia as that system is embodied in A
Master Plan for Public Education which plan was proposed by
agencies of the executive branch and found constitutionally
acceptable by the Circuit Court of Kanawha County, and that
plan will be enforced until such time as it is altered or modified
by this Court or the circuit court.

This formulation seemed to put the courts firmly in control of the
definition of a thorough and efficient education. One might object that the
Supreme Court of Appeals was merely holding the Board of Education to a
Master Plan that it largely developed, yet that plan was itself designed to satisfy
Judge Recht’s criteria and required his approval. The Bailey court did not

Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61

176 See supra text accompanying notes 169–170.

177 Cf. Koski, Fuzzy Standards, supra note 80 at 1190–91 (suggesting that because courts must
rely on the political branches to carry out education reform and face significant risks of
noncompliance, courts “preserve their own institutional legitimacy . . . by only cautiously entering
the school finance fracas”).


181 See id. at 137.

182 Id. at 135.
specifically endorse the Master Plan’s and the Recht Decision’s dim view of local excess levies, but it also did nothing to distance itself from those views.

VI. EQUALITY TAKES A BACK SEAT: THE LOCAL EXCESS LEVY AND CHAFIN

I have now told the Pauley story from the beginning up through the development of the Master Plan in a reasonable degree of detail, and I will also pay considerable attention to Pauley’s end in Part VII below. While I cannot rehearse all the intervening stages in the story, it is essential to discuss the West Virginia Supreme Court of Appeals’ decision in Board of Education v. Chafin183 as a crucial turning point. Whereas the Recht Decision had placed greater emphasis on equality of resources than Pauley v. Kelly, Chafin pushed Pauley’s vision of the right to education in the opposite direction.

From the beginning of the Pauley litigation, it had been clear that state reliance on local excess levies to fund schools was at the heart of the problems faced by Lincoln County and other property-poor districts. The Recht Decision had strongly criticized the local excess levy, and the Master Plan had called for its replacement with a statewide excess levy. Now the challenge was to convince the voters, who proved less persuadable than the courts had hoped.

In 1984, the legislature passed a constitutional amendment that would have created a statewide excess levy system to replace local excess levies,184 but it was easily defeated at the polls in November 1984.185 Some have attributed the defeat to concerns that a statewide levy would redistribute school monies from property-rich to property-poor counties.186 In other words, voters rejected the idea of “leveling down,” which is the political Achilles’ heel of equality theories of school finance reform. Two and a half months later, Judge Jerry W. Cook, who presided over the Pauley case in mid-1980s, held a hearing on Dan Hedges’s motion for a court order implementing the Recht Decision.187 In December 1985, Judge Cook issued an order decreeing that unless the legislature acted to replace or equalize local excess levy revenues by July 1, 1987, the court would “order a more equitable distribution of state aid to schools in conformity with [the Recht Decision].”188

With Judge Cook’s deadline approaching, the legislature made another attempt to pass a statewide excess levy with the Uniform School Funding Amendment,189 which was scheduled to go before the voters on March 5, 1988.

183 376 S.E.2d 113 (1988).
185 See Flanigan, supra note 146, at 234.
186 See Meckley & Hazi, supra note 6, at 340.
188 Id. at 2.
On the day before his deadline, Judge Cook issued an order that extended the deadline by one year in light of the pending vote on a statewide excess levy. While commending the legislature for its efforts, Judge Cook warned that if the statewide levy amendment failed at the polls, the court would impose its own solution to the excess levy problem on June 30, 1988. That solution was to fold excess levy revenues into the local share calculation, phasing the new scheme in over five years such that by the 1992-93 fiscal year, any county excess levy revenues would be wholly included in the county’s local share. Lest the redistributive effects of this proposal were insufficiently clear, Judge Cook explained that “[t]he corresponding increase in local share shall be distributed among all the counties on an equitable basis to be prescribed by the Court.”

Of course, under this system local politicians and voters would have no reason to support local excess levies, and they would simply wither away. As Judge Cook acknowledged, this might have perverse consequences: “This new distribution of local shares leaves the possibility that certain school systems may be injured in their capability to deliver a high quality education if new revenues through reappraisal or from other sources prescribed by the Legislature are not made available to the system.” In other words, the need to eliminate the inequities of the excess levy was so great that equality must be pursued by leveling down, even at the cost of the qualitative goals mandated by the “thorough and efficient” standard.

Whereas Pauley v. Kelly and Judge Recht had both sought a funding regime that would balance the demands of quality and equality, Judge Cook’s order boldly declared that equality must prevail even at the cost of quality if the statewide excess levy failed. Judge Cook obviously hoped his “harsh” solution would not be needed—it was likely meant to be a threat akin to nuclear deterrence. Yet threats do not always work. Voters again rejected the statewide excess levy in March 1988, and the legislature failed to otherwise address the excess levy problem by the trial court’s June 30 deadline.

Unsurprisingly, the state tax commissioner, the state auditor, and thirty-three county boards of education filed suit to prevent the implementation of Judge Cook’s order. His remedy of folding the excess levy into the local share calculation was leveling down, and leveling down is rarely popular. The challengers’ argument was simple: The school excess levy was part of the

190 Pauley v. Gainer, No. 75-1268 (Kanawha Cty. Cir. Ct., June 29, 1987).
191 See id. at 3–4.
192 Id. at 3.
193 Id. at 4. Judge Cook acknowledged that his solution had “the potential for harsh results.” Id. at 4.
194 Id. (“This Court recognizes that this redistribution addresses only the inequality issues. [The Recht Decision of May 11, 1982] addressed not only an equitable system under the standard of equal protection but also the State constitutional guarantee of a thorough and efficient education.”)
195 See Flanigan, supra note 146, at 240. For more information on the run-up to the 1988 vote and a report of an interview with Judge Cook about his role in the Pauley case, see id. at 237–41.
Constitution. Article 10, § 10 was added to the state constitution in 1958 through passage of the Better Schools Amendment, and it provides in relevant part:

Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred percent of such maximum rates, if such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.\(^\text{196}\)

How, the challengers asked, could a measure explicitly blessed by the West Virginia Constitution violate that same constitution’s Equal Protection Clause?

