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ARTICLES & ESSAYS

**A Tale of Two Outcomes:  
Justice Found and Lost for Colorado's Schoolchildren**

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# A Tale of Two Outcomes

## Justice Found and Lost for Colorado's Schoolchildren

Kyle C. Velte\*

### I. Introduction

*"Storytelling is the creative demonstration of truth."*<sup>1</sup>

This is a story about a story. It is the story of a gripping trial, scores of *pro bono* attorneys collaborating—in a way rarely seen since the 1960s Civil Rights Movement—on a civil-rights case for justice, access, and equality for all of Colorado's schoolchildren. It is the story of the thrill of a historic win, and of an agonizing defeat. It is the story about school-finance litigation as the perfect frame for understanding the power of and importance of legal storytelling. In the end, this story about a story demonstrates that a story lost is justice lost.<sup>2</sup> It illustrates that when courts choose not to hear the stories of plaintiffs in school-finance litigation, justice for those plaintiffs, and for all of the participants in the public-education system, is lost and the historic divides between wealthy and

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<sup>1</sup> Philip Meyer, *Vignettes from a Narrative Primer*, 12 LEGAL WRITING 229, 260 (2006).

<sup>2</sup> Lawsuits challenging public-school-finance systems have made their way through the nation's state courts for forty years and have inspired over 1,400 law review articles. Christopher Berry & Charles Wysong, *Making Courts Matter: Politics and the Implementation of State Supreme Court Decisions*, 79 U. CHI. L. REV. 1, 4 (2012). Similarly, there is a deep body of scholarship concerning the use of storytelling in the law that emphasizes the importance of storytelling in both litigation and legal scholarship itself. See, e.g. Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING 3 (2009); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001) [hereinafter Foley & Robbins, *Fiction 101*]; J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53 (2008). However, none of this scholarship has analyzed or discussed school-finance litigation from the perspective of storytelling and narrative theory. This article bridges the gap between storytelling scholarship and school-finance-litigation scholarship through the analysis of one case.

poor school districts continue in ways to deprive children in poor school districts with a constitutionally adequate education.

This article tells the story of one case—*Lobato v. State*, in which dozens of school districts, schoolchildren, and their parents challenged the constitutionality of Colorado’s state-wide public school funding system—and analyzes the impact of the stories told in that case to both the trial court and the Colorado Supreme Court through the lens of narrative theory.

The article’s goals are two-fold. First, it applies three, intersecting, story types—a “Story of the Parties,” a “Story of the Process,” and a “Story of the Law”<sup>3</sup>—to analyze how judges are influenced by story and concludes that trial courts can be influenced through the use of a powerful justice narrative told through a Story of the Parties frame. Analysis of judges’ acceptance or rejection of stories through a school-finance case study adds to scholars’ and practitioners’ understanding of the role of stories and “narrative reasoning” in both litigating and judging.<sup>4</sup>

Second, the article posits that when compelling Plaintiff Stories are told in such cases, and when courts choose to *hear* those Plaintiff Stories and to elevate those stories over the Story of the Process and the Story of the Law, students and school districts will prevail. However, when, as in *Lobato*, courts choose to minimize—in fact, ignore—the call of those Plaintiff Stories and instead choose to elevate the call of “law” stories or “process” stories, the loss of Plaintiff Stories means the loss of justice or, at minimum, the delay or deferral of justice. In this article I do not contend that *every* time a court rejects a plaintiff’s story that the outcome is unjust. Rather, in school-finance cases, in which the constitutional standard is a qualitative one constructed by the stories of the plaintiffs, the outcome will be unjust if the court elevates the stories of process or law over plaintiffs’ stories.

*Lobato* was a nearly decade-long challenge to Colorado’s school-finance system—the state-wide, legislatively crafted formula for funding all of Colorado’s K–12 public schools. The “school-finance system” in this context means much more than its sterile and technical name would suggest; the money that school districts receive through that system directly impacts children’s opportunity to participate meaningfully in the American Dream<sup>5</sup> and to have an equal start in life. One cannot uncouple

3 See RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 103–05 (2013) [hereinafter ROBBINS, JOHANSEN & CHESTEK, *YOUR CLIENT’S STORY*].

4 *Id.* at 103–05 (describing three story types: (1) the story of the parties, (2) the story of the law, and (3) the story of the process); see also, e.g. Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC: JALWD 99 (2012) [hereinafter Chestek, *Competing Stories*].

a state's school-finance system from broader notions of equality, justice, and the future ability of schoolchildren to engage with "the civic, economic, and cultural world in which they will participate as adults."<sup>6</sup> Lead counsels' decades of work with school districts around the state revealed that the formula had *not* resulted in the "thorough and uniform" system of free public schools mandated by the Colorado Constitution's Education Clause. Rather, the formula created a vast divide between poor school districts and wealthy ones. That divide manifested in the failure of children in poor or predominantly minority districts to reach proficiency targets in many academic areas, in dilapidated and dangerous schools in these districts, and in an overall lack of even the most basic classroom resources, such as pencils, in these districts.<sup>7</sup> This situation is not unique to Colorado, but rather is the prevailing state of public education throughout the United States.<sup>8</sup>

The *Lobato* plaintiffs' lawyers crafted a deliberate strategy of storytelling; they believed that stories told and heard would mean justice. The arc of the legal story began with the complaint and continued in discovery, which was extensive and brought out the stories of teachers, parents, schoolchildren, superintendents, principals, local and state school-board members, and legislators.

Next, those stories were told in a five-week bench trial—a trial in which the defendants and their attorneys did not meaningfully contest any of the facts—the stories—told by the plaintiffs. Scores of *pro bono* attorneys rotated through the courtroom over those weeks to elicit the plaintiffs' stories. The Plaintiff Stories carried the day at trial: In a historic

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**5** The American Dream refers to the opportunity for all to engage in a meaningful pursuit of happiness, or, in the words of by James Truslow Adams, that "life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement" regardless of "the fortuitous circumstances of birth or position." JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214–15 (Little, Brown and Co. 1931).

**6** See Third Amended Complaint, *Lobato v. State*, available at <http://www.childrens-voices.org/storage/273-Exhibit-A-Third-Amended-Complaint.pdf> (March 25, 2011) (No. 2005CV4794) [hereinafter Third Amended Complaint].

**7** *Id.*; see also Findings of Fact and Conclusions of Law at 178, *Lobato v. State*, available at <http://www.childrens-voices.org/storage/Decision1.pdf> (Dec. 9, 2011) (No. 2005CV4794) [hereinafter Decision].

**8** See, e.g., Eduardo Porter, *In Public Education, Edge Still Goes to Rich*, N.Y. TIMES, Nov. 5, 2013:

The United States is one of few advanced nations where schools serving better-off children usually have more educational resources than those serving poor students . . . . The inequity of education finance in the United States is a feature of the system, not a bug, stemming from its great degree of decentralization and its reliance on local property taxes . . . . [T]he federal government provides only about 14 percent of the money for school districts from the elementary level through high school, compared to 54 percent, on average, among other industrial nations. More than half the money comes from local sources, mostly property taxes . . . . This skews the playing field from early on. In New York, for instance, in 2011 the value of property in the poorest 10 percent of school districts amounted to some \$287,000 per student . . . . In the richest districts it amounted, on average, to \$1.9 million. . . . [T]he disparity matters a lot. Social and economic deprivation has a particularly strong impact on student performance . . . . Differences in socio-economic status account for 17 percent of the variation in test scores . . . . In New York, . . . only 18 percent of students in the poorest 10 percent of school districts scored above proficiency level in math last year. In the richest tenth, 45 percent did.

183-page ruling, the trial-court judge held that the formula was unconstitutional. Thus, at trial, the Plaintiff Stories heard meant that justice was had.

The plaintiffs' thrill of victory, though, was short-lived. Eighteen months later, the Colorado Supreme Court held—over two vigorous dissenting opinions—that the system is, in fact, constitutional. The Story of the Law and the Story of the Process<sup>9</sup> carried the day on appeal. Thus, on appeal, Plaintiff Stories unheeded and rejected meant justice was lost.

This story of a story proceeds as follows. Chapters 2 and 3 set up the background with a brief overview of narrative theory and storytelling in the law (Chapter 2) and a brief history of school-finance litigation and of Colorado's school-finance system (Chapter 3). Chapter 4 tells the *Lobato* trial story. It analyzes the *Lobato* trial through the lens of narrative theory and posits that it was the use of compelling Plaintiff Stories that resulted in a sweeping and historic victory for the *Lobato* plaintiffs. Chapter 5 tells the *Lobato* appellate story—the plaintiffs' loss—also through the lens of narrative theory. It asserts that this result reflects the majority's acceptance of “law” and “process” stories and rejection of Plaintiff Stories. It attempts to explain the Supreme Court's rejection of the Story of the Parties in favor of the Story of the Law and the Story of the Process and contends that this outcome was legally flawed, contrary to the law of the case, and out of step with supreme courts' school-finance decisions in other states. Chapter 6 is an Afterword to this story about a story; it proposes future projects and includes concluding thoughts on how the plaintiffs' ultimate loss in *Lobato* might be leveraged to engender meaningful reform for school finance in Colorado, as well as how it can be utilized to further scholars' and practitioners' understanding of the power of storytelling.

## II. Storytelling and Narrative Theory

Scholars have written about narrative theory and storytelling in the law since the early 1980s.<sup>10</sup> This body of scholarship generally addresses the importance of storytelling in scholarship, persuasion, legal writing, and litigation, as well as applies narrative theory to analyze specific cases.<sup>11</sup>

9 ROBBINS, JOHANSEN & CHESTEK, *YOUR CLIENT'S STORY*, *supra* note 3, at 103–05.

10 See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); W. LANCE BENNET & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

There is wide agreement that stories are more than mere persuasive window-dressing in litigation; rather, they are “cognitive instruments and . . . [a] means of argumentation in and of themselves.”<sup>12</sup> Put another way, “narratives are fundamental to our understanding of human experience.” They operate “as an instrument of mind in the construction of reality.”<sup>13</sup> Thus, storytelling both *reflects* reality and *constitutes* reality.<sup>14</sup>

Legal adjudication traditionally has relied “solely on informal or formal models of logic.”<sup>15</sup> However, the shortcomings of such abstract logic have become apparent as scholars and practitioners have looked more deeply at what makes a legal argument persuasive. This reflection on persuasive legal argument has revealed that, in addition to logic, “there is such a thing as narrative rationality, a rationality that sees paradigms in human stories that help to explain the meaning of those stories.”<sup>16</sup> Because we use narrative to make sense of our lives and our world, storytelling in the law is as important as strictly legal arguments based on rationality and the rule of law.<sup>17</sup>

**11** See, e.g., Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005); Chestek, *Competing Stories*, *supra* note 4; Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 JALWD 1 (2010) [hereinafter Chestek, *Judging by the Numbers*]; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Foley & Robbins, *Fiction 101*, *supra* note 2; Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); Meyer, *supra* note 1; Rideout, *supra* note 2; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006) [hereinafter Robbins, *Harry Potter*]; Steven L. Winter, *The Cognitive Dimension of the Agony between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2235 (1989).

**12** Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING 3, 6 (2008).

**13** Peter Brooks, “Inevitable Discovery”—Law, Narrative, Retrospectivity, 15 YALE J.L. & HUMAN. 71, 95 (2003) [hereinafter Brooks, *Inevitable Discovery*].

**14** *Id.*

**15** Fajans & Falk, *supra* note 2, at 20 (citing Rideout, *supra* note 2, at 60).

**16** *Id.* While in-depth scholarship about the value of storytelling, and its concomitant acceptance by the bar, bench, and academy as a core component of effective advocacy is a relatively recent occurrence, the “relationship between narrative and the law is ancient.” Winter, *supra* note 11, at 2225. Legal history is full of examples, such as Clarence Darrow, Oliver Wendell Holmes, and Louis Brandeis and his “Brandeis Briefs,” of recognizing and using the power of legal storytelling, and some law schools have begun to recognize the important connection between students’ knowledge and appreciation of literature and their success as effective attorneys. See, e.g., Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 276, 283 (2008); see also Lana M. Manitta, *Broken Barriers in Legal Education: How Immigration and Integration Have Shaped the Way We Learn The Law*, 12 GEO. IMMIGR. L.J. 361, 376 (1998) (“The notion of Realism required more storytelling in the courtroom. One could not grasp the reality of a situation, of parties to an action, or of the potential consequences of a decision, by focusing on the Langdellian method of case analysis. Thus, lawyers with skills beyond the legal texts—oratorical, philosophical, sociological, economic, and yes, *literary* skills—could be more successful. . . . The best example of this is Oliver Wendell Holmes. . . . Further proof of this notion is the infamous and groundbreaking ‘Brandeis Brief,’ which presented sociological data rather than pure case and statutory law in order to tell a story. . . .”) (emphasis in original).

**17** Rideout, *supra* note 2, at 56; see also *id.* at 60 (describing “narrative as co-equal with logic” in a trial). One scholar argues that “the traditional major premise of the normative syllogism, the legal rule, is informed by underlying narrative models that typify human action, although expressed in the abstract terminology of the law.” *Id.* at 63; see also Chestek, *Judging by the Numbers*, *supra* note 11, at 4, 6 (noting that “logic alone is not the best method of persuasion” and describing two forms of reasoning used by judges—logical reasoning and “story reasoning”).

## A. Using Narrative to Craft a Persuasive Story

Regardless of the lens through which scholars think and write about legal storytelling, they agree that persuasive legal storytelling includes the basic elements of stories—character, conflict, setting, point of view, and theme.<sup>18</sup> Moreover, all agree that the arc of a persuasive story focuses on characters, their goals, and their struggles to overcome obstacles to achieve those goals.<sup>19</sup> Robbins, Johansen, and Chestek have articulated three story types in litigation. First, the “Story of the Parties” is that fact-based dispute that brings the parties to court.<sup>20</sup> Second, the “Story of the Law” comes into play when the facts are undisputed but the interpretation or content of the law needs to be changed.<sup>21</sup> Third, the “Story of the Process” speaks to the procedures by which a case is decided.<sup>22</sup> In addition, throughout the story, and across all of its elements, the story must be plausible.<sup>23</sup>

Each of these elements, along with a consistent plausibility, is present in the story of the *Lobato* litigation.

### 1. Character

The development of character in and throughout the story must resonate with the reader as authentic and real. If the characters appear to be “cardboard prototypes,” narrative rationality will not be achieved.<sup>24</sup> Robbins advocates for attorneys to cast their clients as one of several hero archetypes.<sup>25</sup> Chestek cautions against demonizing the opposing party as

18 Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 137 (2008) [hereinafter Chestek, *The Plot Thickens*].

19 *Id.* at 132; see also Chestek, *Competing Stories*, *supra* note 4, at 102.

20 ROBBINS, JOHANSEN & CHESTEK, YOUR CLIENT’S STORY, *supra* note 3, at 104.

21 *Id.*

22 *Id.* Some may find it odd or, perhaps, counterintuitive, to describe “law” and “process” as types of stories because these components of the legal system often are considered more analogous to objective “instructions” to build or use something than to stories. Narrative theory explains that these components are “best understood as disguised and translated stories” such that even “our determination of the appropriate law governing a case . . . is likewise shaped by stories.” Meyer, *supra* note 1, at 229. Legal storytelling, including stories of the law and stories of the process, is not boundless; rather, it is “a carefully circumscribed business . . . [T]here would be danger and destabilization in legal pedagogy of the law were taught and understood exclusively as merely a battle of competing narratives built on shifting legal foundations, rather than on argumentation based upon principles, precedent, and stare decisis.” *Id.* at 230–31.

23 See Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 267–68 (2009) (“Despite the fact that lawyers should tell stories that avoid unfavorable embedded knowledge structures, it is important to remember that the stories lawyers tell should ‘take a familiar form, assuring the judges . . . that the outcome follows as night follows day.’ The story a lawyer tells on behalf of the client must be plausible.”) (internal citations omitted.)

24 *Id.* at 30.

