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The Rise and Fall of Education Reform: Causal Gaps and the Pressure to Exploit Them

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THE RISE AND FALL OF EDUCATION REFORM: CAUSAL GAPS AND THE PRESSURE TO EXPLOIT THEM

I. PAST THEORIES OF EDUCATION REFORM AND FAILURE
   A. Paradigm Specific Scholarship
   B. Scholarship Exploring the Intersectionality of Paradigms

II. EDUCATION’S RE-OCCURRING CAUSAL GAP ACROSS TIME AND CLAIMS
   A. School Desegregation
   B. English Language Learners
   C. Educational Malpractice
   D. Poverty and School Finance Litigation
   E. Students with Disabilities

III. THE ROOT OF EDUCATION’S CAUSATION GAP
   A. General Ambiguity
   B. Externalities to Student Achievement
   C. Educational Policy’s Capacity to Counterbalance Externalities
   D. Indefinite Educational Harms
   E. The Structural Injunctions Accentuation of the Gap

IV. CAUSAL GAPS IN THE FUTURE OF CURRENT EDUCATION REFORMS
   A. No Child Left Behind
   B. School Finance, Lingering Causal Gaps, and the Pressure of Economic Crisis

ABSTRACT

The Article provides a unified explanation for the limits of education legal reform. The politics and interests involved in school desegregation, school finance, student disability litigation, and claims on behalf of English Language Learners differ, but each of these reform movements have been undermined or ended by the same inability to establish a precise causal connection between the educational policy or input in question and student outcomes. This Article identifies the role these causal gaps have played at crucial times in each movement and how they have limited reform. The Article then reveals why these gaps arise, exploring inherent aspects of education that defy the type of causal explanations demanded in court and finding that structural injunctions, the major tool of educational reform, only act to highlight these aspects of education. Thus, the very means necessary to reform education also serve to highlight education reform’s causal gaps. Finally, the Article identifies lingering causal gaps in the two current major reform movements, school finance and No Child Left Behind, and finds that external pressures threaten to exploit those gaps.
INTRODUCTION

Legal reforms have entirely transformed education over the past half century. Public schools have gone from routinely excluding or disadvantaging students based on race, disability, language, and gender to institutions that are formally bound to afford these students equal opportunity if not affirmative supplemental services. Yet, the evolution with respect to each of these student groups’ rights has not followed a path of linear progression and, unfortunately, has almost always involved significant regression after initial periods of progress and rights recognition. In fact, some of these group specific paradigms have experienced declines so significant that advocates are effectively unable to secure remedies for otherwise patently unequal or inadequate educational opportunities. School desegregation, for instance, experienced rapid expansion during the late 1960’s and early 1970’s, only to meet significant legal barriers immediately thereafter. The importance of those barriers grew during the following decades and paved the way for the resegregation that has left schools with levels of racial isolation that mirror those that existed when desegregation began. Although their histories are not as long and storied, the rights of English Language Learners and students with disabilities have also followed a similar path. They saw significant expansions during their nascent periods, but experienced significant subsequent constraints that either cut initial gains short or prevented students from vindicating their rights in practice. School finance reform’s trajectory is more difficult to characterize because the litigation has proceeded on independent tracts in the state court systems. But as a general matter, school finance experienced its greatest failures early, as notions of equity struggled to find recognition, and widespread success more recently, as the theory of adequacy began to take root. The movement’s full story, however, is far from written and recent signs suggest it is slowing and may encounter retraction.

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2 See, e.g., Thomas County Branch of N.A.A.C.P. v. Thomasville School Dist., 299 F.Supp.2d 1340 (M.D.Ga., 2004); NAACP v. Duval County Sch., 273 F.3d 960, 966 (11th Cir.2001); Ex parte James, 836 So.2d 813 (Ala. 2002).
3 See generally Derrick A. Bell, Jr., Race, Racism, and American Law 153-56 (2004 5th Ed.).
5 Eden Davis, Unhappy Parents of Limited English Proficiency Students: What Can They Really Do?, 35 J.L. & Educ. 277 (2006) (discussing the inability of LEP students to secure meaningful educational opportunities or options); Kristi L. Bowman, Pursuing Educational Opportunities for Latino/a Students, 88 N.C. L. Rev. 911, 929 (2010) (“During the 1960s and 1970s, Latinos/as began to benefit from expanding educational equity rights via statutes, doctrine, and regulations. In the thirty years since, many progressive social changes have occurred, but in general the rights-based framework provided by law has contracted.”).
8 See, e.g., Abbott v. Burke, 971 A.2d 989, 1992 (N.J. 2009) (for the first time since the litigation started nearly a quarter of a century ago that the state had met its constitutional obligation and requiring no further steps); John
Past scholarship has developed theoretical frameworks that seek to explain the successes and limits of each of these individual strands of education legal reform, but no one has, as of yet, identified a unified theory that collectively explains these movements and binds them together. This Article moves beyond individualized paradigms and presents such a theory of unified theory of educational legal reform. Analyzing the critical trajectory changes in each of these movements, this Article reveals that, regardless of the interests, motivations, and ideology involved in individual paradigms, all education reform movements share common causal gaps that leave them perpetually subject to legal constraints. In particular, education claims across all paradigms suffer from an inability to establish a causal connection between the educational input or policy in question and student outcomes. Desegregation plaintiffs have lacked evidence that specifically establishes a connection between past discrimination and current school segregation or past discrimination and the current racial achievement gaps. School finance litigation has struggled to establish a causal connection between money and student achievement. Advocates for English Language Learners, students with disabilities, and other disadvantaged students have all struggled to establish the necessary causal connection between a district’s curricular program and student failure. These causal gaps, at one point or another, act to limit or effectively end these movements.

Early in a movement’s evolution, courts sometimes entirely ignore these evidentiary and causal gaps or fill the gaps with assumptions that benefit plaintiffs, but they almost inevitably refuse to ignore these gaps or retain favorable assumptions forever. In particular, outside pressures slowly mount against a movement and outweigh those interests that prompted initial legal intervention. In response to these pressures, courts require that plaintiffs precisely demonstrate that particular educational policies have a detrimental effect on students or that an educational policy, not some other outside factor, is the actual cause of educational harm, which drastically limits plaintiffs’ ability to secure reform. This same problem can also arise at the remedial stage when courts demand that plaintiffs demonstrate that a particular remedy will actually correct the harm they suffer. In short, the causal gaps that are initially ignored so as to recognize claims later become the means by which to limit them.


12 See, e.g., School District No. 1 v. Keyes, 413 U.S. 189 (1973) (applying a presumption to the issue of causation); N.A.A.C.P. v. Duval County School, 273 F.3d 960, 966 (11th Cir. 2001) (presuming that all racial disparities are caused by prior discrimination).
13 Freeman v. Pitts, 503 U.S. 467, 495-96 (2002) (“though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities. . . . As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system.”); see also Missouri v. Jenkins, 515 U.S. 70, 101-02 (1995) (effectively refusing to apply a presumption in regard to diminished African American achievement).
14 See, e.g., Horne v. Flores, 129 S.Ct. 2579 (2009); Milliken v. Bradley, 418 U.S. 717 (1974); Freeman, 503 U.S. at X; Rodriguez, 411 U.S. at X.
By revealing the role that causal gaps play in each reform movement, this Article demonstrates that the various different education reform failures in desegregation, school finance, disability and other areas are not idiosyncratic but rather are examples revealing a common problem. Yet to be clear, these causal gaps alone do not completely control the success or failure of an educational movement. Paradigm specific doctrinal and theoretical frameworks do affect outcomes in the distinct strands of education law. For instance, Derrick Bell’s work suggests that the tolerable limits of school desegregation are set by whether the expansion of minority rights are beneficial to whites, just as other scholars have demonstrated that federalism and separation of powers concerns frequently mark the outer bounds of school finance litigation.\(^{16}\) This point of this Article is not to contradict scholarship of this sort, but to add another layer to and show that while causal gaps alone do not fully account for reform failure, neither does paradigm specific analysis. Both causal gaps and paradigm specific issues are at play, and causal gaps unite these paradigms as much as idiosyncrasies divide them.

In effect, the common causal gaps that the various movements share explain what makes the rise and fall of each movement possible. The very existence of these evidentiary gaps leaves education reform movements perpetually subject to prevailing idiosyncratic doctrinal, theoretical, and motivational approaches. And, in so far as one believes that the law has some grounding in neutral principles of justice and seeks to vindicate rights even in the face of political opposition, these reform failures demand explanation beyond or in addition to racial bias, cultural insensitivity, capitulation to wealth, or simple disregard for rights.\(^{17}\) These theories may reveal ulterior motivations that predispose courts toward particular results, but they do not afford courts free reign to disregard the rule of law. Rather, courts at their core remain tethered to doctrinal and evidentiary bases to justify their results.\(^{18}\) Thus, courts might favor particular results for all the reasons other scholarship suggests, but this article explains why these results are possible across all education paradigms.

The true test or value of a theory, however, is not its ability to explain the past, but its capacity to project into the future. As always, the hope is that we can avoid rather than replicate old mistakes. But if the past experience with causal gaps is any predictor of the future, the two most important current education legal reform movements are in jeopardy. Both school finance litigation and the No Child Left Behind Act are confronting seismic shifts in circumstance that will place increasing pressure on courts and policymakers. Causal gaps in these movements are readily available for exploitation in ways that can seriously undermine the movements.

\(^{16}\) See, e.g., Derrick A. Bell Jr., *The Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

\(^{17}\) See generally Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1, 3 (2008) (describing the rule of law as “one of the most important political ideals of our time. . . . Open any newspaper and you will see the Rule of Law cited and deployed . . . as a benchmark of political legitimacy.”)

\(^{18}\) See generally Id. at X; Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. Miami L. Rev. 947 (2010) (discussing the bounds of judicial discretion); Osborn v. Bank of the United States, 9 Wheat. 738, 866 (1824) (“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it.”).
The faltering economy is placing serious financial constraints on states’ ability to fund education, while lagging test scores are placing pressure on state and federal government to avoid the sanctions that No Child Left Behind demands. School finance litigation has invested enormous resources and time into the premise that money has a causal connection to student outcomes and educational quality, while No Child Left Behind is premised on the same in regard to testing and accountability. The premises of both movements are reasonable, but neither movement is in a position to seriously defend those premises, and mounting pressures threaten to unveil these weaknesses. The result would be a contraction similar to those in experienced elsewhere in the past. The point here, however, is not to encourage or hasten such an end, but to signal a warning for these and all future education reform movements so that they might act accordingly.

This Article proceeds in four parts. Part I of this Article explores past scholarship that has addressed the limits and failures of education reform, and points out that this scholarship has been paradigm specific. To the extent past scholarship has moved beyond a single educational paradigm, it has only been to explore the commonality of interests between movements such as race and poverty, not to identify common problems that explain the limits of reform across paradigms. Part II moves beyond this scholarship and connects the various education paradigms by identifying the causal gaps in desegregation, school finance, disability claims, English Language Learner claims, and educational malpractice. The Article then reveals the role these gaps have played in limiting reform in each individual movement. Part III explores why these causal gaps exist in the first instance, finding that in many respects that are inherent to education and unavoidable. Given that these gaps are endemic, Part IV looks to current and future education reform movements, analyzing whether causal gaps will undermine school finance and the Elementary and Secondary Education Act.

V. PAST THEORIES OF EDUCATION REFORM AND FAILURE
   A. Paradigm Specific Scholarship

Educational legal reform movements, thus far, have each largely been conceptualized through their own idiosyncratic paradigms. Rather than tying these movements to one another, most scholarship has analyzed each one as part of larger identity movement occurring outside of education or, as in the case of school finance, simply a distinct movement within education. School desegregation, for instance, has received the most extensive treatment of any of the

20 20 U.S.C. § 6311 (requiring all schools to meet 100 percent proficiency among all student groups); 20 U.S.C. § 63XX (imposing a series of sanctions for those that fail).
21 See generally Rebell, supra note, at (discussing the importance of money in school finance); see, e.g., Abbott v. Burke, 971 A.2d 989 (N.J. 2009) (20th decision in New Jersey’s school finance litigation, each of which has mandated improvements or changes in the school finance system).
23 See infra notes and accompanying text.
reform movements, but the scholarship has almost invariably treated it as an independent strain of law within education law. Scholars have made due note of desegregation’s changing fortune and attempted to explain it through various desegregation specific analyses. Most notably, Professor Derrick Bell articulated the interest convergence theory, which posits that the Supreme Court sought to dismantle de jure segregation, not to benefit blacks, but because it was in whites’ and the nation’s interests to do so.24 Yet, widespread desegregation that significantly improved the education and opportunities of African American was not in whites’ interests, but were seen as contrary to them.25 In short, the Court supported desegregation only in so far as the interests of whites and blacks converged. As a variant on this theme, other scholars have posited that the Court seeks to protect the status quo, however defined at the time, and desegregation eventually posed too large of a threat to it.26 Another group of scholars move in slightly different directions, conceiving desegregation as a vindication of interests such as corrective justice,27 stigma,28 or equal opportunity that, once addressed to a certain level, demand no further redress.29 To the extent school desegregation has been analyzed outside its own context, scholars have connected it to the larger movement for racial justice, rather than problems endemic to education.30 While the educational interests of Latino/a and other immigrant student populations are in many ways closely aligned with African Americans,31 their frequent status as English Language Learners has lead to another entirely distinct set of rights and analyses. In fact, early on the struggle was simply to gain distinct recognition and rights outside of the desegregation and racial paradigm.32 This, however, lead to a battle over bilingual education and other types of educational programs for English Language Learners.33 Scholars have conceptualized the resistance to bilingual and other educational services as ranging from basic pedagogical

24 Bell, supra note, at 523-24.
25 Id. at 526-27.
28 Kevin Brown, Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease, 78 CORNELL L. REV. 11 (1992) (discussing the invidious value that segregation inculcated and the need to remedy it); Derek W. Black, In Defense of Voluntary Desegregation: All Things Are Not Equal, 44 WAKE FOREST L. REV. 107 (2009).
29 James S. Liebman, Desegregating Politics: “All Out Desegregation” Explained, 90 COLUM. L. REV. 1463 (1990) (arguing that the factual basis for desegregation simply eroded over time).
31 For instance, African Americans and Latinos have both experienced school segregation and the disadvantages that accompany it. Moreover, their segregation is often not from one another but from whites. See, e.g., Keyes v. School District No. 1, 413 U.S. 189 (1973); ORFIELD & LEE, supra note, at X.
32 Bowman, supra note (describing the historical evolution of Latino/a students’ rights, including the movement from “other white” to a group with distinct rights).
33 See, e.g., California Proposition 227; Valeria v. Davis, 307 F.3d 1036 (9th Cir. 2003).
disagreements to cultural wars. On the one side, the majority seeks to maintain cultural and political hegemony and, on the other, Latinos, in particular, seek to validate their own culture and interests or simply resist treatment as second class citizens who are subject to majority’s whims and abuses. Analysis of this sort almost explicitly situates the rights of ELL students, not within education, but within the broader context of immigration and culture.

The literature on students with disabilities may offer the most distinct paradigm of any. Unlike any other group, many students with disability were entirely excluded for public education. Thus, their struggle was not to receive a better education or a non-segregated education, but simply to receive a public education. Although advocates were able to secure basic access to schools, the factors motivating the exclusion often continued and served as limit to reform. As several scholars note, the resistance then and now may simply be to the cost of educating students with serious disabilities, rather than the identity politics involved in other educational movements. That is not to say, however, the students with disabilities have not suffered from harmful stereotypes. Rather, an underlying skepticism of disabled students’ academic capacity and the efficacy of directing resources toward them are not uncommon.

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34 Rachel F. Moran, The Politics of Discretion: Federal Intervention in Bilingual Education, 76 CAL. L. REV. 1249, 1251-57 (1988) (describing the tug of war over the curriculum for linguistic minorities and the various pedagogical arguments on each side); see also id. at 1250 (arguing that “despite efforts to frame the bilingual education debate as a scientific argument about the appropriate content of the curriculum for linguistic minority students, the controversy actually reflects a battle over the allocation of discretion to make educational policy.”).


36 Bangs, supra note, at 113-16 (2000) (arguing that bans on bilingual education are attempts to specifically disempower language minorities at the local level from deciding their own educational fates).


38 Individuals with Disability in Education Act, 20 U.S.C. § 1400 et seq.


40 See generally Mark C. Weber, Reflections on the New Individuals with Disabilities Education Improvement Act, 58 FLA. L. REV. 7, 19-21 (2006) (discussing the opposition and concern over being held accountable for the achievement of students with disabilities); Michael A. Rebell & Robert L. Hughes, Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach, 25 J.L. & EDUC. 523 (1996) (discussing the stigmatization of special education students and its affect on their achievement); see also Sam Dillon, President’s Initiative to Shake Up Education Is Facing Protests in Many State Capitols, N.Y. TIMES, Mar. 8, 2004, at A12 (Democratic legislator criticizing “‘inappropriate’ provisions in the federal law that require special education students to achieve at the same rate as other students”). Children with disability also suffer from other forms of
Yet, among students with mild or questionable disabilities, scholarship has also posited that some special education referrals may be a function of the poor quality of the general education program. In a better school, the marginal student might progress without special services and neither the school nor the student’s parents would seek special education services, but in a low quality school, the calculus changes. The rationale choice for a parent whose child is struggling and who has no other school to attend is to seek a better education through special education. Moreover, to the extent this occurs, it can create a real or perceived competition for resources between the special education and general education program. With the exception of the latter theories, however, scholars have analyzed special education as a distinct movement within education. Its broader applicability is not to other education paradigms, but rather to the larger disability paradigm outside of education.

School finance litigation’s primary constituency is ambiguous and, thus, potentially broader. As a general matter, it involves claims nominally on behalf of poor and disadvantaged students. But in practice, the litigation primarily involves a battle between schools districts and the state. Possible for this reason, school finance litigation, unlike the other education movements, bears no strong connection to social movements outside of education. Although certain funding for poor children came out of the larger war on poverty in the 1960’s, modern school finance litigation is purely an education movement with most scholarship conceptualizing it as implicating a set of factors unique to school finance. For instance, theories regarding separation of powers, judicial competence, tax structures and incentives, local control, and intentional discrimination such as harassment based on their disability. Mark C. Weber, Disability Harassment in the Public Schools, 43 WM. & MARY L. REV. 1079 (2002).


THOMAS B. PARISH, SPECIAL EDUCATION—AT WHAT COST TO GENERAL EDUCATION? (Center for Special Education Finance, 1999-2000); Parental Rights, 121 HARV. L. REV. 365, 372 (2007) (discussing the argument that special education damage awards deplete educational funds for general education); Mary C. Stabilein, An IDEA Gone Out of Control: Covington v. Knox County School Board, 45 HOW. L.J. 643 (2002) (criticizing a Sixth Circuit special education holding as siphoning away funds that are needed to meet the collective good).

For an example of analysis connecting special education to the broader disability movement, see Wendy Hensel; CARRIE BASAS, DISABILITY RIGHTS LAW: CASES, PROBLEMS, AND PRACTICE (2012).

Ryan, infra note , at X.


Laurie Reynolds, Uniformity of Taxation and the Preservation of Local Control in School Finance Reform, 40 U.C. DAVIS L. REV. 1835 (2007); Jeffery D. Van Volkenburg, What Public Education Should Learn from Major
the political power that attends wealth and financial capacity inequality\(^{50}\) have all been significant in understanding the limits of school finance reform, while standards based reform and the centralization of educational responsibility have been identified as expanding it.\(^{51}\) None of these, however, have direct import across the varying other paradigms of education reform.

