

STATE CONSTITUTIONAL LAW—THOROUGH AND
UNIFORM EDUCATION—PROPERTY WEALTH-BASED
SCHOOL FUNDING IN COLORADO IS
CONSTITUTIONAL. *LOBATO v. STATE*, 304 P.3D 1132
(COLO. 2013).

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I. INTRODUCTION

In *Lobato v. State*,¹ the Supreme Court of Colorado held that Colorado’s current public school financing system, despite allowing vast disparities in educational quality across school districts, was permissible under both the education clause and the local control clause of the Colorado Constitution.² Although the Supreme Court of Colorado acknowledged that the case “demonstrate[d] that the current public school financing system might not be ideal policy,”³ it nonetheless concluded that it was rationally related to providing Colorado students with a “thorough and uniform education,” thus fulfilling the requirements of the education clause articulated in article IX, section 2 of the Colorado Constitution.⁴ While the court also acknowledged that

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1. *Lobato v. State (Lobato II)*, 304 P.3d 1132 (Colo. 2013).

2. *Id.* at 1136, 1144.

3. *Id.* at 1144.

4. *Id.* at 1136 (quoting COLO. CONST. art. IX, § 2). Article IX, section 2 of the Colorado Constitution provides:

The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each

disparities in wealth may lead to low-wealth school districts having less fiscal control than more affluent school districts, Colorado's public school financing system also fulfilled the local control clause articulated in article IX, section 15 by "afford[ing] local school districts control over locally-raised funds and therefore over 'instruction in the public schools.'"⁵

This Comment examines how students, parents, and school districts across the nation have used their respective state courts to challenge their states' public school financing laws. Although rational basis review of the Colorado Constitution's education clause may be appropriate, this Comment argues that Colorado's public school financing system is not rationally related to providing Colorado students with a "thorough and uniform education." It further argues that Colorado's public school financing system does not satisfy a legitimate government interest in providing local school districts financial control of their respective school systems. Assuming that Colorado's public school financing system violates its state constitution, this Comment also examines more equitable alternatives to Colorado's current public school financing system. Finally, it discusses which branch of government is responsible for implementing a new system—the judiciary or the legislature.

II. HISTORY OF THE AREA

A. *Public School Finance Reform*

Providing students with a public education is one of the primary obligations of state governments. Because there have been wide disparities in educational funding across school districts in all states,⁶

year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year.

COLO. CONST. art. IX, § 2.

5. *Lobato II*, 304 P.3d at 1136, 1143 (quoting COLO. CONST. art. IX, § 15). Article IX, section 15 of the Colorado Constitution provides:

The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

COLO. CONST. art. IX, § 15. The local control clause described in section 15 essentially limits the state's power over instruction in its public schools.

6. For instance, studies have shown that the wealthiest ten percent of school districts in the United States spend nearly ten times the amount spent by the poorest ten

public school finance is a hot-button issue for litigation today.⁷ Empirical research has noted that “[s]tates’ reliance on local property taxes for educational funding largely accounts for [such] educational spending disparities.”⁸ Given these funding disparities, “the ultimate goal [of such litigation has been] an increase or reallocation of statewide education funding.”⁹

B. “Waves” of Reform

Public school finance litigation is thought to have proceeded through three “waves” of reform.¹⁰ The first “wave” of reform involved challenges in both federal and state courts based on the Equal Protection Clause of the Fourteenth Amendment.¹¹ For instance, the Supreme Court of California applied strict scrutiny review to find that California’s current public school financing system violated the Equal Protection Clauses of the Federal Constitution, along with the California Constitution in *Serrano v. Priest*.¹² In contrast, the United States Supreme Court upheld

percent of school districts in the United States. Linda Darling-Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 127, 127–28 (Richard D. Kahlenberg ed., 2000). “Poor and minority students are concentrated in the less well funded schools In addition, policies associated with school funding, resource allocations, and tracking leave minority students with fewer and lower-quality books, curriculum materials, laboratories, and computers; significantly larger class sizes; [and] less qualified and experienced teachers” *Id.*

7. Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 570 (1998).

8. *Id.*

Variations in revenues generated by local property taxes stem from underlying variations in property values within a state. Generally, school districts in property-rich areas benefit from comparatively higher tax revenues generated by comparatively lower tax rates. Conversely, school districts located in property-poor areas receive lower tax revenues generated by, in some instances, higher tax rates.

Id.

9. 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, 704 (2010).

10. *Id.*

11. *Id.*

12. 487 P.2d 1241, 1263 (Cal. 1971). The Supreme Court of California held that California’s public school financing system, as then structured, was not necessary for giving local school districts decision-making control over the administration of their respective schools. *Id.* at 1260. In so deciding, it held that California’s current public school financing system classified students on the basis of wealth, and wealth was a suspect classification for the purposes of a federal equal protection analysis. *Id.* at 1250, 1254–55. Furthermore,

Texas's public school financing system as constitutionally permissible—in spite of vast inequalities in funding—in *San Antonio Independent School District v. Rodriguez*.¹³ Unlike the Supreme Court of California in *Serrano*, the United States Supreme Court applied the less stringent, rational basis test to determine that children residing within poorer school districts were not a suspect class, as there was no reason to believe that all of the poorest families were “clustered in the poorest property districts.”¹⁴ It also held that education, though important, is not a *federally recognized* fundamental right.¹⁵ Moreover, the Court determined that preserving local control over educational decision-making is a legitimate government interest.¹⁶

After *Rodriguez* “closed the federal door on [Fourteenth Amendment equal protection] challenges [to public school financing,]” litigants began to challenge their states’ public school financing systems under the equal protection clauses of their respective state constitutions, which ushered in the second “wave” of reform.¹⁷ These challenges have had different levels of success, usually depending on whether the state courts found that their particular state constitution preserved education as a fundamental right—the dispositive issue in both *Rodriguez* and *Serrano*.¹⁸ The contrasting holdings in *Rodriguez* and some of these state decisions demonstrate that although education is not considered a fundamental right under the “floor” provided by the Federal

because education was the “lifeline of both the individual and society,” it was a fundamental right. *Id.* at 1256; *see infra* note 13 (describing California’s public school financing system at the time *Serrano* was decided).

13. 411 U.S. 1, 5–6 (1973). Note that both the California public school financing system in *Serrano* and the Texas public school system in *Rodriguez* had relied heavily on local school districts’ property taxes, causing great disparities in school revenue among different school districts. *See id.* at 9–10 (describing a public school financing system where twenty percent of each school district’s funding came from local property taxes alone); *Serrano*, 487 P.2d at 1244 (“[T]he California public school financing system . . . substantial[ly] depend[ed] on local property taxes[,] result[ing] [in] wide disparities in school revenue . . .”). However, the Supreme Court in *Rodriguez* reasoned that “[w]hile it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of some inequality . . . is not alone a sufficient basis for striking down the entire system.” 411 U.S. at 50–51. (citation and internal quotation marks omitted).