25 Robbins, *Harry Potter*, *supra* note 11, at 778–79 (listing twelve hero archetypes: Warrior, Creator, Caregiver/Martyr, Every person/Orphan, Outlaw/Destroyer, Sage/Scholar, Explorer/Wanderer/Seeker, Magician, Ruler, Lover, Jester/Fool, and Innocent).

purely evil and without any redeeming qualities; to do so risks losing credibility because “purely evil characters are almost entirely fictional; in the real world, almost all defendants have redeeming qualities.”<sup>26</sup> Thus, the character of an opposing party, which can also be the “conflict” or “obstacle” of the story, often may be more persuasively cast as a “threshold guardian” rather than as a “villain.”<sup>27</sup> Character can be created using direct methods, such as describing the person’s physical appearance and thoughts, or can be created indirectly, as through action and dialogue.<sup>28</sup>

## 2. Conflict

The “conflict” portion of the story is the driving force and is where the protagonist struggles to overcome an obstacle.<sup>29</sup> There are several well-known themes for conflicts: (1) man against self, (2) man against nature, (3) man against society, (4) man against machine, (5) man against God, and (6) God against everybody.<sup>30</sup>

Other scholars have described obstacle types as antagonist, internal, and systemic.<sup>31</sup> In litigation, two types of conflict emerge: factual conflict, which is the dispute that brought the parties to court, and legal conflict, which is the question of law presented to the court.<sup>32</sup> These two conflicts work together to give social meaning and significance to each other.

## 3. Setting

Setting, or scene, is the description of the time and place of the events of the case.<sup>33</sup> “Scene makes the past present.”<sup>34</sup> Scene provides the backdrop for the action of the story and, in doing so, provides a framework in which the reader can situate and contextualize the story. Details almost certainly are essential to enhance a story’s setting.<sup>35</sup> The effective use of detail ranges from the inclusion of many details of a story

26 Chestek, *Competing Stories*, *supra* note 4, at 105. Though it is commonly understood and accepted that pure evil is rare, legal storytellers must also remember to tell a story that, while nuanced to exclude the “pure evil” theme, also demands that is a “right” and a “wrong” outcome.

27 A “villain” is a character who opposes the hero because of “animus or an evil nature” while a “threshold guardian” is one who is “not evil but who simply [has] different goals which impede the hero’s quest.” *Id.*

28 See ROBBINS, JOHANSEN & CHESTEK, YOUR CLIENT’S STORY, *supra* note 3, at 33.

29 Chestek, *The Plot Thickens*, *supra* note 18, at 140.

30 Foley & Robbins, *Fiction 101*, *supra* note 2, at 469.

31 Chestek, *Competing Stories*, *supra* note 4, at 105 (describing an antagonist obstacle as “another character or characters who oppose the hero,” an internal obstacle as “addiction, physical or mental health issues, emotional struggles, etc.,” and a systemic obstacle as “structure of society or social norms, unfavorable legal [frameworks]”).

32 Chestek, *The Plot Thickens*, *supra* note 18, at 141.

33 *Id.* at 139.

34 THEODORE A. REES CHENEY, WRITING CREATIVE NONFICTION 54 (2001).

35 Fajans & Falk, *supra* note 2, at 40.



to the use of a singular yet powerful detail. Regardless of the approach chosen, “the important thing is to choose details that not only capture the essence of the person, place, or event, but that also establish narrative coherence and fidelity.”<sup>36</sup> As noted below, some plaintiffs’ attorneys in school-finance litigation use scene and detail—the geographical scene, the socio-economic scene, and the physical scene of particular schools—very effectively to set the stage for plaintiffs’ stories about the inadequacy of school finance systems.

#### 4. Point of View

Point of view, the lens through which the storyteller chooses to present the story to the reader, is vital to persuasive storytelling. The point of view of a story can be that of an “omniscient narrator,” a first- or third-person account from just one character, or told through the alternating lenses of several characters.<sup>37</sup> Point of view is “intricately bound up with credibility or its absence.”<sup>38</sup> Traditionally, at least at the stage of the complaint, the point of view is that of the attorney, who transmits the plaintiff’s story through the lawyer’s point of view. However, this approach “merely distances the reader from the narrative and induces her to withhold judgment as to the truth of the matter.”<sup>39</sup> As described below, some plaintiffs’ attorneys in school-finance litigation take this approach in drafting complaints, while others strive to tell the plaintiffs’ stories through a third-person narrative told through the plaintiffs’ point of view and “told, if not in the plaintiff’s own voice, at least[] in a voice the plaintiff can recognize. The reader sees what [the] plaintiff saw, hears what [the] plaintiff heard, and feels [the] what plaintiff felt[,]” all while believing that plaintiff is a reliable source.<sup>40</sup>

#### 5. Theme

Theme, at the most basic level, answers the question *what is the story about*?<sup>41</sup> Theme is accomplished “by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda*—say, for example, Aesop’s characteristic *moral of the story*.”<sup>42</sup> Whereas every element is vital, theme is the most important. It is the

36 *Id.* at 42. As with all aspects of legal storytelling, the choice of which details to include and which to omit is “carefully circumscribed” to fit legal rules and the rules of professional conduct; thus, the “stories told and their tellings must be truthful, factually accurate, and meticulous.” Meyer, *supra* note 1, at 230.

37 *Id.* at 37.

38 *Id.*

39 *Id.*

40 *Id.* at 38.

41 Chestek, *The Plot Thickens*, *supra* note 18, at 146.

42 Fajans & Falk, *supra* note 2, at 18 (emphasis in original); see also Meyer, *supra* note 1, at 257.

heart of the story because it imparts the lesson, the message and the meaning that the storyteller is trying to convey.<sup>43</sup>

## 6. Tone

Finally, though not technically an element of storytelling, tone is a technique that can be used to persuasively deploy the foregoing elements. Tone is set by word choice—diction.<sup>44</sup> Relying only on “empty legalese, redundant synonyms, tired verbs—can spoil the narrative’s effect and destroy credibility”; it is thus tone that brings facts alive.<sup>45</sup> In choosing words, effective legal storytellers seek a “thickness” of story by using active verbs, adjectives, and punctuation.<sup>46</sup> The central goal of the plaintiffs’ attorneys in *Lobato* was to weave together the elements of narrative into the “thickest” stories possible through the testimony of the plaintiffs, as well as through videos, photographs and documents.

## 7. Narrative Coherence, Correspondence, and Fidelity

In addition to incorporating these elements of narrative, a story must have narrative coherence, correspondence, and fidelity to persuade the fact-finder to adopt it as the “truth” upon which a legal decision should be made.<sup>47</sup>

Narrative coherence demands that a story be both internally consistent and complete. Internal consistency results when the evidence submitted at trial conforms to the story being told by the attorney through the complaint and other pleadings and motions.<sup>48</sup> Put another way, narrative coherence means that “there must be sufficient facts to ground whatever inferences need to be made” for the story to be credible.<sup>49</sup> Without internal coherence and completeness, stories will come across as ambiguous or even implausible.<sup>50</sup> This, of course, is how you try to depict your opposition’s narrative.

Narrative correspondence occurs “when a party’s particular story corresponds with socially normative versions of similar stories.”<sup>51</sup> Normative versions are also known as generic scripts or “stock stories,”

<sup>43</sup> See generally Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 250 (2012).

<sup>44</sup> Fajans & Falk, *supra* note 2, at 44.

<sup>45</sup> *Id.* (“All the techniques discussed thus far help a writer to create tone. For example, we can hear outrage or sincerity in a quote and catch irony in the juxtaposition of events.”).

<sup>46</sup> *Id.* at 45–46.

<sup>48</sup> *Id.* at 52; see also Rideout, *supra* note 2, at 55. Rideout posits that narrative coherence and correspondence are “structural” properties of a story, while narrative fidelity is a “substantive” property—one that “persuades, not as a matter of the structure of the narrative, but rather as a matter of its content and the particular substantive appeal that the content makes.” *Id.* at 56.

<sup>49</sup> Fajans & Falk, *supra* note 2, at 20.

<sup>49</sup> *Id.*

<sup>50</sup> Rideout, *supra* note 2, at 65.

<sup>51</sup> Fajans & Falk, *supra* note 2, at 20.

such as “slip-and-fall,” “bait-and-switch” and “corporate greed.”<sup>52</sup> We recognize these “stock stories” instantly because they are “cultural archetypes”<sup>53</sup> and they “allow us to assign meaning to events through ‘pre-given understandings of common events and concepts, configured into the particular pattern of story-meaning.’”<sup>54</sup> “The story at trial must correspond to what ‘could’ happen, or what ‘typically’ happens, not to what actually happened.”<sup>55</sup> Moreover, to determine what “could” have happened, fact-finders do not endeavor to learn the facts of the actual event at issue, but instead look “to a store of background knowledge about these kinds of narratives—to a set of stock stories.”<sup>56</sup>

In school-finance cases, like all other cases, the plaintiffs’ narrative correspondence and coherence is achieved where lawyers combine the “stock stories” with new information—information that particularizes, makes concrete or illustrates a stock story.<sup>57</sup> Stories are particularly powerful and important in school-finance cases because everyone has experience with K–12 education, either as a student, or parent, or both. Specifically as to school-finance litigation, plaintiffs’ narrative correspondence and coherence occurs when a stock story is alleged—“education is vital to society” or “all schoolchildren deserve a level playing field,” or “money matters in schools and student performance” or the “Great Progressive Narrative”<sup>58</sup>—that asserts a legally cognizable harm.

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52 *Id.* at 21. These stock stories allow fact finders to organize experience even with limited information (evidence) because (1) [they] draw upon direct physical or cultural knowledge; (2) they are highly generalized in order to capture and relate together a broad range of particularized fact situations; (3) they are unconscious structures of thought that are invoked automatically and unreflexively to make sense of new information; and (4) they are not determinate, objective characterizations of reality, but rather idealized structures that effectively characterize some but not all of the varied situations that humans confront in their daily interactions . . . .

Winter, *supra* note 11, at 2234.

53 Rideout, *supra* note 2, at 68.

54 *Id.* at 59. However, the storyteller must be careful to not simply assume that her understandings of “cultural archetypes” are shared by all. Rather, the storyteller must be certain that listeners apprehend the exact meaning the storyteller intends. See, for example, Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 343:

Although there certainly is some support for lawyers’ assumptions that traditional mitigation testimony is associated with greater juror empathy and with life sentences, all too often defense lawyers accept uncritically the assumption that a generous helping of traditional mitigation testimony—evidence of child abuse and neglect, family ‘pathology’ and mental illness, and poverty, for example—will allow jurors to empathize with capital defendants. But what if, in the case of black defendants, traditional mitigation testimony—at least if not very carefully presented—risks creating a greater chasm between the defendant and the mostly white jurors than already exists? What if, in other words, jurors hear traditional mitigation narratives differently when the narrative concerns a black defendant? Could a compelling narrative for a white defendant become a stock script when applied to a black defendant? There is some reason to fear that is exactly the case.

55 *Id.* at 67.

56 *Id.*

57 Fajans & Falk, *supra* note 2, at 21–22.

Narrative fidelity is that element of narrative technique that convinces the finder of fact to choose between the competing stories—and to choose the one that has fidelity to social reality.<sup>59</sup> The narrative that persuades the fact finder, based on “practical judgments about what the larger community would deem the right thing to do in that case” is the narrative that has achieved fidelity, based not on abstract notions of moral or legal principles, but on practical judgments.<sup>60</sup> Narrative fidelity thus is the deciding factor for a legal audience to decide between competing stories when both have narrative coherence and correspondence.<sup>61</sup> When a story has “communal validity or relies on shared communal norms, it enjoys narrative fidelity and will be more persuasive than a story that does not possess that characteristic. As a result, narrative fidelity relies on social values as much as it relies on reasoning.”<sup>62</sup> If the story has fidelity, the “audience will instinctively want the client to receive justice.”<sup>63</sup>

In school-finance litigation, narrative fidelity is achieved when plaintiffs (students, their parents, and school districts through their superintendents) “can recognize their own stories” and when the judicial fact-finder “instinctively feels ‘that really happened and justice must be done.’”<sup>64</sup>

## B. The Impact of Narrative on Courts

Having described the types of litigation stories and the elements of such stories, this question remains: How do courts interpret, apply, and construe stories in reaching their decisions? Put another way, if you tell a

<sup>58</sup> This “stock” narrative

sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development . . . . The basic ideals of Americans and their Constitution are promises for the future, promises that the country eventually will live up to, and, in so doing, confirm the country’s deep commitments to liberty and equality.

*Id.* at 85.

<sup>59</sup> Rideout, *supra* note 2, at 70.

<sup>60</sup> Fajans & Falk, *supra* note 2, at 22.

<sup>61</sup> Jennifer Sheppard, *What If the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that Are Harmful to Your Client’s Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 200 (2012) (internal citations omitted). Sheppard goes on to explain: “Narrative fidelity is based on the audience’s personal evaluation of the plausibility of the story.” *Id.*

<sup>62</sup> *Id.* at 200–01 (“Thus, while the audience may consider whether the facts presented by the lawyer are reliable and whether the conclusions drawn from them seem plausible, the story’s fidelity is measured by the extent to which the story is consistent with the audience’s expectations and experience[s].”).

<sup>63</sup> *Id.* (“Narrative fidelity is more than just the structural matching of the parts of the client’s story with the structural aspects of the stock story. It is a consideration of whether the substance of the story comports with what the audience knows of the world based on the audience members’ personal experience.”).

<sup>64</sup> Fajans & Falk, *supra* note 2, at 22 (quoting Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2275 (1989)).

persuasive story that incorporates elements of narrative, will you win your case? Does the answer to that question depend on whether you are telling your story to a trial court judge or jury rather than an appellate judge?

The storytelling begins with the complaint; however, the complaint is just the beginning. It is “an unfinished narrative, a half-told tale that awaits action by the court that will turn it into a comedy (if redress is granted) or tragedy (leading to the sacrifice and isolation of the plaintiff) if it is denied.”<sup>65</sup> Plaintiff Stories will be challenged, undermined, and mitigated within the adversarial system and the judge’s ultimate consideration of the “facts.”<sup>66</sup> Thus, judges choose their own narrative—an opinion in which the end is predetermined and the story is constructed to lead to that conclusion.<sup>67</sup> The narrative of judges’ opinions is retrospective; that is, they

work back from their ends, which are the real determinants of their vectors, the direction and intention of their plotting . . . [A] large part of the coherence of [opinion] narrative derives from the knowledge that an end lies in wait, to complete and elucidate whatever is put in motion at the start.<sup>68</sup>

Thus, judicial opinions, as narratives in and of themselves, tend to make their endings appear inevitable since that is part and parcel of their meaning-making function.<sup>69</sup>

Chestek urges that “narrative reasoning”—the process through which “norm-based . . . arguments . . . motivate a judge to want to rule in party’s favor”—is one of the two equally important modes of reasoning (the other being rule-based reasoning) employed by judges in reaching a decision.<sup>70</sup> He further contends that a story can inform both narrative *and* rule-based reasoning where a story serves to “satisfy a test” imposed by a rule.<sup>71</sup> Thus, whether the issue for a judge’s resolution is fact-based or law-based, persuasive storytelling matters.

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<sup>65</sup> Fajans & Falk, *supra* note 2, at 14.

<sup>66</sup> So too will defendants’ stories be challenged, undermined, and mitigated. However, because plaintiffs frame the initial story with the complaint, and bear the ultimate burdens of proof and persuasion to prevail, their approach to storytelling is particularly significant.

<sup>67</sup> See, e.g., Brooks, *Inevitable Discovery*, *supra* note 13, at 73.

<sup>68</sup> *Id.* at 76.

<sup>69</sup> *Id.* This is also how plaintiffs and defendants construct their narratives: The parties want their desired outcomes—endings—to appear inevitable from their stories.

<sup>70</sup> Chestek, *Competing Stories*, *supra* note 4, at 102.

<sup>71</sup> *Id.* at 126.

Finally, and intuitively, the audience—the kind of judge—matters.<sup>72</sup> When a case goes to trial or goes up on appeal, there will be at least two stories—that of the plaintiff and that of the defendant: a “war between stories.”<sup>73</sup> The outcome of the case “depends very much on which story the judge chose to listen to.”<sup>74</sup> Like all of us, judges are humans with preexisting worldviews, and the effect of these worldviews on a judge’s choice of story “cannot be denied.”<sup>75</sup> This “choice” likely is not a conscious one: Heroic archetypes “work at the level of the unconscious” because they “are embedded deep within each of us.”<sup>76</sup>

In sum, narrative theory and storytelling are alive and well in litigation. When approached in a strategic and intentional manner, as was the case in the *Lobato* litigation, storytelling has meaningful impact on judges and thus on the outcome of cases.

