

THE RIGHT TO AN EDUCATION AND THE PLIGHT OF SCHOOL FACILITIES: A LEGISLATIVE PROPOSAL

MAX CIOLINO

*Public school facilities are an often over-looked aspect of public education financing mechanisms. Several states lack a specific fund for constructing or maintaining facilities, and the states that do maintain these funds often allocate inadequate resources relative to the scope of construction and renovation projects. In addition to underfunding by states, the federal government scarcely is involved in public school facility financing, and localities often have insufficient revenue opportunities to meet funding needs through their own tax bases. The result of this lack of coordination among levels of government is a staggeringly underfunded system of public school facilities, with some estimates placing nationwide construction and maintenance needs at over five hundred billion dollars. These poorly maintained school facilities detract from teacher retention, student learning, and the physical health of building occupants.*

*State and federal courts have deliberated over whether, and to what extent, students have a right to adequate facilities under constitutional and legislative mandates. Although education is considered a police power, and therefore a function and responsibility of state governance, the budget capacity of most states are vastly outstripped by the resource needs of the facilities within those states. Therefore, any hope that future generations of children attend adequate and equitable school facilities relies on an aggressive program that involves all three levels of government to secure the monetary resources that our schools require.*

Introduction ..... 108

I. The State of Public School Facilities..... 110

    A. Historical Needs and Expectations ..... 110

    B. The Costs Associated with Modernizing Public School Facilities..... 111

    C. The Benefits of Adequate School Facilities ..... 111

II. Litigating the Right to an Education and the Duty to Provide Adequate School Facilities ..... 113

    A. The (Lack of a) Federal Right to an Education..... 114

        1. The Equal Protection Clause..... 114

        2. The Due Process Clause ..... 116

        3. Other Avenues Towards a Federal Right of Education..... 117

    B. Individuals’ State Rights to an Education..... 118

        1. Equity Litigation ..... 119

        2. Adequacy Litigation ..... 120

        3. The Tragedy of Abbott v. Burke..... 121

III. Fiscal Constraints to Providing Sufficient School Facilities ..... 122

    A. State Fiscal Limitations ..... 122

    B. Federal Fiscal Capacity..... 125

IV. A Blueprint for Public School Facilities Reform..... 126

    A. Before the Program is Designed ..... 127

        1. Updating the GAO Assessment ..... 127

2. Creating a Facilities Management Office within the Department of Education..... 127

B. Setting Aside Funding ..... 127

    1. Determining the Amount of Funding and a Distribution Mechanism..... 127

C. The Responsibility of the State or School District ..... 128

    1. The Creation of a State Master Plan and the Maintenance of a Statewide Facilities Inventory ..... 128

    2. The States’ Requirement to Contribute Funds and Ensure the Creation of a School Maintenance Fund ..... 129

D. Green Buildings, Safe Surroundings, and Productive Environments..... 129

    1. Green Buildings..... 130

    2. Safe Environments..... 130

    3. Productive Environments..... 130

V. CONCLUSION ..... 131

INTRODUCTION

Every child in the United States of America deserves to obtain a free education in a non-toxic, high quality, and productive learning environment. Unfortunately, most children have neither a state nor federal right to do so. Litigation over a child’s right to an education has taken place for decades in the state and federal court systems. Meanwhile, legislatures in the state and federal governments have attempted to develop a politically and economically feasible program for funding public education. Unfortunately, despite all of this deliberation, children remain without a legal right to safe school buildings, and school districts remain without the requisite funds to build and maintain these schools. This article will evaluate the legal hurdles and landmark cases that have defined and delimited a child’s right to an education; furthermore, it will assess the economic circumstances that have lead to our current shortcomings in providing for the institution of education. Finally, this article will outline a blueprint for national legislation that can begin the process of remediating the inadequate school buildings that many students are legally required to attend.

Public school financing is a contentious process orchestrated by the states to provide matching funds to local districts in a collaborative effort to provide a system of free public education for all students. Across the country, states struggle to create and finance a formula that provides the needed funds to maintain the institution of education, without bankrupting the state. Often, this is achieved through a funding formula that creates a base amount granted to local districts by the state, and a requirement that localities levy taxes to cover the difference to finance the remainder of the districts’ needs.<sup>1</sup> The localities often raise this money through local property taxes, and the states typically provide some form of “equalization funding” to assist low-income districts with achieving the threshold amount established by the state.<sup>2</sup>

Unfortunately, the needs of school facilities often are ignored in these macro formulas

---

<sup>1</sup> ALLAN ODDEN & LAWRENCE PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 10-11 (McGraw Hill, 4th ed. 2007).

<sup>2</sup> *Id.* at 11.

that otherwise aim to provide sufficient funding to the schools throughout the state.<sup>3</sup> Many states have established funds in some form or another to provide for school facility construction, renovation and maintenance.<sup>4</sup> These facility funds often are substantively inadequate by design,<sup>5</sup> and many of them are underfunded on an annual basis by state legislatures.<sup>6</sup> Additionally, several states offer no facilities assistance whatsoever.<sup>7</sup> By and large, the states' general message is that public school facility financing is predominantly a local responsibility.

The delegation of this expensive and important task to the localities by the states has resulted in a grossly inequitable and substantially inadequate national public school facility landscape. The quality of a child's public school building often depends on the property value to pupil ratio within the boundaries of arbitrarily drawn school district lines.<sup>8</sup> This funding system relegates low income and minority students to substandard public schools, due to politically drawn lines.<sup>9</sup> Meanwhile, higher wealth and predominantly white districts are capable of providing quality facilities to the students within their boundaries.<sup>10</sup> Public school facilities play a significant role in determining a student's sense of self-worth and performance in school.<sup>11</sup> Therefore, inadequate facilities for disadvantaged groups of children serve to compound the challenges that these children will face throughout their lives.

Part I of this article will provide an assessment of the public school facilities crisis in the United States. This assessment will include an examination of the history of public school facility financing, the present state of public school buildings in the United States, and the impact that this landscape has on students and communities. Part II will review the federal and state litigation that sought to establish a right to an education and to define those rights. Part III examines the extent of facility needs in light of federal, state and local funding capacity. This section presents the main takeaway of this article: that the vast need for school facilities outstrip state and local budget capacities, thereby necessitating federal involvement to provide safe and productive school facilities to all children. Finally, Part IV will argue for a collaborative public school facility-financing program that will help alleviate the current inadequacy of public school buildings, and

---

<sup>3</sup> Nadine Mompremier, Comment, *Battle for the School Grounds: A Look at Inadequate School Facilities and a Call for a Legislative and Judicial Remedy*, 56 HOW. L.J. 505, 507 (2013).

<sup>4</sup> See ODDEN & PICUS, *supra* note 1, at 155.

<sup>5</sup> See MARY FILARDO ET AL., 21ST CENTURY SCHOOL FUND, STATE CAPITAL SPENDING ON PK-12 SCHOOL FACILITIES 3 (2010) ("It is clear from this review that only about half of all states have a partnership with local districts to share in the responsibility for providing adequate facilities.").

<sup>6</sup> *Id.* at 3 (explaining that eleven states contributed nothing to local districts for capital outlay from 2005 to 2008).

<sup>7</sup> TEX. LEGISLATIVE COUNCIL, FACTS AT A GLANCE: STATE ROLES IN FINANCING PUBLIC SCHOOL FACILITIES 3 (2006) (explaining that Nebraska, Nevada, Oklahoma, and South Dakota have no laws that even create a mechanism for distributing capital outlay funds to local districts).

<sup>8</sup> ODDEN & PICUS, *supra* note 1, at 11.

<sup>9</sup> MARY FILARDO ET AL., BUILDING EDUCATIONAL SUCCESS TOGETHER, GROWTH AND DISPARITY: A DECADE OF U.S. PUBLIC SCHOOL CONSTRUCTION 20 (2006).

<sup>10</sup> *Id.* at 27.

<sup>11</sup> Jeannie Oakes, Symposium, *Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California*, 43 SANTA CLARA L. REV. 1305, 1310 (2003).

prevent future inadequacy by establishing responsible maintenance of schools.

## I. THE STATE OF PUBLIC SCHOOL FACILITIES

### A. Historical Needs and Expectations

The debate over which level of government is responsible for financing and directing public education is as old as the institution of education itself.<sup>12</sup> The concept of “local control” has been a controversial rallying cry for the operation of public schools since the early 1800s.<sup>13</sup> Although the experience and purpose of education has changed significantly since then, the debates over local control do not seem to have changed accordingly. At the inception of public education, most Americans lived in rural areas, and most schools were one-room buildings.<sup>14</sup> Furthermore, “Public Education” was intended to teach children basic concepts that would enable them to fulfill their civic duties in a democratic society.<sup>15</sup>

The need for public school facilities, and consequently the costs associated with public school buildings, has grown substantially since then. Modern education is both compulsory and universal.<sup>16</sup> The states also have required that schools teach subjects far more complex than the fundamentals taught in the 1800’s.<sup>17</sup> Localities, and even states, often lack the resources to provide the requisite facilities to match the growing requirements of a modern education. Although there still are legitimate arguments for maintaining local control over some components of public education,<sup>18</sup> the absence of federal and state funding for local facilities threatens both

---

<sup>12</sup> See Derrik Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to an Education the Silver Bullet?*, 20 KAN. J. L. & PUB. POL’Y 351, 354-55 (2011) (explaining that the role of the federal government has been increasing in recent decades; however, education historically has been considered the responsibility of the states, administered through the management of local districts).