14. *Rodriguez*, 411 U.S. at 22–23.

15. *Id.* at 37.

16. *Id.* at 49–50. Texas’s public school financing system, which ensured a basic education for every child and allowed for significant local control of each school district’s finances, therefore bore a rational relationship to a legitimate state purpose, allowing each school district control over its local needs. *Id.*

17. Bauries, *supra* note 9, at 704–05.

18. *Id.*

Constitution,¹⁹ education may be deemed a fundamental right, and thus must be analyzed under strict scrutiny pursuant to the equal protection clause of some state constitutions.²⁰

While state constitutions' equal protection clauses provided litigants with more opportunities to challenge their respective states' public school financing laws, these types of state equal protection challenges were later replaced by adequacy- or quality-based challenges, which ushered in the third "wave" of reform that remains dominant today.²¹ This third "wave" of reform is unique in two important respects. While the first two "waves" typically focused on traditional proxies for educational equality—such as per-pupil or overall educational spending—the third "wave" typically focuses on the adequacy or quality of the educational services provided and often considers specific education clauses within state constitutions.²² In addition to the idea that equal funding does not

19. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (noting that the Federal Constitution only confers those rights that are minimally required). This may be true for several reasons. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1221–22 (1985). Because "this form of judicial review has survived numerous state constitutional revisions without serious question or challenge[,] the recent phenomenon of scrutinizing state action under state equality provisions independently of federal equal protection doctrine is not unprecedented." *Id.* at 1221. Political theory may also support "more active . . . protection of equality at the state level." *Id.* It would be much more difficult to oppress minorities in a "geographically and politically diverse nation . . . because of the need for continued coalition, political accommodation, and compromise." *Id.* Furthermore, because there has been an "identifiable pattern of 'underenforcement' of the equal protection clause" by the Supreme Court in the past, state courts will always need to look to their own state constitutional equality guarantees. *Id.* at 1222.

20. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 163 (4th ed. 2006) ("[O]ur state equal protection provisions . . . are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."); see Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 302 (2011) (noting that although many state constitutional provisions are either analogous or identical to the Federal Constitution's Equal Protection Clause, some state courts choose to diverge from federal case law and craft their own doctrine).

21. Heise, *supra* note 7, at 571, 585–86.

22. Litigants are able to make these adequacy- or quality-based challenges under state constitutions because most state constitutions—unlike the Federal Constitution—contain provisions mandating minimum standards for public policy in certain areas, such as education. See Bauries, *supra* note 20, at 321. It is important to keep in mind that the school districts that fail to meet these constitutionally-mandated minimums are not necessarily those that receive the least amount of funding. See generally Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, XXXIII LAND & WATER L. REV. 282 (1998).

necessarily amount to equal quality in education, state courts have limited their analyses to specific state constitutional education provisions so that their holdings will be confined to education and not expanded to other local services.²³ Some plaintiffs, however, have challenged their respective states' public school financing systems under both their state constitutions' equal protection and education clauses. For instance, *Lujan v. Colorado State Board of Education*²⁴ demonstrates how such a challenge played out in Colorado.²⁵

While adequacy-based theories challenging states' public school financing systems under state constitutions' education clauses remain the dominant litigation form within the early part of the twenty-first century, the second "wave" of reform continues to have important legal implications. By suggesting that the level of spending for each student's education should be a function of the wealth of the state as a whole, rather than a function of each individual school district, the second "wave" of reform has helped to advance the concept of centralization, an alternative system of school finance that some states have implemented.²⁶ It should also be noted that "court decisions [based on

23. See, e.g., *Robinson v. Cahill*, 303 A.2d 273, 283, 295 (N.J. 1973) (applying the New Jersey Constitution's "thorough and efficient" education clause, rather than the state constitution's equal protection clause so that the holding could not be expanded to other local services beyond education).

24. 649 P.2d 1005 (Colo. 1982) (en banc).

25. At the time *Lujan* was decided, Colorado—similar to California in *Serrano* and Texas in *Rodriguez*—derived a significant portion of its funds for public schools from local property taxes. *Id.* at 1010. The Supreme Court of Colorado, unlike the Supreme Court of California in *Serrano*, held that education was not a fundamental right warranting the strict scrutiny test under the state constitution. *Id.* at 1018–19. Applying the rational basis test, it then determined that Colorado's current public school finance system rationally furthered the legitimate state purpose of local control—giving the members of each local school district's locally-elected school board control over how much more should be raised and how that money should be spent within their respective school districts. *Id.* at 1023.

The use of local taxes affords a school district the freedom to devote more money toward educating its children than is otherwise available in the state-guaranteed minimum amount. It also enables the local citizenry greater influence and participation in the decision making process as to how these local tax dollars are spent. Some communities might place heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation. Finally, local control provides each district with the opportunity for experimentation, innovation, and a healthy competition for educational excellence.

Id. The court went on to hold that Colorado's current public school financing system was also permissible under the education clause of the Colorado Constitution. *Id.* at 1025. The court noted that it had "never interpreted [the education clause] to require equal expenditures within [each school] district[]." *Id.*

26. Heise, *supra* note 7, at 585–86.

state constitutions' equal protection clauses] helped define and shape appropriate legal and legislative roles with respect to the task of school finance reform."²⁷

C. *Divergent State Constitutional Interpretations*

Because most state constitutions contain general mandates requiring or encouraging the legislature to fund and maintain an education system, it follows that the text of most state constitutions' education clauses are worded relatively similarly.²⁸ However, despite these textual similarities, state courts throughout the country have come to widely divergent conclusions about what their specific education clauses require.²⁹ In fact, the "content of [each state's specific education clause] is most often determined through school finance litigation."³⁰

The challenges to state education financing systems remain extremely controversial, not only due to the widely divergent holdings among states, but also due to the large amounts of public dollars at stake and the widely held belief that educational policy is within the province of state legislatures.³¹ Those holding these beliefs maintain that "courts are ill-suited to render decisions approving or disapproving of what are essentially subjective, priority-setting policy decisions of a legislative body."³²

D. *The Public School Financing Act and Colorado's Public School Financing System*

At issue in *Lobato II* was the constitutionality of Colorado's current public school financing system. Similar to the system in place in *Lujan*, Colorado's current public school financing system uses local taxes, in addition to state and federal monies, to fund its public schools.³³ The Public School Financing Act of 1994 ("PSFA")³⁴ controls the majority of funding for education at the state and local level.³⁵ In determining the amount of funding that each school district will receive each school year,

27. *Id.* at 584.

28. Bauries, *supra* note 20, at 322, 325.

29. *See id.* at 322–38 (noting various state courts' interpretations of their respective education clauses).