### III. School-Finance Litigation

#### A. Colorado’s School-Finance System

Most school-financing systems are tripartite: Funding comes from local revenues, predominantly raised through property taxes; state funding; and federal funding.<sup>77</sup> Generally, federal funding constitutes the smallest portion of a public-school-finance system; the federal government’s funding of public education is limited to specific programs, which fund schools serving children living in poverty.<sup>78</sup>

Colorado’s school-finance system mirrors those in most states, with just a sliver of federal funding and a majority of funding from state and local sources. Like many state constitutions, Colorado’s Constitution has an Education Clause, which includes a “thorough and uniform” clause as well as a “local control” clause.<sup>79</sup> The “thorough and uniform” clause

72 *Id.* at 131–32.

73 Delgado, *supra* note 11, at 2418.

74 Chestek, *Competing Stories*, *supra* note 4, at 132. “Listeners”—judges—hear what they want to hear rather than weigh conflicting stories and genuinely try to determine the correct narrative:

If the traditional supposition of the law was that adjudication could proceed by “examining free-standing factual data selected on grounds of their logical pertinency,” now “increasingly we are coming to recognize that both the questions and the answers in such matters of “fact” depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works.”

Brooks, *Inevitable Discovery*, *supra* note 13, at 72 (quoting ANTHONY G. ANDERSON & JEROME BRUNER, *MINDING THE LAW* 111 (2000)).

75 Chestek, *Competing Stories*, *supra* note 4, at 134.

76 *Id.*

77 Berry & Wysong, *supra* note 2, at 8.

78 *Id.* at 9.

79 COLO. CONST. art. IX, §§ 2, 5.

states, in pertinent part, that the legislature “shall . . . provide for the establishment and maintenance of a *thorough and uniform system of free public schools throughout the state*.”<sup>80</sup> The “local control” clause states, in pertinent part, that the legislatively created school districts “*shall have control of instruction* in the public schools of their respective districts.”<sup>81</sup>

The Public School Finance Act of 1994 (PSFA) is the legislative formula through which the constitutional mandates are implemented.<sup>82</sup> The funding provided to any particular school district through the formula is comprised of both state and local tax revenue, with the local share based on the assessed value of taxable property within the boundary of the school district.<sup>83</sup>

Under the PSFA, there is a limited option for a school district to increase funding through the collection of additional local revenues; notably, this is permitted “to provide services *above* those required to meet the fundamental requirements of the Education Clause.”<sup>84</sup> Moreover, this requires an affirmative vote by the electorate of the school district in what is known as an “override election.”<sup>85</sup> Because local property taxes vary widely, an override is not a viable option for “property poor” districts to raise substantial amounts of money.<sup>86</sup> Moreover, because the funding through the PSFA is inadequate to cover the cost of the most basic education, overrides most often are used to provide basic educational services, as opposed to services above those required to meet the fundamental requirements of the Education Clause.<sup>87</sup> Thus, the override option does not provide the poorest school districts with an effective opportunity to meet their obligations under the Education Clause, much less to enhance the educational opportunities for their students.<sup>88</sup>

Of importance to the *Lobato* litigation is the method by which the Colorado legislature drafted the PSFA. It did not establish the funding amount by doing a “cost study” to determine the actual costs to provide a constitutionally adequate education.<sup>89</sup> Nor did it do any kind of study to reach a data-supported funding base that is connected to the actual cost of educating Colorado’s children.<sup>90</sup> This lack of a rational relationship between the funding formula and the goals and objectives of Colorado’s

80 COLO. CONST. art. IX, § 2 (emphasis added).

85 *Id.*

81 COLO. CONST. art. IX, § 15 (emphasis added).

86 *See id.*

82 *See* COLO. REV. STAT. §§ 22-54-101 to -135.

87 *See id.*

83 *See Public School Finance Act*, Children’s Voices, [http://www.childrens-voices.org/school-funding-101\\_2/](http://www.childrens-voices.org/school-funding-101_2/) (last visited Mar. 15, 2014) (emphasis added).

88 *See id.*

89 *See id.*

84 *Id.* (emphasis added).

90 *See id.*

education reform legislation formed the basis of the *Lobato* Plaintiffs' challenge to the PSEFA.

## B. The Legal Landscape of School-Finance Litigation

Though the legal approach taken in school-finance litigation may vary,<sup>91</sup> the overarching goal in these cases is to improve public-school education by increasing the amount of funding allocated to underfunded and underachieving school districts.<sup>92</sup> Most often, these districts are in property-poor counties, have a predominantly minority population, or have a predominantly low-income population; often, all three of these factors are present.

The *Lobato* case, like the other “adequacy” school-finance cases,<sup>93</sup> relied on the state constitution’s education clause, which in part mandates that the State establish a “thorough and uniform” system of free public schools.<sup>94</sup> Other states’ education clauses contain similar language, such as mandating that the legislature “shall make suitable provision for finance of the education interests of the state,”<sup>95</sup> that the state has a “paramount duty . . . to make ample provision for the education of all children residing in its borders,”<sup>96</sup> to “secure a thorough and efficient system of common schools throughout the State”<sup>97</sup> and that the legislature “shall provide for an efficient system of common schools throughout the state.”<sup>98</sup> Courts considering challenges under these education clauses face the task of interpreting and defining these operative phrases in order to establish standards by which plaintiffs’ claims, as well as legislatures’ school-finance decisions, can be measured.<sup>99</sup>

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<sup>91</sup> One legal approach—the “equity theory”—contends that inequitable distribution of resources constitute an equal-protection violation; this approach was largely abandoned after the United States Supreme Court rejected it in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). The other legal approach, pursued vigorously around the country since *Rodriguez* is the “adequacy theory,” which abandons the argument centered on “equality of educational opportunity” and instead argues that states have an obligation to “provide some absolute, adequate level of education to all” based on a state constitution’s education clause rather than on more-general constitutional principles such as equal protection or substantive due process. Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202 (2011). The *Lobato* litigation falls into the latter category.

<sup>92</sup> Tang, *supra* note 91, at 1203.

<sup>93</sup> See *id.*

<sup>94</sup> COLO. CONST. art. IX, § 2.

<sup>95</sup> KAN. CONST. art. VI, § 6.

<sup>96</sup> WASH. CONST. art IX, § 1.

<sup>97</sup> OH CONST. art. VI, § 2.

<sup>98</sup> KY. CONST. § 183.

<sup>99</sup> See, e.g., *Derolph v. State*, 677 N.E.2d 733, 741 (Ohio 1997) (“Other states, in declaring their state funding systems unconstitutional, have also addressed the issue of what constitutes a “thorough and efficient” or a “general or uniform” system of



While most courts stress that the legislature has wide discretion in satisfying the constitutional mandates set forth in education clauses, they also hold that there are “judicially discoverable and manageable standards” to determine whether the legislature’s school finance decisions pass constitutional muster.<sup>100</sup> Because such standards exist, the question whether a school-finance system is constitutional is, in fact, a justiciable question appropriate for state courts to consider.<sup>101</sup>

- Some courts have defined these key phrases in several ways:
- “Simply put, use of ‘suitable’ necessarily conveys the presence of standards of quality below which schools may not fall.”<sup>102</sup>
- “[T]he constitutional mandate [means] . . . that the General Assembly shall maintain and support a system of free public schools *that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare* students intellectually for a mature life.”<sup>103</sup>
- “[T]he [education clause of the] state constitution . . . embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions . . . and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy.”<sup>104</sup>
- “[Thorough and efficient education is one that] develops[—]as best the state of education expertise allows[—]the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.”<sup>105</sup>

public schools. We recognize that some of these decisions were decided on different grounds or involved different education provisions. Despite these differences, we still are persuaded by the basic principles underlying these decisions.”)

<sup>100</sup> Gannon v. State, 319 P.3d 1196, 1224–25 (Kan. 2014).

<sup>101</sup> *Id.*; see also Lobato v. State, 218 P.3d 358 (Colo. 2009) (“[O]ur courts have the responsibility to review the state’s public school funding scheme to determine whether this system is rationally related to the General Assembly’s constitutional mandate.”) [hereinafter *Lobato I.*].

<sup>102</sup> Gannon, 319 P.3d at 1225.

<sup>103</sup> Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–51 (Tenn. 1993) (emphasis added).

<sup>104</sup> Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 227 (Conn. 2010).

<sup>105</sup> Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

- “We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”<sup>106</sup>

Although the goal of all school-finance litigation is similar, the storytelling approach taken by plaintiffs’ attorneys varies. There is a divide among plaintiffs’ school-finance-litigation attorneys about how to approach these cases. Some attorneys present their cases based heavily or exclusively on expert testimony, which describes the tax structures, the property values, the formula underlying the school-finance system, and the like. These attorneys rarely, if ever, call as witnesses the students, parents, teachers, principals, school-board members, or superintendents to tell their stories, the stories of what is happening on the ground in their schools and communities.<sup>107</sup> They rely instead on the stories told by the data.

Other plaintiffs’ attorneys, like those in the *Lobato* case, take the opposite approach. They structure their cases around the stories of students, parents, teachers, superintendents, and school-board members. They seek out plaintiffs who represent a wide swath of the demographic, economic, and cultural diversity of the state. They are intentional about storytelling, believing that if the court hears the stories of the struggles of students and schools, there will be no other possible outcome than for the court to hold in favor of the plaintiffs.<sup>108</sup>

<sup>106</sup> *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

<sup>107</sup> Conversation with David Long, a longtime school-finance litigator, in July 2011.

<sup>108</sup> See, e.g., *Gannon v. State*, 319 P.3d 1196, 1217–18 (Kan. 2014).

Notably, the definitions of key education-clause language are both substantive and qualitative and not merely quantitative.<sup>109</sup> It is this qualitative nature of education clauses that creates the opportunity for (and the related important of) storytelling in school-finance litigation. Because most courts, including the Colorado Supreme Court, have interpreted the key constitutional phrases (“thorough and uniform,” “paramount duty,” “thorough and efficient” and “efficient system of common schools”) to have a *substantive, qualitative* element, the Plaintiff Stories play a critical role in a court’s determination whether a school-finance system is constitutional. While raw data on test scores, school performance, etc., may prove plaintiffs’ cases on the most basic level, it is the stories of the everyday challenges and hardships in the classrooms that give real life to the qualitative aspects of a claim under the education clause of a state constitution; such stories are a powerful way in which plaintiffs substantiate their claims that a legislature has failed its constitutional duties.<sup>110</sup>

Though the plaintiffs’ stories are the centerpiece of the litigation for these attorneys, they do not rely *solely* on the stories of plaintiffs’ day-to-day experiences in the public-education system. They connect these day-to-day life experiences of hardship to the empirical data on student performance, teacher performance, and school performance, which is introduced through lay and expert witnesses.<sup>111</sup> Backing up plaintiffs’ stories with such data combines the power of storytelling with the scaffolding of supporting empirical evidence to bridge the gap between awful hardships and a cognizable constitutional harm.<sup>112</sup> Put another way, the school-finance plaintiffs who take the storytelling approach are not arguing that their hardships are *per se* a constitutional violation. Rather, they argue that the stories of their daily hardships in the public-school system, when coupled with performance and funding data, are direct evidence of a constitutional violation. Together this evidence is compelling

109 See *supra* notes 103–07 and accompanying text.

110 Gannon, 319 P.3d at 1225 (“The district court must make a finding, *after giving the plaintiffs the opportunity to substantiate their claims*, that the legislature has provided suitable provision for financing the educational interests of the State before judgment may be entered for the defendants.”) (emphasis in original).

111 See Decision; see also, e.g., Gannon, 319 P.3d at 1207 (“At trial, the plaintiffs elicited testimony from various employees of the plaintiff districts; representatives from the Kansas Association of School Boards, Kansas Board of Regents, and Kansas State Department of Education; members of the legislature; and experts in the field of school finance.”); *Derolph v. State*, 677 N.E.2d 734 (Ohio 1997) (Syllabus by the Court: “[T]he [t]rial . . . lasted thirty days, culminating in more than five thousand six hundred pages of transcript and the admission of approximately four hundred fifty exhibits into evidence. Sixty-one witnesses testified at trial or by way of sworn deposition.”).

112 See, e.g., *Derolph v. State*, 677 N.E.2d 733, 744 (Ohio 1997) (“The accessibility of everyday supplies is also a problem, forcing schools to ration such necessities as paper, chalk, art supplies, paper clips, and even toilet paper. A system without basic instructional materials and supplies can hardly constitute a thorough and efficient system of common schools throughout the state as mandated by our Constitution.”).

and persuasive when measured against the qualitative nature of a state’s education clause.<sup>113</sup>

## IV. The Lobato Trial Story

### A. Procedural and Factual History

Filed in 2005, *Lobato v. State of Colorado* challenged the state’s public-school-finance system under the “thorough and uniform” and “local control” provisions of the state constitution’s Education Clause.<sup>114</sup> The plaintiffs<sup>115</sup> alleged that the PSFA formula failed to provide school districts with funding necessary to meet the actual and foreseeable costs of educating students consistent with the requirements of the Education Clause or education-reform legislation.<sup>116</sup> They sought declaratory judgment that Colorado’s school-finance system violated the Education Clause. In short, Plaintiffs argued that Colorado’s public-school-finance system was unconstitutional (1) because the state had never determined the actual cost to provide a quality education, (2) the state instead had settled on an arbitrary funding number through political compromise and historical practice, and (3) as a result, the public-school-finance system was not rationally related to the academic achievement and accreditation requirements set forth in Colorado’s education statutes.

As a result, Plaintiffs asserted, the public-school-finance system violated the Education Clause.<sup>117</sup> The named defendants were the State of Colorado, the State Board of Education, the State Commissioner of Education, and the Governor’s office.<sup>118</sup>

Defendants moved to dismiss the case on the grounds that some plaintiffs lacked standing and that the complaint presented nonjusticiable

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**113** See also, e.g., *id.* at 743–44 (“Appellant Christopher Thompson poignantly described his experience growing up in this school district. While Chris attended New Straitsville Elementary School . . . plaster was falling off the walls and cockroaches crawled on the restroom floors. Chris said the building gave him a ‘dirty feeling’ and that he would not use the restroom at school because of the cockroaches. In subsequent years, Chris had to contend with a flooded library and gymnasium, a leaky roof where rainwater dripped from the ceiling like a “waterfall,” an inadequate library, a dangerously warped gymnasium floor, poor shower facilities, and inadequate heating. In fact, due to construction and renovation of the heating system, when Chris attended high school, there was no heat from the beginning of the fall of 1992 until the end of November or beginning of December. Students had to wear coats and gloves to classes and were subjected to kerosene fumes from kerosene heaters that were used when the building became very cold. Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment.”).

**114** See *Case Description*, Children’s Voices, <http://www.childrens-voices.org/case-description/> (last visited Mar. 15, 2014).

**115** By the time of trial, there were twenty-one school-district plaintiffs and ninety-four individual plaintiffs. See Third Amended Complaint.

**116** *Id.*

**117** *Id.*

**118** *Id.*

political questions and thus failed to state a claim upon which relief could be granted.<sup>119</sup> The trial court agreed and dismissed the case.

Plaintiffs appealed, and in *Lobato I*, the Colorado Supreme Court ruled, in a 4–3 decision, that the complaint set forth justiciable claims that must be heard by the trial court.<sup>120</sup> The dissenting opinion vigorously contended that, “despite the vital role that public education plays in our state, this court should not exercise its jurisdiction and determine what constitutes a ‘thorough’ education. The majority’s efforts to do so result in its flawed attempt to affix an untested, undefined, and unlimited rational basis review to all education claims.”<sup>121</sup> Notably, the dissenting justice in *Lobato I* was the author of the majority opinion in *Lobato II*.

The *Lobato I* court did not define the meaning of the Education Clause’s “thorough and uniform” language but instead reserved that task for the trial court:

The plaintiffs are entitled to the opportunity to prove their allegations. To be successful, they must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a “thorough and uniform” system of public education. The trial court must give significant deference to the legislature’s fiscal and policy judgments. *The trial court may appropriately rely on the legislature’s own pronouncements to develop the meaning of a “thorough and uniform” system of education.*<sup>122</sup>

As noted below, the trial court embraced that task and crafted a definition consistent with those courts that have articulated a qualitative and substantive definition that not only invites the stories of students, parents, teachers, and others involved in the public school system, but also appropriately considers those stories (along with empirical data) in determining whether the public-school-finance system complies with the Education Clause.

After remand, discovery commenced. The parties took over 180 depositions and exchanged hundreds of thousands of pages of

119 *Lobato v. State*, 218 P.3d 358 (Colo. 2009) [hereinafter *Lobato I*].

120 *Id.* at 363–64.

