EDUCATION LAW — SCHOOL FINANCE — COLORADO SUPREME COURT UPHOLDS STATE'S SCHOOL FINANCE SYSTEM AS RATIONALLY RELATED TO THE "THOROUGH AND UNIFORM" MANDATE OF THE COLORADO CONSTITUTION'S EDUCATION CLAUSE. — *Lobato v. State*, 304 P.3d 1132 (Colo. 2013).

When the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez*[1] that education is not a fundamental right protected by the U.S. Constitution, education-rights proponents shifted their focus toward state courts and constitutions.[2] Four decades later, the jurisprudence of education rights remains "ever-changing."[3] Equal protection or "equity" suits, such as *Rodriguez* and its state court progeny,[4] have given way to "adequacy" suits, in which plaintiffs assert that a component of a state's education system violates the guarantees of the state constitution's education clause.[5] Recently, in *Lobato v. State*[6] (*Lobato II*), the Colorado Supreme Court upheld the state's school finance system as rationally related to the "thorough and uniform" mandate of the state constitution's education clause.[7] Colorado employed a rational basis test to review the challenged system. But traditional rational basis review is an insufficient tool for measuring the constitutional adequacy of a state's education system, and the *Lobato II* court's attempted importation of rational basis review from a prior equity case into its education clause jurisprudence illustrates the approach's flaws.

The *Lobato* litigation began in 2005, when parents of Colorado public schoolchildren as well as fourteen school districts filed suit for declaratory and injunctive relief against the State of Colorado.[8] The plaintiffs alleged that the state's school finance system[9] was "under-

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[1] 411 U.S. 1 (1973).

[2] *See* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1641 (1989).

[3] Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 305 & n.19 (2011).

[4] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 953 (Cal. 1977) (striking down California's education funding system under the state's equal protection clause); Bd. of Educ. v. Walter, 390 N.E.2d 813, 822 (Ohio 1976) (finding state system constitutional under state equal protection clause); Pauley v. Kelley, 255 S.E.2d 859, 878 (W. Va. 1979) (finding education to be a fundamental right and subjecting discriminatory classifications in school financing systems to strict scrutiny under state equal protection clause).

[5] *See* Richard Briffault, *Adding Adequacy to Equity*, *in* SCHOOL MONEY TRIALS 25, 27 (Martin R. West & Paul E. Peterson eds., 2007).

[6] 304 P.3d 1132 (Colo. 2013).

[7] *Id.* at 1140.

[8] Lobato v. State, 216 P.3d 29, 32–33, 41 (Colo. App. 2008).

[9] Colorado's public school finance system is codified in the Public School Finance Act of 1994 (PSFA). COLO. REV. STAT. § 22-41-101 (2012). Under the PSFA, schools receive a base amount of funds, or total program funding, financed by a combination of state and local revenues. The state funds the difference between the school district's total program funding and the district's

funded" and irrationally financed because the state's funding formulas were not based on the actual costs of providing educational services, thus violating the Colorado Constitution's education clause.[10] The plaintiffs also claimed that underfunding hindered school districts from controlling local educational instruction, which violated the state constitution's local control clause.[11] The trial court granted a motion to dismiss both claims for failure to state a claim and lack of standing.[12] The Colorado Court of Appeals affirmed the lower court's decision that the school districts lacked standing and dismissed the parent plaintiffs' adequacy claim for political question nonjusticiability.[13]

The Colorado Supreme Court reversed on both issues.[14] Writing for the *Lobato I* court, then-Justice Bender instructed the trial court on remand to evaluate whether the state's "financing system is funded and allocated in a manner *rationally related* to the [education clause's] constitutional mandate."[15] Justice Rice, joined by Justices Coats and Eid, dissented.[16] In Justice Rice's view, the state constitution placed discretionary school finance questions "squarely and solely within the legislative ambit."[17] Although Justice Rice recognized that the constitution's language "does not completely foreclose any judicial review," in her view, the political question doctrine should have shut out the plaintiffs' claims.[18]

On remand, the trial court found glaring deficiencies in Colorado's education system[19] and determined that the state's funding system was unconstitutional under the education clause and local control clause.[20] Defendants directly appealed to Colorado's Supreme Court.[21]

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locally raised revenues, but school districts may supplement total program funding with a voter-elected override mill levy. Lobato v. State (*Lobato I*), 218 P.3d 358, 364 (Colo. 2009).

