Kimbrell v. McCleskey: Rethinking the Constitutional Equality Requirement for Funding Arkansas's Public Schools[*]

I. INTRODUCTION

Over the past thirty years, the Arkansas Supreme Court has developed and defined the parameters for providing an adequate and equal education to the children of Arkansas. The first case in which the court considered the state's constitutional mandate to provide a free public education, *DuPree v. Alma School District No. 30*,[1] was decided in 1983. The judiciary first revisited the issue in 1994, when the Lake View School District filed a lawsuit against the State of Arkansas in Pulaski County Chancery Court.[2] Over the next thirteen years, the supreme court issued six notable decisions in the *Lake View* cases,[3] before concluding that the State of Arkansas provided a public school system that complied with the Arkansas Constitution.[4]

The Arkansas Supreme Court found the system established by the Arkansas General Assembly conformed to the state constitution in 2007.[5] Four years later, however, the system was challenged again when the Eureka Springs School District and the Fountain Lake School District filed suit against the State in

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1. 279 Ark. 340, 651 S.W.2d 90 (1983).

2. *See* Tucker v. Lake View Sch. Dist. No. 25 (*Lake View I*), 323 Ark. 693, 694, 917 S.W.2d 530, 531 (1996).

3. *See* Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View VI*), 370 Ark. 139, 257 S.W.3d 879 (2007); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View V*), 364 Ark. 398, 220 S.W.3d 645 (2005); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View IV*), 358 Ark. 137, 189 S.W.3d 1 (2004); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 351 Ark. 31, 91 S.W.3d 472 (2002); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View II*), 340 Ark. 481, 10 S.W.3d 892 (2000); *Lake View I*, 323 Ark. 693, 917 S.W.2d 530 (1996).

4. *See Lake View VI*, 370 Ark. at 145-46, 257 S.W.3d at 883.

5. *Id.*

Pulaski County Circuit Court.[6] The supreme court issued its opinion in the case, styled as *Kimbrell v. McCleskey*,[7] in late 2012. Some praised the decision, while others, including Governor Mike Beebe, voiced grave concern that *Kimbrell* set public school funding back to a time before *DuPree*.

This note explores the history of school funding in Arkansas, discusses the *Kimbrell* decision, and offers suggested improvements. Part II of this note analyzes the troubled history of school funding in Arkansas that laid the groundwork for *Kimbrell*. Part III discusses the majority opinion, each of the dissenting opinions in *Kimbrell*, and the reactions of different officials and state legislators. Part IV examines the *Kimbrell* decision by raising two issues not addressed in any of the opinions. Part V proposes reform.

II. HISTORY: GETTING TO *KIMBRELL*

A firm understanding of the state's constitutional mandate to provide equality in public school education is vital to determine the effect *Kimbrell* may have on the funding balance between the state's 258 school districts. The series of cases decided prior to *Kimbrell* evaluated school funding in terms of adequacy and equality, but *Kimbrell* focused only on the latter. Accordingly, the analysis of its predecessors is therefore limited to the equality issues raised in those cases.

A. *DuPree*: The Equality Requirement

The legal framework for the public school funding system in Arkansas was created in 1983 with the Arkansas Supreme Court's decision in *DuPree*. The system of public school funding in place at the time of *DuPree* tied a large portion of school district funding directly to the amount of property taxes assessed on property within each district.[8] Specifically, the amount of per-pupil revenue received by each district ranged from $1,576 at the ninety-fifth percentile to $937 at the fifth percentile.[9] This disparity existed across all types of school

6. *See* Kimbrell v. McCleskey, 2012 Ark. 443, at 2-3, 424 S.W.3d 844, 846.

7. *See id.* at 1, 424 S.W.3d at 844.

8. *See* DuPree v. Alma Sch. Dist. No. 30, 279 Ark. 340, 344, 651 S.W.2d 90, 92 (1983).

9. *Id.*

districts, from large to small, and from urban to rural.[10] Due to this large gap in funding, the court found "sharp disparities among school districts in the expenditures per pupil and the education opportunities available as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment."[11]

For the first time, the court applied the equal protection guarantees of the Arkansas Constitution[12] to public school funding.[13] The majority found "that the constitutional provision that specifically authorize[d] local districts to levy school taxes, in no way implie[d] that [the] section authorize[d] a system in violation of the requirements of equal protection."[14] The court found the state's school funding system unconstitutional because the system in place at that time bore "no rational relationship to the educational needs of the individual districts," and the system based the amount of funding available to a school district on the value of property located within the school district's boundaries.[15] Further, public policy dictated that "the educational opportunity of . . . children . . . should not be controlled by the fortuitous circumstance of residence."[16] Finally, the court noted that its role in ensuring equal education was limited, and that the Arkansas General Assembly was the proper institution to develop a system in compliance with the mandates of the Arkansas Constitution.[17]

The concurring opinions in *DuPree* mentioned two points relevant to *Kimbrell*. First, Justice Hickman noted large taxable industries operating within certain districts can create a disparity between such districts and other districts without a large taxable industry.[18] Specifically, he stated that all school districts should provide equal levels of education to their students, regardless of

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10. *Id.*

11. *Id.*

12. *See* ARK. CONST. art. 2, § 2; ARK. CONST. art. 2, § 3; ARK. CONST. art. 2, § 18.

13. *See DuPree*, 279 Ark. at 345, 651 S.W.2d at 93.

14. *Id.* at 349, 651 S.W.2d at 94-95 (quoting Serrano v. Priest, 557 P.2d 929, 955 (Cal. 1976)) (internal quotation marks omitted).

15. *Id.* at 345, 651 S.W.2d at 93.

16. *Id.*

17. *Id.* at 349, 651 S.W.2d at 95 (quoting *Serrano*, 557 P.2d at 946).

18. *DuPree*, 279 Ark. at 352, 651 S.W.2d at 96 (Hickman, J., concurring) ("[A] school district that is fortunate enough to have a nuclear energy plant in its district has more tax dollars available than a rural school district that has no taxable local industry.").

the presence of the taxable industry.[19] The funding system in place at the time of *DuPree* did not provide for such equality due to the direct correlation between property wealth and available funding.[20] Second, despite the refusal of the majority to articulate a system it believed would comply with the constitutional mandate of equality, Justice Purtle did just that.[21] He offered "[a] simple solution," one in which each district would levy and collect an unspecified millage on property at twenty percent of its assessed value, which, after collection by the state, would be distributed on a per-pupil basis after taking into account special situations in particular districts.[22]

B. The *Lake View* Cases

1. Priming the Powder Keg

On August 19, 1992, the Lake View School District, school officials, and individuals residing in the Lake View District (collectively, "Lake View") filed suit against the State, alleging that the school funding system in place violated the portions of the Arkansas Constitution that guarantee "suitable" public education[23] and equal protection[24] to Arkansas citizens.[25] Lake View asked the court to enjoin the State from enforcing the system then in place.[26] In November 1994, Judge Annabelle Clinton Imber issued an order finding that the funding system violated the Arkansas Constitution.[27] Specifically, the trial court found two problems with the funding system: (1) variances in funding among districts existed because school districts were able to retain local tax revenues and (2) the State of Arkansas did not provide state revenue to make up for per-pupil expenditure disparities between districts.[28] Judge Imber stayed her order for two years to give the Arkansas General Assembly

19. *Id.*
20. *See id.*
21. *Id.* at 354, 651 S.W.2d at 97 (Purtle, J., concurring).
22. *Id.*
23. ARK. CONST. art. 14, § 1.
24. *See* ARK. CONST. art. 2, § 2; ARK. CONST. art. 2, § 3; ARK. CONST. art. 2, § 18.
25. *Lake View I*, 323 Ark. 693, 694, 917 S.W.2d 530, 531 (1996). The plaintiffs also alleged various violations of the United States Constitution. *Id*.
26. *See id.*
27. *Id.* at 694-95, 917 S.W.2d at 531-32. Judge Imber ruled the system did not violate the United States Constitution. *Id*.
28. *Lake View II*, 340 Ark. 481, 485, 10 S.W.3d 892, 894 (2000).

an opportunity to bring the funding system into compliance with the constitutional mandate.[29]

During its regular session in 1995, the legislature passed several pieces of legislation aimed at curing the funding system's constitutional deficiencies.[30] Despite this effort, Lake View pressed on and received class certification in August 1996.[31] On November 5, 1996, Arkansas voters passed amendment 74 to the Arkansas Constitution,[32] which instituted a base millage rate of twenty-five mills and required that it be used for maintenance and operation in every school district in the State of Arkansas.[33] Significantly, amendment 74 also allowed for variations in school funding amounts and expressly permitted school districts to tax at a rate in excess of the base millage.[34] During its 1997 regular session, the Arkansas General Assembly passed additional legislation aimed at resolving the school funding issue.[35]

The parties attempted to settle the dispute in 1998, but the trial court refused to accept the settlement agreement.[36] In

29. *Lake View I*, 323 Ark. at 695, 917 S.W.2d at 532. The State filed an appeal of Judge Imber's ruling, but the supreme court dismissed it because it was not a final, appealable order. *Id*. at 694, 917 S.W.2d at 531. Notably, Justice Brown, author of each of the majority opinions in the *Lake View* saga, dissented. He believed the declaratory judgment was suitable for appeal and wished to reach the merits. *Id.* at 704, 917 S.W.2d at 536-37 (Brown, J., dissenting).

