CONTINUED DISPARITIES IN SCHOOL FACILITIES: ANALYZING *BROWN V. BOARD OF EDUCATION*'S SINGULAR APPROACH TO QUALITY EDUCATION

Corsica D. Smith[*]

TABLE OF CONTENTS

---

[*] Attorney at the Law Office of Corsica D. Smith. J.D. 2014, American University Washington College of Law; B.A. 2010, Brown University. I would like to thank Professor Lia Epperson for her comments on earlier drafts and the *Tennessee Journal of Race, Gender & Social Justice* staff for their efforts in editing and preparing my article for publication. I, also, would to thank my family and friends for their encouragement and patience during the writing of this article.

I. INTRODUCTION

People on the outside ... may think we don't know what it is like for [affluent] students, but we visit other schools and we have eyes and we have brains. You cannot hide the differences. You see it and compare . . . .

A student who attends an inadequate school in New York City[1]

Almost sixty years have passed since the United States Supreme Court held that the "separate but equal" doctrine was unconstitutional in *Brown v. Board of Education*.[2] While directly attacking the doctrine that allowed dual schooling systems to operate, the Court stipulated that all schools are equal.[3] All schools were not equalized at the time of *Brown*, however, and many schools, particularly low-income, predominately minority schools, continue to be unequal today. A striking example of this disparity is the condition of inadequate school facilities.

The Merriam-Webster Dictionary defines the word "adequate" as "sufficient for a specific requirement."[4] There are a number of schools in this country that are not "adequate" for the specific requirement of a quality education. The Kanawha County Circuit Court articulated what an adequate facility is:

> [An adequate facility is] structurally safe, contain fire safety measures, sufficient exits, an adequate and safe water supply, an adequate sewage disposal system, sufficient and sanitary toilet facilities and plumbing fixtures, adequate storage, adequate light, be in good repair and attractively painted as well as contain acoustics for noise control.[5]

---

[1] A quote from a Puerto Rican teenager named Israel shows that students educated in inadequate facilities are not only aware that others have superior facilities, but they are aware their facility is inferior in quality. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 104 (1992).
[2] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
[3] *Id*.
[4] *Adequate Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/adequate (last visited Apr. 17, 2013).
[5] Pauley v. Kelly, No. 75-C1268 (Kanawha County Cir. Ct., W. Va., May 1982).

Based on this definition, many urban schools serving predominately minority student bodies would not pass muster because of their dilapidated condition.

The thesis of this paper is that in limiting the focus to desegregation after *Brown*, there was an inadvertent forfeiture of the central argument against disparities and unequal distribution of resources in school facilities. The impact of this limitation is that policymakers are still trying to resolve the same disparities that plagued the system before *Brown*. Ultimately, as a result of the heightened pressure on students to obtain a certain academic level of proficiency under No Child Left Behind ("NCLB"), the need for adequate facilities is even more essential.

Part II of this paper will provide a brief overview of the legal basis for claiming a right to an adequate school facility.[6] While there is no fundamental right to education under the United States Constitution, there are other instruments within the law that grant the right to equal education in adequate facilities.[7] Part III of this paper will evaluate the problems that arise because of inadequate school facilities.[8] It will begin with a brief history of schooling provided to minorities, specifically Blacks preceding and following *Brown*, to provide a historical backdrop for the disparities in school facilities today.[9] Additionally, this part of the paper will summarize popular arguments that highlight the shortcomings of failing to attack segregation and equalization simultaneously.[10] Part III will conclude with a discussion of contemporary trends of disparities in educational facilities, a survey of empirical evidence showing how conditions within school facilities impact student achievement, and a highlight of the conflicting relationship between school facilities and NCLB.[11] Part IV uses the evaluation of the problem outlined in Part III to suggest a number of

---

[6] *See infra* Part II.
[7] *See id.* (discussing the affirmative duty to provide education expressed in most state constitutions).
[8] *See infra* Part III.
[9] *See id.* at A.
[10] *See id*. at B.
[11] *See id.* at C.i-iii.

policy recommendation with the goal of improving school facilities across the nation.[12]

II. RIGHT TO ADEQUATE SCHOOL FACILITIES

Nineteenth-century educator and inventor George Washington Carver said, "Education is the key to unlock the golden door of freedom."[13] The relationship between education and social mobility has existed since the creation of the public school system and remains an underlying principle of education policy.[14] Despite the recognized importance of education in our society, the Court in *San Antonio Independent School District v. Rodriguez* held that education is not a fundamental right[15] and that the government abridging it does not warrant the strictest level of scrutiny.[16] Some scholars, however, argue that *Rodriguez* only stands for no right to equal funding of education, and does not invalidate claims that students are not receiving an adequate education in violation of the Equal Protection Clause.[17] Most notably, in *Papasan v. Allain*, the Court asserted that "[it] has not yet definitively settled the question whether a minimally adequate education is a fundamental right . . . ." [18] Thus, given the cost of litigation and the uncertainty of success in federal courts, there has been a reasonable shift to state courts, where there is tangible success with adequacy claims.

As a result of the affirmative duty to provide education in most state constitutions, claims brought to obtain adequate school facilities are most successful at the state level. Moreover, since 1989, of the

---

[12] *See infra* Part IV.
[13] Proclamation No. 6827, 60 Fed. Reg. 49,491 (Sept. 21, 1995) (quoting George Washington Carver in a Presidential Proclamation for National Historically Black Colleges and Universities Week).
[14] ELAINE M. WALKER, EDUCATIONAL ADEQUACY AND THE COURTS 7, 35 (2005) ("The survival of democracy is contingent upon the creation of a body of citizenry who are able to meaningfully participate in the democratic process, and whose participation is not adversely affected by an inadequate education.").
[15] San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 111-112 (1973) (Marshall, J., dissenting).
[16] *Id.* at 38-40.
[17] Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 91 (2012).
[18] Papasan v. Allain, 478 U.S. 265, 285 (1986).

thirty-three education adequacy cases decided, the court sided with the plaintiff sixty-seven percent of the time.[19] The success of plaintiffs in state courts is tied to the education clause in state constitutions and the underlying history of these clauses.[20] The exact wording in the education clauses vary, with the most popular grants including: "establishment and maintenance of a uniform free public school education";[21] a "thorough and efficient system;"[22] and "all suitable means . . . promoting intellectual, scientific, moral and agricultural improvement."[23]

Since their creation, education clauses have enforced a duty on states to provide a "sound basic education" for all children within its jurisdiction.[24] Through litigation, these clauses have allowed plaintiffs to request necessary educational components that provide "concrete, substantive content."[25] In the context of inadequate facilities, state constitution education clauses are the symbolic hook to transform it from a moral wrong or policy issue to a legal right.