<sup>13</sup> Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 69-73 (2011) (explaining that the federalism arguments that have colored the education debate stem from the Constitutional Convention of 1787). Generally, the arguments are that education was a responsibility reserved for the states, and that the federal government is too large to appropriately manage the institution. The counterarguments illustrate that states’ rights changed after the Civil War such that this argument is no longer applicable.

<sup>14</sup> ODDEN & PICUS, *supra* note 1, at 9-10 (describing the earliest schools as one-room buildings; larger cities quickly began developing more advanced and larger school systems).

<sup>15</sup> Imoukhuede, *supra* note 13, at 60-61 (explaining the nation’s founders’ belief that “public education is essential to democracy” and that public education was intended to teach children basic concepts, evinced by Thomas Jefferson’s Bill for the General Diffusion of Knowledge, the purpose of which was to “teach all children reading, writing and arithmetic”).

<sup>16</sup> Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 586-87 (1991) (explaining that all states both provide and require free primary and secondary education).

<sup>17</sup> Courts have explained that not providing science and computer labs is evidence of failing to meet adequate education requirements. *See, e.g.*, *Derolph v. State*, 677 N.E.2d 733, 744 (Ohio 1997); *see also* *Roosevelt v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994); *see also* *Helena Elementary v. State*, 769 P.2d 684, 684 (Mont. 1989).

<sup>18</sup> BUILDING EDUCATIONAL SUCCESS TOGETHER, MODEL POLICIES IN SUPPORT OF HIGH PERFORMANCE SCHOOL BUILDINGS FOR ALL CHILDREN 11-17 (2006) (illustrating the significance of community involvement and participation with neighborhood schools).

the quality of the education and the physical health of students in many localities.<sup>19</sup>

*B. The Costs Associated with Modernizing Public School Facilities.*

The national estimates for public school facilities maintenance and construction have been pegged at somewhere between \$100 Billion and \$650 Billion dollars.<sup>20</sup> The General Accounting Office of the United States government performed the first national assessment of this in 1995. After performing an inventory of the public schools, the GAO estimated that there was a \$112 Billion price tag on deferred maintenance and new construction needs.<sup>21</sup> In 2000, the Nat'l educ. ass'n asserted that the actual need for school facilities and technological modernization amounted to \$321 Billion.<sup>22</sup> Finally, in 2009, 21st Century Schools asserted that \$650 Billion was needed to repair and modernize the Nation's public schools.<sup>23</sup>

Although these numbers are staggering by themselves, it is worth noting that the national expenditures on public school facilities from all sources during the 1995-2004 decade add up to about \$504 Billion.<sup>24</sup> Of these expenditures, about \$363 Billion was spent on new building construction, and half of these funds were spent on building new schools to accommodate a growing population of students.<sup>25</sup> Meanwhile, many existing schools continued to defer needed maintenance.<sup>26</sup> All of this taken together indicates that staggering estimates of deferred maintenance and necessary construction are far from stagnant and stable numbers. The resource needs of public school facilities will continue to grow and compound with each passing year that we fail to implement proper remediation strategies to improve substandard schools and ensure that our investments are properly maintained over time.

*C. The Benefits of Adequate School Facilities*

There are approximately 49 Million students attending 97,000 schools and being taught

---

<sup>19</sup> GRACYE CHENG ET AL., FACILITIES: FAIRNESS AND EFFECTS 3-8 (2011) (surveying studies have found correlations between student health, academic performance, and the quality of school buildings).

<sup>20</sup> MOLLY A. HUNTER, NAT'L EDUC. ACCESS NETWORK, PUBLIC SCHOOL FACILITIES: PROVIDING ENVIRONMENTS THAT SUSTAIN LEARNING 1, 2 (2006), [http://www.schoolfunding.info/resource\\_center/issuebriefs/facilities.pdf](http://www.schoolfunding.info/resource_center/issuebriefs/facilities.pdf).

<sup>21</sup> GAO/HEHS-95-61, at 7 (1995), <http://www.gao.gov/assets/230/220864.pdf>.

<sup>22</sup> See generally NAT'L EDUC. ASS'N, MODERNIZING OUR SCHOOLS: WHAT WILL IT COST? (2000), <http://files.eric.ed.gov/fulltext/ED444339.pdf>.

<sup>23</sup> 21ST CENTURY SCHOOL FUND, REPAIR FOR SUCCESS: AN ANALYSIS OF THE NEED AND POSSIBILITIES FOR A FEDERAL INVESTMENT IN PK-12 SCHOOL MAINTENANCE AND REPAIR 1 (Nov. 16, 2009), <http://www.21csf.org/csf-home/documents/repairforsuccessaugust2011.pdf>. This figure was reached by using a deferred maintenance need calculated at 4% of the cost of a building. According to this article, a 2% estimate for deferred maintenance is considered low, and a 4% estimate is considered a high estimate.

<sup>24</sup> MARY FILARDO, *Good Buildings, Better Schools: An economic stimulus opportunity with long-term benefits*, ECON. POLICY INSTITUTE (April 29, 2008), <http://www.epi.org/publication/good-buildings-schools-economic-stimulus/>.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> 21ST CENTURY SCHOOL FUND, *supra* note 23.

by six million teachers and other staff members.<sup>27</sup> Each of these adults and children must stay within the boundaries of the schools' campuses for most hours of the day, most days of the year. Buildings that create healthy and enjoyable environments positively affect the physical and emotional wellbeing of the adults and children that occupy them.<sup>28</sup> However, when the buildings are unsafe, unclean, or generally run-down, the toll that the environment takes on those using the building has very real consequences for them as individuals, and for the general success and competitiveness of our nation.

There have been hundreds of studies conducted in an effort to determine the impact that the quality of school buildings has on children and adults.<sup>29</sup> Although there are a number of problems with accurately measuring these affects, the sheer volume of research indicating the performance and financial gains or losses associated with safe and productive school environments is staggering. Notably, studies have shown that low-quality buildings increase the likelihood of individuals being diagnosed with asthma, of other measures of student health,<sup>30</sup> of teacher turnover,<sup>31</sup> and of student performance on many indicators.<sup>32</sup> Unfortunately, the debate persists regarding whether the gains in performance and health are worth the vast amount of money it would require to make schools function properly and safely, and remains to be answered conclusively.<sup>33</sup>

The benefits of a comprehensive public school facility program are not contained entirely within the campus boundaries of the impacted schools. First, if improving school facilities improves the likelihood of students achieving their high school diplomas, there will be a lifetime earning increase for the affected students.<sup>34</sup> Furthermore, local property values are affected by the perceived quality of the local schools; therefore, improvements to a school

---

<sup>27</sup> Filardo, *supra* note 23, at 2 & 5.

<sup>28</sup> See also Building Educational Success Together, *supra* note 18.

See generally BARNETT BERRY, ET AL., UNDERSTANDING TEACHER WORKING CONDITIONS: A REVIEW AND LOOK TO THE FUTURE, CENTER FOR TEACHER QUALITY (Nov. 2008), <http://www.teachingquality.org/sites/default/files/Understanding%20Teacher%20Working%20Conditions-%20A%20Review%20and%20Look%20to%20the%20Future.pdf>.

<sup>29</sup> ODDEN & PICUS, *supra* note 1, at 174.

<sup>30</sup> FILARDO, *supra* note 23, at 4.

<sup>31</sup> BERRY, ET AL., *supra* note 28, at 7.

<sup>32</sup> FILARDO, *supra* note 23, at 5.

<sup>33</sup> ODDEN & PICUS, *supra* note 1, at 176 (suggesting that investing the money necessary to rebuild and refurbish schools may yield higher gains in performance at a lower cost if it were invested in other elements of public education that also have been shown to improve student performance. Although this is a legitimate argument, the underserved schools in this country are getting older, and the health and education consequences of further deterioration will be immense. Postponing remedial efforts will only make the ultimate expense of renovating schools even greater. After all, children will need a place to learn no matter what).