30. *Id.* at 326.

31. Bauries, *supra* note 9, at 705–06.

32. *Id.* at 706.

33. *Lobato II*, 304 P.3d 1132, 1140 (Colo. 2013).

34. COLO. REV. STAT. §§ 22-54-101 to -135 (2014); *Lobato II*, 304 P.3d at 1140.

35. *Lobato II*, 304 P.3d at 1140.

the PSFA applies a uniform formula.³⁶ The funds that each school district shall receive as a result of this formula are called the district's "total program."³⁷

Each school district has the opportunity to supplement its "total program" in various ways. For instance, Colorado's public school financing system provides additional "categorical" funding for particular groups of students—such as at-risk students, students with disabilities, and English Language Learners ("ELLs")—that require supplemental resources.³⁸ The PSFA also allows each individual school district to raise additional funding by asking voters within its boundaries to approve "mill levy override[s]" for education purposes.³⁹ Each individual school district may also contract bonded indebtedness, allowing for the construction of new schools or education-related capital improvements with voter approval.⁴⁰

Although Colorado's public school financing system would appear to provide each school district with equal funding, this is not the case. The disparities in school districts' abilities to raise supplemental funds and improve resources through mill levies and contracting for bond indebtedness effectively results in unequal educational opportunities that even supplemental state funding does not rectify.⁴¹

36. *Id.* This formula requires the state to multiply the number of students enrolled in each individual school district by a statutory per-pupil base level of funding. *Id.* The state must then adjust the resulting product to account for various "district-specific factors," including the concentration of at-risk students, online education enrollment, cost of living, number of fifth-year high school students, and personnel costs. *Id.* (internal quotation marks omitted).

37. *Id.* The "total program" that each individual school district receives comes from both local and state sources. *Id.* The majority of a school district's "local share" comes from revenues from a mill levy upon the assessed valuation of the taxable property within each school district's boundaries. *Id.* Subtracting the school district's "local share" from its "total program" yields the school district's "state share," or the amount of funds that the state will contribute to each school district's total program. *Id.*

38. *Id.* at 1140–41.

39. *Id.* at 1140.

40. *Id.* at 1141.

41. Although each individual school district may raise additional funding if voters approve a "mill levy override," those districts with lower property values will likely generate less funds per mill than districts with higher property values, even if they tax themselves at higher rates. *Lobato II*, 304 P.3d at 1151 (Bender, C.J., dissenting). Moreover, because the public school financing system imposes a cap on each individual school district's ability to contract for bond indebtedness—twenty percent of each district's assessed property value—those school districts with lower property values will also generate less funds for construction or education-related capital improvements than wealthier districts. *Id.* For instance, the Aspen School District ("Aspen"), one of the state's wealthiest school districts, has a per-pupil assessed property value of over one million dollars. *Id.* In contrast, the Sanford School District ("Sanford"), one of the state's poorest school districts, has a per-

III. STATEMENT OF THE CASE

A. *Facts and Procedural History*

In 2005, parents from eight school districts across Colorado, who were acting on behalf of their school-age children (“plaintiff parents”), and fourteen individual school districts (“plaintiff school districts”) brought an action against the State, the State Board of Education, the Commissioner of Education, and the Governor (“state defendants”) under both the education clause and the local control clause of the Colorado Constitution.⁴² Plaintiffs generally contended that Colorado’s current public school financing system violated the education clause because it was both “underfunded and allocate[d] funds on an irrational and arbitrary basis.”⁴³ Specifically, plaintiffs alleged that Colorado’s current public school financing system “fail[ed] to provide a constitutionally adequate education to students with disabilities” and “lower socio-economic backgrounds, ethnic and racial minorities,” and ELLs.⁴⁴ Plaintiffs further contended that their school districts’ lack of financial resources, as well as the public school financing system’s restrictions on spending, prevented the school districts from exerting meaningful control over instruction in violation of their constitution’s local control clause.⁴⁵ This lack of local control, in turn, impaired their ability to fulfill the education clause’s general mandate of providing all Colorado children with a “thorough and uniform” system of public education.⁴⁶

pupil assessed property value of less than \$20,000. *Id.* Applying the twenty percent cap, Aspen can raise \$219,000 per pupil while Sanford can only raise \$1100 per pupil—a difference amounting to nearly 20,000%. *Id.*

42. *Lobato v. State (Lobato I)*, 218 P.3d 358, 362 (Colo. 2009).

43. *Id.*

44. *Id.* at 364.

45. *Id.*

46. *Id.* The case’s procedural history is as follows. The trial court dismissed the plaintiff school districts’ claims for lack of standing and dismissed the complaint for failure to state a claim. *Id.* at 362–63. The court of appeals affirmed the trial court’s holding that the plaintiffs failed to state a claim and that the plaintiff school districts lacked standing, but held that the plaintiff parents had standing. *Id.* The Supreme Court of Colorado held that the plaintiffs presented a justiciable claim. *Id.* at 363. On the remand, the district court declared Colorado’s public school financing system unconstitutional and enjoined the state defendants from continuing to execute the current public school financing system. *Lobato II*, 304 P.3d at 1137. Order was appealed directly to the Colorado Supreme Court. *Id.*

B. The Supreme Court of Colorado's Holding

The Supreme Court of Colorado applied rational basis review to hold that Colorado's current public school financing system is constitutionally permissible under both the education clause and the local control clause of the state constitution.⁴⁷ It stated that the phrase "thorough and uniform" in the education clause constitutes "a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state."⁴⁸ The court held that Colorado's public school financing system was therefore rationally related to the education clause's mandate requiring the legislature to provide a "thorough and uniform" system of free public schools throughout the state.⁴⁹ The court also found that "[t]he dual-funded public school financing system at issue in this case complies with the [l]ocal [c]ontrol [c]lause because it affords local school districts control over locally-raised funds and therefore over instruction in the public schools."⁵⁰

IV. THE COURT'S REASONING

A. The Majority

In applying rational basis review, the majority emphasized the importance of limiting its judicial decisions from infringing on legislative power:

[O]ur custom-tailored form of rational basis review "satisfies the judiciary's obligation to evaluate the constitutionality of the state's public school financing system without unduly infringing on the legislature's policymaking authority." In applying this test to the public school financing system, our task is not to determine "whether a better financing system could be devised," but rather to determine "whether the system passes constitutional muster."⁵¹

1. The Education Clause

The majority held that Colorado's public school financing system is rationally related to the education clause's "thorough and uniform"

47. *Lobato II*, 304 P.3d at 1137, 1144.

48. *Id.* at 1138.

49. *Id.*

50. *Id.* at 1143.