III. EVALUATION OF THE PROBLEM OF INADEQUATE SCHOOL FACILITIES

A. Historical Background on Education Facilities Provided to Black Students

Education was a forbidden activity during slavery, and schooling provided during the Reconstruction Era was vastly inadequate. The origins of public education for Blacks can be traced

---

[19] Rebell, *supra* note 17, at 81.
[20] *Id*.
[21] *See* ALA. CONST., art. XIV, § 256; ARIZ. CONST., art. XI, § 1; COLO. CONST., art. IX, § 2; DEL. CONST., art. X, § 1; FLA. CONST., art. IX, § 1; IDAHO CONST., art. IX, § 1; LA. CONST., art. VIII, § 1; MISS. CONST., art. VIII, § 201; MO. CONST., art. IX § 1, cl. A; N.M. CONST., art. XII, § 1; N.Y. CONST., art. XI, § 1; N.D. CONST., art. VIII, § 1; OKLA. CONST., art. XIII, § 1; S.C. CONST., art. XI, § 3; S.D. CONST., art. VIII, § 1; TEX. CONST., art. VII, § 1; UTAH CONST., art. X, § 1; VA. CONST., art. VIII, § 1.
[22] N.J. CONST., art. VIII, § 4, para. (1); OHIO CONST., art. VI, § 3; PA. CONST., art. III, § 14; W. VA. CONST., art. XII, § 1.
[23] CAL. CONST., art. IX, § 1; IOWA CONST., art. IX 2d, § 3. *See also* KAN. CONST., art. VI, § 1; NEV. CONST., art. XI, § 2.
[24] Rebell, *supra* note 17, at 109.
[25] *Id*. at 66 (discussing the use of the clause to force schools to teach students the skills necessary to competently vote and serve on juries).

back to the 1800s after the Civil War.[26] With the aid of Reconstruction Republicans and the Freedmen's Bureau, several thousand schools were opened for Blacks from 1866 until 1870.[27] The attitude toward educating Blacks, however, was seeded in a deep-rooted fear that educated Blacks would challenge white supremacy.[28] At that time, many whites began to accept the Darwinian "scientific" evidence that Blacks were inherently inferior and that extensive education would be futile.[29] This created a push for primarily rudimentary and vocational training for Blacks.[30]

These attitudes also justified local government providing less financial support to schools for Blacks, which equated to less equipment, fewer books, and striking disparities in school facilities.[31] School facilities provided for Blacks were typically primitive wooden cabins, lacking a heating system and indoor plumbing.[32] A single teacher would be assigned to teach several dozen children ranging in age and grade level.[33] Toward the end of Reconstruction, Blacks became disenfranchised, which removed the political leverage that prevented discriminatory distribution of public school funds.[34] Further, the Court's decision to uphold the "separate but equal" doctrine in

---

[26] *See* MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT 3 (2007).
[27] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 50 (2004) (noting that more than 4,000 schools were opened with nearly 250,000 attendees).
[28] *See* KLARMAN, *supra* note 26, at 16.
[29] *Id*.
[30] *See id*. While some scholar saw vocational training for Blacks as a form of subordination, others held vocational training education as a great alternative to ensure Blacks acquired the skills to compete with their white counterparts in areas of carpentry, construction, and agriculture. STEPHANIE DEUTSCH, YOU NEED A SCHOOLHOUSE 14-23 (2011) (telling the story of Booker T. Washington's positive experience as a student at Hampton Institute and founder of Tuskegee Institute).
[31] *See* KLARMAN, supra note 26, at 17.
[32] *See id.* at 18.
[33] *Id*.
[34] *See id*. at 17-18. Without the political leverage of the black vote, it made it difficult to influence local school board funding distribution decisions. *Id*. As result of the lack of influence, large disparities in spending ensued. *Id*. For example, by 1915, per capita spending on white students in South Carolina was twelve time higher than on black students. *Id*.

Plessy v. Ferguson[35] was a symbolic affirmation of Blacks' second-class status and a justification for disparities in their treatment.

The National Association for the Advancement of Colored People ("NAACP"), the organization tasked with fighting for the civil rights of Blacks, did not immediately pursue a frontal attack on the segregation upheld in *Plessy*.[36] As designed by NAACP Litigation Director Charles H. Houston, the strategy was to "secure decisions, rulings, and public opinions on the broad principles instead of being devoted to merely miscellaneous cases."[37] The earliest challenges involved teacher salaries and school facilities.[38] The early school facilities cases dealt with a range of matters including: inadequate physical facilities generally; lack of a cafeteria, infirmary, science laboratory, and library; and non-operating toilets, drinking fountains, and heating systems.[39]

The line of cases that would later lay the foundation for attacking segregation in *Brown*, however, were cases involving graduate school education, which included *Missouri ex rel. Gaines v. Canada*,[40] *Sweatt v. Painter*,[41] and *McLaurin v. Oklahoma State Regents*.[42] These cases highlighted the Court's willingness to require admission to previously whites-only institutions when Blacks-only institutions were nonexistent or inadequate compared to their white counterparts. The court, however, stopped short of saying segregation was an equal protection violation.[43]

---

[35] Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

[36] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470, 473 (1976).

[37] *Id.* (quoting Charles Houston from a 1934 NAACP Report 22).

[38] *See* Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools – 1953*, 67 HARV. L. REV. 377, 430 app. (1954).

[39] *Id.*

[40] Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337, 351 (1938) ("[holding the government must] furnish [Blacks] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race . . . .").

[41] Sweatt v. Painter, 339 U.S. 629, 634-35 (1950) (holding a makeshift, separate law school for Blacks was not "substantially equal" to the accommodations provided for whites).

[42] McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-42 (1950) (holding a university could not expose admitted Black students to unequal treatment within its institution).

[43] Leflar, *supra* note 38, at 382.

The decision to shift from fighting for equalization to an attack on segregation was not a unanimous decision among the African-American community, scholars, or the members of the NAACP.[44] Once the NAACP stopped funding equalization cases in the 1950s, however, combating segregation became the only viable option for plaintiffs seeking to remedy racism in education.[45] Before *Brown*, the NAACP's strategy focused on obtaining equal accommodation for Blacks, but such a strategy was often frustrated by slow progress and lackluster compliance.[46] It was this frustration and the change in the political climate that led the NAACP to choose to devote all resources to challenging *Plessy's separateness prong.*[47] Arguably, however, the fight for integration was a necessary means to secure equal resources from the state. The inherent rationale was that states would not allow whites to go to decrepit schools, and by association, they could not force Blacks to be educated in such environments if they were integrated into schools with whites.[48]

Brown reached the Supreme Court in 1953 as a consolidation of four class action cases.[49] In *Brown*, an argument for equalization was abandoned, and segregation became the focus of litigation.[50] Accordingly, the Court preserved in the holding that the "Negro and white schools involved have been equalized, or are being equalized, with respect to buildings . . . ."[51] In 1954, the Court went on to unanimously decide that segregation was an unconstitutional violation

---

[44] Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 201-02 (2005).

