

Washington University Journal of Law & Policy

Volume 25 *Access to Justice: The Social Responsibility of Lawyers*

January 2007

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Recommended Citation

David A. Terry, *Inadequate and Inequitable: The Role of the Judiciary in Arkansas Education*, 25 WASH. U. J. L. & POLY 245 (2007),
https://openscholarship.wustl.edu/law_journal_law_policy/vol25/iss1/12

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Inadequate and Inequitable: The Role of the Judiciary in Arkansas Education[†]

David A. Terry*

I. INTRODUCTION

In *Lake View School District No. 25 v. Huckabee*,¹ the Arkansas Supreme Court declared the state educational funding scheme unconstitutionally inadequate and inequitable. The decision sparked widespread political debate regarding the proper constitutional role of the judiciary in such funding issues. *Lake View III* was the culmination of years of litigation and political controversy surrounding what many perceived as inadequate school funding, combined with a systematic failure of the State Government to follow its constitutional duty to educate Arkansas' youth.² After the decision, government officials scrambled to bring the system into constitutional compliance, hoping to avoid a showdown between the court and the other branches of State Government.³ The supreme

[†] On May 31, 2007, after this Note's submission for editing and publication, the Arkansas Supreme Court held that the State's current educational funding system has been cured of constitutional infirmities. *Lake View School Dist. No. 25 of Phillips County, Arkansas v. Huckabee*, 2007 WL 1560547 (Ark. 2007). As such, the litigation and related issues discussed herein, particularly the projections and solutions for the future of Arkansas education, are no longer immediately relevant. However, the broader topics addressed by this Note, including the role of the courts in school funding litigation generally, remain pressing concerns for several states throughout the country with similar litigation that remains unresolved. The reader having been cautioned, this Note is presented in its unaltered form.

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

2. *See id.* (detailing the inadequate and inequitable history of the failed educational funding scheme).

3. For a brief overview of legislative and executive efforts to bring the system into constitutional compliance since the *Lake View III* decision, see Bradley D. Jesson and David Newbern, *Special Masters' Report to the Supreme Court of Arkansas* (Apr. 2, 2004), <http://www.courts.state.ar.us/lake%20view/report.pdf> [hereinafter *Masters' Report I*]; Jesson

court, through the use of Special Masters,⁴ retained supervisory control over subsequent legislative efforts to bring the system into constitutional compliance.⁵ The case grew out of a national judicial and political climate that witnessed many states struggling with similar issues, with differing judgments, remedies, and levels of judicial involvement.⁶ The future of *Lake View III* is critical for Arkansas, both because of the immediate practical ramifications on the school system itself and the case's impact on the functionality and authority of the judiciary and its relationship to the other branches of State Government.⁷

The *Lake View III* decision was the culmination of years of litigation surrounding educational funding.⁸ Following the heady days of integration, many poor school districts became increasingly frustrated with their plight. Unable to achieve a satisfactory legislative solution, school districts resorted to lawsuits to effect change in funding inadequacies and disparities. While the state constitution provides guarantees for education,⁹ court involvement has presented practical as well as constitutional issues for the state.

This Note is organized to give the reader a basic understanding of the historical and contemporary judicial and political context of education litigation in Arkansas during the past two decades. Particular attention will be paid to the *Lake View* litigation and

and Newbern, *Special Masters' Report to the Supreme Court of Arkansas* (Oct. 3, 2005), <http://courts.state.ar.us/lake%20view/ReportF.pdf> [hereinafter *Masters' Report II*].

4. See *infra* notes 76–77 and accompanying text.

5. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 142 S.W.3d 643 (Ark. 2004) (recalling mandate in the case); *Lake View Sch. Dist. No. 25 v. Huckabee*, 144 S.W.3d 741 (Ark. 2004) (first appointment of the Special Masters); *Lake View Sch. Dist. No. 25 v. Huckabee*, 210 S.W.3d 28 (Ark. 2005) (second recall of mandate and reappointment of the Special Masters).

6. See, e.g., *Abbott v. Burke*, 693 A.2d 417, 440 (N.J. 1997); *Guinn v. Legislature of State*, 71 P.3d 1269, 1272–73 (Nev. 2003); *Montoy v. Kansas*, 112 P.3d 923 (Kan. 2005). This Note will discuss these cases and compare them to the current Arkansas litigation.

7. Indeed, the level of direct supreme court involvement in the process to cure the constitutional defects in the educational system will profoundly affect the judiciary's prestige. The difficult balancing between judicial overreaching and the continuation of the current unconstitutional system tacitly permitted by a disinterested court will be further discussed in the Proposal section of this Note.

8. See, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Tucker v. Lake View Sch. Dist. No. 25 (Lake View I)*, 917 S.W.2d 530 (Ark. 1996); *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View II)*, 10 S.W.3d 892 (Ark. 2000).

9. See *infra* notes 19–20.

subsequent legislative responses. This Note will also explore measures taken since *Lake View III* to bring the educational system into constitutional compliance, including two separate court appointments of Special Masters. It will also briefly examine politicians' and commentators' viewpoints on constitutional and political snares inherent in the role the Arkansas Supreme Court has taken in this litigation. Additionally, this Note will outline other jurisdictions' respective judicial responses to similar litigation, for the purpose of providing helpful comparative and predictive value to the Arkansas controversy.

This Note will propose legislative solutions that would successfully transform the current education system into constitutional compliance and will further examine the proper future role of the courts in adjudicating constitutional challenges to the school funding system, paying close attention to possible judicial remedies to correct the unconstitutional system.

II. HISTORY

A. *The DuPree Case*

The Arkansas Supreme Court signaled its duty to adjudicate the constitutionality of the school funding scheme nearly twenty years before *Lake View III*. In *DuPree v. Alma School District No. 20*,¹⁰ the court declared unconstitutional the school funding system in place at that time.¹¹ The court acknowledged inherent inequality in funding among school districts,¹² applying the equal protection clause of the Arkansas Constitution¹³ to the State's general constitutional mandate

10. *DuPree*, 651 S.W.2d 90.

11. *Id.*

12. The court accepted the plaintiffs' arguments that the "obvious disparity in property wealth" among the districts necessarily leads to funding disparities in a regime which relies heavily on local property taxes. *Id.* at 95. Indeed, the regime relying on local tax bases as the school's funding system bore "no rational relationship to the educational needs of the individual districts, rather . . . [it] only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged." *Id.* at 93.

13. ARK. CONST. art. XIV, § 1. The full text of the free school system clause of the Arkansas Constitution reads:

to provide a “general, suitable and efficient education.”¹⁴ Thus, *DuPree* serves as an important precedent for the *Lake View III* case, starting the court down the road toward a more sweeping declaration of school funding unconstitutionality, on both inadequate and inequitable grounds.¹⁵

B. The Beginnings of the Lake View Case and Subsequent Legislation

In August of 1992, several plaintiffs¹⁶ sued State officials,¹⁷ seeking “a declaration that the school-funding system was unconstitutional under both the United States Constitution and the Arkansas Constitution” and “an injunction against implementing the unconstitutional system.”¹⁸ In November of 1994, chancery Judge Annabelle Imber held that the school funding system violated both the education article¹⁹ and the equality provisions²⁰ of the Arkansas

Intelligence 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. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

Id. The court, in its equal protection rationale, held that *sufficient* funding among school districts alone does not satisfy the constitution; *equity* must still be achieved. *DuPree*, 651 S.W.2d at 93. “Bare and minimal sufficiency does not translate into equal educational opportunity.” *Id.* This portion of the *DuPree* decision played an important role in the *Lake View III* rationale, establishing the constitutional importance of equity in public schools. *Lake View III*, 91 S.W.3d at 497.

14. *DuPree*, 651 S.W.2d at 93 (quoting ARK. CONST. art. XIV, § 1). This represents a powerful confluence of two facially disparate constitutional provisions, paving the way to the bipartite compliance trial (examining both adequacy and equity) in *Lake View III*.

15. *Lake View III* refers to *DuPree* as “the seminal school-funding case.” *Lake View III*, 91 S.W.3d at 494.

16. Lake View School District No. 25, school district officials, and certain individuals residing in Phillips County, Arkansas. *Id.* at 477.

17. The Governor of Arkansas, the State Treasurer, the Speaker of the House of Representatives, the President of the Senate, officers in the State Department of Education, and the State Board of Education. *Id.*

18. *Id.*

19. ARK. CONST. art. XIV, § 1.

20. “All men are created equally free and independent, and have certain inherent and

Constitution.²¹ Judge Imber stayed entering her order for two years to allow the Arkansas General Assembly time to make necessary changes to bring the educational funding system into constitutional compliance.²² The plaintiffs appealed to the Arkansas Supreme Court, which dismissed the appeal because Judge Imber's order was not a final appealable order.²³

Despite intervening legislation designed to correct constitutional flaws in the school funding system,²⁴ the *Lake View* litigation proceeded.²⁵ On August 22, 1996, following the plaintiffs' filing of their fourth amended complaint, the trial court certified the *Lake View* class.²⁶ On August 17, 1998, the trial court²⁷ dismissed Lake

inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness." *Id.* art. II, § 2. "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." *Id.* art. II, § 3. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." *Id.* art. II, § 18.