121 *Id.* at 376 (Colo. 2009) (Rice, J., dissenting). The dissent took the further position that “the plain language of the constitutional provision coupled with our precedent strongly suggest that the issue before us has been constitutionally committed to the legislative branch,” *id.* at 379, and noted, “[T]he plaintiffs today ask this court to define an ‘adequate’ or ‘thorough’ education in this state, but this intangible concept is ill-fitted for a judicial rule” and “this court is not in a position to devise a judicially manageable standard on which to evaluate the adequacy or thoroughness of an education. There is no precedent to guide our hand in fashioning a standard, creating the unacceptable appearance of an arbitrary judicial decree.” *Id.* at 381. These themes return in the majority opinion of *Lobato II*, indicating that the appellate court accepted the “Story of the Law” and “Story of Procedure” story while rejecting the Plaintiff Stories.

122 *Lobato I*, 218 P.3d at 374–75 (emphasis supplied).

documents.<sup>123</sup> The plaintiffs commissioned a “costing-out” study, which estimated that Colorado needed to spend an additional \$3.58 billion to \$4.15 billion to meet its constitutional requirements.<sup>124</sup> The defendants endorsed an expert who opined that there is no significant relationship between the amount of money spent and student achievement.<sup>125</sup>

A five-week trial was held in the fall of 2011. More than eighty witnesses testified, many of whom were students, parents, superintendents, and local and state school-board members.<sup>126</sup> The trial court admitted more than 2,000 exhibits and nearly 7,000 pages of deposition testimony.<sup>127</sup> The parallel stories of struggle and unyielding dedication to their children and their communities told by Plaintiffs created an intense and somber atmosphere in the courtroom. There were sometimes tears, there was sometimes anger, and often there was little defense counsel could do to counter the emotional power of the Plaintiff Stories.

The trial court issued a 183-page decision holding that Colorado’s school-finance system is “irrational, arbitrary, and severely underfunded,” and therefore violated the Colorado Constitution.<sup>128</sup> The court ordered that the state must design, fund, and implement a system of public-school finance that enables all students in the state to graduate with the knowledge and skills necessary for citizenship, post-secondary education, and participation in the workforce.<sup>129</sup> The trial court stayed the injunction until the conclusion of the state’s appeal to the Colorado Supreme Court.<sup>130</sup>

In *Lobato II*, a 4–2 decision<sup>131</sup> authored by the same justice who wrote the *dissenting* opinion in *Lobato I*, the Colorado Supreme Court reversed the trial court’s decision and declared Colorado’s school finance system to be constitutional.<sup>132</sup>

## B. The Lobato Plaintiffs’ Use of Narrative

The attorneys for the *Lobato* plaintiffs approached the litigation with an intentional plan to incorporate storytelling about their clients. The complaint laid the groundwork for Plaintiffs’ storytelling at trial by laying out the current state of education in Colorado in broad terms. For example, the complaint alleged,

123 See Decision at 40–45.

124 *Id.* at 177.

125 *Id.* at 165.

126 *Lobato v. State*, 304 P.3d 1132, 1145 (Colo. 2013) [hereinafter *Lobato II*].

127 *Id.*

128 Decision at 182.

129 *Id.* at 182–83.

130 *Id.*

131 One justice recused herself from the *Lobato II* case because she had worked on the case as an assistant attorney general prior to her appointment to the court.

132 See *Lobato II*, 304 P.3d at 1136.

The public school finance system fails to provide adequate funds . . . for a constitutionally adequate, quality education. This failure is evidenced by conditions such as over-crowded facilities, use of temporary structures, unsafe facilities, antiquated facilities, inadequate access for the disabled, inadequate facilities and grounds to meet gender equity standards, excessive maintenance and repair costs for antiquated facilities, inadequate technology infrastructure, inadequate heating and cooling systems, inadequate fire securities, leaking and failing roofs; substandard plumbing, substandard wiring, and hazardous building materials.<sup>133</sup>

During discovery, Plaintiffs' lawyers increased their focus on developing particularized stories for trial.<sup>134</sup> Plaintiffs' lawyers met with students, their parents, teachers, principals, and superintendents to learn their stories. The attorneys prepared their clients for depositions by encouraging the plaintiff-deponents to not shy away from the stories of hardship, challenge, distress, and despair that they face every day. In addition, Plaintiffs' attorneys also told stories through photographs, video, and documents, all of which were used at trial.<sup>135</sup> The work of eliciting these stories resulted in the compelling factual record established at trial, which is described below.

With regard to setting, scene, and plot, Plaintiffs' attorneys used a mix of "compressed time" storytelling, some chronological storytelling (with regard to the statutes and constitutional issues at issue), and storytelling by category. Plaintiffs' attorneys called superintendents, students, parents, teachers, and principals, as well as experts, in an effort to weave an overall story of the state of K-12 education in Colorado, rather than a particular chronology. Plaintiffs' attorneys sprinkled the testimony of hybrid experts and expert witnesses—who addressed pertinent legislative requirements, educational best-practices, constitutional history, and the "money matters" debate<sup>136</sup>—among the plaintiffs' stories to both flesh out and provide a scaffold for those stories.

The plaintiffs used specific and descriptive language when setting the scene for their testimony. In some instances, video<sup>137</sup> and photographs

133 See Third Amended Petition ¶ 139. In addition, further examples of storytelling in the complaint can be found in the Appendix [hereinafter App.].

134 The *Lobato* litigation was a massive *pro bono* effort. More than twenty private attorneys from twelve different law firms volunteered to represent the *Lobato* plaintiffs. *Other Volunteer Opportunities*, Colorado Lawyers Committee, <http://www.coloradolawyerscommittee.org/other-volunteer-opportunities> (last visited Dec. 20, 2014). It is estimated that these lawyers donated 14,000 hours of time in discovery, trial preparation, and trial. *Id.* Many additional volunteer hours were donated during the appellate process. *Id.*

135 The video that was made at the request of the plaintiffs' attorneys may be viewed at <http://www.youtube.com/watch?v=wOXBAAEYIRY&feature=youtu.be>. Portions of that video were shown at trial.

were also used to set the scene, with a goal of showing the juxtaposition of the supportive, tight-knit, and beautiful social and physical scenes and the scenes of struggle—the struggle of poverty and the struggle to learn in inadequate school facilities. For example:

You know, people think of us as that beautiful scenic resort city at the foot of Pike’s Peak. We are a rapidly changing school district . . . [W]e were the first in El Paso County, formed in 1873 . . . [W]e have been the victim of suburban flight and urban changes in population[,] [and] now our English-language[-][learner] population is doubling every four or five years, and our free and reduced lunch population has gone from approximately 25 percent to 51.9 percent in just a matter of 10 or 11 years.<sup>138</sup>

The plaintiffs also used detail with a goal of creating for the judge a three-dimensional, textured, and authentic picture of them and their struggles. These details made the plaintiffs’ stories powerful by creating specific, concrete snapshots of their lives—snapshots that everyone in the courtroom, including the judge, could picture in their own minds. For example, Matt Keefauver, a teacher in Montezuma-Cortez School District, testified,

I think I used to be able to make it, and I used to think to myself, “Yeah, absolutely, I can do it. I can eat beans twice a week kind of thing and I can figure it out.” However, the last four years, we haven’t had a raise . . . For this coming year, they asked us to take two furlough days, which sounds like a lot of fun, but it’s \$540 dollars out of my pocket.<sup>139</sup>

Dr. Elliot Asp, Assistant Superintendent for Performance Improvement for the Cherry Creek School District, testified,

[I]n Cherry Creek in one of our high schools . . . [w]e have over a hundred language[s] spoken. We have a number of students who are

136 There is a longstanding debate among education scholars, advocates, and policymakers about whether “money matters” in providing an adequate education. See generally BRUCE D. BAKER, THE ALBERT SHANKER INST., REVISITING THE AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? (2012), available at <http://www.shankerinstitute.org/resource/does-money-matter> (last visited Mar. 23, 2015).

137 See Stefan Walsh, *Lobato v. Colorado*, YouTube (May 13, 2011), <https://www.youtube.com/watch?v=wOXBAAEYIRY>. Portions of this video were shown during the trial.

138 Trial Tr. vol. 2, at 481 (July 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf>; see also App.

139 Trial Tr. vol. 8 at 2317 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>.



coming to us as refugees . . . . Even in Cherry Creek High School, we have students coming to high school who have never used a fork.<sup>140</sup>

With regard to character, the goal of the plaintiffs' attorneys was to portray the plaintiffs as multidimensional characters: teachers as dedicated professionals and selfless heroes; parents as having deep sense of local pride and history and who are committed to change that history for the benefit of their children, no matter how hard the fight. Within Robbins' hero-archetype framework, the plaintiffs' attorneys strove to portray the teachers, students, parents, and other school officials as the Sage, the Innocent, or the Caregiver–Martyr.<sup>141</sup> One example of the Caregiver–Martyr archetype is seen in the testimony of a teacher: When asked how he funded a student field trip, teacher Matt Keefauver, a teacher in Montezuma-Cortez School District, testified,

I paid for it myself. It was—unfortunately, it's kind of an expensive thing, but I started a business on the side literally to use some of that money to enrich things in my classroom. So I work all summer long, and I sell herbs at the farmers' market and a couple of different places, and I'll take a chunk of that to take my kids on a field trip.<sup>142</sup>

With regard to point of view, the plaintiffs' attorney took that of their clients. Because point of view is related to credibility, the attorneys did not want to tell the story with legalese or raw data. The goal was to show various points of view—from that of a dedicated mother of a special-education student, to that of a superintendent who sees first-hand the disconnect between legislative aspirations and the on-the-ground reality of schools without enough money to attain those aspirations, to that of students who love and take pride in their families' long history in poor parts of Colorado, but who feel hopelessness in trying to compete with students from wealthy school districts. The following excerpts from trial illustrate this use of point of view:

The parent of a special education student testified,

We started becoming very concerned that [our daughter] wasn't getting the kind of social development she really needed to integrate into a

<sup>140</sup> Trial Tr. vol. 8 at 739 (Aug. 3, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-3.pdf>; see also App.

<sup>141</sup> Robbins, *Harry Potter*, *supra* note 11, at 778.

<sup>142</sup> Trial Tr. vol. 8 at 2312 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>; see also App. (for additional examples of character development).

college setting. So we assessed Pat Rydell's programs, SCERTS. It's a social skills program for kids on the spectrum. It's more naturalized, meets with peers. So not only would we drive to Lakewood, which is an hour drive. There was a commitment on the part of some friends she made at community Montessori who were typical for that interaction who would drive with us and back, so it's about a four-hour commitment every week.<sup>143</sup>

Dr. Scott Murphy, superintendent of Littleton Public Schools, testified,

Because what's happening is when the state doesn't have money, they tend to use our money. They pass bills, with objectives. Maybe well-meaning, but they don't have the dollars. And to be blunt, they pass the obligation, financial obligation, back to us.<sup>144</sup>

With regard to the technique of tone, the goal was to weave together the forgoing elements of narrative into the "thickest" stories possible. For example, Justine Bayles, a teacher in Montezuma-Cortez School District, testified,

I have a friend who teaches social studies at the seventh-grade level, and on the last few days of school this last school year, he was—he had a pink eraser, and he was erasing profanity from the inside of the book. When you look at the outside of the book, you know, the bindings [are] ripped and some of them are little catawampus, you know, they don't close right. So I offered. I said, "Give me an eraser. Let's just get through this." I proceeded to visit, and we erased the profanity from the book. And all of a sudden, the book flopped open to this page. There was a picture of the Twin Towers, and someone had drawn an airplane into the towers. And he said, "Some of my students have taken the liberty of updating my book. You don't need to erase that one," because someone had drawn an airplane into the Twin Towers into his social studies book. So and I kind of—it was just a little comic relief, but we erased the profanity but left the airplane into the Twin Towers.<sup>145</sup>

143 Trial Tr. vol. 9 at 2514-15 (Aug. 11, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-9.pdf>.

144 Trial Tr. vol. 2 at 429-30 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf>; see also App.

145 Trial Tr. vol. 10 at 2328 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>.

### C. Narrative Coherence, Correspondence and Fidelity

To have narrative coherence, a story must be internally consistent and complete. In *Lobato*, each witness for the plaintiffs testified consistently as to the dire situation of K–12 public education in Colorado. In addition, experts testified that there was no rational basis for the base level of funding in the PSFA. All of Plaintiffs’ witnesses—and some of Defendants’ witnesses—uniformly agreed that Colorado’s public-school-financing system is broken.<sup>146</sup>

The *Lobato* plaintiffs also told a complete story. The strategic selection of plaintiffs from all corners of the state and from all constituencies of students (special education, students of color, gifted and talented, English Language Learners, preschool) created a complete story that went essentially unrefuted by the defendants.

Narrative correspondence requires that the plaintiffs’ story correspond to what “could” have happened according to one of our many culturally shared stock stories.<sup>147</sup> The plaintiffs’ attorneys built upon or challenged several stock stories implicated in school-finance litigation: (1) The “level playing field” script,<sup>148</sup> (2) the “if you just work hard enough, you will succeed” script,<sup>149</sup> (3) the “unfunded mandate” script,<sup>150</sup> (4) the “money matters” script,<sup>151</sup> (5) the related scripts of “education is key to success” and “education is the way out of poverty,”<sup>152</sup> (6) the “education is

146 See App.

147 Rideout, *supra* note 2, at 67.

148 The goal was to convey stories about state-created obstacles and barriers to adequate educational opportunities, which the trial court could remove by declaring the school-finance system unconstitutional, which in turn would result in a level playing field for all of Colorado’s schoolchildren. One example of the correspondence between this script and the evidence was the testimony of teacher Matt Keefauver: “My kids deserve the same opportunities as any kids in the State of Colorado, any kids in the country.” Trial Tr. vol. 10 at 2318 (Aug. 10, 2011), *available at* <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>.

149 The plaintiffs challenged this script. On example was the testimony of a former student: “Probably my biggest moment when I could see that [hard work is not always enough] is when I went to history fair in middle school. I had made it to the state competition, and I went up using a PowerPoint. I expected, oh, everybody will have a PowerPoint . . . [B]ut I got up there and was pretty much blown away by everybody else’s presentations. Mine was a PowerPoint, and some looked like they had actually built a documentary with video technology and video editing.” Trial Tr. vol. 3 at 782–83 (Aug. 3, 2011), *available at* <http://www.childrens-voices.org/storage/Lobato-Trial-Day-3.pdf>.

150 The plaintiffs built on this script by telling stories about the oppressive impact of the legislature’s education reform statutes, which contain mandates about student achievement but were not accompanied by increased funding. One example of the correspondence between this script and the evidence was the testimony of Dr. Scott Murphy, superintendent of Littleton Public Schools: “Because what’s happening is when the state doesn’t have money, they tend to use our money. They pass bills, with objectives. Maybe well-meaning, but they don’t have the dollars. And to be blunt, they pass the obligation, financial obligation, back to us.” Trial Tr. vol. 2 at 429–30 (Aug. 2, 2011), *available at* <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf>.

151 The plaintiffs and experts told stories and presented data to show that money does matter, and thus, that more money does make a positive outcome in student achievement and outcomes.

152 The plaintiffs built on these scripts by telling stories about the impact of inadequate educational opportunities on students’ ability to succeed in the future.

essential to democracy” script,<sup>153</sup> and (7) the script of the “Great Progressive Narrative.”<sup>154</sup> The trial testimony created correspondence between Plaintiff Stories and these stock stories.

Narrative fidelity is that element of narrative technique that convinces the finder of fact to choose between the competing stories—and to choose the one that has fidelity to social reality.<sup>155</sup> In school-finance litigation, narrative fidelity is achieved when plaintiffs (students, their parents, and school districts through their superintendents) “can recognize their own stories” and when the judicial fact finder “instinctively feels ‘that really happened and justice must be done.’”<sup>156</sup> One example of narrative fidelity—one that arguably would make the finder of fact feel as though the Plaintiff Stories must be believed and remedied—is this testimony by Matt Keefauver, a teacher in Montezuma-Cortez School District:

[T]ypically, I buy those things [pencils, erasers, markers] out of my own pocket because I don’t think the educational experience should be upheld because someone doesn’t have a pencil. That’s just ridiculous to say, “Okay. Well, no school today, not enough students have pencils.” So I’ll buy those. The kicker is I have to buy the expensive ones because the cheap ones ruin the pencil sharpener, and I don’t have the money to buy a new pencil sharpener.<sup>157</sup>

In addition to these stories of everyday hardship from students, parents and others involved in the public-school system, Plaintiffs’ attorneys built on these anecdotal stories by introducing “hard data” evidence of Plaintiff students and school districts not meeting the accountability standards set out by the Legislature’s education-reform statutes, such as poor performance on standardized tests, lack of college and workforce preparedness, high-school drop-out rates, low graduations rates and the like. They also presented expert testimony on all of these issues. The empirical data and expert testimony created the link between “mere” stories of hardship, which arguably are not *per se* unconstitutional,

153 The plaintiffs built on this script by telling stories about the negative impact on society-wide concerns such as national security of an inadequate education system. One example of the correspondence between this script and the evidence was the testimony of a superintendent: “[A]ll students need to be prepared academically to have an opportunity to participate successfully in our economy, in our world. They will not get into the front door of some of our businesses without having proper and strong academic preparation.” Trial Tr. vol. 2 at 416 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf>.