In Board of Education v. Chafin,\(^\text{197}\) issued on November 23, 1988, the Supreme Court of Appeals agreed that matters were just that simple. Where constitutional principles appear to conflict, general provisions must yield to specific ones, thus “[e]xcess levies are withdrawn from the operation and scope of equal protection principles.”\(^\text{198}\) Recognizing that Judge Cook’s order effectively proscribed school excess levies, the court issued a writ of prohibition barring the order’s enforcement. The local school excess levy was saved.

In light of this conclusion, the court recognized that equal protection principles could no longer be understood to require the elimination of disparities in school funding, for excess levies would “undoubtedly” produce such disparities. Accordingly, it reconceptualized the mandate of Pauley v. Kelly:

We find the true focus of Pauley to be whether the State has complied with its constitutional duty to provide school financing in a manner, and at a level, that is thorough and efficient. This requires an examination of the school financing formula, without consideration of the excess levy revenues. [The key question is:] Is the basic foundation program, the minimum level of funding guaranteed by the State, constitutionally sufficient to meet the county’s education needs?\(^\text{199}\)

By putting the excess levy “off the books” for equal protection purposes, Chafin effectively forced the Pauley mandate away from its balancing of equality and

\(^{196}\) W. VA. CONST. art. X, § 10. Though the main text was added in 1958, the threshold for passing a school excess levy was lowered from 60% to 50% through passage of the Fair Education Opportunity Amendment in 1982. BASTRESS, CONSTITUTION, supra note 51, at 310.

\(^{197}\) 376 S.E.2d 113 (W. Va. 1988).

\(^{198}\) Id. at 119. The court added that the same result was compelled by the principle that more recent provisions prevail over earlier ones. Id.

\(^{199}\) Id. at 121.
adequacy concerns toward a purer adequacy model. Wealthier districts essentially had a constitutional right to provide education that is more than "thorough and efficient," even if the comparative advantage conferred on their students undermined the real-world adequacy of the education provided in poorer districts. In theory, this consequence could be avoided if the state foundation aid program were sufficiently generous to enable all districts to meet the thorough and efficient standard and that standard were to be set so high by the legislature (or by the courts) that no districts would wish for more. It is hard, though, to see how these utopian conditions could ever draw sufficient political support to become reality.

For Judge Recht (and later Judge Cook), taking away the local excess levy had been a tying strategy: families who wanted the resources to support top-flight education for their kids would have no choice but to support better funding statewide. The interests of all would thus be tied together, regardless of geographic location. But if the local excess levy gave families the option of channeling support more narrowly to their own districts, statewide ties would be broken and most voters would likely support local excess levies in preference to broader state funding.200

Chafin, then, was a major turning point because it placed some of the Recht Decision's goals out of reach. The most that could be hoped for was that all children would have a right to an education that met a quality standard. And though the Recht Decision’s ambitious articulation of educational quality still stood, the state’s demonstrated unwillingness to fund the Recht Decision’s resource mandates meant that a less ambitious quality standard—one appropriately labeled “adequacy” —would likely govern in the future. After a few years of relative quiet in the Pauley litigation, the late 1990s brought legislative developments that led Judge Recht to perform his own reconceptualization of Pauley.

VII. PAULEY WINDS DOWN: ACCOUNTABILITY AS ADEQUACY

A. The End of the Road

Dan Hedges asked the Kanawha County Circuit Court to reopen the Pauley case in 1994, arguing that the Master Plan approved by the West Virginia Supreme Court of Appeals ten years earlier still had not been implemented.201 Judge Dan Robinson now presided over the case, and on April 2, 1997, he issued a ruling that the West Virginia school financing formula—nearly 20 years after

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200 The two failures to pass a statewide excess levy, coupled with considerable success in passing local excess levies around the state for many decades, supports this prediction.

Pauley v. Kelly—was still unconstitutional.

Significantly, the State Board of Education had argued to the court that the Recht Decision’s approach of evaluating educational quality by assessing “inputs” was behind the times and that a more modern approach would focus instead on “output” measures such as standardized test scores and graduation rates. This was a sign of things to come.

Judge Robinson’s order gave the state one year to cure the constitutional defects in the Public School Support Plan, and Governor Cecil Underwood responded ten days later by forming a Governor’s Commission on Educational Quality and Equity. Many of the Commission’s recommendations became law with the 1998 passage of House Bill 4306, titled “An Act Implementing Certain Recommendations of the Commission of Educational Quality and Equity,” which is now principally codified at W.Va. Code § 18-2E-5.

While West Virginia had enacted modest accountability measures as part of an omnibus education bill in 1988, H.B. 4306 brought the standards and accountability movement to West Virginia with full force. Its stated purpose was “to establish a process for improving education that includes standards, assessment, accountability and capacity building to provide assurances that a thorough and efficient system is being provided for all West Virginia public school students on an equal education opportunity basis and that high quality standards are, at minimum, being met.”

On one reading, the bill meant that the legislature had finally taken the steps that Pauley had been urging all along: it had given a meaningful legislative definition of a thorough and efficient educational system.

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203 Dilger, supra note 202, at 3.

204 Linda B. Blackford, Judge Gives Lawmakers 1 Year to Implement Recht, CHARLESTON GAZETTE, Apr. 3, 1997, at 1A.

205 Dilger, supra note 202, at 4–5. A separate Governor’s Commission on Fair Taxation was formed shortly thereafter to recommend changes to the state tax system that would, among other things, further the goal of providing a thorough and efficient system of education. Id. The Commission’s proposals that bore most directly on school funding included replacing the regular levy with state funding and recommending a constitutional amendment that identified the legislature, not the courts, as the arbiter of what constitutes a thorough and efficient system of schools. Id. at 5. These and other Commission proposals proved controversial, and thus the Commission’s main proposals were never enacted. See Calvin A. Kent, What Happened to Tax Reform in West Virginia?, 85 STATE TAX NOTES 1127, 1130 (2017), www.cbermu.org/wp-content/uploads/2017/11/2017-09-18-State_Tax_Notes-Kent.pdf.


208 For a brief introduction to the standards and accountability movement, see Ryan, Standards and Testing, supra note 126, at 1226–29.

education, and thus it had set a coherent goal around which the other elements of the education system could be designed. As Professor Ryan has observed, school finance equity litigation and the standards and accountability movement are at least “a match made in theory” because state adoption of academic standards enables courts to avoid separation of powers concerns. Courts may then say to the legislature, “We are not holding you to our standards of what counts as an adequate education; instead, we are holding you to your standards of what counts as an adequate education.”