21. This decision followed a compliance trial. *Lake View III*, 91 S.W.3d 472, 477 (Ark. 2002). According to Judge Imber, the system did not violate the United States Constitution. *Id.*

22. *Lake View I*, 917 S.W.2d 530, 532 (Ark. 1996). *See also Lake View III*, 91 S.W.3d at 477.

23. *Lake View I*, 917 S.W.2d at 531. It was not a final appealable order because the two-year stay was still in effect. *Id.* *See also Lake View III*, 91 S.W.3d at 477. At the expiration of the two-year stay issued by Judge Imber, near the end of 1996, neither party appealed from her 1994 order. *Id.*

24. During its 1995 Session, the General Assembly approved for popular referendum Amendment 74 (amending ARK. CONST. ART. XIV, § 3) to the Arkansas Constitution, which the voters ultimately approved in November 1996. The Amendment fixed a uniform property tax rate of 25 mills for each school district and permitted local increases in these millage rates to enhance public education. This amendment represents an embodiment of the public's desire to retain some moniker of local control over the school districts during the controversial ongoing *Lake View* litigation.

25. Much of the legislation before *Lake View III* concentrated on increasing funding for schools. *See* 1995 Ark. Acts 916 (levying tax surcharge for the equalization of public school funding); Equitable School Finance System Act of 1995, 1995 Ark. Acts 917 (repealing old funding system and requiring Board of Education to review minimum standards and develop definition of adequate education) (codified in part at ARK. CODE ANN. §§ 6-17-1001, 20-319, 26-80-110 (Lexis Nexis 2005)); 1995 Ark. Acts 1194 (appropriating funds to school districts) (codified in part at ARK. CODE ANN. §§ 6-20-319, 7-1001, 5-303 to 306, repealed by 1995 Ark. Acts 1194 § 30 (Lexis Nexis 2005)); 1997 Ark. Acts 1307 (amending ARK. CODE ANN. §§ 6-20-302, 303, 306 to 311, 323, 401 (Lexis Nexis 2005)); 1997 Ark. Acts 1361 (appropriating funds to school districts).

26. The class included all school districts in the state, students and parents of students statewide, all school board members, and school district taxpayers who supported the system.

View's fourth amended complaint.²⁸ However, the Arkansas Supreme Court reversed, remanding the matter for a compliance trial "as soon as is practicable" regarding the constitutionality of the post-1994 legislative acts.²⁹

1. The *Lake View III* Compliance Trial

Before the 2000 compliance trial,³⁰ the trial court denied motions by 144 school districts that sought to intervene in the litigation and align themselves with the State's position that the post-1994 legislation³¹ had cured the constitutional deficiencies.³² Two weeks before the trial, Judge Kilgore announced that the court would focus on the issues of inequity³³ and inadequacy.³⁴ The compliance trial

Lake View III, 91 S.W.3d at 478.

27. In January 1997, Judge Imber assumed her new role as an Associate Justice of the Arkansas Supreme Court. Chancery Judge Collins Kilgore was subsequently assigned the *Lake View* case and presided over the 2000 compliance trial. *Lake View III*, 91 S.W.3d 472, 478 n.4 (Ark. 2002).

28. The trial court, presuming legislation to be constitutional, dismissed the complaint on the grounds that Amendment 74 and various legislative acts in 1995 and 1997 had implemented a new standard for public school funding. *Id.* at 478; *see supra* notes 24–25.

29. *Lake View II*, 10 S.W.3d 892, 900 (Ark. 2000). This compliance trial formed the basis of the subject of the *Lake View III* decision. *Lake View III*, 91 S.W.3d at 478. The court held that "[i]t would take an extraordinary leap of faith to assume that the mere passage of a new school funding formula resolves all issues relating to disparities in the school funding system set out in the 1994 Order." *Lake View II*, 10 S.W.3d at 899. Dismissing the case, as the trial court did, would effectively preclude subsequent litigation regarding the constitutionality of legislation passed in 1995 and 1997, and the *Lake View* case "cries for finality and resolution." *Id.* at 901.

30. As ordered by Arkansas Supreme Court. *Id.* at 900.

31. In the meantime, the General Assembly during its 1999 session appropriated funds for public education totaling more than \$3.3 billion for the biennium. *See* 1999 Ark. Acts 1392 (appropriating funds to school districts). The General Assembly also established the Arkansas Comprehensive Testing Assessment and Accountability Program to assess and evaluate academic progress and performance in the public schools with an emphasis on reading, writing, literacy, and mathematics from the earliest grades. Arkansas Comprehensive Testing, Assessment, and Accountability Program Act, 1999 Ark. Acts 999 (codified at ARK. CODE ANN. §§ 6-15-401 to 407, 1003 (Lexis Nexis 2005)). These legislative improvements in education became issues in the forthcoming compliance trial. *See Lake View III*, 91 S.W.3d at 478–79.

32. *Lake View III*, 91 S.W.3d at 479.

33. The *Lake View III* court employs the terms "inequity" and "inequality" interchangeably; e.g., "we quickly discern *inequality* in educational opportunities." *Lake View III*, 91 S.W. 3d 472, 497 (Ark. 2002) (emphasis added); *see also id.* at 495–500 (holding that

lasted for nineteen days in September and October of 2000 and ended with Judge Kilgore declaring the current school funding system unconstitutional on the twin grounds of inadequacy under the education article³⁵ and inequality under the equality provisions³⁶ of the Arkansas Constitution.³⁷ The Arkansas Supreme Court's *Lake View III* decision was a direct appeal from Judge Kilgore's ruling.³⁸ The State appealed the constitutionality of this order, and the plaintiffs also appealed to the supreme court.³⁹

2. The *Lake View III* Decision

The State contended that the school funding system presented nonjusticiable questions, since the constitutionality of the school system is properly left to the other branches of government.⁴⁰ The

the school funding scheme is inequitable by pointing out various inequalities in educational opportunities throughout the state).

34. David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 ARK. L. REV. 519, 522 (2003); see also *Lake View III*, 91 S.W.3d at 479 (discussing the twin foci of the 2000 compliance trial). This move surprised many participants in the case, who believed that the trial would focus only on the issue of inequality. See *Lake View III*, 91 S.W.3d at 479; cf. *Lake View II*, 10 S.W.3d 892, 899–900 (Ark. 2000) (discussing the need and purposes for a compliance trial, seemingly focusing exclusively on inequity).

35. ARK. CONST. art. XIV, § 1.

36. *Id.* art. II, §§ 3, 18.

37. *Lake View III*, 91 S.W.3d at 479. Conducting a trial for these two issues was not insignificant, since the adequacy issue caused many richer school districts to be aligned with the poorer ones, in order to seek an increase in overall funding. See *id.* at 479–80 (discussing the posture of the parties).

38. The *Lake View III* court determined that the case it was reviewing was Judge Kilgore's 2001 order, instead of Judge Imber's 1994 order, reasoning that Judge Kilgore's compliance trial was intended to determine "whether the post-1994 legislation and Amendment 74 had corrected the constitutional deficiencies [found by Judge Imber]." *Id.* at 482.

39. The plaintiffs' appeals included challenging the failure of the trial court to hold the State in contempt of court for failure to comply with Judge Imber's 1994 order and failure to order specific remedies. *Id.* at 479. The controversy over attorneys' fees will not be discussed in this Note.

40. The State argued that "courts unduly interfere and even usurp legislative and executive branch functions when they declare school-funding systems unconstitutional." *Lake View III*, 91 S.W.3d 472, 482–83 (Ark. 2002). The State cited the following constitutional provisions: "The powers of the government of the State of Arkansas shall be divided into three distinct departments. . . ." and "[n]o person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." ARK. CONST. art. IV, §§ 1, 2.

supreme court, however, asserted that this justiciability issue was effectively laid to rest⁴¹ by its previous decision in *DuPree*, which the court followed as binding precedent.⁴² The court further observed that the Arkansas Constitution specifically designates the entire State Government, rather than only the General Assembly, as the entity whose constitutional charge it is to maintain a “general, suitable, and efficient system of free public schools[.]”⁴³ The court therefore assumed its equal role with the other branches of State Government in maintaining the constitutionality of the school funding system.

Rejecting the State’s arguments that the court should not review school funding because legislative acts are presumed constitutional, the court harshly responded that “[t]his court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility . . . [w]e refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education.”⁴⁴ Indeed, the court avowed its constitutional duty to adjudicate controversies regarding the constitutionality of school funding,⁴⁵ opining that the State⁴⁶ has an “*absolute duty* to provide the school children of Arkansas with an adequate education.”⁴⁷ Thus, by dismissing the justiciability issues, while vindicating its active role

41. *Lake View III*, 91 S.W.3d at 483.