[10] *See Lobato I*, 218 P.3d at 362; *see also* COLO. CONST. art. IX, § 2 ("The general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . . .").

[11] *Lobato I*, 218 P.3d at 362; *see also* COLO. CONST. art. IX, § 15 ("The general assembly shall, by law, provide for organization of school districts . . . in each of which shall be established a board of education . . . [that] shall have control of instruction in the public schools of their respective districts.").

[12] *Lobato I*, 218 P.3d at 362.

[13] *Id.* at 363.

[14] *Id.*

[15] *Id.* at 374 (emphasis added). The court endorsed the rational basis test used in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982).

[16] *Lobato I*, 218 P.3d at 376 (Rice, J., dissenting).

[17] *Id.*

[18] *Id.*

[19] In a 189-page ruling, trial court Judge Rappaport noted deficiencies and inequalities in academic achievement, teacher quality, resources, and facilities. *See* Lobato v. State, No. 2005CV4794, 2011 WL 10960207 (Colo. Dist. Ct. Dec. 9, 2011).

[20] *Lobato II*, 304 P.3d at 1137.

[21] *Id.* Following *Lobato I*, two justices who were in the majority (Chief Justice Mullarkey and Justice Martinez) resigned; commentators noted a political shift in the composition of the court.

The Colorado Supreme Court reversed. Writing for the court, Justice Rice[22] upheld the public school finance system as "rationally related" to the constitutional mandate of the education clause and as "afford[ing] local school districts control over locally raised funds and therefore over 'instruction in public schools'" in accord with the local control clause.[23] Justice Rice gave a "plain meaning" definition of a "thorough and uniform" public school system as one that is "of a quality marked by completeness, is comprehensive, and is consistent across the state."[24] Justice Rice then applied the *Lobato I* rational basis test to the state's funding scheme, outlining the features of the Public School Finance Act[25] and reasoning that the key feature of "supplying [a] single statutory framework" that describes a system of revenue sources assures uniform application of that system's laws to all schools, thus constituting a thorough and uniform system.[26] Additionally, Justice Rice determined that because the school finance system does not affirmatively require school districts to use their locally raised revenue in certain ways, the system does not violate the local control clause.[27] Justice Rice concluded by noting that "courts must avoid making decisions that are intrinsically legislative."[28]

Chief Justice Bender dissented.[29] He criticized the majority for "abdicat[ing the] court's responsibility to give meaningful effect to the Education Clause."[30] Chief Justice Bender found that the "record reveals an education system so crippled by underfunding and so marked by gross disparities among districts that access to educational opportunities is determined not by a student's interests or abilities but by where he or she happens to live."[31] In his view, such a system is arbitrary and lacks a rational relationship to the education clause's mandate.[32]

See Todd Engdahl, *Justices Reverse Roles in Lobato Decision*, EDNEWS COLO. (May 31, 2013), http://www.ednewscolorado.org/news/justices-reverse-roles-in-lobato-decision.

[22] Justices Coats, Eid, and Boatright joined Justice Rice. Justice Márquez did not participate.

[23] *Lobato II*, 304 P.3d at 1136 (quoting COLO. CONST. art. IX, § 15).

[24] *Id.* at 1138. She found that the education clause's context and previous treatment in *Lujan* "support[ed] [the majority's] plain language construction." *Id.* at 1139.

[25] COLO. REV. STAT. § 22-41-101 (2012).

[26] *Lobato II*, 304 P.3d at 1141.

[27] *Id.* at 1142–43.

[28] *Id.* at 1143 (quoting Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 38 (Colo. 2000)) (internal quotation mark omitted).

[29] Justice Hobbs joined Chief Justice Bender's dissent.

[30] *Lobato II*, 304 P.3d at 1144 (Bender, C.J., dissenting). In his view, "a thorough and uniform system of education must include the availability of qualified teachers, up-to-date textbooks, access to modern technology, and safe and healthy facilities in which to learn." *Id.*

[31] *Id.* at 1149. Chief Justice Bender juxtaposed the state's decline in spending with increased costs in educating Colorado's children and highlighted aspects of the record indicative of inadequate education. *See id.* at 1145–48.