When Judge Recht returned to the case in 1999, it soon became apparent that he regarded the 1998 accountability legislation as a game changer. In a consent order dated September 12, 2000, Judge Recht granted the State Board of Education’s motion to “recognize W.Va. Code sec. 18-2E-5 as the implementation process of ascertaining compliance with the constitutional mandate” and further stated that his 1983 order approving the Master Plan was vacated insofar as it conflicted with the present order. Now that the legislature had finally acted to define a thorough and efficient education, the “suggestions” put forward in the Master Plan could fall away. This was the beginning of Pauley’s end.

Judge Recht more fully explained himself in an order issued on December 3, 2001:

The Legislature has, in effect, with the enactment of West Virginia Code sec. 18-2E-5, changed the paradigm of public education from a resource to a performance model. The West Virginia Legislature has addressed the underpinnings of an adequate and equal education opportunity by establishing educational standards and performance measures as well as the method of assessing that performance in terms of its success and/or failure, with the understanding that if there are deficiencies and failures, resources then will be targeted specifically to correct those deficiencies and failures. This performance based accountability approach is designed to spend and allocate resources where they are most needed, instead of allocating resources at the beginning of the education cycle with the hopeful expectation that the results will achieve the highest quality standard of education.

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210 Ryan, Standards and Testing, supra note 126, at 1230–31. Ryan warns that the standards and accountability movement may actually do more harm than good for school finance equity litigation. See id. at 1240–50.

211 Tomblin v. Gainer, No. 75-1268, slip op. at 10 (Kanawha Cty. Cir. Ct., Sept. 12, 2000).

212 Id. at 9–10.

He added that the "front-end approach" he took in 1982 was required at that time because the evidence presented on the Pauley remand allowed no other option.\footnote{14} Courts have consistently recognized that the contours of a thorough and efficient education must change with the times,\footnote{15} and the legislature was well within its rights to draw on the standards and accountability movement in defining a thorough and efficient education.

Judge Recht officially relinquished jurisdiction in the case on January 3 2003.\footnote{16} His order denied plaintiffs' motions for further changes to the school foundation aid formula, indicating that a better approach would be to wait and see how the new accountability system would play out.\footnote{17} In addition, Judge Recht ruled that the 1998 Act itself satisfied constitutional requirements because the legislature had now provided, by public law, for a thorough and efficient system of free schools.\footnote{18} There was no need to retain jurisdiction because the court believe[d] that the legislative and executive branches have every intention of doing what each says they are going to do. Prior to 1998, there was no such legislative and executive commitment \ldots{} From this day forward, unless this matter is properly returned to this Court, decisions regarding the classroom are out of the courtroom and into the halls and offices of the legislative and executive branches of government.\footnote{19}

\subsection*{B. Assessing Pauley's End}

And so, after a quarter century in the courts, the Pauley litigation ended with more of a whimper than a bang. Throughout the litigation, the West Virginia courts had worked to find both a defensible substantive conception of the right to education and a defensible conception of judicial review of the legislature's efforts to implement that right. At Pauley's end, the courts' approach was less ambitious on both fronts than it had been at the beginning.
Substantively, Pauley had sought to balance the demands of equality and quality without fully working out the proper relationship between the two. The Recht Decision further specified Pauley’s ambitious qualitative standard, but placed greater emphasis on the need for equal resources by attacking the local excess levy. In the wake of Chafin, equality considerations became less critical, and the substantive focus shifted to “quality” or “adequacy.” Finally, the legislature’s embrace of standards and accountability changed the courts’ understanding of quality from a model based on educational inputs to one based on outputs, i.e. standardized test scores. At Pauley’s end in 2003, the meaning of the Pauley mandate as understood by Judge Recht was that the legislature must articulate educational content standards and provide all students with an equal opportunity to meet those standards by targeting additional resources towards the districts that most need them, as identified by test performance. In a nutshell, a “thorough and efficient” educational system aims at quality/adequacy of outputs, with resources allocated via principles of vertical equity.

This substantive endpoint is obviously quite different from, and doubtless less demanding than, what the West Virginia courts envisioned in the early 1980s. And much of the explanation for the change goes to the West Virginia courts’ ultimate acceptance of a more modest conception of the judicial role in enforcing the right to education. In the end, it was the legislature’s job to specify the standards of a thorough and efficient education, even if its standards had little in common with those originally envisioned by the Recht Decision and the Master Plan.

One can interpret the West Virginia courts’ chastened approach to judicial review in different ways. On one common reading of the Pauley story, the West Virginia Supreme Court of Appeals and Judge Recht as its agent were exceptionally aggressive in wielding the power of judicial review. The courts sought to define their own vision of a “thorough and efficient” education de novo, dragging elected officials and the populace by their ears toward a judicially defined educational utopia. Unsurprisingly, the state and its people did not fall into line, underscoring the limits of judicial power to create social change in the absence of public support. Seen in this light, Judge Recht’s relinquishment of jurisdiction and his final gestures toward deferential review were a simple expression of judicial exhaustion, which is not an uncommon endpoint for school finance litigation.

While this narrative of judicial hubris followed by surrender has considerable plausibility, an alternative reading suggests that Pauley and its progeny did not—or at least did not consistently—assert their power to unilaterally define the details of a constitutionally satisfactory education system.

220 See, e.g., Werner, supra note 13, at 72–76.
221 See id. at 82 (“Until reform efforts develop a critical mass of public support, no act of the courts, or of the executive branch, will be effective in changing West Virginia’s schools.”).
222 See, e.g., Weishart, Aligning, supra note 119, at 351.
Instead, the courts sought only to goad the legislature into taking its own educational responsibilities more seriously. Specifically, the courts sought to ensure that the legislature was genuinely aiming at the right target and to suggest—albeit in extraordinary detail—one adequate set of means, all the while recognizing the legislature's authority to choose alternative means so long as those means were consistent with constitutional goals. On this reading, Judge Recht's decision to relinquish jurisdiction was not—or, at least, not simply—an act of throwing in the towel. It was instead a principled application of a more modest vision of the judicial role than the first account would suggest. On this reading, the legislature's adoption of a serious accountability system in 1998 represents not judicial surrender, but at least a modest victory.