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

43. *Lake View III*, 91 S.W.3d at 484 (citing ARK. CONST. art. XIV, § 1). “The people of this state [when adopting the current constitution] unquestionably wanted *all departments of State Government* to be responsible for providing a general, suitable, and efficient system of public education to the children of this state.” *Id.* at 484 (emphasis added). The court analyzed the language of the four preceding Arkansas Constitutions, determining that all of them stated that “the *General Assembly* would provide for public education.” *Id.* (emphasis added). See ARK. CONST. of 1836, art. VII; ARK. CONST. of 1861, art. VII, § 1; ARK. CONST. of 1864, art. VIII; ARK. CONST. of 1868, art. IX, § 1. “In [the current constitution of] 1874, however, that duty was expressly shifted to the *State*, which signaled, in our judgment, a deliberate change.” *Lake View III*, 91 S.W.3d at 484 (emphasis added). The court’s willingness to decide this case affirms the *DuPree* principle that “the responsibility for maintaining a general, suitable and efficient school system falls upon the *state*.” *DuPree*, 651 S.W.2d at 95 (emphasis added).

44. *Lake View III*, 91 S.W.3d at 484.

45. *Id.* at 492–95.

46. “[E]ducation has always been of supreme importance to the people of this state.” *Lake View III*, 91 S.W.3d 472, 492 (Ark. 2002).

47. *Id.* at 492 (emphasis added). See also *supra* note 43 (discussing the role of the entire State Government in providing an adequate and equitable education).

in the matter, the court was able to address the substantive issues on appeal.

a. Adequacy

The State asserted that the trial court should not have issued rulings regarding adequacy, contending that the compliance trial was ordered only under the equality provisions⁴⁸ of the Arkansas Constitution.⁴⁹ The Arkansas Supreme Court swiftly rejected this argument, holding that it had remanded the case for a compliance trial to determine “whether the post-1994 legislation had satisfied the two constitutional deficiencies underscored by Judge Imber in her 1994 order,” a criterion that included a decision on adequacy.⁵⁰

The State also contended that adequacy is “impossible to define.”⁵¹ In response, the court pointed out the failure of the State to follow the directive of the General Assembly to order an adequacy study,⁵² which was “extremely troublesome and frustrating to [the] court, as it must be to the General Assembly.”⁵³ Citing two 1997 Acts from the General Assembly setting forth goals of statewide education,⁵⁴ the court determined that “the General Assembly is well on the way to defining adequacy while the [State] Department of Education . . . has been recalcitrant.”⁵⁵ Therefore, the court turned to

48. ARK. CONST. art. XIV, § 1.

49. *Lake View III*, 91 S.W.3d at 486. There is “considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable.” *Id.* at 496. Adequacy measures basic quality of education; equity compares school districts to each other. *Id.*; cf. *Lake View II*, 10 S.W.3d 842, 899–900 (Ark. 2000) (discussing the need and purposes for a compliance trial, seemingly focusing exclusively on inequity).

50. *Lake View III*, 91 S.W.3d at 486. “Judge Imber had concluded that the school-funding system failed as inadequate under Article 14 and inequitable under Article 2 of the Arkansas Constitution.” *Id.*

51. *Id.* at 486.

52. “The State Board shall seek public guidance in defining an adequate education” Equitable School Finance System Act of 1995, 1995 Ark. Acts 917 (repealing old funding system and requiring Board of Education to review minimum standards and develop definition of adequate education) (codified in part at ARK. CODE ANN. §§ 6-17-1001, 20-319, 26-80-110 (Lexis Nexis 2005)).

53. *Lake View III*, 91 S.W.3d 472, 486 (Ark. 2002).

54. ARK. CODE ANN. § 6-20-302(c)(4)(A) (Lexis Nexis 2005); Arkansas Public Education Act of 1997, § 3, 1997 Ark. Acts 1108 (codified at ARK. CODE ANN. §§ 6-15-1003(a) to (c) (Lexis Nexis 2005)).

55. *Lake View III*, 91 S.W.3d at 487. Indeed, the State Department of Education had not

another jurisdiction's seven-factor definition of an "efficient"⁵⁶ education, undercutting the State's original assertion that adequacy is impossible to define.⁵⁷

The State also pointed out the lack of a correlative relationship between enhanced school funding and increased student performance.⁵⁸ The court responded by enumerating the "abysmal rankings" of various components of Arkansas's educational system, holding that poor student performance essentially demands that something must be done to remedy the situation.⁵⁹ The court cited the testimony of the Director of the Department of Education stating that higher teacher salaries are needed to achieve higher student test

ordered an adequacy study nor set forth an adequacy standard, failing to keep up with the General Assembly's efforts to define adequacy with precision. In short, the State's adequacy argument failed simply because no significant efforts to define adequacy itself had been taken. *Id.* at 486.

56. The Arkansas Supreme Court did not comment on the relationship between "adequate" and "efficient," but appeared to adopt the efficiency factors set forth by the Kentucky Supreme Court as equally applicable to adequacy. *See infra* note 57.

57. *Lake View III*, 91 S.W.3d at 487–88. The court employed the seven factors set forth by the Kentucky Supreme Court:

We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices, (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or the job market.

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

58. *Lake View III*, 91 S.W.3d at 488.

59. *Lake View III*, 91 S.W.3d at 488. The court listed, *inter alia*, poor rankings in per capita government expenditures for education, standardized test scores, percentage of adult high school graduates, percentage of adult college graduates, percentage of adults with graduate degrees, non-proficiency in math, reading, science, and writing, per-pupil revenue, and teacher salary. *Id.* at 488–89. The court did not comment, however, on whether these rankings possessed any dispositive value, or what level of ranking would be constitutionally acceptable. *Id.*

scores.⁶⁰ The court acknowledged what already appeared self-evident: that more money would help cure defects in Arkansas's public school system.

b. Equity

The court addressed the politically explosive issue of equity among State school districts.⁶¹ The court, despite the State's arguments to the contrary,⁶² accepted the trial court's finding of fact regarding inequity among school districts.⁶³ The court identified "the measuring rod for equality" to be the actual per-student expenditures by State Government.⁶⁴ Using such a standard, the court found "self-evident" inequality in educational opportunities.⁶⁵ The court noted differences in school districts' curricula⁶⁶ and facilities.⁶⁷ Additionally, inequality in teachers' salaries among school districts causes teacher migration away from poor districts.⁶⁸ In fact, the school funding system has itself "fostered . . . discrimination" against poor school districts.⁶⁹

60. *Id.* at 489.

61. The equity issue has the potential of dragging down richer school districts, by forcing them to spend less on education to achieve equity with poorer districts.

62. Pointing out the complexities in any definition of "equitable," including the divergent needs for both horizontal equity in per-student expenditures and vertical equity to assure equal opportunities for special needs students, the State argued that "it is virtually impossible to equalize all revenues when special needs come into play and when certain value judgments must be made." *Lake View III*, 91 S.W.3d at 495.

63. *Id.* at 497. "For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution." *Id.* (quoting *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983)).

64. *Lake View III*, 91 S.W.3d at 497.

65. *Id.*

66. The court contrasted the differences in the "barebones" curriculum of the Lake View and Holly Grove School Districts with the "rich curriculum" of the Fort Smith School District. *Id.*

67. Brushing aside arguments that more money does not solve all educational problems, the court stated, "[w]hether a school district has rainproof buildings, sufficient bathrooms, computers for its students, and laboratory equipment that functions is all a matter of money." *Id.* at 497-98.

68. *Id.* at 498. "[M]otivated teachers, sufficient equipment to supplement instruction, and learning in facilities that are not crumbling or overcrowded, all combine to enhance educational performance." *Id.* at 499.

69. *Lake View III*, 91 S.W.3d at 499. Even though Amendment 74 does allow for disparities in millage rates among school districts, it "does not authorize a system of school

c. Stay of the Court's Order and Subsequent Legislation

The court stayed its order in the case until January 1, 2004, pending subsequent school funding legislation.⁷⁰ The 2003 General Assembly passed a bill authorizing an adequacy study of the school funding system.⁷¹ The General Assembly also raised teachers' minimum salaries, but the measure did not affect teachers already earning more than the minimum.⁷² The General Assembly also created a program designed to identify, assess, and address school districts in fiscal distress.⁷³ Additionally, the legislature changed the basis of the State's funding formula from per-district to per-student calculations.⁷⁴

C. Recalling the Mandate and Appointment of the Special Masters

On January 22, 2004, the Arkansas Supreme Court recalled its mandate in *Lake View III*.⁷⁵ Days later, the court appointed two Special Masters in the case, Bradley D. Jesson and David Newbern.⁷⁶ The court explicitly set forth the Masters' task, directing them to evaluate the steps taken by the State since *Lake View III* to correct the unconstitutional school funding formula.⁷⁷

funding that fails to close the gap between wealthy school districts . . . and poor school districts." *Id.*

70. *Id.* at 510.