30. *See* Act 1194, 1995 Ark. Acts 5623 (appropriating funds for grants and aids to school districts); Act 917, 1995 Ark. Acts 4106 (repealing the old funding system, mandating the Board of Education to develop minimum adequacy standards, requiring all districts to tax at a base millage rate, and directing the State Treasurer to supplement revenues of districts not meeting the base millage level); Act 916, 1995 Ark. Acts 4103 (levying an income tax surcharge against residents of districts that did not pass the base millage); *see also Lake View II*, 340 Ark. at 485, 10 S.W.3d at 894-95.

31. *Lake View II*, 340 Ark. at 486, 10 S.W.3d at 895.

32. *Id*.

33. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.

34. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.

35. *See* Act 1361, 1997 Ark. Acts 8075 (appropriating over $1.5 billion in grants and aid to school districts each year); Act 1307, 1997 Ark. Acts 7499 (repealing portions of the legislation passed in 1995, defining "[u]niform rate of tax" under article 14, section 3, and defining terms of the funding formula); Act 1108, 1997 Ark. Acts 6209 (setting educational goals); *see also Lake View III*, 351 Ark. 31, 43-44, 91 S.W.3d 472, 478 (2002).

36. *Lake View III*, 351 Ark. at 44, 91 S.W.3d at 478. The court refused to accept the settlement agreement over concerns that it barred future challenges to the constitutionality of the 1995 and 1997 legislation by the members of the *Lake View* class. *See Lake View II*, 340 Ark. at 490, 10 S.W.3d at 897. At this point in the litigation, Judge Imber recused as she prepared to take a seat on the Arkansas Supreme Court, and Judge Collins Kilgore took over the case. *Lake View III*, 351 Ark. at 44 n.4, 91 S.W.3d at 478 n.4.

August 1998, the trial court issued its final order on the grounds that the case was moot.[37] Specifically, the court found that amendment 74 expressly permitted variance in the amount of funding between school districts, and the court presumed that the legislation passed in 1995 and 1997 was constitutional.[38] On appeal, the Arkansas Supreme Court reversed.[39] The case was remanded with orders for a compliance trial to determine whether the 1995 legislation, the 1997 legislation, and amendment 74 collectively brought the education funding system into compliance with Judge Imber's 1994 order.[40]

At a pretrial hearing, Judge Kilgore informed the parties that the trial would focus on both the equality and adequacy of the system in place at that time.[41] Following a lengthy trial held in September and October 2000,[42] Judge Kilgore entered an order on May 25, 2001 that ruled the State of Arkansas had an unconstitutionally inadequate and unequal education system.[43]

2. Lake View III: *Igniting the Keg*[44]

Following entry of the 2001 order by Judge Kilgore, the State appealed to the Arkansas Supreme Court.[45] The school

37. *Lake View II*, 340 Ark. at 492, 10 S.W.3d at 898.

38. *Id.* at 492, 10 S.W.3d at 898-99.

39. *Id.* at 493, 10 S.W.3d at 899.

40. *Id.* at 494-95, 10 S.W.3d at 900.

41. Up to this point, the parties believed the compliance trial would focus on the equality of the system, not on the adequacy. 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). The new, twin foci of the trial caused two of the state's wealthiest school districts, Rogers and Bentonville, to intervene and file a cross-complaint that alleged the school funding system was inadequate. Dent Gitchel, *Funding the Education of Arkansas's Children: A Summary of the Problems and Challenges*, 27 U. ARK. LITTLE ROCK L. REV. 1, 4-5 (2004). Additionally, prior to the trial, the Arkansas General Assembly passed more education legislation that would be considered during the compliance trial. *See* Act 1392, 1999 Ark. Acts 5701 (appropriating funds in excess of $1.6 billion for education); Act 999, 1999 Ark. Acts 3724 (establishing a testing program to assess and evaluate student performance); *see also Lake View III*, 351 Ark. at 44-45, 91 S.W.3d at 478-79.

42. The trial lasted nineteen days, included testimony from thirty-six witnesses, and produced a record consisting of ninety-nine volumes. *Lake View III*, 351 Ark. at 45, 91 S.W.3d at 479.

43. *Id.*

44. The discussion in this note is limited to the court's findings on equality. The court also undertook a thorough analysis of the adequacy element of the school system. *See* Brian E. Carter, Note, *Towards Intelligence and Virtue: Arkansas Embarks on a Court-Mandated Search for an Adequate and Equitable School Funding System*, 26 U. ARK. LITTLE ROCK L. REV. 143, 167-72 (2003) (discussing the decision in great detail).

districts of Rogers, Bentonville, and Little Rock intervened and asked the supreme court to uphold the trial court's findings.[46] Five amicus briefs were filed with the court, and all but one approved of the trial court's conclusions.[47]

The Arkansas Supreme Court began by discussing the method of calculating school funding in 2001.[48] First, the "base level revenue" was calculated by adding together all funds available to every district in the state and then dividing that figure by the number of students statewide.[49] Next, the "local resource rate" for each individual district in the state was calculated by summing the total assessments of all property—real, personal, and utility—lying within the district, multiplying that figure by ninety-eight percent, and then multiplying again by twenty-five mills—the uniform rate of tax under amendment 74.[50] After dividing the resulting number by the average daily membership of the district, the local resource rate was found.[51] If the local resource rate fell below the base-level revenue, the Department of Education was obligated to supplement the district's resource rate to the extent necessary to meet the base level.[52] The State of Arkansas also provided "additional base funding" to supplement the base-level revenue to ensure that every district would receive an amount equal to at least eighty percent of funds available to the district at the ninety-fifth percentile.[53] The final source of funding for school districts was a general fund for facilities repairs, maintenance, computers, and buses.[54]

The court then addressed the parties' arguments. First, the State argued that judicially determining the constitutionality of

45. Lake View, although prevailing on the constitutionality arguments at the trial level, also appealed. They sought reversal on several grounds, including the trial court's refusal to include desegregation funds in "state aid," denial of attorney's fees, refusal to hold the State in contempt, and failure to issue specific remedies. *Lake View III*, 351 Ark. at 45-46, 91 S.W.3d at 479. The State appealed on the grounds that the trial court improperly interpreted the state constitution. *Id.* at 46, 91 S.W.3d at 479.

46. *Id.*

47. *Id.* at 46, 91 S.W.3d at 479-80.

48. *See id.* at 46-47, 91 S.W.3d at 480.

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

50. *Lake View III*, 351 Ark. at 47, 91 S.W.3d at 480.

51. *Id.*

52. *Id*.

53. *Id.* at 48, 91 S.W.3d at 481.

54. *Id.* at 49, 91 S.W.3d at 481.

the school funding system would violate the separation of powers doctrine.[55] The State also contended the funding system presented a political question for the Arkansas General Assembly to answer.[56] According to the State, the court "unduly interfere[d] and even usurp[ed] legislative and executive branch functions" when it ruled the school funding system unconstitutional.[57] The Arkansas Supreme Court found that the Arkansas Constitution required the "State" to provide for public schools,[58] which meant the people of Arkansas wanted "all departments of state government to be responsible for providing a general, suitable, and efficient system of public education."[59] Thus, if the court refused to hear cases challenging the constitutionality of the public school system, it would be in "complete abrogation of [its] judicial responsibility."[60] Accordingly, the court concluded that jurisdiction was proper and proceeded to rule on the merits.[61]

The court next addressed whether the State of Arkansas provided an adequate public education.[62] In response to the State's contention that defining "adequate education" was impossible, the court noted that the legislature had started to define the term, but that the Department of Education refused to make any progress in determining what an "adequate education" actually meant.[63] The court then discussed the deficiencies of Arkansas's public education system.[64] It looked at nine different rankings of the state's education system and each led the court to conclude the system was "abysmal."[65] Next, it found that extremely low teachers' salaries led to a crisis in hiring quality teachers.[66] Then, the court noted, with specificity, the deplorable state of facilities and educational opportunities in

55. *Lake View III*, 351 Ark. at 51-55, 91 S.W.3d at 482-85.
56. *Id.* at 51, 91 S.W.3d at 483.
57. *Id.* at 51, 91 S.W.3d at 482-83.
58. *See* ARK. CONST. art. 14, § 1.
59. *Lake View III*, 351 Ark. at 53, 91 S.W.3d at 484.
60. *Id.* at 54, 91 S.W.3d at 484.
61. *See id.* at 55, 91 S.W.3d at 485.
62. *See id.*
63. *Id.* at 58, 91 S.W.3d at 487 ("[T]he General Assembly is well on the way to defining adequacy while the Department of Education, from all indications, has been recalcitrant.").
64. *See Lake View III*, 351 Ark. at 59-64, 91 S.W.3d at 488-90.
65. *Id.* at 59-60, 91 S.W.3d at 488.
66. *Id.* at 61-62, 91 S.W.3d at 489.

several districts within the state.[67] For these reasons, the court held that the State of Arkansas was not meeting its constitutional mandate to provide "a general, suitable, and efficient school-funding system."[68]

Finally, the court reached the equality issue, which required it to determine whether the State provided an equal education to all Arkansans.[69] The State focused heavily on the measures of equality the trial court considered before declaring the system unequal.[70] The trial court recognized three formulas commonly used to measure equality of school funding: (1) the Federal Range Ratio; (2) the Coefficient of Variation; and (3) the GINI Index of Inequality.[71] These formulas measured the difference in funding between the ninety-fifth percentile and the fifth percentile of school districts on both school district revenue and expenditures per pupil.[72] The State's method fell within the acceptable range difference on the local revenue measure but fell below that standard when per-pupil expenditures were considered.[73] The State argued that the per-pupil revenue comparison should control, but the supreme court rejected this argument because, in light of *DuPree*, it was proper to require equality in per-pupil spending.[74]

As it attempted to ascertain what constituted "inequality" in public schools, the Arkansas Supreme Court acknowledged "that there is considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable."[75] The court, however, distinguished the two. It ruled that to determine whether "inadequacy" exists, a school must be analyzed individually, whereas "inequality" is determined by comparing an individual school to schools in

67. *Id.* at 62-63, 91 S.W.3d at 489-90.