<sup>34</sup> U.S. BUREAU OF LABOR STATISTICS, *Employment Projections: Earnings and unemployment rates by Educational Attainment*, (last updated Apr. 2, 2015), [www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm). (Achieving a High School diploma is associated with an earning increase of nearly \$200 per week, and experiencing an average of 3.5% lower unemployment rate than others).

building may result in improvements to local property values.<sup>35</sup> Although improved graduation rates, increased lifetime earnings of the next generation, and increased property value all are highly compelling reasons to refurbish deteriorating schools, the most immediate gain to be realized via a large-scale public school facility program is increased employment. In 2011, there were an estimated 1.5 Million unemployed construction workers in this country.<sup>36</sup> One estimate indicates that each one billion dollars invested in building or renovating schools will create between 9,000 and 10,000 jobs.<sup>37</sup> Therefore, an aggressive school renovation program has the potential to put many Americans back to work while improving the quality of life and education for our nation's young people.

The historical expectation of local control over public education may still have some place in the modern Education climate; however, in the realm of public school facilities, local control is a recipe for disaster. The incredible aggregated costs of comprehensive reform demonstrate that localities simply are not equipped to resolve this problem entirely on their own. A truly effective plan will require increased involvement from both the state and federal levels of government. Although the upfront investment may seem impossible at first, it will only grow more insurmountable over time. Furthermore, the benefits to be achieved by providing safe and productive learning environments to the nation's young people come with benefits both measurable and incalculable. Despite the sticker shock, a comprehensive reform plan for public school facilities is an important investment.

## II. LITIGATING THE RIGHT TO AN EDUCATION AND THE DUTY TO PROVIDE ADEQUATE SCHOOL FACILITIES

For more than half a century, advocates have sought state and federal court rulings that recognize a fundamental right to an education.<sup>38</sup> The recognition of such a right would impose on the affected governing body certain duties to ensure that no individual's rights are violated by the shortcomings of schools, districts, or governments. It is important to note that the recognition of a right to an education in itself will add little value to advocates' ability to achieve better educational inputs in the federal court system.<sup>39</sup> The true value of the right to an education is determined by how this right is defined. Technically, the right to an education may require only that *something* be provided in an effort to educate students. A uselessly low threshold will fall short of arming advocates with the tools necessary to fight for the rights of students in the federal

---

<sup>35</sup> Filardo et al., *supra* note 9, at 5 (surveying research on the impact that public school buildings have on local residential property values and community vitality).

<sup>36</sup> MARY FILARDO, JARED BERNSTEIN, & ROSS EISENBREY, 21ST CENTURY SCHOOL FUND, CREATING JOBS THROUGH FAST!, A PROPOSED NEW INFRASTRUCTURE PROGRAM TO REPAIR AMERICA'S PUBLIC SCHOOLS 1 (2011) [http://www.21csf.org/besthome/docuploads/pub/237\\_fixa\\_mericasschoolsfinal.pdf](http://www.21csf.org/besthome/docuploads/pub/237_fixa_mericasschoolsfinal.pdf).

<sup>37</sup> *Id.*

<sup>38</sup> *Brown v. Board*, 74 U.S. 483 (1954) is generally considered to be the first case in modern times centered on a student's right to an education.

<sup>39</sup> Bitensky, *supra* note 16, at 635-38 (arguing that the right in itself adds legitimacy to arguments and increases expectations on the part of governments). In contrast, others have argued that the Right to an Education would provide little or no value if the right is brought into existence at a threshold requirement that is already being met (*see generally* Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038 (1992)).

and state courts. Therefore, it is equally important that the contents of the right be fought for with the same zeal as the presence and recognition of the right in the first place. As it pertains to this article, the right to an education without the right to a safe and productive learning environment fails to provide a meaningful right by which advocates can ensure that students are given the tools they need to succeed educationally, personally, and professionally.

A. *The (Lack of a) Federal Right to an Education*

1. The Equal Protection Clause

After local control reigned supreme over public education for more than a century, various federal programs began weakening the grasp of states and localities over the institution of education. First, *Brown v. Board of Education* was decided in 1954, which brought an end to *de jure* segregation in public schools.<sup>40</sup> This represented the first major restriction on the otherwise total control over education of the state and local governments. The Supreme Court put the Equal Protection Clause to historically good use by declaring that an education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>41</sup> Although the Court did not go so far as to declare that education was a fundamental right, its decision in *Brown* represented a willingness to ensure that the injustices that had previously characterized local control over public education were remediable in the judiciary.

After the Supreme Court decided *Brown*, several state courts began determining that the right to an education was a fundamental one under the federal Constitution.<sup>42</sup> Most notably among these was the California Supreme Court’s ruling in *Serrano v. Priest*, which held that the Equal Protection Clause created an affirmative duty for the California Supreme Court to provide an equitable education for all students in the state.<sup>43</sup> Several years later, the Supreme Court finally took up the question of a fundamental right to an education in the landmark decision *San Antonio Independent School District v. Rodriguez*. In *San Antonio* the Supreme Court held that education is neither explicitly enumerated as a federal right, nor has it been impliedly adopted as a fundamental right.<sup>44</sup> It is important to note that the Court did not entirely foreclose the possibility of education being recognized as a fundamental right;<sup>45</sup> however, the decision did limit the extent

---

<sup>40</sup> *Brown*, 347 U.S. at 495.

<sup>41</sup> *Id.* at 493.

<sup>42</sup> See *San Antonio v. Rodriguez*, 411 U.S. 1, 29 n. 68 (1973).

<sup>43</sup> *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (“We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge, and must fall before the equal protection clause.”).

<sup>44</sup> *San Antonio*, 411 U.S. at 35.

<sup>45</sup> *Id.* at 36-37 (stating that “[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to a meaningful exercise of either [the right to speak or to vote], we have no indication that the present levels of educational expenditures in Texas provides an education that falls short.”). This cryptic message has been the subject of much deliberation in later court opinions and scholarly articles.



to which a federally recognized right would yield the types of benefits that advocates would hope came from the recognition of such a right.<sup>46</sup>

The Court's ruling in *San Antonio* seemed to lay to rest the question of a fundamental right to an education; however, the issue returned to the Supreme Court in three subsequent cases. The first was *Plyler v. Doe*, which established that the Supreme Court would use a heightened scrutiny test to ensure that legislative deprivation of education to groups of students would not be permissible under a simple rational basis test.<sup>47</sup> The Supreme Court returned to the question in *Papasan v. Allain*, where it reiterated that there is no fundamental right to education currently recognized by the Supreme Court; however "[a]s Rodriguez and Plyler indicate, this court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right, and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."<sup>48</sup> Finally, the Court's most recent discussion of a federally recognized right to education occurred in *Kadrmas v. Dickinson Public Schools*, when a Montana family attempted to argue that the state infringed on a student's rights by allowing non-reorganized districts to charge a transportation fee for bus services to and from school.<sup>49</sup> Once again, the Supreme Court pointed out that there was no federally recognized right to an education, without fully foreclosing the opportunity for the Court to recognize such a right at a later date.<sup>50</sup>

As of this writing, the Supreme Court has not recognized a fundamental right to an education under the Equal Protection Clause.<sup>51</sup> Although the Court has not proclaimed that such a right cannot exist, its decision in *San Antonio* placed a limit on how useful the future recognition of this right under the Equal Protection Clause could be.<sup>52</sup> Even if the right to an education is of limited utility, there still would be a tremendous benefit to advocates if the right ultimately was recognized in any form.<sup>53</sup> This is because of the legitimacy that the recognition of the right would

---

<sup>46</sup> Daniel Greenspahn, Symposium, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 763 (2008) (explaining that achieving a federal right to an education may not be as meaningful now that *San Antonio* has limited the extent to which students are entitled to an equal right to an education).

<sup>47</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982). The Texas legislature attempted to deprive children of immigrants illegally within the country from accessing public education. The Supreme Court used heightened scrutiny to require that the Texas legislature did not penalize children for their parents' actions, especially in the absence of any demonstrable benefit to the state of Texas.

<sup>48</sup> *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

<sup>49</sup> See generally *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988).

<sup>50</sup> Bitensky, *supra* note 16, at 572 (arguing that the Court's discussion of the federal right to an education was purely dictum, and that it reiterated that one hasn't been recognized. *Bitensky* also explains that *Kadrmas* further revealed the reluctance of the Court to accept the right, decreasing the likelihood that a future court would discover such a right).

<sup>51</sup> *Kadrmas*, 487 U.S. at 458 ("Nor have we accepted the proposition that education is a 'fundamental right,' like equality of franchise, which should trigger strict scrutiny when the government interferes with an individual's access to it.").

<sup>52</sup> The language of *San Antonio* and subsequent cases addressing the unlikely possibility that there is a federal right to an education also delimited the extent to which that right would be governed by equity considerations under the Equal Protection Clause.

<sup>53</sup> Bitensky, *supra* note 16, at 635-37 (arguing that a federally recognized right would "impart the idea that education, rather than being simply a necessary rite of passage, is a matter of supreme importance..." This heightened

provide for federal education claims. Even if the right did not afford students access to a quality education, it would increase the odds of the students gaining access to the federal court system, through which they could argue for incremental increases in the minimum quality of education that children have a right to.