154 The plaintiffs built on this script by telling stories of the hopes and dreams of students, which would be difficult or impossible to attain under the current school-finance system.

155 Rideout, *supra* note 2, at 70.

156 Fajans & Falk, *supra* note 2, at 22 (citation omitted).

157 Trial Tr. vol. 10 at 2318 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>. This is also an example of effective use of detail and an example of character. See also App.

and a cognizable constitutional claim that Colorado's public-school-finance system was neither thorough nor uniform.<sup>158</sup>

#### D. The Defendants' Stories

The defendants left the plaintiffs' factual stories essentially untouched. Indeed, there was no meaningful counter-narrative to the "Party Story" by Plaintiffs because these stories both reflected and constituted the everyday lives of the plaintiffs.<sup>159</sup> Thus, Defendants were left with the "Story of the Law" and the "Story of the Process." With regard to the "Story of the Law," Defendants urged that the school-finance statute and the Colorado Constitution's Education Clause were met even when the Plaintiff Stories were considered. They further told a story about the "rationally related" standard that *Lobato I* articulated, arguing that it, too, was satisfied even when the Plaintiff Stories were considered. The following statement from the Attorney General exemplifies Defendants' theme and story:

Education is of paramount importance to the State of Colorado. The Governor, Board of Education, and Commissioner of Education work every day to provide all Colorado children equal access to thorough and uniform educational opportunities. Colorado is a national leader in education reform efforts and provides substantial financial support to its public school system. As the traditional base of local financial support for public schools has eroded, the state has taken on an increasingly larger share—now nearly two-thirds of the total funding for K-12 education.

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**158** Examples of such "hard data" evidence presented by plaintiffs are illustrated by the following excerpts from the trial court's findings of fact: "Colorado students are not meeting achievement standards, including proficiency on assessments, high school graduation, and postsecondary and workforce readiness." Decision at 179. "Approximately 400,000 students in Colorado are below proficiency on CSAP tests." *Id.* at 55. "In 2009, over 25% of Colorado high school students did not graduate with a diploma." *Id.* at 179. "Colorado has one of the widest achievement gaps in the United States. . . . There is roughly a thirty[-]percent gap in Colorado between white and minority students and high-income and low-income students with respect to achievement on standardized tests." *Id.* at 56. "Twenty-nine percent of high school graduates in Colorado require at least one remedial course to attend post-secondary education institutions. At some Colorado colleges, more than fifty percent of incoming students need remedial coursework. . . . The high remediation rate in Colorado indicates that kids are not being adequately prepared for post-secondary education." *Id.* at 58.

**159** On a couple of occasions, defense lawyers attempted to elicit facts from superintendents, principals, or other school administrators to show fiscal inefficiencies, waste, or fraud, but were unable to get any traction for this attempted narrative. In fact, the testimony of many witnesses called in the defense's case-in-chief supported the plaintiffs' contention that the school finance system is broken and as a result a generation of Colorado's children are being left behind. The trial court expressly noted this: "The State introduced testimony from several members of the State Board of Education and other witnesses for its case-in-chief. However, the Court notes that much of the State's testimony actually bolstered Plaintiffs' arguments in this case, and certain other contrary testimony lacked factual support." Decision at 158. The trial court concluded, "[T]he State has been unable to point to any specific inefficiencies or waste in the school districts involved in this case." *Id.* at 53.

Notwithstanding Colorado's commitment to public education, the plaintiffs, a group of individuals and school districts from across the state, assert that Colorado's alleged underfunding of the public schools violates Colorado's constitutional provisions . . . . If Plaintiffs were to win . . . the state would either have to raise taxes by at least 50 percent or have to devote 89 percent of the general fund budget to K-12 funding, crowding out things such as Medicaid, unemployment assistance, transportation, public safety . . . and Higher Education, to name just a few.<sup>160</sup>

Finally, Defendants tried to tell a "Story of the Law" that their hands were tied: they asserted that a constitutional provision separate and apart from the Education Clause, known as TABOR, precluded the state from raising additional tax revenue to in turn increase funding under the PSFA.<sup>161</sup>

This case could alter the relationship between the people of Colorado and their government for decades to come. One of Plaintiffs' main arguments is that the Taxpayer Bill of Rights ("TABOR") must give way to the education clause so that taxes could be raised and revenues increased to meet the needs of the education clause without a vote of the people.<sup>162</sup>

With regard to the "Story of the Process," Defendants had little opportunity to tell this story. Prior to *Lobato I*, Defendants' theory of the case—their "Story of the Process"—was that the plaintiffs' complaints were only properly addressed by the legislature; the court was precluded from considering the case because it presented a nonjusticiable, political question. Though that story was precluded at the trial court level by *Lobato I*, the Defendants tried another "Story of the Process" at the trial court after remand from *Lobato I*. Defendants asserted an affirmative defense that the Colorado General Assembly was an indispensable party under Colorado Rule of Civil Procedure 19. However, the trial court rejected this "Story of Process" when it granted the Plaintiffs' motion for summary judgment on this affirmative defense.

160 *Lobato v. Colorado, Office of the Attorney Gen. and Colo. Dep't of Law*, [http://www.coloradoattorneygeneral.gov/departments/state\\_services/education/lobato](http://www.coloradoattorneygeneral.gov/departments/state_services/education/lobato) (last visited Aug. 31, 2014).

161 TABOR, also known as the Taxpayer Bill of Rights, was enacted by the voters of Colorado in 1992. It amended to Colorado Constitution to prohibit state and local governments from raising tax rates unless approved by voters. It further prohibits governments from spending existing tax revenues—if such revenues grow faster than the rate of inflation and population growth—unless approved by voters. The government is required to refund to taxpayers the tax revenue that exceed the TABOR limit (known as the "TABOR surplus"), unless voters approve, via referendum, a revenue change as an offset. *See* COLO. CONST. art. X, § 20.

162 *See* *Lobato v. Colorado, Office of the Attorney Gen. and Colo. Dep't of Law*, *supra* note 160.

## E. The Trial-Court Opinion

The hard work of storytelling paid off for the plaintiffs when the trial court adopted the plaintiffs' proposed findings of fact and conclusions of law almost verbatim. In fact, the court's order reads like a book, with chapters for the individual plaintiffs and school districts.<sup>163</sup>

The following excerpts from the trial court's 183-page order—organized by “stock story” theme—reveal that the trial judge chose to hear the “Story of the Parties” (the Plaintiff Stories) and decided to reject the “Story of the Law” and “Story of the Process” presented by Defendants:<sup>164</sup>

### *Education is Essential to Democracy*

Public education is one of if not the most important functions of Colorado state government. It is critical for individuals, business, and society that we have a well-educated populace . . . . In order for Colorado to build a strong and competitive economy, all students must have the opportunity to obtain a quality education.<sup>165</sup>

### *“Money Matters” in Education*

There is not one school district in Colorado that is sufficiently funded. This is an obvious hallmark of an irrational system.<sup>166</sup>

At trial, there were countless examples of instances in Colorado schools and districts in which additional funding for particular programs or interventions resulted in measurable achievement gains.<sup>167</sup>

### *Education Is the Key to Success and the Way Out of Poverty*

The problem has been compounded by the fact that Colorado and virtually every school district have experienced significant demographic changes, particularly in the number and concentrations of English language learners, ethnic minorities, and children of poverty. The number of children with severely disabling conditions has also grown . . . . The educational achievement requirements for these students are the same as for general education students, but the cost to achieve proficiency and growth requirements among these students is much higher. This represents a major source of additional expense that has not been taken into account in the finance system.<sup>168</sup>

### *There is Not a Level Playing Field for Colorado's Schoolchildren*

Rural and urban poverty School Districts are unable to hire, compensate, and retain effective, highly qualified teachers and administrators; to provide the curriculum, technology, textbooks, and other instructional

163 Decision at 8.

166 *Id.* at 181.

164 For further examples from the Decision, see App.

167 *Id.* at 50.

165 Decision at 8.

168 *Id.* at 181–82.

materials necessary to meet student performance expectations; and to construct, maintain, renovate school buildings and facilities. Many of these School Districts are relegated to obsolete textbooks and materials, lack of necessary computers and internet connectivity, and dilapidated and unsafe classroom and other facilities.<sup>169</sup>

*“If You Just Work Hard Enough You Will Succeed”*<sup>170</sup>

As a state, we are not educating our own children so that they will be competitive . . . Colorado is losing ground in education as compared to other states and countries.<sup>171</sup>

The trial court defined a “thorough and uniform system of public schools” as one that “must assure that all students graduate with the knowledge and skills necessary to (1) participate effectively as citizens of Colorado and the United States; (2) engage productively and competitively in the workforce; and (3) be successful lifelong learners.”<sup>172</sup>

The court came to this definition based on (1) *Lobato I*'s mandate that “the trial court may appropriately rely on the legislature’s own pronouncements to develop the meaning of a ‘thorough and uniform’ system of education”<sup>173</sup> together with (2) the trial court’s finding that the “General Assembly, in the name of education reform, adopted a system of ‘educational accountability’ founded on a ‘standards-based education’ system with the purpose of defining the content of a thorough and uniform system of public education and creating measures to test the accomplishment of that system.”<sup>174</sup>

Because this definition was built on education accountability and assessment statutes, the court relied on test scores, graduation rates, remediation rates, college-readiness data, overall school-district ratings and similar data, along with the plaintiffs’ stories, which gave life to this raw data, to determine whether the school-finance system violated Colorado’s Education Clause.<sup>175</sup>

It considered the record—replete the stories of hardship *and* empirical evidence of achievement gaps and poor performance by students in poor districts *and* expert testimony—to conclude that taken as a whole, the record proved that Colorado’s public-school-finance system did not satisfy the court’s definition (as informed by *Lobato I* and

169 *Id.* at 178.

170 As noted above, the plaintiffs challenged this stock script at trial. As the following excerpts demonstrate, the court agreed with the plaintiffs’ challenge to this deeply engrained cultural script.

171 Decision at 55.

172 *Id.* at 171.

173 *Lobato I*, 218 P.3d at 375.

174 Decision at 11.

175 Decision at 49.



legislative enactment of education standards) of “thorough and uniform.” It thus concluded by declaring the PSFA unconstitutional:

As a result of the irrational and inadequate school finance system, Colorado students are not meeting achievement standards, including proficiency on assessments, high school graduation, and postsecondary and workforce readiness. Taken as a whole, the achievement and growth data indicates that hundreds of thousands of Colorado students are not reaching proficiency and are not on a course to reach proficiency in reading, writing, mathematics, and science. In 2009, over 25% of Colorado high school students did not graduate with a diploma. These problems are particularly, but not exclusively, true of under-served student populations. Disaggregated achievement data proves that these students are not achieving at levels even approaching those of white, English speaking, middle class, students—and they are not closing the achievement gaps. Students whose achievement is below proficient are not meeting the levels of growth necessary for them to catch-up in three years or by tenth grade. Finally, substantial numbers of Colorado students are not ready for postsecondary education upon graduation, and many of those who enter postsecondary education require remediation.

All of the evidence demonstrates a systemic failure to provide all students with the knowledge and skills mandated by the Education Clause and standards-based education. This failure is directly correlated to inadequate and irrational funding. The overwhelming evidence supports the conclusion that with sufficient funding, school districts can meaningfully improve all students’ achievement. Unquestionably, additional financial resources appropriately applied can improve student achievement, which, under the standards-based system, is the ultimate measure of the success of a thorough and uniform system of public education.

The Court therefore concludes that Colorado public school children are not receiving the thorough and uniform educational opportunities mandate by the Education Clause<sup>176</sup>

Stepping back and viewing the *Lobato* litigation from complaint to the judge’s order, as this “story of a story” has sought to do, it demonstrates

176 *Id.* at 179. Examples of some of the specific findings of the trial court, which were reached through the consideration of empirical data coupled with the stories of hardships by individual plaintiffs include the following:

- “When North Conejos School District (‘North Conejos’) was able to afford a writing teacher, CSAP [Colorado Student Assessment Program, Colorado’s standardized test] writing scores were at their highest. Now that North Conejos is no longer able to afford a writing teacher, CSAP writing scores at the elementary level are some of the lowest ever seen in the district. North Conejos once had a summer school program that was beneficial to its students, as reflected in higher CSAP scores. The district is no longer able to afford summer school and has seen a decline in CSAP score.” Decision at 51.
- “The most recent NAEP [National Assessment of Education Progress] data shows that sixty percent of all Colorado students were not proficient in fourth grade reading on NAEP. Eighty-two percent of Hispanic students and ninety-six percent of

that school-finance litigation is the perfect frame for understanding the power and importance of legal storytelling to further justice. Specifically, this story of a story illustrates the powerful impact of the intentional use of character, conflict, setting, point of view, theme, and detail.<sup>177</sup> In *Lobato*, that impact was seen in the trial judge's decision to "hear" the Plaintiff Stories and reach her decision based on those stories. The conclusion of this "story of a story," the answer to the question *what is this story "about"?*—at least at the trial level—is that in school-finance litigation, a story heard is justice served.

However, as discussed below, this "story of a story" did not end with the trial judge's order. What happened next provides interesting fodder for the further inquiry into why different judges choose different stories to "hear" and into the question of whether stories are heard differently by appellate judges than by trial court judges.

## V. The Lobato Appellate Story

The Colorado Supreme Court reversed the trial-court decision by a 4–2 vote.<sup>178</sup> This loss for the plaintiffs is a reminder that the impact of

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limited English proficient students in Colorado were not proficient according to NAEP. Eighty-one percent of economically disadvantaged and eighty-five percent of children with disabilities [were] not proficient. The data is similar for fourth grade math and eighth grade reading and math." *Id.* at 56.

- "According to the ACT, 77% of all students in Colorado are not college ready in all four subjects measured by the ACT. 93% of Blacks and 92% of Hispanics are not college ready in all four subjects." *Id.* at 57.
- "A quality teacher is one of the most important factors for student achievement. Every aspect of school reform depends on highly skilled teachers for success. This is especially true where, as in Colorado, education standards have been raised and the diversity of the student body is increasing . . ." *Id.* at 60.
- "School districts in Colorado do not possess the necessary technology and resources to provide a thorough twenty-first century education. No school district has adequate technology to fully implement and sustain the new state academic standards." *Id.* at 108.
- "Center [School District] cannot offer any advanced placement or international baccalaureate (IB) classes. The only foreign language that is taught is Spanish and it is only offered for two years. The district purchased Rosetta Stone to teach French. The only electives offered are music, physical education, and basic art. The only vocational offerings are graphic arts and a building trades class. The district has had to cut its other vocational programs, including welding, vocational business, and agriculture . . . . Center's graduation rate is sixty-five percent. The graduation rate from the alternative high school is twenty-five percent. Center has an achievement gap in every area: math, science, reading, and writing." *Id.* at 121–22.
- "[Plaintiff] Taylor Lobato believes she received an inadequate education at Center schools. She was behind her classmates when she got to college, particularly in writing, grammar, and knowledge of history and current events, and had to catch up . . . . Taylor Lobato had exhausted Center's math class offerings by her senior year, as there were no more math courses available in Center at her level. She was unable to take math classes at Adams State College because the distance would have required her to miss too much of the school day. . . . Less than one third of Taylor Lobato's graduating class went to college. At least fifty percent of her classmates that started college dropped out by their sophomore year." *Id.* at 149–50.

<sup>177</sup> Chestek, *The Plot Thickens*, *supra* note 18, at 137.