I am not sure either of these readings is wholly right or wrong. Rather than trying to choose between them or crafting some intermediate interpretation, I want to reflect on Pauley's end by assuming that the West Virginia courts finally and sincerely embraced a conception of judicial review that ensures the legislature has targeted constitutional ends, yet defers substantially on the choice of means. I contend that even on this more modest vision of judicial review, the sense of a premature ending and a somewhat hollow victory in the Pauley litigation is not entirely dispelled.

Judge Recht's final orders in the Pauley case envisioned the state's new accountability system not as an end in itself, but as a more precise way of identifying where to target additional resources so that all of West Virginia's children might have an equal opportunity to attain a thorough and efficient education. He wrote in his December 2001 order that if the state's accountability system showed "deficiencies and failures [in student performance], resources will then be targeted specifically to correct those failures." This makes sense, for an accountability system can in theory allow states to know where resources are most needed rather than simply estimating ex ante that, e.g., high-poverty schools require 30% more aid, other things being equal. Further, H.B. 4306 arguably reflected a legislative commitment to target resources in exactly the way Judge Recht envisioned:

The state board shall use information from the system of education performance audits to assist it in ensuring that a thorough and efficient system of schools is being provided and to improve student, school, and school system performance,

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223 See Pauley v. Bailey (Recht Decision), No. 75-1268 (Kanawha Cty. Cir. Ct., May 11, 1982), supplemented by No. 75-1268, slip op. at 9 (Kanawha Cty. Cir. Ct., May 22, 1982) (explaining that the trial court would "suggest" through the Master Plan an approach to providing a thorough and efficient education, but that "it is ultimately a legislative function [whether to adopt the Master Plan], and whatever the Legislature does do, can only and will only be measured by the existing constitutional standards").

including but not limited to . . . (3) targeting additional resources when necessary to improve performance.\(^{225}\)

This language is not self-interpreting, of course. “Additional resources” in the statute need not be read as exclusively or even predominantly meaning “additional financial resources.” Nevertheless, it seems likely that Judge Recht understood the promise of H.B. 4306 to be primarily about allocating additional financial resources to help those students identified by the testing regime as having the greatest needs.\(^{226}\) If the statute is read as Judge Recht apparently read it, West Virginia’s practice has not really lived up to this legislative commitment. And to the extent this is so, West Virginia’s educational system and its financing system in particular still fall short on even the more modest conception of judicial review. If the state is not actively targeting financial resources where the accountability system says they are most needed, perhaps the state has not yet shown that its system of free schools truly aims at a thorough, efficient, and reasonably equal education for all.

That is a provocative charge, and—based on what I have said thus far—one could fairly object that the charge seems to rest on the dubious assumption that greater funding is both necessary and sufficient to improve underperforming schools. This, of course, is false. Money helps if it is spent wisely,\(^{227}\) but money is not the entire answer.\(^{228}\) Nevertheless, the concern that West Virginia’s accountability regime has not displayed a serious commitment to targeting resources where they are most needed can be substantiated without simplistic assumptions.

Consider what West Virginia’s accountability system tells us about the Lincoln County schools, where the \textit{Pauley} litigation started more than forty years

\(^{225}\) An Act Implementing Certain Recommendations of the Commission of Educational Quality and Equity, H.B. 4306, 73d Leg. (W. Va. 1998) (creating proposed section W. VA. CODE \$18-2E-5(f)). The current version of the statute, with no significant changes in wording, is codified at W. VA. CODE ANN. \$18-2E-5(h) (West 2019).

\(^{226}\) In his final order closing the \textit{Pauley} litigation, Judge Recht wrote: “The performance-based accountability approach is designed to spend and allocate resources where they are most needed, instead of allocating resources at the beginning of the education cycle with the hopeful expectation that the results will achieve the highest quality standard of education.” \textit{Tomblin v. West Virginia State Bd. of Educ.}, No. 75-1268, slip op. at 6 (Kanawha Cty. Cir. Ct., Jan. 3, 2003) (emphasis added).

\(^{227}\) See generally Michael A. Rebell, \textit{Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts}, 85 N.C. L. REV. 1467 (2006). Professor Rebell sums up his analysis this way: “In the end, all of the elaborate economic production analyses and discussions in the academic literature and in the legal decisions about whether money matters really comes down to a basic consensus that, of course, money matters—if it is spent well.” \textit{Id.} at 1487.

\(^{228}\) See, e.g., Derek Black, \textit{Taking Teacher Quality Seriously}, 57 WM. & MARY L. REV. 1597, 1643 (2016) [hereinafter Black, \textit{Teacher Quality}] (explaining that higher salaries alone are likely not sufficient to attract and retain high quality teachers in schools serving poor and minority student populations); Ryan, \textit{Schools, Race, and Money}, supra note 29, at 296 (expressing doubts about whether money alone can solve the problems faced by racially isolated schools).
ago. The West Virginia Department of Education’s online accountability database\(^{229}\) indicates that for the 2017-18 school year, the proficiency rates on statewide assessments for all West Virginia students were 45% in reading, 37% in math, and 37% in science.\(^{230}\) The proficiency rates for all students in Lincoln County schools were 36% in reading (9 points below the state average), 26% in math (11 points below the state average), and 31% in science (6 points below the state average).\(^{231}\) To add a third data point, the proficiency rates in Monongalia County, home of West Virginia University, were 55% in reading (10 points above the state average), 51% in math (14 points above the state average), and 50% in science (13 points above the state average). There is more to education than standardized test scores, but the scores are relevant here because the Pauley litigation concluded by proclaiming that West Virginia’s accountability system was an acceptable legislative measure of what constitutes a thorough and efficient education. By that standard, it is difficult to see how Lincoln County students are receiving an education that is either adequately equal or equally adequate.

Lincoln County, then, would seem to be a district to which additional resources would be appropriately targeted. But there seems to be no evidence—either today or any other time since 2003 when Judge Recht relinquished jurisdiction—that additional financial resources have been targeted to Lincoln County in response to its weak test scores. According to the latest available school finance data, Lincoln County’s per student spending in 2015 was $11,290.48, slightly below the statewide average and nearly $300 less than the figure for Monongalia County.\(^{232}\) This is not to say the state has offered no extra support to Lincoln County. State money in 2015 provided more than 87% of the county’s basic foundation allowance generated by the seven-step Public School Support Plan formula, the third highest percentage in the state.\(^{233}\) The excess levy explains Lincoln County’s below-average per pupil spending, for the extra support from the state is not enough to offset the disparities in the amount of funding that can be generated by the excess levy.\(^{234}\) The most critical point,

\(^{229}\) West Virginia’s online accountability database is ZOOMWV, https://zoomwv.k12.wv.us/Dashboard/portalHome.jsp (last visited Apr. 4, 2019).