### B. Scholarship Exploring the Intersectionality of Paradigms

While scholarship has yet to unify these strands of education litigation and reform, this does not mean that it has ignored certain intersections between these movements. In fact, scholarship in all of these paradigms has identified the ways in which they intersect. For instance, school finance litigation, as litigation on behalf of poor and disadvantaged students, involves the interests of virtually every subgroup one could imagine, from racial minorities, language minorities, and students with disabilities to rural schools, urban schools and suburban schools. Thus, advocates routinely make out their prima facie case by demonstrating the educational deficiencies that minority, ELL, and disabled students suffer.\(^{52}\) Professor Jim Ryan, in particular, has demonstrated the likely role that race, even though not an explicit factor, has played in frustrating certain school finance claims.\(^{53}\) In particular, school finance claims brought on behalf of school districts that are predominantly minority have faced not only those problems endemic to any school finance claim, but also the subtle disadvantage of race, even though the claims themselves are not based on race.\(^{54}\)

Scholars have also focused on the intersection of racial discrimination and special education, as minority students are disproportionally identified as having disabilities.\(^{55}\) Too often minority students may not actually have a disability, but rather are simply perceived as

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\(^{50}\) Jeffrey Metzler, Inequitable Equilibrium: School Finance in the United States, 36 IND. L. REV. 561 (2003) (finding that regardless of judicial remedies or the particular funding method, school finance inequality is constant across states because political pressures result in measures that cancel out progressive action); see also JOHN E. COONS, WILLIAM H CLUNE III & STEPHEN D. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (Harv. U. Press 1970) (identifying the problem in school finance not as one of insufficient local effort, but of vast wealth inequalities within a state).


\(^{52}\) See, e.g., Hancock v. Driscoll, No. 02-2978, 2004 WL 877984 at 14-15 (2004); Hoke County v. State, 599 S.E.2d 365, 390 (N.C. 2004) (including limited English Proficiency and membership in a racial or ethnic minority within the definition of “at-risk” and discussing the evidence regarding those students’ opportunities).


\(^{54}\) Id. at 434.

having a disability because, for instance, a school or teacher’s behavioral expectations are tinged with racial bias that is difficult to discern.56 Moreover, the difficulty in making an a racial discrimination claim and the relatively abundant protections that special education statutes provide in regard to disability can make a special education identification attractive shield to minority parents.57 ELL students, likewise, experience analogous problems. Schools frequently struggle with whether immigrant students’ academic difficulties are indicative of a learning disability or language limitation. Administrators can misperceive an ELL student’s language deficiencies as a disability or overlook an actual disability because they assume the learning barriers stems from language.58 Finally, the intersection of race, language and special education also relates to school finance, as schools with the highest percentages of racial minorities, language minorities, and special education students often tend to be the districts with the highest student need and the least financial capacity to meet that need.59 Yet as the theoretical paradigms related to each of the student groups suggest, the law is not predisposed to respond.

In these respects, these educational movements are inherently intertwined and insightful scholarship has developed the relevance of these overlapping paradigms. In effect, intersectional analysis unveils the double bind that a particular movement might encounter. Rather than just encountering the limits endemic to special education, some advocates will also encounter limitations stemming from race. Some scholars may even argue that race pervades most education reform movement in some respect.60 But such theories are premised on the intersectionality of race, not on race or any other paradigm as a unified theory of education reform. Thus, while intersectional analysis recognizes and imports the relevance of one paradigm of disadvantage in the context of another education reform movement, such analysis is not equivalent to a unified theory of education reform. This article takes the opposite approach. It makes no attempt to address the intersectionality of various educational paradigms. Rather it assumes the existence of individual paradigms, as well as their intersection, and instead directs its attention toward identifying a unified theory of the rise and fall of education reforms.

VI. EDUCATION’S RE-OCCURRING CAUSAL GAP ACROSS TIME AND CLAIMS

Educational legal reform movements have been largely defined by the causation problems they confront. From school desegregation and school finance to the rights of English Language Learners, students with disabilities, and students subject to poor teaching, causation

56 See Losen & Welner, supra note, at 413-17 (indicating that many racially disparities in special education are so large that they are indicative of racial discrimination in the identification process).
57 Minority students, for instance, are disproportionately funneled through the “school to prison pipeline.” ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005). Special education procedures unfortunately may be one of the few options some parents have to slow down the process.
60 See, e.g., William L. Taylor, The Continuing Struggle for Equal Educational Opportunity, 71 N.C. L. REV. 1693 (1993) (identifying race as our central social dilemma and articulating various educational policies that are responsive to that realization).
questions have consistently constrained the ability of advocates to substantiate claims and secure remedies. The extent to which courts overlook or examine these questions has largely been the difference between plaintiffs’ success and failure. When courts have relaxed or ignored causation inquiries, plaintiffs have had relatively little difficulty in establishing their claims. But in most instances where courts have examined causal questions, they have revealed evidentiary gaps or demanded such precise evidence that plaintiffs have been unable to provide it. This has served to limit liability under existing claims or simply eliminate classes of claims altogether.

A. School Desegregation

1. The Early Years: Ignoring the Gap in the Rise of Desegregation

The centrality of causation to the rise and fall of educational claims is most obvious in school desegregation. In the earliest years of desegregation, causation was unquestioned and effectively irrelevant. Schools were coming out of a period where they had entirely barred minorities from attending white schools. That those prohibitions were the cause of segregation in schools was largely beyond question. In addition, the Court’s initial failure to specify any remedy other than eliminating the prohibition on integrated schools avoided tough causal questions. But once the Court began to demand affirmative desegregation, the question of causation, at least theoretically, became important.

The Court in Brown v. Board of Education II stated its goal as restoring the victims of segregation to their former positions. Since a court cannot actually rewind the clock, restoring victims to their former position necessarily raises the question of how much current segregation is attributable to past discrimination. It is certainly possible that past discrimination and segregation are the sole causes of all-black and all-white schools, but it is also possible that they only caused a disproportionately large or significant number of minorities to attend non-white schools. The Court’s earliest desegregation cases, however, had at least two important reasons for avoiding this issue altogether. First, resolving this causal question may be impossible because it calls for specificity and speculation. Second, eradicating legally sponsored segregation and discrimination was so morally and legally compelling that it superseded other concerns, including causation uncertainties that could undermine change.

The Court in Green v. New Kent County, for instance, was clear that desegregation was of overwhelming importance and could no longer wait. Thus, it is of no surprise that the Court obfuscated causal inquiries that would impede the movement. The Court asserted that the

62 Id. at 495–96 (reserving the question of a remedy for subsequent argument).
63 Brown v. Board II, 349 U.S. 294, 300 (1955) (only mandating that “the defendants make a prompt and reasonable start toward full compliance” with its previous decision).
64 See generally J. HARVIE WILKINSON, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION 62 (1979) (“No single decision has had more moral force than Brown; few struggles have been morally more significant than the one for racial integration of American life.”); Paul Bender, Is the Burger Court Really Like the Warren Court?, 82 Mich. L. Rev. 635, 647 (1984) (noting others’ description of segregation as a moral disaster).
66 Id. at X.
connection between current and past segregation mandated action, and implicitly assumed that all existing segregation was caused by either past or present discrimination. Little, if any, attention was paid to actually connecting current inequality with discriminatory conduct. The Court simply indicated that a school’s constitutional responsibility was to eradicate the vestiges of discrimination “root and branch,” and the existence of current inequality itself amounted to vestige. Thus, schools’ effective responsibility was to eliminate all segregation and inequity, without precisely examining its root.

Given that de jure segregation was recent and most districts had done nothing since Brown to affirmatively dismantle segregation, the Court’s mandate and assumption were, of course, accurate in most instances. The point here is simply that, during the initial stages of desegregation, the Court made causal assumptions, which it was not bound to make. Second, those causal assumptions were integral to ensuring that desegregation moved forward rapidly. Third, those causal assumptions, while reasonable at the time, are not infallible. Any time that the Court wished to slow desegregation, it could simply refrain from making those assumptions.

2. **The Middle Years: Recognizing the Gap, But Limiting Its Relevance**

The first step in slowing desegregation occurred when desegregation moved outside the south. The Court immediately questioned the causal connection between segregation and discriminatory state action. Rather than assume a causal connection, the Court in Keyes v. School District No. 1 held that in a district that was not previously segregated by law a plaintiff must demonstrate that intentional discrimination was the cause of current segregation. This holding immediately created problems outside of the south, where most districts had never explicitly mandated segregation by law. In such districts, plaintiffs would have to identify a racial motivation to segregate students and actual steps taken toward that end. Likewise, they had to connect the segregative action to actual segregative results. These inquiries represent a clear shift away from its previous paradigm to one that places limits on the duty of schools to desegregate and leaves segregation that is not causally connected to past discrimination untouched.

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67 Id. at X.
68 Id. at 438.
70 ORFIELD & LEE, supra note 6.
71 Keyes v. School District No. 1, 413 U.S. 189 (1973)
72 Id. at 205-206.
73 Id. at 217.
74 Id. at X.
The Court, however, was keenly aware of the significance of bringing these causal inquiries to the fore, particularly for plaintiffs. While the Court was no longer willing to overlook these issues, neither was it willing to bring desegregation to an end. Thus, it took a more moderate approach. The Court held that, if a plaintiff could establish intentional discrimination and that it was the cause of a substantial portion of the segregation in a school district, a presumption would arise that all other segregation in the district was also a result of intentional discrimination.\(^76\) This presumption would also apply across time. If a plaintiff could establish past intentional discrimination, courts would presume that past discrimination was the cause of current segregation.\(^77\) In short, once plaintiffs made an initial showing of substantial past or present discrimination, plaintiffs would then bear the burden of disproving a causal connection between discriminatory action and current segregation.

In this respect, the evidentiary gap that *Keyes* raised became the central determinate to the future of desegregation. As the time the end of de jure segregation became more distant in time, establishing liability would become increasingly difficult unless evidentiary burdens were eased. New acts of intentional discrimination would not be blatant as old ones,\(^78\) nor would the causal connection between old policies and current circumstances be simple.\(^79\) The passage of time alone would guarantee changes in school board membership, school district administration, neighborhood compositions, and school enrollments,\(^80\) any of which would complicate causal inferences. Given these evidentiary problems, placing the burden of proof on plaintiffs to affirmatively demonstrate causation with any level of precision would almost certainly render the end of numerous desegregation remedies in the short term and most in the long term.\(^81\) Placing the burden on the defendant to disprove causation would result in the opposite.\(^82\) Recognizing this, the Court in *Keyes* was confronted with a choice of who should benefit and suffer from this evidentiary gap. Addressing the question, the Court indicated that it was not bound by any rule, but rather “[t]he issue . . . ‘is merely a question of policy and fairness based on experience in the different situations.’”\(^83\) When a school district has a history of segregative acts, “‘fairness' and ‘policy’ require state authorities to bear the burden of explaining actions or

\(^{76}\) *Keyes*, 413 U.S. at 208  
\(^{77}\) *Id.* at 210.  
\(^{78}\) *Id.* at 212 (describing how facially neutral assignment policies may in fact be discriminatory).  
\(^{79}\) *Id.* at 211 (noting that the connection between past discrimination and current segregation may be “so attenuated as to be incapable of supporting a finding of de jure segregation”)  
\(^{80}\) See, e.g., Thomas County NAACP v. City of Thomasville 299 F.Supp.2d 1350 (200X).  
\(^{81}\) See G. Scott Williams, *Unitary School Systems and Underlying Vestiges of State-Imposed Segregation*, 87 COLUM.L.REV. 794, 810 (1987) (discussing the significance of allocating the burden of proof within the context of such complex questions of fact); see also *Keyes*, 413 U.S. at 224 (J. Powell) (arguing that the majority opinion was results oriented); Freeman v. Pitts, 503 U.S. 467, 503 (1992) (Scalia concurring) (writing that “allocation of the burden of proof foreordains the result in almost all of the ‘vestige of past discrimination’ cases. If . . . we require the plaintiffs to establish . . . that the racial imbalance they wish corrected is at least in part the vestige of an old de jure system[,] the plaintiffs will almost always lose.”).  
\(^{82}\) *Freeman*, 503 U.S. at 503 (Scalia dissenting)  
\(^{83}\) *Keyes*, 413 U.S. at 209.
conditions which appear to be racially motivated.\textsuperscript{84} As James Liebman later wrote, the presumption was not simply a choice to favor plaintiffs, but was based on minimizing the errors that inevitably result from dealing with complex questions of fact, such as the cause of school segregation.\textsuperscript{85} Regardless of what evidence could be marshaled in any particular case, the Court was assuming that current segregation, in reality, was more often than not caused by past intentional segregation. Thus, placing the burden on school districts would minimize errors and correctly allocate the cost of inevitable errors to districts.\textsuperscript{86}

Regardless, the presumption immediately became part of basic desegregation law and was even expanded in application by lower courts. Courts presumed not only that any identifiable school segregation was a result of past discrimination, but also that racial disparities in various other aspects of schools, such as transportation, faculty, staff, facilities, extracurricular activities, discipline and ability grouping were caused by past discrimination.\textsuperscript{87} The connection between past discrimination and racial disparities in these latter areas, however, is even less clear than in regard to school segregation itself.\textsuperscript{88} And, for this very reason, a strictly applied presumption in regard to causation is even more difficult to disprove. In short, while significant evidentiary gaps in regard to causation existed in desegregation cases, the courts closed this gap for plaintiffs through the presumption, justifying the measure based on history and fairness.

3. Focusing on Causal Gaps As the Means to End Reform

Nearly as soon as the Court recognized the presumption to resolve causation ambiguities, it began to curtail its application. While the Court in \textit{Keyes} had limited desegregation in one respect by requiring evidence of intentional discrimination, the presumption created the means by which to extensively expand desegregation in other respects. Taken to its natural conclusion, there is very little racial inequity in schools to which the presumption would not apply.\textsuperscript{89} Thus, just one year later, in \textit{Milliken v. Bradley},\textsuperscript{90} the Court made a crucial distinction between intra- and inter-district segregation and refrained from applying the presumption in regard to the latter.\textsuperscript{91} In the lower court, the plaintiffs had established intentional segregation by the Detroit School System, along with the collusion of the state and some surrounding districts.\textsuperscript{92} The precise extent and cause of segregation in the entire metropolitan area was certainly vaguer, but

\textsuperscript{84} Id. at 209 or 210.
\textsuperscript{85} Liebman, \textit{supra} note 38, at 1512.
\textsuperscript{86} Id. at 1512.
\textsuperscript{87} See, e.g., N.A.A.C.P. v. Duval County, 273 F.3d 960, 966 (11th Cir. 2001); Lockett v. Bd. of Educ., 111 F.3d 839, 843 (11th Cir.1997).
\textsuperscript{88} See generally 93 HARV. L. REV. 60, 127 (discussing the questionable yet real connection between past and present segregation).
\textsuperscript{89} Liebman, \textit{supra} note, at X; G. Scott Williams, \textit{Unitary School Systems and Underlying Vestiges of State-Imposed Segregation}, 87 COLUM. L. REV. 794 (1987); see also Tasby v. Wright, 520 F. Supp. 683, 706 (N.D. Texas 1981) (“Over time, disproof of causation might become increasingly difficult for the defendant . . . . It may become impossible ever to prove . . . that past school segregation no longer has an impact on residential segregation.”).
\textsuperscript{91} Id. at 748.
\textsuperscript{92} Id. at X.
applying the presumption to the established instances of segregation theoretically could have warranted desegregation of the entire metropolitan area.\textsuperscript{93} In fact, the district court ordered a metropolitan wide remedy.\textsuperscript{94}

The Supreme Court, however, reversed and held that a metropolitan wide remedy was unjustifiable in the absence of evidence of more substantial intentional discrimination by the suburban districts themselves.\textsuperscript{95} The Court made no mention of the presumption, notwithstanding the state’s discrimination, its control over the suburban districts, and some instances of discrimination by the suburban districts themselves. The Court dismissed the suburban discrimination as insignificant and the state involvement as too attenuated.\textsuperscript{96} In effect, the Court went from presuming a connection between current and past intra-district segregation in \textit{Keyes} to presuming the opposite regarding the connection to inter-district segregation in \textit{Milliken}. The practical effect was that evidentiary gaps worked to the advantage of plaintiffs in intra-district cases, but worked to their disadvantage in inter-district cases.

Three years later, the Court in \textit{Dayton v. Brinkman}\textsuperscript{97} went even further to limit the presumption’s effect in intra-district cases. The Court required plaintiffs to demonstrate the “incremental segregative effect” of past discrimination on the current “racial distribution of [a] school population,” as measured by the difference between the current level of segregation and “what it would have been in the absence of . . . constitutional violations.”\textsuperscript{98} Such a precise causal showing have never even been hinted at previously, but in \textit{Dayton} marked the outer limits of the desegregation remedy. The Court indicated that the remedy would do no more than “redress that [precise] difference, and only if there has been a systemwide impact may there be a systemwide remedy.”\textsuperscript{99} By forcing the plaintiffs to make these affirmative causal showings, the Court implicitly rejected the presumption and, thereby, limited desegregation by demanding that plaintiffs close a practically unresolvable causal gap.

The Court’s causal demand is even more curious given that the Court in \textit{Dayton} was candid in its appraisal of the evidentiary problems involved. The Court wrote that in at least two distinct respects “the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit.”\textsuperscript{100} First, “[f]indings as to the motivations of multimembered public bodies are of necessity difficult.”\textsuperscript{101} Second, “the [causal] question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face

\textsuperscript{94} \textit{Milliken}, 418 U.S. at 729-730.
\textsuperscript{95} \textit{Id.} at 745.
\textsuperscript{96} \textit{Id.} at 748.
\textsuperscript{97} 433 U.S. 406 (1977).
\textsuperscript{98} \textit{Id.} at 421.
\textsuperscript{99} \textit{Id.} at X.
\textsuperscript{100} \textit{Id.} at 414.
\textsuperscript{101} \textit{Id.}
but were in fact invidiously discriminatory is not an easy one to resolve." The Court even indicated that it sympathized with the lower court, writing that “it is much easier for a reviewing court to fault ambiguous phrases such as ‘cumulative violation’ than it is for the finder of fact to make the complex factual determinations in the first instance.” The Court attempted to articulate these as judicial problem rather than ones that would undermine the plaintiffs, but the recognition of the problem itself necessarily reveals that the Court was keenly aware that requiring evidence of the “incremental” segregative effects of schools’ actions would ultimately limit the future of desegregation.

The rapid deceleration of desegregation that Dayton’s incremental effects requirement would have wrought, however, was forestalled by subsequent lower court and Supreme Court that distinguished the facts in Dayton. But Dayton’s fundamental concern regarding the diminishing causal connection between the original acts of discrimination and current segregation as time passed did not vanish. The concern resurfaced even more explicitly in subsequent cases, as the natural passage of time increasingly highlighted the potential causation problem. When it resurfaced, however, it came not just as a limit on desegregation remedies, but as a measure to bring about the complete end of desegregation in many districts.

In Freeman v. Pitts, for instance, the Court held that “in the late phases of carrying out a decree, when [racial] imbalance is attributable neither to the prior de jure system nor to a later violation by the school district but rather to independent demographic forces,” lower courts are prohibited from requiring various aggressive desegregation measures. With no other context, this statement might sound insignificant because, technically speaking, current racial imbalance that is not attributable to past discrimination has always been beyond the reach of court ordered remedy. Yet in early periods, the Court had assumed the connection to past discrimination because both the attribution and non-attribution of current imbalances was unclear. The Court’s statement in Freeman, in contrast, represents a refusal to make any such causal assumptions and a shift toward delineating between the causes of segregation. Moreover, when significant demographic shifts have occurred, the Court will, to plaintiffs’ detriment, presume that current segregation is the result of demographic shifts rather than discrimination.