It is doubtful *Kadrmas* will be the last time we hear from the Supreme Court on the fundamental right to an education via the Equal Protection Clause. In the meantime, there are several other Constitutional and legal handles with which to argue for the right to an education. The Supreme Court has not yet squarely ruled upon the remaining arguments, but as the literature develops, advocates may place greater emphasis on the alternatives to the Equal Protection clause in future cases.

## 2. The Due Process Clause

The shortcomings of the Equal Protection Clause have caused scholars and advocates to seek other footholds in the Constitution to fight for the recognition of a right to an education. The Substantive Due Process Clause appears to have the most compelling arguments for such recognition at this time. Essentially, each individual state has some version of a Compulsory Education Clause.<sup>54</sup> This means that each state requires all children below a certain age to attend schooling of some form. The argument is that when the states require the institutionalization of children, they have invoked certain affirmative duties that, if not properly performed, give rise to a Substantive Due Process claim by the people who have been deprived of their rights.<sup>55</sup> Although this argument has led to the successful recognition of rights in some institutional settings, it has yet to be addressed by the Supreme Court in regards to a fundamental right to an education.<sup>56</sup>

The argument for a right to an education under the Substantive Due Process Clause is intuitively compelling. In light of many of the most egregious examples of public school facility neglect,<sup>57</sup> we appear to be in a situation where the state has the right to deprive all students of their free will to choose whether or not to attend school, but in return has no federally-backed obligation whatsoever to ensure that the schools these children are obligated to attend are safe, clean, and positive environments.<sup>58</sup> Whereas many cases have been decided that have required a certain level of quality for prisons and mental institutions, it seems patently unfair that our

---

significance would help foster the collaborative focus necessary to improve education in America).

<sup>54</sup> *Id.* at 586-87.

<sup>55</sup> Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 203 (2006).

<sup>56</sup> *Id.* at 210 (extending substantive due process rights to prisons (citing *Estelle v. Gamble*, 429 U.S. 105, 104 (1976)); 211 (extending substantive due process rights to hospitals (citing *Youngsberg v. Romeo*, 457 U.S. 307, 315 (1982)); 215 (extending substantive due process rights to other custodial settings (citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989))).

<sup>57</sup> Ciolino, et al., *Education Reform in New Orleans: Voices from the Recovery School District*, 12 POLICY FUTURES IN EDUC. 4, 465 (2014) (describing a classroom in which all of the ceiling tiles were removed to perform mold remediation. The ceiling tiles were never replaced and the mold returned. Ultimately, the teacher had to continue teaching in a classroom with visible mold and wires hanging from the ceiling).

<sup>58</sup> *San Antonio v. Rodriguez*, 411 U.S. 1, 34-36 (1973).

youngest residents do not experience similar protections in their most formative years.<sup>59</sup>

Furthermore, any claims that school choice, homeschooling, or private schooling excuse the states from providing a certain level of facilities care are contextually unreasonable. The students in the most unsound school buildings often come from the most disadvantaged backgrounds, and thereby would be less able to exercise their rights of choice than their more advantaged counterparts who probably already have access to safe school buildings in the first place.<sup>60</sup> Despite the hypothetical ability for students to opt out of public schools while still complying with compulsory education laws, the reality is that students are being forced to attend dangerous school buildings under threat of penalty.<sup>61</sup>

### 3. Other Avenues Towards a Federal Right of Education

Although the Equal Protection Clause and the Substantive Due Process clause appear to be the two strongest arguments for a federally recognized right to an education, there are several other footholds in the Constitution and federal legislation that scholars have argued could or should be read to recognize or create a right to an education. First, the Privileges and Immunities clause may contain the right to an education because without an adequate education, citizens may be unable to enjoy the privileges of citizenship in a modern society.<sup>62</sup> The argument for Privileges and Immunities violations is enhanced by the Federal Tax Code's deduction for state and local taxes. Essentially, the federal government is providing a subsidy for state level funding that abridges the privileges and immunities of citizens.<sup>63</sup> Furthermore, the right to free speech and the right to vote have been argued as casting penumbras over the right to an education, because both of these rights require mastery of certain intellectual skills or possession of certain information.<sup>64</sup> Finally, some have argued that the ever increasing federal presence in education, through a half century of expanding legislative influence over the previously local obligation, has resulted in a legislatively granted right to an education.<sup>65</sup> These legislative enactments include The Elementary and Secondary Education Act, The No Child Left Behind Act, and the creation of the Federal Department of Education, to name a few.<sup>66</sup> Specifically, the requirements of funding, access, and assessment contained within these enactments creates a federally imposed minimum that the states must provide to students within their boundaries.<sup>67</sup>

Although each of these arguments is interesting and intellectually gratifying, it is

---

<sup>59</sup> See generally Aviel, *supra* note 55.

<sup>60</sup> Aviel, *supra* note 55, at 209.

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Bitensky, *supra* note 16, at 606-15 (providing an extended discussion of the argument).

<sup>63</sup> Kara Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1290 (2003).

<sup>64</sup> Bitensky, *supra* note 16, at 596-606.

<sup>65</sup> Greenspahn, *supra* note 46, at 765.

<sup>66</sup> For a discussion of federal education spending, see, e.g., Sarah G. Boyce, Note, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government's Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1030-45 (2012).

<sup>67</sup> *Id.*

unlikely the Supreme Court will hold that the right to free speech or the right to vote require the federal government to police the national education landscape to ensure that schools are providing the tools necessary to think freely or understand political arguments.<sup>68</sup> The Court historically has treated these rights as negative rights, which means they confer no affirmative duty on the government to act. Negative rights merely proscribe actions by the government that infringe upon these rights.<sup>69</sup> Although some negative rights have resulted in the creation of affirmative duties on the part of state governments,<sup>70</sup> it seems unlikely that the right to vote or speak freely will result in the imposition of a meaningful right to an education, as the Supreme Court already has explicitly rejected this argument at least once.<sup>71</sup>

Furthermore, the Privileges and Immunities Clause has enjoyed little attention by the Supreme Court on any subject since the *Slaughterhouse Cases* in 1873.<sup>72</sup> Finally, the legislative rights argument appears to be ineffectual from the outset. Even if there is a legislatively created right to an education, it is unlikely that the quality of education will increase by a mere judicial recognition of this right. If states and localities are not conforming to the laws that already have passed, then they are already in violation of the law. No judicially recognized right will increase the responsibilities of these states and localities, because the federal government already can compel compliance with existing laws. Furthermore, if Congress sees fit to increase the requirements of national programs through potential penalties of reduced funding or sanctions, then it may do so. Recognition of the right to an education through legislative enactments will be virtually inconsequential, unless the right to an education has some intrinsic value, however defined.<sup>73</sup>

#### *B. Individuals' State Rights to an Education*

Every state constitution contains language requiring the state to maintain some system of free public schools.<sup>74</sup> The mechanisms by which these systems must be run, and the terms used to describe the goals and functions of these systems, are largely undefined.<sup>75</sup> Therefore, the subject of relevant litigation in many states has centered on defining what that state's responsibilities are, and whether those responsibilities have been met.<sup>76</sup> State-level attempts to recognize and define

---

<sup>68</sup> The Supreme Court dismissed the claim of a sufficient nexus between education and speech in *San Antonio v. Rodriguez*, 411 U.S. at 36 (stating, "The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.").

<sup>69</sup> Bitensky, *supra* note 16, at 576-77.

<sup>70</sup> See generally Aviel, *supra* note 55.

<sup>71</sup> See *San Antonio*, 411 U.S. at 36.

<sup>72</sup> Bitensky, *supra* note 16, at 607.

<sup>73</sup> *Id.* at 636-37.

<sup>74</sup> ODDEN & PICUS, *supra* note 1, at 40.

<sup>75</sup> *Id.* (explaining that the specific language of a state constitution's education clause and the political history of the state's relation to education impact the degree to which a court imposes an affirmative duty to provide a certain level of education.).

<sup>76</sup> *Id.* at 30.

the right to an education have come in two “waves” of litigation: the pursuit of “equitable” resource distribution, and the pursuit of an “adequate” education.<sup>77</sup>

Equitable distribution can be described as requiring that the quality of educational inputs provided for one school, district, or group within a state is substantially similar to others within the same state.<sup>78</sup> Equity litigation has encountered several problems. First, the permissible variance in educational inputs is hard to pinpoint from a constitutional standpoint. If students in lower income districts are receiving slightly fewer resources, even though they have significantly higher needs, has equity been achieved? Furthermore, localities have always been allowed, if not expected, to supplement state inputs to school districts.<sup>79</sup> Are private individuals to be prevented from supplementing their educational allotments simply to ensure that wealthier districts do not outspend the districts with the least funding? Due to an inability to satisfactorily agree on the varying needs of students—and perhaps out of a reasonable desire to decrease antagonism between geographic and socioeconomic groups—equity was a short-lived goal for state educational litigation.<sup>80</sup>

Adequacy, on the other hand, focuses on whether the overall inputs into a school or district are enough to provide some minimally acceptable level of education that will allow the students the opportunity to succeed in school and in life.<sup>81</sup> The primary departure from equity in this line of litigation is that it is irrelevant whether other districts are providing more or less for their students. All that matters is whether the students have sufficient resources to create an opportunity for a meaningful education. Obviously, court battles ensue over what is necessary for an “adequate education.”