\(^{230}\) These figures combine the percentages of students identified as either meeting or exceeding the state standard.

\(^{231}\) Since the 2014–15 school year, Lincoln County students have registered gains in math and science, but reading scores have fallen. The county’s trend lines over the past four years are not notably different from the trend lines for all students.

\(^{232}\) WEST VIRGINIA DEP’T. OF EDUC., SOURCEBOOK 2015, supra note 56, at 96. The state average per pupil spending was $11,369; Monongalia County’s per pupil spending was $11,575. These figures reflect total spending, including both local school excess levies and federal aid.

\(^{233}\) Id. at 30. In contrast, the state share of the basic foundation allowance for Monongalia County was less than 60%. Id.

\(^{234}\) For example, in 2015 Monongalia County had a property tax base nearly ten times greater than Lincoln County’s: $5,330,627,025 in total assessed valuation versus $548,539,356. Id. at 7.
however, is not just that the excess levy means Lincoln County is able to spend less money per pupil than many counties that have both greater wealth and higher test scores. The critical point is that there is still nothing in West Virginia’s school financing system that ties school funding to test score performance. While West Virginia provides a larger share of support for Lincoln County schools than for many other districts, that difference is a function of the county’s lower property tax base, not its test scores.

It is true, of course, that West Virginia uses its accountability system to identify low-performing schools and to require various corrective measures in those schools. Federal law—currently in the form of the Every Student Succeeds Act\(^\text{235}\)—requires as much.\(^\text{236}\) But West Virginia’s ESSA compliance plan says very little to suggest that additional financial resources would play a significant part in improving low-performing schools.\(^\text{237}\) The ESSA plan criteria require states to describe how they will “periodically review resource allocation to support school improvement in each LEA in the State serving a significant number or percentage of schools identified for comprehensive or targeted support and improvement,”\(^\text{238}\) and reviewing resource allocation for low-performing schools does sound like a step down the path Judge Recht envisioned. The Department of Education’s response, however, points only to the possibility of “blending funds across existing resources” to support “comprehensive support and improvement” (CSI) schools.\(^\text{239}\) It is unclear how much money might be available for reallocation, or how the envisioned “blending” would work.

Perhaps it is unsurprising that states would not specifically promise greater financial resources to failing schools. Such a scheme might seem to set up perverse incentives, and since it obviously matters how the money is spent, one would expect any increase in financial resources to be one part of a more comprehensive school improvement scheme. All that makes sense. But a real commitment of financial resources would probably need to be a part of an effective school improvement plan as well, and the simplest way to make the


\(^{236}\) For a brief description of the ESSA’s requirements, see Derek W. Black, Abandoning the Federal Role in Education: The Every Student Succeeds Act, 105 CALIF. L. REV. 1309, 1334–35 (2017). Professor Black explains that the ESSA’s mandate for corrective action in low-performing schools is significantly more flexible and less stringent than that of its predecessor, the No Child Left Behind Act. See id. at 1325, 1334–35.

\(^{237}\) WEST VIRGINIA’S CONSOLIDATED STATE PLAN FOR THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, AS AMENDED BY THE EVERY STUDENT SUCCEEDS ACT OF 2015 (2018), https://wveis.k12.wv.us/essa/docs/WV_ESSA_Plan_Edit_022018.pdf. Pages 35 to 47 describe West Virginia’s processes for identifying low performing schools, specifying “exit criteria” for schools so identified, providing comprehensive support to low-performing schools, and providing “more rigorous interventions” for schools that fail to meet the exit criteria in three years.

\(^{238}\) Id. at 40.

\(^{239}\) Id. at 40–41.
point is to reflect on the most important component of a good school system: high-quality teachers.

Researchers have repeatedly confirmed that good teaching matters and that good teachers are unevenly distributed. Children who live in high-minority, high-poverty, and/or geographically isolated schools and districts are far less likely to have high-quality teachers than children in whiter, wealthier schools in more populated areas. Judge Recht identified the teacher quality gap as a problem in West Virginia back in 1982. Commendably, the ESSA recognizes the problem and accordingly requires state compliance plans to explain what steps states will take to ensure that students in schools identified for improvement “are not served at disproportionate rates by ineffective, out-of-field, or inexperienced teachers.” As Professor Black has explained, it is a mistake to think that higher salaries alone would close the teacher quality gap, but it is also a mistake to think that significant salary incentives are unnecessary. Indeed, one of the reasons for the intractability of the teacher quality gap is that where salary supplements have been tried, they have not proven sufficiently robust to overcome other disincentives for high-quality teachers to be willing to work in schools they see as less desirable. In West Virginia, one of the positive developments that arose from the Pauley litigation was 1984 legislation providing for greater equity in teacher pay across the various districts in the state. As a result, variations in teacher pay across districts have been significantly reduced, but relatively equal pay is likely not enough to overcome the teacher quality gap that affects districts like Lincoln County.

240 Black, Teacher Quality, supra note 228, at 1607-09. Professor Black’s article draws together a wide range of the existing research on the teacher quality gap and the policies that would be needed to close it. Readers wishing to dig deeper into the question can find comprehensive guidance in his citations.

241 Id. at 1643.

242 See Pauley v. Bailey (Recht Decision), No. 75-1268, slip op. at 135-36 (Kanawha Cty. Cir. Ct., May 11, 1982) (explaining that “[p]roperty poor counties are unable to attract and retain highly qualified teachers”).


244 Black, Teacher Quality, supra note 228, at 1643 (“School finance theory would have us believe that if schools serving predominantly poor and minority students just had more money, they could attract and retain better teachers. This is true only to some extent and depends on how much money is at stake.”).

245 Id. at 1637–39.


247 WEST VIRGINIA DEP’T OF EDUC., SOURCEBOOK 2015, supra note 56, at 138 (table showing that in the 2014–2015 school year, the average salary for classroom teachers was $45,783 with a high salary of $49,182 and a low of $41,985). Lincoln County’s figure was just below the state average, while Monongalia County’s was near the top, but if one adjusts for cost of living in the two districts, the claim of rough equality is plausible.
County. Of course, adjusting teacher salaries to provide incentives for high-quality teachers to work in low-performing districts would be complex politically and legally since teacher expectations and existing collective bargaining agreements would be implicated. But these are issues that would need to be addressed in any serious effort to target additional resources—financial and otherwise—to districts and schools with poor test results. It is difficult to see how one might improve low-performing schools without quality teachers, and it is just as difficult to see how such schools can attract and retain quality teachers without raising salaries.