102 Id.
103 Id. at 420.
104 Dayton involved a peculiar set of facts in which the district court had referred to the school district as engaging in a “cumulative violation” rather than specifying the violation. Id. at 413. The facts also included the district court indicating that no intentional discrimination had been involved in the setting of school attendance boundaries, but faulting the school district for failing to take affirmative steps to desegregate. Id. at 412.
105 Id. at 407 (explaining that when mandatory segregative policies had “long since ceased,” it must be determined that the school board intended to discriminate and that a systemwide remedy would only be appropriate in the event of systemwide discrimination).
107 Id. at 493.
108 Swann v. Mecklenburg, X (indicating the scope of the violation determines the scope of the remedy).
109 See, e.g., Keyes v. School District, 413 U.S. at X.
110 Freeman, 503 U.S. at 495. See also David Crump, From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Cases, 68 WASH. L. REV. 753 (1993) (“Freeman allows the school district to rebut causation by showing that the violation was distant in time.”).
The Court’s rational for its holding makes its skepticism regarding the causal connection between past and present segregation even clearer. The Court reasoned that although past segregation by the state is “a stubborn fact of history [that can] . . . linger and persist,” we must not “overstate its consequences in fixing legal responsibilities.”\textsuperscript{111} For these vestiges of segregation to be any “concern of the law . . . , they must be so real that they have a causal link to the de jure violation being remedied.”\textsuperscript{112} In most instances, the Court indicated that no such connection any longer exists.\textsuperscript{113} Rather, “[a]s the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.”\textsuperscript{114}

The problem with this reasoning, however, is that the causal effects of past discrimination have always been “subtle and intangible.”\textsuperscript{115} For this very reason, the Court in Keyes refused to place the full burden of establishing causation on the plaintiffs. And given the passage of time, plaintiffs needed the benefit of the presumption more in Freeman than in Keyes. But rather than extend the presumption, the Court in Freeman, at best, acts as though it evaporates over time and, at worst, reverses it, effectively presuming that demographic shifts sever the connection between present and past segregation.\textsuperscript{116}

It is also worth noting that, while the majority was unwilling to directly confront this underlying reality, Justice Scalia authored a concurrence in Freeman that as clearly as any opinion identified the causal problem and what was at stake not only in Freeman, but throughout the prior decades. He explained that the evidentiary problem in education was far more complex than the Court had ever previously admitted and that the simplistic way in which it had been applied only obfuscated the problem.\textsuperscript{117} Previous opinions had “not even betrayed an awareness that [identifying segregative violations and remedying them is] considerably more difficult than calculating the amount of taxes unconstitutionally paid . . . [or] that any assessment that [schools] would not be segregated, or would not be as segregated, in the absence of a particular one of those [public or private] factors is guesswork.”\textsuperscript{118} Rather than a reasoned and

\textsuperscript{111} Freeman, 503 U.S. at 495-96.
\textsuperscript{112} Id. at 496.
\textsuperscript{113} Id. at X (“It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a de jure violation. And the law need not proceed on that premise.”).
\textsuperscript{114} Id. at 495-96.
\textsuperscript{115} Id. at 496.
\textsuperscript{116} See generally Wendy Parker, The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities, 50 HASTINGS L.J. 475 (1999) (finding that “the causation presumptions appear to lessen in validity over time”); Crump, supra note, at X.
\textsuperscript{117} “Identifying and undoing the effects of some violations of the law is easy. Where, for example, a tax is found to have been unconstitutionally imposed, calculating the funds derived from that tax (which must be refunded), and distinguishing them from the funds derived from other taxes (which may be retained), is a simple matter. That is not so with respect to the effects of unconstitutionally operating a legally segregated school system; they are uncommonly difficult to identify and to separate from the effects of other causes.” Id. at 501.
\textsuperscript{118} Freeman, 503 U.S. at 503 (“It is similarly guesswork, of course, to say that they would be segregated, or would be as segregated, in the absence of one of those factors.”).
reliable procedural tool, Justice Scalia argued that the presumption was simply a policy choice to preordain winners and losers. He conceded that such an “extraordinary” policy choice may have once been warranted, but emphasized that it is “absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”

Thus, the time had come to “revert to the ordinary principles of our law” and require that desegregation plaintiffs to “prove intent and causation and not merely the existence of racial disparity.”

While the Court did not have to formally adopt Scalia’s position, it has produced it as a matter of practice. Given the inevitable demographic shifts in major metropolitan school districts and the unresolvable causal inquiry the shifts raise, very few plaintiffs have been able to meet the evidentiary requirements of *Milliken* and *Freeman*. In short, a mere in the Court’s approach to causal gaps has been enough to bring an end to desegregation in most districts. One last option, however, was left for plaintiffs: seeking additional resources to improve schools and districts that would not otherwise be desegregated.

Yet, shortly after *Freeman*, the Court’s opinion in *Missouri v. Jenkins* demonstrated that the causal problems involved in justifying educational quality improvements are just as complex as those in school integration remedies. The district court in *Jenkins* had ordered qualitative improvements on two bases: to attract whites back to the public schools and to remedy diminished African American achievement. The rationale behind attracting whites was quickly dismissed. The Court reasoned that white flight was primarily a response to desegregation remedies, not segregation itself. If a plaintiff could establish that de jure segregation itself was a direct cause of subsequent white flight, a remedy might be in order, but a plaintiff would still need to establish the precise segregative effect of the de jure segregation induced white flight. It suffices to say that, if disentangling segregation caused by demographic shifts from segregation caused by school policy borders on guesswork, peering into the minds of white parents who fled school districts years ago with the precision suggested by the Court requires sorcery.

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119 *Id.* (The “allocation of the burden of proof foreordains the result in almost all of the ‘vestige of past discrimination’ cases. If . . . we require the plaintiffs to establish . . . that the racial imbalance they wish corrected is at least in part the vestige of an old de jure system[,] the plaintiffs will almost always lose. Conversely, if we alter our normal approach and require the school authorities to establish the negative—that the imbalance is not attributable to their past discrimination—the plaintiffs will almost always win.”).

120 *Id.* at 506.

121 *Id.* at 506.

122 515 U.S. 70.

123 *Id.* at 91 (explaining that the district’s goals were impermissible because they involved inter-district action where courts had only before found intra-district violations).

124 Jenkins v. Missouri, 855 F.2d 1295, 1302 (“These holdings are bolstered by the district court’s findings that the preponderance of black students in the district was due to the State and KCMSD’s constitutional violations, which caused white flight”).

125 *Jenkins*, 515 U.S. at 83-84 (expressing concern over the fact that the district court had not identified the extent of the segregative effect).
The more important aspect of Jenkins addressed the causal connection between past segregation and the black-white achievement gap. The primary basis for ordering qualitative educational improvements was that segregation deprived minority students not simply of the right to attend a school of their choice, but to receive a quality education, which had the effect of depressing African American achievement. This rationale had sufficed to justify qualitative improvement remedies in various cases prior to the Court’s decision in Jenkins. To justify such remedies, however, the Court in Jenkins required that plaintiffs affirmatively demonstrate the causal connection between segregation and the achievement gap. In particular, plaintiffs must identify “the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs.” And the Court presupposed that this effect would be limited at best, writing that “[j]ust as demographic changes independent of de jure segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of the [schools] affect minority student achievement.” Thus, establishing the causal connection between past segregation and current achievement gaps would be no less complicated that connecting past segregation to current segregation. In short, the Court, as in all of its cases after Keyes, raised a complex causal question and placed the nearly impossible burden of resolving it on plaintiffs.

4. The Practical Impossibility of Resolving Desegregation’s Causal Gap

The practical impossibility of the foregoing causal demands is borne out by the fact that so few subsequent plaintiffs have attempted, much less met, these demands and that even in those select successful cases, success has been limited and still failed to resolve important causal ambiguities. Whether attempting to distinguish the various factors that cause the achievement gap (per the Court’s decision in Missouri v. Jenkins) or attempting to establish inter-district segregation and its incremental effects, causal problems continue to abound and reinforce the seeming impossibility of reliably resolving the causal inquiries raised by Supreme Court precedent. Plaintiffs have presented probative evidence, but the evidence simply raises additional causal questions that plaintiffs are in no better position to answer. In the end, plaintiffs are successful only when a court is willing to make a favorable inference or assumption on plaintiffs’ behalf.

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127 Little Rock v. Pulaski County, 839 F.2d 1296 (8th Cir. 1988).
128 Jenkins, 515 U.S. at 101.
129 Id. at 102.
130 James E. Ryan, The Limited Influence of Social Science Evidence in Modern Desegregation Cases, 81 N.C. L. REV. 1659, 1673 (2003) (indicating that sorting the effects of past segregation from the effects of various external factors on student achievement is nearly impossible).
132 See, e.g., Lauderdale County v. Enterprise Consol. School Dist., 24 F.3d 671 (5th Cir. 1994); Goldsboro City v. Wayne County, 745 F.2d 324 (4th. 1984); Liddell v. State, 731 F.2d 1294 (8th Cir. 1984); Berry v. School Dist., 698 F.2d 813 (6th Cir. 1983).
For instance, on remand in *Missouri v. Jenkins*, both the plaintiffs and defendants presented extensive evidence in the attempt to delineate the various factors contributing to the racial achievement gap and its connection to past segregation.\(^{133}\) The defendants asserted that poverty rather than race caused the achievement gap.\(^{134}\) The district court agreed that the poverty was a significant cause, but rejected the notion that it was the sole cause.\(^{135}\) Rather, poverty only explained or caused two-thirds of the achievement gap.\(^{136}\) As to the remaining one-third of the gap, the court relied on the plaintiffs’ evidence, which established “that about 4% to 9% of the achievement gap was explained by race” alone.\(^{137}\) But another two to four percent of the gap was attributable to “teachers’ low expectations” for students attending schools that are predominantly minority.\(^{138}\) Taking the high end of these ranges, the district court concluded that 13% of the achievement gap was attributable to race.\(^{139}\)

The delineation of the achievement gap with this level of specificity is unquestionably impressive, but it does not strictly speaking fully resolve the causal connection to segregation, which the Supreme Court in *Jenkins* indicated was at issue. Establishing that race accounts for a portion of the achievement gap does not reveal why race matters.\(^{140}\) Race could matter because private actors are currently discriminating against minorities, private actors previously discriminated against minorities, minorities continue to suffer the effects of de jure segregated schools, de facto segregated schools are currently providing inferior opportunities to minorities, or a combination of these and other factors. Thus, while race clearly matters, it is unclear that segregation—the basis for the remedy in the case—is the cause of the achievement gap. Likewise, that the low expectations of teachers contribute to low achievement in predominantly minority schools is instructive, but these low expectations can be a result of teachers’ racial biases or other arguably non-racial reasons such as their awareness of the perpetual low failure of students in predominantly poor schools.\(^{141}\)

The point here is not that discrimination lacks any current causal power. It is hard to imagine that it does not given our historical experience with discrimination. But statistical analysis, even very sophisticated analysis, does not establish the strict form of causation the Court has demanded. At best, statistical analysis provides a reasonable basis to infer a causal connection to past segregation,\(^{142}\) but not the precise incremental effect that past segregation has

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\(^{133}\) *Jenkins v. Missouri*, 122 F.3d 588, 598-99 (8th Cir. 1997).

\(^{134}\) Id. at 598.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id. The evidence also showed that the achievement gap increased over time in subsequent grade levels. Id.

\(^{140}\) See generally D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 534-36 (2008) (discussing the problems associated with drawing causal effects and causal inferences from statistics, as well the unquantifiables that are masked by data); Wessman v. Gittens, 160 F.3d 790, 803-04 (1st Cir. 1998) (refusing to attribute discrimination as the cause of the statistical relevance of race in the achievement gap).

\(^{141}\) Thomasville, X.

\(^{142}\) Greiner, *supra* note, at X.
on current student achievement, which the Court indicated was necessary. The lower court averred the problem this presented for plaintiffs solely by holding that “burden of proof [i]s on the State to prove that it had not caused the gap.” While plaintiffs may not have established the causal connection, neither did defendants rebut the presumption that the connection exists. Thus, the presumption rather than the evidence resolved the question of causation in plaintiffs’ favor. Yet, as indicated previously, the Supreme Court’s opinion in Jenkins made no mention of applying the presumption in regard to the achievement gap. In fact, other courts have held that the presumption does not apply here. And when other courts have refused to apply it, plaintiffs have almost uniformly failed in their attempts to connect present achievement gaps to past discrimination.

Plaintiffs have had no more success in precisely connecting past segregation to current segregation itself. This problem is most obvious in inter-district segregation claims where the courts have abandoned the presumption and demanded evidence of incremental segregation. Without the benefit of the presumption to close the factual ambiguities, plaintiffs face the same practical impossibility that exists regarding the achievement gap. While almost every metropolitan school district in the country has experienced significant inter-district segregation, only two courts have ever found that a plaintiff’s evidence was sufficient to establish inter-district segregation and the specific causation requirement. Moreover, even in those instances where plaintiffs have succeeded, their success has been limited.

For instance, in U.S. v. Board of School Com’rs of City of Indianapolis, the plaintiffs demonstrated that intentional inter-district segregation had occurred, but they could not establish that the segregative effects were substantial enough to justify a metropolitan wide inter-district desegregation plan. Plaintiffs presented expert evidence that attempted as best as

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143 In fact, for these reasons, the defendant argued that the plaintiffs’ expert testimony was insufficient evidence upon which to base a connection to past segregation. The correlation between poverty and achievement ruled out past segregation as a cause of two thirds of the achievement gap, but the correlation between race and a portion of the gap did not establish segregation as a cause. Thus, inferring such a causal conclusion, without further evidence, is speculative. Jenkins, 122 F.3d at 598.
144 Id. at 598.
146 Milliken v. Bradley, X; Edgerson v. Clinton, 86 F.3d 833, 837 (8th Cir. 1996).
148 See, e.g., U.S. v. City of Indianapolis, 637 F.2d 1101 (7th Cir. 1980); and XX.
149 637 F.2d 1101 (7th Cir. 1980).
150 Id. at 1108. The evidence revealed a debate during the late 1960’s over whether to expand the city school district’s boundaries to encompass the county. The Court of Appeals indicated that there were simply differing opinions as to this issue, but “the district judge considered the timing of the decision (shortly after this suit had been filed, signaling a likely end to the segregated conditions which had been prevailing within IPS), the history of state sanctioned discrimination against black students within IPS, the foreseeable impact of the decision on the minority population of Indianapolis, and the predominately political, rather than educational, reasons for the decision and concluded that it was made with a discriminatory purpose.” Id.
151 Id. at 1112.
possible to connect the inter-district segregation to past segregative school decisions, but the Court of Appeals found that the asserted causal connection was “not credible [given] both the general nature of much of the testimony and the weakness of statistical support for the conclusions.” Interestingly, while the court rejected a metropolitan desegregation remedy, it did uphold a small inter-district transfer program. But the same causal gap existed here, as there was no evidence to justify the specific number of students who would have access to the transfer program. Nonetheless, the court was not ready to deny plaintiffs a remedy altogether given that the past segregation did in fact occur.

In short, as both Jenkins and City of Indianapolis demonstrate, causal inquiries of this sort necessarily involve ambiguities that most often can only be resolved through inferences or presumptions, not with precise evidence or certainty. Plaintiffs can establish faulty conduct on the part of schools, such as intentional discrimination or segregation, but quantifying the effects of these acts presents a much higher hurdle. In neither case did the plaintiffs demonstrate the precise effect of past intentional discrimination. The difference between the two cases was simply the availability of a presumption or willingness of the court to make an assumption to resolve the ambiguity in plaintiffs’ favor. But with the change in Supreme Court doctrine discussed above, the benefits of such assumptions are few and far between now. In the absence of them, desegregation has been replaced by resegregation.

**B. English Language Learners**

The evidentiary gaps involved in causal inquiries, while common and most obvious in desegregation cases, are not unique. Similar causal gaps problems regularly arise in other major areas of education law and dictate success and failure in regard to English Language Learner rights, educational malpractice, disability rights, and school finance litigation. The evidentiary gaps in these categories of education law have tended to coalesce around the causal connection between educational practices and student outcomes. In comparison to Jenkins v. Missouri, where the causal connection was to be made across time, these other areas of education law are theoretically in a better situation to resolve the causal connection between particular educational programs and student outcomes. Yet, advocates have similarly struggled to do so in these other areas of educational law and, thus, the movements have been significantly limited.

The educational rights of English Language Learners (ELL) provide the first example. ELL rights revolve almost entirely around the courts’ application of the Equal Educational Opportunities Act. The Act obligates school districts “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”

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152 *Id.* at 1111.
153 *Id.* at 1112.
154 *Id.* at 1112-14.
155 *Id.* (setting the size of the program at 6,000 students but providing no basis for that size other than that a past violation had occurred).
156 ORFIELD & LEE, *supra* note.
While the statutory language clearly establishes an affirmative duty to assist ELL students, exactly what schools must do is far from clear.\textsuperscript{158} Once a district takes some action, issues of causation or non-causation immediately arise. Plaintiffs must establish that a district’s current program is causing diminished achievement or failing to elevate their achievement to the appropriate level. This showing, as a practical matter however, is nearly impossible.

The causal question is embedded in the basic three prong test for challenging ELL programs articulated in \textit{Castaneda v. Pickard}.\textsuperscript{159} The first two prongs address whether a district’s ELL program is based on an educational theory and whether the district has actually implemented that theory.\textsuperscript{160} A district, however, need not establish academic consensus in regard to the educational theory, but only some academic support.\textsuperscript{161} As a result, these first two parts of the test are relatively cursory.\textsuperscript{162} The third prong queries whether the ELL program is in fact effective in helping students overcome language barriers.\textsuperscript{163} This third inquiry involves the causal connection between the ELL program and student outcomes.

As in desegregation, the party who bears the burden of proof on this causal connection will most likely lose because too many variables and too much uncertainty are involved. Currently, that burden falls on plaintiffs in ELL cases. If ELL students have regressed or made no progress after being exposed to the district’s program, their ability to state a claim might be relatively easy. But if students made some progress—which is generally inevitable regardless of the district’s action—plaintiff’s will struggle to establish that the progress they made was in spite of the ELL program and, thus, legally insufficient.\textsuperscript{164} The problem is intertwined with districts’ extensive discretion under \textit{Castaneda} in selecting an ELL program. That discretion makes identifying a baseline group against which to measure the students’ achievement elusive.\textsuperscript{165} The fact that students might be performing significantly better in programs taking a different pedagogical approach is of limited to no relevance because under \textit{Castaneda} the district is free to adopt any program that has theoretical support.\textsuperscript{166} And, comparing the challenged district to others with the same program is potentially circular and of little normative value. If the program chosen by the district is simply pedagogically inferior, then comparing it to other

\textsuperscript{158} U.S. DEPT. OF EDUC., POLICY UPDATE ON SCHOOLS’ OBLIGATIONS TOWARD NATIONAL ORIGIN MINORITY STUDENTS WITH LIMITED-ENGLISH PROFICIENCY (Sept. 27, 1991) (indicating that a language program should be implemented, but “most court decisions in this area stop short of providing OCR and recipient institutions with specific guidance.”).

\textsuperscript{159} 648 F.2d 989 (1981).

\textsuperscript{160} Id. at 1010.

\textsuperscript{161} Id.

\textsuperscript{162} Eric Haas, The Equal Educational Opportunity Act 30 Years Later: Time to Revisit “Appropriate Action” for Assisting English Language Learners, 34 J.L. & EDUC. 361(2005); see, e.g., Valeria G. v. Wilson, 12 F. Supp. 2d. 1007 (N.D.Cal. 1998), aff’d, 307 F.3d 1036 (9th Cir. 2002).

\textsuperscript{163} 648 F.2d at 1010.

\textsuperscript{164} See, e.g., Quiroz v. State, 1997 WL 661163 at 6 (E.D.Cal. 1997) (“Castaneda provides no guidance in determining what standards a court should use in evaluating an educational plan. Because it “is surely beyond the competence of this court to fashion its own measure of academic achievement” the court approaches this prong with “great trepidation.”).

\textsuperscript{165} Id.

\textsuperscript{166} 648 F.2d at 1009-1010.
pedagogically inferior districts is largely pointless. Performing at or above the level of these equally inferior programs does not normatively mean that the challenged program is effective. Only the worst of the worst would actually reveal themselves as ineffective. In short, because Castaneda does not qualitatively evaluate programs as a class in any meaningful way, plaintiffs in ineffective programs are forced to compare their achievement to students in other ineffective programs. Doing so ignores what may be the real causal factor in their low achievement—the pedagogy itself—and instead focuses on the possibility that the challenged district is ineffective in carrying out the program.