Unlike the federal counterparts to equity and adequacy litigation, many state courts have declared that their constitutions create a right to an education, and that this right places affirmative responsibilities on the state legislatures.<sup>82</sup> Often, these affirmative responsibilities include some requirement that the state finance school facility construction and maintenance to some degree.<sup>83</sup> This article now will assess the litigation of select states to demonstrate the successes and limitations of a state-based fight for school facility financing.

### 1. Equity Litigation

The two most famous cases in the fight for fiscal equity at the state level were New Jersey’s *Robinson v. Cahill*, and California’s *Serrano v. Priest II*.<sup>84</sup> Each of these cases resulted in the relevant state supreme court holding that the state must create, to the greatest extent possible,

---

<sup>77</sup> *Id.* at 31 (explaining that school finance litigation can be categorized in three distinct waves, with the first pertaining to the federal level requirements, the second to achieving equity at the state level, and the third to achieving adequacy at the state level.)

<sup>78</sup> *Id.* at 31.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 37 (explaining that equity litigation occurred primarily between 1973-1989).

<sup>81</sup> *Id.* at 31.

<sup>82</sup> *Id.* at 37.

<sup>83</sup> *Id.* at 154.

<sup>84</sup> *Id.* at 37-39.

an equality of educational inputs for all districts within the state.<sup>85</sup> Unfortunately, pressure to reduce taxes, and a lack of a mandate to ensure some basic achievable level of educational input resulted in a poorly funded, albeit equitable, system for statewide funding.<sup>86</sup> Odden and Picus have suggested that, although equity lawsuits had a less than fifty percent success rate, the increase in state level litigation caused many states to increase equity of their own accord, in an effort to avoid lawsuits altogether.<sup>87</sup>

## 2. Adequacy Litigation

As the shortcomings of equity lawsuits became clearer, reform attempts at the state level began to take the form of adequacy litigation.<sup>88</sup> In some instances, plaintiffs brought both state Equal Protection claims and Education Clause adequacy claims, only to have the courts dismiss the equal protection claims and focus on the adequacy requirement from the states' Education clause.<sup>89</sup> In others, the plaintiffs brought claims of adequacy outright. Regardless of their origin, adequacy cases began achieving a greater level of success than their equity counterparts.<sup>90</sup> This may be because the task of creating a fair remedy under the demands of an adequate system of education is much more straightforward than pursuing an equitable system.

In many adequacy cases, the courts first set out to determine what educational inputs are required to achieve the constitutional mandate for a system of education within that state.<sup>91</sup> Compared to attempting to envision a system in which parity of funding is achieved between the poorest and richest districts of the state—complete with all of the political, legal, and economic ramifications of neutralizing widely disparate funding levels—simply defining prerequisites for an education is an easy task. The Supreme Court of New York attempted to create a comprehensive list of educational inputs necessary to achieve adequacy, whereas the Supreme Court of Kentucky approached the adequacy question by articulating certain educational opportunities that the state needed to provide to its students.<sup>92</sup> Several other states incorporated

---

<sup>85</sup> *Id.* at 37-38.

<sup>86</sup> *Id.* at 39.

<sup>87</sup> *Id.* at 39.

<sup>88</sup> *Id.* at 39.

<sup>89</sup> *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (N.Y. 1995) embodies this dual approach by litigants and courts to settle whether the state must provide equity or adequacy, or both. The plaintiffs brought an Equal Protection challenge under the state's constitution in an effort to demand equity. The court dismissed this claim by citing New York and United States Supreme Court jurisprudence that a successful equal protection claim requires establishment of proof to discriminate against a suspect class. *Id.* at 669. In upholding the adequacy challenge, the court held that "the state must assure that some essentials are provided. Children are entitled to minimally adequate facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks." *Id.* at 666.

<sup>90</sup> ODDEN & PICUS, *supra* note 1, at 48.

<sup>91</sup> *Campaign for Fiscal Equity*, 655 N.E.2d at 666. The court explained that the constitution imposed a requirement on the State of New York to provide buildings, books, and desks, whereas in *Rose v. Council for Better Education*, the court explained that the state had to provide enough resources to accomplish goals such as proficiency of subject matter and an understanding of civic life. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 208 (Ky. 1989).

<sup>92</sup> *See Campaign for Fiscal Equity*, 655 N.E.2d at 666; *see also Rose*, 790 S.W.2d at 208.

these lists by reference, or comprised similar expectations within their states.

### 3. The Tragedy of *Abbott v. Burke*

As more states develop mechanisms with which to ensure that they are upholding their constitutional requirement to provide a free public education to all students, it is tempting to believe that we, as a collection of states, are moving towards a resolution of our centuries-old educational deficit. Unfortunately, this is not so. The fundamental thesis of this article is that the states do not possess the ability to provide fully functional, safe, and adequate facilities for public education within their borders by utilizing their resources alone. As important as these equity and adequacy battles are for assuring that underserved students within a state are provided with a remedy in their quest for justice, a judicial order can only go so far when a state is on the verge of a fiscal crisis in its own right. *Abbott v. Burke*, the twenty-one part litigation series in New Jersey, best demonstrates the limitations of a judicial remedy.<sup>93</sup>

Although the *Abbott* cases involved twenty-one rulings over the course of twenty-six years, it is important to note that the five-part *Robinson v. Cahill*<sup>94</sup> litigation series preceded the *Abbott* cases. Altogether, the *Abbott* court returned four separate declarations that the State of New Jersey's education financing system was unconstitutional, either due to its programmatic design or due to the state's failure to fund its own program.<sup>95</sup> In *Abbott XX*, the state finally received approval from the Supreme Court of New Jersey, stating that the financing mechanism satisfied the state's constitutional duty to provide a thorough and efficient system of education.<sup>96</sup> Although this sounds like a long-sought victory, New Jersey simply failed to fund its new formula, resulting in the *Abbott XXI* order, which directed the state to fully fund the program in order to comply with its constitutional mandate.<sup>97</sup>

The State of New Jersey had decades of court orders compelling it to design a funding program to adequately support student learning in the *Abbott* Districts, and it still could not find a politically and economically feasible solution. Perhaps more troubling, however, is how many of New Jersey's underserved students were not even counted among the *Abbott* Districts in the first place. Altogether, when the *Abbott* litigation began, there were 205 school districts within New Jersey that were unable to provide the types of educational inputs that would be required under the *Abbott* reading of the "thorough and efficient" clause of the New Jersey constitution.<sup>98</sup> Despite the pervasive need for additional resources throughout New Jersey, the state's Supreme Court

---

<sup>93</sup> The *Abbott v. Burke* litigation series began in 1985 with *Abbott v. Burke I*, 495 A.2d 376 (N.J. 1983). The last installment was *Abbott v. Burke XXI*, 20 A.3d 1018 (N.J. 2011). In between, there were nineteen opinions and judicial orders that accomplished everything from declaring the state system of funding to be unconstitutional, to defining boundaries of educational inputs and opportunities that the state must provide.

<sup>94</sup> *Robinson v. Cahill I*, 303 A.2d 273 (N.J. 1973).

<sup>95</sup> See generally *The History of Abbott v. Burke*, THE EDUC. LAW CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html>.

<sup>96</sup> *Abbott v. Burke XX*, 971 A.2d 989, 992 (N.J. 2009).

<sup>97</sup> *Abbott v. Burke XXI*, 20 A.3d at 1045.

<sup>98</sup> Kyle E. Gruber, *Bringing Home the Bacon: A Case for Applying the New Jersey Urban School Funding Remedy from Abbott v. Burke to Poor Rural School Districts*, 2 COLUM. J. RACE & L. 1, 195 (2012).

provided a remedy for only the twenty-one underfunded urban districts.<sup>99</sup> This left the majority of the underserved suburban and rural districts to attempt to resolve their resource needs in the absence of a state mandate, or take to the courts for their own rights in other litigation.<sup>100</sup> This means New Jersey was incapable of properly tending to its highest need students, let alone all students. This shortcoming alone illustrates how significant the problem of underfunding schools in some states can be, and how incapable many states are of handling these matters without assistance.