71. 2003 Ark. Acts 94. The General Assembly, however, did not follow all of the adequacy study's recommendations, including failing to raise teachers' salaries by the suggested 10%. See *Masters' Report I*, *supra* note 3, at Question 1, 12.

72. Public School Funding Act of 2003, 2004 Ark. Acts 59 (codified at ARK. CODE ANN. §§ 6-20-2001 to 2006, 17-2401 to 2405, 23-501 (Lexis Nexis 2005)).

73. The Quality Education Act of 2003, 2003 Ark. Acts 1467 (codified at ARK. CODE ANN. §§ 6-15-202, 203, 206 to 209, 423 to 431, 20-1901 to 1911, and amending 15-401 to 404, 406, 419 to 421, 423 to 431, 13-1403 to 1405, 1409, 1410 (Lexis Nexis 2005)).

74. Public School Funding Act of 2003, *supra* note 72.

75. "Because of noncompliance with the November 21, 2002, opinion of this court [*Lake View III*], we recall our mandate in this case forthwith." *Lake View Sch. Dist. No. 25 v. Huckabee*, 142 S.W.3d 643, 644 (Ark. 2004).

76. Jesson is a former Chief Justice of the Arkansas Supreme Court. *Lake View Sch. Dist. No. 25 v. Huckabee*, 144 S.W.3d at 742. Newbern is a former Justice of the Arkansas Supreme Court. *Id.*

77. The court commanded the Masters to "examine and evaluate legislative and executive action taken since [*Lake View III*], to comply with . . . the constitutional mandate that the State 'maintain a general, suitable, and efficient system of free public schools and . . . adopt all

In a lengthy Report, the Masters addressed several issues involving the school funding scheme.⁷⁸ The Masters endorsed this definition of “adequacy”: “[A]n amount of revenue per pupil enabling a student to acquire knowledge and skills specified by public officials as necessary to participate productively in society and to have an opportunity to lead a fulfilling life.”⁷⁹ Generally, the Masters approved of the steps taken by the General Assembly since the *Lake View III* decision to bring the system into constitutional compliance.⁸⁰

The Arkansas Supreme Court again recalled its mandate in the *Lake View III* case on June 9, 2005, reappointing Special Masters

suitable means to secure to the people the advantages and opportunities of education.” *Id.* (quoting ARK. CONST. art. XIV, § 1).

78. *Masters’ Report I*, *supra* note 3. The Masters addressed ten issues related to school funding: (1) the adequacy study prepared for the General Assembly and the steps taken by that body to implement the study; (2) steps taken by the State to put in place a system to assess, evaluate, and monitor public school curricula offered in all primary and secondary schools in the State; (3) steps implemented by the State to assure a substantially equal curriculum is made available to all school children in the State; (4) steps taken by the State to assess and evaluate public school buildings and educational equipment across the State; (5) steps taken by the State to implement measures to assure that substantially equal school buildings and school equipment are available to all school children in the State; (6) measures in place to assure that teacher salaries are sufficient to prevent the migration of teachers from poorer school districts to wealthier school districts or to neighboring states; (7) accountability and accounting measures in place for the state to determine per-pupil expenditures and how money is actually being spent in local districts; (8) accountability and testing measures in place to evaluate the performance and rankings of Arkansas students by grade, including in-state, regionally, and nationally; (9) measures taken by the General Assembly to enact a school funding formula and to fund it so that the school children of the State are afforded an adequate education, and a substantially equal educational opportunity so as to close the gap between wealthy school districts and poor school districts; and (10) measures taken by the General Assembly to assure that funding education is the priority in the budgetary process. *Id.*

79. *Id.* at 5. This definition, derived from an expert witness’ testimony at the 2000 compliance trial, came “as close to being useful as any” *Id.* Note that this definition is itself vague, and such a definition “must necessarily vary with the state of education art and science.” *Id.*

80. “[M]uch well-intentioned legislation and regulation are now in place in response to the court’s decision, and more implementing regulation by the Arkansas Department of Education is to follow.” *Id.* at 11–12. However, “the important changes will take time to implement and more time to assess after they have been implemented.” *Id.* Incidentally, the Masters addressed school consolidation, a subject not directly mentioned the supreme court, pointing out that it will have undeniable positive effects on administrative expenses and quality of curriculum. *Id.* at 7–10. The Masters again addressed consolidation in their second Report. *See infra* note 92.

Jesson and Newbern.⁸¹ The Masters released their second report on October 3, 2005.⁸² After a detailed explanation of the state education funding formula,⁸³ the Special Masters presented findings of fact relevant to the issues raised by the parties and overall evaluations on the steps taken since their last report.⁸⁴

The Masters concluded that “the state has not lived up to the promise made by the 84th [2003] General Assembly . . . to make education the state’s first priority.”⁸⁵ The Masters roundly criticized the General Assembly for failing to raise the per-pupil funding amount to take into account considerations such as inflation.⁸⁶ Also,

81. *Lake View Sch. Dist. No. 25 v. Huckabee*, 210 S.W.3d 28 (Ark. 2005). The court recalled its mandate upon motions by more than forty school districts, alleging that they could not provide constitutionally adequate educations to their students because of the General Assembly’s alleged noncompliance with certain obligations undertaken in the 2003 legislation. *Id.* The Masters were originally required to complete their report by September 1, 2005. *Id.* However, they requested and were granted an extension until October 1, 2005. *Lake View Sch. Dist. No. 25 v. Huckabee*, 211 S.W.3d 543 (Ark. 2005).

82. Masters Report II, *supra* note 3.

83. The school funding formula is only obliquely relevant to the topic of this Note, which is to examine the judicial role in determining the constitutionality of school funding regimes, not the regimes themselves.

84. *Masters’ Report II*, *supra* note 3, at 3. For the purposes of this Note, the findings of fact themselves are not of pertinent interest, but the Masters’ evaluation of these facts in light of the constitutional and statutory requirements for education in Arkansas is of paramount importance.

85. *Id.* at 72. Apparently completely accepting testimony from school superintendents, the Masters wrote, “Without exception, the school superintendents who testified before us were of the opinion that regression in state-aid funding, costly unfunded new education mandates, and the General Assembly’s failure to take inflation sufficiently into account had adversely affected their efforts to provide an ‘adequate’ education to their students.” *Id.*

86. *Id.* at 73–74. The General Assembly’s failure to raise the foundation funding amount from \$5400 in 2005–2006 is “difficult to defend”:

The predictable rise in the cost of items such as textbooks, food served in school cafeterias, and general supplies would have justified a cost-of-living increase. Also, an increase in foundation funding should have been forthcoming due to new spending requirements placed upon the school districts by the 85th General Assembly [such as hiring music and art teachers, vision-screening personnel and equipment, duty-free lunch periods for teachers, and forty-minute preparation time for teachers].

Id. at 74. Furthermore, the Masters pointed out that the General Assembly enacted “cost-of-living increases for other state agencies, but there was no increase for the school districts for fiscal year 2005–2006.” *Id.* at 76. The General Assembly rejected a bill and a recommendation by the Governor that the foundation funding should be increased. *Id.* at 75–76. Lawmakers recognized the political and legal fallout from such inaction; for example, Rep. Jodie Mahony, D-El Dorado, said, “The fact we didn’t [raise the per-pupil funding] makes us look bad.” Seth Blomely, *Legislature Didn’t Help Its Own Case on School Funding, Lawmaker Says*, ARK.

the Masters expressed concern that school superintendents might be required to draw upon their reserve balances in order to retain the minimum level of performance called for by the General Assembly, implying that the state legislature should fund its own goal initiatives.⁸⁷

The Masters further criticized the State's policy of placing too much financial responsibility for facilities deterioration on the individual school districts' noticing that if a school district needs repairs to its facilities, it was probably strapped for cash in the first place.⁸⁸ Additionally, the appropriated funds for the biennium⁸⁹ "do not come close to addressing the state's public-school facilities needs."⁹⁰

The Special Masters berated the State Department of Education, asserting that instead of curing the constitutional defects in the school system, Department Officials short-sightedly discussed how to spend available money.⁹¹ "[A]n atmosphere of satisfaction prevailed among state officials. They seemed satisfied that the supreme court had approved what they had done in 2003 and that they could simply rest on the laurel bestowed by the court when it released its mandate after our initial report."⁹² The Masters concluded by urging the General

DEM.-GAZ., Sept. 13, 2005, at 1A. Mahony also said that the State "probably helped open the door for litigation by school districts" by not increasing this amount. *Id.*

87. *Masters' Report II*, *supra* note 3, at 74. This represents a powerful statement in favor of state, as opposed to local, financial responsibility to schools, at least to the extent that the pertinent goals are set by the state.

