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Constitutional Law—Education and Equal Protection—Towards Intelligence and Virtue: Arkansas Embarks on a Court-Mandated Search for an Adequate and Equitable School Funding System. Lake View School District No. 25 v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002).

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CONSTITUTIONAL LAW—EDUCATION AND EQUAL PROTECTION—TOWARDS INTELLIGENCE AND VIRTUE: ARKANSAS EMBARKS ON A COURT-MANDATED SEARCH FOR AN ADEQUATE AND EQUITABLE SCHOOL FUNDING SYSTEM. *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002).

I. INTRODUCTION

The Arkansas Constitution proclaims that “[i]ntelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government.”¹ Our society’s emphasis on education traces back to our nation’s founding.² Arkansans appreciate the value of education enough to associate educational deficiencies with the state’s poverty, its low-paying jobs, and the overall degradation of its citizens’ welfare.³

Many argue that the state’s public schools have not kept pace with the state’s understanding of and appreciation for the benefits of education.⁴ Some might blame this shortcoming on a resistance to change, and at least one study suggests that the level of school financing discrepancy and the popular will for change are societal functions defined by regions.⁵ The greater society’s resistance to change, the more reluctant the state legislature is to reform the state’s school finance system; therefore, court action often becomes necessary for reform.⁶

In *Lake View School District No. 25 v. Huckabee* (“Lake View IV”),⁷ the Arkansas Supreme Court ended ten years of litigation when it determined that the Arkansas school funding system was both inadequate and inequitable.⁸ This ruling required the state to examine both the formulae and the underlying concepts in how it provides public education for Arkansas’s children.⁹ The court’s ruling demonstrated the unique nature of school fund-

1. ARK. CONST. of 1874, art. 14, § 1, *amended by* ARK. CONST. of 1874 amend. 53.

2. See Christine M. Durham, *The History and Contemporary Content of Constitutional Mandates for Public Education: Obligations of the Judicial Branch*, 15 UTAH B. J. 33, 33 (2002) (pointing out that Thomas Jefferson and Benjamin Franklin were among those responsible for bringing education to the forefront of our nation’s culture).

3. See, e.g., Jim Argue, Jr., *A Chance for Schools: Lakeview Case Means the State Needs To Decide*, ARK. DEMOCRAT-GAZETTE, Feb. 2, 2003, at 79.

4. See, e.g., *id.*

5. See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1125 (2000) (explaining the hypothesis of sub-cultural typologies and describing “traditionalistic” states as resistant to changes).

6. See *id.*

7. 351 Ark. 31, 91 S.W.3d 472 (2002).

8. *Id.*, 91 S.W.3d at 472.

9. See generally *id.* at 97–98, 91 S.W.3d at 511 (finding that the state would have to get more involved in school funding allocations and expenditures to satisfy the school funding system’s “dire need” for repair).

ing cases because the court determined what was not constitutional yet did not provide the standard that would make the system constitutional.¹⁰

This note first describes the ten-year history of this case, from its beginning in a small town in eastern Arkansas to its statewide effect.¹¹ Then, the note discusses the history of school funding litigation throughout the nation and what the measurements of "equity" and "adequacy" mean in the context of school funding.¹² Next, the note details how the Arkansas Supreme Court arrived at its findings of inequity and inadequacy.¹³ Finally, this note demonstrates how the court used judicial activism to open the door for reform while leaving unanswered the question of what would make the school funding system constitutional.¹⁴

II. FACTS

The Arkansas Supreme Court's decision on November 21, 2001, culminated over ten years of litigation.¹⁵ In 2000 the court remarked that the "case [had] taken on a life of its own"¹⁶ and that its history "is long and tortured."¹⁷ This section divides that life into three phases. The first phase includes the challengers' successful initial suit and the legislature's responses to that challenge. The second phase involves the parties' attempts to bring finality, first through agreement, then through dismissal. The third phase is the court's determination as to whether the cumulative legislative response complied with the court's initial findings.

A. Initial Litigation and Resulting Legislation

On August 19, 1992, Lake View School District Number 25 of Phillips County, Arkansas, along with the school district's board members and other Phillips County residents ("Lake View") filed a lawsuit challenging the public school funding system.¹⁸ The suit listed the following state officials

10. *Id.*, 91 S.W.3d at 511; see William H. Clune, *School Finance Reform: The Role of the Courts* 3 (Consortium for Policy Research in Educ. ed., Feb. 1993), available at <http://www.cpre.org/publications/fb03.pdf>.

11. See discussion *infra* Part II.

12. See discussion *infra* Part III.

13. See discussion *infra* Part IV.

14. *Lake View IV*, 351 Ark. at 91, 91 S.W.3d at 507; see discussion *infra* Part V.

15. *Lake View IV*, 351 Ark. at 42, 91 S.W.3d at 477.

16. *Lakeview Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 501, 10 S.W.3d 892, 904 (2000) (Glaze, J., dissenting) ("*Lake View II*").

17. *Id.* at 484, 10 S.W.3d at 893.

18. *Id.* at 483-84, 10 S.W.3d at 893-94. The school funding system in place in 1992 resulted from the School Finance Act of 1984 that passed on November 1, 1983, and went into effect on January 1, 1984. See ARK. CODE ANN. §§ 6-20-302 to -321 (Michie Repl. 1993). This legislation was passed as a result of the Arkansas Supreme Court's finding that

as defendants: the Governor, the Speaker of the Arkansas House of Representatives, the President Pro Tempore of the Arkansas Senate, the Treasurer of the State of Arkansas, officers of the Arkansas Department of Education, and Arkansas Board of Education members ("State").¹⁹ Lake View asserted that the Arkansas school funding system was unconstitutional because it violated the United States Constitution's Equal Protection Clause,²⁰ the Arkansas Constitution's Equal Protection Clause,²¹ and the Arkansas Constitution's Education Clause.²²

On November 9, 1994, the Pulaski County Chancery Court²³ ruled that the school funding system violated the Arkansas Constitution based on the disparity between wealthy and poor school districts.²⁴ The court found the funding system unconstitutional because (1) districts raised local revenues dependent upon local property value; (2) districts could increase the variances by raising local taxes in excess of the state-prescribed minimum; and (3) the state funding formula did not correct the disparities.²⁵ The court stayed the effect of its order for two years so the General Assembly could develop an equitable funding system.²⁶ The Arkansas Supreme Court described this decision, along with two December 21, 1994, modifications, as the "1994 Order."²⁷

In an effort to comply with the 1994 Order, the Arkansas General Assembly enacted Act 916²⁸ and Act 917²⁹ in April of 1995 ("1995 Legislative

the prior funding system was unconstitutional. See *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); see also discussion *infra* Part III.A.1.C.

19. *Lake View II*, 340 Ark. at 483, 10 S.W.3d at 893.

20. U.S. CONST. amend. XIV, § 1.

21. See ARK. CONST. of 1874, art. 2, §§ 2-3, 18.

22. ARK. CONST. of 1874, art. 14, § 1, *amended by* ARK. CONST. of 1874 amend. 53 (stating that "[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education").

23. Effective July 1, 2001, Arkansas's circuit courts and chancery courts merged, and they all became circuit courts. See *Lake View IV*, 351 Ark. 31, n.1, 91 S.W.3d 472, 477 n.1 (2002) (citing ARK. CONST. of 1874 amend. 80). All lower court decisions referenced in this note are dated prior to July 1, 2001; therefore, this note refers to the lower courts as "chancery courts."

24. See *Lake View II*, 340 Ark. at 484-85, 10 S.W.3d at 894; Bruce B. Tidwell, *Survey of Legislation, 1995 Arkansas General Assembly: Education*, 18 U. ARK. LITTLE ROCK L.J. 317, 317 n.2 (1996) (citing *Lake View Sch. Dist. No. 25 v. Tucker*, No. 92-5318 (Ark. Ch. Nov. 9, 1994) ("1994 Order")).

25. *Lake View II*, 340 Ark. at 484-85, 10 S.W.3d at 894.

26. *Id.*, 10 S.W.3d at 894.

27. See, e.g., *Lake View IV*, 351 Ark. at 42, 91 S.W.3d at 477.

28. ARK. CODE ANN. § 6-20-312 (Michie Repl. 1995). Act 916 prescribed a ten percent surcharge on income taxes for school districts that failed to assess the base school-funding millage; however, the Arkansas Supreme Court later found this Act unconstitutional on other

Acts"). Act 917 repealed the previous school funding system, required the State Board of Education to conduct an adequacy study, and provided for state supplements to local school districts to meet the state-established base millage.³⁰

On March 11, 1996, the State appealed, challenging both the constitutionality of the 1994 Order and the court's method of calculating equity.³¹ The Arkansas Supreme Court dismissed the appeal because the 1994 Order was not yet final and thus not ripe for appeal.³² The State argued that the 1995 Legislative Acts made the case moot because the previous, unconstitutional funding system had been replaced.³³ The court dismissed this theory because the old funding system would be effective until July 1, 1996.³⁴

After *Lake View I*, the chancery court took additional steps in the litigation process.³⁵ On August 13, 1996, the court scheduled trial for November 1996 to determine if the State had complied with the 1994 Order.³⁶ In *Lake View*'s fourth amended complaint, the school district asked the court to find the 1995 Legislative Acts unconstitutional, and the school district also sought class certification.³⁷ On November 18, 1996, Chancellor Annabelle Clinton Imber recused,³⁸ and the case was reassigned to Chancellor Collins Kilgore.³⁹ The chancery court postponed the compliance trial and found that the 1995 Legislative Acts, which the court presumed were constitutional, would be considered within the scope of facts for the compliance determination.⁴⁰

The state enacted additional school financing legislation in 1996 and 1997.⁴¹ On November 5, 1996, the people of Arkansas passed Amendment 74 of the Arkansas constitution ("Amendment 74").⁴² Amendment 74 re-

grounds. See *Lake View II*, 340 Ark. at 485 n.2, 10 S.W.3d at 894 n.2 (citing *Barclay v. Melton*, 339 Ark. 362, 5 S.W.3d 457 (1999)).

29. ARK. CODE ANN. §§ 6-20-301 to -320 (Michie Repl. 1995).

30. *Id.* (repealing the School Finance Act effective July 1, 1996).

31. See *Tucker v. Lake View Sch. Dist. No. 25*, 323 Ark. 693, 917 S.W.2d 530 (1996) ("*Lake View I*").

32. *Id.* at 697, 917 S.W.2d at 533.

33. *Id.*, 917 S.W.2d at 533.

34. *Id.*, 917 S.W.2d at 533.

35. *Lake View II*, 340 Ark. 481, 486, 10 S.W.3d 892, 895 (2000).

36. *Id.*, 10 S.W.3d at 895.

37. *Id.*, 10 S.W.3d at 895. On August 22, 1996, the court approved class certification for everyone affected by the state's school districts: students, parents, school boards, and taxpayers. *Id.*, 10 S.W. 3d at 895.