51. *Id.* at 1139–40 (quoting *Lobato I*, 218 P.3d at 363).

mandate because “it funds a system of free public schools that is of a quality marked by completeness, is comprehensive, and is consistent across the state.”⁵² The majority reasoned that in order to do this the public school financing system uses a “multi-faceted statutory approach that applies uniformly to all of the school districts in [the state].”⁵³

The majority then explained the components of Colorado’s public school financing system in greater detail. First, the PSFA, which “serves as the cornerstone of [the] public school financing system,” uses a standard formula, supplying a single statutory framework to uniformly calculate each school district’s total program.⁵⁴ Moreover, because the public school financing system’s “categorical funding” allocates money beyond the base PSFA amount to school districts marked for students who require supplemental resources—including at-risk students, students with disabilities, and ELLs—it assists in providing every child in the state with an education that is “complete” and “comprehensive.”⁵⁵ Finally, because “the public school financing system provides a mechanism—contracting for bonded indebtedness—whereby individual school districts may ask their constituents to fund capital improvements or the construction of new school facilities,” it “help[s] facilitate the implementation of a public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state.”⁵⁶

2. The Local Control Clause

The majority also held that Colorado’s public school financing system “complies with the [l]ocal [c]ontrol [c]lause because it affords local school districts control over locally-raised funds and therefore over ‘instruction in the public schools.’”⁵⁷ The majority first articulated the importance of local control within the school districts, noting that the question of whether the General Assembly has afforded school districts local control over instructions in their public schools plays an important role in its analysis of the constitutionality of Colorado’s public school financing system.⁵⁸ It subsequently described the three benefits of local control

52. *Id.* at 1140.

53. *Lobato II*, 304 P.3d at 1141.

54. *Id.*

55. *Id.*

56. *Id.* Note, however, that the majority still recognized that “[Colorado’s] public school financing system might not provide an optimal amount of money to the public schools.” *Id.*

57. *Id.*

58. *Id.* at 1142. (“[T]he historical development of public education in Colorado has been centered on the philosophy of local control’ due to the freedom and flexibility local

articulated in *Lujan*. First, using local taxes to partially fund each school district allows each school district to devote more funds to education than it would otherwise receive in the state-guaranteed minimum amount.⁵⁹ Making local control a priority also provides “the local citizenry greater influence and participation in the decision making process as to how the[ir] local tax dollars are spent.”⁶⁰ Finally, the court reasoned that “local control provides each district with the opportunity for experimentation, innovation, and a healthy competition for educational excellence.”⁶¹

The court went on to compare the facts of the case to *Lujan*.⁶² The court also noted that Colorado’s current public school financing system authorizes school districts to raise additional funds beyond their total programs through mill levy overrides and bond indebtedness mechanisms.⁶³ While the court acknowledged that disparities in wealth could impair a low-wealth district’s ability to pass mill levy overrides and contract for bond indebtedness, “such a ‘result, by itself, does not strike down the entire school finance system’ on [l]ocal [c]ontrol grounds, just as the same result did not strike down the entire school finance system for equal protection purposes in *Lujan*.”⁶⁴

B. *The Dissents*

1. Chief Justice Bender’s Dissent

Although the chief justice also used the rational basis test, he concluded that Colorado’s public school financing system is *not* rationally related to the General Assembly’s affirmative duty to provide and

control provides.” *Id.* (quoting *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 941 (Colo. 2004) (en banc)).

59. *Lobato II*, 304 P.3d at 1142 (citing *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) (en banc)).

60. *Id.* (alteration in original) (quoting *Lujan*, 649 P.2d at 1023); *see also Lujan*, 649 P.2d at 1023 (“Some communities might place heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation.”).

61. *Lobato II*, 304 P.3d at 1142 (quoting *Lujan*, 649 P.2d at 1023).

62. *Id.*; *Mesa Cnty. Bd. of Cnty. Comm’rs v. State*, 203 P.3d 519, 528–29 (Colo. 2009) (“[A] state can require the local government to pay its statutorily mandated share under a dual funding formula” if the local entity remains “responsible for imposing, collecting and expending local property taxes.”); *see also Lujan*, 649 P.2d at 1023 (finding that the public school financing system was rationally related to the legitimate state purpose of promoting local control over instruction because “utilizing local property taxation to partly finance Colorado’s schools is rationally related to effectuating local control over public schools”).

63. *Lobato II*, 304 P.3d at 1143.

64. *Id.* (quoting *Lujan*, 649 P.2d at 1023).

maintain a thorough and uniform system of free public education and therefore violates the education clause.⁶⁵ Before specifically addressing why he found differently from the majority, the chief justice made several points about the conditions in many of Colorado's public schools that set the context for his rationale: many of Colorado's school districts lack safe and healthy school buildings; a significant number of schools fail to comply with the Americans with Disabilities Act; and students in many school districts lack adequate, up-to-date textbooks and basic supplies.⁶⁶ Finally, in many school districts, students who require additional support—including ELLs, special education students, and gifted and talented students—do not receive it.⁶⁷ An education policy advisor also testified that “the literature was uniform in its finding that [school] facilities had a direct impact on student achievement.”⁶⁸

While Chief Justice Bender stated that he agreed with the majority's interpretation of “thorough” as “complete” and “uniform” as “consistent,” he maintained that “[such] an education system so crippled by underfunding and so marked by gross disparities among districts” does not provide Colorado students with a “thorough and uniform education.”⁶⁹ The chief justice first made several points with respect to how Colorado's current public school financing system fails to provide students with a “thorough” education.⁷⁰ “The funding provided by the PSFA bears no rational relationship to the actual cost of providing a thorough and uniform education.”⁷¹ The record, moreover, showed that categorical funding is so inadequate that it fails to serve students that

65. *Id.* at 1144 (Bender, C.J., dissenting).

66. *See id.* at 1147. For instance, according to a 2010 study, Colorado's schools needed nearly eighteen billion dollars in repairs and upgrades. *Id.* The ceiling in the Sanford School District, located in the San Luis Valley, had caved in during a standardized testing. *Id.* A water main break under Sheridan High School, located in the Southwest Denver metro area, had essentially caused the high school to sink. *Id.* One student at Pueblo West High School, who has a form of dwarfism, could not reach the bathroom sinks to wash her hands. *Id.* Moreover, the superintendent of Sanford High School testified that a student had approached him and told him that he was using the same physics book that the superintendent himself had used back in 1980. *Id.*

67. *Id.* at 1148. While expert testimony stated that ELL students need between four to seven years of instruction to become proficient in English, Colorado funds, at best, two years of English-language instruction. *Id.* Colorado ranks fifty-first, or last among all states and the District of Columbia, in state spending on special education students. *Id.* Furthermore, many rural school districts are unable to offer gifted and talented programs because they do not have the teachers to teach them. *Id.*

68. *Id.* at 1147 (alteration in original) (internal quotation marks omitted).