The experience of advocates reveals that this problem is not just theoretical. As a practical matter, plaintiffs have almost uniformly been unable to overcome the causal problems embedded in the Castaneda standard. So long as a district takes some action and there is some pedagogical support for it, a plaintiff’s claim is likely to fail. Furthermore, because plaintiffs cannot easily resolve the causal burdens they bear, districts are largely free to adopt any ELL program they want with no threat of a qualitative check through litigation. In this respect, the Castaneda standard effectively renders ELL services a right without a remedy.

The longstanding litigation in regard to Arizona’s ELL programs served as a meaningful exception for some time. The litigation had avoided the causal pitfalls by focusing on state level support of district level policy, rather than the local pedagogy itself. The plaintiffs argued that the state was acting arbitrarily toward districts that were attempting to implement their obligations pursuant to the Equal Educational Opportunities Act and Castaneda. Per this reasoning, the district court had ordered state level to provide remedies for nearly a decade.

The Supreme Court’s recent decision in Horne v. Flores, however, revealed that even at the state level causal questions remain dominant. The Court rejected the district court’s finding that the persistent achievement gap between ELL students and native speakers was attributable to inadequate funding or the low quality of ELL educational programs. The Court indicated that such a causal connection was far more complex than the district court recognized. Thus, on remand, the Court instructed the district court to focus on two distinct causal questions. First, it directed the lower court to closely examine variables unrelated to the ELL program itself that might explain the achievement gap, such as “the difficulty of teaching English to older students (many of whom, presumably, were not in English-speaking schools as younger students) and problems, such as drug use and the prevalence of gangs.” The obvious implication of this

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168 Haas, supra note, at X.
169 Id.
172 Horne v. Flores, 129 S.Ct. 2579 (2009) (holding that to determine whether a school district violated the EEOC, the court must consider not only the funding level of the ELL program and the achievement of the students in the program, but also changed circumstances related to the ELL population and any other means aside from increased funding that the State was employing to improve ELL instruction and student performance).
173 Id. at 2588.
174 Id. at 2605, n.20.
direction was the assumption that the achievement gap was attributable to student and family factors rather than schools. Second, the Court questioned whether funding, much less incremental increases in it, bears any relationship to the quality of the ELL program. The Court indicated the plaintiffs must establish that money has a causal effect on educational quality, that educational quality has an effect on achievement, and that the achievement gap between ELL and other students is not caused by outside factors.

In summary, ELL students, without question, have the right to educational services that assist them in overcoming language barriers. By placing districts on notice of their affirmative obligation to take some action, ELL students have certainly seen an expansion of programs beyond what existed prior to the Equal Education Opportunities Act. But ELL claims involve causal gaps that make enforcing the qualitative aspects of this right nearly impossible. The Castaneda standard affords districts so much discretion that plaintiffs are unable to establish that a district’s program—even a poor one—is the cause of educational failure. Similarly, even a state’s refusal to significantly support ELL programs will go unchecked unless a plaintiff can control for numerous variables and casually connect state policy to student outcomes. As a result, the initial promise of affirmative rights has subsequently by stymied by causal uncertainty.

C. Educational Malpractice

Although unable to gain traction in the courts, advocates have theorized that a cause of action for educational malpractice could encompass many of the interests at stake in the various education reform movements, as well as capture educational deprivations that do not fall squarely into those other paradigm. As such, educational malpractice claims could form the basis for serious challenges to educational inequality and inadequacy. Numerous parents, with few other legal options, have already sued school districts based on a theory of educational malpractice. The basic theory is that teachers, like doctors, lawyers and other professionals, are accountable for breaches of their professional standards. Those courts that have dismissed the claims out of hand, reasoning that no legal authority affirmatively establishes a professional standard that teachers or schools must meet, bear little relevance to a


176 Id. at 2600-2607 (reviewing factors which on remand must be considered before a judgment can be made as to whether the school district was taking “appropriate action”).


178 Id. at 375.

unified theory of reform. But several other courts have gone straight to the causal problems that plague all education reform, indicating that even if schools were obligated to meet particular professional standards proving that this failure had harmed students would implicate serious causal issues. These courts have emphasized that various outside factors lead to educational success and failure, and suggested the very existence of these outside factors is a basis for not recognizing a plaintiff’s right to even assert a claim. In effect, they assume that poor educational opportunities are not a significant or discernable causal factor in poor educational outcomes. And even if poor teaching is a causal factor in student outcomes, they have questioned whether the harm that students suffer is measurable. In short, the courts are skeptical as to whether a causal connection between educational malpractice and student outcomes exists, as well whether any harm caused is significant enough to warrant judicial intervention.

Only one case of significance has recognized a claim of educational malpractice claim, but even it demonstrates the centrality of causation. In Sain v. Cedar Rapids Community School District, the court’s recognition of a malpractice claim is of limited precedential value beyond its facts. The court recognized a claim because the plaintiff’s factual allegations, unlike those in other malpractice cases, were not dependent on a causal inquiry. The plaintiff’s claim in Sain did not involve poor instruction, diminished academic performance or the failure to obtain certain skills. Rather, the claim involved a guidance counselor allegedly giving the student-athlete false information regarding the academic eligibility requirements of the National Collegiate Athletic Association. Relying on that false information, the student took the wrong courses and lost his scholarship. These peculiar facts did not require the court to make any qualitative assessments of the school or the student, and reduced the case to a single basic factual question of whether the student received the wrong information. If so, the causal connection to his course selection is clear and his loss of opportunity absolute. Moreover, outside factors bear no relevance to the school’s action and the student’s loss. That the only significant case recognizing a malpractice claim involves such narrow facts simply reinforce the prohibitive role that causation plays in other malpractice cases. In short, focusing on causal problems, courts have simply refused to allow this reform movement to even begin.

D. Poverty and School Finance Litigation

School finance litigation has faced the same problem of attributing student outcomes to school inputs as other areas, but at a much higher level. The question has not been whether a particular program in a particular school or classroom affects the outcomes for particular students, but whether a statewide system of school financing affects school quality and/or student

180 Parker, supra note, at 377, 404 (outlining general outside factors such as social, environmental, and economic means of shaping a student’s ability level); Id. at 409 (listing specific factors, such as low parental involvement, lack of student motivation, lack of preparedness for school, an undiagnosed learning disability).
181 Id. at 405-06.
182 626 N.W.2d 115 (2001).
183 Id. at X.
184 Id. at 119.
outcomes. As Michael Rebell writes, in almost every state school finance case, “the question of whether ‘money matters’ has been a central legal issue [that precipitated] extensive expert testimony on . . . technical economic and social science issues.”\(^{185}\) Notwithstanding school finance litigation’s relative success as of late, however, both its initial and continuing limitations have been a function of this uncertain causal connection. Early on, this causal gap forestalled school finance equity altogether and, in fact, contributed to the effective end of federal litigation.

Plaintiffs initially pursued school finance reform under the theory that the equal protection clause of the Fourteenth Amendment prohibits certain inequalities.\(^{186}\) In *San Antonio v. Rodriguez*,\(^{187}\) the Supreme Court rejected the claim on legal grounds, but its concern regarding the causal connection between money and educational quality was clear. Even if students had a fundamental interest in education, the Court suggested that a causal flaw pervaded plaintiffs’ claim. First, the Court wrote: “On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.”\(^{188}\) Second, the Court indicated that the lower court had incorrectly “assumed [a] correlation [in] virtually every legal conclusion it drew regarding money.”\(^{189}\) This rejection of school finance litigation on both legal and factual grounds effectively ended the movement in federal courts.

As a result, plaintiffs turned to state courts, asserting claims under state constitutions.\(^{190}\) While state constitutions offered a different legal paradigm, the causal problem regarding the connection of money to school and student outcomes remained. The way in which each respective state court has dealt with the causal uncertainty has essentially dictated the outcome of finance reform in the state. As a general matter, state courts have addressed the problem in one of three ways: 1) rejecting claims based on the lack of a clear causal connection;\(^{191}\) 2) acknowledging the lack of consensus on the causal question but determining that the weight of the overall evidence, or the evidence in a particular state, is sufficient to establish a causal connection;\(^{192}\) or 3) simplifying the inquiry by ignoring whether money correlates with particular outcomes and, instead, inferring a causal connection to those outcomes based on the simple fact that money buys access to certain tangible resources.\(^{193}\)

The Colorado Supreme Court exemplifies the first category that rejects plaintiffs’ claim based on insufficient evidence of a causal connection between money and educational outcomes. For instance, in *Lujan v. Board of Education*,\(^{194}\) the court refused to seriously entertain the

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\(^{185}\) Rebell, *supra* note 7, at 1484.

\(^{186}\) Underwood, *supra* note, at X.


\(^{188}\) Id. at 42-43.

\(^{189}\) Id. at 43.

\(^{190}\) Underwood, *supra* note, at X.

\(^{191}\) See, e.g., *Lujan v. Board of Education*, 649 P.2d 1005, 1018 (Col. 1982).


\(^{194}\) 649 P.2d 1005, 1018 (Col. 1982).
plaintiff’s claims, simply asserting that “a raging controversy” persists over whether “there is a direct correlation between school financing and educational quality and opportunity.” Absent evidence “that equal educational opportunity requires equal expenditures for each school child,” judicial intervention in school finance would amount to “social policy under the guise that there is a fundamental right to education.” The Georgia Supreme Court in McDaniel v. Thomas went deeper into the factual and causal issues, but still came to the same conclusion regarding the causal connection. The court found that Georgia’s funding scheme created unequal access to certain opportunities and resources, but it refused to conclude that this inequality lowered the quality of education in particular districts or negatively impacted student outcomes. In effect, the court distinguished inequality in access to resources or opportunities, which necessarily follows from unequal funding, from educational quality and outcomes. Like Lujan, the court further noted that to act in the face of this uncertainty would intrude on the legislature’s province.

In short, courts in this category reject plaintiffs’ claims because they find that the causal connection between money and outcomes is lacking and, thus, the matter best left to the legislative branch.

A significant number of courts fall into the second category that finds a causal connection between money and outcomes based on statistical and other evidence. By Michael Rebell’s count, twenty-nine out of the thirty courts who examined the question have “determined that money does indeed matter.” Yet, placing too much credence in these numbers or group is dangerous because, even among these courts, some express reservations or articulate caveats to their conclusion. While several courts have concluded that money is causally connected to school quality or student outcomes based on social science and statistical evidence, other courts in this category are content reach the same conclusion in the absence of any hard evidence. In fact, some courts suggest that such a causal connection should not matter. Courts taking this approach blur the line between courts that find an evidentiary causal connection and courts that infer a causal connection based on the simple notion that money buys resources and access. The New Jersey Supreme Court, for instance, intentionally blurred this line. The court clearly falls into the category of concluding that money matters, and has ordered one of the most extensive, longstanding and progressive realignments of school finances in the country. But the court nonetheless expresses ambivalence regarding evidentiary basis for a causal connection.

195 Id.
196 Id.
198 Id. at 160-61.
199 Id.
200 Id. at 165.
201 Rebell, supra note 7, at 1484-85.
In Abbott v. Burke,\textsuperscript{204} the court, like those in the first category that rejected plaintiffs claims, admitted that “controversy abounds” and that the “research, while promising and constructive, [is] inconclusive, at least on the underlying issue before us” regarding whether money improves educational outcomes.\textsuperscript{205} The research, moreover, is clear “that money alone has not worked” and that some strategies have shown promise notwithstanding money.\textsuperscript{206} The court, however, distinguished itself from the first category by refusing to surrender to the lack of causal certainty, indicating that while research may not have uniformly showed a positive causal connection, “it does not show that money makes no difference.”\textsuperscript{207} This conclusion, combined with the fact that students have an affirmative right to education in the state, prompted the court resort to what amounted to a presumption in favor of the plaintiffs causal claim. “[W]hile we are unable to conclude from this record that the State is clearly wrong,” denying plaintiffs relief would “strip all notions of equal and adequate funding from the constitutional obligation unless we were convinced that the State was clearly right.”\textsuperscript{208} That the court was erring on the plaintiffs’ side in regard to this causal question was clear when it wrote: “even if not a cure, money will help, and these students are constitutionally entitled to that help. If the claim is that additional funding will not enable the poorer districts to offer a through and efficient education, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.”\textsuperscript{209} In short, that plaintiffs have succeeded in cases where the evidence regarding the causal connection is front and center does not mean the issue has been resolved. The causal problem is always lurking and largely kept at bay, not by the evidence, but by the way in which courts have approached it.

The last category of courts stand alone in avoiding the causal problem, but they have done so only by ignoring it altogether or framing a much more simple inquiry. For instance, the California Supreme Court in Serrano v. Priest\textsuperscript{210} upheld a challenge to the state’s school finance scheme,\textsuperscript{211} but effectively ignored the causal connection between money and educational quality. It relegated the issue to a single footnote and indicated the differing scholarly findings on this point were irrelevant.\textsuperscript{212} Rather than substantively address the issue, the court simply took the plaintiffs allegations that money affected quality be to true and noted “that the several courts which have considered contentions [to the contrary] have uniformly rejected them.”\textsuperscript{213} But the Serrano court’s citations regarding other courts’ conclusions are less than persuasive. The other courts had rejected the argument that money does not matter, but their rejections were not necessarily based in evidence. In fact, at least 2\textsuperscript{2} of those decisions based their conclusions on.

\textsuperscript{204} 575 A.2d 359 (N.J. 1990).
\textsuperscript{205} Id. at 377.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 375.
\textsuperscript{210} 487 P.2d 1241 (Cal. 1971).
\textsuperscript{211} Id. at 1244.
\textsuperscript{212} Id. at 1253 n 16.
\textsuperscript{213} Id.
intuitive inferences or assumptions. For instance, the Court in *McInnis v. Shapiro* concluded that money affected quality because “[p]resumably, students receiving a $1000 education are better educated that (sic) those acquiring a $600 schooling.”

In a second appeal in the *Serrano* litigation, the court devoted slightly more analysis to the causal connection, but still ignored the possibility there was an evidentiary gap. This time the court gave no hint of the differing conclusions of scholars or other courts. Rather, the court in conclusory fashion asserted a causal connection existed. Offering no citation or explanation, it wrote that “[s]ubstantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities.” Similarly, it asserted “differences in dollars do produce differences in pupil achievement.” Ultimately, the court’s only basis for finding a connection, like those of courts it previously cited, was to infer a connection based on the undeniable fact that the current financing system afforded high wealth districts an advantage in obtaining quality teachers, staff, equipment and facilities. Of course, the evidentiary question that courts in the other categories struggle with is not this simple one, but rather whether these differences amount to differences in educational quality and/or achievement.

Not surprising, those courts falling in the first category uniformly reject school finance claims. Those falling in the second and third categories uphold school finance challenges. Yet virtually no courts are immune from expressing ambivalence regarding the causal connection. At best, those in the third category hide their ambivalence by refusing to discuss the evidence. In short, a significant causal gap pervades all school finance cases and the differing outcomes in the cases are not a product of differing evidence, but of courts’ willingness to tolerate uncertainty regarding the evidence.

**E. Students with Disabilities**

To the extent there is an exception to the trends in other education reform movements, it may be in regard to special education. Certain categories of special education claims have avoided the causal problems that have plagued other education claims, but this exception is primarily a function of the fact that so many special education rights are procedural in nature.

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215 *Id.* at 331. *See also* Askew v. Hargrave, 401 U.S. 476 (1971) (writing that “it may be that in the abstract ‘the difference in dollars available does not necessarily produce a difference in the quality of education.’ But this abstract statement must give way to proof” that spending differentials result in “actual educational advantages in the high-cost schools, especially with respect to the caliber of the teaching staff.”).
217 *Id.* at 939. The court further reasoned that “Although an equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs, equality of educational opportunity requires that all school districts possess an equal ability in terms of revenue to provide students with substantially equal opportunities for learning. The system before the court fails in this respect, for it gives high-wealth districts a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings.” *Id.*
218 *Id.*
219 *Id.*
rather than substantive.\(^{220}\) For instance, the Individuals with Disabilities in Education Act guarantees students access to a free and appropriate public education, which includes specialized educational services in many instances.\(^{221}\) This right is a substantive. The majority of the Act, however, deals not with the substance of these educational services, but with the numerous and precise procedures that schools must follow in delivering these services.\(^{222}\) While numerous parents surely have substantive complaints about the quality of the educational services their children are receiving, school districts more often find themselves struggling to comply with the procedural aspects of the Act. In fact, some courts never reach the merits of the educational services themselves because the procedural violations are so egregious or sufficient in and of themselves to warrant relief.\(^{223}\) For instance, the District of Columbia Public Schools have been in the receivership of the federal district court for years because they have failed to promptly administer the various student evaluations and due process hearings that the Act requires.\(^{224}\)

Procedural rights, as opposed to substantive rights, avoid causal problems for at least two reasons. First, procedural rights are unambiguously affirmative, whereas the rights implicated in desegregation, for instance, are negative.\(^{225}\) Students do not have a right to integrated schools, but only a right to be free from discrimination.\(^{226}\) Establishing that a school has failed to deliver an affirmative right is simple in comparison to establishing the existence of discrimination. In effect, with affirmative rights, the absence of beneficial action by the school means the student wins.\(^{227}\) But with negative rights, the burden shifts to the plaintiff, who must establish a wrongful act by the school, and the absence of any evidence would mean the school wins.\(^{228}\) Second, procedural rights avoid causal problems because the vindication of procedural violations does not rest upon evidence of educational harm per se, at least not in special education. The legal harm is simply the deprivation of the procedure itself, not the substantive educational right.

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\(^{220}\) See generally Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81, 93 (2000) (“compliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals”).

\(^{221}\) 20 U.S.C. § 1400 (guaranteeing a free appropriate education); 20 U.S.C.A. § 1412 (requiring individualized education plans); 20 U.S.C.A. § 1413 (listing the special services that funds can be spent on).

\(^{222}\) 20 U.S.C. § 1415 (detailing various procedural protections).

\(^{223}\) See, e.g., Jacobsen v. D.C., 564 F.Supp. 166, 169 (D.D.C.1983) (DCPS obligated to fund private placement where it fails “to provide the necessary procedural safeguards in processing requests for special education.”); M.M. v. Miami–Dade City, 437 F.3d 1085, 1097-98 (11th Cir. 2006) (finding that the failure to comply with IDEA procedural protections justifies relief).


\(^{226}\) See Lee, supra note, at 166 (finding that the Court betrayed its early commitments to desegregation and returned to a purely negative rights view).

\(^{227}\) Id. at X.

\(^{228}\) Id. at X.
the procedure is designed to protect.\textsuperscript{229} Thus, causation is effectively irrelevant, as the harm and its causation are necessarily embodied in the failure to follow procedure.

Yet, even with the benefit of various affirmative and procedural obligations,\textsuperscript{230} some students can still experience causal problems under IDEA. For instance, the procedural protections only fully apply if a student is in need of special services and, thus, the pure question of whether a student actually has a disability can implicate causal issues. Most notably, a parent might believe that his child’s academic problems are caused by a disability, but a school, not predisposed to provide the requisite services, might assert that the academic problems are caused by other factors.\textsuperscript{231} At this early stage, the school is in a far better position to win because of the inherent difficulty of the causal inquiry.\textsuperscript{232} Thus, it should be of little surprise that parents frequently encounter school district resistance at this stage as opposed to later.\textsuperscript{233}

Likewise, when individuals have asserted educational disability claims outside of federal law where procedural protections are unavailable, causal problems become even more obvious. For instance, when parents have brought educational malpractice claims involving disability classification or a student’s specific special education placement, the harm to the student comes to the forefront and presents causal problems. Even if a plaintiff can establish that a special education classification or placement itself was substantively incorrect—which is no small feat—the plaintiff must still establish that this classification or placement caused educational harm to the student to sustain retroactive relief.\textsuperscript{234} Just as in ELL cases, plaintiffs would need to

\textsuperscript{229} See, e.g., Miami–Dade City, 437 F.3d at 1097-98 (finding that the failure to comply with IDEA procedural protections would justify a monetary award for parents). Congress has attempted to curtail the procedural requirements of the Act, particularly those related to paperwork. 20 U.S.C. § 1408 (reducing the paperwork and procedural obligations of schools).