38. In January 1997 Judge Imber became an Associate Justice of the Arkansas Supreme Court. See *id.* at 487, 10 S.W.3d at 895.

39. See *Lake View IV*, 351 Ark. 31, 44 n.4, 91 S.W.3d 472, 478 n.4 (2002).

40. See *Lake View II*, 351 Ark. at 487, 10 S.W.3d at 895-96.

41. See *id.* at 486-88, 10 S.W.3d at 895-96.

42. ARK. CONST. of 1874 amend. 74.

quires all school districts to enact a minimum property tax rate of twenty-five mills and to use those funds for the operation and maintenance of their schools.⁴³ The amendment also provides that districts may tax beyond the twenty-five mills to acquire additional funds for the operation and maintenance of schools.⁴⁴ In 1997 the State enacted Act 1307⁴⁵ and Act 1108⁴⁶ ("1997 Legislative Acts"). Act 1307 defined which revenue sources count towards the minimum twenty-five mills and established that high school graduates should "demonstrate a defined minimum level of competence in English Communications, oral reading and writing; [m]athematical skills; and [s]cience and social studies disciplines."⁴⁷ Act 1108 established the goals of providing students with basic skills competency, practical skills application, and state assessments to measure student achievement.⁴⁸

B. Agreement and Dismissal Attempts

On May 29, 1997, Lake View filed its fifth amended complaint in which it challenged the constitutionality of both the 1995 Legislative Acts and the 1997 Legislative Acts.⁴⁹ The chancery court gave Lake View until November 21, 1997, either to resubmit its complaint free of conclusory allegations or to submit a different pleading.⁵⁰ Lake View chose to submit a petition to show cause as to why the court should not hold the State in contempt for non-compliance with the 1994 Order.⁵¹ The State filed a motion to dismiss Lake View's petition.⁵²

While these actions were pending, the parties filed an Agreed Order.⁵³ The proposed settlement stated, *inter alia*, that Lake View would dismiss the case after the court resolved the attorneys' fees and costs issues, which the court could consider after Lake View submitted its application for those fees and costs.⁵⁴ The chancellor rejected the Agreed Order.⁵⁵

43. See *id.* A mill is 1/10 of one cent or .001 dollars, so 25 mills is .025 dollars. Millage is mills per dollar of valuation. See Michael Rowett, *Re-look at Schools' Funding Rejected*, ARK. DEMOCRAT-GAZETTE, Dec. 20, 2002, at 1.

44. ARK. CONST. of 1874 amend. 74.

45. ARK. CODE ANN. §§ 6-20-302 to -327 (LEXIS Repl. 1999).

46. *Id.* §§ 6-15-1001 to -1011 (LEXIS Repl. 1999) (establishing the Arkansas Comprehensive Testing, Assessment, and Accountability Program).

47. *Id.* §§ 6-20-302 *et seq.*

48. *Id.* §§ 6-15-1001 to -1011.

49. *Lake View II*, 340 Ark. 481, 488, 10 S.W.3d 892, 896 (2000).

50. *Id.*, 10 S.W.3d at 896.

51. *Id.* at 488-89, 10 S.W.3d at 896-97.

52. *Id.*, 10 S.W.3d at 896-97.

53. *Id.* at 489, 10 S.W.3d at 897.

54. See *id.* at 489, 10 S.W.3d at 897. The court's award of attorneys' fees was a large portion of Lake View's case, necessitating that it file a separate brief on attorneys' fees alone. See *Lake View IV*, 351 Ark. 31, 46, 91 S.W.3d 472, 479 (2002). The attorneys' fee issues are

On August 17, 1998, the chancery court found that the combination of Amendment 74, Act 917, and Act 916 made both Lake View's fourth amended complaint and its show-cause petition moot.⁵⁶ The court, therefore, dismissed both the complaint and the petition.⁵⁷ Lake View had the burden of overcoming the legislation's presumption of constitutionality, but the court determined that Lake View had not provided sufficient facts to meet its burden.⁵⁸ The Arkansas Supreme Court, however, reversed and remanded the chancellor's dismissal, ordering the chancery court to conduct a compliance trial soon.⁵⁹

C. Compliance Determination

In September 2000, six months after *Lake View II*, the chancery court commenced the compliance trial.⁶⁰ The trial lasted for nineteen days, involved thirty-six witnesses, produced 187 exhibits, and resulted in a ninety-nine volume appellate record with 20,878 pages.⁶¹ On May 25, 2001, the chancery court found that the school funding system was still inequitable and inadequate.⁶²

The compliance trial brought to light several indications of Arkansas's student performance as measured by rankings.⁶³ In per capita elementary and secondary education expenditures, Arkansas ranked fiftieth among the states.⁶⁴ Between 1990 and 1999, Arkansas students scored significantly

beyond the scope of this note.

55. See *Lake View II*, 484 Ark. at 490, 10 S.W.3d at 897.

56. *Id.*, 10 S.W.3d at 898-99.

57. *Id.*, 10 S.W.3d at 898-99.

58. *Id.*, 10 S.W.3d at 898-99.

59. *Id.* at 495, 10 S.W.3d at 900.

60. *Lake View IV*, 351 Ark. 31, 45, 91 S.W.3d 472, 479 (2002). Also in September 2000, the Rogers and Bentonville School Districts, who were intervenors on behalf of the State, filed a cross-claim against the State. *Id.* at 45-46, 91 S.W.3d at 479. They filed the cross-claim because, although they agreed that the funding system was equitable, they did not think the funding system met the newly presented test of adequacy. *Id.*, 91 S.W.3d at 479. One hundred and forty-four of the state's 310 school districts agreed that the legislative actions had corrected the inequities in the school funding system, yet the chancery court denied the districts' requests to join as intervenors. *Id.*, 91 S.W.3d at 479. In addition to the Rogers and Bentonville School Districts, the Alma School District, the Little Rock School District (which later joined in the appeal challenging the adequacy of the state school funding system), and the Pulaski County Special School District were joined as intervenors. *Id.*, 91 S.W.3d at 479.

61. *Id.*, 91 S.W.3d at 479.

62. *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 1992-5318, 49, 53-54 (Ark. Ch. 2001).

63. See *Lake View IV*, 351 Ark. at 59-60, 91 S.W.3d at 488.

64. *Id.*, 91 S.W.3d at 488.

below average on national standardized tests.⁶⁵ Of Arkansas's fourth-grade students tested in reading and math, only forty-four percent and thirty-four percent, respectively, were proficient in those subjects.⁶⁶ The math scores worsened for eighth-grade students, who demonstrated a sixteen-percent proficiency rate.⁶⁷ Admissions officials at Arkansas's universities required fifty-eight percent of entering Arkansas students to take either math or English remediation courses before they could start collegiate coursework.⁶⁸

The trial also introduced non-performance discrepancies caused by the school funding system.⁶⁹ In teacher salaries, Arkansas ranked forty-fifth in the nation and last among its bordering states.⁷⁰ Some schools could not meet basic equipment demands.⁷¹ The court listed multiple examples of substandard facilities, primarily in the eastern part of the state.⁷²

The 2001 school funding system that the chancery court found unconstitutional had three funding sources: federal funds targeted for special needs students, state funds, and local funds that derived primarily from property taxes.⁷³ The state distributed the funds through a complex, technical state funding formula designed to equalize the per-pupil revenue disparities among the districts.⁷⁴

The state offered guarantees to the local districts beyond the funding formula.⁷⁵ To diminish the extent of disparities between districts, the state

65. See *id.*, 91 S.W.3d at 488.

66. *Id.*, 91 S.W.3d at 488.

67. *Id.*, 91 S.W.3d at 488.

68. See *id.*, 91 S.W.3d at 488.

69. See *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 1992-5318, 39-40 (Ark. Ch. 2001).

70. *Id.* The trial court pointed to one example in which a science teacher at the Lake View high school possessed two masters degrees and had over forty-one years of experience, yet made only \$31,500 per year. *Id.*

71. See, e.g., *id.* at 15. For example, Lake View's math classroom had one useable chalkboard, on which tests had to be written because of a dilapidated duplicating machine, and the school did not have enough graphing calculators for its trigonometry class of only ten students. *Id.*

72. See *id.* at 18 (finding "poor heating and air conditioning systems, broken and missing windows, missing floor tiles and walls in need of repair").

73. See *id.* at 11.

74. See *id.* The court offered a "simplified explanation" of the school funding formula in Arkansas. *Id.* The funding formula started with the calculation of two numbers, the "local resource rate" and the "base level revenue." See *Lake View IV*, 351 Ark. 31, 47, 91 S.W.3d 472, 480 (2002). The local resource rate represented the per-pupil revenue that a district raised from property taxes. *Id.*, 91 S.W.3d at 480. The base level revenue represented the per-pupil equal share of the state's total school funding revenue, from both the state and all local funding sources. *Id.*, 91 S.W.3d at 480. If the local resource rate was less than the base level revenue, then the state supplemented the difference through Equalization Aid. *Id.*, 91 S.W.3d at 480.

75. See *Lake View IV*, 351 Ark. at 48-49, 91 S.W.3d at 481.

guaranteed a per-student minimum funding rate, termed "additional base funding," that was equal to eighty percent of the per-pupil rate of the school at the ninety-fifth percentile.⁷⁶ The state also provided funds for computer and bus purchases and facility repairs through the Growth Facilities Funding program.⁷⁷ The Debt Service program offered assistance in servicing debt incurred from capital improvement projects.⁷⁸

The 2001 school funding system did not differ much from the 1994 school funding system.⁷⁹ The primary difference was the change from providing additional funds for special-needs students through the school funding formula in 1994 to providing those additional funds through special categories outside of the formula in 2001.⁸⁰ Both systems started with a per-pupil funding amount based on available funds, and then each system used that foundation in attempts to provide equal per-pupil revenues throughout the state.⁸¹ Neither system solved Arkansas's educational funding problems; therefore, the battle in the courts continued.⁸²

III. BACKGROUND

As a nation we have an appreciation for the benefits of education to both individuals and society.⁸³ Indeed, even the courts have taken notice of the impact that education has on the success of our civilization.⁸⁴ Although the recognition of educational importance is almost universal, there has been formidable opposition to the school funding reform initiatives.⁸⁵ These forces have made it difficult for the political branches or the administrative

76. See *id.*, 91 S.W.3d at 481 (citing ARK. CODE ANN. § 6-20-303(17) (LEXIS Repl. 1999)) (defining the ninety-fifth percentile as a ranking based on the total per-pupil revenue from both state and local sources).

77. *Id.*, 91 S.W.3d at 481.

78. *Id.*, 91 S.W.3d at 481.

79. *Id.* at 47, 91 S.W.3d at 480.

80. See *id.*; see also discussion *infra* Part III.A.1.b.i.

81. See *Lake View IV*, 351 Ark. at 48, 91 S.W.3d at 480.

82. See *id.* at 71, 91 S.W.3d at 496 (stating that Arkansas had not fulfilled its obligation to provide every child with an adequate education).