[32] *See id.* at 1149.

Justice Hobbs also dissented.[33] Justice Hobbs addressed the context, intent, and purpose of the state's education clause. He determined that its purpose is to "ensure that each Colorado child has the opportunity to become an educated person equipped to participate in life's many challenges, opportunities, and responsibilities."[34] Against that constitutional standard, Justice Hobbs found Colorado's school finance system to be irrational.[35]

Although the *Lobato II* court's concerns about judicial policymaking are legitimate, the court's approach illustrates the flaws of rational basis review in the educational adequacy context. Colorado's rational basis test makes it possible to uphold a school finance system despite the realities of the education provided and without regard to the arbitrariness of the system's design. Other courts reviewing education clause challenges should recognize *Lobato II* as an indication that rational basis review is a conceptually inapposite tool for assessing the constitutional adequacy of education systems.

In the last decade, a number of state courts reviewing challenged school finance systems have turned to deferential tests similar to rational basis review.[36] One prominent explanation for this trend is that deferential review is an alternative response to the same concerns cited by states that dismiss adequacy suits as nonjusticiable — concerns about separation of powers, judicially manageable standards, and a lack of clear remedies.[37] Balancing these concerns with a sense that a "refusal to review school funding . . . would be a complete abrogation of . . . judicial responsibility,"[38] courts may see deferential approaches

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[33] Chief Justice Bender joined Justice Hobbs's dissent.

[34] *Lobato II*, 304 P.3d at 1151 (Hobbs, J., dissenting).

[35] *Id.* at 1160.

[36] *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 255–56 (Conn. 2010) (en banc) (plurality opinion) (giving deference to legislature's reasonable attempts to provide adequate education); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1140 (Mass. 2005) (plurality opinion) (considering whether schools were "acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate"); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 784–85 (Tex. 2005) (requiring legislative choices of educational goals and means to achieve those goals "not [be] arbitrary").

[37] *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002); Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1190–93 (Ill. 1996); City of Pawtucket v. Sundlun, 662 A.2d 40, 57–62 (R.I. 1995); *see also* MICHAEL A. REBELL, COURTS AND KIDS 22–28 (2009); Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 730–31 (2012).

[38] Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002); *see also* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 705–06 (2009).

like rational basis review as a workable compromise. Colorado's highest court seems to have adopted that view.[39]

However, Colorado's approach has taken deference to its furthest extreme with rational basis review, and this approach is inapposite to adequacy challenges like *Lobato II*.[40] In *Lobato I*, Justice Rice's dissent explicitly noted this doctrinal mismatch when she condemned the majority's importation of rational basis from *Lujan v. Colorado State Board of Education*,[41] which applied rational basis review to the state's funding system in an equal protection challenge.[42] Justice Rice reasoned that because the test in *Lujan* "responded only to a traditional equal protection argument," it would create an "untested, undefined, and unlimited rational basis review" if adopted in an adequacy suit.[43] Other states have taken a similar position. For example, in an education case, the Washington Supreme Court held that negative-rights-based frameworks, such as rational basis review, which query if the state has done too much, are the "wrong lens for analyzing positive constitutional rights"; the relevant question is whether the state has "done enough" and "whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'"[44]

Thus, the first criticism of rational basis review in the education context can be seen in the key insight in Justice Rice's and the Washington Supreme Court's observations: rational basis review is ill suited to constitutional rights that require the legislature to affirmatively provide a service, like education. Traditional rational basis review portrays constitutional rights as "a set of negative restraints" on governmental power[45] and asks whether legislative action has infringed too much on a right, not whether the action has done enough to "achieve constitutionally fixed social ends."[46] This traditional framework is ill suited to the positive right to education protected by Colorado's education clause, which compels the legislature to "*provide* for the *establishment* and *maintenance*" of a certain quality ("thorough and uniform") system of "free public schools."[47] As Professor Helen Hershkoff has pointed out, a more appropriate evaluation of positive

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[39] *Lobato II*, 304 P.3d at 1144 (suggesting the court's decision "affords the General Assembly an opportunity to reform Colorado's education policy" without "unduly infringing upon [its] policy-making power").