Admittedly, the preceding account is just a sketch. Much more work would need to be done to translate these ideas into a workable scheme for addressing teacher quality issues in low-performing schools, and of course improving teacher quality is only one aspect—albeit the most important one—of school improvement. My goal is only to suggest how it might be possible to adjust school financing in ways that directly respond to the findings of an accountability system. Suppose, however, that one is skeptical that this can be done. What then?

There is another, far more common approach that also ties school finance to student educational need. If targeting additional resources ex post on the basis of test scores seems unworkable, a rough and ready substitute is to provide additional resources ex ante based on student or district poverty. We have long known that economically disadvantaged students are generally more expensive to educate. Indeed, the Recht Decision recognized this fact back in 1982. And it is certainly feasible to incorporate the greater needs of poor students into school financing formulas. The vast majority of states do so now. Thirty-two states take poverty into account through student-based funding formulas. Under this approach, district per-pupil allocations start from a baseline that reflects the assumed costs of educating a student with no special needs or disadvantages. The formulas then apply multipliers that increase the funding level for each individual

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248 See Black, Teacher Quality, supra note 228, at 1649.

249 As Professor Black points out, school finance litigation and the literature on teacher quality tend to oversimplify the problems, and my sketch undoubtedly does the same. A comprehensive approach would attend to broadening the supply of potential quality teachers entering the profession and retaining quality teachers as well as issues of teacher distribution. Higher salaries—more specifically, salaries that make teaching competitive with comparable professions in the labor market—are only part of the picture. See id. at 1657–58.

250 See Ryan, Schools, Race, and Money, supra note 29, at 285–86.

251 See Pauley v. Bailey (Recht Decision), No. 75-1268, slip op. at 128 (Kanawha Cty. Cir. Ct., May 11, 1982) (explaining that a constitutional school financing structure would have to take into account factors affecting educational cost including “concentrations of educationally disadvantaged and culturally isolated students”).

student on the basis of student characteristics that indicate greater educational need: e.g., poverty or disability. Another 22 states adjust overall district funding on the basis of district concentrations of impoverished students. And some states do both.\footnote{See id.}

West Virginia does neither.\footnote{See id.} Its seven-step foundational aid formula is resource-based, relying on calculations of the resources needed to run the public schools in each district.\footnote{EdBuild provides an explanation of resource-based formulas and a graphic identifying the states that primarily use such formulas. See National Policy Maps: Formula Type, EdBuild, http://funded.edbuild.org/national#formula-type (last visited Apr. 5, 2019).} The formula does take some district variations into account, and the legislature has made numerous changes over the years in response to the \textit{Pauley} litigation.\footnote{Cataloguing every one of these changes is a task beyond the scope of this article. For a helpful summary of changes in the first ten years after the Recht Decision, see Jeanette A. Sites & Richard Salmon, \textit{West Virginia's School Finance: A Look at the Past and the Present}, 17 J. EDUC. FIN. 318, 328–36 (1992).} Perhaps most notably, the legislature in 2008 adjusted some elements of the school foundation formula to use different multipliers based on a county district’s population density.\footnote{H.B. 4588, 78th Leg. (W. Va. 2008) (amending parts of school aid formula in W. VA. CODE ANN. § 18-9A-1) (West 2019)). For a brief description of how these changes affect the school funding formula, see \textit{West Virginia Dep’t of Educ., Sourcebook 2015}, supra note 56, at 25–26.} These changes work to funnel somewhat greater resources to rural, sparsely populated districts in order to compensate for higher transportation costs and limited ability to take advantage of economies of scale. As a practical matter, the changes probably direct more funds to poorer students, but these effects are incidental. The school funding formula fails to directly account for the greater costs of educating poor students in the ways that most states do, and any shift in resources toward poor students that exists under West Virginia’s formula is far smaller than needed.\footnote{See \textit{Bruce D. Baker, Danielle Farrie, & David Sciarra, Is School Funding Fair? A National Report Card} 11 (7th ed. 2018), http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edition.pdf (finding that West Virginia’s funding scheme is essentially flat, providing only slightly greater funding in high-poverty than in low-poverty districts).}

To sum up, accountability systems might help school financing systems produce a thorough and efficient education for all by providing hard information about where additional financial and other resources are most needed. Less precisely but more commonly, school financing formulas might take the greater educational needs of poor students into account ex ante by explicitly incorporating student or district poverty levels. That West Virginia has done neither raises doubts about whether the accountability approach adopted in 1998 should really be understood as fulfilling \textit{Pauley}'s mandate and about whether the
West Virginia courts bowed out of the case too soon, even assuming a more modest conception of the judicial role.

To the extent that *Pauley v. Kelly*, and later Judge Recht, scaled back their vision of judicial review, that vision still requires courts to ensure that the legislature has adopted the *ends* required by the constitution and that it has chosen *some set of means* that can be reasonably seen as directed towards achieving those ends. On this more modest conception, the Recht Decision was never more than one set of possible means. When the *Pauley* litigation began, West Virginia had not really taken aim at the goal of a “thorough and efficient” education. As Judge Recht put it in 1982, there was no way he could give significant weight to the legislature’s standards on remand because the existing state standards were too vague and inadequate to count as a definition of a thorough and efficient school system.\(^{259}\) In other words, West Virginia’s statutory framework for education looked no different than if the state constitution had required the legislature to provide merely a general system of public schools, not a thorough and efficient system.\(^{260}\) If judicial review means anything, it surely means that courts can demand that legislatures aim at constitutionally appointed goals. The *Pauley* courts did this, and their efforts were rewarded. Just as Judge Recht concluded, the West Virginia legislature met its responsibility to *define* the contours of a thorough and efficient system of schools through adopting a regime of standards and accountability in 1998. The legislature had finally taken aim at its constitutional target in a substantive way.