83. See, e.g., Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 136, 136 (Helen F. Ladd et al. eds., 1999), available at <http://books.nap.edu/books/0309065631/html/R1.html>.

84. See, e.g., Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 550-52 (1998) (explaining the judicial recognition of how education affects personal and national economics, politics, and social growth).

85. See Carr & Fuhrman, *supra* note 83, at 137-39 (indicating the various political issues involved in school finance challenges, including local control and separation of power concerns).

agencies to bring reform,⁸⁶ and the courts find themselves amidst this politically-charged fray.⁸⁷ This section discusses the legal challenges to our public school finance systems, following with an exploration of the opposition to school finance reform.

A. The Case for Reform

Challenges to state school finance systems have spanned the last thirty years and have involved litigation in forty-one states.⁸⁸ Almost half of those states have found for those challenging the constitutionality of the funding system⁸⁹ while the rest have found for the states.⁹⁰ Challengers have presented two basic arguments for the necessity of school finance reform: inequity and inadequacy.⁹¹ Both litigants and courts often confuse these arguments, and this confusion only adds to the inherent difficulty of assessing the merits of both arguments.⁹²

1. *The Equity Challenge*

Litigants first challenged public school financing systems by basing their arguments on equal protection.⁹³ In examining the equity question, this section first discusses the nation's equity litigation history.⁹⁴ Because equity

86. See *id.* at 141 (explaining that the political environment leads to a lack of incentives for the majoritarian branches to resolve school funding issues).

87. See *id.*

88. See, e.g., Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 84, at 35, 41–46; Jon Mills & Timothy McLendon, *1999 Florida Constitution Revision: Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State To Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329 app. II at 402–09 (2000) (summarizing each state's educational funding litigation). See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Ex parte James*, 836 So. 2d 813 (Ala. 2002) (finding that the court's ordering of remedies to school finance inadequacy would be a violation of the separation of powers and dismissing the prior order that the legislature comply with the court order to develop an adequate system); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

89. See Mills & McClendon, *supra* note 88, at 402–09.

90. See *id.*

91. See, e.g., William E. Thro, *Issues in Education Law and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 601–03 (1994).

92. See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (stating that "[w]hat constitutes an appropriate education or even an 'equal, adequate, and meaningful' one, 'is not likely to be divined for all time even by the scholars who now so earnestly debate the issues'" (quoting *Rodriguez*, 411 U.S. at 43)).

93. See Thro, *supra* note 91, at 600–01.

94. See discussion *infra* Part III.A.1.a.

as an argument is difficult to understand without a basic understanding of what finance equity means, the note then examines the empirical determination of equity.⁹⁵ This section concludes by discussing how Arkansas has fared in the school funding equity analysis.⁹⁶

a. Equity litigation

Americans have often used the judicial process in our constant search for equal opportunity.⁹⁷ The question of equal opportunity was a natural result of the Supreme Court's almost revolutionary approach to the Fourteenth Amendment in the 1950s and 1960s.⁹⁸ In particular, *Brown v. Board of Education*⁹⁹ and its progeny brought education and the Equal Protection Clause together.¹⁰⁰ The idea that education serves as the great equalizing key to success in our society contributed to the bringing of educational challenges based on equal opportunity.¹⁰¹ In light of these circumstances, litigants naturally saw equal protection as the appropriate path for challenges to school finance systems.¹⁰²

Commentators have expressed the evolution of school finance reform in terms of three "waves" of litigation.¹⁰³ The first wave consisted of those challenges based on the Fourteenth Amendment's Equal Protection Clause.¹⁰⁴ In 1973 the United States Supreme Court found that equality in school financing is not a fundamental right guaranteed by the Constitution; therefore, the Court did not find a state's school finance system in violation of the Fourteenth Amendment.¹⁰⁵ The Court found that equal educational funding was not a fundamental right because the Constitution neither explicitly nor impliedly provided for such a right.¹⁰⁶

After the Court's ruling in *Rodriguez*, litigants turned to the state courts.¹⁰⁷ All states have educational clauses in their constitutions providing

95. See discussion *infra* Part III.A.1.b.

96. See discussion *infra* Part III.A.1.c.

97. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 101 (1995) (citing the nation's equality litigation in the areas of racial equality, interstate commerce, and equal rights for those with disabilities).

98. See *id.* at 116.

99. 347 U.S. 483 (1954).

100. *Id.* at 495.

101. See Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 84, at 7.

102. See Enrich, *supra* note 97, at 117.

103. See Thro, *supra* note 91, at 598 n.4.

104. See *id.* at 600.

105. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973).

106. See *id.*

107. See Thro, *supra* note 91, at 601-02.

explicit rights to education.¹⁰⁸ Litigants used this naturally progressive argument to their advantage in state-based litigation in which they pointed to an explicit education clause.¹⁰⁹

The second wave consisted of state court litigation challenging the equal opportunity provided by school financing systems.¹¹⁰ Challengers based their cases on the state constitutions' equal protection clauses, the state constitutions' education clauses, or both.¹¹¹ California was the first state to hear a school finance argument challenging the inequity of the state's funding system, and the plaintiffs based their successful challenge on the state's equal protection clause.¹¹² The court determined that the funding system violated the state's equal protection clause because the state designed the system so that a child's level of educational opportunity was directly related to the wealth of that child's school district.¹¹³ In 1973 the New Jersey Supreme Court became the first second-wave court to use the state educational clause as the basis for finding that the school funding system was inequitable.¹¹⁴ Again, the state court found that there was inequity based on the equal protection clause.¹¹⁵

The second-wave cases had varying results because, although most state equal protection clauses are almost identical to the federal equal protection clause, the state courts interpreted them differently.¹¹⁶ During the first two waves, seven state courts found their school funding systems unconstitutional due to inequity,¹¹⁷ but courts in fifteen states did not find the funding systems unconstitutional.¹¹⁸

108. See Mills & McLendon, *supra* note 88, at 344. Scholars have placed education clauses in four categories based on the strength of what the clause guarantees. *Id.* Category I clauses provide for some public school system. *Id.* Category II clauses annotate some minimal quality standards that the public school system should provide. *Id.* Category III clauses are more specific about the required quality standards. *Id.* Category IV clauses are the strongest, because they state education as a paramount state duty. See *id.* For a listing of the text of education clauses that have been cited in state constitutions with category designations, see *id.* app. I at 387–401. Arkansas's "efficient system" language is a Category II clause. ARK. CONST. of 1874, art. 14, § 1, *amended by* ARK. CONST. amend. 53; See Mills & McLendon, *supra* note 88, at 345.

109. See Mills & McLendon, *supra* note 88, at 337.

110. See Thro, *supra* note 91, at 601–02.

111. See *id.*

112. See *Serrano v. Priest*, 557 P.2d 929, 957–58 (Cal. 1977).

113. See *id.*

114. See *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973).

115. See *id.* at 295.

116. See Thro, *supra* note 91, at 602–03.

117. See Mills & McLendon, *supra* note 88, at 337 n.30 (listing Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming).

118. See *id.* at 336 n.31 (listing Arizona, Colorado, Georgia, Idaho, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, and Wisconsin).

b. Empirical equity

One of the major challenges in answering the equity question is defining equity in school funding systems.¹¹⁹ The courts have turned to empirical data to help answer this question.¹²⁰ Education policy scholars indicate that states must address four questions to determine if a school finance system is equitable: (1) whether it is the taxpayer or the student who should benefit from the funding system; (2) whether states should measure revenue or distribution of educational outcomes; (3) what principles states should use to determine equitable distribution; and (4) what statistics states should use to determine the degree of equity.¹²¹ A full exploration of these questions is beyond the scope of this note. Instead, this section explores those underlying questions through three broad issues: the distribution principles, the distribution formulae, and the determination of inequality.¹²²

i. *Distribution principles*

The basic principle underlying a school funding system is the first issue in an empirical analysis.¹²³ Horizontal equity, vertical equity, and fiscal neutrality are common principles that states and courts use to determine the most equitable way to distribute school funds.¹²⁴

The horizontal equity principle is based on the idea that pupils who are "equally situated" should receive equal funding.¹²⁵ The principle is based on the concept that the amount of funding per child should be the same for all pupils throughout the state regardless of the property valuations within the pupils' districts.¹²⁶ The argument under this principle expounds the "one scholar-one dollar" concept that students should be funded alike, and the argument does not take into account the increased funding requirements for students who have special needs.¹²⁷

119. See Berne & Stiefel, *supra* note 101, at 9.

120. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (evaluating past and present funding formulae, equalization calculations, national rankings and test scores in forming funding system constitutionality).

121. See GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, SCHOOL FINANCE: THREE STATES' EXPERIENCES WITH EQUITY IN SCHOOL FUNDING 5 (Dec. 19, 1995).

122. See *id.*

123. See *id.*

124. See *id.*

125. See Berne & Stiefel, *supra* note 101, at 18-19 (explaining that "equally situated" means all students within a group, such as general education or at-risk groups, should be funded alike).

126. See *id.*

127. See Minorini & Sugarman, *supra* note 88, at 36.

Funding based on the vertical equity principle, however, does factor in the differences in funding requirements among members of designated groups of students (e.g., Title I students, special education students, students in poorer districts, etc.).¹²⁸ This method has been called needs-based equity because it is based on the idea that differently situated students should receive different funding.¹²⁹ The most common way to address the varying funding needs of student groups is to incorporate a mathematical weight greater than one for each student with a greater funding need.¹³⁰

Fiscal neutrality is not itself a principle of funds distribution.¹³¹ Rather, fiscal neutrality is a measurement of the relationship between the per-pupil school funding and the school district's wealth.¹³² A score of zero indicates that there is no relationship between student funding and district wealth.¹³³ As the score increases, the relationship between funding and wealth strengthens.¹³⁴ Fiscal neutrality is a valuable tool in determining funds distribution because it can be used as a basis for measuring the need for the state to supplement the local, wealth-based funding revenue through the process of "leveling-up."¹³⁵

ii. *Distributions formulae*

States use two basic formulae for the distribution of state funds to school districts within the state.¹³⁶ The first is the foundation formula, which is designed to guarantee the same amount of education dollars for all students.¹³⁷ In the early cases, foundation funding formulae were the standard basis of state funds distribution.¹³⁸

128. *See id.*

129. *See id.*

130. *See* Berne & Stiefel, *supra* note 101, at 21 (indicating that in the 1993–94 school year, thirty-seven states used weighting in their funding formulae). With a weighted formula, for example, a special needs student might be funded at 1.33, which means that the student would be funded as one and one-third students.

131. *See* John G. Augenblick et al., *Equity and Adequacy in School Funding*, THE FUTURE OF CHILDREN, Winter 1997, at 63, available at http://www.futureofchildren.org/usr_doc/vol7no3ART5.pdf.

132. *See id.* at 73.