<sup>178</sup> *Lobato II*, 304 P.3d 1132 (Colo. 2013). The Colorado Supreme Court has seven justices. One of the justices recused herself from the *Lobato* appeal because she had worked on the case as an Assistant Attorney General before being appointed to the Court. *Id.* at 1144; see also Joey Bunch, *Report: Court Backs State on Education Funding in Lobato Case*, DENVER POST (May 27, 2013), available at [http://www.denverpost.com/ci\\_23333198/colorado-school-funding-case-goes-against-parents-tv](http://www.denverpost.com/ci_23333198/colorado-school-funding-case-goes-against-parents-tv) (last visited Mar. 23, 2015).

stories depends on “narrative transmission and transaction: that is, to stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative.”<sup>179</sup> Put another way, narratives are “situationally produced and interpreted” and “depend on the particular context and organization of their production for their political effect.”<sup>180</sup>

*Lobato II* demonstrates that the “Story of the Parties” was not received, and thus was stripped of its power to produce legal effect. Instead, the court chose to hear the “Story of the Law” and the “Story of the Process” and utilized those stories to reverse the trial judge. As explained below, in doing so, it contravened the law of the case as well as contradicted school-finance precedent from other jurisdictions.

### A. Defining “Through and Uniform”

*Lobato II* began by defining “thorough and uniform,”<sup>181</sup> a task it did not undertake in *Lobato I*.<sup>182</sup> Through its process of reaching that definition, the court indicated early in the opinion that it would be telling its own “Story of the Law” rather than adopting the “Story of the Parties” that was accepted below.<sup>183</sup> It indicated this when it resorted to “the same set of statutory construction rules applicable to statutes,” namely, by giving “thorough and uniform” what the court considered to be its “plain and commonsense meaning”<sup>184</sup> rather than creating a definition by reference to legislative declarations made in the context of passing education

<sup>179</sup> Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1, 3 (2002) (emphasis added) [hereinafter Brooks, *Narrativity of the Law*]. Brooks also asserts that “narrative is morally a chameleon that can be used to support the worse as well as the better cause” and notes the “omnipresence of narrative used for both majoritarian and counter-majoritarian purposes.” *Id.* at 2. In other words, there are often, if not always, at least two sides to the story—that of the plaintiff and that of the defendant—and the finder of fact must choose which side of the story to believe, or come up with its own version of the “truth.” School-finance litigation is different, though, because the defendants in such litigation rarely have a compelling counter-story. Instead, the defense’s “story” typically is a dry one that, even if a compelling story of the law or the process, will not be as compelling or persuasive as Plaintiff Stories because the defendant’s stories lack a the human element. Rather, the narrative of these defense stories is one of data (tax rates, property values, mill levies, etc., often introduced through expert testimony), political compromise, political apathy, and historic stagnation. Importantly, often the plaintiffs’ facts go undisputed. Because the stories in school-finance litigation are so heavily lopsided in favor of plaintiffs, defendants’ stories cannot pose a viable counter-story to plaintiffs’ stories. So Brooks’s position that narrative is “morally a chameleon” does not hold true (or is at least not nearly as persuasive) in the context of school-finance litigation.

<sup>180</sup> Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC’Y REV. 197, 197 (1995).

<sup>181</sup> COLO. CONST. art. 9, § 2.

<sup>182</sup> *Lobato II*, 304 P.3d at 1138.

<sup>183</sup> Like evidence presented at trial, court opinions are also a form of narrative, for “in American law, all the issues—including those that concern the telling of and the listening to stories—find their ultimate commentary in the judicial opinion.” Brooks, *Narrativity of the Law*, *supra* note 179, at 7. The decision of a judge is “itself a narrative”—courts reach an outcome and then construct a narrative that makes that outcome seem natural. Rideout, *supra* note 2, at 77.

<sup>184</sup> *Lobato II*, 304 P.3d at 1138.

statutes, which *Lobato I* suggested was the proper manner by which to ascertain the meaning of the phrase.<sup>185</sup> Instead, the Court looked to *Webster's Third New International Dictionary* and defined “thorough and uniform” as a phrase that “describes a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state.”<sup>186</sup>

This shift from the trial court’s “fact-based” definition (based on substantive, educationally based considerations articulated by the legislature and fleshed out by the Plaintiff Stories) to the Colorado Supreme Court’s “law based” definition (based on “the same set of statutory construction rules applicable to statutes”) is the opinion’s first illustration of the majority’s overall theme of its story—its opinion—namely, that it will accept the “Story of the Law.”<sup>187</sup>

The majority also accepts the “Story of the Process” in that its approach and holding gives great deference to the legislature and thus the “process” that is enshrined by the separation of powers doctrine, which mandates that the legislature engage in the *lawmaking* process while the courts engage in *interpreting* the constitution and the laws.<sup>188</sup>

## B. The Disappearance of the Plaintiff Stories

After seeing the *Lobato II*’s process of defining, and ultimate definition of, “thorough and uniform” it is unsurprising that the Plaintiff Stories are absent from the majority decision. In fact, the word “record” does not appear once in the majority’s opinion.<sup>189</sup> The word “evidence” appears only three times, and only one of those mentions addresses the evidence presented at trial: “The case proceeded to trial. Plaintiffs and Defendants presented extensive evidence addressing the constitutionality of the public school financing system.”<sup>190</sup>

The majority’s only relevant use of the word “fact” is also the majority’s only reference to the Plaintiff Stories told at trial: “While the trial court’s detailed findings of fact demonstrate that the current public

<sup>185</sup> *Lobato I*, 218 P.3d at 363.

<sup>186</sup> *Lobato II*, 304 P.3d at 1138. *But see* Decision at 171, where the trial judge defined a “thorough and uniform” system as one that “must assure that all students graduate with the knowledge and skills necessary to (1) participate effectively as citizens of Colorado and the United States; (2) engage productively and competitively in the workforce; and (3) be successful lifelong learners.”

<sup>187</sup> The majority also integrates the Story of the Process in that its approach and holding give great deference to the legislature and thus the “process” that is enshrined by the separation-of-powers doctrine, which mandates that the legislature engage in the *lawmaking* process while the courts engage in *interpreting* the constitution and the laws.

<sup>188</sup> *Lobato II*, 304 P.3d at 1139–40.

<sup>189</sup> *Id.* at 1132–44.

<sup>190</sup> *Id.* at 1137.

school financing system might not be ideal policy, this Court's task is not to determine 'whether a better financing system could be devised but rather to determine whether the system passes constitutional muster.'<sup>191</sup> This passage again illustrates the *Lobato II* decision to accept the "Story of the Law" and the "Story of the Process."

Once the court flipped the story of the case, it became an easy and straightforward task for it to conclude its "Story of the Law" and "Story of the Process" by finding the school-finance system constitutional:

The primary component of the public school finance system, the PFSA, uses a standard formula . . . to calculate an amount of money each district will receive in a given year from a combination of state and local sources. By supplying the single statutory framework whereby the state may calculate every district's total program, and by describing the sources of state and local revenue that make up the calculated amounts, the PSFA applies uniformly to all of Colorado's school districts and serves as the cornerstone of a public school financing system that funds a public education system that is of a quality marked by completeness, is comprehensive, and is consistent across the state.<sup>192</sup>

The Court's rejection of a fact-based, qualitative definition of "thorough and uniform" is legally flawed. First, it improperly ignores the law of the case—*Lobato I*—which instructed that the trial court could "appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education."<sup>193</sup> The trial court duly followed the *Lobato I*'s direction when it defined "through and uniform" as a system that "must assure that all students graduate with the knowledge and skills necessary to (1) participate effectively as citizens of Colorado and the United States; (2) engage productively and competitively in the workforce; and (3) be successful lifelong learners."<sup>194</sup> In rejection the trial court's qualitative, substantive definition of this key constitutional phrase, the *Lobato II* court failed to follow the law of the case.

Second, the *Lobato II*'s definition of "thorough and uniform" is out of step with other state supreme courts' definitions of similar state constitutional education clauses; those courts' definitions, like the trial court's, bear a qualitative nature.<sup>195</sup>

Third, in adopting a "law-based" definition of "thorough and uniform" that is devoid of any qualitative element, *Lobato II* rendered that constitu-

191 *Id.* at 1144.

192 *Id.* at 1141.

193 *Lobato I*, 218 P.3d at 375.

194 Decision at 171.

195 See *supra* chapter 3 of this article (describing the Education Clause of the Colorado Constitution).

tional phrase meaningless. For, if a record like the one in this case—where rich, uncontroverted stories of everyday hardship were buttressed with empirical data linking those stories to dismal educational outcomes that fall far below educational standards set by the legislature—is insufficient to prove the absence of a “thorough and uniform” public education system, there is likely *no* set of facts (beyond the unrealistic case in which the State abandons its duty to fund public schools *at all*) that will be able to show a violation of Colorado’s Education Clause. The *Lobato II*’s definition approach thus gets away from the commonly accepted notion that the education clauses in state constitutions create a “positive right,” one that the state *must affirmatively provide* and one that thus can be enforced by individuals, as opposed to the more familiar “negative rights” embodied in the federal constitution, which mandate what the federal government *cannot* do.<sup>196</sup> Thus, put another way, by rendering the “thorough and uniform” clauses essentially meaningless through its definition of that term, the *Lobato II* majority improperly stripped the Education Clause of its positive-right character.

### C. Why the Difference?

Is it possible to explain the significant shift from the trial judge’s acceptance of the “Story of the Parties” to the Colorado Supreme Court’s acceptance of the “Story of the Law” and “Story of the Process”?

Recall that “narrative reasoning” is the “norm-based . . . arguments that motivate a judge to want to rule in a party’s favor.”<sup>197</sup> These “arguments” are the stories that are told. Narrative reasoning compliments “rule-based reasoning” in judges’ decisionmaking processes.<sup>198</sup> However, the unique and preexisting worldview of every judge means that the acceptance or rejection of stories will depend on the particular judge:

Judges, like other humans, have a variety of world-views. Some are conservatives, resistant to change; others are more liberal, accepting of change. Conservatives and liberals respond very differently to different stimuli. Stories featuring certain types of heroes told to somebody with a conservative world view will likely yield a very different reaction than the same story told to somebody with a more liberal world view. Stated another way, conservatives and liberals will understand the case, and choose the heroes they empathize with, differently.<sup>199</sup>

196 See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 303–13 (2011).

197 Chestek, *Competing Stories*, *supra* note 4, at 102.

198 *Id.*

199 *Id.* at 134.

The same justice who authored the *Lobato I* dissent authored the *Lobato II* majority. The story themes that constituted her dissent in *Lobato I* are front and center in the story that is the *Lobato II* opinion (see chart).

This side-by-side comparison reinforces Chestek's point that the effects of a judge's preexisting world view "cannot be denied."<sup>200</sup> This justice, who spent a decade as an Assistant United States Attorney and another decade as a trial-court judge before being appointed to the Colorado Supreme Court, clearly holds a preexisting worldview that inclines her to be open to "Stories of Law" and "Stories of Process" over "Stories of the Parties."<sup>201</sup>

#### D. A Critique of *Lobato II*

Just because there may be viable competing stories of the parties, the law, and the process, in some contexts one of these stories has more legal, political, and normative legitimacy than others. Specifically, in the school-finance context generally and with the *Lobato* case in particular, the Court's rejection of the Plaintiff Stories created a result with diminished legal, political, and normative legitimacy because the loss of the Plaintiff Stories meant the loss of justice.

The diminished legitimacy is a result of a story (the opinion) lacking in narrative coherence, correspondence, and fidelity. *Lobato II* lacks narrative coherence because it lacks a strong internal consistency: The "Story of the Law" and the "Story of the Process" told by the court does not comport with the factual evidence, with the reality of the everyday lives of the Plaintiffs. *Lobato II* cites no evidence, thus rendering the opinion incomplete. Because there are no facts cited, there is nothing "to ground whatever inferences need to be made."<sup>202</sup> Instead, it is circular, conclusory, and context-free.

*Lobato II* also lacks narrative correspondence because it does not correspond to any meaningful "stock script." Instead, it relies on a "rhetoric of constraint"<sup>203</sup> to justify its conclusory outcome, which is devoid of facts.

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<sup>200</sup> Chestek, *Competing Stories*, *supra* note 4, at 134. Of course, it is also true that the dissenters and the trial-court judge came to the case with their own preexisting worldviews. However, as argued above, the trial court and dissenters in *Lobato II* have worldviews and predilections that led to a legally sound determination (based on the law of the case, persuasive precedent from other jurisdictions, and the positive-right intent of the drafters of the Education Clause) that the definition of "thorough and uniform" is a qualitative one and, pursuant to that definition, the system was not only unequal but a constitutional failure.

<sup>201</sup> Whether this inclination toward "Stories of Law" and "Stories of Process" over "Stories of the Parties" is also a function of a judge's position as an appellate judge rather than a trial judge is an interesting question, but one that will not be addressed here.

<sup>202</sup> Fajans & Falk, *supra* note 2, at 20.

<sup>203</sup> Brooks, *Inevitable Discovery*, *supra* note 13, at 99.

**LOBATO I DISSENT**

*Rice, j., dissenting*

"[T]he plain language of the [thorough and uniform] constitutional provision coupled with our precedent strongly suggest that the issue before us has been constitutionally committed to the legislative branch."<sup>204</sup>

"The Colorado Constitution . . . plac[es] discretionary education questions in Colorado squarely and solely within the legislative ambit."<sup>206</sup>

"[It] is impossible to create a judicial standard or rule that can define, accommodate, and limit the enormity of preparing students for meaningful 'civic, political, economic, social' engagement in the world. The majority's attempts to affix a rational basis standard to a nebulous concept like this do not present a manageable framework, and the standard fails to inform or channel judicial discretion. Such an unbound standard of review simply substitutes the trial court for the General Assembly, essentially giving the trial court veto power over any legislative policy determination in education. I believe such a breach of the separation of powers is unacceptable."<sup>208</sup>

**LOBATO II MAJORITY**

*Rice, j.*

"The Colorado Constitution tasks the judicial branch with construing the meaning of constitutional language . . . 'In giving effect to a constitutional provision, we employ the same set of construction rules applicable to statutes.' . . . We begin by giving the relevant constitutional terms "their plain and commonsense meaning."<sup>205</sup>

"[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.'<sup>207</sup>

"We presume that the statutes that make up the public school financing system are constitutional, and we will uphold the legislation unless the Plaintiffs have proven beyond a reasonable doubt that the statutes fail to pass the *Lobato I* rational basis test, and are therefore unconstitutional."<sup>209</sup>

Finally, the majority opinion lacks narrative fidelity—the concept that “the larger community would deem [the court’s decision] the right thing to do in that case.”<sup>210</sup> As Rideout notes, narrative fidelity “is a matter of assessing the substantive worth of a story, but not in terms of its appeal to

<sup>204</sup> *Lobato I*, 218 P.3d at 379 (Rice, J., dissenting).

<sup>205</sup> *Lobato II*, 304 P.3d at 1138.

<sup>206</sup> *Lobato I*, 218 P.3d at 376 (Rice, J., dissenting).

<sup>207</sup> *Lobato II*, 304 P.3d at 1139.

<sup>208</sup> *Lobato I*, 218 P.3d at 380–81 (Rice, J., dissenting).

<sup>209</sup> *Lobato II*, 304 P.3d at 1140.

<sup>210</sup> Fajans & Falk, *supra* note 2, at 22.



abstract universals like the truth, and not in terms of its ability to translate into formal, logical propositions about social reality.”<sup>211</sup> Instead, whether the audience to which the story is directed is willing to hear and abide by the story is what determines whether a story will provide “good reasons for belief or action.”<sup>212</sup>

Because the court in *Lobato II* was decidedly *unwilling* to accept any of the plaintiffs’ stories as legally relevant, the opinion lacks narrative fidelity—it lacks any element that would make its story compelling. Though it contains a “Story of the Law” and a “Story of the Process,” it seems “more ‘like words on paper,’ or more a matter of abstract legal principle than of lived experience.”<sup>213</sup> As a result, the opinion reflects a “rule-oriented” narrative: its detached description and analysis of the dispute within the framework of “legal rules and principles” “omit[s] details of [the dispute’s] social statuses or relationships.”<sup>214</sup> In taking this approach (accepting the “Story of the Law” while rejecting the “Story of the Parties”), the opinion promotes, produces, and reinforces the same dominant cultural meanings and unequal power relations that the plaintiffs set out to (and did) expose through their stories and sought to remedy through the judicial process.<sup>215</sup> *Lobato II* thus tells a hegemonic story—one that “reproduce[s] existing relations of power and inequity.”<sup>216</sup> The end result: A story lost is justice lost.<sup>217</sup>

Finally, an observation about this “story about a story.” Notwithstanding the foregoing critiques of *Lobato II*, there is yet another way to tell this story about a story. In this story about a story, at least when told from the plaintiffs’ point of view, the *Lobato II* majority might easily be described as the villain—a character who opposes the hero (the plaintiffs) “out of animus or an evil nature.”<sup>218</sup> After all, the detached, legalistic, and sterile nature of *Lobato II* coupled with its holding, which robbed the plaintiffs of an important victory, might easily be lambasted.