Ultimately, the lessons to be learned from decades of state-level litigation are as follows. First, although the state litigation path is tortuously slow, the odds of achieving success are substantially higher under arguments of a state right to an education than to the federal right to an education. Secondly, the language of a state constitution's Education Clause and political history often determines the extent of the right to an education in that state. Finally, the remedy afforded by successful state litigation over the right to an education always will be limited by the state's budgetary reality. Unfortunately, the resource needs of school facilities in virtually every state outstrip the resource availability of the states.

### III. FISCAL CONSTRAINTS TO PROVIDING SUFFICIENT SCHOOL FACILITIES

The total amount of resources needed to modernize school facilities is unclear. First, several different studies have been conducted in an attempt to pinpoint a definitive amount, but each of them has come with considerable shortcomings. First, the General Accounting Office's \$112 billion assessment was performed using a limited sample of buildings, and it did not account for technological updates.<sup>101</sup> Next, the Nat'l educ. ass'n's \$322 billion assessment attempted a more thorough assessment of school facility needs by gathering data from experts within each state and performing a thorough analysis of the most current data.<sup>102</sup> The NEA report itself acknowledges that the \$322 billion estimate is likely a conservative number, but explains that the only way to achieve a truly accurate number would be to have the states conduct the assessments themselves, and routinely update their inventory.<sup>103</sup> Finally, an estimate from 21st Century Schools places an upper-level estimate at \$650 billion, using aggregate deferred maintenance calculations, rather than performing an actual assessment.<sup>104</sup> This section compares the fiscal capacity of the states with the estimated school facility needs, to demonstrate the enormity of the facilities' need compared to the scarcity of state discretionary resources. It then examines some federal precedent for the scale of the program proposed in Part V of this article.

#### A. State Fiscal Limitations

Unfortunately, the most recent and reliable study that assessed school facilities needs is fifteen years old. The Nat'l educ. ass'n's Assessment provided a \$322 billion estimate for

---

<sup>99</sup> *Id.* at 169, 195.

<sup>100</sup> *Id.* at 169.

<sup>101</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 7-8.

<sup>102</sup> *Id.* at 10-11.

<sup>103</sup> *Id.* at 23.

<sup>104</sup> 21ST CENTURY SCHOOL FUND, *supra* note 23, at 1-2.



infrastructure and technological upgrades using state-level aggregates.<sup>105</sup> Although this estimate is somewhat outdated, subsequent research has indicated that federal involvement in facilities funding remains very low,<sup>106</sup> and that the amount of money states and localities have dedicated to facilities since the mid 1990s has been vastly outstripped by the need.<sup>107</sup> Finally, in 2009, the 21st Century Fund pegged the possible estimate at approximately \$650 billion dollars.<sup>108</sup> In light of these increasing estimates and a continued absence of federal resources, it seems plausible that the NEA's estimates in 2000 provide an instructive, albeit conservative, baseline for school resource needs today. Therefore, this article will compare the NEA's state-level estimates from 2000 with current fiscal capacity of the states, to demonstrate the unlikelihood that states will resolve these issues on their own.

According to the NEA report, the nine states with the highest resource needs made up nearly 60% of the national need of \$322 billion.<sup>109</sup> Of course, the actual needs of a state are only useful from a policy standpoint when these numbers are compared to the fiscal capacity of the states. Therefore, it is important to note that with a \$322 billion resource need for facilities in the year 2000, the aggregate of state general fund expenditures for the fiscal year 2015 is estimated to be \$751.6 billion.<sup>110</sup> Therefore, even a fifteen-year-old estimate would encompass nearly half of the states' aggregated discretionary budget.<sup>111</sup> Using the 21st Century estimate of \$650 Billion, facilities needs would make up more than 85% of the state's general funds. Even with this tremendous resource deficit, public elementary and secondary education spending comprise the single largest use of general fund budgets, averaging approximately 35% of expenditures nationwide.<sup>112</sup> Furthermore, when funding from all sources is included, public elementary and secondary education spending comprises 19.5% of the states' aggregated \$1.8 trillion dollar expenditures, outstripped only by Medicaid spending.<sup>113</sup>

---

<sup>105</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 7.

<sup>106</sup> MARY FILARDO & SEAN O'DONNELL, 21ST CENTURY SCHOOL FUND, FEDERAL SPENDING ON PK-12 SCHOOL FACILITIES 13 (2010).

<sup>107</sup> Filardo, et al., *supra* note 9, at 6-17. After \$504 billion was spent between 1995 and 2004, it was estimated that \$363 billion was spent on new construction, much of which was directed towards accommodating increasing student enrollment. Existing buildings experienced little investment compared to their increasing deferred maintenance needs.

<sup>108</sup> 21ST CENTURY SCHOOL FUND, *supra* note 23, at 1.

<sup>109</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 16. A summary of these figures is as follows: New York: \$50.7 billion; California: \$32.9 billion; Ohio: \$25 billion; New Jersey: \$22 billion; Texas: \$13.7 billion; Illinois: \$11.3 billion; and Massachusetts, Michigan, and Pennsylvania all with approximately \$10 billion resource needs.

<sup>110</sup> THE NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES: AN UPDATE ON STATE FISCAL CONDITIONS 1 (2014).

<sup>111</sup> *Id.* at 1. The general fund is the primary mechanism used for state discretionary funds. State funds not allocated to the general fund are usually earmarked for a specific purpose by some previously enacted legislative instrument.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* The total state spending reaches \$1.8 trillion, with general fund revenue comprising 40.5% of all revenue, federal funds comprising 30.3%, other state funds comprising 27.1%, and bonds comprising 2.1%. Medicaid expenditures from all sources comprised 25.8% of expenditures in 2014.

An even clearer picture is provided when state-level resources are compared to state-level need. For instance, the state with the highest resource need in 2000 was New York. According to the NEA, New York public schools needed \$50.7 billion for modernization.<sup>114</sup> In 2013, the State of New York had access to \$60.5 billion in its general fund.<sup>115</sup> California, the state with the second highest estimated need fared slightly better. In 2000, California had a \$32.9 billion estimated need,<sup>116</sup> compared to a \$98.8 billion dollar general fund in 2013.<sup>117</sup> Finally, the state with the third highest estimated need was Ohio. The NEA pegged Ohio's facilities need in 2000 at just under \$25 billion,<sup>118</sup> whereas the state's 2013 general fund amounted to only \$30.5 billion.<sup>119</sup>

Assuming that comparing facility needs from 2000 with general fund resources in 2015 is a remotely accurate depiction of need relative to resources, New York and Ohio would need to spend more than 80% of their discretionary funds on school facilities, and California would need to spend 33.3%. Considering that education spending already accounts for over 30% of the national average for general fund expenditures, repairing these buildings appears to be a mathematical impossibility at any point in the foreseeable future.

Predictably, there is some relation between resource need and general fund revenue. The extent of facilities needs is to some degree a function of the size of the state and to the size of the state's economy. Therefore, looking at only the three highest need states may incidentally imply that the remaining states are faring better. By performing the same analysis on the states with the three lowest estimated needs from the NEA report in 2000, we can achieve a clearer picture of the uniformity of need across the country. The Nat'l educ. ass'n's 2000 report estimated that the State of Vermont had the lowest need, at \$333.3 million.<sup>120</sup> Vermont was followed by North Dakota and New Hampshire, which had estimated needs of \$545.2 million and \$620.3 million, respectively.<sup>121</sup> The National Association of State Budget Officers (NASBO) report explained that in 2013, Vermont had general fund resources amounting to \$1.3 billion, whereas North Dakota had \$3.9 billion, and New Hampshire had \$1.5 billion.<sup>122</sup> Comparing these needs to resource availability, facility needs in the three states represent 25% of general fund resources in Vermont, 14% in North Dakota, and 42.5% in New Hampshire. Even though these small states are faring proportionately better than the larger states, it still is unlikely that any state would be able to reallocate enough of its general fund dollars to provide adequate and modern school buildings for all of their students in the foreseeable future.

---

<sup>114</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 16.

<sup>115</sup> THE NATIONAL ASS'N OF STATE BUDGET OFFICERS, *supra* note 110, at 4.

<sup>116</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 16.

<sup>117</sup> THE NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 110, at 4.

<sup>118</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 16.

<sup>119</sup> THE NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 110, at 4.

<sup>120</sup> NAT'L EDUC. ASS'N, *supra* note 22, at 18.

<sup>121</sup> *Id.* at 18.

<sup>122</sup> THE NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 110, at 4.