68. *Id.* at 72, 91 S.W.3d at 495.

69. *Lake View III*, 351 Ark. at 72, 91 S.W.3d at 495.

70. *Id.* at 72, 91 S.W.3d at 495-96. The State also advanced two additional arguments: (1) after accounting for the special needs of certain students and districts, it was almost impossible to for the State to equalize all revenues and (2) the disparities were offset by the government interest in providing funding for other state services and retaining local control over schools. *Id.* The court dispensed of these arguments quickly by applying precedent from *DuPree*. *See id.* at 73-77, 91 S.W.3d at 496-99.

71. *Id.* at 49, 91 S.W.3d at 481.

72. *Id.* at 49-50, 91 S.W.3d at 481-82.

73. *Id.* at 50, 91 S.W.3d at 482.

74. *Lake View III*, 351 Ark. at 73-75, 91 S.W.3d at 496-97.

75. *Id.* at 72, 91 S.W.3d at 496.

other districts.[76] The court's equality analysis looked to the per-pupil expenditures at each school and "whether [those expenditures] resulted in equal educational opportunity."[77] The court found:

> Equalizing revenues simply does not resolve the problem of gross disparities in per-student spending among the school districts. It provides an educational floor of money made available to the school districts but in no way corrects the inherent disparity between a wealthy school district that can easily raise additional school funds for educational enhancement by passing millage increases far in excess of the 25 mill uniform rate and poorer school districts that are only offering, as we said in *Dupree*, the "barest necessities."[78]

The court observed various school district expenditures and found that gross disparities did in fact exist.[79] For example, the curriculum offered in the Lake View School District was described as "barebones," while the Fort Smith School District provided advanced and specialty courses in subjects such as German, fashion, and marketing.[80] Some schools lacked rainproof buildings, computers, and laboratories, while these problems were unimaginable in other districts.[81] Moreover, large disparities existed between teachers' salaries in different districts.[82]

The State responded to these findings by noting that amendment 74 specifically allowed for differences in revenues between districts.[83] The court answered:

> Amendment 74 does not authorize a system of school funding that fails to close the gap between wealthy school districts with premier educational programs and poor school districts on the lower end of the economic spectrum,

76. *Id.* at 72-73, 91 S.W.3d at 496.

77. *Id.* at 74, 91 S.W.3d at 497.

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

79. *Lake View III*, 351 Ark. at 75, 91 S.W.3d at 497.

80. *Id.*

81. *Id.* at 75, 91 S.W.3d at 497-98.

82. *Id.* at 76, 91 S.W.3d at 498.

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

> which are mired in poverty and unable to provide a system of education much above the most elementary kind.[84]

The court also found that the funding formula amounted to wealth-based discrimination.[85] Finally, the court addressed equality of educational opportunity, which "must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education."[86] Ultimately, the court refused to award Lake View any of its requested remedies and stayed its mandate to provide the Arkansas General Assembly with another opportunity to enact a system that would prevent public schools from operating under a "constitutional cloud."[87]

3. The Dust Begins to Settle: The Effects of *Lake View III*

In response to the *Lake View III* decision, the Arkansas General Assembly passed several pieces of legislation.[88] Nevertheless, the Arkansas Supreme Court recalled its mandate on January 22, 2004.[89] Days later, the court appointed Bradley D. Jesson and David Newbern as "Special Masters" to the court.[90] The judiciary charged the duo with determining whether the legislative and executive actions taken from 2002 to 2004 complied with the court's order in *Lake View III* and the constitutional mandate to provide adequate and equal education to the children of Arkansas.[91]

The first submitted report, dated April 2, 2004, raised two primary concerns with respect to equality.[92] First, the report

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84. *Lake View III*, 351 Ark. at 77, 91 S.W.3d at 499.

85. *Id.*

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

87. *Id.* at 91, 97, 91 S.W.3d at 507, 511.

88. *See* Act 1467, 2003 Ark. Acts 5287 (creating programs to identify and assist schools in financial distress); Act 59, 2005 Ark. Acts 2d Extraordinary Sess. 1058 (raising the minimum salary for teachers and fixing the state's funding formula to reflect per-pupil revenue). The legislature also authorized an adequacy study of the state's school system. *See* Act 57, 2005 Ark. Acts 2d Extraordinary Sess. 1047.

89. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 355 Ark. 617, 618, 142 S.W.3d 643, 644 (2004).

90. Lake View Sch. Dist. No. 25 v. Huckabee, 356 Ark. 1, 2, 144 S.W.3d 741, 742 (2004). Jesson and Newbern had both previously served on the Arkansas Supreme Court. *Id.*

91 *Id.*

92. *See* BRADLEY D. JESSON & DAVID NEWBERN, SPECIAL MASTERS' REPORT TO THE SUPREME COURT OF ARKANSAS 5-7 (Apr. 2, 2004), *available at* http://www.schoolfunding.info/states/ar/ARspecialmaster.pdf.

acknowledged the fact that amendment 74 expressly permitted funding variations and individual school districts could levy taxes at a rate above the twenty-five mill minimum.[93] Justices Jesson and Newbern wrote that the authorized variation perpetuated the gap in teacher pay between Arkansas's more prosperous school districts and their poorer counterparts.[94] This meant that the flight of teachers from poor school districts to better paying jobs in wealthier school districts could not be combated without "more imagination."[95] The Arkansas Supreme Court responded, in *Lake View IV*, by simply noting that "[t]he General Assembly ha[d] addressed this issue in a meaningful way."[96] Second, the authors of the report sought clarification on the meaning of "substantially equal."[97] They queried whether that requirement meant "attainment of . . . 'adequacy' for all, or . . . provision of substantially the same educational assets for all Arkansas children."[98] The court responded by declaring the first definition proper, and it held that "[i]dentical curricula, facilities, and equipment in all school districts across the state is not what is required."[99]

The court relinquished jurisdiction of the case on June 18, 2004, even though some of the measures passed by the Arkansas General Assembly were not yet in full effect, and not all were fully funded.[100] The court explained that separation of powers, along with a desire to avoid morphing the court into a "brooding superlegislature," guided its decision to dispense with the *Lake View* litigation.[101] Finally, the court warned that it would not hesitate to "exercise the power and authority of the judiciary at any time" if the *Lake View* rulings were not followed.[102]

On June 9, 2005, the Arkansas Supreme Court again recalled the *Lake View III* mandate and reappointed Justices Jesson and Newbern.[103] The court acted in response to

93. *Id.* at 5-6.
94. *Id.* at 6.
95. *Id*.
96. *Lake View IV*, 358 Ark. 137, 158, 189 S.W.3d 1, 15 (2004).
97. JESSON & NEWBERN, *supra* note 92, at 6-7.
98. *Id.*
99. *Lake View IV*, 358 Ark. at 155, 189 S.W.3d at 13.
100. *See id.* at 160-61, 189 S.W.3d at 16-17.
101. *Id.* at 160, 189 S.W.3d at 16.
102. *Id.* at 161, 189 S.W.3d at 17.
103. Lake View Sch. Dist. No. 25 v. Huckabee, 362 Ark. 520, 522, 210 S.W.3d 28, 30 (2005).

allegations by forty-nine school districts that the Arkansas General Assembly reneged on the legislation passed in 2004 that triggered the release of jurisdiction.[104] Justices Jesson and Newbern returned their findings on October 3, 2005, and the pair concluded the funding system enacted by the legislature failed to meet the constitutional requirements or the mandate of *Lake View III*, primarily on adequacy grounds.[105] The court indicated the constitutional mandate would be fulfilled through legislation and executive compliance with Act 57 and Act 108.[106] At this point, issuance of the mandate was stayed until December 1, 2006.[107]

On April 26, 2007, Justices Jesson and Newbern filed their final report.[108] They concluded that the Arkansas General Assembly had complied with all of the *Lake View* mandates and that the State of Arkansas had followed every law that it enacted.[109] The court fully adopted the findings, praised the Arkansas General Assembly, and directed the clerk of the court to issue its mandate.[110]

III. *KIMBRELL V. MCCLESKEY*

A. Statutory Provisions

The issues presented in *Kimbrell* related to a fairly complex system of assessing, collecting, and distributing the constitutionally required uniform rate of tax, as well as the method the State of Arkansas uses to determine each school district's funding requirements.[111] The framework of the funding system lies in amendment 74 to the Arkansas Constitution. Each year, every Arkansas county levies a

104. *Id.* at 521-22, 210 S.W.3d at 29.

