CIVIL RIGHTS, CHARTER SCHOOLS, AND LESSONS TO BE LEARNED

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Abstract

Two major structural shifts have occurred in education reform in the past two decades: the decline of civil rights reforms and the rise of charter schools. Courts and policy makers have relegated traditional civil rights reforms that address segregation, poverty, disability, and language barriers to near irrelevance, while charter schools and policies supporting their creation and expansion have rapidly increased and now dominate federal policy. Advocates of traditional civil rights reforms interpret the success of charter schools as a threat to their cause, and, consequently, have fought the expansion of charter schools. This Article argues that the civil rights community has misinterpreted both its own decline and the rise of charter schools. Rather than look for external explanations, civil rights advocates should turn their scrutiny inward. And, rather than attack charter schools, they should learn from them.

A close examination of past civil rights movements in education reveals that their decline was inevitable. Each of the various educational movements depended on establishing a causal connection between the reform sought and positive student outcomes. But precisely establishing causal connections in education is nearly impossible. Education involves too many variables to isolate conclusively the effects of educational policies on student outcomes. Ignoring this reality leaves civil rights reforms vulnerable to contraction. This weakness—not competition from charter schools—continues to undermine civil rights reform.

Charter schools suffer from the same causal weakness, but it is not impeding their expansion because the charter movement, unlike civil rights, is not based primarily on evidence. Instead, charter school advocates emphasize ideological values that appeal to broad constituencies. These value-based constituencies form a movement that forces the expansion of charter schools and is undeterred by evidentiary critique. To regain relevance, civil rights advocates must scale back their reliance on evidentiary claims and reframe their arguments in terms of compelling values that can again inspire a movement.

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INTRODUCTION

In recent years, educational civil rights advocates have felt the policy world shift underneath their feet. One of the primary factors in this shift has been the increasing prevalence of charter schools and favorable policies encouraging their continual expansion. Since the late 1990s, when charter schools numbered only in the hundreds,[1] charter schools have grown exponentially. Today there are over five thousand charter schools in operation,[2] serving over two million children.[3]

1. U.S. DEP'T. OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: YEAR ONE EVALUATION REPORT iii (2000).

2. *Schools Overview*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (2011), http://dashboard.publiccharters.org/dashboard/schools/year/2011; *see also* CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 9 (2009).

3. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., BACK TO SCHOOL TALLIES: ESTIMATED

While not the initial driving force behind this trend, federal policy has increasingly supported it and is now a leading advocate. When Congress enacted the No Child Left Behind Act of 2001 (NCLB), charter schools were still operating at the margins of educational policy and were largely relegated to a footnote in federal law.[4] Less than a decade later, charter schools dominate the policy world. In 2009, the U.S. Secretary of Education stressed that states that "put artificial caps on the growth of charter schools will jeopardize their applications under the [$4.35 billion] Race to the Top Fund."[5] Many states responded by immediately dropping their resistance to charters and eliminating caps on the number of charter schools they would authorize.[6] Today, the fascination with charter schools has become so intense that charter schools are effectively sucking all the air out of reform conversations and limiting the discussion of other reform options. Other reform policies are, at worst, ignored and, at best, measured based on their consistency with a charter school agenda.[7]

The growth and increasing relevance of charter schools has roughly coincided with the decreasing relevance of traditional civil rights reforms. As a result, advocates for racial, ethnic, and disability equality in education have understandably perceived charter schools as the enemy. Leading researchers and advocates have charged that charter schools are more racially and socioeconomically segregated than regular public schools, and that they routinely discourage the enrollment of students with language or disability needs.[8] Charter school advocates

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NUMBER OF PUBLIC CHARTER SCHOOLS & STUDENTS, 2011–2012 at 1 (Dec. 2011) www.publiccharters.com/ publication/?id=637.

4. The only mention of charter schools in the main provisions of the Act are to indicate that they are an acceptable option for students exercising the voluntary transfer provision and an acceptable method for restructuring a school in need of improvement. 20 U.S.C. § 6316(b)(8)(B)(i) (2006); 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

5. David Nagel, *Charter School Support Is a Prerequisite for Race to the Top Funds*, THE JOURNAL (June 09, 2009), http://thejournal.com/articles/2009/06/09/charter-school-support-is-a-prerequisite-for-race-to-the-top-funds.aspx.

6. *See, e.g.*, Rob Christensen, *Perdue Signs Law Lifting Cap on Charter Schools*, NEWS & OBSERVER (June 17, 2011) (discussing North Carolina's elimination of its cap on charter schools), http://www.newsobserver.com/2011/06/17/1281607/perdue-signs-law-lifting-cap-on.html.