*B. Federal Fiscal Capacity*

The budget of the United States government is larger than the combined budgets of the total funding sources of all fifty states combined. According to NASBO, the combined total funding for state governments from all sources in 2015 was \$1.8 trillion.<sup>123</sup> The Fiscal Year 2014, according to the White House's budget manual, included expenditures of nearly \$3.8 trillion.<sup>124</sup> The aggregate funding needs of the states, compared to the states' funding *from all sources* resulted in a need that amounted to about 17.8% if the NEA's conservative estimate is accurate, and 36.1% if the 21st Century's \$650 billion estimate is accurate. Recall, however, that funding from all sources is not an accurate way to conduct budgetary analysis, because the majority of state funds are earmarked for specific purposes prior to a legislative session. Similarly, the federal budget for the Fiscal Year 2014 encompassed \$3.8 trillion in expenditures,<sup>125</sup> but only about \$1.06 trillion of these funds were contained within the discretionary funding mechanism.<sup>126</sup> Making matters worse, the federal government anticipated total receipts to amount to about \$3.03 trillion.<sup>127</sup> In other words, the federal government was operating at a deficit of over \$700 billion dollars, or more than 20% of the total budget.

When the federal budget is broken out into its member departments and agencies by discretionary funding only, the Department of Education is the third most highly funded department. The Department of Education was given an operating budget of \$71.2 billion, or 6.7% of the total discretionary budget.<sup>128</sup> The Department of Health and Human Services was the second highest funded department, at \$78.3 billion or 7.4% of the discretionary budget.<sup>129</sup> And the Department of Defense was, predictably, the most highly funded department. In Fiscal Year 2014, the Department of Defense was allocated \$526.6 billion, or 49.8% of the total discretionary budget.<sup>130</sup>

It sheds further light on the scope of the school facilities funding problem that, by using more generous estimates, it would take more resources than those allotted to the entire Department of Defense just to modernize America's schools!<sup>131</sup> Furthermore, the facilities needs estimates could only barely be fully funded using the 2014 federal deficit spending.<sup>132</sup> In other words, school facility financing needs are beyond the fiscal capacity of the federal government.

---

<sup>123</sup> *Id.* at 1.

<sup>124</sup> OFFICE OF MGMT. AND BUDGET, FISCAL YEAR 2014, BUDGET OF THE U.S. GOVERNMENT 183 (2014).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 222.

<sup>127</sup> *Id.* at 183.

<sup>128</sup> *Id.* at 222.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> This assertion is arrived at by using the 21st century schools facilities estimates of \$650 billion (found at 21<sup>ST</sup> CENTURY SCHOOL FUND, *supra* note 23, at 1) and comparing it to the 2014 Department of Defense budget allocations of \$527 billion (found at OFFICE OF MGMT AND BUDGET, *supra* note 124, at 222.)

<sup>132</sup> Office of Mgm't and Budget, *supra* note 125, at 183 (explaining that in 2014, the federal government was projected to spend \$744 Billion more than it anticipated collecting in total receipts).

When this is combined with the limitations imposed on states discussed above, or the \$369 billion in outstanding bonds being held by local governments and school districts,<sup>133</sup> school facility funding is in a difficult position.

In light of budgetary constraints at every level of government, coupled with the burgeoning needs of school facilities, it is important that a collaborative solution be developed to begin addressing this need as soon as possible. The price tag on total school facilities outstrips the capacity of all three levels of government for any single year alone, but if no steps are taken to begin remediating this crisis, it will only grow less achievable and more pressing over time. The collaborative program should engage all three levels of government and operate using accurate and current information. The program need not attempt to fully resolve this crisis because such an impossible undertaking may deter any effort at all. This crisis took us decades to create and will undoubtedly take us decades to resolve; however, by using the blueprint below, and breaking the problem into achievable components, we may be able to realize a national school system comprised of safe, productive, and modern schools within our lifetimes.

#### IV. A BLUEPRINT FOR PUBLIC SCHOOL FACILITIES REFORM

The tremendous and increasing need for financial resources to repair and maintain public schools in this country makes abundantly clear that the states are incapable of managing this responsibility on their own. Local control may be important on an ideological basis to those who recognize the socialization of students that takes place within schools and the benefits that come from community involvement in schools. Unfortunately, the reality is that for many schools and districts “local control” means control over a nightmarish school building that exposes students and staff to toxins while demonstrating that their city, state, and country do not value them enough to provide healthy and functional facilities in which they may learn and prepare for their lives as adults.

The truth is our localities—particularly in low-income communities—do not have the financial resources to maintain the schools over which they have been delegated authority by their respective states. On the other hand, each state is constitutionally vested with the affirmative obligation to create a system of education. This obligation is defined either within the text of the state’s constitution or by subsequent litigation. Unfortunately, the states do not possess sufficient resources to bring each school within their borders into safe and modern functionality. Although there is no affirmative duty on the federal government to provide an education for students, nothing forecloses the federal government’s ability to help ameliorate the facilities fiasco that is unfolding in America.

The federal government should take a leadership position in the effort to provide safe schools to all children. Not only would the investment in our young people pay off in the long run through increased property values<sup>134</sup> and increased earning potential,<sup>135</sup> but it would also result in immediate economic recovery by putting thousands of construction workers back to work.<sup>136</sup> The

---

<sup>133</sup> Filardo et al., *supra* note 5, at 2.

<sup>134</sup> Filardo et al., *supra* note 9, at 8.

<sup>135</sup> U.S. Bureau of Labor Statistics, *supra* note 34.

<sup>136</sup> Filardo, *supra* note 24, at 2 (explaining that a \$20 Billion investment in maintenance funding alone could create up to 250,000 jobs).

program needs to make funding available to states to assist with the construction, renovation, and maintenance of public school facilities. It also needs to have a delivery mechanism, both in terms of how funding is allocated to states and school districts, but also to assess how funding distributions are prioritized. Finally, the program needs to place certain requirements on states to ensure that funds are used appropriately, and that the national investment in public school facilities is protected in the long run. Indeed, there is no sense in rebuilding every school in America if we simply are going to let them fall to pieces in the coming years.

#### *A. Before the Program is Designed*

##### 1. Updating the GAO Assessment

Although it is tempting to list specific figures that “sound good” for how much money the federal government should allocate for school facilities, any such assertion within this article would be truly meaningless—especially in light of the five hundred billion dollar difference among the three estimates that have been enumerated in the past two decades. Therefore, before the federal government begins establishing the specifics of a facilities program, it should endeavor to update the original GAO report to reflect the current school facilities need.<sup>137</sup> Once the GAO has provided an updated assessment of public school facilities, these estimates should be disaggregated into state level data and made available to the individual states for future benchmarking and need-assessment.

##### 2. Creating a Facilities Management Office within the Department of Education

Presently, there is no office of school facilities housed within the Department of Education.<sup>138</sup> In fact, there actually are more people working on school facilities within the Environmental Protection Agency and the Department of Energy than within the Department of Education.<sup>139</sup> Therefore, the Department of Education should create an Office of School Facilities to ensure accountability that funding is properly utilized and inventories are properly maintained.

#### *B. Setting Aside Funding*

Once the GAO report has been updated and the facilities office in the Department of Education has been created, the federal government can begin to establish a fund for facilities.

##### 1. Determining the Amount of Funding and a Distribution Mechanism

Using the updated GAO report, Congress can set a realistic goal for a funding level for the program. Although the amount to be appropriated to this fund will be a largely political decision,<sup>140</sup> it is important to remember that each one billion dollar investment will result in an

---

<sup>137</sup> Cheng et al., *supra* note 19, at 6-7.

<sup>138</sup> Filardo & O’Donnell, *supra* note 106, at 13.

<sup>139</sup> *Id.*

<sup>140</sup> 21ST CENTURY SCHOOL FUND & BUILDING EDUC. SUCCESS TOGETHER, INTERIM ANALYSIS OF SCHOOL FACILITY FUNDING IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 3 (2010) (explaining that the most

estimated nine to ten thousand jobs.<sup>141</sup> Furthermore, as will be addressed below, the federal government should not be the only level of government acting in this arena.

The federal government must then determine how funds will be distributed, and for what purposes. First, it must be decided whether states should receive the funds or if the funds should be dispersed directly to school districts. As one author suggests, virtually every school receives some funding through Title 1 of the Elementary and Secondary Education Act.<sup>142</sup> Therefore, there likely is some administrative ease to be achieved by utilizing an existing distribution mechanism, rather than creating an entirely new program.

Furthermore, it must be decided whether to provide this assistance in the form of debt payment assistance, or upfront aid. Presently, most school districts finance capital outlay expenditures through issuing local bonds.<sup>143</sup> The result of this reliance on bonded indebtedness was a staggering \$369.4 billion outstanding long-term loan debt from the aggregated district capital expenditures at the end of 2008.<sup>144</sup> Therefore, it may be more economically efficient to provide assistance in the form of up-front payments; however, there may be greater accountability to providing debt relief because the costs of capital outlay are fully defined once the projects have been financed.

### *C. The Responsibility of the State or School District*

Regardless of whether the federal government determines that the state or school district is the appropriate direct recipient of federal dollars, several strings must be attached to these legal entities to ensure that the investment is protected, that the funds are properly used, and that the funds are properly distributed. These requirements should include the responsibilities of planning and taking inventory, maintenance, need-based distribution, and meeting green building requirements.