69. *Lobato II*, 304 P.3d at 1148–49 (Bender, C.J., dissenting).

70. *See id.* at 1149–50.

71. *Id.* at 1149.

require additional services in any meaningful way.⁷² Citing the methods for contracting for bond indebtedness, the chief justice argued that the “most striking” aspect of Colorado’s public school funding system “is [its] method of funding capital construction.”⁷³

With respect to how Colorado’s public school financing system fails to provide students with a “uniform” education, the chief justice explained that Colorado is one of the few states that employs a regressive finance system, meaning that the school districts with higher poverty rates receive less funding.⁷⁴ Because districts with higher concentrations of poverty typically have higher education costs—given that they generally have more special education students, ELLs, and at-risk students—these districts “get trapped in a cycle of poverty from which there is little opportunity to free themselves.”⁷⁵

2. Justice Hobbs’s Dissent

Although he agreed with Chief Justice Bender’s arguments, Justice Hobbs also addressed the context, intent, and purpose of the education clause, arguing that it “requires more than a thorough and uniform system of *laws*.”⁷⁶ Rather, it “mandate[s] ‘establishment and maintenance of a thorough and uniform system of free public *schools*.’”⁷⁷ While the existence of the uniformly applicable laws described by the majority may

72. *Id.* at 1150. For instance, although state support for ELL students is about \$127 per student, per year, this funding barely covers the cost of administering the state-mandated Colorado English Language Assessment. *Id.* Colorado also ranks last in the nation in its financial contribution to special education. *Id.*

73. *Id.* Capital construction in Colorado is funded exclusively at the local level, unlike in most other states. *Id.* Capping bond indebtedness for capital construction at twenty percent of each district’s assessed property values means that seventy districts cannot raise enough money to build one new K–8 school building, and many others cannot raise enough money to provide students with a safe and healthy learning environment. *Id.*

74. *Id.* at 1151.

75. *Lobato II*, 304 P.3d at 1151 (Bender, C.J., dissenting). Mill levy overrides and contracting for bond indebtedness appear to exacerbate this problem. Although the PSFA allows school districts to raise additional funding by asking their electorate to approve mill levy overrides for education purposes, districts with higher property values will naturally generate more money per mill than districts with lower property values because the amount of funding generated by a mill levy override is tied to local property values. *Id.* To generate revenues comparable to those generated by wealthier districts, districts with lower property values must assess more mills, and therefore, tax themselves at higher rates. *Id.* Furthermore, because Colorado’s public school financing system caps a school district’s ability to contract for bonded indebtedness at twenty percent of assessed property value, the total amount of funds that a district may raise is “purely a function of the district’s property wealth.” *Id.*

76. *Id.* at 1158–59 (Hobbs, J., dissenting).

77. *Id.* at 1159 (quoting COLO. CONST. art. IX, § 2).

be necessary, it is not sufficient to fulfill the education clause's "thorough and uniform" mandate.⁷⁸

Specifically, Justice Hobbs looked to the text of the education clause to help determine what he believed was the constitutional committee's intent. While thirty-two out of thirty-seven state constitutions contained detailed provisions for education before Colorado adopted its own education clause, Colorado was the first state to incorporate the phrase "thorough and uniform" into its own constitutional mandate for public education.⁷⁹ While there is no record as to why the constitutional committee chose the phrase "thorough and uniform" over "thorough and efficient"—its original phrasing—Justice Hobbs maintained that this broader phrasing suggests that the constitutional committee valued maintaining at least a minimum, uniform level of educational quality throughout the state.⁸⁰

Justice Hobbs also looked to the General Assembly's own declarations regarding the level of education expected under the education clause and argued that these expectations are relevant to constitutional interpretation.⁸¹ As early as 1993, the Colorado legislature had adopted a series of statutes with the specific intent to provide a uniform set of standards for the students in all of its public schools.⁸² Justice Hobbs contended that the legislature's enactment of these statutes demonstrates that the constitutional drafters intended the phrase "thorough and uniform" to ensure that each student in Colorado received an education that allowed them to "be effective citizens of Colorado . . . [and] productive members of the labor force."⁸³

While Justice Hobbs stated that it is clear that Colorado's current public school financing system is not rationally related to providing the "thorough and uniform education" mandated by the education clause, it is not within the province of the court to promulgate a new system.⁸⁴ However, with diligent time and effort, the legislature has the ability to

78. *See id.*

79. *Id.* at 1155–56.

80. *Id.* at 1156.

81. *Lobato II*, 304 P.3d at 1157 (Hobbs, J., dissenting).

82. *Id.* at 1157–58. In 1993, the General Assembly adopted Part 4 ("Education Reform") of the Educational Accountability Article, calling for the implementation of a standards-based education, with the ultimate goal "[of ensuring] that Colorado's schools have standards which will enable today's students of all cultural backgrounds to compete in a world economy in the twenty-first century." *Id.* (citation and internal quotation marks omitted). Other standards-based statutes followed over the course of the next two decades. *See id.* at 1158.

83. *Id.*

84. *Id.* at 1160 ("It is not this court's job to instruct the General Assembly how to fix the system or to pin a dollar amount on a constitutionally permissible alternative.").

craft a new system that guarantees all Colorado students their rights under the education clause.⁸⁵

V. THE AUTHOR'S ANALYSIS

A. *Soundness of the Majority's Opinion*

While many state supreme courts have moved away from analyzing states' public school finance laws under their respective state constitutions' equal protection clauses,⁸⁶ the dissenting opinions in *Lobato II* demonstrate how litigants in Colorado have solid arguments challenging their state's current public school financing laws under their state constitution's education clause and local control clause, even if the less stringent rational basis review applies.⁸⁷ If courts are to find that Colorado's current public school financing system violates both the education clause and the local control clause, a new, more equitable system of public school financing must then be constructed.

1. The Education Clause

Due to implications involved and the vast inequalities across school districts, it appears unlikely that Colorado's current public school financing system is rationally related to the legitimate state interest of

85. *Id.*

[T]hrough a combination of legislative action, whether by the General Assembly or the voters through referendum or initiative measures, the state should provide each district with the funding necessary to meet the standards the legislature sets for educational achievement. As the record makes clear, it may take years—and significant effort—to reshape the current school finance system into one capable of supporting our rapidly growing and diversifying schools in compliance with the Education Clause's mandate. Colorado should face this critical issue head-on.

Id.

86. Although litigants may still want to challenge Colorado's public school financing system under their constitution's equal protection clause, similar to what the plaintiffs did in *Lujan*, this may be difficult for several reasons. First, although it can be argued that Colorado's current public school financing system has the potential to disproportionately affect poor students because school districts with lower property values typically receive less funding, this may be difficult to prove. Moreover, if courts were to allow litigants' equal protection challenges to state education finance laws to succeed, they would be walking down a "slippery slope"—litigants looking to advance other rights with respect to other local services may try to expand the courts' holdings to those services. *See supra* note 23 and accompanying text.