7. *See, e.g.*, Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV 257, 270, 280 (1999).

8. *See generally* ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (2010) (criticizing charter schools and revealing the rift between charter advocates and civil rights advocates). There are charter schools whose mission is to serve students who speak English as a second language, *see generally* Alexandra Villarreal O'Rourke, *Picking up the Pieces after* PICS: *Evaluating Current Efforts to Narrow the Education Gap*, 11 HARV. LATINO L. REV. 263, 274–75 (2008), but those schools are the exception rather than the rule, and are technically segregated as well.

respond that civil rights advocates are unfairly comparing charter schools to *all* public schools, rather than to public schools in the particular neighborhoods where charter schools are located.[9] In addition, charter school supporters assert that the racial and socioeconomic characteristics of charters are secondary to the real goal of expanding quality education for disadvantaged students.[10] In short, segregation is irrelevant if students are receiving a higher quality of education in charters.[11] As to the latter point, civil rights advocates counter that most charter schools are not delivering the improved academic outcomes they promise and fall short of the opportunities that integrated middle-income schools could offer.[12]

This line of attack by civil rights advocates, even if reasoned, misses the point. First, it draws civil rights advocates into a battle *against* charter schools, rather than one *for* civil rights. This battle is counterproductive regardless of the winner, but the recent trajectory of charter schools suggests that charter schools will be the winner by a large margin.[13] Second, the truth is that most educational civil rights were marginalized long before the rise of charter schools for reasons related to their own shortcomings. The United States Supreme Court placed major limitations on desegregation as early as the 1970s and effectively ensured its end in the 1990s;[14] lower courts established standards for English Language Learner claims that assured their ineffectiveness just a few years after Congress passed the Equal Educational Opportunities Act;[15] the focus on individual remedies in special education law narrowed its impact from the outset;[16] and courts

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9. Gary Ritter et al., *A Closer Look at Charter Schools and Segregation*, EDUC. NEXT, Summer 2010, at 69, 69.

10. Melanie Smollin, *Should Segregated Charter Schools Integrate? Does it Matter That Their Schools are Segregated?*, TAKE PART (June 10, 2011), http://www.takepart.com/node/17833/actions (reporting that KIPP charter schools' Los Angeles Executive Director does not think segregation in charter schools matters.).

11. *Id.*

12. RICHARD D. KAHLENBERG, CHARTER SCHOOLS THAT WORK: ECONOMICALLY INTEGRATED SCHOOLS WITH TEACHER VOICE 8 (2010); *see also* Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 644 (2011).

13. *See generally* Molly Peterson, *Charter Schools Gain Support from 64% of U.S. Adults in Survey*, BLOOMBERG (Aug. 26, 2009, 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWRZ1.Y3s9Jo (reporting that a majority of Americans support charter schools despite confusion about charter schools).

14. *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 499 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991); Milliken v. Bradley, 418 U.S. 717, 752 (1974); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 213–14 (1973).

15. Castaneda v. Pickard, 648 F.2d 989, 1001 (5th Cir. 1981).

16. *Cf.* Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 430 (2001) (arguing for

have demanded evidence of a causal connection between money and student outcomes in school finance litigation that litigants have struggled to establish.[17] Given this reality, attacks on charter schools are misdirected, and they distract civil rights advocates from asking the important question of why their own reforms have waned while charter schools are gaining strength.

The answer is that civil rights reforms have not failed because charter schools, or any other policy for that matter, have undermined them. Rather, education reform litigation across the various paradigms has consistently failed because the movements share a central flaw: the inability to establish a precise causal connection between educational policy and inputs on the one hand and student outcomes on the other.[18] When advocates increasingly focus their movements on legal claims premised on causal connections, advocates set themselves up for failure. Not recognizing this harsh reality, civil rights advocates simply press for better evidence. But better evidence cannot be found, because the particular causal gaps that plague educational civil rights reform are inherent in the educational process itself. Thus, pursuing educational reform primarily through litigation and evidence-based arguments leaves traditional civil rights reforms perpetually vulnerable to contraction, because the evidentiary gaps endemic to those movements can be exposed any time courts or policy makers care to scrutinize them.

Ironically, from an evidentiary point of view, charter schools have had far more to overcome than civil rights advocates. Charter school advocates have asserted that they could improve student outcomes.[19] They have pointed to the purported failure of past reform policies to demonstrate that the system is broken and that the bureaucratic stranglehold on education makes it incapable of change from within.[20] They have argued that school choice, market forces, and the flexibility that charters can bring to education would foster efficiency, innovation, and educational quality that would improve student outcomes.[21] But nearly two decades into the charter school movement, the pedagogy of charter schools has yet to demonstrate a significant causal effect on student outcomes. While a small percentage of charter schools

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alternative avenues of relief for IDEA violations because of the disproportionate impact on low-income students of color due to the focus on individual remedies).