[45] The NAACP stopped accepting equalization cases by the 1950s, which forced many plaintiffs to restructure their inadequate facilities issues into segregation issues. *See* KLARMAN, *supra* note 26, at 57.

[46] *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 75-78 (1994).

[47] *See id.* at 85.

[48] *See id*.

[49] *See generally* Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951); Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952); Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952); Gebhart v. Belton, 91 A.2d 137 (Del. 1952). The fifth case that is normally associated with *Brown*, Bolling v. Sharpe, 347 U.S. 497 (1954), could not be joined because Fourteen Amendment protection only applied to state actions, which excluded the District of Columbia.

[50] *See* Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

[51] *Id*. at 492.

of the Fourteenth Amendment because separating Black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community . . . ."[52] The decision in *Brown* overruled the "separate but equal" doctrine from *Plessy*, but also inadvertently eliminated the argument for equalization of resources.[53]

The Court's decision did not result in sweeping positive changes or, by some scholars' accounts, a lasting remedy.[54] The immediate reactions to *Brown* were direct state resistance, violent outbreaks, school closings, white flight, assignment programs, and other tools to prevent, or at least delay, integration.[55] Perhaps the most notable backlash of *Brown* was the increase in violence.[56] With the lack of voluntary state action, litigation ensued to obtain equitable remedies and speed up the desegregation process.[57] Though it took a substantial amount of time, litigation and patience, the implementation of desegregation made progress, putting more Black children in adequate facilities with their white counterparts, especially in the South.[58]

---

[52] *Id*. at 494.
[53] *Id*. at 495.
[54] Bell, *supra* note 36, at 471.
[55] *See* Epperson, *supra* note 44, at 179-81 (discussing that in the wake of the *Brown* decision, many Southern political factions came together and issued the "Declaration of Constitutional Principles," often referred to as the "Southern Manifesto"); *see* SOUTHERN MANIFESTO, AMERICAN RADIOWORKS, *available at* http://americanradioworks.publicradio.org/features/marshall/manifesto.html (asserting that Southern politicians would not follow the decision in *Brown* and would do everything within their power to overturn the "unwarranted exercise of power by the Court, contrary to the Constitution").
[56] *See* KLARMAN, *supra* note 26, at 189-212 (arguing that between 1954 and 1963, there were increased instances of mob violence, lynching, and bombings in reaction to school desegregation).
[57] *See* Keyes v. Sch. Dist., 413 U.S. 189, 212-14 (1973) (holding that a district that practiced *de facto* segregation, and had no history of *de jure* segregation, could be subject to a court-ordered integration order); Davis v. Bd. of Sch. Comm'rs, 402 U.S. 33, 37-38 (1971) (holding that the use of busing was an appropriate remedy to integrate schools); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971) (holding that the use of busing to promote integration was constitutional); Green v. Cnty. Sch. Bd., 391 U.S. 430, 441-42 (1968) (striking down "freedom of choice" plan to maintain segregation); Brown v. Bd. of Educ., 349 U.S. 294, 300-01 (1955) (holding that school districts must use "all deliberate speed" to desegregate).
[58] *See* John R. Logan & Deirdre Oakley, *The Continuing Legacy of the Brown Decision: Court Action and School Segregation*, 1960-2000 2-8 (2004), *available at* http://www.s4.brown.edu/usschools2/reports/report2.pdf.

Unfortunately, this push for integration was short-lived, and the courts began to limit and invalidate desegregation efforts. Most would argue that the *Milliken v. Bradley*[59] decision marked the decline of remedying segregation.[60] In *Milliken*, the Court geographically limited the practice of busing Black students to desegregated predominately white schools, which promoted integration. That court held that students could only be bused to the districts where "harmful" segregation occurred and not to the "innocent" outlying suburban districts.[61] Thus, that case prevented any future use of a busing inter-district remedy.[62] Several other cases went on to further place limits on the remedies available to racially diversify schools.[63]

This noted shift in the attitude of courts and the general public can best be described as exhaustion with attempting to fix the problem of racism in education. Critical Race Theorist Darren Hutchinson explains the concept of exhaustion well in his article, *Racial Exhaustion*, where he argues that the racial exhaustion perception stems from the belief that "persons of color (most often blacks) have benefitted from a . . . costly social project that has defeated and adequately remedied racism."[64] Thus, under Hutchinson's racial exhaustion perception, any

---

[59] Milliken v. Bradley, 418 U.S. 717, 721-53 (1974).

[60] *See* Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACK LETTER J. 99, 108 (1991) ("The Court's experimentation with integration, however, ended with Milliken v. Bradley."); Epperson, *supra* note 44, at 184 ("[T]he Court [in *Milliken*] effectively ended the expansion of desegregation law . . . by signaling the preeminence of local control principles.").

[61] *See Milliken*, 418 U.S. at 752-53.

[62] *Id.*

[63] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 723 (2007) (holding that a district could not use race classification to remedy racial imbalance within schools voluntarily); Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (holding a school district does not have to remedy *de facto* inequality); Freeman v. Pitts, 503 U.S. 467, 489-94 (1992) (holding that once a district compiles with a meaningful portion of a desegregation order, that portion can cease to be monitored by the federal government and returned to local control); Okla. City Bd. of Educ. v. Dowell, 498 U.S. 237, 249-50 (1991) (holding that once a school district shows "good faith" and complies with a desegregation order, a federal desegregation order can be lifted, even if it leads to re-segregation).

[64] Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 926 (2009); *see also* Colin Wayne Leach, *Against the Notion of a 'New Racism*,' 15 J. COMMUNITY & APPL. SOC. PSYCHOL. 432, 439 (2005) (arguing that Slavery, Black Codes, and Jim Crow laws have been replaced with a more subtle racial discrimination and bias).

remaining inequality is not a product of racial discrimination, but the result of "poverty, individual pathology, or lack of merit."[65] This perception leads to the false belief that this country has become a post-racist society that no longer needs the aid of courts and laws to ensure equal treatment.[66]

With the loss of public and judicial support, school districts across the country have begun re-segregating, largely because of housing patterns.[67] In 2000, it was estimated that over seventy percent of all Black and Hispanic students attended predominately minority schools.[68] Further, even in the south, where a large amount of the desegregation efforts occurred, the percentage of Blacks in predominately white schools has fallen.[69] This re-segregation trend, many have argued, is also a product of courts granting unitary status to districts under desegregation mandates.[70] With remedying segregation at a stalemate, and equalization forfeited, there is a true question about what tools can be utilized to ensure that all children receive quality education.