87. *See infra* note 107 and accompanying text (noting that litigants succeeded on these types of challenges in New Jersey).

providing Colorado's students with a "thorough and uniform education," under the Colorado Constitution's education clause. In the *Lobato II* dissents, Chief Justice Bender and Justice Hobbs explored various ways in which education in Colorado is neither thorough nor uniform across school districts. Various other theories support the dissenting justices' ultimate conclusions.

a. Thorough Education

In determining that Colorado's current public school financing system is not "thorough," Chief Justice Bender noted that the Colorado legislature has not significantly revised the PSFA to account for "Colorado's changing demographics,"⁸⁸ mainly the increased costs associated with Colorado's changing student population.⁸⁹ Furthermore, capping bond indebtedness at twenty percent of a school district's assessed property values means that seventy school districts across the state cannot raise enough funds to build even one new K–8 school building.⁹⁰ Most others cannot raise enough money to provide safe or healthy learning environments for their students.⁹¹ Vast achievement gaps among students of different income levels are readily noticeable.⁹²

88. *Lobato II*, 304 P.3d at 1149 (Bender, C.J., dissenting). A statewide pupil count conducted by the Colorado Department of Education revealed that the statewide student count increased by 10,049 students from the 2010–11 school year to the 2011–12 school year alone. *Statewide K–12 Student Enrollment Continues to Grow*, COLO. DEPARTMENT OF EDUC. (Jan. 27, 2012), <http://www.cde.state.co.us/communications/releases/20120127pupil> membership. Among ethnic groups, students identified as two or more races increased by 10.6% from 23,565 students in 2010 to 26,073 students in 2011. *Id.* Students identified as Asian increased by 8.3% from 24,493 students in 2010 to 26,522 students in 2011. *Id.* In addition, a study conducted by the Colorado Department of Higher Education showed that the number of Hispanic/Latino residents in the state will increase from approximately 21% of the population share to over 25% by 2021. DEPT OF HIGHER EDUC., STATE OF COLO., ENROLLMENT PROJECTIONS (2011–2020) (Apr. 2012), *available at* http://highered.colorado.gov/CCHE/Meetings/2012/may/may12_ia_att.pdf. By 2040, one third of all Colorado residents will be Hispanic/Latino. *Id.* This may partly explain why Colorado's ELL population has grown by 250% since 1995. *Lobato II*, 304 P.3d at 1145 (Bender, C.J., dissenting).

89. *Lobato II*, 304 P.3d at 1145 (Bender, C.J., dissenting). Colorado has the fastest growing child poverty rate in the nation. *Id.* Thirty percent of students in the state are eligible for the federal free lunch program. *Id.* Moreover, the percentage of "majority low income" schools has risen from seven percent to twenty-five percent over the last two decades. *Id.*

90. *See supra* note 73.

91. *See supra* note 66 and accompanying text.

92. A 2005 study conducted by the Bell Policy Center found that students from low-income families who qualify for reduced or free lunch—students who often live in property-poor school districts—performed thirty percent worse on standardized tests than their

Moreover, “[s]tudent performance rates [across the state] continue to decline.”⁹³ In some districts, over fifty percent of students are not college-ready by graduation and need to take remedial classes in college.⁹⁴

Colorado’s failure to educate many of its students has significant economic and social costs. Given the current economic climate, it appears that attaining an adequate education is more important for students’ future success than ever before. “Economically, robust links exist between educational attainment and personal income.”⁹⁵ Given the new “information age” that we are part of, “th[e] link between education and economic viability appears to be strengthening over time.”⁹⁶ While each college graduate represents a \$44,346 benefit to the state, Colorado’s high school drop-outs, by “conservative estimates,” cost the state a total of six billion dollars per year.⁹⁷ According to Chief Justice Bender’s dissent, approximately 11,500 Colorado students drop out of high school per year.⁹⁸

Taking all of these factors into account, it appears that Colorado’s current public school financing system is not rationally related to providing all students with a “thorough education.” The aforementioned facts and their implications demonstrate that Colorado’s current public school financing system may not only be failing to provide a thorough education to students living in lower property wealth districts, but it may also be failing to do so for many other students—regardless of their respective school districts’ property wealth, race, or family income.

middle- and high-income peers. JENNIFER SHARP-SILVERSTEIN ET AL., THE BELL POLICY CTR., UNDERSTANDING COLORADO’S ACHIEVEMENT GAP: AN ANALYSIS OF STUDENT PERFORMANCE DATA BY RACE AND INCOME 33 (2005), available at <http://www.thebell.org/PUBS/WP/2005/AchievementGap.pdf>.

93. *Lobato II*, 304 P.3d at 1146 (Bender, C.J., dissenting).

94. *Id.* Taylor Lobato, the named plaintiff in *Lobato*, was one such student who had to take remedial courses. *Id.* at 1148. In spite of graduating first in her class and being one of the best students her school superintendent “had ever seen,” she was sent to the grammar center due to her lack of grammar skills as a freshman at the University of Denver. *Id.* While Lobato’s roommate received forty-five credits for the advanced placement courses she took in high school, Lobato received no advanced placement credits because her school district, similar to many districts across the state, could not afford to offer such courses. *Id.*

95. Heise, *supra* note 7, at 550–51.

96. *Id.*

97. *Lobato II*, 304 P.3d at 1146 (Bender, C.J., dissenting).

98. *Id.* (“Studies show that high school dropouts pay fewer taxes, have higher health care costs, and are more likely to engage in criminal activity.”).

b. Uniform Education

Various statistics demonstrate that Colorado's current public school financing system also fails to provide all of its students with a "uniform education." In addition to the mill levy overrides and contracts for bond indebtedness capping each school district's ability to raise funds for capital construction at twenty percent of their assessed property values, Colorado is one of "only a handful of other states" that employs "a regressive finance system, meaning districts with higher concentrations of poverty receive less funding."⁹⁹ This funding system has led to vast disparities in facilities and opportunities for Colorado's students across different school districts. For instance, the students at Vail's Battle Mountain High School "enjoy state-of-the-art video editing labs, a culinary arts studio, and top-end Apple computers," while many students in the San Luis Valley are forced to attend unsafe schools.¹⁰⁰ "Because districts with higher concentrations of poverty typically have higher education costs, districts with low property values get trapped in a cycle of poverty from which there is little opportunity to free themselves."¹⁰¹ These additional factors demonstrate that Colorado's public school financing system is also not rationally related to providing all of Colorado's students with a "uniform education."