\textsuperscript{230} Even the substantive aspects of IDEA have a procedural bent to them, whereby causation is irrelevant and harm is assumed. If a student can establish that a school did not offer the appropriate services, courts will award damages for the value of those services or compensatory services without inquiring as to the effect on the student. See, e.g., Forest Grove v. T.A., 129 S. Ct. 2484 (2009). In effect, the student is harmed by the deprivation of the service itself, not by any differential educational outcome. This approach to harm and causation is distinct from other education paradigms. Furthermore, because the deprivation of the service is a violation, some courts permit students to attach emotional and other compensatory damages to the deprivation. Mark C. Weber, Damages Liability in Special Education Cases, 21 REV. LITIG. 83 (2002).

\textsuperscript{231} See, e.g., Alvin v. Patricia F., 503 F.3d 378 (5th Cir. 2007); M.C. v. Bedford, 473 F. Supp. 2d 532, 537 (S.D.N.Y. 2007).

\textsuperscript{232} See Rodiricus L. v. Waukegan, 90 F.3d 249, 254 (7th Cir.1996) (no basis for school to suspect disability when student's academic performance is average and student's guardian never requested special education services); P.J. v. Eagle-Union, 1999 WL 1054599 at 3 (7th Cir. 1999) (indicating that the students improved academic performance during the year and pediatrician’s finding that he was not learning disabled were sufficient bases upon which for the school to determine he was not in need of special education); May, supra note, at X

\textsuperscript{233} X.

\textsuperscript{234} See, e.g., D.S.W. v. Fairbanks, 628 P.2d 554, 556 (Alaska 1981) (“The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable which is beyond the ability of courts to deal with in a reasoned way.”); Smith v. Alameda County, 90 Cal.App.3d 929, 941 (1979) (indicating precedent had rejected such claims because of “the difficulties of assessing the wrongs and injuries involved”).
demonstrate educational failure and that the failure is attributable to the school’s actions, rather than some other factor. While the school’s action is surely a partial cause, a student’s academic achievement or failure, as in other education paradigms, rarely occurs in a vacuum and can be a result of various other factors.\textsuperscript{235} And sorting these factors out in the absence of a reasonable baseline of what the child would have achieved in a different program or with a proper classification implicates the same causal problems and speculations as in other educational paradigms.

In short, while many disability claims provide an exception to the causal problems that typically pervade education reform claims, this exception simply proves this Article’s overall theory. These exceptions in disability law are limited to claims involving procedural violations, which themselves are a unique claim because they involve affirmative rights. Yet those disability claims that go to the substance of students’ rights tend to implicate the same causal inquiries that arise in any other movement and present significant barriers to students seeking relief.

VII. THE ROOT OF EDUCATION’S CAUSATION GAP

The forgoing sections identify the role of causal gaps across education reform paradigms, but they do not necessarily reveal why these gaps occur. If future education reform movements are to avoid past failures, understanding why the causal gaps arise is crucial. Certain aspects of the problem arise because education claims are framed in ways that are premised on precise causation. The remainder of the problem arises because education itself is not conducive to causal showings. The way that education is delivered, the way students learn, the various factors that affect that learning, and the basic way that we measure that learning frequently defy precise explanation. Because these aspects of education deny clear explanation, plaintiffs might demonstrate that a school or state has engaged in inequitable or prohibited conduct, but be unable to demonstrate how they have been harmed. Moreover, in the context of education, this inability is only further amplified by the impending structural injunctions that plaintiffs tend to request. Courts must weigh the benefit of an injunction against the burden it may impose on non-parties. With this in mind, courts scrutinize these gaps more than they might otherwise. The following sections, however, suggests that courts may make too much of these gaps. Thus, successful reform entails courts adjusting their evidentiary expectations or advocates proceeding more cautiously in how they frame their claims and the evidence upon which they rely.

A. General Ambiguity

Education eludes causal clarity because education itself is ambiguous on several levels. First, how one receives education, what one actually receives, and how one demonstrates or verifies what one has received are not fully understood. Surely teaching imparts learning and

\textsuperscript{235} See, e.g., Katherine May, By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilities Education Act, 2009 B.Y.U. EDUC. & L.J. 173 (2009) (discussing whether the causal problems involved in determining whether a student’s academic problems are related to a disability or something else).
that learning is later expressed by students, but our understanding of learning is far from a science. At best, we simply know that certain things tend to work well or not. Second, even when we know certain things tend to work, those things do not remain constant. Schools, administrators, teachers, and students can vary more than they coalesce. Thus, to speak of education, a school district, or even a school as acting or learning in a particular way is, on some level, to engage in fictional narrative. Policies, programs, and curriculums unify educational units, allowing causal factors or tendencies to emerge at those high levels, but causal factors also operate at much lower levels that defy larger narratives and measurement. In short, when we analyze education, we are often analyzing imprecise generalizations.

Third, education is continually evolving and changing. Education is a process rather than a finite and static resource that students receive. As such, there are nearly an infinite number of potential points of causation, yet no point of causation alone is necessarily sufficient to produce an identifiable effect or significant outcome. This creates an internal conflict in measuring educational effects. Educational effects tend to be only reliably assessed at the cumulative level. Yet at the cumulative level, attribution only becomes more complex because many more variables come into play—not all of which are measurable—and the measureable variables themselves are not necessarily constant. In addition, as the number of variables increase, so too does the possibility that the variables will counterbalance one another, which can result in otherwise important variables only manifesting minimal effects.

Fourth and implicit in the foregoing, certain aspects of education are polycentric on some level. Policy changes can have indirect effects that counteract the primary policy. For instance, testing students exclusively on core subjects like math and science often leads to more

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236 Stacey Childress, Denis Doyle, David A. Thomas, Leading for Equity, The Pursuit of Excellence in Montgomery County Public Schools at VI (2009).
238 Id. at 690-91 (2009) (discussing the highly contextualized variability at the classroom level).
241 See generally James Traub, No Child Left Behind: Does It Work, N.Y. Times 24 (Nov. 10, 2002) (referring to an essay by E.D. Hirsch that argued “so many variables go into learning” that virtually no study can draw firm conclusions regarding reform); DeMitchell, supra note, at 502 (discussing a number of causative factors including physical, neurological, emotional, cultural and environmental factors, as well as student attitude, motivation, temperament, past experiences, and home environment).
242 Traub, supra note; Balfanz & Byrnes, supra note, at 151; see also Thomas Kane, Douglas Steiger, Improving School Accountability Measures, National Bureau of Economic Research Working Paper Series, (2001) (proposing more sophisticated statistical analysis for education outcomes that would account for the infinite number of variables that potentially influence academic performance).
243 Kane, supra note, at 1-4.
244 Id.
245 Id.; see also Balfanz, supra note, at 145.
246 Kane, supra note, at 1-4.
instruction in those areas, but less in others.\textsuperscript{247} The reduced instruction in other areas, such as physical education and art, however, can result in less emotionally and physically healthy children.\textsuperscript{248} Their diminished health will then offset some of the gains they would have otherwise made in math and science.\textsuperscript{249} Similarly, states might increase teacher qualification standards in the effort to improve education, but increasing standards will exclude some teachers and dissuade others from pursuing the career regardless of their potential. The result would be a near-term shortage of teachers and, thereby, an enlargement of classroom sizes, which can have its own counterbalancing negative effects.\textsuperscript{250} These two examples are among the most simple, but illustrate the polycentric nature of education and how it makes conceptualizing effective educational policy difficult. And, the prevailing ambiguity of education makes measuring the effects of even well crafted policy difficult.

\section*{B. Externalities to Student Achievement}

The externalities that operate on student achievement are extensive. The externalities of greatest relevance arise from students’ experiences outside of school. Regardless of the efforts that schools make during the day, these externalities can either support or undermine schools’ efforts once the school day is over.\textsuperscript{251} As a general matter, students’ varying socio-economic status, familial status, housing status, and medical status, just to name a few, tend to correlate with experiences outside of school that significantly affect educational outcomes.\textsuperscript{252} Yet the effect is not only on a student’s own individual achievement, but on those around them. The concentration of students with particular characteristics, such as low or high socio-economic status, in schools or classrooms impacts all of the students in a school or classroom.\textsuperscript{253} In short, not only do a student’s own externalities affect his or her achievement, other students’ externalities affect that student’s achievement.\textsuperscript{254} Thus, the overall demographic characteristics of a school will significantly impact achievement in the school regardless of the school’s

\textsuperscript{248} Ken Petress, \textit{Perils of Current Testing Mandates}, 33 JOURNAL OF INSTRUCTIONAL PSYCHOLOGY 80-82, (2006); X.
\textsuperscript{252} \textit{See generally} COLEMAN REPORT; Fram, supra note, 312-316; Sara Sepanski Whipple, et al., \textit{An Ecological Perspective on Cumulative School and Neighborhood Risk Factors Related to Achievement}, 31 JOURNAL OF APPLIED DEVELOPMENTAL PSYCHOLOGY 422-427 (2010)
\textsuperscript{253} \textit{See supra note} X. see also Geoffrey Borman & Maritza Dowling, \textit{Schools and Inequality: A Multilevel Analysis of Coleman’s Equality of Educational Opportunity Data}, 112 TEACHERS COLL. REC. 1201 (2010) (finding group level effects to be greater than individual factors).
academic policies (though schools do have the capacity to control their demographics through assignment policies). Some schools will have student bodies that are predisposed toward success given that they are learning not only at school but both at home and over the summer, while other schools will be predisposed to fall behind because their students’ outside learning opportunities are generally less robust. Of course, all these group and individual factors interact with one another, amplifying, mitigating or canceling out one another.  

The temporal dispersion of learning also increases the number of and likelihood that externalities have intervened. Because student learning occurs across long periods of time, a student’s learning necessarily intersects with innumerable factors and experiences. This is not to say that all of these factors and experiences are significant, but only that they necessarily arise. And the more external possibilities one identifies, the more difficult it becomes for a fact finder to infer a causal connection between a challenged educational policy and the educational outcome. Even putting significant externalities aside, the passage of time alone makes causal inferences more challenging because our understanding of causation is largely based on the temporal connection between events. In the absence of temporal proximity, our propensity to infer causation dissipates. Thus, the mere passage of time between the educational policy challenged and an educational outcome can raise courts’ skepticism toward an educational claim, prompting them to demand more specific causative evidence. In short, there are simply an infinite number of factors effecting student outcomes. Time only highlights the problem.

C. Educational Policy’s Capacity to Counterbalance Externalities

Of course, the point of accounting for student externalities is to determine the extent to which school policy matters, particularly to student achievement. Simply getting to this question, however, is never easy and the answers are rarely satisfying. As suggested above, the two major education litigation movements, desegregation and school finance, have struggled with whether the remedies sought would improve student outcomes. Early on, courts largely assumed that segregation harmed minority students’ achievement and, thus, any remedy to

256 See generally Michael S. Moore, Causation and Responsibility: An Essay in Law, Morals, and Metaphysics 13 (2009) (indicating that remoteness in time can destroy causation); Brown, supra note, at 42-44 (discussing the importance of temporality in causation and ruling out other factors).
257 Brown, supra note, at 42-44.
258 Id.
260 Wessman v. Gittens, 160 F.3d 790, XX (1st Cir. 1998) (finding that the passage of time made the connection between the achievement gap and past discrimination spurious); see also Michelle Adams, Causation and Responsibility in Tort and Affirmative Action, 79 Tex. L. Rev. 643 (2001) (discussing the multitude of factors relating to achievement and how the passage of time created problems for plaintiffs attempting to establish that segregation was a cause of the achievement gap).
segregation would bear positive academic results. But as the commitment to desegregation waned, both courts and scholars began to scrutinize the connection between improved academic achievement and integration. Although the connection definitely exists advocates and courts expected a far stronger and more certain connection to justify the continuation of all out desegregation. Ultimately, the nearly impossible standards the Supreme Court erected in cases Dowell and Jenkins are reflections of the concern over this causal connection. Even today, when social scientists have more clearly established a connection between racial segregation and academic achievement (primarily because of the socio-economic isolation that accompanies it), members of the Court in the most recent desegregation case again questioned the academic impact of integration.

The fundamental problem, however, is not that integration or money fail to impact student outcomes, but that they are not silver bullets and their impact not as overwhelming as courts and policymakers might expect. Decades of research, including federally funded studies by the Department of Education, indicate that socio-economically integrative and segregative policies significantly impact student achievement. Even opponents of desegregation concede

261 Ryan, Limited Influence of Social Science, supra note 134, at 1673. This is not to suggest that the only harm of segregation was academic. Segregation, without question, produced equally, if not more, harmful stigmatic effects. See Kevin Brown, supra note, at X.

262 Liebman, supra note, at X; Minow, supra note, at 26-27.

263 Liebman, supra note, at X.

264 Id. at X; Wendy Parker, supra note, at 522-34 (analyzing the Court’s tightening of the evidentiary basis for desegregation remedies).

265 Ryan, supra note, at 1673; Wendy Parker, supra note, at 519-21, 524.


268 Department of Health, Education, and Welfare, Equality of Educational Opportunity 21–22 (1966); see also supra note X.
The problem, however, is that neither integrative policies, nor any other school policy for that matter, fully control student achievement. Student achievement is necessarily affected by the various externalities discussed above. Each factor, including school policies, has only an incremental effect on achievement, and no single factor or educational policy can explain or eradicate education failure alone. Thus, the analytical flaw of courts and skeptics can be to expect an overwhelming causal connection and effect from educational policy. No one can fairly criticize integration as failing to affect student achievement. At best, one might criticize the effect of integration as too limited or failing to justify its costs. But such criticism is endemic to most any educational policy, as all must contend with the externalities that counteract educational policy. Nonetheless, the inability to demonstrate that students’ low or increased academic achievement is primarily the result of school policy is a barrier for education litigation. Too often the expectation remains that individual educational policies render externalities moot.

As discussed extensively earlier, the skepticism regarding the connection between school policy and student outcomes is explicit in school finance. In addition, the causal problem is more complex than elsewhere because, not only does school finance contend with student level externalities, such as individual or concentrated poverty, that afflict integration, but school finance must contend with school district level externalities and variances. First, the basic cost of schooling and the capacity to finance it varies from district to district and is controlled by external factors. School districts vary in terms of their tax base, student needs, and costs of operation. As of yet, no reliable, exact standard exists to compare districts across these measures. One can surely account for the variances in local costs associated with facilities, transportation, and other non-instructional operations, as well as the funds that school districts are currently raising, but the question of how much money any district actually needs in order to offer an adequate education or improve achievement includes a level of speculation or assumption. For instance, teachers have certain preferences in terms of the places they teach and live that affect the cost of hiring them. While some studies offer broad generalities

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270 X.
271 Balfanz, supra note, at 151; see also DeMitchell, supra note, at 502.
272 See, e.g., X; see also Adams, supra note, at X (explaining that a Court of Appeals decision had effectively required that past segregation be the sole or primary cause of the achievement gap, rather than just a contributing cause, to justify an affirmative action plan).
274 Id. at X; Nechyba, supra note, at 143-44.
275 Id. at X.
276 See generally X.
regarding how much it would cost to attract high quality teachers to needier schools and localities,\textsuperscript{278} these generalities are far from sufficient to set specific budgets for every district in a state. Moreover, if a state allotted funds to needy districts, but those funds were insufficient to attract high quality teachers to certain areas, student achievement would likely remain flat in some areas even though teacher salaries increased. From this, one might infer that money does not matter, when in fact the problem is that we do not know how much money it takes for money to matter in a particular location.

The second and interrelated problem is that schools allocate their available funds in different ways, which makes determining whether those funds are sufficient to meet their varying geographic and demographic needs extremely difficult.\textsuperscript{279} For instance, money might not appear to matter much if all schools have resources in excess of their need, as the surplus funds are spent on frivolous items.\textsuperscript{280} Conversely, if no schools have enough money, one presumably would see qualitative differences between them based on how short of funds each school is. But this assumption will not always hold true because, in the absence of sufficient funds, schools must make different strategic choices, some wiser than others, about how to allocate limited resources, which will result in some schools doing better or worse than others in ways that do not relate to how much money they have.\textsuperscript{281} Thus, while we know that districts vary substantially in what they spend on schools and in their capacity to raise more funds,\textsuperscript{282} precisely identifying the extent to which money matters even in the poorest and wealthiest districts is most complex because some schools with excess surely squander funds and struggling schools vary in their response to the shortage. In short, even if one can generally establish that money matters, the basic question of how much money is necessary to put schools on equal footing lingers because schools spend money differently.

None of the foregoing is to suggest that money does not matter. Science aside, it is nonsensical to deny the basic rational of courts that infer a causal connection based on the fact

\textsuperscript{278} See, e.g., Bill Turque, In Second Year, Rhee Is Facing Major Tests, WASH. POST, Aug. 21, 2008, at DZ01 (discussing a proposal to raise teacher salaries to $120,000 and the resistance of teachers toward it); see also ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers); Hanusheck, supra note, at 350 (finding that a ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white females to teach in the school); id. at 351 (finding that a twenty-five to forty percent salary increase would be necessary to induce white females with two or fewer years of experience to transfer from teaching in a suburban to an urban school). But see Howard Machtinger, What Do We Know about High Poverty Schools?, HIGH SCHOOL JOURNAL at 3 (2007) (estimating that $1800 annually in compensation had a positive effect on teacher recruitment in North Carolina).

\textsuperscript{279} See generally William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. REV. 597, 615 (1994) (noting that local variances make determining whether state funding is sufficient difficult); RYAN, infra note.

\textsuperscript{280} Abbott v. Burke, 575 A.2d 359, X (N.J. 1990) (reasoning that if “all districts in the state have much more than whatever the minimum amount may be, the excess and the differences in the excess, are irrelevant to the quality of education.”).

\textsuperscript{281} Id. at 377 (noting that money likely matters, but “can be used more effectively than it is being used today.”).

\textsuperscript{282} BAKER, supra note, at X; Nechyba, supra note, at 155.
that money buys the resources that are necessary to educate children.\textsuperscript{283} The foregoing simply reveals that even though we might be certain that money matters we are not certain how much it matters, nor how much more we should afford to needy schools. We know that “‘money is only one of a number of elements [involved in education]’”\textsuperscript{284} and is not the sole or main determinant of education. Thus, its impact, like any other educational policy, is going to be limited and subject to causal attack.

Ultimately, the relevance of externalities to causal inquiries in education is a function of how the underlying educational right at stake is framed. If state or federal law affords students an affirmative right to integrated schools, quality teachers, quality curriculum, or programs responsive to their needs, externalities become less important. Schools are affirmatively obligated to deliver access to these opportunities or outcomes and, thus, the cause of any impediments are largely irrelevant.\textsuperscript{285} Schools must simply see that they are overcome. As noted previously, however, most educational legal frameworks do not afford students affirmative rights.\textsuperscript{286} Thus, the question is not whether students positively benefit from a particular opportunity or achieve at a particular level, but whether a school policy is the cause of any failure in these respects.\textsuperscript{287} When the question is framed in this manner, externalities are extremely important, as they are almost certainly contributing causes, if not substantial or primary causes. Even if they are not causal factors, their capacity to affect educational outcomes requires that litigants account for them and establish that they are not causal factors, thus complicating the causal analysis.