211 Rideout, *supra* note 2, at 72.

212 *Id.*

213 *Id.* at 83.

214 Ewick & Silbey, *supra* note 180, at 207.

215 *Id.* at 211.

Because narratives are social practices that are constitutive of, not merely situated within, social contexts, they are as likely to bear the imprint of dominant cultural meanings and relations of power as any other social practice. More important, the stories and accounts that are told to and by litigants, clients, lawyers, jurors, and other legal actors are not simply reflective of or determined by those dominant meanings and power relations. They are implicated in the very *production* of those meanings and power relations.” *Id.* (emphasis in original).

216 *Id.* at 197.

217 This narrative critique of the *Lobato II* majority should be read alongside the legal critique of the opinion. See note 212 and discussion at pp. 60–61.

218 Chestek, *Competing Stories*, *supra* note 4, at 105.

However, as Chestek suggests, “[c]hoosing an unrealistic, villainous role” for an antagonist is “likely to raise a great deal of skepticism.”<sup>219</sup> Following that advice, in this “story about a story,” the *Lobato II* court might more accurately be cast as the “Threshold Guardian”—a character who is not evil but who simply has “different goals which impede the hero’s quest.”<sup>220</sup> Considered through this lens, the *Lobato II* court can be described not as evil, but as the guardian of a fundamentally important principle of our constitutional democracy—the separation-of-powers doctrine. Through this lens, then, the end result might be described as this: A story lost is justice deferred and justice redirected; perhaps the “Story of the Parties” will result in justice for Colorado’s schoolchildren if it is told to the legislature rather than the courts.

## VI. Afterword

### What are the ultimate lessons of *Lobato*?

First, *Lobato* illustrates that school-finance litigation provides an ideal frame in which to analyze and thus further understand the influence and significance of storytelling in the law. Analysis of judges’ acceptance or rejection of stories through a school-finance case study thus adds to scholars’ and practitioners’ understanding of the role of stories and “narrative reasoning” in both litigating and judging.<sup>221</sup> Moving forward, an expansion of this project to include a comparison of the outcomes of school-finance cases from around the country, which takes into consideration narrative theory as well as the emerging empirical evidence and scholarship about the psychological power of stories in judicial decision-making, would deepen our understanding of the role of narrative reasoning, which would enhance both scholarship and practice.

Second, *Lobato II*’s rejection of the “Story of the Parties” and acceptance of the “Story of the Law” and the “Story of the Process” resulted in a loss of justice for the Plaintiffs and, arguably, for all of Colorado. A school system that produces a large number of citizens who are not prepared to meaningfully engage in civil, political, and business activities harms everyone. But perhaps it is not a complete loss of justice but rather a delay or deferral of justice. Perhaps the Plaintiff Stories would be “heard” and acted upon if told to a different audience, such as the legislature, the arena that *Lobato II* clearly situated as the proper one to provide redress for the plaintiffs. Further development of the concept of

<sup>219</sup> *Id.* at 128–29.

<sup>221</sup> See, e.g. Chestek, *Competing Stories*, *supra* note 4.

<sup>220</sup> *Id.* at 105.

“legislative rhetoric”<sup>222</sup> as well as empirical and theoretical research around storytelling in the legislative arena may provide insights for scholars and practitioners, as well as students, their parents, and school districts, who are interested in creating systemic and positive change in the area of public-school finance.

## Appendix

### I. A Tale of Two Outcomes: Justice Found and Lost for Colorado’s Schoolchildren

#### A. Examples of Storytelling from the Third Amended Complaint

The complaint included the following allegations:<sup>223</sup>

[I]n the 2005-2006 school year none of the 178 Colorado school districts was able to raise and expend general operating funds at a level sufficient to provide an education that meets the goal of universal proficiency in academic performance and other mandates.

In 2009, Colorado ranked 48th among the fifty states in elementary and secondary school revenues per \$1,000 of personal income and 47<sup>th</sup> in elementary and second school expenditures per \$1,000 of personal income.

School districts have been forced to reduce instructional and support staff, administrative staff, programs, services, instructional materials, and supplies and to defer needed facilities and equipment acquisition, maintenance, and renovation, thereby preventing them from providing a constitutionally adequate, quality education to their students.

At the elementary and middle levels, the following groups of students did not meet the reading/language arts and math proficiency targets: Native Americans, Asians, Blacks, Hispanics, English language learners, economically disadvantaged students, migrants, and students with disabilities.

At the high school level, Blacks, Hispanics, English language learners, economically disadvantaged students, migrants, and students with disabilities did not meet proficiency targets in reading/language arts and math.

<sup>222</sup> See Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

<sup>223</sup> Each of the following allegations is contained in the Third Amended Complaint.

The public school finance system fails to provide adequate funds or a means for school districts to raise and expend sufficient funds to provide all students with an equal opportunity for a constitutionally adequate, quality education. This failure is evidenced by conditions such as overcrowded facilities, use of temporary structures, unsafe facilities, antiquated facilities, inadequate access for the disabled, inadequate facilities and grounds to meet gender equity standards, excessive maintenance and repair costs for antiquated facilities, inadequate technology infrastructure, inadequate heating and cooling systems, inadequate fire securities, leaking and failing roofs; substandard plumbing, substandard wiring, and hazardous building materials.

Because of lack of access to adequate financial and other resources

- school districts are not able to provide and school children to not receive the educational programs, services, instructional materials, equipment, and facilities necessary to assure a constitutionally adequate, quality education.
- school districts are unable to hire, retain, and compensate the instructional staff needed to provide the opportunity for a constitutionally adequate, quality education for their students.
- students in Colorado school districts do not have adequate access to textbooks and other classroom resources; instructional equipment, including computers, software, and internet access; audio-visual equipment and resources; and instructional materials, such as workbooks and library books, all of which are necessary to meet the mandate of the Education Clause.
- many school districts are not able to offer the courses and curriculum needed and sought by many students, including those identified as gifted and talented. Advanced courses in core academic subjects, college-preparatory, and advanced placement programs are limited, over-crowded, or have been eliminated because school districts do not have the resources to provide such programs to all who need them. As a result, many Colorado students are not prepared to enter, compete, and succeed in post-secondary education and business and professional careers.
- many school districts are not able to offer vocational and other programs needed and sought by non-college bound students to prepare and succeed in productive and useful work and rewarding lives in society.

## B. Examples of Storytelling from Trial

### *Character*

We saw a psychologist who I knew through my work at Autism Society of Boulder County to have her assessed. I was afraid she was dumping over into a clinical depression. I wasn't sure what to do. What we found out was she was becoming self-aware that she had autism. She didn't know. You kind of wait— we had chosen to wait until she showed a readiness for that conversation, and that was happening at the same time many kids go through that very awkward stage of just feeling like an ugly duckling and very different anyway. So it was all kind of caving in on her at once.<sup>224</sup>

I paid for it myself. It was—unfortunately, it's kind of an expensive thing, but I started a business on the side literally to use some of that money to enrich things in my classroom. So I work all summer long, and I sell herbs at the farmers' market and a couple of different places, and I'll take a chunk of that to take my kids on a field trip.<sup>225</sup>

Q: "Why did you run for school board?"

A: "I felt the kids needed a representative in the school. I felt it was about the kids. Community in small districts are—we need our children to grow. We need our children to be educated because those are the ones that are going to come back and sustain us in the future, and if we don't put—if we don't put our interests into them and help them to achieve that, our communities can't sustain or grow. Huge farming, agricultural communities, we need kids to go and understand how to grow the crops and how to do the things and be able to get through the universities. And I see those kids be able to get that help. I have a real fondness for those kids and hope to see them do well."<sup>226</sup>

### *Point of View*

We started becoming very concerned that she wasn't getting the kind of social development she really needed to integrate into a college setting. So we assessed Pat Rydell's programs, SCERTS. It's a social skills program for kids on the spectrum. It's more naturalized, meets with peers. So not only would we drive to Lakewood, which is an hour drive. There was a commitment on the part of some friends she made at Community Montessori who were typical for that interaction who would

224 Trial Tr. vol. 9 at 2507 (Aug. 11, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-9.pdf>. (Teresa Wrangham, mother of a special-education student).

225 Trial Tr. vol. 8 at 2312 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf> (Matt Keefauver, a teacher in Montezuma-Cortez School District, in response to the question: "How did you fund the trip to Crow Canyon?").

226 *Id.* at 2184–85. (Ty Ryland, parent and school-board member for Sierra Grande School District).

drive with us and back, so it's about a four-hour commitment every week.<sup>227</sup>

Because what's happening is when the state doesn't have money, they tend to use our money. They pass bills, with objectives. Maybe well-meaning, but they don't have the dollars. And to be blunt, they pass the obligation, financial obligation, back to us.<sup>228</sup>

I attended school from third grade through eighth grade at Sierra Grande Schools, and my freshman year, my parents took me out of the school due to the feeling that I was not getting a proper education, and I went to New Mexico Military Institute . . . to finish my school education.<sup>229</sup>

Q: How long has your family been in that area?

A: At least six generations. It's our belief that my dad's side of the family came over with the Spanish settlers and settled in San Luis.<sup>230</sup>

My dad's name is Anthony. He is a rancher. We raise cattle. Him and my uncle run the ranch. My mother is a nurse. She works in Center. And I have a little sister that is going to be a junior in Center.<sup>231</sup>

Probably my biggest moment when I could see that is when I went to history fair in middle school. I had made it to the state competition, and I went up using a PowerPoint. I expected, oh, everybody will have a PowerPoint. It'll be all the same. It'll be just a good time, but I got up there and was pretty much blown away by everybody else's presentations. Mine was a PowerPoint, and some looked like they had actually built a documentary with video technology and video editing.<sup>232</sup>

Q: Didn't you have video technology or video editing for your project?

A: "I didn't know that was an option. I didn't know that's what students would be using. When I came back after the first year, I tried to find some. I looked—the school did have one video production class. There was only one student actually who knew all the ins and outs of the video

<sup>227</sup> Trial Tr. vol. 9 at 2514–15 (Aug. 11, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-9.pdf> (Teresa Wrangham, mother of a special-education student).

<sup>228</sup> Trial Tr. vol. 2 at 429–30 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf> (Dr. Scott Murphy, superintendent of Littleton Public Schools).

<sup>229</sup> Trial Tr. vol. 8 at 2178 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf> (Ty Ryland, parent and school-board member for Sierra Grande School District).

<sup>230</sup> Trial Tr. vol. 2 at 754–55 (Aug. 3, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-3.pdf> (Taylor Lobato, former student in the San Luis Valley).

<sup>231</sup> *Id.* at 757.

<sup>232</sup> *Id.* at 782–83.

technology, and he luckily taught me during after school and times like that. And so I—I tried to use that to the best of my abilities the next year.<sup>233</sup>

### *Setting and Scene*

[The San Luis Valley] It's beautiful. They're surrounded by mountains on three sides. The fields are beautiful in the summertime. Everything is growing. It's green. The potatoes' flowers are just gorgeous.<sup>234</sup>

Okay, well, Center used to have a pharmacy. It no longer does. It was closed down quite a few years ago. We have a small grocery store in Center. It was closed for about six months as they made a transition from one owner to another. And it takes about—it's about 50 minutes from my house to get to Adams State College, which is the closest college. We live about 20 miles north of Center. And it's about 35 to 45 minutes to get to Adams State College from Center.<sup>235</sup>

The families are very close. I've known my best friends since kindergarten. We've grown up together, know everything about each other. You walk around town, and people know who you are. Also, there's generational families that are very close. So, for example, my dad is very close with some of his friends, and I am friends with their children.<sup>236</sup>

The Sierra Grande School District is basically the center of the communities. All the academic, athletic events that take place are very well attended by the public. It's the gathering place. The school is used for large funerals.<sup>237</sup>

[The Sierra Grande] is . . . a high agricultural area. Agriculture is the primary employment there . . . . School district does have some jobs, but other than that, there's not much. You know, we're probably the top one or two poorest counties in the State of Colorado.<sup>238</sup>

You know, people think of us as that beautiful scenic resort city at the foot of Pike's Peak. We are a rapidly changing school district. In some ways, I—I draw an analogy to Denver. When—we were the first in El Paso County, formed in 1873. But there are 17 school districts in El Paso

233 *Id.* at 783.

234 *Id.* at 754.

235 *Id.* at 755.

236 *Id.* at 756–57.

237 Trial Tr. vol. 8 at 2181–82 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>. (Ty Ryland, parent and school-board member for Sierra Grande School District).

238 *Id.* at 2194.

County. And we have been the victims of suburban flight and urban changes in populations to now our English language [learner] population is doubling every four or five years, and our free and reduced lunch population has gone from approximately 25 percent to 51.9 percent in just a matter of 10 or 11 years.<sup>239</sup>

We're losing ground every single day. And what we worry the most about is it's not just boilers and lights and equipment, it's—at some point, if you don't maintain a facility, it starts to become a self-fulfilling prophecy as a ghetto school. If the weeds are growing, then it gets tagged with graffiti, the neighborhood starts to ignore it, students start opting out of school, and it becomes a self-fulfilling prophecy, a repetitive cycle we can't escape.<sup>240</sup>

[It's] [n]ot a very rich community . . . [T]ypically between 85 percent and 90 percent of our students' families qualify for reduced lunch.<sup>241</sup>

[The school] is the center of the community. We don't have a community center. We don't have a lot of restaurants, great facilities. So if somebody's going to hold a birthday party or a baby shower, they're very likely to use our school facilities. If there's going to be a recreation event going on, they're going to use our school facilities.<sup>242</sup>

[E]veryone knows you when you go around town. The wide-open spaces are just fabulous. The family ties that tend to take place in rural Colorado are just wonderful. I mean, you know, everyone in some way is related to everyone or knows someone or knows someone who did, what have you. The pace is different.<sup>243</sup>

### *Detail*

A typical day for Rachel right now, right now, she is gearing up to go back to school. She attends school right now in two campuses. . . . She's taking a course at community college . . . and she works part time at Dairy Queen at Flatiron Mall.<sup>244</sup>

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<sup>239</sup> Trial Tr. vol. 2 at 481 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf> (Glenn Gustafson, Chief Financial Officer for Colorado Springs School District 11).

<sup>240</sup> *Id.* at 492.

<sup>241</sup> Trial Tr. vol. 1 at 96 (Aug. 1, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-1-full.pdf> (George Welsh, Superintendent of Center School District).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 210.

<sup>244</sup> Trial Tr. vol. 9 at 2503–04 (Aug. 11, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-9.pdf> (Teresa Wrangham, mother of a special-education student, in response to what is a typical day for her daughter).



It's equipped with, like, a toaster oven, a microwave, and a hot plate, which don't generalize well for living skills because children like Rachel need to see examples of what they can expect out of the real world. So teaching someone to cook on a hot plate isn't very relevant to what her actual experience would be when she transitions. It doesn't have a washer dryer.<sup>245</sup>

We provide—we have a breakfast program, and we're doing breakfast in the classroom. We also have a . . . lunch program. And, you know, what I've noticed as a teacher, especially an elementary teacher, sometimes when it comes to snack time and kids are hungry and just need a little boost, I have lots of students that aren't able to bring a snack from home. One of the things I'll do is I'll go to the grocery store and bring snacks for the students.<sup>246</sup>

One of my largest classes is I have 26 students in that class, and I have to do four levels of differentiation in my curriculum to be able to instruct that class. I have just a handful of students who are at grade level and they're fine . . . . And then I have another group of students who actually need somebody sit with them and guide them, to model, sometimes to read and scribe for them. And then I also have one student who has trouble controlling his bowels, and he poops his pants.<sup>247</sup>

[commenting on a photo of the library] That's our newest dictionary in the Haskin Elementary Library . . . . You'll note the Soviet Union still exists.<sup>248</sup>

I'd like to point out what you see there is two students sharing one textbook. The textbook is a high school math textbook. The high school math textbook we bought on Amazon.com because we couldn't afford a new \$120 one.<sup>249</sup>

### *Tone*

I'll just give you an example that most people don't think about, but if there is a question on CSAP [Colorado's standardized test], for example, that talks about the garage. Well, if you're a student who's recently moved

245 *Id.* at 2516–17 (Teresa Wrangham, mother of a special-education student, in response to a question about transition program for her special-education student).