2. Local Control

Although the majority also asserted that Colorado's current public school financing system complies with the local control clause because "it affords local school districts control over locally-raised funds and therefore over 'instruction in the public schools,'"¹⁰² the aforementioned analysis demonstrates that this is not the case. Because each school district's combined property values determine how much additional funding it may raise from a mill levy override, and because bond indebtedness for funding capital construction is capped at twenty percent of a district's property values, many school districts that wish to either improve their school buildings or allocate more funds toward special education, ELL instruction, or gifted and talented instruction are prohibited from doing so. Thus, more affluent school districts—such as Aspen—may raise additional funds, while the school districts who need

99. *Id.* at 1151.

100. *Id.* at 1150; *see also supra* note 75 and accompanying text (describing effects of mill levy overrides and contracting for bond indebtedness).

101. *Lobato II*, 304 P.3d at 1151 (Bender, C.J., dissenting).

102. *Id.* at 1137 (majority opinion).

such additional funds the most—such as those within the San Luis Valley—are precluded from doing so.

When students in certain school districts—such as the Sanford School District in the San Luis Valley—are forced to learn in school buildings whose ceilings have caved in due to the school district's lack of ability to fund capital construction, or when deserving students in many school districts are unable to receive gifted and talented instruction due to their school districts' lack of resources, it hardly seems that these less affluent school districts are being provided "with the opportunity for experimentation, innovation, and a healthy competition for educational excellence" that the majority in *Lobato II* advocates.¹⁰³ Rather than promoting local control, Colorado's current public school finance laws appear to be subverting local control. In light of Colorado's current public school financing system's failure to afford a significant number of school districts adequate local control of their finances, it appears that Colorado's current public school financing system is not rationally related to the legitimate state purpose of fostering local control within each school district.

Serrano, moreover, suggests that using a different public school financing system would still enable local school districts to retain administrative control over their respective schools. It appears clear that individual school districts are in the best position to "decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination."¹⁰⁴ Yet, no matter how Colorado decides to finance public education, it may still leave this kind of administrative, decision-making power to the discretion of local school districts.¹⁰⁵ In fact, using a different school financing structure would also enable local school districts to have even greater administrative control because their decision-making abilities would not be as constrained by their finances.

B. Remedies

According to Chief Justice Bender's dissent in *Lobato II*, "Colorado could achieve a constitutionally thorough system of education with adequate funding," and "Colorado could achieve a constitutionally uniform system of education with an equitable method to distribute

103. See *id.* at 1142 (quoting *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) (en banc)).

104. *Serrano v. Priest*, 487 P.2d 1241, 1260 (Cal. 1971).

105. *Id.*

available funds.”¹⁰⁶ The issue then becomes how Colorado can attain these goals. Another important issue is whether school funding decisions should be left up to the judiciary or the legislature.

1. Adequate Funding/Equitable Method of Distribution

One of the most equitable ways to achieve adequate funding appears to be the centralization method advocated in the New Jersey case, *Robinson v. Cahill*.¹⁰⁷ Centralization, like Colorado’s current public school financing system, involves distributing funds allocated to education on a per-pupil basis. However, the funds allocated to education would be a function of the property wealth of Colorado as a whole, rather than each individual school district. Centralization in Colorado may therefore involve the taxpayers in each school district each paying a flat property tax rate to the state to be evenly distributed to the school districts on a per-pupil basis. Centralization has positive implications, as well as potential drawbacks. “Specifically, some scholars [as well as state supreme court justices] argue that greater centralization will ameliorate the inequitable results stemming from school districts’ present heavy reliance on local property tax bases for funds.”¹⁰⁸ For instance, in *Robinson*, the Supreme Court of New Jersey noted that had there been “statewide equalization of the assessments, thereby to insure an even distribution of the tax burden, it is likely that the per-pupil basis for distribution of the statewide tax proceeds would have [an] inherent equitable appeal.”¹⁰⁹ However, “[g]iven centralization’s possible role in equal educational opportunity, the relative paucity of related research is curious.”¹¹⁰

One such state that may provide a model demonstrating the effects of school funding centralization is Michigan. During the 1990s, Michigan lawmakers centralized school funding “simultaneously [and] dramatically

106. *Lobato II*, 304 P.3d at 1149 (Bender, C.J., dissenting). Here, Chief Justice Bender appears to have been advocating an adequacy-based theory.

107. See 303 A.2d 273, 276–77, 295 (N.J. 1973) (declaring New Jersey’s public school finance system relying on local tax proceeds to provide sixty-seven percent of the state public school budget unconstitutional under the state constitution’s education clause and advocating a per-pupil distribution of statewide tax proceeds as an alternative).

108. Heise, *supra* note 7, at 559.

109. *Robinson*, 303 A.2d at 291. Note that this was the original method of financing public schools in New Jersey. However, a shift to a “ratable” method of collecting taxes was implemented later, after those in more affluent school districts or counties complained that the rural, less affluent school districts were undervaluing their “ratables” in order to avoid paying a fair share of their tax burden. *Id.*

110. Heise, *supra* note 7, at 559.

reduc[ing] school districts' reliance on local property taxes."¹¹¹ Although discrepancies in per-pupil financing continue, the new system made it "more difficult to exacerbate them" by "limit[ing] a district's ability to use local funds to supplement state foundation grants."¹¹² Rather, school districts that wish to spend more may advocate for "increases to the state-funded foundation grant," benefitting all school districts across the state, rather than just one particular school district.¹¹³

Similar to centralization in Michigan, centralization in Colorado may provide the "inherent equitable appeal" advocated in *Robinson* in several ways. First, while Colorado's current public school financing system often forces those in lower-wealth school districts to pay higher property tax rates in an attempt to get on equal footing with those in more affluent school districts, this alternative approach would allow each taxpayer to pay the same property tax percentage, as allocated to educational spending, regardless of where he or she lives. Moreover, because monies would be distributed wholly based on statewide funds, rather than district-wide funds, each student would receive, at the very least, the same amount of minimum funding. Because all of each school district's property taxes would be going to the state to be distributed across the school districts, this would ensure a much higher level of minimum funding than Colorado currently provides.

Various scholars argue, however, that the state-funded foundation grant may reduce local control over educational spending.¹¹⁴ Moreover, "[a] second and more important concern" with some forms of centralization may be "educational spending's reliance on state revenues," as "[s]uch reliance exposes school spending to greater competition with other worthy demands upon state resources."¹¹⁵

A closer look at centralization's potential drawbacks, however, demonstrates that these concerns may not be as warranted as some scholars believe. With respect to local control, local school districts may continue to decide who to hire, how to schedule their educational offerings, and a host of other matters irrespective of how their respective schools are financed.¹¹⁶ Given that certain school districts in Colorado—particularly those in the San Luis Valley and other lower-wealth school

111. *Id.* at 562. It is important to note, however, that unlike many states, there was no school finance litigation in the Supreme Court of Michigan before the legislative reform was enacted. *Id.* at 562–63.