88. *Id.* at 79. Again, this underscores the Masters' desire for the State to take more financial responsibility for individual school districts, undercutting arguments of local control.

89. \$120 million. *Id.* at 79.

90. *Id.*

91. "Rather than seeking to address the needs of the schools . . . the discussions were about how to spend available funds." *Id.* at 75. In this criticism of the Department, the Masters highlight the necessity of fundamental reform as necessary to bring the system into constitutional compliance.

92. *Id.* at 77. The "same sense of satisfaction seems to be present" in the school consolidation issue, which the Governor advocated as a "major participant" in 2004, as a means of achieving greater efficiency in schools. *Id.* By 2005, the Governor, perhaps conscious of greater political ambitions, was "no longer actively participating in" politically difficult efforts to consolidate small schools. *Id.* at 77-78. The Masters additionally criticized the new plan for consolidation: "school districts that fall into distress . . . may be consolidated forcibly [by the Department of Education] when other attempted cures fail." *Id.* This plan results in "even less efficiency," and "it ignores what is happening in the classrooms during the years leading up to one or more of the distress conditions Several of the superintendents who testified before

Assembly to “stay the course,” indicating that “infusing the schools” with money would not solve the problem.⁹³

The supreme court adopted this harsh report.⁹⁴ The court concluded that the General Assembly failed to assess what constitutes an adequate education⁹⁵ and additionally failed to prioritize education funding.⁹⁶ Furthermore, the General Assembly “made no effort” to determine what adequate funding should be in the first place.⁹⁷ The court stayed the issuance of its mandate until December 1, 2006, to allow the General Assembly time to comply with the constitutional requirements for education.⁹⁸

us said that their districts would not be able to avoid fiscal distress if the level of funding were not raised . . .” *Id.* at 78–79.

93. Masters’ Report II, *supra* note 3, at 82.

94. *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005). Once again, the court stressed its proper role in determining the constitutionality of the educational funding scheme: “it is also the duty of this court to assure constitutional compliance when compliance is challenged and to assure that the . . . constitution is fulfilled.” *Id.*

95. The General Assembly has a “continuing duty to assess what constitutes an adequate education.” Continuing Adequacy Evaluation Act of 2004, ARK. CODE ANN. § 10-3-2102 (2006). *See also* *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005). The General Assembly failed to determine per-pupil funding for subsequent years, as required by the Act. Continuing Adequacy Evaluation Act of 2004.

96. This was contrary to the requirements the General Assembly imposed on itself. *See* Act of Feb. 12, 2004, 2003 Ark. Acts 108 (an act creating an educational adequacy fund). *See also* *Lake View*, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005) (holding “that the General Assembly failed to comply with Act 57 and Act 108”); *supra* note 95 (addressing the State’s failure to comply with the Continuing Adequacy Evaluation Act of 2004).

97. *Lake View*, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005).

98. *Id.* This stay of the mandate is strikingly similar to that of *Lake View III*. *See Lake View III*, 91 S.W.3d 472, 511 (Ark. 2002). The court once again declined to take an active role in prescribing remedies in the case:

[T]his court does not direct the General Assembly to appropriate a specific increase in foundation or categorized funding amounts, as requested . . . Whether an increase is necessary is for the General Assembly to determine, after its compliance with existing legislation and its assessment of the relevant information necessary for fixing funding levels in the current biennium . . .

Lake View, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005).

D. Responses and the 2006 Special Legislative Session

Various public figures across Arkansas commented on the Special Masters' second report and what the supreme court's next steps should be. Governor Mike Huckabee vehemently denounced the Masters' report.⁹⁹ Huckabee also expressed deep concern about the potential constitutional ramifications of an active role for the state supreme court in school funding.¹⁰⁰

The General Assembly met in special session in April 2006, passing many bills in response to the Masters' report.¹⁰¹ Namely, it raised teachers' salaries by 1.6% and provided extra assistance to financially failing school districts.¹⁰² In November 2006, four school districts asked the supreme court not to withdraw its mandate in the *Lake View* case until at least the end of the 2007 legislative session.¹⁰³ The court agreed, again appointing Special Masters Jesson and Newbern.¹⁰⁴ The majority opinion stated the court's rationale for re-appointing the Masters: "We wish to emphasize that this court is not prejudging whether constitutional compliance has occurred or not. We simply have not been provided with the necessary information to make an informed determination."¹⁰⁵ The court also disclaimed that "it is not this court's intention to monitor the 2007 session of the

99. Seth Blomeley, *Huckabee Slams Masters; Court Overstepping in School-Funding Case, He Says*, ARK. DEM.-GAZ., Oct. 6, 2005 at 1A. Huckabee characterized the report as "convoluted and confusing." *Id.* Having defended his efforts and those of the General Assembly to increase funding to public schools, Huckabee stated that he was "amazed and appalled [at the Masters' Report]. It's as if they have ignored your tax money." *Id.* Huckabee was referring at least in part to the Masters' wholesale agreement with the superintendents on the foundation funding issue. *See Masters' Report II, supra* note 85.

100. Huckabee said, "I'm confident there will be a united effort in the two branches of government to say to the third [the judicial branch] that there are three equal branches of government and one does not supersede the other." *Id.*

101. *See* Seth Blomeley, *Education Bills Can't Please All, Huckabee Says*, ARK. DEM.-GAZ., Apr. 12, 2006 at 1B.

102. *See id.*

103. *See* Michael R. Wickline, *4 Districts Ask for Extension in School Case*, ARK. DEM.-GAZ., Nov. 18, 2006 at 1A.

104. *Lake View Sch. Dist. No. 25 v. Huckabee*, No. 01-836, 2006 WL 3456468 (Ark. 2006).

105. *Id.*

General Assembly.”¹⁰⁶ Justice Hannah’s dissent expressed fatigue with the ongoing role of the court:

This court’s jurisdiction does not reach to supervising or overseeing the actions of the other branches of government. [T]he basis of the court’s action is simply that this court has decided that it will not let go until it is satisfied that an adequate school system has been provided by the General Assembly . . . [which] is not a basis for jurisdiction.¹⁰⁷

In 2006, Arkansas voters elected Attorney General Mike Beebe as Governor.¹⁰⁸ Beebe, a supporter of Amendment 74,¹⁰⁹ has acknowledged and accepted the inherent inequity in the school funding scheme: “You’ll always have the potential for inequity . . . It’s part of the American ethic to let people excel and go as far as you want to go for their own education.”¹¹⁰ Beebe has also advocated that the supreme court step aside in the case, stating in November 2006, “The legislature and Governor took the necessary steps to address the court’s concerns in [the special session], and we will not step back from any of the reforms that are being implemented.”¹¹¹

E. Similar Litigation in Other Jurisdictions

State courts across the country have confronted difficult issues regarding degrees of judicial oversight of legislative efforts to bring the educational funding system into constitutional compliance. In many cases, courts directly oversaw the actions of the legislature, including the imposition of deadlines for corrective action¹¹² and dictating school funding provisions to the legislature.¹¹³ The issues

106. *Id.*

107. *Id.* (Hannah, C.J., dissenting).

108. See 2006 General Election and Non-Partisan Judicial Election, Arkansas Secretary of State (2007), <http://www.arelections.org> (click “Results by Contest,” then click “Governor”).

109. Seth Blomeley, *Beebe Was Major Player in 4 Amendments*, ARK. DEM.-GAZ., Aug. 20, 2006 at 1B.

110. *Id.*

111. Wickline, *supra* note 103.

112. See, e.g., *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326 (N.Y. 2003) (the court gave the State one year to come into compliance).

113. *Montoy v. State*, 112 P.3d 923 (Kan. 2005).

these courts faced in the litigation naturally are relevant to the future of the Arkansas litigation and their remedial strategies offer alternatives to what the Arkansas Supreme Court has already prescribed to rectify the unconstitutional situation.

1. New Jersey

New Jersey has been embroiled in school litigation for more than three decades,¹¹⁴ and the political events surrounding the *Abbott v. Burke*¹¹⁵ litigation resulted in similar constitutional issues for New Jersey as Arkansas currently faces.¹¹⁶ Eventually, the New Jersey Supreme Court ordered monetary relief in per-pupil expenditures for several school districts¹¹⁷ and mandatory entitlements for disadvantaged children, including constitutionally-required preschool programs.¹¹⁸ When the State balked at enacting legislation to bring the educational system into constitutional compliance, the New Jersey Supreme Court again intervened, spelling out specific substantive educational standards, such as student-teacher ratios.¹¹⁹ The New Jersey Supreme Court thus assumed an active role in prescribing substantive solutions to the state's unconstitutional educational system, effectively compelling the legislature to adopt specific measures.