105. *See* BRADLEY D. JESSON & DAVID NEWBERN, SPECIAL MASTERS' REPORT TO THE SUPREME COURT OF ARKANSAS 72 (Oct. 3, 2005), *available at* http://www.arkleg.state.ar.us/education/K12/LitigationDocuments/6/2005.10.03_MastersReport.pdf.

106. *See Lake View V*, 364 Ark. 398, 415-16, 220 S.W.3d 645, 657 (2005).

107. *Id.*

108. *See* BRADLEY D. JESSON & DAVID NEWBERN, SPECIAL MASTERS' REPORT TO THE SUPREME COURT OF ARKANSAS (Apr. 26, 2007), *available at* http://www.arkleg.state.ar.us/education/K12/LitigationDocuments/6/2007.04.26_Masters%20Report.pdf.

109. *Id.* at 22-24.

110. *Lake View VI*, 370 Ark. 139, 145-46, 257 S.W.3d 879, 883 (2007).

111. Kimbrell v. McCleskey, 2012 Ark. 443, at 3, 424 S.W.3d 844, 846.

uniform tax of twenty-five mills on all real, personal, and utility property within its boundaries.[112] Following collection, the county treasurers remit the tax to the State Treasurer.[113] Upon receipt, the tax revenues are "distributed by the state to the school districts as provided by law."[114] The State of Arkansas is forbidden from retaining any of the funds received from the uniform rate of tax ("URT").[115] This tax is the primary source of school district income, and the proceeds can only be used for school maintenance and operation.[116] Further, amendment 74 expressly allows for variations in funding—the "primary reason" being that school districts are authorized to levy taxes at a higher rate than the URT.[117] The amendment also recognizes that some variation in funding may exist due to provisions in the Arkansas Constitution, the United States Constitution, federal or state laws, or court orders.[118]

A second problematic matter is the concept of "foundation funding." Prior to each school year, the Arkansas General Assembly determines how much money a school district must spend, per pupil, to provide that student with an "adequate" education.[119] To calculate the amount of funds a particular district must receive for a given school year, the amount set by the legislature is multiplied by the average daily membership ("ADM")[120] of the particular school district during the previous year.[121] This final figure is the "foundation funding amount" for a school district, and it is the duty of the State of Arkansas to supply each district with its funds.[122]

A firm understanding of the state's obligation to provide "foundation funding aid" is also crucial. Foundation funding aid

112. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.
113. *See* ARK. CODE ANN. § 26-80-104 (Repl. 2008).
114. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.
115. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.
116. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.
117. ARK. CONST. art. 14, § 3, *amended* by ARK. CONST. amend. 74.
118. ARK. CONST. art. 14, § 3, *amended* by ARK. CONST. amend. 74.
119. ARK. CODE ANN. § 6-20-2303(6) (Repl. 2013).
120. "Average daily membership" is defined as "the total number of days of school attended plus the total number of days absent by students . . . during the first three (3) quarters of each school year divided by the number of school days actually taught in the school district during that period of time." ARK. CODE ANN. § 6-20-2303(3)(A).
121. *See* ARK. CODE ANN. § 6-20-2305(a)(2) (Repl. 2013) (outlining the mathematical formula used to determine the funding amount the Department of Education will distribute for future school years).
122. *See* ARK. CODE ANN. § 6-20-2305.

is an amount paid by the state to an individual school district to make up the difference between the URT generated in that school district under amendment 74 and the foundation funding amount required for that district under Arkansas law.[123] The foundation funding aid is generally equal to the foundation funding amount "less . . . [n]inety-eight percent (98%) of the uniform rate of tax multiplied by the property assessment of the school district."[124] Essentially, the foundation funding aid a school district receives from the state is equal to the difference between the URT collected by that district and the foundation funding amount calculated using the Arkansas General Assembly's formula.[125]

The foundation funding statutes may be better understood when reduced into a mathematical formula. The following formula is used to calculate foundation funding:

> Foundation funding aid = ([money necessary to provide adequate education] * ADM) – ((0.98 * 0.025 * total assessed value) + miscellaneous funds).[126]

The first parenthetical is the amount of money that the Arkansas General Assembly determines is necessary, per pupil, to provide an adequate education, multiplied by the school district's ADM.[127] The total of the first parenthetical is the district's foundation funding amount.[128] The second parenthetical "represents estimated proceeds (0.98 of the total due) generated by the URT supplemented by miscellaneous funds."[129] The solution to the equation is the foundation funding aid, which the state must pay in addition to the URT revenues.[130]

B. Facts

Kimbrell involved the foundation funding aid provided to individual school districts. Following *Lake View*, Arkansas

123. Kimbrell v. McCleskey, 2012 Ark. 443, at 10, 424 S.W.3d 844, 850; *see also* ARK. CODE ANN. § 6-20-2303(21) (Repl. 2013).

124. ARK. CODE ANN. § 6-20-2305(a)(1)(A) (Repl. 2013).

125. *See* Ark. Att'y Gen. Op. No. 2010-094 (Oct. 18, 2010).

126. *Id.*; *see also* ARK. CODE ANN. § 6-20-2305(a)(1) (Repl. 2013).

127. *See* Ark. Att'y Gen. Op. No. 2010-094 (Oct. 18, 2010).

128. *Id*.

129. *See id.*; *see also* ARK. CODE ANN. § 6-20-2303(11) (Repl. 2013) (defining "miscellaneous funds").

130. Ark. Att'y Gen. Op. No. 2010-094 (Oct. 18, 2010).

implemented the foundation funding concept and began to provide proper funding to school districts. Legislators, when originally passing the school funding legislation, predicted that the amount of funds raised in a district under the URT would never be enough to produce the required foundation funding amount for that district.[131] This meant that every year, the state government would be required to supplement the URT revenues of every district in the state with foundation funding aid in order to provide the districts with their required foundation funding amount.

However, a unique problem developed. In 2010, the Arkansas Department of Education ("ADE") discovered that, during the previous two years, it had paid more than the foundation funding amount to four school districts—Fountain Lake in Garland County, Eureka Springs in Carroll County, West Side in Cleburne County, and Armorel in Mississippi County.[132] The ADE appropriated the excess funds to these districts because the URT revenues raised in the districts yielded more than the amount required under the foundation funding aid formula.[133] The amount paid by the ADE to the districts for those two years totaled $2.6 million.[134]

An analysis of the mathematical formula explains the excess revenues. When the Arkansas General Assembly enacted the foundation funding concept, legislators believed that the calculated foundation funding aid would always result in a positive number.[135] This positive number represented the amount the State of Arkansas must pay to school districts in order to provide an adequate education.[136] The problem with the four districts in *Kimbrell* was that the mathematical formula produced a negative number, meaning that the districts' URT revenue was greater than the required foundation funding amount.[137]

After discovering what it believed to be an overpayment, the ADE requested that the four districts repay the State of

131. Seth Blomeley, *School Funds Spur Clash*, ARK. DEMOCRAT-GAZETTE, Dec. 5, 2010, at 1A.

132. *Id.*

133. *See id.*

134. *Id.*

135. *See id.*

136. Blomeley, *supra* note 131.

137. *See id.*

Arkansas.[138] The ADE recognized immediate repayment could adversely affect the districts' budgets, so the Department agreed to negotiate payment plans.[139] Initially, West Side and Armorel agreed with the ADE and admitted there was little they could do to avoid repayment.[140] Both eventually returned the money.[141] Eureka Springs and Fountain Lake, however, refused to repay the funds.[142] In response, the ADE rejected the districts' budget proposals and began to withhold funding.[143] This prompted the districts to file suit in Pulaski County Circuit Court in 2011.[144]

The trial court issued an injunction, ordering the State to refrain from taking any actions against the districts refusing to pay the excess funds.[145] The State of Arkansas continued to withhold funding, and the districts asked the court to hold the state in contempt.[146] The trial court declined, but it clarified its earlier order and required the payment of the categorical funding[147] due to the districts.[148]

C. The Court's Ruling

1. Majority Opinion

The court's opinion addressed three separate issues. First, the court ruled on the ability of the ADE to capture URT revenues from districts where the revenue generated by the URT exceeded the foundation funding amount and then distribute those funds to other school districts.[149] Second, the court addressed the issue of withholding funds from the four school districts after the ADE refused to approve their budgets.[150]

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138. *Id.*

139. *Id.*

140. *See id*.