[40] *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).

[41] 649 P.2d 1005 (Colo. 1982).

[42] *Lobato I*, 218 P.3d 358, 379 (Colo. 2009) (Rice, J., dissenting).

[43] *Id.* at 376, 379.

[44] McCleary v. State, 269 P.3d 227, 248 (Wash. 2012) (quoting Hershkoff, *supra* note 40, at 1138).

[45] Hershkoff, *supra* note 40, at 1138.

[46] *Id.* at 1156.

[47] COLO. CONST. art. IX, § 2 (emphases added).

state constitutional provisions that contain "specific, affirmative command[s] compelling the political branches to [act]"[48] is whether the challenged act "achieves, or is at least likely to achieve, the constitutionally prescribed end."[49]

Justice Rice was right to point out that state education clause terms create somewhat nebulous, difficult-to-manage standards for evaluating whether a state has done enough.[50] But "thorough and uniform" is no more abstruse than other constitutional phrases, such as "necessary and proper,"[51] "unreasonable,"[52] "uniform,"[53] or "equal."[54] Moreover, state courts that have chosen approaches less abstract than Colorado's rational basis test have increasingly found ways to give substance to the constitutional purposes in education clauses.[55] Some state courts have ordered cost studies to determine a funding amount required in order to provide an adequate education.[56] Others have measured a statute's adequacy against state-promulgated education standards, gauging whether the legislature's funding was designed to provide students with real opportunities to meet those standards.[57] Difficulties in defining adequacy are thus no excuse for declining to define and enforce the quality terms of Colorado's education clause.[58]

Lobato II declined to give concrete meaning to the terms of the mandate of the Colorado Constitution's education clause. And this choice by the court illustrates the insufficiencies of an undefined rational basis test. In its rational basis review, *Lobato II* failed to require provision of education that meets set standards of quality. Instead, the Court read the test broadly to permit virtually any public school funding law to satisfy the "rationally related" standard. For ex-

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48 Hershkoff, *supra* note 40, at 1171.

49 *Id.* at 1137.

50 *Lobato I,* 218 P.3d 358, 380 (Colo. 2009) (Rice, J., dissenting) (arguing that "thorough" is an "intangible concept . . . ill-fitted for a judicial rule").

51 U.S. CONST. art. I, § 8, cl. 18.

52 *Id.* amend. IV.

53 *Id.* art. I, § 8, cl. 1.

54 *Id.* amend. XIV, § 1.

55 *Compare* Briffault, *supra* note 5, at 33–34 (citing older cases in Kansas, Maine, Minnesota, Nebraska, and Wisconsin as evincing cursory investigation into adequacy), *with* ELAINE M. WALKER, EDUCATIONAL ADEQUACY AND THE COURTS 54 (2005) (noting improved "substantive guidelines" for adequacy in recent years).

56 *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 348 (N.Y. 2003) (ordering a cost study as part of remedy); *cf.* Montoy v. State, 138 P.3d 755, 762–63 (Kan. 2006) (relying on cost studies to assess compliance with remedial order).

57 *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (evaluating constitutionality through seven defined learning goals); Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 790 (Tex. 2005) (comparing increased rigor of academic content standards with insufficient funding to find financing scheme arbitrary).

58 *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

ample, the majority reasoned that the Public School Finance Act, "[b]y supplying [a] single statutory framework" to "every district[]," "applies uniformly . . . and serves as the cornerstone" of a system "marked by completeness . . . comprehensive[ness], and . . . consisten[cy] across the state."[59] The majority's reasoning capitulates to form, describing the law's design rather than the rational relationship of the law's content to the constitutional mandate. As Justice Hobbs pointed out, the majority's reliance on the "existence of uniformly applicable laws" as evidence of a "thorough and uniform" system was misplaced because "the Education Clause requires more than a thorough and uniform system of *laws* — it mandates 'establishment and maintenance of a thorough and uniform system of free public *schools*.'"[60] And on this point, the record was overwhelming: Colorado's schools are not consistent, comprehensive, or complete. The state's overall academic achievement data in 2011 shows that over fifty percent of Colorado's students are less than proficient at writing.[61] There are massive inequalities in academic outcomes, including a twenty-five-point gap in graduation rates between white and Hispanic students.[62] The court's abstract analysis illustrates how rational basis review makes it possible to uphold a school finance system without regard to the factual realities of that system. A less abstract approach would have engaged with the concrete reality of Colorado's education system and thus better measured its adequacy.