246 Trial Tr. vol. 8 at 2304 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf> (Matt Keefauver, a teacher in Montezuma-Cortez School District).

247 *Id.* at 2324. (Justine Bayles, a teacher in Montezuma-Cortez School District).

248 Trial Tr. vol. 1 at 100 (Aug. 1, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-1-full.pdf> (George Welsh, Superintendent of Center School District.)

249 *Id.* at 103.

from the Navajo reservation to Cortez, you might not have any idea what a garage is because garages really don't exist on the Navajo reservation. A few years ago, there was a question . . . that had to do with the Number 16 bus goes downtown, charge \$1.25. I'm sorry, but not only do the Native American students and the students from the reservation not understand that question, but it's also biased I believe [it is a biased question as] to kids that are in rural Colorado.<sup>250</sup>

Q: Why do you continue to do what you do when you face the challenges you do?

A: "Well, there was—I question myself because I have four children, and a lot of times it's hard to stay in a profession that we're taking pay cuts, but there was a pivotal moment in my career a couple of years ago when I was [a] family consumer science teacher that I gave an assignment to my students after a unit on choices and decision-making, and I just gave them a quick writing assignment . . . . This was a paragraph written by one of my students. He has very—his writing is very elementary. It's almost like kindergarten. Probably a 4-year-old could write better than this. He reverses a lot of letters. B are a lot of D's, and he spells phonetically, but he talks about how—what his family life is like at home. He talks about alcohol and how he sees people in his tribe—all he sees is drunk people everywhere and how he has to run from the cops because of certain family members in his family . . . . He just wants to be a normal—he wants to live a normal life, and he states that in this letter. He says, "All I want is a normal life." And just the last few sentences of it, he says, "I know if I do the right thing, my future children will have a better life than me. I will never treat my future children the way I lived. They will not grow up like me." And the first time I read this, I just—I bawled. I just cried, and it's heartbreaking because education is what breaks the cycle; and he does not have the skills to be able to do that. And he never returned back to school after this year. So I don't know where he is. And this is just one of many. And I love my students very much, and they are all—it breaks my heart because education is what is going to get these students where they want to be."<sup>251</sup>

### *Narrative Coherence*

You know, this probably sounds really rote and crazy, but I'm here for my kids. My kids deserve the same opportunities as any kids in the State of Colorado, any kids in the country. They're just as capable as any students in terms of learning, and I feel like it's, you know, frankly, unfair that they

250 Trial Tr. vol. 8 at 2309 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf> (Matt Keefauver, a teacher in Montezuma-Cortez School District).

251 *Id.* at 2337–39 (Justine Bayles, a teacher in Montezuma-Cortez School District).

have to do without some of the things that, you know, I had as a student growing up and things that even we have five, six, seven years ago.<sup>252</sup>

[A]ll students need to be prepared academically to have an opportunity to participate successfully in our economy, in our world. They will not get in the front door of some of our businesses without having proper and strong academic preparation.<sup>253</sup>

Developing an educational system among us, for the future, [is] of greater value than the gold of our mountains, and a better safeguard to society than the elective franchise or standing armies.<sup>254</sup>

### *Narrative Fidelity*

I've watched—I've watched a lot of struggle and not just with my daughter, and it has to stop. Our kids are falling through the cracks. They're not receiving an appropriate education, and [my daughter] may not realize being mainstreamed because she was failed by the system. And it's an opportunity without taking away from the general fund through due process or suing the school district to make positive change.<sup>255</sup>

[T]ypically—I buy those things [pencils, erasers, markers] out of my own pocket because I don't think the educational experience should be upheld because someone doesn't have a pencil. That's just ridiculous to say, "Okay. Well, no school today, not enough students have pencils." So I'll buy those. The kicker is I have to buy the expensive ones because the cheap ones ruin the pencil sharpener, and I don't have money to buy a new pencil sharpener.<sup>256</sup>

It [the lack of current textbooks and lack of sufficient number of textbooks] slows us down. It slows us down because I am not able to send homework home. There's no homework assignments because I don't have enough textbooks that every student can have a book. And if

252 *Id.* at 2318. (Matt Keefauver, a teacher in Montezuma-Cortez School District).

253 Trial Tr. vol. 2 at 416 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf>. (Dr. Scott Murphy, Superintendent of Littleton Public Schools).

254 Tom I. Romero, II, "Of Greater Value than the Gold of Our Mountains": *The Right to Education in Colorado's Nineteenth-Century Constitution*, 83 U. COLO. L. REV. 781, 785 (2012) (quoting W.J. Curtice, the First Territorial Superintendent of common schools).

255 Trial Tr. vol. 9 at 2502 (Aug. 11, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-9.pdf> (of Teresa Wrangham, mother of a special-education student, responding when asked why she joined the suit).

256 Trial Tr. vol. 8 at 2315 (Aug. 10, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-8-nonconfidential2.pdf> (Matt Keefauver, a teacher in Montezuma-Cortez School District). This is also an example of effective use of detail and an example of character.

one book is lost, that means in the classroom someone is short a book the next day. So homework is just not something we do.<sup>257</sup>

The rationale that was built into the funding levels had never been addressed because the whole finance formula is one piece, but if you don't have the base established to why it should be there, in some ways, I know this is a little harsh, but you got a little bit of a house of cards.<sup>258</sup>

It's like going out and hiring baseball players and having a ball and a bat, but you don't have a baseball field. I mean, it just plain does not make sense.<sup>259</sup>

The way I've heard it best told that I thought was very clear is that you have four people going out to dinner, one happens to leave and the other three are left paying the bill. And that's kind of the situation that we have.<sup>260</sup>

### C. Examples of the Success of Plaintiffs' Storytelling in the Trial Court's Opinion

The following excerpts from the trial court's 183-page order—organized by “stock story” theme—reveal the impact of the Plaintiffs' stories on the court's decision:

#### *Education is Essential to Democracy*

The benefits of certain education reforms that have been proven to increase achievement, such as class size reduction, preschool expansion, and teacher salary increases, significantly exceed the costs, thereby justifying investment in these reforms today rather than paying the fiscal and social consequences of inadequate education later. By failing to make sufficient investments in these and other effective educational interventions, Colorado is trading short run budget savings for potentially much larger long run economic burdens.<sup>261</sup>

#### *“Money Matters” in Education*

The uncontested evidence establishes that the Public School Finance Act (PSFA) statewide base per pupil funding and factors when created in 1994 and as adjusted in every year since then are not now and have never

<sup>257</sup> *Id.* at 2329

<sup>258</sup> Trial Tr. vol. 2 at 403 (Aug. 2, 2011), available at <http://www.childrens-voices.org/storage/Lobato-Trial-Day-2.pdf> (Dr. Scott Murphy, superintendent of Littleton Public Schools).

<sup>259</sup> *Id.* (Dr. Scott Murphy testifying about rationale behind PSFA).

<sup>260</sup> *Id.* at 411 (Dr. Scott Murphy testifying about rationale behind PSFA).

<sup>261</sup> Decision at 9.

been rationally related to the costs of providing the educational services mandated by the standards-based education system or any other measure of educational quality.<sup>262</sup>

In order to determine whether the State adequately funds a particular program, it is important to know how much that program costs. Nevertheless, Defendants have not conducted a study to determine the cost of funding all public education programs set forth in statute and regulation.<sup>263</sup>

Unquestionably, additional financial resources appropriately applied can improve student achievement, which, under the standards-based system, is the ultimate measure of the success of a thorough and uniform system of public education.<sup>264</sup>

Even Defendants' lead expert witness, Dr. Eric Hanushek, acknowledges that, "money certainly matters"; he testified that if a school district in Colorado efficiently spends its money, additional funds for education could lead to higher student achievement.<sup>265</sup>

Dr. Hanushek's analysis that there is not much relationship in Colorado between spending and achievement contradicts testimony and documentary evidence from dozens of well-respected educators in the State, defies logics, and is statistically flawed. Dr. Hanushek's analysis relies on median growth percentiles rather than proficiency levels, which are not a straightforward measure of achievement.<sup>266</sup>

The limited number of schools and school districts cited by Defendants' witnesses as successful received additional funding above per pupil operating revenue and/or has not yet met state standards and requirements.<sup>267</sup>

In states that have undertaken major school finance reforms, studies have found that those investments radically changed the trajectory of achievement and reduced the size of achievement gaps as a function of those reforms.<sup>268</sup>

State level budget cuts in the last two years have reduced overall school funding by nearly one billion dollars . . . Current economic conditions, however, are not the source of the school finance crisis. They have made

262 *Id.* at 40.

263 *Id.* at 39, 40.

264 *Id.* at 179.

265 *Id.* at 49–50.

266 *Id.* at 54.

267 *Id.* at 165.

268 *Id.* at 50.

an unworkable situation unconscionable. But Colorado's history of irrational and inadequate school funding goes back for over two decades.<sup>269</sup>

*There is Not a Level Playing Field for Colorado's Schoolchildren*

Due to lack of access to adequate financial resources, the Plaintiff School Districts are unable to provide the educational programs, services, instructional materials, equipment, technology, and capital facilities necessary to assure all children an education that meets the mandates of the Education Clause and standards-based education.<sup>270</sup>

The impact of irrational and inadequate funding is not, however, limited to rural and urban poverty School Districts. The Court finds that all School Districts are unable to provide the early childhood and kindergarten programs that are critical to student achievement. All School Districts are unable to provide the classroom time, professional training, and instructional interventions that are critical to meet the expectations of CAP4K, the Education Accountability Act, and SB 191. All School Districts are unable to provide the classroom time, professional training, and interventions critical to the education of underserved student populations, including students at-risk of academic failure, non-English speaking students, students with disabilities, students of minority racial and ethnic heritages, students of low-income families, and gifted and talented students.<sup>271</sup>

The amount of funding for special education in Colorado is insufficient . . . . By placing the burden on local districts to fund the majority of special education costs, Colorado is abdicating its responsibilities under special education law to assure that FAPE [free appropriate public education] is provided to all students with disabilities in the state . . . . As a result, the needs of all students with disabilities are not currently being met in Colorado.<sup>272</sup>

There is insufficient funding in Colorado to provide the types of effective instructional and support programs for English language learners (ELLs) mandated by the No Child Left Behind Act, supported by research, and recommended by CDE in its own guidebook so that ELLs can meet language acquisition and state standards . . . . It is arbitrary and irrational to provide only two years of funding for ELL instruction.<sup>273</sup>

269 *Id.* at 182.

272 *Id.* at 81, 83, 84.

270 *Id.* at 178.

273 *Id.* at 94–95.

271 *Id.*

*“If You Just Work Hard Enough You Will Succeed”*<sup>274</sup>

As a state, we are not educating our own children so that they will be competitive . . . Colorado is losing ground in education as compared to other states and countries.<sup>275</sup>

Approximately 400,000 students in Colorado are below proficiency on CSAP tests. In 2009, over 25% of Colorado high school students did not graduate with a diploma. In addition, Colorado has one of the widest achievement gaps in the United States. There is roughly a thirty percent gap in Colorado between white and minority students and high-income and low-income students with respect to achievement on standardized tests.<sup>276</sup>

Twenty-nine percent of high school graduates in Colorado require at least one remedial course to attend post-secondary education institutions. At some Colorado colleges, more than fifty percent of incoming students need remedial coursework . . . The high remediation rate in Colorado indicates that kids are not being adequately prepared for post-secondary education.<sup>277</sup>

#### **D. Examples of Chief Justice Bender’s Acceptance of the “Story of the Parties” in His Dissent**

Many of Colorado’s students lack safe and healthy school buildings.<sup>278</sup>

The average school building is nearly 40 years old, and many have architectural problems and inadequate heating, lighting, and plumbing systems . . . [There are] classrooms where children ‘had worn a dent in the floorboards around a heater they had to huddle around during the cold of winter.’ Some schools are infested with mice, bats, or rattlesnakes.<sup>279</sup>

Many schools do not comply with the Americans with Disabilities Act and are largely inaccessible to students with special needs. Keila Barish, a recent graduate of Pueblo West High School, has a form of dwarfism, is three feet tall, and uses a scooter to move from place to place. She could not reach, let alone open, many of the doors at school. She could not reach bathroom sinks to wash her hands. When the elevator was broken, which happened several times a week, she relied on fellow students to carry her to second-floor classrooms.<sup>280</sup>

274 As noted above, the plaintiffs challenged this stock script at trial. As the following excerpts demonstrate, the court agreed with the plaintiffs’ challenge to this deeply engrained cultural script.

275 Decision at 55.

276 *Id.* at 55–57, 179.

277 *Id.* at 58.

278 *Lobato II*, 304 P.3d at 1147 (Bender, J., dissenting).

279 *Id.*

280 *Id.*

In Bethune School District in eastern Colorado, counseling sessions were carried out in the lunchroom in front of other students until private space was created in a cleaned-out closet.<sup>281</sup>

In Pueblo School District No. 60, the average age of a school building is over 50 years old. The Sanford school building, which houses all K-12 students, has elevated carbon dioxide levels and high concentrations of mold. The roof is partially collapsed.<sup>282</sup>

As the majority notes, school districts may contract for bonded indebtedness to fund capital improvements or the construction of new schools. By statute, however, bonded debt is capped at 20% of the district's total assessed property value. For 70 school districts, this means that they cannot raise enough money to build one new K-8 school building. For most others, this means that the districts cannot raise enough money to provide a safe and healthy learning environment for students.<sup>283</sup>

Students at schools in the San Luis Valley attend buildings with crumbling foundations, partially collapsed roofs, caved-in ceilings, ancient heating systems, and inadequate plumbing.<sup>284</sup>

Like many teachers who testified, Anastasia Campbell, a teacher at Nikola Tesla High School in Colorado Springs, buys school supplies for her students with her own money. She also collects half-used notebooks and other slightly used supplies for her students. Jefferson High School in Greeley stocks its school library using community donations. In the Boulder Valley School District, Fairview High School has to, in the words of principal Donald L. Stensrud, 'choose desks or choose books.'<sup>285</sup>

The history textbooks at Nikola Tesla High School identify Bill Clinton as the current president.<sup>286</sup>

Teachers at Sheridan Middle School have an unofficial "try twice" rule to deal with their aging computers. If they do not boot up on the second try, then the teacher moves on.<sup>287</sup>

[S]tudents [in the San Luis Valley] receive only 40 minutes of computer time per week. Some computers still in use only take 5 1/2-inch floppy

281 *Id.* at 1148.

282 *Id.* at 1150.

283 *Id.*

284 *Id.* at 1150.

285 *Id.* at 1147.

286 *Id.*

287 *Id.* at 1147-48.



disks. Taylor Lobato testified that, at Center High School, a single webpage took 20 minutes to load during an online assessment test.<sup>288</sup>

At best, Colorado funds two years of English-language instruction despite expert testimony that ELL students need between four and seven years of instruction to become proficient.<sup>289</sup>

Two Boulder elementary schools rely on parent volunteers to help with gifted and talented programming because the schools do not have money to hire enough teachers.<sup>290</sup>

Many rural districts do not offer advanced placement classes because they do not have the teachers to teach them.<sup>291</sup>

At one rural school, 8th graders identified as gifted and talented in math were given a CD and sent to the library to teach themselves algebra.<sup>292</sup>

Taylor Lobato, the named plaintiff in this case, graduated first in her class and was, according to Superintendent George Welsh, one of the best students he had ever seen. Still, as a freshman at the University of Denver, her professors sent her to the grammar center because she lacked grammar skills. Whereas her college roommate received 45 college credits for advanced placement classes she took in high school, Lobato took no advanced placement classes because her district, like many others, could not afford to offer them.<sup>293</sup>

Parents in the Boulder and Denver school districts testified that their special-needs children were shunted from school to school and had to leave programs that were working because the programs were deemed too expensive.<sup>294</sup>

One plaintiff was not identified as a special education student until 10th grade, at which time she read at a 2nd-grade level. At first, she received five hours a week of specialized instruction, but her time was reduced to one hour a week in 11th grade and a half-hour a week in 12th grade. Her grades did not improve. She scored an 11 on the ACT, and no Colorado college has accepted her.<sup>295</sup>

288 *Id.* at 1150.

289 *Id.*

290 *Id.* at 1148.

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

Colorado's education system is, beyond any reasonable doubt, neither thorough nor uniform . . . I cannot conclude, as the majority does, that the finance system is rationally related to providing a thorough and uniform education when 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. In my view, Colorado's constitutional guarantee demands something more.<sup>296</sup>

.....  
<sup>296</sup> *Id.* at 1149.