B. Scholarship Review of Shortcomings in Abandoning Equalization

It has been almost sixty years since *Brown* and, like many scholars, I have the benefit of looking at the strategy utilized in *Brown* and its pitfalls in hindsight. In this section, I examine the critiques offered by education scholars Derrick A. Bell Jr., Denise C. Morgan, and Lia B. Epperson to provide support for my overall argument that

---

[65] Hutchinson, *supra* note 64, at 926.
[66] *Id*.
[67] Epperson, *supra* note 44, at 190 ("Racial isolation in public school is worse today than at any time in the last thirty years[;] [a]lmost all the nation's largest urban school districts are overwhelmingly non-white."). Black and Hispanic students tend to attend schools that are predominately minority in recent years. *Id.*
[68] *See* Michael A. Rebell, Symposium, *High-Poverty Schooling in America: Lessons in Second-Class Citizenship: What are the Limits and Possibilities of Legal Remedies?: Poverty, 'Meaningful' Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1473 (2007).
[69] *See* GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 5-6 (1999).
[70] *Id.*

the abandonment of equalization severely limited remedies that could be employed to cure disparities in school facilities.

Perhaps the most controversial criticism of the strategy utilized in *Brown* comes from Bell's "Serving Two Masters."[71] Bell argues that the racial balancing remedy yielded from *Brown* was not in the best interest of African-American clients in desegregation cases.[72] Analyzing the pitfalls of *Brown* through the lens of a lawyer-client relationship, Bell asserts that the civil rights lawyers who litigated desegregation cases were typically middle class and benefited from focusing on integration, at the expense of their working-class clients.[73] Moreover, Bell emphasizes "racial separation is only the most obvious manifestation of . . . subordination[,] . . . [p]roving unequal and inadequate school resources [are] at least as damaging to black children as enforced separation."[74] Bell concluded with a call for the end of this "single-minded commitment" to integration, which has become an unobtainable and unrealistic goal after the rise of minority urban cores.[75]

Bell's "interest-convergence" theory has been praised and criticized by many. A major criticism of his theory is that it fails to recognize the value of desegregation.[76] While Bell's frontal attack on the single-minded commitment to racial balance may falter in the face of substantial research on the results of desegregation, his underlying premise that unequal and inadequate resources are as harmful as segregation has merit. There is a body of research showing that inadequate resources lead to low student achievement, high drop-out rates, and high teacher turnover.[77]

---

[71] *See generally* Bell, *supra* note 36.
[72] *Id*. at 486.
[73] *Id*. at 489-92 (arguing that the push for integration over measure-based remedies was part of a larger agenda to get equal opportunities in housing, employment, and other fields of society, which middle class Blacks were denied based on race.); *see also* KLARMAN, *supra* note 26, at 125-48 (providing an overview of the indirect effects of *Brown* including launching public debates about race relations, rising black awareness, and encouraging activism within the Black community).
[74] Bell, *supra* note 36, at 487-88.
[75] *Id*. at 516.
[76] Epperson, *supra* note 44, at 195-200 (discussing that despite integration's slow progress, it has not been the failed, unnecessary social experiment Bell characterizes it to be because of the academic gains of African Americans between 1970 to 1990, and the amount of literature supporting the long-term effects on African Americans and society as a whole).
[77] *See infra* Part III.C.ii.

Similarly, Denise C. Morgan, in her article, "What's Left to Argue in Desegregation Law," asserts that the "right to education" should be interpreted as the right to adequate education.[78] Rather than attack the merits of past strategies, including desegregation, integration, and equal financing, she argues that these strategies merely failed to cure the underlying issue.[79] According to Morgan, the issue is that the education provided to minorities is not adequate to ensure social and political mobility.[80] Moreover, she emphasizes that the substandard facilities and inadequate education available to Black children in predominately minority schools prevent them from participating in politics and competing for gainful employment.[81] She suggests that a new education strategy should focus on achieving adequate education for all children, regardless of their race, and abandon measuring adequacy based on racial balancing and funding levels.[82] Morgan's "adequacy" theory, like Bell's "interest-convergence" theory, affirms the notion that equalization should not have been abandoned completely for an attack only on segregation.

Professor Lia B. Epperson recently critiqued *Brown*'s focus on segregation in her article, "True Integration."[83] Epperson argues that the strategy of utilizing a one-dimensional attack on racial segregation without a corresponding attack on unequal resources hinders the process of racial inclusion and equalization of education opportunities.[84] Reviewing the strategy utilized in *Brown* in hindsight, Epperson asserts that "a vital opportunity" was missed by not advocating for equalization of resources along with "desegregative remedies" to "directly address the realities of entrenched racial hegemony."[85] Moreover, she does not advocate either a push for pure equalization or pure segregation, but a "two-string bow" approach of "true integration and equality of resources."[86]

---

[78] Morgan, *supra* note 60, at 100.
[79] *Id*. at 107.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 117.
[83] *See generally* Epperson, *supra* note 44, at 200-09.
[84] *Id*.
[85] *Id*. at 202.
[86] *Id*. at 177, 194.

With the benefit of hindsight to reflect on the strategy employed in *Brown*, a vital flaw I observed in the strategy was that desegregation was constructed to be a "one-size-fits-all" solution for every district in this country. As Bell, Morgan, and Epperson argue in their respective articles, a missing element was a fight for resources. The decision to make desegregation the primary focus in the fight for equal education for African-Americans created a presumption that the only problem in the educational system was the lack of racial mixing.[87] The misconception and stipulation in *Brown* that all schools are equal, or in the process of becoming equal, has curtailed the argument today that conditions within the majority of predominately minority public schools are inadequate.[88]

Ironically, the three other cases consolidated into *Brown*, at their cores, were about inadequate facilities.[89] In *Briggs*, the plaintiffs initially requested a school bus to transport their children to school.[90] The plaintiffs later drafted a petition, *Briggs* petition,[91] which outlined inadequate conditions provided to Black children in comparison with their white counterparts. Most notably, the petition asserts that the "elementary and high schools maintained for Negroes [had] no appropriate and necessary central heating system, running water or adequate lights."[92]

Similarly, in *Davis*, the plaintiffs' children were subjected to dilapidated conditions within public schools. [93] Sparked by a 16-year-old's passionate speech, several hundred students walked out of school and engaged in a two-week protest demanding a new school with indoor plumbing.[94] Morton High School, the school at the center of the

---

[87] *See* Bell, *supra* note 36, at 487 (arguing that the NAACP pressed for racial balancing at the expense of more effective measure-based remedies).
[88] *See* Epperson, *supra* note 44, at 202.
[89] *Brown*, 347 U.S. at 495 n.1.
[90] *Briggs*, 103 F. Supp. at 921-23; *see also* KLUGER, *supra* note 27, at 3-25.
[91] Petition from Harry Briggs, et al., to the Board of Trustees for School District No. 22. (Nov. 11, 1949) (on file with the South Carolina Department of Archives and History), *available at* http://www.teachingushistory.org/tTrove/documents/BriggsvElliottPDF.pdf.
[92] *Id*. at ¶ 3.
[93] *Davis*, 103 F. Supp. at 339-41.
[94] JUAN WILLIAMS, Eyes ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1945-1965 25-27 (1988) (telling the story behind the student protest that sparked *Davis v. County School Board).*

controversy, had no cafeteria, no gym, no infirmary, and several tar-paper huts in the back of the main building for classroom overflow.[95]