\textbf{D. Indefinite Educational Harms}

Education claims also suffer from a relative inability to identify and quantify student harms. First, the primary method of assessing students is through achievement, for which we have no certain or reliable measure. The current primary method for student outcome evaluation is through standardized tests.\textsuperscript{288} Yet, standardized tests do not necessarily or fully capture the effect of a particular educational policy or input.\textsuperscript{289} While standardized testing data is valuable, educational researchers have lodged a bevy of critiques against standardized tests, including that they do not accurately reflect student learning or, at least, the most important types of learning.\textsuperscript{290} Regardless, a policy might very well impede a student’s learning, but not in a way that affects

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\item See, e.g., Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976).
\item Abbott, 575 A.2d at 376-77.
\item See, e.g., id. at X; Rebell, supra note, at X.
\item See supra notes.
\item Shrag, supra note; MINOW, supra note, at 38-39
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the student’s achievement on a standardized test. Or the effect may not be large enough to show a significant change in a standardized test. Yet in so far as the absence of a change in test scores does rule out the possibility that a student has been harmed, the primary method for establishing harm, standardized tests, often lacks the capacity to identify student harms. Second, even were standardized test scores a valid indicator of student knowledge and learning, knowing whether an education policy has caused harm in that respect requires some knowledge of how the student would have performed had a different policy been in place, which as discussed previously involves a significant degree of speculation. Thus, the best one can do is infer a general harm based on statistical analyses of how other students perform.

Third and related, educational harms generally are marginal. Rather than absolute deprivations of opportunity, students tend to experience marginal qualitative differences in educational opportunity. Likewise, student achievement operates on sliding rather than absolute scale. Thus, the harms inequalities cause are marginal, particularly when measured by standardized achievement scores (which continue to be affected by student externalities). For instance, a student might be incorrectly suspended for three days of school, one-fifth of a school’s teaching staff might be unqualified while the other half is highly qualified (both to varying degrees), a school might incorrectly diagnose a student’s disability in the fall semester but correct it in the spring, or a student assignment policy could cause the poverty level in a school to rise from sixty to seventy percent. The faulty conduct is a given in all of these examples, but the change in most students’ end of year performance of standardized tests will be small at worst and, thus, the harm marginal.

While few would doubt that each of these policies harmed students in some meaningful way, the inability to quantify substantial harms in certain instances can be the legal equivalent of not causing any harm. For instance, notwithstanding what might be gross educational failures by a school, some courts have dismissed educational malpractice claims because they questioned whether the student had actually suffered a measurable harm. Likewise, some have rejected segregation and school finance claims because the exact extent of the harm is minimal or unquantifiable, even though students surely suffered some form of harm.

This problem is somewhat particular to education claims. Harms to non-educational interests, either because they are conceptualized differently or are absolute, are not subject to the ambiguities that breed skepticism. For instance, in housing, individuals are denied and granted apartments or homes; in employment, jobs, promotions, or exact salaries. In tort claims,
plaintiffs suffer physical or property damage. In these cases, most often the hurdle is not to establish the harm itself or that the defendant caused it, but that the defendant’s conduct is faulty. But in education, with the exception of proving intentional discrimination, the faulty conduct that creates unequal funding, denies opportunity, or mislabels students can be relatively obvious while causation and harm are not.

Fourth, because educational harms are marginal, they are often only reliably identifiable at the aggregate level. But identifying aggregate harm generally reveals very little about whether a particular student or smaller subset of students, such as a school or district, has been harmed, much less how much harm an individual or smaller subset of students has suffered. In short, by analyzing statewide or national data, one might establish the general principal that concentrated poverty or teacher quality affects student achievement, but identifying a harm or its exact extent at the level of an individual student, school, or district might be impossible.

Fifth, educational harms can be latent. For instance, the harm caused by the failure to expose children to appropriate reading opportunities in early grades may not manifest itself for years. Because all children are initially novice or developing readers, the differences between the properly educated child and other children can be small in early grades. Consequently, immediately identifying the harm and attributing it to a school’s action may be impossible in many instances. That small difference between students, however, can grow exponentially over time and lead to a large disparity. Yet, while the passage of time may make the disparity obvious, it will not necessarily make the causal connection to the school’s action obvious. In fact, it will do the opposite, as the passage of time increases the possibility that external factors have intervened and contributed to the harm. Furthermore, the passage of time decreases the likelihood that anyone will retroactively realize that a school’s action years ago may have contributed to the harm. In effect, the long past educational decision will simply get lost amongst the numerous other potential causes, from which little sense will likely be made.

In summary, the general ambiguity of education manifests itself in a series of concrete evidentiary gaps and problems. The most obvious ones relate to the various externalities that affect schools and students. These externalities make identifying the causal connection between educational policies and inputs and student achievement difficult. Even if a causal connection can be established, plaintiffs may still be unable to demonstrate an exact harm. Educational harms are often marginal, latent, or group based, and rarely individual and obvious. Yet, in the absence of clear and substantial harm, courts will reject educational claims, notwithstanding otherwise faulty conduct by a defendant.

298 X.
299 Balfanz, supra note, at 145.
300 X.
E. The Structural Injunctions Accentuation of the Gap

The inherent causal gaps in education claims are further accentuated by the fact that education reform claims routinely involve some form of a structural injunction.\textsuperscript{301} While seemingly the best remedy for plaintiffs in many instances, structural injunctions include tradeoffs. By their nature, they are imperfect educational remedies that pose risks to third parties and are sometimes over-corrective. These risks heighten courts’ focus on education’s evidentiary gaps beyond what might otherwise exist, prompting courts to require more particularized showings of harm and more certainty that the injunctive relief will remedy the harm. In short, the very remedies that tend to be necessary to address educational harms are also the ones that accentuate education’s inherent evidentiary gap. Of course, this internal tension only begs the question of whether educational reform advocates should continue to pursue structural injunctions. For the purposes of this Article, however, it suffices to indicate why plaintiffs have pursued structural injunction without attempting to definitely resolve the wisdom of those choices. That those choices have been made are undeniable, and their effect on the analysis of education’s causal gaps crucial.

1. Injunctions As Practical Necessity

Advocates have primarily pursued structural injunctions to remedy educational violations for at least three major reasons. First, education is not a private good or interest analogous to the various other private interests contested in civil litigation. Education rights are distinct from most other rights in that, while individuals have educational rights, education is public good in which multiple parties both directly and indirect have stakes.\textsuperscript{302} As a practical matter, education is delivered to groups of students at the classroom level and communities at the school level, making it difficult to disentangle individual interests from the group interests. Neither the policy an individual student challenges, nor the harm the student might suffer, is entirely specific to that student. Thus, the nature of education militates toward a group remedy that addresses both the individual and the group.\textsuperscript{303} In this respect, education litigation generally entails the vindication of the public good rather than private rights.

Second, as a public good, it makes sense to devote more energy to “perfecting” education than to compensating individual harms, particularly future harms. Perfecting education entails preventing harm in the first instance, not compensating for harm after the fact. Moreover, the latter makes neither moral nor economic sense. In fact, it is hard to imagine a rational basis for

\textsuperscript{301} See, e.g., Owen M. Fiss, The Supreme Court 1978 Term, 93 HARV. L. REV. 1 (1979) (discussing the centrality of structural injunctions to desegregation).
\textsuperscript{303} Myriam E. Gilles, In Defense Of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 GA. L. REV. 845, 876 (2001) (calling injunctions “uniquely appropriate remed[ies]” for the public sector and citing Roe v. Wade and Brown v. Board of Education as cases in which “plaintiffs ... sought to reform the institutions, laws, or customs that had injured them” and “sought not only redress for themselves, but protection for society at large against the harms they had personally suffered”).

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operating public schools if we accepted that they would provide poor education and we would simply financially compensate students for the difference between a poor and quality education. Closing all public schools and giving children a lump sum with which to procure education privately would make more sense and be more economically efficient.\(^{304}\) The only rational decision consistent with both the mission of public education and economic efficiency is to provide a proper public education in the first instance. While monetary damages may be an appropriate remedy for past victims, they serve little value beyond compensation for compensation’s sake for future victims. Injunctive relief is the only remedy directly aimed at preventing future harm, which must be the goal if we are to have public education.\(^{305}\)

Third, as a practical matter, monetary damages do not accomplish the goals of education reform. In particular, it is far from clear that monetary damages can effectively stop future harms or improve education. It is true that monetary damages can be crafted to compensate for future harms, but as a practical matter, they may do little to meet the goal of preventing harm. In theory, the prospect of monetary damage awards creates incentives for school systems to take voluntary corrective action. Elsewhere, monetary damages are assumed to compensate past victims as well as to serve as a future deterrent.\(^{306}\) Without question, monetary damages operate this way for businesses and other private actors.\(^{307}\) But it is far from clear that monetary damages create a similar deterrent for schools.\(^{308}\) Because schools are neither businesses nor private actors, they do not make purely economical decisions. Economics certainly play a role in educational decision making and school budgets, but public education is also about actualizing community values,\(^{309}\) which regularly trump economics.

The triumph of values over economics is relatively clear, for instance, in the resistance to school desegregation. Prior to forced integration, school boards bore the cost of operating separate schools for African Americans, even though they could have operated unitary systems cheaper, because they perceived value in segregation.\(^{310}\) And once the Court mandated

\(^{304}\) In fact, some seem to advocate for as much. Dominick Cirelli, Jr., Utilizing School Voucher Programs to Remedy School Financing Problems, 30 Akron L. Rev. 469, 491-94 (1997).

\(^{305}\) Of course, one might argue that injunctive relief may not prevent future harm either. However, if one succumbs to complete defeatism in regard to future harms, then one is essentially questioning whether we should offer public education. Such questioning, however, is untenable given that all fifty state constitutions obligate states to provide it. Allen W. Hubsch, Education and Self-Government: The Right to Education under State Constitutional Law, 18 J. L. & Educ. 93, 96-97 (1989).

\(^{306}\) Derrick Bell made a variant of this argument when he asserted that fully enforcing separate but equal would have served African Americans better than integration because separate but equal would have imposed a higher cost on segregation. Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform 24-27 (2006). Plus, it would have compensated minorities in those schools that were not integrated. In fact, this was NAACP’s initial strategy. See, e.g., SC Case. See also David I. Levine et al., Remedies: Public and Private 640 (5th ed. 2009) (discussing the deterrent effect of damages).


\(^{309}\) See generally Woodward, supra note, at X.
integration, significant number of white families chose to bear the cost of enrolling their children in private schools rather than submit to desegregation in free public schools. While these were private actors not the school itself, they were the school board’s constituency and their acts attest to the fact than money may not be a sufficient deterrent regarding school policy. Those who remain in public schools form an even stronger block on school boards and there is little reason to believe they would abandon their position as a result of simple financial liability by the school system. Even Derrick Bell’s argument that minorities should have pursued equal funding in separate schools rather than integration implicitly recognizes that financial burdens would have been insufficient in the short term to produce integration. He argued that over the long term those costs would grow so high that whites would eventually voluntarily integrate. Thus, monetary consequences were not a per se deterrent, but rather extreme financial burden over a long period of time. This disregard for monetary consequences, moreover, is not limited to desegregation. Rather, any number of equality mandates place the law at odds with what certain educators and parents think are best for students and they have frequently held out until forced to change. Monetary damages, without question, create a counterweight to both the internal and external pressures that limit schools’ capacity to self-correct, but they are not per se sufficient. In short, schools are not immune from financial pressures, but they are not nearly as responsive to them as businesses and private actors.

In addition, schools’ willingness, unlike businesses, to ignore costs can actually create viscous cycles where schools are entirely immune from financial deterrents. When a school defers systemic corrective action for too long, educational deprivations and the compensation for them can become so prevalent and systematized that a school might suffer diminishing gains from correcting the problem. Or, a school running can be running at such qualitative and financial deficits that course correcting is practically impossible. Any new lawsuits or damages are functionally irrelevant because they stand in line behind countless previous violations. For instance, some districts are in receivership of a court because they have engaged in systemic

311 SEAN F. REARDON & JOHN T. YUN, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION 17 (2002) (“White private school enrollment rates increased sharply in the years immediately following the Brown decision and peaked at roughly 16% from 1958 to 1965”).

312 So long as they have the financial capacity, many families continue this trend today. Id. at X.

313 Bell, Interest Convergence, at X.

314 Id. at X

315 Id. at X. And as a matter of history, it was the full injunctive power of courts coupled with the executive power of the federal government that forced change, not the threat of monetary damages. Chinh Q. Le, Racially Integrated Education and the Role of the Federal Government, 88 N.C. L. REV. 725 (2010). Of course, the executive power drew on its authority to withhold funding, but it also took drastic measures such as calling on the national guard to assist in integrating schools.

316 For instance, internal forces within school administration operate to maintain practices such as ability grouping or isolating special education students. See, e.g., KEVIN G. WELNER AND JEANNIE OAKES, NAVIGATING THE POLITICS OF DETRACKING (Skylight Publications 2000).

317 Even to the extent monetary damages weigh in schools’ analysis that weight may be discounted. First, monetary damages against the state are generally limited. See, e.g., Ind. Code Ann. § 34-13-3-4(b) (Michie Supp. 2004) (no punitive damages against state officers or entities); Md. Code Ann. art. 23A, § 1A (2001) (municipal corporations and their officers are not liable for punitive damages). Second, with individualized damages, one can generally assume that far fewer plaintiffs will be able to make out a specific claim than are actually harmed. See infra notes.
IDEA violations. These schools cannot provide special education services or follow procedural requirements in regard to current students because they are expending so many resources to cover their past violations, which they are also behind on. Each new adjudicated violation simply means another monetary damage award, which indirectly lowers the quality of education beyond its already inadequate state for other students who then are more likely to suffer new violations and pursue additional damages. While these districts are not on the verge of insolvency, they are in an analogous situation because they cannot catch up to their qualitative obligations under the current system. The only hope of course correcting these districts is an infusion of resources or to wipe the slate clean and build a new and better system. This is not to suggest that injunctive remedies could or should “wipe the slate clean,” but simply to illustrate that monetary damages do not always serve as a deterrent for schools and, when they do not, schools may ultimately loose the capacity to course correct themselves.

The foregoing, however, merely establishes that monetary damages are insufficient to secure core education goals. It still may be the case that monetary damages are entirely appropriate in addition to injunctive relief in education reform cases. As scholars have noted, injunctive relief alone has frequently overlooked the past harm caused by desegregation or inadequate educational opportunities. For instance, desegregation injunctions do nothing to address the lost educational and employment opportunities that those who experienced segregation in the past suffered. The same critique can be made of school finance remedies that ignore students who have long since graduated or will graduate before a remedied is instituted. In effect, desegregation and school finance remedies ignore these tangible past harms and, at best, look solely to avoiding future harms. Regardless, as a practical matter, the plaintiffs participating in these suits have been willing to forego personal remedies and view their participation in the litigation as serving future generations. Their primary goal is not to receive direct compensation but to reform education and, in some respect, society, which is more likely to result from injunctive relief than monetary damages.

319 Id. at X.
320 WASH. LAWYERS’, supra note, at X.
321 Leibman, supra note, at 1520; Morgan, supra note, at X.
322 Leibman, supra note, at 1520; Morgan, supra note, at X.
323 XX (source on societal cost of inadequate education); see also Robinson v. Kansas, 117 F. Supp. 2d 1124 (D. Kan. 2000) (no request for compensatory damages); Hoke County v. State, 358 N.C. 605, 607 (2004) (taking up on appeal the first remedy in the case since it was initiated in May 1994).
324 Leibman, supra note, at 1520; Morgan, supra note, at X. Some indicate that school finance remedies are not directed at students at all, but at districts. James E. Ryan & Thomas Saunders, Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?, 22 YALE L. & POL’Y REV. 463, 469 (2004).
326 Lively, supra note, at X; see also RICHARD KLUGER, SIMPLE JUSTICE (1977).
327 Gilles, supra note, at 876.
2. Injunctive Relief As a Pressure Point on Education’s Causal Gap

While structural injunctions are necessary to address the core problems or goals in education, they come with serious consequences that motivate courts to take more serious looks at education’s causal gaps than they might otherwise. In this respect, the key remedial tool in education reform is also the very source of its downfall. The problem stems from the fact that structural injunctions, by their nature, are blunt instruments and are even more so in education. Of course, this bluntness is necessary to ensure a remedy for all aggrieved children, but it also produces any number of unintended and unavoidable consequences. Moreover, with continuing injunctions, these unintended consequences accumulate over time and, even if overlooked initially, eventually become difficult for courts to ignore. Education’s causal gaps offer an escape valve for courts operating under the pressure of and responsibility for these consequences.

Structural injunctions in education are unusually blunt. Because education is primarily delivered to groups and communities, injunctions will almost necessarily impact a substantial number of students. In typical education reform litigation, structural injunctions affect an entire school district, if not an entire state or several districts, and are not easily limited to the plaintiffs and defendants in the case. First, the wider the breadth of an injunction the less able a court is to narrowly tailor it to the class. As education injunctions are often broad, they often bestow benefits and burdens on an undifferentiated group of students. Thus, non-parties, who legally had no stake in the litigation, will be indirectly negatively or positively affected. Second, breadth aside, injunctive remedies are not easily tailored to specific levels of educational harm or fault. While monetary damages can be adjusted based on the amount of harm suffered or the comparative fault and causation between plaintiffs and defendants, structural education injunctions tend to be all or nothing remedies. Most systemic educational problems do not lend themselves to “halfway” untrack the classes so as to leave undisturbed those students who were correctly assigned or unaffected by the bias. A court could either ban ability grouping altogether or order that the classroom assignment process be revamped and all students revaluated. Under both options, all students are going to be affected in some respect and some negatively.

To be even more precise, the breadth and bluntness of educational injunctions leads to under and over-correction of harms, which from a corrective justice perspective is a fundamental flaw that demands judicial attention. For instance, scholars have attacked desegregation from both sides. Some argue that school desegregation failed to produce fully desegregated schools, compensate the victims of school segregation, or even consider the indirect harms it produced.

328 Parker, Hastings, supra note, at X; Nagel, supra note, at X; Leibman, supra note, at X.
329 XX.
331 LAYCOCK, supra note, at X.
332 XX.
333 Morgan, supra note, at X.
outside of school. In these respects, school desegregation was grossly under-corrective. At the same time, injunctive desegregation remedies overcorrected constitutional wrongs by placing the costs of desegregation on those who were not necessarily the perpetrators of segregation and providing the remedy to those who were not necessarily the victims.

These same problems arise in school finance litigation as well. School finance remedies are frequently under-corrective because courts are unwilling to force states to devote the resources or take the action necessary to ensure that the needs of the most disadvantaged students in the poorest districts are met. These students may see improvements, but they are insufficient to deliver an adequate education. Of course, school finance remedies, like desegregation, do nothing at all for those students who have been harmed in the past or who will not see a remedy before they graduate. Yet, school finance remedies can also be over-corrective because the remedies tend to be implemented broadly at the district level. The basis for a remedy is generally the inadequate educational opportunities in economically disadvantaged school districts or for disadvantaged students, but not all students in a disadvantaged school district receive a poor education, nor is low quality education always a result of state policy. Nonetheless, all economically disadvantaged districts and all the students in those districts are likely to be beneficiaries of school finance remedies. This over-breadth is likely not as serious as in desegregation, but it still exists and is something of which courts have been mindful.

The most significant concern with over-corrective remedies, however, is the fact that in education the over-correction tends to impact third parties. Were the imperfections of injunctions felt only by the parties they might be tolerable. But third party impacts raise an entirely distinct and heightened level of concern. As Abram Chayes observed in the late 1970s, class action litigation, particularly in areas such as education, moved away from disputes primarily between private parties over private rights to broader policy contests that frequently and significantly impacted third parties. As such, the adjudication morphed from a traditional consideration of rights and harms among the primary parties to balancing of interests that centered on equitable effects on both the litigants and third parties.