112. *Id.* at 563.

113. *Id.*

114. *Id.* at 563–64.

115. *Id.* at 564 (cautioning that there may be difficulties during times of downturn, as various entities would be competing for limited state resources).

116. *See supra* text accompanying notes 104–05.

districts—cannot even afford to educate their students in safe school buildings or provide them with up-to-date textbooks, centralization would provide, rather than limit, many school districts’ local control over their finances.¹¹⁷

With respect to reliance on state revenues, the centralization system proposed for Colorado here differs from Michigan’s centralization system in one important way. While the State of Michigan chose to appropriate monies from the state to fund public schools, the majority of Colorado’s school funding would still come from local property taxes. However, rather than basing each school district’s funding solely on its own property taxes, these taxes would be appropriated to a common statewide fund and distributed evenly throughout the state on a per-pupil basis. This form of taxation would essentially impose a mill levy on each school district, except members of each school district would be taxed on a flat rate based on their property values. The revenue would then be distributed to students across the state on a per-pupil basis, regardless of which school district the students live in.

Finally, with respect to students’ differing educational needs, Colorado could continue to provide the categorical funding that it provides under its current public school financing system—allocating additional funding to school districts for students who require supplemental resources—but do so on a per-pupil basis. In theory, this would help to ensure that each student receives the resources that he or she needs to succeed.

C. *Judiciary Concerns*

Both the majority and Justice Hobbs’s dissent in *Lobato II* expressly stated that while the judiciary may declare Colorado’s current public school financing system unconstitutional, it is the duty of the legislature to promulgate a new system.¹¹⁸ The history of school finance litigation in New Jersey illustrates how both the majority and the dissent appear to have valid reasons for this belief.¹¹⁹ Courts risk incurring significant

117. See *supra* note 66 and accompanying text.

118. See *supra* notes 51, 84 and accompanying text.

119. See WILLIAMS, *supra* note 20, at 976–78 (describing the New Jersey Supreme Court’s near forty-year struggle with public school finance reform). Taking a more active role in promulgating a new public school finance system led the New Jersey Supreme Court to facilitate the passage of the state’s first income tax, advance a court order to close the state’s public elementary and secondary schools, and, most recently, require increased educational funding to New Jersey’s special needs students as interim relief. *Id.* at 977. In spite of the court’s taking a more active role in school finance reform, this saga has

monetary costs, as well as damage to their reputations, if their efforts to advance new public school financing systems are unsuccessful.¹²⁰ Furthermore, “the prospect of court involvement [in creating new systems] is sometimes subject to criticism on comparative institutional competence grounds.”¹²¹

Given these valid concerns, it appears evident that it would be unwise for Colorado to follow New Jersey and take an active role in promulgating an alternative public school education finance system. This, however, does not mean that Colorado’s judiciary lacks the power to declare its current public school financing system unconstitutional and spur the legislature to create a more equitable system, as Justice Hobbs advocated in his dissent.¹²² The Colorado judiciary can spur the legislature to act in various ways. For instance, it can impose deadlines on the legislature to implement a more equitable standard, as the Supreme Court of Kentucky did successfully in *Rose v. Council for Better Education*.¹²³ Colorado courts may also frame the issue in a way that

continued for thirty-six years, as the court has been unable to achieve a satisfactory public school financing system. *Id.*

120. *See id.* at 977–78.

[E]fforts to reform school finance systems through the courts generate costs, sometimes considerable costs. Attorneys’ fees as well as other direct costs associated with a substantial litigation effort can quickly become consequential. . . . Another potential cost incurred through protracted litigation is borne by state court systems. In New Jersey, for example, dramatic remedial measures which closed that state’s public school system evidently were not enough to induce the development of a constitutionally acceptable school finance system. That such judicial measures were not adequate, particularly in light of the almost three decades-long effort, fuels unflattering debates over judicial efficacy. By struggling to achieve what it sets out to achieve, the New Jersey Supreme Court risks eroding precious capital relating to its legitimacy as a political institution.

Id. at 977.

121. Bauries, *supra* note 9, at 703. This problem is particularly acute in education finance litigation that advocates the adequacy theory. While “[most types] of public law litigation can be defended,” because the judiciary “typically occupies its traditional role of protecting individual liberties from being infringed by the affirmative actions of the majority,” “[l]itigation over educational adequacy ostensibly places the judiciary in the position of rendering value judgments as to legislative appropriation levels in the absolute, and this requirement raises significant separation of powers concerns.” *Id.* at 703–04.

122. *See supra* note 84 and accompanying text.

123. *See* 790 S.W.2d 186, 216 (Ky. 1989).

[The] one-year deadline[] creat[ed] a sense of urgency and open[ed] a policy window for comprehensive legislative action on an issue of public interest. Indeed, some legislators even speculated that a legislative response would not have been possible if the court had merely ruled that the school finance system, considered alone, was unconstitutional.

draws support from not only the students, families, and educators from low-property wealth districts, but also from the state as a whole.¹²⁴ Taking these measures will preserve the judiciary's traditional role of protecting individual liberties by ensuring that a more equitable public school financing system is implemented without infringing on the legislature's traditional duties or unduly burdening the judiciary with unnecessary costs.

VI. CONCLUSION

Despite the majority's holding in *Lobato II*,¹²⁵ both justices' dissents, as well as various educational statistics, demonstrate why plaintiffs in public school finance litigation may be able to show how Colorado's current system of public school financing—which relies heavily on taxes based on local property values—is unconstitutional under both the education clause and the local control clause of the Colorado Constitution. If these plaintiffs are successful, the next task is to determine a more equitable method of education financing. Although centralization has various drawbacks, combining centralization methods with categorical per-pupil funding may best allow Colorado students to receive an adequate education—regardless of where they live or their unique needs. The final task is to determine whether the legislature or the judiciary is best equipped to implement such a new system. While education finance litigation in New Jersey has demonstrated the dangers of courts overstepping their roles, education finance litigation in Kentucky demonstrates how courts may successfully prompt the legislature to act, thus preserving the judiciary's traditional role of “protecting individual liberties.”

Phil Weiser, *What's Quality Got To Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 781 (1994–95).

124. See Weiser, *supra* note 123, at 781 (noting that the Kentucky Supreme Court in *Rose* successfully framed the issue so that the entire public—not just families in low-wealth school districts—were involved). Here, Colorado may be able to involve the entire public by noting the importance of education to the state as a whole, as well as noting that education performance rates throughout the state appear to be in decline. See *supra* notes 93–98 and accompanying text.

125. *Lobato II*, 304 P.3d 1132, 1144 (Colo. 2013).