The Delaware case, *Gebhart*, was a consolidation of two cases involving inadequate facilities in Claymont, Delaware, and Hockessin, Delaware.[96] The Claymont case involved a run-down high school that was overcrowded, deteriorating from years of maintenance neglect, and lacking the space needed to offer vocational courses within the school.[97] Similarly, the Hockessin case involved an elementary school that was a one-room facility converted into a two-room school with a partition.[98] Despite the facilities, however, the initial complaint regarded the lack of transportation to school available for Black children.[99] The district court found that the exterior painting, floors, and toilets were inadequate, and a serious fire hazard existed.[100] In contrast, in the district court case *Brown*, the plaintiffs' children attended an adequate school facility, but wanted to attend a whites-only school that was closer to their respective homes.[101]

The equalization narratives of *Briggs, Davis*, and *Gebhart* were abandoned for the segregation narrative of the Kansas district court case, *Brown*.[102] Although both narratives had the common goal of ensuring quality education for Black children, it must be noted that the narratives are different and not interchangeable. By limiting the consolidated case to segregation and advocating for the one-size-fits-all remedy of desegregation, a great opportunity to address the striking disparities in the condition of public schools attended by Blacks was lost. As other scholars have argued, segregation and unequal resources should have been attacked simultaneously to afford Blacks with a range

---

[95] *Id*.
[96] *Gebhart*, 91 A.2d at 149; *see also* KLUGER, *supra* note 27, at 434-36.
[97] *See* KLUGER, *supra* note 27, at 434-35.
[98] *Id*. at 435-36.
[99] *Id*. at 436. The idea of a suit over segregation was unpopular within the Black community in
Delaware, which made it difficult for the NAACP to enlist witnesses.
[100] *Id*.
[101] *Brown*, 98 F. Supp. at 798 (varying from the other three cases, the school at subject, Monroe School, was structurally sound, safe, and had ample room); *see also* KLUGER, *supra* note 27, at 416 (noting that the Bureau of Educational Research at Denver University's School of Education rated Monroe School higher than the nearest whites-only school).
[102] *See Brown*, 347 U.S. at 486.

of education issues with a range of suitable remedies.[103] The reality is that each school district has a unique history, political landscape, and limitations. Limiting the narrative to a one-size-fits-all remedy realistically does not fit at all.

C. Contemporary Education Landscape and the Disparities in School Facilities

1. *Existing Disparity in Facilities*

Spending on construction, maintenance, and renovation has increased across the country, but there remains a disparity in spending across racial and socio-economic groups. A recent study found that from 1995 to 2004, nearly three-quarters of the more than 17,000 school districts had undergone school construction.[104] According to the U.S. Census of Governments, public school districts spend $504 billion in capital expenditures.[105] During the past decade, school construction has boomed in this country, with "more than 12,000 new schools and . . . more than 130,000 renovation . . . projects to address health, safety, technology, access for students with disabilities, [and] educational enhancement . . . ."[106] The increase in school construction is linked to the expansion of early childhood education programs, an increase in services for mentally and physically disabled students, an increase in immigration, and changes in federal education standards.[107]

Despite spending more on schools in the past decade than we have since the World War II baby boom, the funding has not been equally distributed between affluent, predominately white districts and

---

[103] *See* Epperson, *supra* note 44, at 201-04.
[104] MARY W. FILARDO, JEFFREY M. VINCENT, PING SUNG, & TRAVIS STEIN, GROWTH AND DISPARITY: A DECADE OF U.S. PUBLIC SCHOOL CONSTRUCTION 6 (2006), *available at* http://www.21csf.org/csf-home/publications/BEST-Growth-Disparity-2006.pdf.
[105] *Id*.
[106] *Id*. at 1. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, SCHOOL FACILITIES: CONSTRUCTION EXPENDITURES HAVE GROWN SIGNIFICANTLY IN RECENT YEARS, GAO/HEHS-00-41, (2000) (providing a breakdown by state of the increase in spending on construction in schools).
[107] FILARDO, *supra* note 104, at 12-13.

low-income, predominately minority districts.[108] School districts spend, on average, $4,800 per students in districts serving low-income populations; in more affluent school districts, however, spending almost doubles to $9,361 per student.[109] Breaking it down by race, school districts serving predominantly minority students and school district serving majority minority students spend $5,172 and $5,612 per student, respectively, with both amounts below the national average of $6,519.[110] School districts serving predominately white students, on the other hand, spent, on average, $7,102 per student.[111] Most concerning is the fact that the high investment in more affluent school districts tends to go to enhancements, such as science labs and performing arts centers, while the smaller investment in schools serving low-income, minority students is used for funding necessary and overdue repairs, including new roofs and asbestos removal.[112]

In 1996, a U.S. General Accounting Office report, which detailed the physical conditions of American facilities, estimated that twenty-five million children attended schools with at least one "unsatisfactory" condition.[113] Moreover, the GAO report found that schools in the greatest state of disrepair primarily served minority and low-income students.[114] While there is an ongoing debate about the amount of funding that is required to ensure that all existing schools are adequate,[115] there is a consensus that millions of American children are being educated in substandard and, in some cases, dilapidated school facilities, which constrains their ability to receive a quality education.

---

[108] *See id*. at 17-24 (detailing the varying ways in which financial disparities in construction and renovations exist between predominately white and minority schools).
[109] *Id*. at 18.
[110] *Id*. at 23.
[111] *Id*.
[112] *Id*. at 2. The high investment per student in affluent districts, coupled with opulent school enhancements, may be an issue of oversight depending on the funding source. Opulent enhancement funded from state money earmarked for the entire state results in money not being available for the neediest school districts.
[113] U.S. GENERAL ACCOUNTING OFFICE, AMERICA'S SCHOOLS REPORT DIFFERING CONDITIONS, 16 GAO/HEHS-96-103 (1996) [hereinafter GAO report], *available at* http://www.gao.gov/assets/230/222833.pdf.
[114] *Id*. at 17-18.
[115] *See* FILARADO, *supra* note 104, at 3 (noting that the GAO estimated the total cost of repair in 1996 at $112 billion; contrasted with the National Education Association estimating the cost in 2000 at $322 billion).