Once the impact on third parties comes into focus, the movement toward heightening evidentiary standards for plaintiffs inevitably follows. Burdening third parties involves a more complex balancing of interests than in purely bilateral litigation. Third party burdens can

334 Id. at 9-10; Leibman, supra note, at 1513-14.
335 Leibman, supra note, at 1510.
336 See, e.g., Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072, 1078 (1991); DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002) (overruling a prior decision partly because the legislature failed comply with the mandate to completely “overhaul” school funding); Edgewood v. Meno, 917 S.W.2d 717, 726 (Tex. 1995) (state implemented a minimally adequate remedy only after six years and three opinions).
337 Ryan & Saunders, supra note, at 469.
338 See, e.g., Hoke County v. State, 358 N.C. 605, 635 (2004) (recognizing that the local district’s insufficient resources may be a result of its poor allocation of existing resources rather than inadequate support from the state).
340 Id. at 1292.
341 Morgan, supra note, at 8-9; Chayes, supra note, at 1294.
require justifications distinct from and in addition to those required to impose burdens on
defendants who have violated students’ rights. In regard to third parties, a defendant’s faulty
court toward a plaintiff is arguably irrelevant. If the defendant is effectively removed from
the equation, two innocent parties remain: plaintiffs and third parties. Since neither the plaintiff
nor third party has been harmed or benefited by the other, their equitable interests are
functionally equivalent. To the extent there is any distinction between them, it is only that the
plaintiffs have suffered harm at the hands of the defendants. Yet, the third parties assert that they
will suffer harm at the hands of the remedy.

A generalized harm might be sufficient to justify an overbroad remedy against a faulty
defendant because the equities weigh in the plaintiff’s favor as against the defendant. But where
the equities are more roughly equal between plaintiffs and third parties, the judicial response in
education has been to require clearer evidence of a constitutional wrong and specific harm.
Heightened evidentiary standards limit third party impacts to a much more narrow set of cases in
which plaintiffs’ harm is more egregious and their demand for a remedy is undeniable. In such a
case, the balancing is slightly different because leaving the harm unremedied may work a greater
injustice on the plaintiff than would imposing some incidental impact on third parties. It is worth
noting, however, that even under these circumstances, some courts might find that the balance
still weighs against plaintiffs because the third party impacts of an injunction will be immediate
and continuing, whereas the capacity of the injunction to actually cure plaintiffs’ harm by
improving academic achievement, educational quality or other outcomes is not certain.

Of course, the foregoing analysis entails two assumptions: first, that third party interests
are legally relevant and second, that third party interests are actually adverse to securing justice
for victims. In the two major areas of school reform—school desegregation and finance—the
answer to these questions has been yes. In school desegregation, the Court’s concern with third
party interests and the notion they were adverse to plaintiffs steadily increased over the course of
the various stages of school desegregation. As early as Brown II, the Court identified
the interference with third party interests and the turmoil it might produce as a basis for courts to
precede cautiously in desegregating schools. Later, the Court went even further, finding in
various cases that the need for local control, the interests of suburban schools and parents in
remaining undisturbed, and fiscal concerns outweighed plaintiffs’ interests in a remedy. In
fact, only in those few cases during the late 1960’s and early 70’s where the Court pushed the
hardest for desegregation did it refrain from any significant consideration of third party
interests.

342 X.
344 See, e.g., Milliken v. Bradley, 418 U.S. 717 (1974); Dowell, X; Jenkins, 515 U.S. at 102 (instructing district
courts to “bear in mind” that the goal “is not only ‘to remedy the violation’ to the extent practicable, but also ‘to
restore state and local authorities to the control of a school system that is operating in compliance with the
Constitution’”); see also James E. Ryan, The Supreme Court and Voluntary Integration, 121 HARY. L. REV. 131,
142-43 (2007).
Although not as prevalent, scholars observe that finance litigation remedies have also been curtailed to limit third party impacts. The distinction between equity and adequacy claims, in particular, tends to bear out these concerns. Equity claims implicate the differing financial wealth of all school districts in a state, and can prompt state action to recapture or redistribute funds from wealthy districts to poorer ones.\(^{346}\) Based on the notion that wealthy districts have not committed a constitutional wrong themselves and that local efforts to support education, even when producing inequity across districts, are a net positive, some courts are reluctant to impose sweeping finance equity reforms.\(^{347}\) In effect, the wealthy districts are the equivalent of the innocent third party.\(^{348}\) Adequacy claims, however, do not pose the same threat to wealthy school districts. Adequacy claims merely set a qualitative floor below which no district can fall, but which wealthy districts are free to exceed at their discretion.\(^{349}\) In this respect, adequacy claims minimize external impacts. Thus, scholars have posited the success of adequacy litigation in comparison to equity is a function of the fact that adequacy does not directly challenge inequity in ways that implicate the interests of other districts.\(^{350}\)

In summary, the nature of structural injunctions in education brings education’s evidentiary and causation gaps into sharp focus. Their breadth frequently implicates interests of bystanders who are not parties in litigation. Consequently, courts see injunctive relief as less attractive and justified than other forms of relief, and proceed more cautiously.\(^{351}\) The judicial effort to minimize or avoid third party impacts manifests itself with demands for more specific proof of causation and harm. Yet, as discussed throughout, the inherent causal gaps in education make such evidence practically impossible for plaintiffs to marshal. When these two realities collide, they can effectively portend the end of an education reform movement. In short, the very remedy that educational victims need to address their harm becomes the very mechanism that accentuates and exploits education’s evidentiary gaps.

VIII. CAUSAL GAPS IN THE FUTURE OF CURRENT EDUCATION REFORMS

The foregoing causal gaps not only define past educational reform movements they threaten future ones at any time that judicial or external pressures arise. As noted in the introduction, the two major current educational reform movements are coming under immense pressure. School finance reform is under intense pressure from the economy,\(^{352}\) which is eroding


\(^{347}\) See, e.g., San Antonio v. Rodriguez, 411 U.S. 1 (1973); X.

\(^{348}\) Wealth districts, however, are not entirely innocent as they assert influence in the legislature to maintain the status quo. Kirk Vandersall, Post-Brown School Finance Reform, in STRATEGIES FOR SCHOOL EQUITY 7, 20 (1998).

\(^{349}\) X.

\(^{350}\) X.

\(^{351}\) See generally Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 GEO. L.J. 1355, X (1991); Wendy Parker, supra note, at 517 (“Even the facts proving a violation are of little assistance in determining the appropriate remedy.”).

state revenues and, thus, their capacity to deliver core educational services. This erosion makes new lawsuits more likely.\textsuperscript{353} Courts who do not want to find themselves compromised by the collision of legal rights and practical reality will confront the option of extricating, like others, by demanding precise evidence of the causal connection at the center of plaintiffs’ claims. As noted earlier, among those courts that have previously found such a connection, they have primarily done so based on simplistic reasoning or general principles derived from social science, not necessarily specific state level evidence. Not only does the current financial crisis create pressure for a reexamination of the evidence, but courts and advocates’ increasing reliance on state standardized test scores to make out prima facie cases offers a ready set of data for comparison. In short, if standardized test scores are used to prove a violation, it is only a matter of time before courts examine the results of past remedies on these scores.\textsuperscript{354} Yet, given the intractable causal gaps seen elsewhere, plaintiffs may find themselves unable to defend themselves from attack.

At the federal level, the most recent reauthorization of the Elementary and Secondary Education Act has dug its own whole by setting unquestionably high achievement goals to be met within a definite time frame\textsuperscript{355} and premised their attainment on a causal connection between standardized testing and improved student achievement. In contrast to previous legislation, it sought to address educational failures, not by creating entitlements to resources or even discretionarily driving funds toward particular educational inputs, but by expanding achievement assessment systems.\textsuperscript{356} The expansion of assessment was relatively easy to achieve, as was the assertion of high expectations, but fairly meeting those expectations is proving practically impossible. A substantial number, if not all, of the states will fail to meet the Act’s proficiency requirements.\textsuperscript{357} Thus, if it has not already, the Act will soon fail to deliver on its causal assertion, triggering a set of bad options: sanctioning schools,\textsuperscript{358} waiving compliance, or changing the standard for compliance.\textsuperscript{359} The latter options, in particular, will undermine the


\textsuperscript{354} Ryan, \textit{supra} note, at X.


\textsuperscript{356} 20 U.S.C. § 6301 (1).


\textsuperscript{358} 20 U.S.C 6316(b)(7) (describing sanctions for schools that fail to make adequate yearly progress).

\textsuperscript{359} 20 U.S.C. 36XX (granting the Department the power to “waive any statutory or regulatory requirement of this Act”). The Department has already significantly downgraded teacher qualification requirements and given states flexibility in meeting them. U.S. Dept. of Educ., \textit{New No Child Left Behind Flexibility: Highly Qualified Teachers}
federal government’s credibility in enforcing and leveraging future educational legislation, as well as abandon those aspects of the Act that have real value.\textsuperscript{360}

\textbf{A. No Child Left Behind}

\textbf{1. A Flawed Causal Assertion}

On January 8, 2002, President Bush signed the reauthorization of the Elementary and Secondary Education Act, popularly titled the No Child Left Behind Act,\textsuperscript{361} into law. The Act’s purpose was “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”\textsuperscript{362} More specifically, the Act was to close the achievement gap for poor and minority students and end what President Bush termed the soft bigotry of low expectations.\textsuperscript{363} The Act would achieve this through an accountability system that demanded that states set high academic standards for all students, test students yearly in core content areas, disaggregate test scores by race, poverty and other factors, and sanction school systems that failed to meet proficiency benchmarks.\textsuperscript{364} The ultimate requirement was that 95 percent of students, including 95 percent of students in individual sub-groups, reach proficiency in every school by 2014.\textsuperscript{365}

All states have instituted the standards and tests, but it is reasonably clear that absent blatant manipulation of the tests or test results the proficiency level goals will not be met, nor will the less emphasized and enforced stipulation that all students be taught by highly qualified teachers occur. Recent studies estimate that approximately one-third of the nation’s schools in 2010 were not on pace to hit their interim goals for reaching 95\% proficiency by 2014.\textsuperscript{366} Moreover, twenty states, while technically on track with their interim yearly progress, have set yearly progress goals that will escalate in the final years leading up to 2014,\textsuperscript{367} making it nearly impossible for them to make yearly progress in the future and reach 95\% proficiency. Even among those states that set reasonable targets and are currently on track, making in proficiency gains is statistically less likely the closer they get to the 95 percent level. In short, absent widespread manipulation of their tests, which is a real threat,\textsuperscript{368} it is possible that only a handful

\textsuperscript{360} See also Matthew D. Knepper, Shooting for the Moon: The Innocence of the No Child Left Behind Act’s One Hundred Percent Proficiency Goal and Its Consequences, 53 St. Louis U. L.J. 899 (2009).
\textsuperscript{361} 20 U.S.C. § 6301, et al.
\textsuperscript{362} Id. at X.
\textsuperscript{365} The Act technically requires schools to move toward 100\% proficiency but only requires that 95\% of students be tested. See 20 U.S.C. § 6311; see also Rod Paige, Key Policy Letters Signed by the Education Secretary or Deputy Secretary (July 24, 2002) http://www2.ed.gov/policy/elsec/guid/secletter/020724.html.
\textsuperscript{366} Dietz & Roy, supra note .
\textsuperscript{367} Chudowsky & Chudowsky, supra note .
\textsuperscript{368} Ryan, Five Miles, supra note, at 251.(discussing how Tennessee dropped the percentage of answer a student must get correct to be proficient from 51 percent to 43 percent to 40 percent); see also Paul E. Peterson & Frederick M. Hess, Keeping an Eye on State Standards: A Race to the Bottom?, 6 Education Next 28-29 (2006) (finding that
of states will meet the Act’s proficiency requirements as currently articulated. Progress toward placing highly qualified teachers in every classroom is even paltrier. It is unlikely that a single state will meet this goal.\(^{369}\)

Even claiming meaningful progress toward these benchmarks is questionable. The achievement gap between minority and white children or poor and middle income children has not significantly decreased, nor has any widespread increase in scores occurred.\(^{370}\) Two years after the Act was enacted, the Department of Education claimed progress,\(^{371}\) but close analysis reveals that to the extent any achievement gains had occurred they were minimal or were likely attributable to factors other than the Act.\(^{372}\) It is, likewise, hard to argue that the Act improved the quality of education in schools. In fact, many argue that it has had the opposite effect (drill and kill) in regard to the method of instruction in disadvantaged schools.\(^{373}\) And in regard to high quality teachers, the effect has been minimal at best in the neediest schools.\(^{374}\)

For most, these past and impending results mark NCLB as an enormous failure. The pressing question for this Article is why the Act is a failure. To suggest that NCLB has fallen victim to the same causal problems as other education reforms would over simplify the matter, but the truth is not far removed. NCLB differs from the other reform movements discussed herein in that it is legislation rather than litigation and, consequently, several of the earlier discussed limitations of litigation would not necessarily extend to NCLB. Nonetheless, the Act’s most significant flaws arise in the way it replicates rather than avoids the problems that plague litigation based education reform. First, the legislation has an almost singular focus on student outcomes on standardized tests.\(^{375}\) The success of both school districts’ and the Act itself hinge on precise goals in regard to student achievement and various assumptions about how they can

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the state tests set much lower proficiency levels than the National Assessment of Educational Progress); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

\(^{369}\) EDUCATION COMMISSION, *supra* note, at X.


\(^{371}\) See generally Thomas Dee and Brian Jacob, *Evaluating NCLB*, EDUCATION NEXT (Summer 2010) http://educationnext.org/evaluating-nclb/; *Ed Next Research Finds NCLB Has Produced Substantial National Gains In Math Skills*, Educationnews.org (indicating that gains may not be attributable to NCLB) http://www.educationnews.org/ed_reports/91486.html; *see also* Sean Cavanagh, *NCLB Found to Raise Scores Across Spectrum*, Ed. WEEK (June 17, 2009) (noting the apparent gains, but indicating that the gains are largely the result of changes in test evaluation and scoring).


\(^{373}\) EDUCATION COMMISSION OF THE STATES, *infra* (indicating no states were on track to meet the teacher requirements); Sarah Almy & Christian Theokas, *Not Prepared for Class: High Poverty Schools Continue to Have Fewer In-Field Teachers* (2010), http://www.edtrust.org/sites/edtrust.org/files/publications/files/Not%20Prepared%20for%20Class.pdf.

\(^{374}\) See generally Robinson, *supra* note, at 1679 (criticizing No Child Left Behind for looking exclusively at statewide assessments and the achievement gaps therein); *see also* 20 U.S.C. §§ 6311, 6316.
be produced.\footnote{20 U.S.C. § 6311(setting proficiency goals of 100 percent).} In this respect, the Act voluntarily places itself in a situation no different than the various other education reforms that have faltered due to their inability to establish a causal connection between student outcomes and some particular educational policy or act.

Second, the Act’s heavy handed accountability regime is, at least, analogous to a judicial injunction in that mandates particular action designed to remedy educational failure. While states and school districts could, in theory, have refused to accept federal education dollars and absolved themselves of NCLB’s mandates, none actually did because the federal financial role in education has become significant enough that it is not easily be given up.\footnote{Utah, for instance, considered passing on the funds, but ultimately accepted them. Sam Dillon, \textit{Education Law Finds Few Fans in Utah}, N.Y. TIMES, Mar. 6, 2005, at 33; see also Michael D. Barolsky, \textit{High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind}, 76 GEO. WASH. L. REV. 725, 749 (2008) (noting the Secretary of Education’s threat to withhold all Title I funds when Utah, Virginia, and Connecticut considered opting out of NCLB).} Thus, schools now operate under a federally mandated testing and accountability system that was promised to improve student achievement and which they themselves did not readily consent to.\footnote{Barolsky, \textit{supra} note, at X.} Third, like ill-fitting or ineffective injunctions, the constituency against NCLB has steadily mounted because, not only has it failed to produce the promised gains, it has produced other indirect negative consequences. Most notably, it has prompted curricular changes, increased political pressures, and in some instance labeled as failing schools that were operating relatively effectively prior to the Act and which were never intended to be the directly target of the Act.\footnote{Diana Jean Schemo, \textit{Bush Seems to Ease His Stance on the Accountability of Schools}, N.Y. TIMES at A1 (July 10, 2001) (indicating that the president did not want to label all schools as failures); Nicholas Lemann, \textit{Testing Limits: Can the President’s Education Crusade Survive Beltway Politics?}, THE NEW YORKER (July 2, 2001) (indicating the intent to aim the bill at a narrow group of schools).} Based on these similarities, NCLB and any subsequent iterations of it that maintain its particular focus are in risk of faltering for the same reasons other education reforms have.

The impending failure of the Act stems from a master narrative surrounded its enactment and enforcement that hinged its efficacy on an inherently problematic causal connection. In essence, NCLB was premised on the assertion that standardized testing and accountability for it would raise the achievement of students in general and close the achievement gap.\footnote{Lemann, \textit{supra} note, at X; \textit{The New Administration}, N.Y. TIMES (Jan. 24, 2001) (excerpted Presidential speech)} Ironically, no significant research supported the conclusion that testing and accountability can elevate all students to proficiency or ensure adequate educational opportunities.\footnote{\textit{James E. Ryan, Five Miles Away, A World Apart} (2010).} At most, the experience of a few states that had implemented their own testing and accountability systems coincided with some educational gains in those states.\footnote{\textit{Id.} at X.} First, the reforms in those states were not limited to testing and accountability, but were part of larger education reforms. Texas’s testing and accountability regime, for instance, came in conjunction with long standing school finance
reform, and North Carolina’s reforms were as much about curriculum reform as testing. Second, while these state experienced meaningful educational advances, they did not elevate all students to proficiency, nor did the large achievement gaps between white and minority students vanish. In short, NCLB promised results that it had no basis for believing it could deliver.

The Act’s causal assertion, more than its actual function and results, is its undoing. Viewed as a measure that was intended to meet the achievement levels it articulated, the Act is not simply a failure, but almost seems ludicrous in retrospect. The achievement gaps and various unequal opportunities that existed in 2002 were so large that closing these gaps and getting nearly every student to a level of proficiency on challenging academic standards in a mere 12 years by simply implementing tests and accountability would have been nearly impossible. Yet, the Act on its face rejected the notion that these achievement levels were only aspirational. It explicitly required that states, districts, and schools meet the achievement levels or suffer sanctions.

The bill’s success, however, need not have been tied to this causal assertion. In fact, it is likely that those closest to the bill did not actually believe the assertion or see it as the primary purpose of the bill. A review of the original purposes and expectations behind the Act suggest that is helpful in addressing this issue, as there was significant divergence between the President, Congress and the public regarding whether the Act would or could deliver on its causal premise. The problem is that they incorporated the causal assertion in the bill’s master narrative to rally support for it, when in fact their intentions and expectations were much lower. In short, the flaw in the causal hypothesis was obvious to key actors, but obfuscating the flaw was politically expedient.

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383 See, e.g., Edgewood v. Kirby, 917 S.W.2d 717, 730 (Tex. 1995) (concluding the state standards system was consistent with constitutional adequacy); West Orange-Cove v. Nelson, 107 S.W.3d 558 (2003) (recounting the history).

384 Helen F. Ladd & Randall P. Walsh, Implementing Value-Added Measures of School Effectiveness: Getting the Incentives Right, 21 ECON. EDUC. REV. 1 (2002). Get more information or detail to permit more precise wording above the line.

385 David S. Broder, Long Road to Reform, WASHINGTON POST A01 (Dec. 17, 2001) (indicating that even North Carolina and Texas would have been labeled failing under the initial version of the bill).

386 See, e.g., West Orange, 107 S.W.3d at X; Hoke County v. State, 599 S.E.2d 365, X (N.C. 2004) (discussing the lower court’s findings regarding achievement).

387 See Knepper, supra note, at X.

388 Leeman, supra note, at X (noting the governors’ opposition to the bill based the unreasonable achievement expectations and indicating these rates of improvement had never been seen before).


390 Chester E. Finn, Jr., Leaving Education Reform Behind, THE WEEKLY STANDARD (Jan. 14, 2002) (indicating that the real effect of the bill was to require regular testing, but as to defining and meeting proficiency the bill gave states broad flexibility); Lorraine Woellert, Why the Education Bill Is Likely to Fail, BLOOMBERG BUSINESSWEEK (Dec. 26, 2001) (indicating that the heart of the bill was really about driving reform in the long term); The President’s Big Test, FRONTLINE (online interview with Leeman) March 28, 2002 (characterizing the bill as a step toward a nationalized curriculum, and distinguishing the bill’s details from its rhetoric); see also James E. Liebman and Charles F. Sabel, The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda, 81 N.C. L. REV. 1703, 1731-32 (2002) (finding that the bill creates the conditions for change rather than change itself).