141. *See* Sean Beherec, *Millage Decision Favors Schools*, ARK. DEMOCRAT-GAZETTE, Nov. 30, 2012, at 1A.

142. *See* Linda Satter, *School Fund Withholding Goes to Court*, ARK. DEMOCRAT-GAZETTE, Oct. 5, 2012, at 1A.

143. *Id.*

144. *Id.*

145. Kimbrell v. McCleskey, 2012 Ark. 443, at 5, 424 S.W.3d 844, 847.

146. *Id.*

147. Categorical funding is money provided to school districts based upon the special needs of the children in that district, such as free-lunch, language, or special education programs. *See Lake View III*, 351 Ark. 31, 72, 91 S.W.3d 472, 495-96 (2002).

148. *Kimbrell*, 2012 Ark. 443, at 5-6, 424 S.W.3d at 847.

149. *See id.* at 6-17, 424 S.W.3d at 848-54.

150. *See id.* at 17-19, 424 S.W.3d at 854-55.

Finally, the court analyzed whether the URT was a special school tax, as opposed to a state or local tax.[151]

a. Redistribution of URT Revenue

On appeal, the State first argued that the circuit court erred in finding that the Arkansas General Assembly did not authorize the ADE: (1) to withhold URT revenues from districts generating funds in excess of their foundation funding amount or (2) to redistribute those funds to other school districts.[152] Ultimately, the Arkansas Supreme Court ruled against the State, holding that the State Treasurer was required to return all URT revenues to the district from which the funds were received.[153] The court based its opinion on constitutional and statutory construction of the various provisions of Arkansas law that provide for the collection and distribution of the URT.[154] Amendment 74 directs the State Treasurer to distribute funds "as provided by law."[155] This means that provisions of the Arkansas Code Annotated govern distribution of the funds.[156] To interpret the relevant law, the court first looked to Arkansas Code Annotated section 26-80-101(b)(1)(A).[157] It concluded that this provision allowed the State Treasurer to collect the funds from the school districts and required the State of Arkansas to distribute all funds back to the school districts—without retaining or redistributing any of the URT revenues.[158]

The court next addressed Arkansas Code Annotated section 26-80-101(b)(1)(B), which provides, "[n]o portion of the revenues from the uniform rate of tax shall be retained by the state but shall be distributed back to the school district from which the revenues were received or to other school districts."[159] The State's arguments focused on the language "or to other school districts." Under its interpretation, this language allowed the ADE to capture the excess funds generated by the plaintiff school districts and redistribute them to school districts where

151. *See id.* at 19-22, 424 S.W.3d at 855-57.
152. *Id.* at 6, 424 S.W.3d at 848.
153. *Kimbrell*, 2012 Ark. 443, at 11-12, 424 S.W.3d at 851.
154. *Id.* at 9, 424 S.W.3d at 850.
155. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.
156. *See Kimbrell*, 2012 Ark. 443, at 9-11, 424 S.W.3d at 850-51.
157. *See id.* at 11, 424 S.W.3d at 850-51.
158. *Id.* at 11, 424 S.W.3d at 851.
159. *Id.* (quoting ARK. CODE ANN. § 26-80-101 (Repl. 2008)).

the foundation funding amount was not met by the URT collected on assessed property.[160]

Pursuant to the final phrase of the relevant provision, the court turned to Arkansas Code Annotated section 16-80-101(c), which states, "[f]or each school year, each county treasurer shall remit the net revenues from the uniform rate of tax *to each local school district from which the funds were derived*."[161] The court concluded that, although subsection (b)(1)(B) referred to disbursement of URT funds to other school districts, subsection (c) only allowed the county treasurer to pay URT funds to the school district from which the funds came.[162] Thus, there was no statutory mechanism that, "by law," enabled the State of Arkansas to distribute URT revenues raised in one school district to another district since county treasurers, under subsection (c), are only enabled to dispense funds to the school district from which the revenue was "derived."[163]

The court next addressed the State's argument that the trial court violated the *Lake View* mandates by holding that the ADE could not capture the excess URT revenues generated by the plaintiff school districts.[164] First, the majority turned to amendment 74, which acknowledged that some variation in school funding was inevitable.[165] Because of the amendment's explicit allowance of funding variations, the court found that distributing excess URT funds back to the school district from which they were generated does not violate the Arkansas Constitution, as long as the State of Arkansas continued to supplement the URT raised in districts where the URT did not meet the foundation funding amount.[166] Further, the court turned to the *Lake View* decisions themselves and again concluded that variation was acceptable.[167] It believed the concern was not "'whether the revenues doled out by the State

160. *Id.*

161. *Kimbrell*, 2012 Ark. 443, at 12, 424 S.W.3d at 851 (alteration in original) (quoting ARK. CODE ANN. § 26-80-101(c) (Repl. 2008)).

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.* at 13, 424 S.W.3d at 851-52.

166. *See Kimbrell*, 2012 Ark. 443, at 12-14, 424 S.W.3d at 851-52.

167. *Id.* at 13-14, 424 S.W.3d at 852.

to the school districts [are] equal.'"[168] School districts were not required to supply more than an adequate education simply because another district provided more than an adequate education.[169] Based on these considerations, the court found that its decision did not violate the *Lake View* mandates.[170]

The State next contended that Arkansas Code Annotated section 6-20-2306 allowed it to adjust other revenues of the plaintiff districts because the excess URT revenues paid to those districts constituted an overpayment of funds.[171] The court analyzed Arkansas Code Annotated section 26-80-101, which required the county treasurers to remit the "net revenues from the uniform rate of tax" to the State Treasurer and directed the State Treasurer to then distribute those funds back to the county treasurers.[172] The court noted that the provision made no distinction between URT revenues in excess of the foundation funding amount and all other URT funds.[173] Thus, the court concluded that all net revenues from the URT had to be returned to the county treasurer from which the State Treasurer received the funds.[174]

The court also acknowledged that the excess URT funds were not a result of a voter-approved, higher tax rate. But it concluded that there was no difference between excess revenues raised as a result of higher assessed property values and extra money raised by an ad-valorem tax rate higher than the URT.[175] The court reasoned that every school district was capable of providing an adequate education—even without raising large revenues through the URT—because of the statutory obligation to provide foundation funding aid.[176] Additionally, the statutory scheme establishing the URT did not provide the ADE with a mechanism that allowed it to redistribute funds among the school districts.[177]

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168. *Id.* at 13, 424 S.W.3d at 852 (quoting *Lake View III*, 351 Ark. 31, 74-75, 91 S.W.3d 472, 497 (2002)).

169. *Id.* at 13-14, 424 S.W.3d at 852.

170. *Id.* at 12, 424 S.W.3d at 851.

171. *See Kimbrell*, 2012 Ark. 443, at 14, 424 S.W.3d at 852.

172. *Id.* (quoting ARK. CODE ANN. § 26-80-101(b)(1)(A) (Repl. 2008)).

173. *Id.*

174. *Id.*

175. *Id.* at 14-15, 424 S.W.3d at 852.

176. *Kimbrell*, 2012 Ark. 443, at 16, 424 S.W.3d at 853.

177. *Id.* at 15, 424 S.W.3d at 853.

b. ADE's Authority over Budgets

The State's second point on appeal was that the trial court erred in finding that the ADE acted improperly when it withheld money from the plaintiff districts after they failed to submit an approved budget.[178] Every year, school districts must submit a budget to the ADE.[179] The ADE then reviews the budgets to determine if they comply with state law and administrative rules.[180] If the ADE does not approve a budget and the district then fails to remedy the problems, Arkansas law authorizes the ADE to withhold money from the district.[181]

In *Kimbrell*, the ADE determined that the plaintiff districts' budgets did not comply with state law because they included URT revenues in excess of the foundation funding amount.[182] As such, the ADE withheld categorical funding from the districts.[183] Following the first holding—that the URT revenue generated by the districts in excess of the foundation funding amount belonged to the districts—the court held the districts' budgets were not deficient, and that the State had to release the withheld funds.[184]

c. The URT as a State Tax or Local Tax?