2. *Empirical Evidence that School Facilities Impact Academic Outcomes*

The inadequate investment in school facilities in low-income, predominately minority districts would not be of such importance if the condition did not affect student achievement. In the past decade, the body of empirical research has shown that poor building conditions are linked to students' academic achievement and physical well-being.[116] Studies have shown that students pursue fewer years of education and attend school less often when their school buildings are unclean, structurally crumbling, or use temporary annex buildings for overcrowding.[117] Poor school conditions impact the ability to recruit and retain quality teachers.[118] Further, a series of recent studies show there is a connection between poor school conditions and students' cognitive ability.[119] Mark Schneider's study recently found that inadequate school facilities directly affect a student's motivation, energy, attention level, capacity to listen, and visual retention.[120]

Another effect of inadequate school facilities is the negative impact on the health of students within the school. Empirical studies have consistently shown that conditions including asbestos, mold, poor air and water quality, and lack of an operational heating and cooling

---

[116] *See* GRACYE CHENG, STEVE ENGLISH & MARY FILARDO, FACILITIES: FAIRNESS & EFFECTS: EVIDENCE AND RECOMMENDATIONS CONCERNING THE IMPACT OF SCHOOL FACILITIES ON CIVIL RIGHTS AND STUDENT ACHIEVEMENT 3-10 (2011), *available at* http://www.21csf.org/csf-home/publications/ImpactSchoolFacilitiesCivilRightsAug2011.pdf.

[117] *See, e.g.*, David Branham, The *Wise Man Builds His House Upon the Rock: The Effects of Inadequate School Building Infrastructure on Student Attendance*, 85 SOC. SCIENCE Q. 1112, 1120-23 (2004) (finding the quality of school facilities has an effect on school attendance and drop-out rates); Valkiria Duran-Narucki, *School Building Condition, School Attendance, and Academic Achievement in New York City Public Schools: A Mediation Model*, 28 J. ENV'T PSYCHOL. 278, 279-83 (2008) (finding low attendance from students in poorer facilities is linked to lower standardized test scores).

[118] *See generally* JACK BUCKLEY, MARK SCHNEIDER & YI SHANG, THE EFFECTS OF SCHOOL FACILITY QUALITY ON TEACHER RETENTION IN URBAN SCHOOL DISTRICTS, National Clearinghouse for Educational Facilities 1-4 (2004), *available at* http://www.ncef.org/pubs/teacherretention.pdf.

[119] *See generally* MARK SCHNEIDER, DO SCHOOL FACILITIES AFFECT ACADEMIC OUTCOMES? National Clearinghouse for Educational Facilities 1-9 (2002), *available at* http://www.ncef.org/pubs/outcomes.pdf.

[120] *Id*. at 6.

system lead to asthma, respiratory illness, allergies, and other ailments.[121] The Environmental Protection Agency has repeatedly asserted that poor school facility conditions may lead to "sick building syndrome."[122] Sick building syndrome ("SBS") is an illness including coughing, chest tightness, fevers, chills, throat irritation, nausea, and muscles aches that appears to be linked to spending time in a building with inadequate ventilation as well as chemical contaminants from indoor sources.[123] Moreover, SBS and other respiratory illnesses account for more than 10 million missed school days by students per year.[124] The attendance of a student directly impacts his or her academic performance because days home sick are days not spent in the classroom learning.

With poor conditions in schools impacting a myriad of facets of student achievement, it is not surprising that students in inadequate schools perform poorly on standardized tests. There is a large body of literature that shows that a variety of factors, such as cognitive abilities, teacher quality, health and attendance, all impact a student's standardized scores.[125]

A common finding among studies is that students educated in "substandard buildings" were more likely to not pass English, Mathematics, and science portions of standardized tests than their peers who were educated in "standard buildings."[126] Moreover, these studies have found a three percentile to seventeen percentile difference between students in poor buildings and students in quality buildings on standardized tests.[127] As discussed above, students educated in

---

[121] *Id*. at 3-6.
[122] EPA, INDOOR AIR QUALITY AND STUDENT PERFORMANCE, EPA 402-f-00-009 (2001) [hereinafter STUDENT PERFORMANCE], *available at* http://nepis.epa.gov/.
[123] EPA, INDOOR AIR FACTS NO.4 SICK BUILDING SYNDROME, MD-56 (1991), *available at* http://www.epa.gov/iaq/pdfs/sick_building_factsheet.pdf.
[124] STUDENT PERFORMANCE, *supra* note 122, at n. 3 (citing the President's Task Force on Environmental. Health Risks and Safety Risks to Children, *Asthmas and Environment: A Strategy to Protect Children* (Jan. 28, 1999)).
[125] *See* CHENG, *supra* note 116, at 3.
[126] *See, e.g.*, GLEN I. EARTHMAN, ACLU OF MD, PRIORITIZATION OF 31 CRITERIA FOR SCHOOL BUILDING ADEQUACY 18, 24 (2004), *available at* http://schoolfunding.info/policy/facilities/ACLUfacilities_report1-04.pdf.
[127] *Id*. at 26–27 (compiling 12 studies done between 1992 and 2002 to determine that natural light, indoor air quality, temperature, and cleanliness of schools impact student learning and achievement).

inadequate facilities are often low-income, minority students and already at a disadvantage academically. Inadequate facilities compound the disparate academic problems such students experience, forcing them to fall behind their peers and increase the academic gap.

3. *NCLB and School Facilities Disparities*

The No Child Left Behind Act (NCLB) sets required academic levels each student must reach, but fails to address disparities in public school facilities, which impact academic achievement. Signed by President George W. Bush in 2002, the No Child Left Behind Act reauthorized the Elementary and Secondary Education Act and placed more emphasis on standardized testing, academic progress levels, accountability, and teacher quality.[128] NCLB, unlike its predecessors, required annual standardized testing of all students and held school districts accountable for not reaching required academic milestones by withholding federal funding.[129]

In addition, NCLB also holds students, regardless of race, class, English proficiency level, or disability, to the same rigorous standards.[130] NCLB's purpose is to "ensure that all children . . . reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[131] Despite NCLB's honorable attempt to raise the standards of education in this country, it inadvertently caused perverse incentives to lower academic standards,

---

[128] *See* No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 (2001); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U.L. Rev. 932, 932, 939 (2004).

[129] *See* Ryan, *supra* note 128, at 939-41. Improving American's Schools Act (IASA) required testing in math and reading at only three points during a student's school career, whereas NCLB requires testing annually from third to eight grade in math, reading, and science.

[130] *See* No Child Left Behind Act of 2001, 20 U.S.C.A. § 6311 (2001); *but see* Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER RACE & JUST. 311, 320-21 (arguing that the colorblind approach taken by NCLB adopts aspects of New Racism). This theory of New Racism ignores color differences and instead pretends that the privileges enjoyed by members of the dominant cultures do not impact societal outcomes.