114. See *Robinson v. Cahill*, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972). In *Robinson*, the New Jersey Supreme Court declared the school funding scheme unconstitutional. The state constitution reads in pertinent part: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State . . ." N.J. CONST. art. VIII, § 4.

115. *Abbott v. Burke*, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984).

116. See *id.*

117. *Abbott v. Burke*, 693 A.2d 417, 440 (N.J. 1997).

118. *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998). This development in itself is stunning, since the New Jersey Constitution only mandates a "thorough and efficient education" for children ages five through eighteen. N.J. CONST. art. VIII, § 4. However, the New Jersey Supreme Court demonstrated its willingness to accept studies showing the importance of preschool aptitude to future success: "[R]esearch clearly supports the notion that full-day kindergarten is an essential part of a thorough and efficient education for the Abbott children." *Abbot*, 710 A.2d at 461.

119. *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000).

2. Nevada

The Nevada Supreme Court invalidated a procedural provision of its state constitution to allow its legislature to levy taxes more easily.¹²⁰ The case arose out of the Nevada General Assembly's failure to reach an agreement on either the amount of funding for the educational system or the tax increases necessary to fund education (after the legislature had appropriated money for non-educational governmental functions).¹²¹ The Governor of Nevada called two separate special sessions to address this issue, neither of which produced results sufficient to remedy the constitutionally offensive educational system.¹²² The Governor then sued the state legislature for a writ of mandamus to compel it to fulfill its constitutional duties with regard to education funding.¹²³ Acknowledging its limitations and inherent inability to levy taxes,¹²⁴ the Nevada Supreme Court nonetheless characterized the state constitutional provision requiring a two-thirds majority in both Houses¹²⁵ as "procedural."¹²⁶ The court invalidated the provision for the purposes of allowing the state legislature to fulfill its constitutional requirements regarding education.¹²⁷ The court further ordered the Nevada legislature to raise

120. *Guinn v. Legislature of State*, 71 P.3d 1269, 1272–73 (Nev. 2003).

121. *Id.*

122. *Id.* at 1273.

123. *Id.* at 1272. "The Governor of Nevada has petitioned this court for a writ of mandamus declaring the Legislature to be in violation of the Nevada Constitution, and compelling the Legislature to fulfill its constitutional duty . . . by a time certain. We agree that our intervention is appropriate in this extraordinary circumstance." *Id.*

124. *Id.* at 1274. "Clearly, this court has no authority to levy taxes or make appropriations. Only our Legislature has been given the constitutional mandate to make appropriations, levy taxes, and to balance the state's budget." *Id.*

125. "[A]n affirmative vote of not fewer than two-thirds of the members elected to each House is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form . . ." NEV. CONST. art. IV, § 18(2).

126. *Guinn v. Legislature of State*, 71 P.3d 1269, 1275 (Nev. 2003).

127. *Id.* However, the court asserted its proper role in adjudicating the dispute without directly levying taxes: "[w]hen constitutional provisions are incompatible with one another or are unworkable, or when the enforcement of one prevents the fulfillment of another, this court must exercise its judicial function of interpreting the Constitution and attempt to resolve the problem." *Id.* at 1274.

When a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield. Here, the application of the general procedural requirement for a two-thirds majority has prevented the Legislature as a

the necessary taxes to fund the school system on a simple majority vote.¹²⁸

3. Kansas

In 2005, the Kansas Supreme Court directly ordered its state legislature to increase funding for public education by at least \$285 million for the next biennium under threat of completely cutting off funding to public schools through a judicial order,¹²⁹ in order to bring the system into constitutional compliance.¹³⁰ Predictably, this move has attracted criticism, particularly from the state legislature, which perceived increasing educational funding as its duty under the state constitution.¹³¹ The legislature eventually complied with the court's

body from performing its obligation to give life to the specific substantive educational rights enunciated in our Constitution.

Id. at 1275.

128. *Id.* at 1276. It is also important to note the desperate fiscal situation that faced Nevada at the time of the dramatic *Guinn* decision:

Nevada now faces an unprecedented budget crisis. Schools have not been funded for the upcoming school year. Teachers have not been hired. Educational programs have been eliminated. Planning for the academic year is not possible, and the state's bond rating may be jeopardized. This court has been petitioned to resolve the crisis. In light of the above circumstances, it appears there is no plain, speedy and adequate remedy in the ordinary course of law, and this court's intervention is warranted.

Id. at 1274.

129. The possibility of an injunction against the State Treasurer to prevent funding of an unconstitutional school system will be discussed subsequently in this Note. *See infra* notes 174–75 and accompanying text.

130. *Montoy v. State*, 112 P.3d 923 (Kan. 2005). Kansas' constitution calls for a "suitable" education, and the Kansas Supreme Court has struck down various funding formulas because of a lack of equal protection. *Id.*

We conclude, however, that additional funding must be made available for the 2005–06 school year to assist in meeting the school districts' immediate needs Specifically, no later than July 1, 2005, for the 2005–06 school year, the legislature shall implement a minimum increase of \$285 million above the funding level for the 2004–05 school year, which includes the \$142 million presently contemplated in H.B. 2247.

Id. at 940.

131. For example, the State Senate passed a constitutional amendment aimed at defining increasing funding as exclusively the role of the legislature. *See Fred Mann & Steve Painter, Senate Passes Funding Amendment*, THE WICHITA EAGLE, June 25, 2005.

order, passing a bill that increased funding in a manner acceptable to the court.¹³²

III. ANALYSIS AND PROPOSAL

A. *The Nature of Possible Future Court Involvement*

According to the Arkansas Supreme Court, education is of paramount constitutional importance.¹³³ The level of court involvement in the school funding process is the dominant controversy facing the State in this arena. The plaintiffs have argued that the court should prescribe specific remedies against the State to bring the school funding formula into constitutional compliance,¹³⁴ but the court has declined to directly impose its vision of school reform on the State by commanding specific performance.¹³⁵ The court has, however, offered a general blueprint of constitutional requirements, directly urging the State to take a more aggressive approach toward curing the defects in the school funding scheme.¹³⁶

132. "The present solution may not be ideal. However, it is approved for interim purposes." *Montoy v. State*, No. 92,032 (Kan. July 8, 2005) (order lifting stay on the expenditure of funds), <http://www.kscourts.org/ordershowcause7805.htm>.

133. "That education has been of paramount concern to the citizens of this state since the state's inception is beyond dispute." *Lake View III*, 91 S.W.3d 472, 492 (Ark. 2002).

134. *Id.* at 479.

135. "It is not this court's intention to monitor or superintend the public schools of this state." *Id.* at 511. See also Matthews, *supra* note 34, at 535.

136. The *Lake View III* court set forth its general blueprint of constitutional requirements as follows:

It is the State's responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.

Lake View III, 91 S.W.3d at 500. This language closely parallels that of the charge given to the Special Masters' task on both occasions. See *supra* notes 77–78 and text accompanying note 81.

As the *Lake View* litigation persists and the supreme court continues its involvement, problematic issues of judicially-prescribed remedies intensify. Courts around the country have faced similarly difficult separation of powers issues regarding proper remedies for school funding litigation,¹³⁷ and their respective approaches provide helpful insight into predicting the nature of future court involvement.

Professor John DiPippa¹³⁸ warned of court intrusion into the legislative sphere, expressing concern that the Arkansas Supreme Court has maneuvered itself into a politically difficult position because of its inherent lack of enforcement mechanisms.¹³⁹ Other commentators optimistically suggest that these problems of court involvement can easily be avoided by constitutional compliance, which may simply consist of a seemingly subtle adjustment in foundation funding.¹⁴⁰

137. See, e.g., discussion *supra* Part II.D.

138. Professor of Constitutional Law and Associate Dean at the University of Arkansas at Little Rock's William H. Bowen School of Law.