The plaintiff school districts also filed a cross-appeal, claiming that the trial court erred by classifying the URT revenue as a state tax.[185] They argued that amendment 47 prohibited the State of Arkansas from levying an ad valorem tax, which meant that the URT was not a state tax.[186] The court adopted this logic and found that the URT was not a state tax.[187]

Additionally, the court addressed the issue of whether the URT was a county tax, ruling that it was not.[188] The court relied

178. *Id.* at 17, 424 S.W.3d at 854.
179. *See* ARK. CODE ANN. § 6-20-2202(a)(1) (Repl. 2013).
180. ARK. CODE ANN. § 6-20-2202(c)(1)(A).
181. ARK. CODE ANN. § 6-20-2202(d)(2).
182. *Kimbrell*, 2012 Ark. 443, at 18, 424 S.W.3d at 854.
183. *See id.* at 19, 424 S.W.3d at 855.
184. *Id*.
185. *Id*.
186. *Id.* at 19-20, 424 S.W.3d at 855.
187. *Kimbrell*, 2012 Ark. 443, at 21, 424 S.W.3d at 856 ("Clearly, the URT is not a county tax, but further absent is any suggestion whatsoever that it is a state tax.").
188. *Id.*

on precedent to reach this conclusion.[189] According to the court, the URT was a "one-of-a-kind tax, a school-district tax,"[190] because of several unique characteristics: (1) a state wide electorate enacted the tax; (2) county treasurers assessed, collected, and distributed the tax; (3) the State Treasurer held the tax revenue for a short period; and (4) the only use of the tax was for public education.[191]

2. Dissenting Opinions

Three justices, Chief Justice Hannah, Justice Brown, and Special Justice George D. Ellis, authored separate dissenting opinions, each joining in the dissent of the others.

a. Chief Justice Hannah

Chief Justice Hannah claimed that the majority's interpretation of Arkansas Code Annotated section 26-80-101 created an unconstitutional system for funding the public schools of Arkansas.[192] He alleged that the majority's opinion also deprived the legislature of a means to provide poorer school districts with the required foundation funding amount.[193] The majority opinion prevented the State of Arkansas from using the excess URT revenues captured from the plaintiff districts as foundation funding aid for school districts where URT revenues did not meet the foundation funding amount.[194] Without the ability to redistribute those funds, the State of Arkansas lost a revenue source for its foundation funding aid.

Chief Justice Hannah conceded that Arkansas Code Annotated section 26-80-101(c) was ambiguous, particularly the language that required officials to remit the URT to the school district "'from which the revenues were derived.'"[195] Despite this, he believed the funding scheme was unambiguous when

189. *Id.* (citing Barker v. Frank, 327 Ark. 589, 594, 939 S.W.2d 837, 839 (1997)).

190. *Id.* at 22, 424 S.W.3d at 856-57.

191. *Id.*

192. *Kimbrell*, 2012 Ark. 443, at 22-23, 424 S.W.3d at 857 (Hannah, C.J., dissenting).

193. *Id.* at 24, 424 S.W.3d at 858.

194. *Id.* at 24, 424 S.W.3d at 857-58.

195. *Id.* at 23, 424 S.W.3d at 857-58 (quoting ARK. CODE ANN. § 26-80-101(c) (Repl. 2008)).

considering the statutory scheme as a whole.[196] The fact that the scheme required county treasurers to first remit the URT to the State Treasurer, who then redistributed it to the county treasurers, demonstrated the Arkansas General Assembly's intent—that the state government may, after collecting URT from county treasurers, distribute funds back to a particular county treasurer in an amount more or less than it received from him or her.[197] To hold otherwise, as the majority did, would render the payment from county treasurers to the State Treasurer a "vain and useless act."[198]

Chief Justice Hannah also wrote that the majority misapplied amendment 74's contemplated variance.[199] He wrote that the any variation from the foundation funding amount should only occur after district voters approve an ad valorem tax higher than the uniform rate.[200] Since the variation from the foundation funding amount in this case did not come from a voter-approved tax increase, he concluded the funding scheme permitted the State of Arkansas to distribute the funds at issue to school districts other than the one from which the funds originated.[201]

b. Justice Brown

Justice Brown began his dissent by discussing *DuPree*.[202] He noted that in *DuPree*, the supreme court held that the school funding system in place at that time was unconstitutional because it tied the amount of funds available to a school district directly to the value of the property in that district.[203] The majority's holding in *Kimbrell*, he wrote, returned the funding system to "a pre-*DuPree* standard where property wealth can be used by the State of Arkansas to benefit some school districts more than others."[204] In his opinion, the majority's holding allowed the State of Arkansas to distribute excess URT revenues

196. *See id.* at 25, 424 S.W.3d at 858.

197. *See Kimbrell*, 2012 Ark. 443, at 25-26, 424 S.W.3d at 858 (Hannah, C.J., dissenting).

198. *Id.* at 25, 424 S.W.3d at 858.

199. *Id.*

200. *Id.*

201. *Id.* at 24, 424 S.W.3d at 858.

202. *Kimbrell*, 2012 Ark. 443, at 26-27, 424 S.W.3d at 859 (Brown, J., dissenting).

203. *Id.* at 27, 424 S.W.3d at 859 (Brown J., dissenting).

204. *Id*.

to a school district, even if that amount is exponentially greater than funds distributed to the rest of the state's districts.[205] This, he claimed, was "manifestly wrong."[206]

Next, Justice Brown attacked the majority's conclusion that the distinction between excess URT revenues and voter-approved tax increases was "without a difference."[207] He believed that the distinction did make a difference. The applicable law authorized the State Treasurer to distribute the foundation funding, so the transaction represented a state appropriation.[208] Justice Brown wrote that this was vastly different than a tax rate increase enacted by a local school district.[209] Because the foundation funding was a state appropriation, the *Lake View* mandates prohibited the State of Arkansas from distributing those funds in a way that benefitted a school district solely because of high property values.[210] The majority's holding, he contended, abrogated this requirement and made "discriminatory payouts . . . the new normal."[211]

Justice Brown's opinion then addressed the majority's statutory construction analysis.[212] First, he discussed Arkansas Code Annotated section 26-80-101(b)(1)(B), which required distribution of the excess URT funds "'back to the school district from which the revenues were received *or to other school districts*.'"[213] He believed that this language enabled the State of Arkansas to retain URT funds from the plaintiff districts and distribute them to districts in which URT revenues did not meet their foundation funding amount.[214] Amendment 74 required distribution, "'as provided by law.'"[215] Justice Brown noted that the law of the state, under *Lake View*, was to prohibit discriminatory distribution of school funds,[216] and he concluded

205. *See id.* at 27-28, 424 S.W.3d at 859.
206. *Id.* at 28, 424 S.W.3d at 859.
207. *Kimbrell*, 2012 Ark. 443, at 28, 424 S.W.3d at 859-60 (Brown, J., dissenting).
208. *Id.*
209. *Id.*
210. *See id.*
211. *Id.* at 29, 424 S.W.3d at 860.
212. *Kimbrell*, 2012 Ark. 443, at 29-30, 424 S.W.3d at 860 (Brown, J., dissenting).
213. *Id.* at 29, 424 S.W.3d at 860 (quoting ARK. CODE ANN. § 26-80-101(b)(1)(B) (Repl. 2008)).
214. *Id.*
215. *Id.* (quoting ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74).
216. *Id.* at 28, 424 S.W.3d at 860.

that the majority "overlook[ed]" or "discount[ed]" this facet of the state's law.[217]

Finally, Justice Brown discussed the final two holdings of the majority opinion. First, he concluded that the distribution of excess URT funds to the plaintiff school districts was an overpayment, and that the ADE had full authority to withhold future payments to the school districts, unless they repaid the State.[218] Second, he addressed the majority's holding that the URT is neither a local nor a state tax, but rather a "one of a kind" tax.[219] Justice Brown reached a different conclusion—that the URT was a state tax.[220] He reasoned that several of the tax's characteristics supported this conclusion: (1) the people of the state adopted the tax;[221] (2) amendment 74 levied the tax;[222] and (3) the electors of the state had to approve an increase of the URT.[223]

c. Special Justice Ellis

Special Justice Ellis was especially critical of the majority's opinion. He wrote that "[i]t is as if the majority has entered a time machine" and believed the majority's opinion re-created "a wealth-driven system of public education."[224] The Special Justice raised one point relating to the majority's statutory construction. He quoted a recent case, which stated, "[i]n construing statutes, we will not presume the legislature to have done a vain and useless thing."[225] He found that the majority rendered "vain and useless" the language directing the State Treasurer to distribute URT revenues "'back to the school district from which the revenues were received *or to other school districts*,'" by prohibiting the treasurer from distributing the funds to any district other than the district from which the funds were derived.[226]

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217. *Kimbrell*, 2012 Ark. 443, at 30, 424 S.W.3d at 860 (Brown, J., dissenting).
218. *Id.* at 31, 424 S.W.3d at 861.
219. *Id.* at 31, 424 S.W.3d at 860.
220. *See id.* at 32-33, 424 S.W.3d at 861.
221. *Id.* at 31, 424 S.W.3d at 861.
222. *Kimbrell*, 2012 Ark. 443, at 32, 424 S.W.3d at 861 (Brown, J., dissenting).
223. *Id.* at 31-32, 424 S.W.3d at 861-62.
224. *Id.* at 34, 424 S.W.3d at 863 (Ellis, Spec. J., dissenting).
225. *Id.* at 34-35, 424 S.W.3d at 863 (quoting Snowden v. JRE Inves., Inc., 2010 Ark. 276, at 15, 370 S.W.3d 215, 223).
226. *Id.* at 35, 424 S.W.3d at 863.

d. The Majority's Response

The majority opinion briefly addressed many of the issues raised by the dissenting opinions. First, the majority dismissed the dissenters' claims that the majority's holding violated *DuPree*.[227] Instead, the court distinguished *DuPree* by finding that that case dealt with a funding system that allocated resources "primarily" on the tax base of each district—not on educational needs.[228] In contrast, the system at the time of *Kimbrell*: (1) provided an adequate and substantially equal education to all students; (2) was not subject to change due to the wealth of the State Treasury; and (3) was not tied to fluctuations in the value of property.[229] Further, the foundation funding concept ensured that every student received a constitutionally adequate education.[230]

The majority also contested the dissenters' notion that the majority opinion failed to effectuate the intent of the legislature.[231] They believed their interpretation satisfied this requirement by relying on the court's own interpretation of the Arkansas Code Annotated.[232] Notably, the majority stated that if the Arkansas General Assembly did in fact desire to establish a mechanism for funds to be distributed from one school district to another, it was free to enact legislation to that end.[233]

D. Reactions to *Kimbrell*

Following *Kimbrell*, several prominent figures expressed their contempt for the decision. Governor Mike Beebe believed that the ruling stymied the progress on education made since *DuPree*.[234] Additionally, he stated that the decision opened the door for future elected officials to backtrack from the monumental decisions in *DuPree* and *Lake View*.[235] ADE Commissioner Tom Kimbrell opined that the decision would

227. *Kimbrell*, 2012 Ark. 443, at 15, 424 S.W.3d at 853 (majority opinion) ("While [the dissenting Justices] so subtly suggest that the majority's decision is in violation of our decisions in *DuPree* and *Lake View*, nothing could be further from the truth.").