391 Leeman, Frontline, supra note.
Among those who took the Act’s language and purpose seriously, the proficiency levels appeared impossible to meet. For them, the causal hypothesis was not credible. Consequently, a coalition of governors immediately attacked the earliest versions of the bill, knowing that it would label many systems as failures rather than elevate them to success.\textsuperscript{392} Preliminary studies, likewise, supported their skepticism, finding that nearly every state in the country would be labeled failing under the initial version of the Act, including Texas and North Carolina, whose past successes were supposedly justifications for the Act.\textsuperscript{393} At the other end of the spectrum was a large constituency in Congress that believed whole heartedly in the testing and accountability system’s capacity to produce results. They asserted that the threat of failure came not from setting the standards too high, but from demanding too little accountability in meeting the standards.\textsuperscript{394} Consistent with this thinking, the House version of the Act included more severe sanctions and stricter outcome requirements than the final bill.\textsuperscript{395} The White House fell somewhere between these two positions. While publicly trumpeting the efficacy of testing and accountability, the White House quietly admitted that 100 percent proficiency was not possible.\textsuperscript{396} Understanding this, the administration’s goal was to set standards high enough to identify the worst schools, but not so high that they condemned additional schools as failures.\textsuperscript{397}

The bill’s final version was a compromise that retained high proficiency goals and explicit accountability for them, but included several safety valves that could allow states and/or the Department of Education to mask the lack of success.\textsuperscript{398} The compromise, however, was not touted. Rather, that testing and accountability could improve education and close the achievement gap was the dominant narrative,\textsuperscript{399} which as discussed above has undoubtedly failed. These safety valves, in contrast, garnered relatively little attention. Yet, the safety valves represent an uneasiness or disbelief in the Act’s causal assertion and further suggest that the master narrative was simply part of selling the bill to the public and prompting states to comply once it became law. In fact, those closest to the Act knew that it could not produce full proficiency and instead harbored a much narrower and more subtle set of goals.\textsuperscript{400}

2. Excising the Causal Assertion

Interestingly, if the master narrative is pushed aside, the Act has actually been a smashing success in several respects. First, the Act required that states align their curriculum with their standardized assessments and test students yearly. Prior to the Act, only nine states had aligned

\textsuperscript{392} Id.
\textsuperscript{393} CONGRESSIONAL RESEARCH SERVICE REPORT (2001).
\textsuperscript{394} Woellert, supra note (criticizing the bill for not being tough enough); Schemo, supra note (noting that the House version of the bill was far more strict).
\textsuperscript{395} XX.
\textsuperscript{396} Schemo, supra note; Barolsky, supra note, at X.
\textsuperscript{397} Id.
\textsuperscript{398} Compare 20 U.S.C. § 6311(setting proficiency goals of 100 percent) with 20 U.S.C. § 63XX (allowing states to develop their own assessments and proficiency levels); see also Leeman, supra note; Liebman & Sabel, supra note, at 1724.
\textsuperscript{399} Leeman (2001), supra note.
\textsuperscript{400} Infra note.
their curriculum and tests, and only fifteen tested students yearly.401 Today, all fifty states are doing both.402 This was the only requirement in the Act that states could not avoid and, on this basis, possibly the Act’s primary goal. Second, rather than actually close the achievement gap, the Act’s goal could have been merely to identify and draw attention to it.403 Through yearly testing and disaggregation of data, the racial and socio-economic gap can be identified in every public school in the country.

On their face, these “successes” might appear modest in light of the time, money, and effort thus far invested in NCLB, but these modest successes are consistent with more profound long term reform. While testing and accountability in and of themselves lack the direct causative power to raise overall achievement and close the achievement gap, that does not foreclose their value over time in indirectly prompting other policies that can improve student achievement.404 Since the White House created various safety valves relating to short term changes in student achievement, but none in regard to the implementation of the testing and accountability system, its unstated goal may have simply been to create a nationwide system that would set up the conditions for long term change.

NCLB has, without many even noticing it, put the conditions for long term change in place. Through nationalized testing, a rudimentary national concept of an adequate education is developing,405 as well as significant movement toward a more nationalized curriculum directed toward delivering it.406 Thus, while claiming its mandates were content neutral, the Act has been anything but in practice. Second, the ability to identify and track the achievement gap in every school on a year basis has brought a focus and attention to the achievement gap in way previously unseen.407 Closing the achievement gap is now part of the core conversation regarding the educational mission of state and national actors.408 Third, an educational accountability structure now exists. As of yet, the federal government has not tested its leverage capacity,409 but it exists as a matter of fact and the notion that the federal government might utilize it to affect change is one to which states are growing accustomed.410 Prior to the Act, the federal government seemingly had little ability to force any particular policy change at the state level without carrying the full financial freight itself.411 While states have vocally lamented the

402 EDUCATION COMMISSION OF THE STATES.
403 Liebman & Sabel, supra note, at 1715; Broder, supra note (Rep. Miller believed the problem was that no one really knew how far behind minority children were); Linda Darling-Hammond, Evaluating No Child Left Behind, THE NATION (May 21, 2007) (indicating that the bill is a success in “flagging” the achievement gap).
404 Liebman & Sabel, supra note, at X.
405 X.
408 Id. at X.
409 Finn, supra note (questioning whether DOE would actually exercise the authority given to it).
410 X.
411 X.
alleged unfunded mandates in NCLB, they have nonetheless sought to comply with them. Moreover, even if the federal government flooded the states with money, it previously would have had little ability to monitor its effectiveness. Now it can.

A real threat to NCLB, or its general educational reform movement, however, still persists because these short term accomplishments were not part of the master narrative. Regardless of implicit machinations of the White House, its master narrative singularly promised that it would improve education, close the achievement gap, and effectively expand the Texas miracle in the short term, not the long term. And it is on this short term measure that the bill will be judged a success or failure, not on whether it created the conditions to improve education later. Moreover, the promises regarding the former jeopardize the later. Because NCLB has failed to produce the short term gains its master narrative promised, several short term effects are occurring that counter act long term positive possibilities. For instance, by labeling many schools as failures, including those that have made progress or were already achieving at relatively high levels, the Act has engendered the vitriol of schools systems and states that otherwise might have favored the Act. In addition, the widespread negative labeling of schools only further increases the public’s skepticism of public schools and the capacity to improve them. Schools themselves look like failures and federal policy appears inept to rectify it.

The Act’s short-term failures could have been avoided by simply detaching the Act’s success from a causal connection between the pedagogy of testing and improved student outcomes. The Act could have been sold as legislation that would force states to test all children and disaggregate the results so that we could identify and respond to the achievement gap. This language would not have demanded unobtainable achievement results, but rather that states and federal government respond with specific supports or sanctions in places that needed them. Of course, the efficacy of those supports would have been scrutinized through the test results, but the conversation would have been far different. First, success could have rightly have been claimed on the ability to identify the lowest performing schools and those with the largest achievement gaps within them. Likewise, success could have been claimed by simply responding to these districts. Second, the responses, including sanctions, in those districts would appear warranted because the intervention would be based, not on the failure to obtain an unreasonable goal, but on need. Equally important, such a bill would not mislabel good schools as failing. In short, by simply taking out the promise that testing in and of itself would produce results, the Act would focus national attention on the achievement gap and put in place a means

412 See, e.g., Pontiac v. Department of Education, 584 F.3d 253 (6th Cir. 2009); Connecticut v. Duncan, 612 F.3d 107 (2d Cir. 2010).
413 See, e.g., Challen Stephens, Times Watchdog Report: No Child Left Behind on the Way Out, But Not Anytime Soon, HUNTSVILLE TIMES, August 12, 2010 (arguing that Act misled parents with its label of failing).
414 X.
415 In fact, The Education Commission of the States takes this approach, lauding the progress the states have made in various categories such as offering the tests and setting standards. ECS, supra note. Yet, failures are widespread in regard to the most significant goals, such as proficiency and high quality teachers. Id. The Commission treats those as just minor failures in the midst of numerous successes.
for systematically responding to it.\textsuperscript{416} Of course, those responses are of key importance, but a range of substantive responses might available, as opposed to the basic singular approaches of shame and sanction in NCLB.

**B. School Finance, Lingering Causal Gaps, and the Pressure of Economic Crisis**

School finance litigation, the second major educational reform movement currently underway, is also moving dangerous close to a causal gap it may be unable to close. First, standardized test scores are becoming a central aspect of plaintiffs’ prima facie case and courts’ analysis. Those test scores can just as easily be turned against plaintiffs if courts demand evidence that either past remedies have improved test scores or that variances in state expenditures have a precise effect on scores. Second, crises in state budgets will place pressures on courts to extricate themselves from finance litigation. These test scores will provide a readily viable option, particularly since school finance has struggled with causal connections since its inception.

1. The Increased Importance of Test Scores

Student achievement on standardized test has increasingly become part of the analysis over the past two decades. In 1989 in the seminal adequacy case, \textit{Rose v. Council for Better Education}, the Kentucky Supreme Court wrote, “achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district.”\textsuperscript{417} While some court have been careful to not overstate the importance of the test, they have been clear that the scores are relevant and should be examined. For instance, in states like New York and Wyoming, the highest courts emphasized the importance of student achievement on standardized tests, but recognized that they “should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.”\textsuperscript{418} The North Carolina Supreme Court, in remanding the issue of whether the state was providing an adequate education, simply wrote “[a]nother factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests.”\textsuperscript{419}

Such directions have had obvious effects. Subsequent courts have analyzed standardized test scores at length,\textsuperscript{420} and based significant conclusions on them. For instance, the trial court in \textit{Montoy v. State} wrote “Kansas test results are informative and disturbingly telling.”\textsuperscript{421} Similarly,

\begin{thebibliography}{99}
\item Liebman & Sabel, supra note, at X (reasoning that the bill’s real goals were these more modest ones).
\item Rose v. Council, 790 S.W.2d 186, 197 (Ky. 1989).
\item Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997).
\item Montoy, 2003 WL 22902963.
\end{thebibliography}
the Arkansas Supreme Court quoted reviewed the lower court’s recitation of student’s achievement on standardize tests and agreed that the “State has a remarkably serious problem with student performance.” Some states, however, have gone beyond treating the results as a mere factor. Maryland, to avoid further litigation, specifically agreed to provide a level of funding “sufficient to allow [schools] to meet prescribed State performance standards.” The New Hampshire Supreme Court, likewise, effectively turned the states testing system into the measure of adequacy. Scholars of school finance have simply declared that adequacy litigation claims “at their core . . . seek to link spending with student achievement results.”

The increased importance of and reliance on standardized tests, however, poses as serious a threat to the long-term viability of school finance movements in the same way NCLB’s causal assertion undermines its goals. In fact, the increased availability of detailed student achievement through state level testing regimes and then NCLB closely coincided with the rise in school finance claims and victories. As both James Ryan and Michael Heise note, educational advocates have been able to leverage poor test scores and failure and into education finance litigation success. In fact, as early as 1987, Julius Chambers, the then director-counsel of the NAACP Legal Defense Fund urged reformers to take this exact approach. The more testing data that became available the harder it became for courts to ignore it, nor should they have ignored it.

Without question, student achievement on standardized tests is relevant to the question of whether students are receiving an adequate education. That they are relevant, however, does not mean that they resolve the question of whether students are receiving an adequate education. Yet NCLB’s seeming attempt to reduce educational quality and adequacy into test scores and states curricular and statutory movements in this direction signal that this distinction may soon be lost. If this occurs, plaintiffs will be at the mercy of the courts. As James Ryan notes, plaintiffs see this move as being to their benefit, but if this move becomes complete, they will see it is not: Inadequate test scores could be used as proof that the standards are not being met. This in itself, however, would not necessarily lead a court to order increased

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422 Lake View, 91 S.W.3d at 488-89.
425 ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE (4th ed. 2008). See also Michael Zuni (“school finance is linked to student academic achievement.”); Meltzer, supra note, at 565; Molly Hunter: Human Rights Article: (indicating that because states have failed to align their funding schemes with the standards based alignment of curricula, teacher preparation and test scores, plaintiffs “can use the standards when they present evidence of insufficient educational ‘inputs’ and ‘outcomes.’”); William H. Clune, Educational Adequacy: A Theory and Its Remedies, 28 U. MICH. J.L. REFORM 481, 481 (1995) (“‘Adequacy’ refers to resources that are sufficient (or adequate) to achieve some educational result, such as a minimum passing grade on a state achievement test.”).
426 Heise, supra note, at 338-339.
427 Id. at 338; Ryan, supra note (Texas), at 1231.
428 Julius Chambers, Adequate Education for All: A Right, An Achievable Goal, 22 HARV. C.R.-C.L. L. REV. 55, 60-61 (1987) (concluding increased use of standards and tests “present us with an affirmative opportunity to define a right to a minimally adequate education”) (emphasis omitted).
funding. Instead, it would trigger an inquiry into whether the disparities in test scores relate to insufficient funding. Plaintiffs will succeed in their quest for funding if, but only if, that causal link can be established. Thus, test-score disparities might be necessary but not sufficient to prove the need for greater funding.\textsuperscript{429}

In essence, the centrality of test scores simply opens up the type of core causal problems that has elsewhere been unresolvable. Plaintiffs will be unable to demonstrate that a precise amount of increase funding leads to a precise increase, if any in test scores. This evidentiary gap, rather than any flaw in plaintiffs’ claim or merit to the state’s education system, can effectively end school finance reform. While not addressing this direct termination of reform, Ryan posits a few other negative consequences prior to this end. States can simply manipulate the test scores to suggest that students are performing better than they are or, in an effort to actually meet a test driven concept of adequacy, states will simply narrow the scope of education and, thereby, diminish the quality of education.\textsuperscript{430}

2. The Changed Circumstances of Financial Crisis

The current financial crisis in state budgets only makes the foregoing scenario more likely. The decrease in state revenues is currently testing state school systems’ capacity to deliver core educational services and the situation will likely worsen in the coming years.\textsuperscript{431} Only the assistance of the federal government during the last two budget cycles has averted catastrophic shortfalls in state and local school budgets and the painful decisions they would have wrought.\textsuperscript{432} While state revenue shortages are sure to continue, federal assistance is not. Consequently, schools will eliminate various services, opportunities, and positions.\textsuperscript{433} In response to the cutbacks these past two years, advocates have already begun asserting that states are failing to meet their constitutional and statutory obligations.\textsuperscript{434} Schools and states that have not already experiencing serious hardship soon will, and similar claims by advocates will follow.

New claims, however, will place the judiciary in a more precarious situation than previously. Most of the previous decisions recognizing education rights were issued during times of relative economic prosperity.\textsuperscript{435} The most obvious choices for courts now will be to

\textsuperscript{429} Ryan, supra note, at 1243.
\textsuperscript{430} Id. at X.
\textsuperscript{431} Leslie A. Maxwell, School Funding on Block Again as States’ Fiscal Pain Continues With Budget Gaps Growing, About Half Expect K-12 Cuts, ED WEEK (March 3, 2010).
\textsuperscript{432} State Fiscal Stabilization Fund, supra note, (detailing the need and disbursement of education funds as part of the larger economic stimulus bill of 2009); Education Jobs Fund, Public Law No. 111-226 (August 10, 2010) (allocating 10 billion dollars for the 2010-11 school year to save or create education jobs).
\textsuperscript{433} Even more aggressively, Kansas is seriously considering changing its constitutional clause in regard to education so as to remove the issue from judicial scrutiny. Access Quality Education, supra note.
\textsuperscript{434} See, e.g., Ramirez, supra note (discussing the potential for a lawsuit in Nevada as a result of education cuts); Harrison, supra note (discussing the problems that diminished educational funds create for complying with a past state finance settlement).
\textsuperscript{435} See, e.g., Rebell & Wolff, supra note (recounting the success of school finance litigation during the 1990’s and the following decade).
demand that state legislatures devote a more significant portion of an already shrunken overall state budget to education, demand that they raise taxes, or issue decisions that effectively treat students’ constitutional right to education as contingent, or as less robust than previously indicated. Ordering financial remedies would test the institutional capacity of courts, as states are less likely to respond favorably than in earlier years. At best, courts might find themselves embroiled in a back and forth with the legislature for several years until budget revenues reverse. While practically easier, courts might undermine their own legitimacy if they rendered decisions that directly or indirectly undercut the educational rights they have already established. In some respects, such action can be worse than taking no action, as backtracking eviscerates rights, even if they are only symbolic during the financial crisis.

In short, these unenviable options will place pressures on the courts to find other ways out of the litigation. The rising importance of test scores in school finance litigation can provide an easy exit strategy. Educational advocates are in no better position than any other education reform movement to demonstrate a causal connection between educational policies or money and educational outcomes as measured on standardized tests. In fact, given the extensive research devoted to this very question and its failure to produce conclusive and specific results, school finance litigation advocates could be in an even worse position. The point here is not to criticize, but simply to diagnose and warn. School finance litigation’s most consistent success have come through its ability to assess adequacy and equity in terms of education inputs, with only tangential attention to test scores. NCLB and financial crisis create pressures to shift this balance. This shift would like mark the reversal of the school finance trajectory, just as it has elsewhere.

CONCLUSION

Over the past half century, public education has undergone significant changes and experienced a myriad of education reforms aimed at perfecting our greatest social experiment. In general, these reforms have focused on securing equal and quality education opportunities for the various disadvantaged demographic groups in schools. Thus far, scholarship has conceptualized these reforms as implicating distinct and individualized paradigms that correspond with the particular demographic group whose interests are at stake. To the extent that past scholarship has conceptualized these reforms more broadly, it has simply connected these reforms to movements outside of education—such as desegregation to racial justice—or explored how the interests of one group intersect with another group—such as the interests of poor and minority students. While such analysis is invaluable, it only explains half of the story

436 See, e.g., Ex parte James, 836 So.2d 813 (Ala. 2002).
437 Recent scholarship, however, offers one important caveat. Professors Sabel and Simon suggest that modern public litigation has moved beyond the model offered by Abram Chayes in the 1970’s and discussed herein. They conclude that public law litigation can destabilize public structures that work to plaintiffs’ disadvantage. The litigation helps gain a seat at the table of policy formation for plaintiff groups. Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1016 (2003). In this respect, school finance litigation might not present unreasonable challenges to the current system, but simply force it to account for schools’ needs as it navigates through this crisis.
and overlooks certain fundamental aspects of education that run constant throughout these reforms.

In particular, every major education reform movement has experienced a causal gap that ultimately marks its limits. In desegregation, that causal gap was in regard to the connection of past discrimination to current segregation and the achievement gap. In school finance, the causal gap was the effect of money on school quality and student outcomes. In other areas, the gap has similarly been between some particular pedagogical practice or educational input and student outcomes. Courts have, in some instances, been willing to tolerate these gaps so as to not impede progress, but eventually courts have returned to these gaps at some point and used them as the primary means to limit or end reform. The impetus to limit reform is generally a product of external pressures or ideology, some of which is paradigm specific and, thus, implicit in other scholarship, and the rest of which is inherent to education. Either way, education’s causal gaps explain why reform, regardless of the individual paradigm, is perpetually subject to limits and reversal. Courts are not acting ultra vires in disregarding plaintiffs’ claims; they are exploiting the evidence.

The import of this Article’s analysis on educational causal gaps, however, is not simply on the past but the future. Major education reforms, such as school finance and the No Child Left Behind Act, exemplify causal gaps the same as others have in the past. While they have to some extent evaded the full potential brunt of these gaps thus far, the risk is never far away. In fact, both movements are in the midst of immense external pressures that have the capacity to turn these movements inward, revealing the gaps and providing bases to unravel the movements. Fair analysis by courts would recognize these gaps for the practical reality that they are, not exploit them, but in the absence of fairness, advocates would be well served to steer clear of the issue altogether.