139. DiPippa stated that adopting wholesale the Special Masters' latest report would amount to having "the [s]upreme [c]ourt ordering the other two branches of government to do something." Laura Kellams, *Attorney for Schools Tells State: Don't Wait Governor: No Rush for Special Session*, ARK. DEM.-GAZ. Oct. 5, 2005 at 1A, 9A. DiPippa continued, describing a possible scenario of the executive and legislative branches failing to comply with future orders by the Arkansas Supreme Court regarding education: "The other two branches could say, 'No thank you.' The court really can't do anything about it . . . [which] shows you what a difficult position the [s]upreme [c]ourt has put itself in." *Id.* This "no thank you" is illustrated by Sen. Jim Argue, D-Little Rock, who suggested possible future legislative noncompliance with such a court order: "It's in the Legislature's authority to expend funds . . . I don't think the Legislature is ever going to concede that that's a shared responsibility with the court." Seth Blomeley, *Legislature Didn't Help Its Own Case on School Funding, Lawmaker Says*, ARK. DEM.-GAZ., Sept. 13, 2005 at 1A, 2A. Such frustration at the court's role in the matter is perhaps best embodied by a now-infamous April 2005 e-mail by Assistant Attorney General Tim Gauger, suggesting that the state constitution should be amended to strike the "adequate" requirement. See Seth Blomeley, *E-Mails Point to Frustration about School-Funding Case; Correspondence Submitted to Masters*, ARK. DEM.-GAZ., Aug. 31, 2005. However, the seriousness of this e-mail has been questioned, and no politician to date has publicly advocated to amend the constitution in this manner. *Id.*

140. See Gary W. Ritter, Joshua H. Barnett & Ginny Blankenship, Editorial, *Arkansas' School Finance Reform on the Right Path*, ARK. DEM.-GAZ., Oct. 9, 2005 at 3J. These authors, after presenting their case for how the General Assembly has effectively initiated meaningful reforms in Arkansas's education system, argue that "While the headlines say 'system ruled inadequate,' people must understand that, with a little tinkering – perhaps simply a fair inflation adjustment – Arkansas can be on the right path to creating an adequate and equitable education system." *Id.* This optimism seemingly flies in the face of the dismal outlook outlined by the supreme court in its most recent opinion. See *Lake View Sch. Dist. No. 25 v. Huckabee*, No.

B. Proposed Legislative and Judicial Solutions

The Arkansas Supreme Court is certainly aware of the controversy surrounding its appropriate function, but it remains dedicated to overseeing efforts to bring the educational system into constitutional compliance.¹⁴¹ Increased court involvement, however, may harm the prestige of the court and consequently delay tangible changes in the educational system.¹⁴² Even David Matthews, an attorney for two school districts in the litigation,¹⁴³ has voiced caution at the possibility of specific remedies ordered by the court.¹⁴⁴ However, non-participation by the court is not a plausible alternative because decreased judicial participation in the process will likely lull lawmakers into a sense of complacency and unwillingness to face difficult issues. Even though the court has been active in changing Arkansas' educational funding system, the onus must be upon the other two branches of State Government to avoid inventive judicial sanctions¹⁴⁵ by taking strides to achieve perpetual constitutional compliance.¹⁴⁶ The State must conceive and implement a system whereby Arkansas' pupils receive adequate and equal educational opportunities, and, accordingly, the proposals set forth in this Note will be grouped loosely under those two categories. Finally, this Note will analyze the appropriateness of the court's future role absent constitutionally sufficient future legislation.

01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005).

141. "Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case." *Lake View III*, 91 S.W.3d 472, 511 (Ark. 2002).

142. Naturally, the court's ability to compel the other branches of government to action on the education issue is dependent at least in part on its political prestige.

143. Rogers School District No. 30 and Bentonville School District No. 6. Matthews, *supra* note 34, at 541 n.1.

144. Matthews "do[es] not see [specific remedies] as the trial court's, or [the supreme] court's, function Development of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education." *Id.* at 535 (citing *Lake View III*, 91 S.W.3d at 507).

145. Feasible options available to the court, a coequal partner with the other two branches of government, will be discussed subsequently in this Note. *See infra* Part III.D.

146. Proposals to amend the constitution to prevent the court from making determinations on the constitutionality of the public school system undercuts the overall spirit of the State's responsibility to its youth, and such a "quick fix" does not appear politically feasible.

1. Adequacy

The lack of a uniform “adequacy” standard throughout State Government hampers efforts to achieve adequacy in the first place.¹⁴⁷ The supreme court applauded legislative efforts to define adequacy and chided the State Department of Education for failing to do the same.¹⁴⁸ The General Assembly should take decisive steps towards establishing a statewide adequacy standard.¹⁴⁹ The adequacy definition should contain specific curriculum, facilities, and teacher salary criteria. Additionally, the definition should be binding on all branches of State Government, including the Department of Education.¹⁵⁰

Standardized testing is a key objective indicator for whether adequate standards are being maintained in the State’s school districts. The General Assembly should pass a bill requiring mandatory yearly testing of elementary-aged pupils, requiring remedial summer schoolwork or being held back a grade for those students who fail. This will provide important data indicating which school districts are failing at adequately educating children, and provide the State Department of Education with an opportunity to propose solutions for that particular school district to live up to the adequacy requirements.¹⁵¹

147. The Arkansas Supreme Court has refused to define adequacy; “We offer no conclusion on the precise definition of an adequate education as we deem that to be a matter better left to the General Assembly and to the State Department of Education.” *Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1, 4 (Ark. 2004).

148. “Despite [a directive from the General Assembly], nothing has been done by the Department of Education, and seven years have passed.” *Lake View III*, 91 S.W.3d at 486.

149. A possible solution is the appointment of an “adequacy standard task force,” which would review recommendations from various state departments, the Governor’s office, school superintendents, officials from other states, and perhaps a private firm conducting an adequacy study. Based on its findings, the task force should set out in clear, specific writing an adequacy standard for the State to follow. The *Rose* factors are a good start in any attempt to define adequacy. *See supra* note 57.

150. Presumably, a legislative effort to “force” the Department to adopt an adequacy standard is more politically and constitutionally desirable than a similar effort initiated by the judiciary.

151. State funding is essential in such an effort. Financially failing school districts should not be forced to pay the costs of reeducating failing children; these costs should be assumed by the General Assembly.

2. Equity

A more accurate measure of equity in educational opportunities among the State public school districts will help ensure the perpetual success of the adequacy goals.¹⁵² Equity is a particularly difficult issue given the inherent differences in cost of living and property value among school districts.¹⁵³ As such, the era of exclusive “local control” of school finance must come to an end in order to increase uniformity in educational funding throughout the State.¹⁵⁴ The State Government simply must take a more active role in school funding, which will result not only in more concentrated power in Little Rock, but also better educational opportunities.¹⁵⁵

The amount of per-pupil expenditures should be aggressively increased, but this is only half of the concern. The State should also provide supplemental funds for school districts that cannot raise tax money on the same level as the wealthier school districts.¹⁵⁶ The goal of such a fund should be to bring every school district in the State up to a minimum per-pupil expenditure level, calculated at 50% of the difference between the average per-pupil expenditures of the top 15% of school districts and the lowest level per-pupil expenditures in the State. This fund should be a high priority,¹⁵⁷ and surplus State revenues could be deposited into this fund to ensure its perpetual

152. “[T]here is considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable. Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality.” *Lake View III*, 91 S.W.3d at 496.

153. The equity issue is also more difficult politically, since “forcing” districts to offer roughly equal educational opportunities compared with one another essentially undermines the concept of local control in education.

154. Clearly, Amendment 74 and its authorization of school districts raising their own funds through increased millages must fit in this framework.

155. The equity proposals outlined in this Note should all occur with accountability schemes, so the State can monitor how money is spent by individual school districts. This will enhance the State’s role as the proper guardian of equity in educational opportunity.

156. This cannot be a 100% match. If money from citizens throughout the State was used to supplement those school districts which had not passed local tax increases, no school district would have an incentive to use its own tax base to raise money past the minimum required by Amendment 74.

157. Educational funding in general should be high priority. “That education has been of paramount concern to the citizens of this state since the state’s inception is beyond dispute.” *Lake View III*, 91 S.W.3d 472, 492 (Ark. 2002).

viability. Such a system would reduce the likelihood of a large gap between rich and poor school districts.¹⁵⁸

C. Equality in Facilities, Curriculum, Equipment, and Teacher Salaries

The Arkansas Supreme Court has made it clear that equalizing per-pupil expenditures by itself is not enough to meet the constitutional equity requirements; equality in facilities, curriculum, and equipment among school districts is also necessary.¹⁵⁹ Identifying the districts with the poorest educational opportunities is the best way to start an equalization scheme. Aggressive state funding for improved facilities and educational equipment in these problematic districts is necessary to afford them an opportunity to provide equal educational opportunities with other districts throughout the state. It is likely that forced consolidation, despite its political difficulties, will necessarily improve curriculum.¹⁶⁰ Alternatively, or in combination with a state-initiated consolidation scheme, state grants for textbooks for honors and Advanced Placement courses would be a step in the right direction towards equalizing educational opportunities in the curriculum offered.¹⁶¹

The teacher salary issue is complex¹⁶² and should be approached similarly to the per-pupil expenditure equalizing scheme as discussed above. First, the General Assembly should raise teacher salaries across the board, with particular attention to the lowest teacher

158. Additionally, a cost of living calculation may be beneficial. For example, a school district with high per-pupil expenditures which also happens to have a high cost of living should have its per-pupil expenditure figure adjusted downwards for purposes of calculating the proper funding level for disadvantaged school districts in this scheme.

159. See *Lake View III*, 91 S.W.3d at 497–500 (discussing the need for increased equality in facilities, curriculum, educational equipment, and teachers' salaries).