Yet truly meaningful judicial review under state education clauses requires courts to do more than merely ensure that the legislature has formally adopted the proper ends. Courts must also ask whether the means are at least reasonably related to those ends, for at a certain point the choice of means can become so irrational as to cast doubt on whether the legislature is genuinely seeking the purported ends at all. Judge Recht made the importance of means-end review clear in 1982: “The state has a legal duty to provide equal educational opportunities by allocating resources to counties according to criteria substantially related to educational needs and costs.”\(^{261}\) The state’s chosen means, its school financing system, must use criteria that are substantially related to educational needs if the state is to rationally aim at a thorough and efficient education for all. Given how much we know about poverty’s impact on educational needs and costs, it is doubtful that a state funding system can rationally aim at a thorough and efficient education for all without explicitly

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\(^{259}\) See *Pauley v. Bailey (Recht Decision)*, No. 75-1268, slip op. at 92 (Kanawha Cty. Cir. Ct., May 11, 1982).

\(^{260}\) This may be another respect in which the *Pauley* litigation was influenced by New Jersey’s approach in *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (“Surely, the existing statutory system is not visibly geared to the mandate that there be a ‘thorough and efficient’ [system of public schools]. Indeed the State has never spelled out the content of the educational opportunity the Constitution requires.”).

\(^{261}\) *Recht Decision*, slip op. at 217.
taking student poverty into account. And the point can be pushed still further. As my colleague Joshua Weishart has pointed out, West Virginia has never even commissioned a “costing out” study that would seek to determine what it would actually cost to produce the results the legislature has selected as defining a thorough and efficient education. Even on a relatively modest vision of judicial review that defers significantly to the legislature’s choice of means, courts might question whether the legislature’s commitment to the end of a thorough and efficient education for all runs as deep as the state constitution requires.

Litigation in other states—most famously, in New Jersey—has proceeded in two broad phases: a first designed to produce a legislative plan for an educational system meeting constitutional requirements, and a second designed to ensure that the legislative commitments bear real fruit for all students. West Virginia’s litigation ended in 2003 with the first phase seemingly complete, but no second phase has ever begun in the state. Second-phase suits have been brought successfully in other states, and they are still being brought. Indeed, a suit based on a “failure to adjust resources in response to performance measures” theory survived a motion to dismiss in the Delaware Chancery Court late last year. Plaintiffs pointed to Delaware’s accountability system as a legislative declaration of a substantive educational guarantee, then compared the goal to the disappointing test results achieved by “disadvantaged students,” i.e. low-income students, disabled students, and English language learners. The theory, approved in principle by the trial court, was that Delaware had failed these classes of disadvantaged students by failing to provide the resources needed to meet the state’s own definition of an adequate education. When Judge Recht relinquished jurisdiction over the Pauley litigation in 2003, he was properly satisfied that the state had finally taken aim at the proper constitutional goal, and he was confident that the state’s choice of means would rationally support the ends identified by the new accountability system. That West Virginia has neither accounted for poverty in its school funding system nor performed a cost adequacy study suggests that Judge Recht’s confidence has not been completely rewarded. The time may not be right to continue the battle for adequately equal educational opportunity in West Virginia through the courts.


263 As in the Robinson v. Cahill sequence of cases in New Jersey, culminating in the 1976 decision that New Jersey legislation passed in response to the Robinson litigation was facially constitutional. Robinson v. Cahill, 355 A.2d 129 (N.J. 1976).


Still, we should not forget that Pauley’s core promise of a thorough and efficient education remains unfulfilled for many West Virginians. Courts cannot change that by themselves, and it can fairly be said that the Pauley litigation might have produced greater change had there been more public support for Pauley’s twin goals of promoting quality and equality in West Virginia education. Perhaps the teachers’ strikes and this spring’s resistance to S.B. 451 can be seen as an effort to realize the vision that the West Virginia Supreme Court of Appeals put forward forty years ago.267 If so, one hopes that popular political commitment to Pauley’s constitutional vision will one day finish the job the courts started.

VIII. PAULEY’S LEGACY.

Pauley articulated a vision of the right to education that was and is normatively attractive because it properly insisted on the importance of both educational quality and educational equality. That vision should still command the allegiance of West Virginians, and recent political events suggest that for many West Virginians, it still does. While much work remains to make Pauley’s vision a reality, the decision moved the state’s education system forward in several ways:268

First, Pauley has resulted in a substantial increase in West Virginia’s overall level of investment in primary and secondary education. A 2018 study from Rutgers and the Education Law Center based on 2015 data ranked West Virginia 22nd among states in its educational funding level with an adjusted figure of $9,932 per student.269 That might not sound especially impressive, but the study ranks West Virginia ahead of much wealthier states including California (32nd), Florida (41st), and North Carolina (47th). More tellingly, West Virginia is one of only seven states to receive an A grade on “fiscal effort,” a measure that indexes state and local education spending in relation to a state’s ability to generate revenue.270 Together, these measures portray a relatively poor state with a greater commitment to support education than many of its wealthier neighbors. That level of commitment is unimaginable without Pauley.

267 See supra notes 14–16 and accompanying text.
268 My colleague Robert Bastress, supra note 51, provides a cogent summary of Pauley’s practical impact at 324–26. My observations largely track those of Professor Bastress.
269 BAKER, FARRIE, & SCIARRA, supra note 258, at 10. The study’s funding level measure is based on a model that “predicts average funding levels while controlling for . . . student poverty, regional wage variation, and school district size and density.” Id. at 9. On a less optimistic note, however, West Virginia is like many states in that funding levels have yet to fully rebound from the Great Recession of 2008. See Weishart, Long Overdue, supra note 262, at 15–16.
270 BAKER, FARRIE, & SCIARRA, supra note 258, at 15–16. The study measures fiscal effort in relation to both personal income and gross state product. West Virginia was in the top group of seven states on the personal income measure and in the top group of twelve states on the gross state product measure.
Second, Pauley’s emphatic insistence that education funding is a state responsibility—along with Tax Limitation Amendments in 1932 and 1982—has resulted in the state assuming a larger share of responsibility for the education budget. Shifting funding responsibility away from localities and toward the state has been a constant in school finance equity litigation from the beginning. Some of the earliest cases won by reformers featured levels of local funding responsibility that would be hard to imagine today. See, e.g., Horton v. Meskill, 376 A.2d 359, 366 (Conn. 1977) (finding that local funding paid for 70% of the Connecticut school budget). For discussion of West Virginia’s Tax Limitation Amendments, see Bastress, Constitution, supra note 51, at 284–86, 292–94.