228. *Id.* (emphasis omitted).

229. *Id.* at 16, 424 S.W.3d at 853.

230. *Id.*

231. *Id.*

232. *Kimbrell*, 2012 Ark. 443, at 16, 424 S.W. 3d at 853.

233. *Id.* at 17, 424 S.W.3d at 853-54.

234. Beherec, *supra* note 141.

235. *Id.*

negatively impact the foundation of fifteen years of educational decisions.[236] State Senator Joyce Elliot, a member of the Senate Education Committee, was "crestfallen" and questioned whether the decision made it difficult to provide "a suitable and equitable education" for students across the state.[237] President of the Arkansas Education Association, Donna Morey, concluded that the decision conflicted with the legislature's intent and vowed to support the passage of legislation to solve the problems created by the decision.[238]

Governor Beebe, perhaps the most outspoken critic of *Kimbrell*, again discussed the case at a meeting of the Arkansas School Boards Association held shortly after the opinion was issued. He stated that the decision still "irritated" him.[239] He admitted that the issue was not how the decision affected the state's budget and that the monetary impact on the state was not a concern.[240] In his opinion, the decision could enable future officials to change what many had fought for decades to achieve—education as a top priority of the state.[241] Further, Beebe posed a broader question: "'If you can start tinkering with parts of [the *Lake View*] decision, [and] if you can start saying that parts of [amendment 74] are subject to really totally different kinds of interpretation . . . what can you do on these other issues?'"[242] He claimed that as one of the chief authors of amendment 74 during his time in the state legislature, he knew more about the amendment than the Arkansas Supreme Court.[243] Nevertheless, Governor Beebe pledged to follow the court's decision.[244]

A short time after the decision was issued, both the State and the plaintiff school districts in *Kimbrell* filed post-hearing motions. The school districts asked the court to take judicial notice of certain facts that were neither presented to nor

236. Sean Beherec, *No Challenges yet on Millage Decision*, ARK. DEMOCRAT-GAZETTE, Dec. 1, 2012, at 1A.

237. *Id.*

238. *Id.*

239. Michael Wickline, *School Decision Still Irks Beebe*, ARK. DEMOCRAT-GAZETTE, Dec. 8, 2012, at 1B.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Wickline, *supra* note 239.

considered by the court.[245] The districts also urged the court to consider the fact that, regardless of whether foundation funding is equal, the amounts received by school districts were never truly equal because of categorical funding.[246] They contended that these facts disproved the State's theory and corrected a "mistaken assumption" of the dissenters in *Kimbrell*.[247]

The State, on the other hand, filed a motion asking the court to rehear the matter and clarify its holding.[248] Specifically, the State sought clarification regarding the state's requirement to fund schools equally.[249] The state questioned whether the court abrogated the equality requirement of *DuPree* and *Lake View*.[250] Essentially, it asked: If the State of Arkansas provides an adequate education to all of its students, does this mean that the equality requirement is met?[251] The court denied both motions without explanation.[252]

During a special session of the Arkansas General Assembly in 2013, legislators proposed two bills addressing the problems created by *Kimbrell*.[253] The first, Senate Bill 7, sought to allow the redistribution of excess URT funds.[254] The legislation passed committee,[255] but a full vote was not held after a companion bill stalled in the House Education Committee.[256] The second bill, Senate Bill 1, effectively sought to codify the *Kimbrell* decision by allowing school districts that raised excess URT revenues to retain the extra funds.[257] Its sponsor eventually withdrew the bill.[258]

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245. Sarah D. Wire, *Districts Dispute Facts on Funding*, ARK. DEMOCRAT-GAZETTE, Dec. 15, 2012, at 1B.

246. *Id.*

247. *Id.*

248. Sarah D. Wire, *Up in Air on Equal Education, State Says*, ARK. DEMOCRAT-GAZETTE, Dec 18, 2012, at 1A.

249. *Id.*

250. *See id.*

251. *Id.*

252. Sean Beherec et al., *Justices Uphold 25-Mill Decision*, ARK. DEMOCRAT-GAZETTE, Jan. 18, 2013, at 1A.

253. Sean Beherec & Michael R. Wickline, *Rival Senate Bills Aim to Allocate 25-Mill Tax*, ARK. DEMOCRAT-GAZETTE, Oct. 18, 2013, at 1A.

254. *Id.*

255. *Id.*

256. Sean Beherec, *Bid to take 25-Mill Spillover Fails*, ARK. DEMOCRAT-GAZETTE, Oct. 19, 2013, at 1A.

257. Beherec & Wickline, *supra* note 253.

258. *Id.*

IV. ANALYSIS

This Part analyzes two key issues not addressed by the majority opinion or any of the dissenting opinions in *Kimbrell*. First, a critical characteristic shared by all of the districts in *Kimbrell* is considered. Second, the formula used to determine a district's foundation funding aid is scrutinized. This Part also provides a brief analysis of variations in URT revenue under amendment 74 not considered by the *Kimbrell* court.

A. Shared Characteristic of the Districts

None of the opinions discussed one crucial characteristic that the four school districts in *Kimbrell* had in common—high property values and low student enrollment.[259] The districts received unusually large amounts of revenue from the URT when compared to other districts, but had a relatively small amount of students on which to spend that revenue.

Another important consideration is the cause of the high property values. Armorel had a steel mill, and its corresponding high property value assessment, located within its boundaries.[260] The other three school districts—Fountain Lake, Eureka Springs, and West Side—were all located in communities with aging populations and large amounts of high-priced property.[261] Presumably, the districts with older populations also had few, if any, school-age children living inside their districts.

The fact that the districts received more school funding because of the value of the property situated within their borders flatly contradicts the Arkansas Supreme Court's holding in *DuPree*. In *DuPree*, the court held that a system which based funding on property value, rather than educational needs, was unconstitutional. The amount of funding received by the districts under *Kimbrell* clearly violates that standard. Under the court's new standard, these four districts now receive more money per student than any other district in the state—a clear violation of *DuPree*. Further, the *DuPree* court also noted that the residence of a child should not determine his or her educational opportunity. Under *Kimbrell*, students in the interested districts received more funding for their education

259. Blomeley, *supra* note 131.
260. *Id.*
261. *Id.*

than those residing in other districts because they happened to live in a district with high property values and low enrollment. Their place of residence enabled them to receive more funding for their education—another direct contradiction of *DuPree*.

Justice Hickman's concurring opinion in *DuPree* is particularly on point. He believed that the presence of a large industry in a district, such as a nuclear power plant, should not affect the amount of revenue a school district receives for education.[262] This situation manifested itself almost thirty years later, as the four interested districts in *Kimbrell* realized greater revenues due to the high-value property located within their boundaries. Although Justice Hickman's concurring opinion was not binding precedent, his prediction of the situation presented in *Kimbrell* was ominous.

The definition of equality developed and evolved in the *Lake View* cases, but the definition provided in those cases did not abrogate the court's holding in *DuPree*. The most definitive definition, as stated by the court in *Lake View III*, was 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."[263] *Kimbrell* failed to address the curricula, facilities, or equipment of the districts involved in the decision. It did, however, repeatedly cite and quote *DuPree* favorably, which signals *DuPree*'s equality mandate should still hold today.

The most recent school year did not see a resolution to the situation, and eight school districts are now set to receive more URT revenues than their requisite foundation funding amount in 2014.[264] The funds these districts will receive in excess of their foundation funding amount will total $8.4 million.[265] Once again, the unique characteristics of the school districts caused them to receive the excess URT revenue.[266] Namely, the districts have one or more of the following characteristics that result in abnormally high property values: (1) a highly taxable

262. DuPree v. Alma Sch. Dist. No. 30, 279 Ark. 340, 352, 651 S.W.2d 90, 96 (1983) (Hickman, J., concurring).

263. *Lake View III*, 351 Ark. 31, 79, 91 S.W.3d 472, 500 (2002).