160. More students in an individual school district creates more demand for particular advanced classes.

161. It will also have the desired effect of better preparing students for college, a problem that loomed large in *Lake View*. See *Lake View III*, 91 S.W.3d at 488 (discussing the widespread need for remediation in college as a factor in its finding of inadequacy in education).

162. "The task of closing the gap, and thus the task of addressing the problem of teacher migration among Arkansas school districts, will at least require more imagination than has been demonstrated by the state or by the other parties and intervenors thus far." *Masters' Report I*, *supra* note 3, at 6.

salaries. Second, the General Assembly should enact a fund designed to subsidize teacher salaries in poor districts.¹⁶³ Additionally, a similar calculation to the above proposal of per-pupil expenditures should occur regarding teacher salaries, representing an attempt to achieve a greater degree of equity in this area among school districts in the state.¹⁶⁴

D. The Future of the Court's Role

It is unclear at best whether the General Assembly will enact appropriate steps to guarantee an adequate and equitable education system in Arkansas. Even so, the Arkansas Supreme Court must be prepared to exercise caution with its future role in the funding litigation, even in the absence of innovative and constitutionally effective political solutions.¹⁶⁵ The court's inherent lack of enforcement mechanisms is a serious limitation. The prestige of the court enjoys is its most effective vehicle for bringing the other branches of government into constitutional compliance in education.

1. Specific Remedies

So far, the Arkansas Supreme Court has not, and apparently will not, order specific remedies for constitutional defects in education.¹⁶⁶

163. Indeed, it would be short-sighted and irresponsible for the State to require raising teachers' salaries without taking on much of the responsibility for funding them.

164. For example, lessening the gap between the highest districts' teachers' salaries for various experience levels and the lowest would achieve greater equity.

165. This will undoubtedly cause tension between the active judicial steps necessary to ensure constitutional compliance and the court's stated intention "[not] to monitor or superintend the public schools of this state. Nevertheless, . . . we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case." *Lake View III*, 91 S.W.3d 472, 511 (Ark. 2002).

166. The Arkansas Supreme Court appears unwilling to go as far as the New Jersey Supreme Court, for example. Compare *Lake View III*, 91 S.W.3d at 507 (asserting that it is the General Assembly's role to develop and implement new educational programs to comply with the constitution) with *Abbott v. Burke*, 748 A.2d 82, 101 (N.J. 2000) (ordering the implementation of a preschool program by a time certain). For further discussion of the New Jersey litigation, see *supra* notes 114–19 and accompanying text. The *Lake View III* court did not view specific remedies as a proper function of the judiciary. *Lake View III*, 91 S.W.3d at 507. Rather, the court opined that "[d]evelopment of the necessary educational programs and the implementation of the same falls more within the bailiwick of the General Assembly and the Department of Education." *Id.*

For example, the court explicitly declined to require a mandatory preschool program or other substantive educational programs.¹⁶⁷ Additionally, the Arkansas Supreme Court has declined to set forth specific definitions of adequacy or specific funding requirements in any area.¹⁶⁸ In short, it appears that the supreme court will continue to wait and see what steps the General Assembly and the State Department of Education will take in the future before assuming a more active role. Even if the legislative and executive branches fail at bringing the system into constitutional compliance, however, the court should avoid specific remedies in an effort to offend the appropriate separation of powers.

2. “Forcing” the General Assembly to Raise Taxes

The supreme court could conceivably take a more aggressive role and directly affect the levying of taxes.¹⁶⁹ It is not out of the question that in some future, unforeseen budget crisis,¹⁷⁰ that Arkansas’ requirement of a three-fourths affirmative vote of both Houses to raise taxes¹⁷¹ could be temporarily overruled by the supreme court.¹⁷²

167. See *Lake View III*, 91 S.W.3d at 511 (leaving substantive changes in the educational to the discretion of the General Assembly).

168. *Id.* (ordering the Arkansas Department of Education and the General Assembly to formulate a statewide adequacy definition and declining to offer specificity on the substance of this definition). In the continuing absence of a supreme court definition of “adequacy,” the State Department of Education must take further steps to define the term. See *supra* note 148 and accompanying text. The New Jersey Supreme Court’s treatment of specific remedies to bring its educational system into compliance illustrates the essential point that the Arkansas Supreme Court may order specific remedies to bring the educational system into constitutional compliance. See *Abbott*, 748 A.2d at 101 (ordering the implementation of a preschool program by a time certain).

169. See, e.g., *Guinn v. Legislature of the State*, 71 P.3d 1269, 1274–75 (Nev. 2003) (invalidating a constitutional provision for a two-thirds majority requirement to raise taxes to make it easier for the Nevada legislature to fund education). For a further explanation of the *Guinn* decision, see *supra* notes 120–28 and accompanying text.

170. Nevada was facing a severe budget crisis at the time of the *Guinn* decision. *Guinn*, 71 P.3d at 1274.

171. ARK. CONST. art. V, § 38 (as amended by ARK. CONST. amend. XIX).

172. See Matthews, *supra* note 34, at 539. Matthews, an attorney for two school districts in the *Lake View* litigation, strongly advocates increased court involvement. But even he admits that a court decision invalidating the three-fourths requirement “would create a significant separation of powers problem that can be avoided if the General Assembly acts in a timely fashion.” *Id.* See also *Guinn*, 71 P.3d at 1274 (invalidating a similar constitutional provision for the purposes of raising taxes to fund education).

The court, however, is currently reluctant to set forth specific standards for the legislature to follow.¹⁷³ Such a course would be politically disastrous. Ordering the State to provide more money for education and directly affecting the methods of taxing individuals are two different matters. The court should not intrude on the legislature's prerogative in this manner, and should prescribe, at most, only realistic remedies within the General Assembly's power to enforce.

3. Injunction Against the State Treasurer

The court could attempt to force the General Assembly into action by issuing an injunction against the State Treasurer to prevent the funding of an unconstitutional system.¹⁷⁴ The court, however, seems unwilling to explicitly set forth what is necessary to bring the system into constitutional compliance.¹⁷⁵ Thus, such an order is unlikely or, at most, far in the future. Moreover, the court should avoid such an option, as an injunction would immediately bring the its role in the funding scheme into a controversial spotlight. Ordering an injunction cannot be ruled out, however, if the litigation and insufficient legislative responses persist.

173. Also, the inherent separation of powers difficulties of such a decision mitigate against its probability. However, the important precedent set forth by the Nevada Supreme Court could lend great weight and credibility to a similar decision in Arkansas. *See Guinn*, 71 P.3d 1269.

174. *See Montoy v. Kansas*, 112 P.3d 923 (Kan. 2005) (threatening an injunction against the State Treasurer if certain funding requirements are not met). Indeed, it is within the court's power to freeze the disbursement of State funds to public schools, effectively paralyzing the statewide educational system, to force lawmakers to bring the system into constitutional compliance. David Matthews suggested this possibility:

Because of the primacy of education in the Arkansas Constitution, appropriations for non-constitutionally mandated functions are suspect in the face of an education system that is not funded adequately. Spending money on non-constitutionally mandated functions while education is left lacking will *surely* give rise to an illegal exaction suit A mandatory injunction ordering the State Treasurer to 'adequately' fund the education system seems a likely prospective remedy.

Matthews, *supra* note 34, at 540 (emphasis added). "[A]most any misuse or mishandling of public funds may be challenged by a taxpayer action." *Starnes v. Sadler*, 372 S.W.2d 585, 587 (Ark. 1963).

175. *See supra* notes 166–68 and accompanying text.

Overall, the court should tread very carefully before and while ordering any specific remedies. The litigation is settling into a familiar and destructive pattern: a judicial declaration of unconstitutionality, followed by insufficient legislative and administrative responses, followed by Special Masters confirming the insufficiency of these responses, followed by the supreme court agreeing with the Special Masters and giving the State time to respond insufficiently again. The court should continue to avoid adopting coercive measures to force the General Assembly into immediate action. Instead, the court's future role should be tempered with caution. The court should continue monitoring the General Assembly, but remove any threat of intruding on its constitutional role in government. This will help ensure that the task of providing an adequate and equitable education in Arkansas will be the job of the entire State Government, not just the dictation of the supreme court.

IV. CONCLUSION

Arkansas faces the daunting task of bringing its educational system into constitutional compliance as soon as possible. The work remaining is difficult, and specific, fundamental changes towards achieving tangible results to ameliorate the inadequate and inequitable funding scheme are needed. The Arkansas Supreme Court will certainly remain involved in this process. The nature of that involvement will not only dictate the substantive outcome of the litigation and progress towards constitutionality, but it will also fundamentally define the court's role in similar disputes in years to come. The *Lake View* litigation represents a fundamental shift away from the core concept of local control over education. The time has come for the State to take a more active and hands-on role in education the pupils of Arkansas, and the supreme court's leadership must be followed by the other two branches of State Government.