133. *See id.* at 73 fig.2; *see also id.* at 63–64 (indicating that a district's wealth is function of its "ability and willingness to raise local tax revenues").

134. *Id.*

135. *See generally* Carr & Fuhrman, *supra* note 83, at 138, 161 (explaining that "leveling-up" occurs when the state supplements local tax revenues to bring poor districts up to the prescribed per-pupil funding level); Margaret E. Goertz & Gary Natriello, *Court-Mandated School Finance Reform: What Do the New Dollars Buy?*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 99, 111.

136. *See* Clune, *supra* note 10, at 5; Goertz & Natriello, *supra* note 135, at 104.

137. *See* Goertz & Natriello, *supra* note 135, at 104, 132 n.5.

138. *See* Enrich, *supra* note 97, at 126 n.119 (listing the early cases and the per-pupil

A foundation formula starts with the state's determination of the per-pupil base, or foundation, to which the districts contribute (usually through funds raised with local property taxes).¹³⁹ The state provides the difference between the district contribution and the state-prescribed foundation amount.¹⁴⁰ The result is that students receive the same amount of support regardless of their district's property value.¹⁴¹ Because this formula directly relates to district property values, districts with higher property values receive less state funding than districts with lower property values.¹⁴² Arkansas uses a foundation program.¹⁴³

The second basic formula is the guaranteed tax base (GTB).¹⁴⁴ This formula provides for even greater state revenue to compensate for very large disparities in school districts' property values.¹⁴⁵ The formula attempts to equalize the tax base among the districts through an established, minimum tax base.¹⁴⁶ Because the variable in this formula is the tax base (usually based on property value) rather than the tax rate, using the GTB allows districts the freedom to choose their tax rates.¹⁴⁷ Under this formula, the state provides the difference between the district-chosen tax rate as applied to its actual tax base and the district-chosen tax rate as applied to the GTB.¹⁴⁸ Obviously, districts with a tax base greater than the GTB would not benefit from this formula; therefore, the formula also allows for greater state funds distributions to districts with lower property values.¹⁴⁹

iii. *Inequality determination*

The purported goal of the various principles is to design funding formulae that result in an equitable funding system.¹⁵⁰ To determine if the principles and resulting formulae meet that goal, courts must explore the question of whether the funding system is equitable.¹⁵¹ Different scholars use various statistics to make this determination; however, two of the most

amounts expressed by their foundation funding plans).

139. See Berne & Stiefel, *supra* note 101, at 17 (noting that districts generally contribute through funds raised by local property taxes).

140. See *id.*

141. See *id.*

142. See generally *id.*

143. See discussion *infra* Part III.A.1.C.

144. See Clune, *supra* note 10, at 5; Goertz & Natriello, *supra* note 135, at 104, 132 n.6.

145. See Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 15-17 (2002).

146. *Id.*

147. See Goertz & Natriello, *supra* note 135, at 104 n.6.

148. See Kramer, *supra* note 145, at 15-17.

149. See *id.*

150. See Augenblick, *supra* note 131, at 74.

151. See generally Goertz & Natriello, *supra* note 135, at 110-11.

commonly used are the federal range ratio and the coefficient of variation.¹⁵² The Arkansas court has used both of these statistics to determine inequity.¹⁵³

The federal range ratio measures the gap between educational expenditures for those students at the ninety-fifth percentile and those at the fifth percentile; therefore, the ratio excludes those at the extreme high and low ends of distribution.¹⁵⁴ The federal range ratio expresses this gap as a percentage of the difference between these two numbers; whereas, the "restricted range" expresses the gap as a raw dollar amount.¹⁵⁵

The coefficient of variation measures how much district spending varies from the average district.¹⁵⁶ Smaller variations indicate that expenditures are more equitable throughout the state; a coefficient of zero indicates equal spending among the districts.¹⁵⁷

c. School funding inequality in Arkansas: *DuPree v. Alma School District*¹⁵⁸

In *DuPree*, the Arkansas Supreme Court found the Arkansas school funding system inequitable because it based funding primarily on property tax.¹⁵⁹ The state distributed both base aid funds and equalization aid funds using a foundation method called the Minimum Foundation Program.¹⁶⁰ The state distributed one-half of the equalization aid based on a per-pupil amount without regard to the local revenues raised; therefore, the state used only the remaining one-half of this part of the formula to equalize funding disparities.¹⁶² In 1979–1980 the formula resulted in the state distributing only 6.8% of the Minimum Foundation Program for equalization.¹⁶³

The court used the federal range ratio and fiscal neutrality measurement to determine the inequality of the school funding system.¹⁶⁴ The court

152. See *id.*

153. *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 343, 651 S.W.2d 90, 92 (1983).

154. See *id.*, 651 S.W.2d at 92 (explaining that the calculation measures, based on a list ordering all districts by the amount they spend on education, the difference between those at the top from those at the bottom of the list).

155. See *id.*, 651 S.W.2d at 92.

156. See Augenblick, *supra* note 131, at 73.

157. See *id.*

158. 279 Ark. 340, 651 S.W.2d 90 (1983).

159. *Id.* at 342–43, 651 S.W.2d at 91.

160. *Id.*, 651 S.W.2d at 91.

161. *Id.*, 651 S.W.2d at 91–92.

162. See *id.*, 651 S.W.2d at 91–92.

163. *Id.*, 651 S.W.2d at 91–92.

164. See *DuPree*, 279 Ark. at 343, 651 S.W.2d at 91–92 (evaluating computations by comparing the difference at the ninety fifth and fifth percentiles and by measuring the extent correlations of property-wealth to funding).

also examined opportunity variances such as basic course offerings, facilities, equipment, class size, and staff.¹⁶⁵

2. *The Adequacy Challenge*

Although the equity argument still holds considerable allure in both society and jurisprudence, many courts have shifted to analyzing the school finance question based on inadequacy.¹⁶⁶ At the heart of the adequacy measurement lies the question of how much is enough.¹⁶⁷ Although the comparison is different, adequacy is as difficult to measure as equity.¹⁶⁸ Courts have to determine what to measure: is the appropriate measurement, for example, an outcome such as student achievements or an input such as pre-determined funding levels?¹⁶⁹ After looking at the shift to adequacy as a new basis of challenging school funding, this section looks at how courts have made the difficult measurement determinations. Then this section examines the different models used to fund an adequate educational system.

a. Adequacy added to the arsenal

The third wave of litigation made a considerable shift in the argument because it moved from an argument of inequity to an argument of inadequacy.¹⁷⁰ The Kentucky and Montana courts began this wave in 1989.¹⁷¹ Both of these cases, however, continued to bring up the inequality challenges.¹⁷²

In the second-wave 1983 Arkansas decision, the court stated, without expressly ruling on adequacy, that the funding system would be unconstitutional if great inequity still existed without a legitimate reason even if the state funded all schools to operate at "minimal sufficiency."¹⁷³ Rather than using the education clause to determine adequacy, the Arkansas Supreme

165. See *id.*, 651 S.W.2d at 91-92.

166. See, e.g., Enrich, *supra* note 97, at 143 (stating that equality arguments continue to be viable because of the great "argumentative power we find in the concept").

167. See *id.* at 171.

168. See *id.* at 170.

169. See *id.* at 170-71; Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 308-09 (1998).

170. See Thro, *supra* note 91, at 603.

171. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); Mills & McLendon, *supra* note 88, at 338-40.

172. See *Rose*, 790 S.W.2d at 186; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 684; Mills & McLendon, *supra* note 88, at 338-40.

173. See *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 347, 651 S.W.2d 90, 93 (1983).

Court determined that the education clause served as support for applying the equal protection clause.¹⁷⁴ In its third-wave decision, the Montana Supreme Court in *Helena*¹⁷⁵ took a markedly different approach in using inequity as a basis for determining that the system was inadequate; therefore, it found the school funding system's inadequacy to be the culprit that led to inequitable school funding.¹⁷⁶

A court analyzing the adequacy question must ascertain the level of state-guaranteed education, if any, granted by the state's education clause.¹⁷⁷ The courts have discussed the actual wording of the education clauses much more than they have discussed the equal opportunity clauses, because the education clause language provides a more concrete basis upon which they can establish constitutionality standards.¹⁷⁸ Theoretically, the higher the category of the education clause, the easier challengers should find it to successfully assert the state's duty to provide an adequate education.¹⁷⁹ Education scholars disagree, however, as to the predictive nature of the actual language of the education clause, because state courts will interpret those clauses differently.¹⁸⁰

b. Determining the adequacy standard

If the court finds that the state does have an affirmative duty to provide an adequate education, then the court must apply the education clause standard to the current educational situation.¹⁸¹ In other words, the courts must determine if the state's schools fall below the required quality level.¹⁸² Most courts that have found state educational funding systems inadequate have not made the determination as to what is "adequate."¹⁸³ Instead, they have insisted that it is the legislature's responsibility to determine adequacy, and

174. See *id.* at 345, 651 S.W.2d at 93.

175. 769 P.2d at 690.

176. See *id.*; Mills & McLendon, *supra* note 88, at 340.

177. See Thro, *supra* note 91, at 605.

178. See Lundberg, *supra* note 5, at 1112-13.

179. See Thro, *supra* note 91, at 606-07 (stating that, in theory, a plaintiff in a state with a higher category has a better chance of success); see *supra* note 108 (describing the education clause categories).

180. See generally Minorini & Sugarman, *supra* note 88, at 45-46.

181. See Thro, *supra* note 91, at 607.

182. *Id.* (arguing, *inter alia*, that the courts have to determine how disperse the problem of inadequacy is before they will determine whether the entire system is unconstitutional).

183. See, e.g., McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (leaving it to the legislative branch to define adequacy); Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 104 (2000) (positing that not providing a standard could be the most beneficial method for the plaintiff, because the legislature would either provide more than the court wanted or it would fail the court's "know it when I see it" review until it did).

the court's duty is to determine when the system is not adequate.¹⁸⁴ In making the determination of what is not adequate, courts have considered both expert opinion testimony that contrasted educational services among districts and empirical data.¹⁸⁵

The Kentucky Supreme Court not only found Kentucky's funding system inadequate, but it was also the first state supreme court to find an entire state educational system unconstitutional in *Rose*.¹⁸⁶ The *Rose* court went beyond finding the system unconstitutional and actually defined the standards that the state must meet to have an adequate educational system.¹⁸⁷ In 1979 the West Virginia Supreme Court also provided adequacy criteria.¹⁸⁸ The adequacy standards established by the Kentucky and West Virginia courts have been influential in other courts' adequacy determinations.¹⁸⁹

c. Funding for adequacy

After the state completes the mammoth task of determining what adequacy is, the state must then determine how to finance its achievement.¹⁹⁰ School funding experts have developed five models for determining the target per-pupil cost of providing an adequate education: the historical spending approach, the expert design approach, the econometric approach, the successful schools approach, and the school reform programs model.¹⁹¹

The historical spending approach is the easiest to use because it uses the previous year's spending, adjusted for inflation and educational services changes, to determine the current year's spending needs.¹⁹² If the previous year's spending was inadequate, however, this method would be ineffec-

184. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989).