#### 1. The Creation of a State Master Plan and the Maintenance of a Statewide Facilities Inventory

The intelligent design of a statewide system of public schools necessitates a plan for the strategic placement and development of school facilities, both within and across districts. Therefore, the Department of Education within each state government should be required to maintain a master plan that is revisited periodically. Furthermore, the state Department of Education also should maintain an inventory of the school facilities within the state, including information on maintenance needs and building improvement requests.<sup>145</sup> This will allow for

---

recent federal government attempt was during the passage of American Recovery and Reinvestment Act (ARRA), in which \$16 Billion was proposed for public school facilities. These funds were reallocated before the bill's passage and replaced with a permissive use clause on other funds, allowing for a percentage of recovery funds to be used for public school facilities. Thirty-five states used none of the funds on school facilities, and only six used more than \$1 Million. Altogether, very little of the ARRA funding was spent on school facility improvements).

<sup>141</sup> Filardo et al., *supra* note 36, at 1.

<sup>142</sup> *Id.* at 2.

<sup>143</sup> Filardo et al., *supra* note 5.

<sup>144</sup> Filardo et al., *supra* note 36, at 2.

<sup>145</sup> See, e.g., THE NAT'L EDUC. ASS'N, *supra* note 22, at 23.

greater responsiveness and transparency.

## 2. The States' Requirement to Contribute Funds and Ensure the Creation of a School Maintenance Fund

The scope of the facilities problem in America necessitates a matching grant program with the states. Federal dollars simply will go much further if states are contributing to capital outlay expenditures. The percentage of state contributions will be a political decision made in Congress, similar to the current mechanism for financing Medicaid.<sup>146</sup> There should also be a restriction on the percentage of the state contribution for school facility maintenance that can be received from the localities. This will allow stakeholders from all levels of government to contribute to the decision-making process, without allowing the states to place the burden squarely on localities.

Additionally, one of the main reasons for the current inadequacy of public school buildings is the failure to properly maintain these buildings over time. Studies have recognized the current system of public school maintenance as a 'run-to-fail system.'<sup>147</sup> Presently, maintenance needs often are systemically de-prioritized until they become substantially more expensive problems.<sup>148</sup> Therefore, the states must be required to create maintenance funds for the school facilities. These funds could be created using the same matching formula as the original grant, or by some other means. The maintenance of public schools is an expensive undertaking, with some arguing that a school should spend between 2-4% of the total value of the school on maintenance each year.<sup>149</sup> Modern schools, built to accommodate hundreds of students from multiple age groups, often cost tens of millions of dollars to build.<sup>150</sup> Although setting aside millions of dollars a year for maintenance of school buildings sounds expensive, it is substantially cheaper than allowing new and recently renovated buildings to deteriorate.

### *D. Green Buildings, Safe Surroundings, and Productive Environments*

All too often, students receive their education in school buildings that needlessly waste resources such as energy and water, or expose them to toxic substances. As will be illustrated in detail below, the building trends of the late 1900s resulted in buildings that detracted from, rather than contributed to, student learning and productivity. If we are going to undertake this task of renovating the Nation's public schools—or even a very small percentage of them—we should not waste this golden opportunity by replenishing the schools using wasteful, distracting, or toxic inputs.

---

<sup>146</sup> THE NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 110, at 26 (explaining that Medicaid is paid for by a combination of state and federal tax dollars, with the federal government paying the majority). For a discussion of the Federal Government's spending power and its parameters, *see generally* *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>147</sup> *See, e.g.*, 21<sup>ST</sup> CENTURY SCHOOL FUND, *supra* note 22, at 1. Essentially, the lack of availability of maintenance funds, coupled with the bulk of the burden for financing capital outlay in the first place, causes localities to build cheaply and then neglect maintenance needs as they arise.

<sup>148</sup> HUNTER, *supra* note 20, at 2.

<sup>149</sup> Mustapha A. Bello & Vivian Loftness, *Addressing Inadequate Investment in School Facility Maintenance*, RESEARCH SHOWCASE @ CMU 1, 2 (2010).

<sup>150</sup> COWEN INSTITUTE FOR PUB. EDUC. INITIATIVES, NEW ORLEANS PUBLIC SCHOOL FACILITIES UPDATE 2013 13-16 (2013).

### 1. Green Buildings

Architectural trends of the last several decades have resulted in technologies that can substantially reduce the energy and water resource needs of public schools.<sup>151</sup> Furthermore, greater focus has been placed on the environmental health inside of school buildings. For example, researchers have performed studies that demonstrate a correlation between indoor air pollutants and mold in schools, with respiratory diseases for students and adults who work in school settings.<sup>152</sup> Furthermore, traditional HVAC systems may re-circulate toxins throughout a school building.<sup>153</sup> For a federal program to truly accomplish its goals, there must be a set of standards that requires all new schools to be LEED certified (or meet a similar certification program's specifications). These standards must compel architects to create buildings that decrease operating costs and neutralize toxicity. This may sound like an expensive proposition, but the costs of a green building are only 1.5 to 3% higher than a traditional building, and the energy savings pay for themselves in an average of ten years.<sup>154</sup> This is particularly important, because most schools have a minimum life expectancy of thirty years.<sup>155</sup> Furthermore, toxicity reductions will decrease health care needs of students and school employees, thereby further relieving strain on limited taxpayer dollars.<sup>156</sup>

### 2. Safe Environments

Although there is much to be said for community safety, this subsection primarily addresses siting schools in non-hazardous locations. As of 2004, twenty states have no regulations regarding siting schools away from hazardous pollution sites.<sup>157</sup> Furthermore, only 12 states and Washington, D.C. actually prevented schools from being built within certain distances of hazardous sites in 2008.<sup>158</sup> The federal program should be designed to deter states from siting schools near hazardous sites, in order to protect children from chronic illness.

### 3. Productive Environments

Much of the school facilities research has been dedicated towards designing classroom environments in ways that increase productivity. Some of the findings have determined that increasing natural lighting, decreasing background noise, and sufficient ventilation<sup>159</sup> all increase

---

<sup>151</sup> See, e.g., AM. FED'N OF TEACHERS, BUILDING MINDS, MINDING BUILDINGS: OUR UNIONS ROAD MAP TO GREEN AND SUSTAINABLE SCHOOLS 4 (2008).

<sup>152</sup> See, e.g., CHENG, ET AL., *supra* note 19, at 6; see generally BERRY ET AL., *supra* note 28.

<sup>153</sup> AM. FED'N OF TEACHERS, *supra* note 151, at 18.

<sup>154</sup> *Id.* at 24.

<sup>155</sup> ODDEN & PICUS, *supra* note 1, at 156.

<sup>156</sup> See, e.g., AM. FED'N OF TEACHERS, *supra* note 151, at 25.

<sup>157</sup> Daria Neal, *Healthy Schools: A Major Front in the Fight for Environmental Justice*, 38 ENVTL. L. 473, at 486-87 (2008).

<sup>158</sup> AM. FED'N OF TEACHERS, *supra* note 151, at 7.

<sup>159</sup> CHENG, ET AL., *supra* note 19, at 7.



student productivity and improve student health. Furthermore, each of these inputs contributes collectively to a teacher's satisfaction with the working conditions of the relevant school.<sup>160</sup> Research indicates that retaining teachers is one of the most effective ways to increase student performance, because teachers develop their competency over time.<sup>161</sup> Therefore, productivity-enhancing design will increase school quality in two ways: first, by directly supporting student learning, then, by incentivizing teachers to spend more years in the classroom.

## V. CONCLUSION

The task of reforming our public school infrastructure is a monumental one, but it will only slip further from reach if no remedial action is taken. The extent of the problem in most states necessitates federal involvement for an appropriate resolution. Therefore cities, states, and the federal government should work together to construct and finance a program that provides needed funding to deteriorating our outdated schools.

Public school facility finance is in a precarious legal position, because the state entities that may be compelled to provide the adequate school buildings often face budgetary limitations that prevent them from doing so. Meanwhile, the federal government, which has vastly deeper pockets, has no obligation to provide education or school buildings to localities. Despite some constitutional conundrums, improving the Nation's public schools is politically and economically sound policy. Not only would an aggressive program put many Americans back to work, but it also would increase student performance while decreasing energy consumption and healthcare costs in the long run.

However large or small the program is, it is important that proper inventory be taken to understand the true scope of the problem. Furthermore, there must be an office created within the Department of Education to oversee the public schools of the states. After this is achieved, a matching grant should be implemented to ease the burden on the states in an effort to provide positive environments for children. Finally, advancements in green building technology should be utilized, alongside safe siting of schools, and the creation of classroom environments that are conducive to learning. The cost of this program may seem insurmountable, and the politics of organizing and administering this program may present a tremendous challenge; but the cost of doing nothing is far greater.

---

<sup>160</sup> See generally BERRY ET AL., *supra* note 28.

<sup>161</sup> *Id.*