[131] *See* 20 U.S.C.A. § 6301 (2001).

push out low-performing student, and deter quality teachers from teaching in schools in low-income areas. [132]

Though not discussed as often as other unintended consequences, the diversion of limited resources from other sections of school budgets for testing also occurs as result of NCLB. Moreover, the emphasis on testing and meeting academic standards has led to a substantial portion of resources being expensed on state testing programs.[133] The Government Accounting Office estimated that states spend between $1.9 billion to $5.3 billion on testing programs and remedial programs to "teach the test."[134] Education Policy Analyst Liz Hollingworth observed that the money extended to cover these costly testing initiatives tends to syphon funding from the district's budget for building constructions, repairs, and facilities maintenance.[135] This diversion of resources has impacted low-income, predominately minority districts because the already insufficient funding in these districts is diverted to fund testing initiatives, thus increasing the gap in facility quality.[136]

As many scholars have argued, there is an undeniable connection between school facilities and student outcomes.[137] Inexplicably, disadvantaged students receive about half of the funding for construction investment, yet are held to the same academic standards as their more affluent peers.[138] With that in mind, NCLB undermines its key goal of decreasing the "academic gap" by increasing the

---

[132] *See* Ryan, *supra* note 128, at 944. The low-performing students that get pushed out tend to be low-income students, minority students, and students with disabilities. *Id*. at 969.

[133] *See* Linda Darling-Hammond, *From 'Separate But Equal' to 'No Child Left Behind': The Collision of New Standards and Old Inequalities*, *in* MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 3, 8 (Deborah Meier & George Wood eds., 2004) (noting that "[m]ost of the federal money has to be spent for purposes other than upgraded facilities, textbook, or teachers' salaries").

[134] U.S. GOV'T ACCOUNTABILITY OFFICE, TITLE I: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES, GAO-03-389 3 (2003) *available at* http://www.gao.gov/new.items/d03389.pdf.

[135] Liz Hollingworth, *How We Spend Our Money: An NCLB Commentary*, 3 A.S.C.D. EXPRESS 6, 6 (2007).

[136] *See generally id*.

[137] *See supra* Part III.C.ii.

[138] *See id*.

disparities in school facilities through aggressive standardized testing and enforced achievement levels.

IV. POLICY RECOMMENDATIONS

A. Clear Federal Policy Making School Building Quality a Priority

As the federal government makes schools, teachers, parents, and students more accountable under the NCLB, there should be a reciprocal duty to ensure that school facilities are adequate to accomplish strict academic milestones. NCLB arguably is a remarkable step to standardizing the quality of education, but it is also a way in which the federal government is playing an increasingly intrusive role in the education of children in this country. As Paul Houston, executive director of the American Association of School Administrators, asserts, "[NCLB is] the largest federal intrusion into the educational affairs of the states in the history of this country."[139] Moreover, if the federal government is to demand achievement of academic milestones, it must provide explicitly and financially the tools to achieve such goals.[140]

School facilities play a big role in student achievement,[141] yet NCLB does not mention this within the law's 600 pages, nor does it allocate special funding for construction investment.[142] In surveying the NCLB, there are 144 instances of the word "facilities," and of these instances, the primary focus is correctional facilities, schools serving Native Americans, private schools, and public charter schools.

For charter schools, NCLB devotes an entire section and explicitly grants funding for construction, renovation, and maintenance, yet no such provision exists regarding traditional public schools.[143]

---

[139] *See* Sam Dillon, *Thousands of Schools May Run Afoul of New Law*, N.Y. TIMES, Feb. 16, 2003, at N33.
[140] *See* Andrew Caffrey, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129, 1154 (2010) (arguing that NCLB places unobtainable yearly progress requirements on schools and provides no funding to achieve the required milestones).
[141] *See supra* Part III.C.iii.
[142] *See generally* 20 U.S.C.A. § 6301.
[143] *See* No Child Left Behind Act of 2001, 20 U.S.C.A. § 7223 (2001).

Despite the emphasis placed on the creation of charter schools by NCLB and their increased prevalence across the United States, the majority of children are still educated in traditional public schools.[144] As of 2009, there were more than one million students educated in charter schools, but more than 49 million students educated in publics schools overall.[145] That equates to only 3.2% of students being educated in charter schools. Without a provision in NCLB emphasizing the importance of traditional public school facilities, 96.8% of students will be disadvantaged because they were not "lucky" enough to attend a "valued" charter school.[146]

Traditional public schools should receive the same, if not more, emphasis on adequate facilities because the majority of students in this country are educated in these schools. NCLB should explicitly state the importance of adequate facilities in its purpose, alongside other important factors in student achievement like teacher quality and curriculum standards. Furthermore, NCLB should allocate funding to the neediest school districts in order to comply with its purpose to ensure quality education for all students.

B. Use Litigation to Force States to Recognize the Right to Adequate Facilities

Litigation is an invaluable tool to obtain adequate facilities for low-income, minority students. Traditionally, school districts handle financing the construction and renovation of school facilities through property taxes, and the state government plays a minimalist role.[147] Property tax revenue in more affluent school districts generates more monetary support for school construction projects compared to districts with a lower socioeconomic populous.[148] This disparity in property tax

---

[144] *See* U.S. DEP'T OF EDUC. & NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY, 1990-91 THROUGH 2009-10 (2011), *available at* http://nces.ed.gov/programs/digest/d11/tables/dt11_101.asp.
[145] *Id*.
[146] *See generally* THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS (2000) (arguing that charter schools only serve a small selected fraction of students in the public school system and do not solve existing wider problems within public education).
[147] William Duncombe & Wen Wang, *School Facilities Funding and Capital-Outlay Distribution in the States*, 34 J. EDUC. FIN. 324, 325 (2009).
[148] *Id*.

revenue is a significant factor in existing disparities in school facilities.[149] State governments must engage the problem, in the form of legislative resolution. Litigation can be utilized to obtain court-ordered remedies that would put pressure on state legislators to take action to remedy these serious inequalities.[150] With the existence of education clauses in most state constitutions, this is an attainable cause of action.[151]

Utilizing litigation as a catalyst for social change is not a novel idea. Litigation has been a component of many social movements in this country to remedy injustices.[152] Many would characterize the Blacks civil rights movement as the model for social change through litigation.[153] As UCLA law professor Stephen Yeazell asserts, through "sufficient dedication and creativity[,] . . . deep, important social changes" can occur through litigation.[154] He further emphasizes the idea of ligation as a form of political expression and an avenue for people to learn and "effectuate" their legal rights.[155] More explicitly, litigation is a way to challenge the status quo of the existing power structure within school districts.[156]

In total, thirty-five states have engaged in litigation involving school facilities in recent years.[157] In states with successful court cases challenging school facilities, investment in facilities per student is greater than in states with unsuccessful suits or no litigation at all.[158]

---

[149] *Id*. at 325-27.
[150] WALKER, *supra* note 14, at 86-123, 182-183 (detailing that in Alabama, Kentucky, New Jersey, Ohio, and Texas litigation resulted in legislative formulation).
[151] *See supra* Part II.
[152] *See* Claire Riegelman, *Environmentalism: A Symbiotic Relationship Between a Social Movement and U.S. Law?*, 16 MO. ENVTL. L. & POL'Y REV. 522, 539 (2009) (referring to the role of social movements in political change).
[153] Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1983 (2004).
[154] *Id*. at 1977.
[155] *Id*. at 1990.
[156] *See id*. at 2000.
[157] WALKER, *supra* note 14, at 182. *See generally* DAVID G. SCIARRA, KOREN L. BELL & SUSAN KENYON, SAFE AND ADEQUATE: USING LITIGATION TO ADDRESS INADEQUATE K-12 SCHOOL FACILITIES, Educ. L. Ctr. (2006), *available at* http://www.edlawcenter.org/assets/files/pdfs/publications/Safe_and_Adequate.pdf (providing the names of the cases that correspond with school facility litigation in all thirty-five states).
[158] FILARDO, *supra* note 104, at 24.