185. See, e.g., *McDuffy*, 615 N.E.2d at 552-53 (using stipulated reports and statements describing variances in class size, curriculum, staff development, basic subject preparation, and guidance counseling in determining an inadequate funding level for the plaintiff's school district).

186. See *Rose*, 790 S.W.2d at 215; Mills & McLendon, *supra* note 88, at 338.

187. See *Rose*, 790 S.W.2d at 212-13 (defining the goals of an efficient education as providing skills and training in communication, civic responsibility, physical education, and cultural education); Mills & McLendon, *supra* note 88, at 338.

188. Mills & McLendon, *supra* note 88, at 339 n.43 (citing *Pauley v. Kelly*, 255 S.E.2d 859, 876 (W. Va. 1979)) (describing the elements of an adequate education as training in basic math, civic education, environmental awareness, recreation, and cultural awareness and stating that a school's physical environment and the state's oversight are essential elements).

189. *Id.* at 338-39 n.43; Paul A. Minorini and Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*, *supra* note 84, at 175, 196.

190. Augenblick, *supra* note 131, at 74.

191. See *id.* at 75-76; POLICY BRIEF: FROM EQUITY TO ADEQUACY 3 (WestEd July 2000), available at http://web.wested.org/online_pubs/po-00-03.pdf [hereinafter WESTED].

192. See Augenblick, *supra* note 131, at 75.

tive.¹⁹³ The historical spending approach continues to factor local school district wealth into the formula, which is a factor that has no relevance to educational needs.¹⁹⁴

The expert design approach, also known as the professional judgment model, uses a group of professionals to first determine the elements of a school district that would provide an adequate education, and then to determine the per-pupil costs of those elements.¹⁹⁵ This method has support among educators¹⁹⁶ because it narrows the findings to the precise resources needed to achieve the model district.¹⁹⁷ This approach, however, is highly data intensive, and the necessary data to make the element-cost determinations are not always available.¹⁹⁸ An additional concern with this method is that it usually produces spending models that far exceed current spending levels.¹⁹⁹ Wyoming has surfaced as the exemplar, successfully using a modified version of this model for its funding determinations.²⁰⁰

The econometric approach, also called the cost-function analysis, links the spending level to student performance.²⁰¹ The basic determination is how much it would cost to educate students in particular circumstances to a level at which they could provide specified outcomes (e.g., specified scores on standardized tests).²⁰² This method uses extensive data and complex statistics to include socioeconomic factors in the spending determination for student groups.²⁰³ The econometric approach uses the law of diminishing returns in analyzing factors, such as class size, to determine at what point there will be no greater outcome from a smaller class size.²⁰⁴ This approach also has support among both legislatures and economists, yet no state has adopted the model in its funding determinations.²⁰⁵

193. *See id.*

194. *See id.*

195. *See id.*; WESTED, *supra* note 191, at 3.

196. WESTED, *supra* note 191, at 3.

197. Augenblick, *supra* note 131, at 75.

198. *Id.* at 75.

199. *See id.* (stating that Alaska, California, and Illinois are among the states that attempted this approach but later abandoned it because of the model's determination of drastically increased costs).

200. *See* Wyoming v. Campbell County Sch., 19 P.3d 518 (Wyo. 2001). For a detailed discussion of the professional funding model and how Wyoming applied it, see James W. Guthrie & Richard Rothstein, *Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 84 at 209, 228–46.

201. Augenblick, *supra* note 131, at 75; WestEd, *supra* note 191, at 3.

202. Augenblick, *supra* note 131, at 75; WestEd, *supra* note 191, at 3.

203. *See* Augenblick, *supra* note 131, at 75; WestEd, *supra* note 191, at 3.

204. Augenblick, *supra* note 131, at 75.

205. *See id.*

The successful schools approach, also known as the typical high-performing district model, uses the spending level of districts currently at the required adequacy level as the model per-pupil spending level.²⁰⁶ This method is simple and easy to understand, and both Ohio and Mississippi have used it.²⁰⁷ The school reform program model is similar to the successful schools method in its success-modeling approach; however, the school reform program identifies particular school programs rather than school districts that have been successful.²⁰⁸ This approach provides schools with a definite plan for achieving results, but there is not sufficient evidence of a truly successful program upon which schools in different districts could model.²⁰⁹

Each of these approaches endeavors to provide the price of achieving a state-determined level of adequacy by applying rational means to get to an amorphous end.²¹⁰ Even if the state determined the perfect per-pupil formula for achieving adequacy, the state's duty would not end.²¹¹ The fluid standard of adequacy is relative to time and circumstances, so the quest for adequacy is continuous.²¹²

B. The Forces of Opposition

In the three decades of evolving arguments and increasingly complex measurement issues, at least one thing has remained constant in school finance reform litigation—opposition to reform.²¹³ This section presents the basic arguments opposing school finance reform. First, this section looks at the state-defendant's assertions of justiciability concerns before discussing the local control arguments. Then, this section discusses local control arguments. Next, the section explores contentions involving non-funding factors. This section concludes with a look at how the arguments have endured in light of the shift to adequacy-based challenges.

1. *Justiciability Issues*

States have challenged the court's involvement in the issue of school funding, arguing that the question is a political one better left to the majori-

206. *Id.*; WESTED, *supra* note 191, at 3.

207. Augenblick, *supra* note 131, at 75; WESTED, *supra* note 191, at 4.

208. *See* Augenblick, *supra* note 131, at 75; WESTED, *supra* note 191, at 4.

209. *See* Augenblick, *supra* note 131, at 75; WESTED, *supra* note 191, at 4.

210. *See, e.g.*, WESTED, *supra* note 191, at 4.

211. *See, e.g.*, Enrich, *supra* note 97, at 171 (indicating that adequacy changes as society, economics, and society's expectations change).

212. *See id.*

213. *See generally* Carr & Fuhrman, *supra* note 83, at 136–37 (explaining how the political arguments have plagued school finance reform since the 1970s).

tarian branches.²¹⁴ The United States Supreme Court first set out the political question criteria in *Baker v. Carr*.²¹⁵ Those challenging the court's involvement in school finance primarily base their arguments on the "textually demonstrable constitutional commitment of the issue to a coordinate political department" and the lack of "judicially discoverable and manageable standards" inherent in school funding issues.²¹⁶

Opponents of court involvement assert that it is a legislative function to decide what defines an adequate education.²¹⁷ Further, the opponents assert that the courts are not the appropriate branch for deciding complex school finance questions that require extensive fact-finding and political considerations.²¹⁸ Defenders of the school funding systems also argue that there are no standards by which courts can determine whether school funding systems are either equitable or adequate.²¹⁹ Other commentators express concern that the courts set themselves up for additional litigation with findings based on unclear standards and that such findings place the courts in judicial oversight roles until the legislatures devise systems that the courts adjudicate as meeting those unclear standards.²²⁰

Some courts have agreed with these contentions and have chosen not to mandate reform even where those courts found discrepancies.²²¹ Other courts assert that state courts do not have the same separation of powers restrictions under which the federal branches operate.²²² Some courts have

214. See, e.g., *Ex parte James*, 836 So. 2d 813 (Ala. 2002).

215. 369 U.S. 186, 217 (1962).

216. *Id.*; Heise, *supra* note 84, at 303.

217. See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1190 (Ill. 1996).

218. Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 250 (1998) (citing *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 827 (Ariz. 1994) (Moeller, V.C.J., dissenting)).

219. See, e.g., *Coalition for Adequacy & Fairness in Sch. Funding, Inc., v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996).

220. See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (stating that the courts' assumption of a legislative role would likely result in extensive costly and time-consuming litigation).

221. See *Ex parte James*, 836 So. 2d 813 (Ala. 2002) (dismissing the case because the court found that an imposed remedy would usurp the legislature's power); *Coalition for Adequacy and Fairness in Sch. Funding*, 680 So. 2d at 400 (finding that it would be an intrusion into the legislature's realm to find a school funding system inadequate without a measurable standard for adequacy); *Comm. for Educ. Rights*, 672 N.E.2d at 1178 (stating that the court did not indorse the school funding system simply because it found the issue to be non-justiciable); *Marrero v. Pennsylvania*, 739 A.2d 110 (Penn. 1999); *City of Pawtucket*, 662 A.2d at 40 (stating that the court's interference in resolving educational deficiencies through funding mandates would have chaotic results).

222. See Enrich, *supra* note 97, at 172 (describing the state judicial structure as more political, the state constitutions as more easily adaptable to change, and the state constitutions as free from federalism concerns).

not addressed the political question, while many simply incorporate the political nature of the education clauses into their decisions.²²³

Commentators opine that when legislatures have previously attempted to resolve school finance issues, the courts will be less willing to get involved.²²⁴ As a general matter, courts do not want to interfere with the politically-based issue of school finance, but some commentators argue that they only do so because of "a demonstrated failure to address education finance policy" by the other branches.²²⁵ In *DuPree*, Justice Hickman addressed this issue head-on, stating that the court had before it "a problem that the other branches of government have either been unable or unwilling to resolve."²²⁶ The courts' involvement is not entirely surprising.²²⁷ As one scholar pointed out, "[t]his involvement of the courts would seem to be inevitable, for as de Tocqueville aptly wrote, 'Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'"²²⁸

2. Local Control

Perhaps the most consistent argument against school finance reform is that statewide reformation attempts would lead to decreased local control.²²⁹ At least since the struggle for racial equality in education began, the judiciary has been well aware of the local orientation of education.²³⁰ The United States Supreme Court reflected this awareness when it stated that "education is perhaps the most important function of state and local governments."²³¹ Challengers to court intervention take this theme into the current era of school litigation as they argue that local school districts might be better situated to determine the most efficient use of local school funds.²³²

223. See Lundberg, *supra* note 5, at 1107 (citing *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993)).

224. See Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1163 (2000).

225. *Id.* at 1163-64 (stating that courts only get involved when other measures have either failed or have not been addressed by the other branches).

226. *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 351, 651 S.W.2d 90, 96 (1983) (Hickman, J., concurring); See Swenson, *supra* note 224, at 1163.

227. See Swenson, *supra* note 224, at 1163.

228. Mills & McLendon, *supra* note 88, at 335 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. XVI, at 280 (Everyman's Library, 1994)).

229. See, e.g., Enrich, *supra* note 97, at 159 n.282 (asserting that all courts have addressed the local control concern in school finance equity cases).

230. See *id.*

231. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); see Enrich, *supra* note 97, at 117 (citing the school finance movement's repeated use of the expanded version of this passage as demonstrative of the Court's recognition of education's importance in society).