The second criticism of rational basis review in the education clause context is that rational basis review provides an insufficient check against arbitrary legislative reasoning in the development of school funding formulas. Under traditional federal rational basis review, legislation must be upheld if "any reasonably conceivable state of facts . . . could provide a rational basis" for it, even if the decision is "improvident," and even when the legislature has not articulated rational reasons for enacting the statute.[63] Colorado's rational basis is virtually equivalent.[64] Even scholars who have advocated for a deferential approach toward legislative judgments in the education context[65] have recognized that there is a point at which state funding schemes must be deemed irrational and arbitrary: when either "the legislature, in enacting a school finance system, failed to consider rele-

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[59] *Lobato II*, 304 P.3d at 1141.

[60] *Id.* at 1159 (Hobbs, J., dissenting) (quoting COLO. CONST. art. IX, § 2).

[61] Lobato v. State, No. 2005CV4794, 2011 WL 10960207, at *48 (Colo. Dist. Ct. Dec. 9, 2011).

[62] *Id.* at *49.

[63] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993).

[64] *See* Pace Membership Warehouse v. Axelson, 938 P.2d 504, 507 (Colo. 1997).

[65] *See* Bauries, *supra* note 37, at 762–63 ("[S]tate courts should defer to legislative discretion in applying the nebulous terms of education clauses, but they should draw from private corporate law to apply a state-specific approach to deference distinct from the overly harsh practice of total abstention from the merits . . . .").

vant, material information, or where its ultimate plan could not have been rationally based on the actual information presented to it."[66] Thus, the *Lobato II* majority concluded that the public school finance system is not arbitrary by employing a test that fails to engage with a factual record clearly evincing arbitrary legislative reasoning.[67]

Significantly, the trial court noted that the legislature failed to make rational alterations to the Public School Finance Act's base factors over time to reflect the increased rigor of state academic content standards, changes in demographics, and the costs of education; furthermore, the state failed to perform any cost studies or provide reasons for its funding levels.[68] The *Lobato II* majority failed to respond to that evidence of an arbitrarily funded system, and so did not evaluate whether that system's design bore any actual rational relationship to the needs of Colorado's students and to fulfilling the Colorado Constitution's mandate for a thorough and uniform system.

Proponents of *Lobato II* would point out that the majority did refer to the legislation's purported purposes and provided abstract analytical linkage between those purposes and the goal of providing a complete, consistent, and comprehensive scheme. This abstract linkage, these proponents might claim, satisfies the low bar of rational basis review. But the fact that the court's analysis comports with traditional rational basis review even when the court performed no assessment of the legislature's actual reasoning demonstrates the approach's flaws. Colorado's approach is more abstract than that of the vast majority of states that accept education clauses as justiciable and actually do rely upon real world indicia.[69] That Colorado's approach is doctrinally viable illustrates that rational basis review does not require that adequacy be defined or enforced by real world indicia of either adequacy or rationality. Thus, rational basis review provides a conceptually inapposite metric to evaluate the constitutional adequacy of education systems.

Lobato II failed to adequately evaluate the legislature's actions against the constitutional mandate to affirmatively provide an education to Colorado's children. But nothing in the court's deferential application defies the contours of traditional rational basis review. The conceptual inadequacy of rational basis review in education litigation thus provides a warning against its adoption, and calls for less deferential approaches that evaluate education as designed by a legislature and as provided to the children of a state.

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[66] *Id.* at 763.

[67] *See Lobato II*, 304 P.3d at 1145, 1148 (Bender, C.J., dissenting).

[68] Lobato v. State, No. 2005CV4794, 2011 WL 10960207, at *34, *69 (Colo. Dist. Ct. Dec. 9, 2011).

[69] *See* Eric A. Hanushek, *The Alchemy of "Costing Out" and Adequate Education*, *in* SCHOOL MONEY TRIALS, *supra* note 5, at 77, 79.