While school construction has broadly increased, states with successful cases spend an additional $158 per student annually on school facilities, which is twenty-three percent more than the median construction expenditure per student.[159] This sizable increase led to tangible progress in bringing schools to adequate levels for all students.[160]

New Jersey is a great example of how successful litigation can lead to increases in school investment. In *Robinson v. Cahill*, a New Jersey state court ruled that the state had a responsibility to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in [the] [S]tate."[161] In a series of cases denoted as *Abbott*, the court held that, under the New Jersey constitution, the government had the obligation to ensure adequate funding to property tax poor districts to guarantee all school buildings remain safe, healthy, and educationally adequate.[162] The success of the *Abbott* cases led to the Education Facilities Construction and Financing Act ("EFCFA"), which allocated billions in bond financing for Abbott School Facilities, and established the Economic Development Authority ("EDA"), an agency responsible for financing school facilities projects.[163] Since 2000, the *Abbott* litigation has led to 125 construction projects in the neediest districts, including the construction of a new building and the renovation of existing buildings.[164] Moreover, litigation has reduced the gap between per-student spending on construction, with low-income students receiving $7,795 and high-income students receiving $8,548.[165]

The success of using litigation as a tool for social change demonstrates that a court order forcing state funding can remedy existing disparities in school facilities. Additionally, New Jersey's specific litigation approach is not the only approach. More than thirty

---

[159] *Id*.
[160] *Id*.
[161] Robinson v. Cahill, 303 A.2d 273, 291 (N.J. 1973).
[162] While there are twenty-one Abbott cases, I will only be discussing the two that primarily dealt with school facilities, *Abbott II* and *Abbott V*. *See* Abbott v. Burke, 575 A.2d 359 (1990) ("Abbott II"); Abbott v. Burke, 710 A.2d 450 (1998) ("Abbott V") [hereinafter collectively Abbott].
[163] *See* SCIARRA, *supra* note 157, at 11.
[164] SCHOOLS DEV. AUTHORITY, STATE OF N.J. COMPLETED PROJECTS, 2013, *available at* http://www.njsda.gov/Schools/SchoolsList/PDF/CompletedProjects.pdf.
[165] FILARDO, *supra* note 104, at 26.

states have engaged in school facility litigation and have employed various approaches based on existing legal framework and political environments.[166] Litigation is a powerful tool when used to raise awareness of inadequate schools, and can spark tangible responses from state governments to cure disparities in school facilities.

C. Use Grassroots Efforts to Garner Public Support

Perhaps the most underestimated vehicle to resolve the issue of inadequate facilities is grassroots efforts. NAACP pioneer Charles Houston asserted that any strategy for rights must include arousing and strengthening" social and public factors . . . before the actual litigation commences."[167] His successor, Thurgood Marshall, echoed a similar sentiment by asserting that a key component to the success of *Brown* and the Civil Rights Movement was the '"build[ing] . . . of public opinion' in support of" desegregation.[168] Many agree that stand-alone litigation without public support will not lead to effective and lasting change.[169] Thus, any attack against inadequate school facilities must include coalition building, mobilization of diverse organizations, education of the public regarding the prevalence and social impact of inadequate school facilities, and legislative advocacy.

Unlike the social movements of the past, this generation benefits from using social media to reach a large number of people immediately, inexpensively, and often.[170] Forums such as Facebook, Twitter, Google+, YouTube, blogs and other social media platforms have

---

[166] *See* WALKER, *supra* note 14, at 182 (no litigation involving facilities have been heard in the following states: Georgia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oregon, Vermont, Virginia, and Wisconsin).

[167] KLARMAN, *supra* note 26, at 243 (quoting Charles Houston memorandum of Oct. 26, 1934, NAACP papers).

[168] Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 349 (2005).

[169] Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 137 (2009) ("[Y]ou [can] file all the suits you want to, but unless you ha[ve] a community base you [a]ren't going to get anywhere.").

[170] *See, e.g.*, Brad Stone & Noam Cohen, *Social Networks Spread Iranian Defiance Online*, N.Y. TIMES, June 16, 2009, at A11; Jesse Kirdahy-Scalia, *Social Media Opportunities for Social Movements*, OPEN MEDIA BOSTON (Sept. 19, 2008), http://www.openmediaboston.org/node/327.

become an invaluable tool to mobilize support for a range of issues.[171] Moreover, regarding inadequate school facilities, social media can inform the public of conditions within facilities that may otherwise be only locally known. A picture of a collapsed ceiling in a third-grade classroom can be shared, tweeted, and downloaded with a few clicks of a mouse. Such dissemination of information can lay the foundation for building public support and advocacy.

V. CONCLUSION

Restricting the racial inequality narrative to a problem of segregation abandons the attack on unequal resources identified in *Brown*. The one-size-fits-all approach, of advocating integration without equalization, has left many school districts "integrated," but vastly inadequate and in decrepit condition. Furthermore, conditions within school facilities connect directly to student achievement. The academic requirements of NCLB unfairly penalize students who are educated in inadequate facilities that do not provide safe, clean, or adequate school learning environments. Bringing all schools in this nation to an adequate level is not impossible. Through the inclusion of school quality as a priority in NCLB, the filing of state adequacy suits, and the formulation of grassroots efforts, school facilities can improve. Civil rights leader Malcolm X once said, "education is our passport to the future;" without adequate school facilities, millions are denied that passport.[172]

---

[171] Jennifer Preston & Colin Moynihan, *Death of Florida Teen Spurs Outcry and Action*, N.Y. TIMES (Mar. 21, 2012), http://thelede.blogs.nytimes.com/2012/03/21/death-of-florida-teen-spurs-national-outrage-and-action/ (petitioning on Facebook, Twitter, and Change.org formed the social movement that eventually led to the investigation and arrest of George Zimmerman for the murder of Florida teenager Trayvon Martin).

[172] Malcolm X, Speech at the Founding Rally of the Organization of Afro-American Unity (1964).