232. Clune, *supra* note 10, at 3.

These opponents of court involvement generally argue that states should spend local dollars on local students, and that the feeling of local ownership leads to increased support for both property-based taxation and the schools themselves.²³³

Another argument against reformation plans is that the plans redistribute funds from wealthier districts to poorer districts.²³⁴ Redistribution, by its operation, results in either fewer funds for the wealthy districts or increased taxation for those districts (if they choose to keep the same, pre-redistribution funding levels for their schools).²³⁵ With the success of property-based taxation resting, at least somewhat, on local ownership of the local services derived from those taxes, increased state control would likely require either other taxation sources or reductions of other state services to provide increased educational funding.²³⁶

Local control has lost some of its appeal in light of the recognition that the world into which students will enter is increasingly global in nature, and a more standardized curriculum might better prepare them for the global competition.²³⁷ Additionally, some commentators argue that local politics bring the credibility of local decision-makers into question, because taxation concerns heavily influence educational spending decisions.²³⁸ Other commentators claim that the current system actually denies true local control because students and parents with few options and limited opportunities have no real control.²³⁹

3. *Non-funding Factors*

Challengers further argue that more money will not necessarily improve the quality of education.²⁴⁰ These observers claim that equalizing dollar expenditures without considering other factors contributing to educa-

233. See generally Enrich, *supra* note 97, at 160–61.

234. See *id.*

235. See, e.g., *id.* at 114 (positing that California's attempts to bring equality in the aftermath of *Serrano*, coupled with declining economic conditions, led to a degradation of the quality of California's school system—yet, it maintained the requisite equity).

236. See *id.* at 164 (expressing the strong interrelationship between local taxation and local control). Some states have asserted that the funding of other state programs serves as a legitimate reason to provide fewer educational dollars towards ensuring equity, but courts have been reluctant to endorse this argument. See, e.g., *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (finding that “fiscal difficulties in no way justify perpetuating inequities”).

237. See generally Clune, *supra* note 10, at 3.

238. See *id.*

239. See, e.g., *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690.

240. See Carr & Fuhrman, *supra* note 83, at 152 (stating that researchers have found no evidence that more resources lead to higher student achievement); Thro, *supra* note 91, at 608.

tional results would not likely bring equitable results.²⁴¹ Reform that addresses this nexus would require decreased local autonomy because the state would address those factors at the state level.²⁴² Others claim that no amount of state adjustment to these non-funding factors would vitiate the "environments and . . . the capacities with which [students] arrive at school."²⁴³

Opponents of reform also claim that educational opportunities are bleak in some districts because of local-fund mismanagement, too much administrative overhead, or even corruption.²⁴⁴ The Kentucky Supreme Court dismissed these purported reasons for discounting reform, stating that "[e]ven a total elimination of all mismanagement and waste in local school districts would not correct the situation as it now exists."²⁴⁵ Rather than dismissing reform altogether, the *Rose* court used the non-funding factors as reasons for finding the entire educational system, not just the funding, unconstitutional.²⁴⁶

4. *Opposition and the Shift to Adequacy*

The foundation plans contested in the early equity-based challenges were, by nature, adequacy-based, and attacking those systems head-on would have been an attack on the adequacy of funding.²⁴⁷ Instead, the early decisions looked at the fairness of the foundation plans.²⁴⁸ Adequacy arguments, however, addressed the level of education provided to all children rather than developing formulae to ensure a fair dispersion of the state's educational resources.²⁴⁹

Educational reform advocates shifted their arguments, at least in part, because it is difficult to disagree with the idea that all children should receive a quality education.²⁵⁰ These advocates found it easier to challenge the concept that poorer districts should receive the fruits of development created by wealthier districts.²⁵¹ Equity arguments challenge the constitutionality of school funding systems based on a child-to-child comparison; how-

241. See Enrich, *supra* note 97, at 149 (noting examples such as facilities, staff, class sizes, and curriculum).

242. See *id.* at 149-50.

243. See *id.* at 150.

244. See Thro, *supra* note 91, at 608 (asserting that courts must consider factors other than finance in resolving the reasons for inadequacy).

245. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 197 (Ky. 1989).

246. See *id.*; Thro, *supra* note 91, at 608.

247. See Enrich, *supra* note 97, at 126-27.

248. See *id.* at 127.

249. See, e.g., *id.* at 168-70.

250. See *id.*

251. See *id.*

ever, the adequacy question challenges the constitutionality based on a comparison of the education that a child actually receives to the education that the child should receive.²⁵²

Advocates for reform countering the local control argument in equity-based challenges assert that solutions based on a funds-distribution formula allow school districts to maintain local control of both their district's activities and their taxing rates.²⁵³ The counter-argument modified for adequacy-based challenges is that districts do maintain some control because they can spend beyond the base amount required for adequacy, thereby creating inequity beyond adequacy through local discretion.²⁵⁴

Adequacy-based school finance reform continues to be politically contentious, because the business of legislating involves juggling interests that compete for available resources.²⁵⁵ Opponents continue to assert that setting a pre-determined school funding level challenges the traditional negotiation methods for determining fund allocations.²⁵⁶ Notwithstanding the at-times fierce opposition, Arkansas school reform advocates spent a decade in court making their case for an adequate and equitable school financing system.

IV. REASONING

Before the Arkansas Supreme Court could address the constitutionality of the school financing system, the court first had to determine whether it was reviewing the 1994 Order²⁵⁷ or the 2001 compliance trial order ("2001 Order").²⁵⁸ The court found that the compliance trial leading to the 2001 Order properly took into consideration the post-1994 Order legislation; therefore, the court was reviewing the 2001 Order.²⁵⁹ In its decision the court addressed both the court's role in educational funding issues and the constitutionality of Arkansas's funding system.²⁶⁰

252. See generally *id.* at 168–71.

253. See Enrich, *supra* note 97, at 146.

254. See Minorini & Sugarman, *supra* note 189, at 198–99. But see *Wyoming v. Campbell County Sch.*, 19 P.3d 518, 536 (Wyo. 2001) (finding that any inequality violates the state constitution regardless of its creation beyond the adequacy threshold).

255. See Augenblick, *supra* note 131, at 74–75.

256. *Id.*

257. See discussion *supra* Part II.A.

258. See discussion *supra* Part II.C.

259. See *Lake View IV*, 351 Ark. 31, 50, 91 S.W.3d 472, 482 (2002). The decision, written by Justice Robert L. Brown, unanimously determined that Arkansas's school funding system is unconstitutional. *Id.* Justices Donald L. Corbin and Jim Hannah both filed concurring opinions, Justice Tom Glaze filed an opinion concurring in part and dissenting in part (on the issue of staying the court's order until January 1, 2004), and Justice Annabelle Clinton Imber did not take part in the decision. See generally *id.*

260. See generally *id.*, 91 S.W.3d at 472.

A. Determining the Court's Role

The court next turned to the State's assertion that the issue of school finance was non-justiciable.²⁶¹ The Arkansas Supreme Court dismissed the State's contention that the trial court's ruling on school-funding interfered with a duty expressly granted to the General Assembly.²⁶² Reiterating its finding in *DuPree*²⁶³ that the legislature has the responsibility of determining how to provide a constitutional school-funding system, the court noted its own duty to determine when the system is unconstitutional.²⁶⁴ Those duties, the court found, are distinct, and the court's performance of its duty does not interfere with the General Assembly's power.²⁶⁵

The court also found it significant that the Arkansas Education Clause makes "the State" responsible for providing an adequate education.²⁶⁶ Distinguishing Arkansas's Education Clause language from the language of those jurisdictions that the State had cited, the court noted that the cited states make "the General Assembly" responsible for education.²⁶⁷ The court further noted that the education clauses in the four previous Arkansas Constitutions used "General Assembly" rather than "State," surmising that, in 1874, Arkansans deliberately shifted the burden to all state entities to share.²⁶⁸ The court adopted the Kentucky Supreme Court's stance that it would be an abrogation of its duty not to rule on the school-funding system, particularly given the wide-spread effect of school funding on both the state's economy and its citizens.²⁶⁹

Next, the court addressed the State's assertion that the court cannot adjudicate adequacy because the court cannot define adequacy.²⁷⁰ The Arkansas Supreme Court, pointing to attempts by both the courts and the legislature to form a definition, recognized the inherent difficulty of deciding what is not adequate without knowing what is adequate.²⁷¹ Noting that the General Assembly had taken steps to provide a definition, the court found that just because the Arkansas Department of Education had been recalcitrant in

261. *Id.* at 51-52, 91 S.W.3d at 483-84.

262. *Id.*, 91 S.W.3d at 483-84.

263. *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

264. *Lake View IV*, 351 Ark. at 82, 91 S.W.3d at 483.

265. *Id.*, 91 S.W.3d at 483.

266. *Id.* at 52-53, 91 S.W.3d at 484.

267. *Id.*, 91 S.W.3d at 484.

268. *Id.*, 91 S.W.3d at 484.

269. *Id.* at 53-54, 91 S.W.3d at 484 (noting that school finance makes up almost fifty percent of the state budget and affects most of the state's school-age children).

270. *Lake View IV*, 351 Ark. at 56, 91 S.W.3d at 486.

271. *See id.* at 57-58, 91 S.W.3d at 486-87 (indicating that both then Judge Imber and Judge Kilgore stated the need for an adequacy study and the General Assembly directed the State Board of Education to conduct such a study in Act 917 of 1995).

performing a legislatively mandated adequacy study does not mean that adequacy is indeterminable.²⁷² In noting that the lower courts had used the Kentucky Supreme Court's²⁷³ standards to determine educational efficiency, the Arkansas Supreme Court found that it could determine the adequacy of the state's educational funding system.²⁷⁴ The court held, therefore, that the issue was justiciable.²⁷⁵

The Arkansas Supreme Court then evaluated the nexus between increased funds and increased performance.²⁷⁶ Focusing on low teacher salaries, the court listed the rankings and performance results from the 2001 Order.²⁷⁷ In looking at the evidence submitted by Dr. Raymond Simon, director of the Arkansas Department of Education, the court determined that student performance would increase if the state addressed its serious need for more teachers.²⁷⁸ The court reasoned that hiring more teachers requires more money, and if more teachers lead to better performance, then the increased money would positively lead to improved performance.²⁷⁹ The court also found a link between school-environment issues and student performance, finding that increased funding would resolve such issues as deficient buildings and equipment, insufficient supplies, and the completion of much needed construction projects.²⁸⁰ Dismissing the no-nexus assertion, the court determined that education deserves priority in the state's funding process and that "no program of state government takes precedence over it."²⁸¹

With that determination in mind, the court addressed the level of judicial review of school funding legislation.²⁸² If the court found that education was a fundamental right in Arkansas, the court would have to apply strict scrutiny in analyzing school-funding legislation.²⁸³ Pointing to the personal rights listed in the Arkansas Constitution,²⁸⁴ the court noted that the drafters addressed education in a separate article altogether, and that article

272. *Id.*, 91 S.W.3d at 486–87.

273. *Id.*, 91 S.W.3d at 486–87 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989)).