According to the West Virginia Department of Education, the state provides 57.4% of the revenue supporting the public schools, while local governments contribute 32.6% and the federal government contributes 10%.272 Other things being equal, a higher proportion of state funding produces greater fairness by compensating for local revenue shortfalls in property-poor districts and by substituting more progressive modes of taxation (i.e. income taxation) for regressive property taxation regimes.

Third, Pauley and the Recht Decision led to the creation of a robust statewide school facilities system and significant investment in new school construction, particularly during the 1990s.273 While the School Building Authority’s funding criteria promoted school consolidation and have been criticized on that score,274 there is no denying that facilities spending and quality have improved.

Fourth, Pauley and the Recht Decision were significant factors in prompting the state to reform its system of property tax appraisal and assessment in 1990.275

Fifth, Pauley established that educational classifications are subject to strict scrutiny. The application of this stringent standard has led to a series of supreme court decisions protecting the right to education from a varied set of infringements.276

Sixth, Pauley solidified the principle that education has constitutionally preferred status in West Virginia’s budget. The Supreme Court of Appeals of West Virginia has been consistently willing to enforce this principle,277 which

271 Shifting funding responsibility away from localities and toward the state has been a constant in school finance equity litigation from the beginning. Some of the earliest cases won by reformers featured levels of local funding responsibility that would be hard to imagine today. See, e.g., Horton v. Messkill, 376 A.2d 359, 366 (Conn. 1977) (finding that local funding paid for 70% of the Connecticut school budget). For discussion of West Virginia’s Tax Limitation Amendments, see Bastress, Constitution, supra note 51, at 284–86, 292–94.

272 See West Virginia Dep’t of Educ., Sourcebook 2015, supra note 56, at 55.


274 See generally Bastress, The Impact of Litigation, supra note 62, and Purdy, supra note 145.

275 See supra note 146.

276 See, e.g., Shrewsbury v. Bd. of Educ., Wyoming Cty., 265 S.E.2d 767 (W. Va. 1980) (ordering school board to provide transportation to children living on a poorly maintained road, even at the cost of purchasing additional vehicles smaller than a school bus); Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340 (W. Va. 1977) (holding that students expelled from West Virginia schools must be provided with a free education in an alternative educational environment).

probably plays some part in explaining the state's relatively strong record for investing in education.

*Pauley*’s legacy regarding inter-district equity—the core issue that birthed school finance equity litigation—is more mixed. The constitutional invulnerability of the excess levy means that inter-district equity can never be perfect, of course. But if equity is measured “horizontally” in terms of per capita student spending, West Virginia fares well. Indeed, a 2012 study by the New America Foundation ranked West Virginia second behind Hawaii in inter-district equity. 278 In addition, an array of minor changes to the state financing system in the years since *Pauley* has helped to address the greater resource needs of rural, sparsely populated counties. 279

On the other hand, studies that prize “vertical equity”—i.e. targeting greater resources toward students with greater needs—give West Virginia lukewarm reviews. The Rutgers/Education Law Center study measures inter-district equity by asking “whether a state’s funding system recognized the need for additional resources for students in settings of concentrated student poverty.” 280 State finance systems are regarded as progressive if they allocate at least 5% more funding for high (30%) poverty districts than for low (0%) poverty districts. West Virginia’s funding distribution is essentially flat, which warrants a grade of C. 281 As I have already indicated, West Virginia’s resource-based school financing formula does not adjust funding levels to account for student or district poverty. As Judge Recht saw in 1982, recognizing that high-poverty schools need greater resources should be seen as a key part of the *Pauley* mandate. 282

The Rutgers/Education Law Center Study identifies other troubling facts about the compensation and distribution of teachers in West Virginia’s public schools. We know, and have known for a long time, that good teachers matter. And as a matter of simple economics, attracting and retaining good teachers requires competitive wages. 283 Yet using 2015 data, the Rutgers/ELC study ranked West Virginia only 33rd in providing competitive wages for teachers. A 25-year old teacher in West Virginia in 2015 made only 79% of the salary of other 25-year old professionals in the same labor markets with similar levels of education and hours worked. 284 We also know that smaller class sizes matter, particularly for students in high-poverty schools. From an equity standpoint, then, the distribution of teachers ought to be skewed toward high-poverty

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278 Cited in BASTRESS, CONSTITUTION, supra note 51, at 324 n.9. As Hawaii has only one school district, its inter-district equity is necessarily perfect.

279 See supra notes 256–257 and accompanying text.

280 BAKER, FARRIE, & SCIARRA, supra note 258, at 9.

281 Id. at 11.

282 See supra notes 250–258 and accompanying text.

283 See supra notes 240–249 and accompanying text.

284 BAKER, FARRIE, & SCIARRA, supra note 258, at 24, 26.
districts. West Virginia’s distribution of teachers, like its distribution of funding resources, is essentially flat.\textsuperscript{285}

In sum, \textit{Pauley} has done a lot of good for West Virginia, but much remains to be done. Recent teacher strikes suggest that West Virginia educators hold fast to \textit{Pauley}’s promise of a free, thorough and efficient system of public education for all West Virginians. Yet frustration with the slow pace of change, perhaps coupled with cynical doubts that public education in the poorest West Virginia counties can ever be made thorough and efficient, has brought the state to a crossroads. Will West Virginia redouble its commitment to make the public schools thorough and efficient for all students? Or did the introduction of S.B. 451 signal that West Virginia is about to head down what teachers perceived as a slippery slope toward privatization?\textsuperscript{286} The first path regards \textit{Pauley} as a beacon of a better future; the second regards it as a mistake. The path West Virginians choose will determine whether the legacy of \textit{“Pauley at 50”} will be worth celebrating.

\textsuperscript{285} \textit{Id.} at 24, 27.

\textsuperscript{286} After the failure of S.B. 451, Senate President Mitch Carmichael lamented that the “champions of the status quo” had won, but added that the teachers’ victory “will not stop progress. They’re on the wrong side of history.” Brad McElhinny, \textit{House Votes to Table Omnibus Education Bill Indefinitely, W.V. METRO NEWS} (Feb. 19, 2019), http://wvmetronews.com/2019/02/19/striking-teachers-gather-chant-at-west-virginia-capitol-ahead-of-house-vote/. President Carmichael’s comments suggest that West Virginia teachers properly grasped the stakes when they chose to draw the line at the first steps toward school privatization.