264. Beherec & Wickline, *supra* note 253.

265. *Id.*

266. *Id.*

industry such as a steel mill or coal-fired power plant; (2) a tourist destination; (3) a retirement community; (4) or a large natural gas play.[267] This continues to contradict both the Arkansas Constitution and *DuPree*. A student should not receive more money for his or her education than another solely because that child lives in a district with high property values.

Although the funding disparity may not be enormous at the present time, it is growing. In 2008, the excess funds affected four school districts and, over the course of two years, totaled $2.6 million.[268] By the 2014–15 school year, the number of districts receiving excess funds increased to eight, with a total of $8.4 million distributed to those districts.[269] The list of districts that generate excess URT revenue differs annually, which makes it difficult to predict which districts will benefit from one school year to the next. The attorney for the plaintiff school districts in *Kimbrell* stated that the decision could affect as many as twenty school districts in the future.[270]

B. Amendment 74 Analysis

The majority in *Kimbrell* turned to amendment 74, which allows variations in school funding, to conclude that its decision regarding the excess URT funds was constitutional. The applicable portion of amendment 74 reads:

> The General Assembly shall provide for the support of common schools by general law. In order to provide quality education, it is the goal of this state to provide a fair system for the distribution of funds. It is recognized that, in providing such a system, some funding variations may be necessary. *The primary reason for allowing such variations* is to allow school districts, to the extent permissible, to raise additional funds to enhance the educational system within the school district. It is further recognized that *funding variations or restrictions thereon may be necessary in order to comply with, or due to, other provisions of this*

267. *Id.*
268. Blomeley, *supra* note 131.
269. Beherec & Wickline, *supra* note 253.
270. Satter, *supra* note 142.

> *Constitution, the United States Constitution, state or federal laws, or court orders*.[271]

The districts can raise the additional funds alluded to in the amendment by having voters approve an ad valorem property tax at a rate higher than the twenty-five mill minimum.[272] The higher tax rate is "[t]he primary reason" amendment 74 allows variation in funding.[273] The excess URT revenue at issue in *Kimbrell* did not occur after voters approved a higher tax rate, so those revenues do not fit within the first variation allowed by amendment 74.

The second circumstance in which amendment 74 allows for variation in funding occurs where a district must comply with other sources of federal and state law. The largest source of variation caused by other laws comes from what the Arkansas Code Annotated labels "[a]dditional education categories," which includes funds for "alternative learning environments, English-language learners, national school lunch students, and professional development."[274] This class of funds is frequently referred to as "categorical funding."[275] The excess URT revenue cannot be characterized as categorical funding because it is not another "education category" as defined by statute. Rather, the revenue at issue is derived from the URT. Since the URT is contemplated by amendment 74 itself, the amendment's reference to variation in funding caused by other sources of law cannot apply to funding sources created by amendment 74.

After the *Kimbrell* decision, the plaintiff districts asked the court to acknowledge that variations exist outside of the foundation funding, due in large part to categorical funds, which means that school districts never receive truly equal funding.[276] This, they contended, demonstrates that even foundation funding can vary since true equality in funding never exists.[277] That logic fails, however, because amendment 74 expressly permits variations caused by federal or state statute. The Arkansas Code

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271. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74 (emphasis added).

272. *See* ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.

273. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.

274. ARK. CODE ANN. § 6-20-2303(1) (Repl. 2013) (internal quotation marks omitted).

275. *See, e.g.*, *Lake View VI*, 370 Ark. 139, 143-44, 257 S.W.3d 879, 882 (2007).

276. Wire, *supra* note 245.

277. *Id.*

Annotated expressly creates categorical funding, which means that the second exception for variation under amendment 74 encompasses the disparities caused by statutory categorical funds.

C. The Foundation Funding Formula

The foundation funding statutes can be translated into the following equation:

> "Foundation funding aid = ([money necessary to provide adequate education] * ADM) – ((0.98 * 0.025 * total assessed value) + miscellaneous funds)."[278]

Legislators did not anticipate a situation where the equation would result in a negative number. Rather, they believed the formula would always produce a positive number and the state would be required to pay the proper amount to the school districts. However, the formula created unexpected funding for the four districts in *Kimbrell* and will apparently continue to do so in the future.

Foundation funding aid is "the amount of state financial aid provided to a school district under [section] 6-20-2305(a)(1)."[279] The formula, laid out above, is the mathematical translation of this provision. When the formula produces a positive number, it is "the amount of state financial aid provided to a school district under [Arkansas law]."[280] For the interested school districts in *Kimbrell*, the requisite amount of financial aid to be provided by the state was a negative number, and the formula should have enabled the state to retain the amount produced by the solution.

The majority in *Kimbrell* did not consider the formula, and the opinion would have been improved had they done so. As it stands, *Kimbrell* effectively directs the State of Arkansas to disregard any negative number produced by the formula and simply substitute a value of zero. The formula acts to fill a logical hole, which led the majority to decide the State Treasurer could not redistribute any of the excess URT funds to other districts. The Arkansas Supreme Court concluded that, although there was a provision which allowed the State Treasurer to

278. Ark. Att'y Gen. Op. No. 2010-094 (Oct. 18, 2010); *see also* ARK. CODE ANN. § 6-20-2305(a) (Repl. 2013).

279. ARK. CODE ANN. § 6-20-2303(21) (Repl. 2013).

280. *See* ARK. CODE ANN. § 6-20-2303(21).

distribute funds from one district to another, there was not a mechanism that legally enabled the State Treasurer to redistribute the funds.

Despite the absence of a legal mechanism to redistribute the excess funds, the formula actually provides such a procedure by which the State of Arkansas may redistribute the excess funds. When the formula results in a negative number, the State Treasurer must make a negative payment to a particular district, which means the State Treasurer initially retains the amount received from that district and then distributes the funds to other districts. Amendment 74 dictates that "[n]o portion of the revenues from the uniform rate of tax shall be retained by the state."[281] Therefore, as long as the State Treasurer redistributes the excess URT revenue to another district and does not retain it or apply it to general funds, the State of Arkansas is in full compliance with amendment 74.

V. SUGGESTIONS AND CONCLUSION

The Arkansas Supreme Court clearly erred in *Kimbrell*. Arkansas must now determine how to resolve the problem created by the decision—Arkansas's unconstitutional school funding system. In *Lake View III*, the court maintained jurisdiction over the case because the Arkansas Constitution required the "State" to provide for public education.[282] The court declared the provision reflects Arkansas citizens' desire that "all departments of state government" work to ensure they received adequate and equal educations.[283] Thus, one of the other two branches of government must provide a remedy.

After Governor Beebe vowed to obey the court's decision, he ordered the State Treasurer and ADE to distribute excess URT funds to the district from which they were derived.[284] As such, the solution will likely not come from the Governor's Office. Instead, and as suggested by the Arkansas Supreme Court in *Kimbrell*,[285] the state legislature must find a solution. Although the proposed legislation did not pass during a special

281. ARK. CONST. art. 14, § 3, *amended by* ARK. CONST. amend. 74.

282. *Lake View III*, 351 Ark. 31, 52-54, 91 S.W.3d 472, 484 (2002) (emphasis omitted).

283. *Id.* at 53, 91 S.W.3d at 484.

284. *See* Wickline, *supra* note 239.

285. *See* Kimbrell v. McCleskey, 2012 Ark. 443, at 17, 424 S.W.3d, 844, 853-54.

session in 2013,[286] the Arkansas General Assembly should again introduce and seriously consider a bill to overturn the holding in *Kimbrell*.[287] Sample legislation, identical to a bill proposed in 2013, is attached as Appendix A.

The fight for adequate and equal schools across the State of Arkansas has a long and troubled history—the system spent the better part of the last three decades in tangled litigation and tense legislative debate. This is not to say that Arkansas schools are grossly inadequate. Rather, the debate demonstrates the commitment of Arkansas to continuously improve public education. The Arkansas Supreme Court in *Kimbrell* missed an opportunity to continue that effort, but it left the door open for the other branches of government to correct its mistake.

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286. Beherec, *supra* note 256.
287. *See* H.B. 1010, 89th Gen. Assemb., 1st Extraordinary Sess. (Ark. 2013).

APPENDIX A

Arkansas Code section 26-80-101(c), concerning the uniform rate of tax, is amended to read as follows:

(c)(1) Subject to subdivision (c)(2) of this section, for each school year, each county treasurer shall remit the net revenues from the uniform rate of tax to each local school district from which the net revenues were derived.

(2)(A) For each local school district, the Department of Education shall determine if the local school district has a net revenue per student from the uniform rate of tax in excess of the per student foundation funding amount under § 6-20-2305.

(B) Beginning in the 2015–2016 school year, if the Department of Education determines that a local school district has excess net revenue from the uniform rate of tax as calculated under subdivision (c)(2)(A) of this section then the Department shall certify the amount of excess net revenue from the uniform rate of tax to the affected local school district no later than April 1 of each year.

(C) A local school district who receives certification under subdivision (c)(2)(B) of this section shall remit the amount certified to the Department of Education for the credit to the Educational Facilities Partnership Fund Account for the maintenance and operation of schools.