274. *Id.* at 58–59, 91 S.W.3d at 487–88.

275. *Id.*, 91 S.W.3d at 487–88.

276. *Lake View IV*, 351 Ark. at 59–61, 91 S.W.3d at 488–89.

277. *Id.*, 91 S.W.3d at 488–89.

278. *Id.* at 62–63, 91 S.W.3d at 489–90.

279. *Id.*, 91 S.W.3d at 489–90.

280. *Id.*, 91 S.W.3d at 489–90. The court also noted that in 2001 all schools in the state's academic distress program were poor and that poor districts cannot participate in Debt Service Fund supplements because they are too poor to incur the debt in the first place. *Id.* at 63–64, 91 S.W.3d at 490.

281. *Id.* at 66, 91 S.W.3d at 492.

282. *Lake View IV*, 351 Ark. at 66–68, 91 S.W.3d at 492–93.

283. *Id.*, 91 S.W.3d at 492–93.

284. ARK. CONST. of 1874, art. 2.

addresses the state's duties rather than a citizen's rights.²⁸⁵ The Arkansas Supreme Court then determined that in neither the 1994 Order nor the 2001 Order had the trial court expressly stated that education was a fundamental right.²⁸⁶ Next, the Arkansas Supreme Court discussed the route other courts had taken and noted that most had not made a determination as to whether education is a fundamental right.²⁸⁷

The Arkansas Supreme Court thus avoided the fundamental rights determination.²⁸⁸ The court determined that the debate on fundamental rights was unnecessary because the school funding system is either adequate or inadequate.²⁸⁹ The court decided that the Arkansas system is not adequate.²⁹⁰ The court, however, left it to the majoritarian branches to define adequacy, finding that this "falls more within the bailiwick of the General Assembly and the Department of Education."²⁹¹

B. Determining Constitutionality

The court conceded that the concepts of inequity and inadequacy significantly overlap.²⁹² As long as the state's school funding system fails to provide an adequate education, the court noted, the system could not, by definition, provide equal educational opportunity.²⁹³ The court considered several factors in making its determination of inadequacy.²⁹⁴ The court looked at student achievement levels as measured by both national and state tests, examined the substandard facilities and insufficient equipment and supplies plaguing several school districts, and considered the state's relatively low teacher salaries.²⁹⁵

285. See ARK. CONST. of 1874, art. 14, § 1, *amended by* ARK. CONST. amend. 53.

286. *Lake View IV*, 351 Ark. at 70, 91 S.W.3d at 494.

287. *Id.* at 67–69, 91 S.W.3d at 493–94.

288. *Id.* at 71, 91 S.W.3d at 495.

289. See *id.*, 91 S.W.3d at 495 (finding that the state has an absolute duty to provide an adequate education).

290. *Id.*, 91 S.W.3d at 495.

291. *Id.* at 71, 91 S.W.3d at 507. Although the court expressed frustration with the state's under-funding of the school system and its failure to conduct an adequacy study, the court was reluctant to oversee the school financing system. *Id.* at 70–71, 91 S.W.3d at 495.

292. *Lake View IV*, 351 Ark. at 71, 91 S.W.3d at 496. The court embedded the element of adequacy in its definition of equity, finding that "[e]quality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education." *Id.* at 79, 91 S.W.3d at 500 (emphasis added).

293. *Id.*, 91 S.W.3d at 500.

294. See *id.* at 62–63, 91 S.W.3d at 490.

295. *Id.* at 60–61, 91 S.W.3d at 488–90.

In finding Arkansas's school funding system inequitable, the court considered several of the same issues.²⁹⁶ The primary difference between the court's adequacy analysis and its equity analysis is that the court's adequacy analysis compared student achievement to quality standards; whereas, the equity analysis compared student educational opportunities among the state's districts.²⁹⁷ The State contended that it had ensured educational equity through equal funding, but the court rejected this contention based on its finding that the appropriate measure for educational equity is equal expenditures.²⁹⁸

To determine the inequity in expenditures, the court compared the curricula in the Lake View and the Fort Smith school districts.²⁹⁹ The court then looked at the same facility and equipment deficiencies identified in its adequacy analysis.³⁰⁰ Finally, the court considered the intra-state differences in teacher salaries.³⁰¹ The court found that the discrepancies in these factors represented inequity in educational opportunity.³⁰²

The State argued that two factors—the State's responsibility to fund other programs along with the local control of school districts—provided legitimate reasons for the school funding disparities.³⁰³ The court summarily dismissed the funding rationale as unconvincing.³⁰⁴ The court then ad-

296. *Id.* at 75–76, 91 S.W.3d at 497–98.

297. *Id.* at 73, 91 S.W.3d at 497.

298. *Lake View IV*, 351 Ark. at 71, 91 S.W.3d at 496.

299. *See id.* at 75, 91 S.W.3d at 497 (finding that Lake View had very limited offerings while Fort Smith offered both advanced classes and diverse electives such as fashion merchandising and marketing).

300. *Id.*, 91 S.W.3d at 497–98.

301. *Id.* at 62, 91 S.W.3d at 489; *see* discussion *supra* Part II.C.

302. *Lake View IV*, 351 Ark. at 79, 91 S.W.3d at 500. The court also ruled on the Federal Range Ratio calculation, which the lower court used in determining inequity. *Id.* at 84–85, 91 S.W.3d at 503–04; *see* discussion *infra* Part III.A.1.b.ii. The court found that federal desegregation funds were properly excluded in the calculation of the state's total available education funds. *Lake View IV*, 351 Ark. at 84–85, 91 S.W.3d at 503–04. The court also determined that excess debt millage should not have been applied towards Amendment 74's minimum twenty-five mills requirement for the operation and maintenance of schools. *Id.*, 91 S.W.3d at 503–04; ARK. CONST. of 1874 amend. 74; *see* ARK. CODE ANN. § 26-80-204(18) (LEXIS Supp. 2001); *Lake View IV*, 351 Ark. at 89–91, 91 S.W.3d at 506. The court determined that counting excess debt millage towards the minimum millage is contrary to the intent of Amendment 74 because the additional category allows districts to pass less than the required minimum millage earmarked for operations and maintenance. *Lake View IV*, 351 Ark. at 87, 91 S.W.3d at 505. After the ruling, Senate President Pro Tempore Mike Beebe (elected as Arkansas's Attorney General in November, 2002), who was involved in writing Amendment 74, stated that the court misinterpreted the amendment and that the General Assembly intended to allow the districts to use excess debt millage towards the twenty-five mills minimum for operations and maintenance. *See* Rowett, *supra* note 43, at 1.

303. *Lake View IV*, 351 Ark. at 78, 91 S.W.3d at 499.

304. *Id.*, 91 S.W.3d at 499–500.

ressed the State's concern for local control in the area of education.³⁰⁵ The court again pointed to its decision in *DuPree*,³⁰⁶ in which the court had determined that, although the State can create school districts to carry out its educational duties, the State must intervene if the districts do not produce the desired results.³⁰⁷ Because the State bears the ultimate responsibility for Arkansas's public school system, the court found that the State's deference to local school districts was not a legitimate reason for providing an inequitable funding system.³⁰⁸

The Arkansas Supreme Court concluded by granting a stay on the effects of its decision.³⁰⁹ The court expressed concerns about a potential uproar of legal contests resulting from a ruling that deemed the funding system immediately unconstitutional.³¹⁰ Instead, the court gave the legislature until January 1, 2004, to develop an adequate and equitable school funding system.³¹¹

V. SIGNIFICANCE

*Lake View IV*³¹² will earn landmark status in Arkansas's judicial history because the court's decision could potentially affect every current and future Arkansan.³¹³ The case is significant not only because of what the court held, but also because of what the court held back. In finding the Arkansas school funding system unconstitutional, the court exercised judicial activism to open the door for reform; the court left it to the political branches, however, to determine what would make the school funding system constitutional.³¹⁴ The court's combination approach of stepping out to declare inadequacy, yet stepping back without defining it, has led to a mandate for reform mired in unanswered questions. This section first explains how activism led to the court's determination of inadequacy, and the section then examines the questions that the court left unanswered.

305. *Id.* at 78–79, 91 S.W.3d at 499–500.

306. *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

307. *Id.* at 349, 651 S.W.2d at 95.

308. *Lake View IV*, 351 Ark. at 78–79, 91 S.W.3d at 499–500.

309. *Id.* at 96–97, 91 S.W.3d at 510–11.

310. *Id.*, 91 S.W.3d at 510–11.

311. *Id.* at 97, 91 S.W.3d at 511.

312. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002).

313. *See, e.g.*, Telephone Interview with David R. Matthews, Partner, Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A. (Jan. 2, 2003) (stating that this is probably the most significant case in Arkansas in the last fifty years); Telephone Interview with Mike Beebe, President Pro Tempore, Arkansas Senate (Dec. 30, 2002) (stating that this case will have far-reaching effects in terms of both Arkansas's finances and its educational system).

314. *Lake View IV*, 351 Ark. at 91, 91 S.W.3d at 507.

The court recognized that local school districts were not making the grade and that the legislature was not addressing the issue of sufficient funding for Arkansas schools.³¹⁵ The State did not contest the evidence supporting the abysmal status of Arkansas's schools.³¹⁶ Ten classes of students had graduated from Arkansas's school system since this case began, but the Arkansas Department of Education had still not conducted the court-mandated adequacy study.³¹⁷ Courts are in a unique position to provide educational reform for those parties who would not necessarily have support from the political process, namely the students in poor districts.³¹⁸ The court's engagement under these circumstances was a classic example of judicial activism.³¹⁹

Although the courts have neither the expertise nor the extensive fact-finding forum for making specific educational reforms, they can provide the impetus for the majoritarian branches to bring reform.³²⁰ Courts can play the role of "shak[ing] things up."³²¹ The Arkansas Supreme Court could have adopted the position taken by the Florida³²² and Alabama³²³ supreme courts in finding that the school funding system is a non-justiciable political question. In finding both judicial power and responsibility to address this issue, however, the court chose to step into the fray.³²⁴ Among its reasons for taking this step was the court's indication that the constitution provides a shared textual commitment in the area of school funding because the education clause grants responsibility to the "State" rather than to the "General Assembly."³²⁵

The court found additional significance in the term "State" in its emphatic determination that local control is not a legitimate reason for providing insufficient funding, because education in Arkansas is a state responsibility.³²⁶ With the political realities of school consolidation and increased state oversight looming as inevitable results of this decision, the court undoubtedly knew that this ruling would elicit outcries about a loss of local

315. *Id.* at 79, 91 S.W.3d at 500.

316. *Id.* at 59–61, 91 S.W.3d at 488–89.

317. *See* Lake View Sch. Dist. No. 25 v. Huckabee, No. 1992–5318, 53 (Ark. Ch. 2001) (noting that as of May 2001 nine classes had graduated).

318. *See* Clune, *supra* note 10, at 4.

319. *See* Swenson, *supra* note 224, at 1149–50 (stating that "[s]triking down a statewide system of public school finance is a quintessential example of judicial activism").

320. *See* Clune, *supra* note 10, at 4.

321. *See id.*

322. Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996).

323. *Ex parte* James, 836 So. 2d 813 (Ala. 2002).

324. Lake View IV, 351 Ark. 31, 55, 91 S.W.3d 472, 485 (2002).

325. *Id.* at 54–55, 91 S.W.3d at 484–85.

326. *Id.* at 78–79, 91 S.W.3d 499–500.

control.³²⁷ The court was likely also aware that this outcry would induce the same political pressure brought by previous consolidation plans. The court was right on both counts.³²⁸

Because the court explicitly laid the burden at the steps of the Arkansas State Capitol,³²⁹ the political branches will be able to point to the court as the culprit that shifted control away from local school districts. Almost immediately after the ruling, Governor Mike Huckabee used the opportunity to propose a consolidation plan and claimed that the court forced him to do it.³³⁰ In addressing local control, the court's action gave the majoritarian branches an opportunity to face issues like increased taxation and consolidation with a political scapegoat, disallowing one of the major reasons for not addressing these difficult questions.³³¹

The court moved a step beyond its decision in *DuPree*³³² when it interpreted the need for a new requirement of adequacy. In *Lake View IV* the court held that simply equalizing the funding formula was no longer sufficient.³³³ Arkansas's public education had not improved significantly since *DuPree*, so a subsequent attempt to provide an equitable funding system would not likely improve educational opportunity.³³⁴ The court's introduction of the adequacy determination could reduce political apprehension if that determination were to lead to more concrete results than the equity-based legislation produced.³³⁵

The requirement of an adequate education is nowhere to be found in the Arkansas Constitution.³³⁶ The court, using a map provided by the Ken-

327. See, e.g., Seth Blomeley, *Consolidation Push Brings Touch of Deja Vu*, ARK. DEMOCRAT-GAZETTE, Jan. 19, 2003, at 1. Commentators have touted local control of school districts as a cultural issue, and many Arkansans believe that consolidation takes away from who we are and where we come from. Interview with Herschel Cleveland, Speaker, Arkansas House of Representatives, in Little Rock, Ark. (Jan. 22, 2003).

328. See Blomeley, *supra* note 327, at 1.

329. See *Lake View IV*, 351 Ark. at 78–79, 91 S.W.3d at 490–500 (finding that the General Assembly, not the local school districts, has the ultimate responsibility for Arkansas's educational system).

330. See Michael Wickline, *Ears Out on Education Changes: Legislators Use Weekend To Take State's Pulse on Consolidation*, ARK. DEMOCRAT-GAZETTE, Jan. 18, 2003, at 10 (reporting that Governor Huckabee proposed a consolidation plan reducing the number of districts from 310 to 116 and that he remarked that the court's "ruling abolished local control").

331. *Lake View IV*, 351 Ark. at 78–79, 91 S.W.3d at 499–500.

332. See *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

333. *Lake View IV*, 351 Ark. at 78–79, 91 S.W.3d at 499–500.

334. *Id.* at 59, 91 S.W.3d at 488.

335. See discussion *supra* Part II.A (describing the 1995 Legislative Acts and the 1997 Legislative Acts as attempts to equalize school funding).

336. See ARK. CONST. of 1874, art. 14, § 1, *amended by* ARK. CONST. amend. 53 (stating Arkansas's educational responsibilities without using the word "adequate").

tucky Supreme Court,³³⁷ took an indirect route to finding the adequacy requirement. The court started with the three words that are listed in the constitution, “general, suitable, and efficient” and translated them to mean “adequate.”³³⁹ Other than a reference to the *Rose* standards, the court did not explain how it made that transformation.³⁴⁰ The *Rose* standards defined an “efficient” education, but the Kentucky Supreme Court used those standards to define an adequate education.³⁴¹

The court exercised restraint in defining adequacy. It listed the *Rose* standards as a measurement by which it determined existing inadequacy, yet it did not rule that these were the standards the state should adopt.³⁴² Instead, it left it up to the General Assembly to define an adequate education.³⁴³

The court’s ruling leaves the legislature to define the standards by which the court will measure adequacy in future litigation. The court, however, clearly stated that it would find future funding systems inadequate should the legislature fail to provide the court’s interpretation of constitutionally guaranteed standards.³⁴⁴ This combination of pronouncements seems to indicate that the court determined that the General Assembly should define adequacy, yet the court could determine the sufficiency of that definition in future litigation.³⁴⁵ The legislature, therefore, would need to know what the court had in mind in its interpretation of adequacy. The court did not provide a basis for the legislature to make this determination because the court did not articulate an adequacy standard that it would use in future litigation.

Although it did not provide a definition, the court did give some general guidance in defining adequacy.³⁴⁶ The court said that it could not meas-

337. See generally *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

338. See generally *id.*

339. *Lake View IV*, 351 Ark. at 55–56, 91 S.W.3d at 486–87.

340. *Id.* at 58–59, 91 S.W.3d at 487–88.

341. *Rose*, 790 S.W.2d at 212. Even the attorneys were unclear about adequacy being a measuring term until the compliance trial, as evidenced by *Lake View*’s attempt to file a separate suit based on adequacy and the State’s argument that the compliance trial was supposed to rule on equity only. *Lake View IV*, 351 Ark. at 56, 91 S.W.3d at 486 (Hannah, J., concurring). In his concurrence, Justice Hannah discussed the definition of the words “general, suitable and efficient” independently. *Id.* at 102–04, 91 S.W.3d at 514–17. He concluded that equitable and adequate are not the appropriate measures and stated that the question is whether the school system is general, suitable, and efficient in the plain meaning of those terms. *Id.*, 91 S.W.3d at 514–17 (Hannah, J., concurring).

342. *Lake View IV*, 351 Ark. at 58–59, 91 S.W.3d at 487–88.

343. *Id.* at 91, 91 S.W.3d at 507.

344. *Id.* at 98, 91 S.W.3d at 511.

345. See *id.*

346. *Id.* at 57–58, 91 S.W.3d at 486–88.

ure adequacy by inputs, i.e., funding.³⁴⁷ The other possible measurements are expenditures and outputs.³⁴⁸ The court's guidance is less clear regarding these two measurements.³⁴⁹ This lack of clarity derives from the question of whether the court refers to "adequacy" as "access to adequate funding" or as "an opportunity for an adequate education."³⁵⁰

Measuring the "access to adequate funding" for education begs the question, because the court must still define "adequate." The court ruled that the school system is inadequately funded, but the court based this finding on a combination of anecdotal evidence and examples of shortfalls in the current educational system.³⁵¹ This method of determination indicates that the court was seeking something in addition to adequate funding in its guidance concerning adequacy.

The court's measurement of the quality of education is an indication that the court sought particular educational outcomes to determine adequacy.³⁵² If the court expects particular outcomes from an adequate educational system, then perhaps the court actually found that the State has the burden of providing each child an opportunity for an adequate education.³⁵³ This requirement is quite different from providing adequate funding because funding is only one aspect of how the legislature might go about providing for an adequate educational opportunity.³⁵⁴ Ruling that the school system funding was inadequate, yet using outcome measures in that determination, created the need for a nexus between increased funding and improved outcomes. Few studies, however, suggest such a nexus exists.³⁵⁵

In addition to the nexus issue, using outcome measures brings other questions for the legislature's consideration. The legislature must decide which outcomes are determinative of an adequate education.³⁵⁶ If adequacy is based on outcomes, then the General Assembly would need to decide how long after implementing a new educational system either the court or the legislature could determinatively measure those outcomes.

347. *Id.* at 73-75, 91 S.W.3d at 496-97.

348. *See* Berne & Stiefel, *supra* note 101, at 23.

349. *See Lake View IV*, 351 Ark. at 73-79, 91 S.W.3d at 497-500.

350. *See id.*, 91 S.W.3d at 497-500.

351. *Id.* at 62-64, 91 S.W.3d at 489-90.

352. *See id.*, 91 S.W.3d at 489-90; Kelley Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 438 (2000).

353. *Lake View IV*, 351 Ark. at 79, 91 S.W.3d at 500.

354. *See* William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*, *supra* note 83, at 72, 83.

355. *See, e.g.*, Frederick M. Hess, *Courting Backlash: The Risks of Emphasizing Input Equity Over School Performance*, 6 VA. J. SOC. POL'Y & L. 11, 17 (1998).

356. *See* Berne & Stiefel, *supra* note 101, at 58.

The court's decision also lacks clarity as to whether local districts could spend more to increase opportunity beyond producing adequate outcomes.³⁵⁷ By definition this would require inequitable expenditures, but the court's only response to this was that there could not be substantially inequitable spending among the districts.³⁵⁸ Districts would very likely require, however, substantially inequitable spending levels to achieve the same outcomes because the per-pupil cost will be greater in some districts (e.g., those with low parental involvement) to get the same outcomes as other districts.³⁵⁹ If the goal is the outcome, then the per-pupil expenditure becomes a legitimate variable and inequity becomes almost necessary.³⁶⁰

Making the adequacy measurement based on outcomes has advantages. After the legislature defines specific outcomes, those outcomes would provide concrete, measurable standards for litigants, the court, and the legislature.³⁶¹ Additionally, holding the state accountable for outcomes instead of adjudicating spending levels might prove more politically acceptable.³⁶² If the court bases constitutionality of the educational funding systems on outcomes, then citizens would see what they are getting in exchange for the cost, which comes in the form of both money and loss of local control.³⁶³

Outcome measures might backfire because, if the outcomes do not materialize, failure could thwart future reform attempts.³⁶⁴ If more money does not improve outcomes, that failure would solidify the argument that increased funds do not improve the quality of education. Such results might leave citizens feeling that their loss of local control resulted in no return.

Notwithstanding the political pressures of local control activists and challenges of justiciability, the court opened the door so that the necessary reform could begin. In refraining from defining where adequacy came from, what adequacy is, and how one should measure adequacy, the court created as many questions as it answered. The court granted a stay on the effects of its order until January 1, 2004, and stated that on that date "this case will be over."³⁶⁵ With the open door of reform and the open questions of adequacy,

357. *Lake View IV*, 351 Ark. at 77, 91 S.W.3d at 499. *But see id.* at 107, 91 S.W.3d at 517–18 (Hannah, J., concurring) (stating that after all districts receive adequate funding local districts are not prohibited from spending beyond that amount).

358. *Id.* at 77, 91 S.W.3d at 499.

359. *See Berne & Stiefel*, *supra* note 101, at 23–24.

360. *See id.*

361. *See Hess*, *supra* note 355, at 46.

362. *Id.* at 16.

363. *Id.* at 46.

364. *Id.*

365. *Lake View IV*, 351 Ark. at 97, 91 S.W.3d at 511.

however, the end of this case will have marked only the beginning of Arkansas's quest for a constitutional school funding system.

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