17. *See infra* Section II.C.

18. *See infra* Part II.

19. Pearl Rock Kane & Christopher J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, *in* PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION? 203, 205 (Henry M. Levin ed., 2001).

20. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 3 (1990).

21. Kane & Lauricella, *supra* note 19, at 210–30.

outperform public schools, most do not. Forty-six percent of charter schools perform at the same level as public schools and 37% perform at a level significantly below public schools.[22] Only 17% of charter schools actually outperform their local public schools.[23] Thus, the data "reveals in unmistakable terms that, in the aggregate, charter students are not faring as well as their [traditional public school] counterparts."[24]

Yet the trajectory of charter schools stands in stark contrast to that of civil rights reforms. Charter schools suffer from their own evidentiary weaknesses, but they have not yet fallen victim to the general trend of reform failure in civil rights. Charter schools have succeeded where civil rights advocates, as of late, have failed, because charter school advocates have built a movement that appeals to values and interests that do not rest on an evidentiary showing alone. At the broadest level, charter schools are a "movement" in every sense of the word, while traditional civil rights reforms have been reduced to evidentiary claims. And insofar as the evidence for traditional civil rights reforms is no worse and often better than the evidence for charter schools,[25] the absence of a "movement" would appear to have little to do with the efficacy of the reform. That is not to say that evidence is irrelevant, but that evidence *alone* is insufficient, as it is only one of several relevant considerations. Recognizing this, charter school advocates have built a movement based on political and ideological claims as much as evidentiary claims. The expansion of charter schools thus demonstrates that a strong value-based movement can render weak evidence linking educational policy to increased student outcomes irrelevant. In this regard, charter school advocates can teach educational civil rights advocates so much.

In particular, charter schools appeal to two important ideological values that sustain them regardless of their results: individual autonomy

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22. CTR. FOR RESEARCH ON EDUC. OUTCOMES, *supra* note 2, at 3.

23. *Id.*

24. *Id.* at 6.

25. For instance, one of the most consistent social science findings of the past several decades is the positive effect of socioeconomic integration on achievement. JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966) [hereinafter COLEMAN REPORT]; RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 6, 47–76 (2001); Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TCHRS. COLL. REC. 1201 (2010); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355–56 (2004); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Social Composition on Academic Achievement in Southern High School*, 107 TCHRS. COLL. REC. 1999, 1999 (2005). Though not as strong, a solid basis exists to show that money affects educational opportunities. *See generally* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1476–79 (2007).

and free market mentality.[26] Ultimately, some parents and advocates care little about whether charter schools on the whole are successful or even whether their own charter school is more successful than their local public school. What they desire is self-determination, and thus, the power to control their children's educational choices has value in and of itself.[27] In effect, a qualitatively worse education in a school of their choosing is preferable, if not superior, to a similar education in a school not of their choosing.[28] Interests in individual autonomy intersect with business interests that adhere unflinchingly to the market's ability to respond to consumer needs and choice, which they believe will necessarily produce better schools.[29] That many charters are low-performing now is irrelevant. The market will replace them over time with better schools.

The power of these two ideologies has built a constituency that demands charter expansion regardless of the underlying data and evidence. While educational civil rights once leveraged moral- and value-based claims, that focus has been lost over the years. Civil rights reforms now are more often a battle of evidence and social science in the courts or policy preference in legislative processes. As a result, educational civil rights remain vulnerable to perpetual constraints by the causal gaps that inherently exist in education. In contrast, charter schools gain influence despite the lack of an evidentiary basis to support them. Likewise, civil rights advocates' assertions of evidentiary superiority in comparison to charters have little, if any, effect on the policy conversation. In short, the civil rights and charter school movements are operating on two different levels: an evidentiary one that boxes civil rights advocates into failure and a value-based one that offers charter schools a chance for success.

If educational civil rights are going to have any significant relevance in the future, it will not come from attacking charter schools or marshalling better evidence; it will come from following charter schools' strategic lead and recognizing that past civil rights victories in

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26. *See generally* CHUBB & MOE, *supra* note 20 (discussing individual autonomy and free market mentality as applied to public and private schools).

27. *See* Jack Buckley & Mark Schneider, *Are Charter School Parents More Satisfied with Schools? Evidence from Washington, DC*, 81 PEABODY J. EDUC. 57, 58 (2006); Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 147 (2007) (explaining that some support charter schools because of the "parent driven school governance").

28. *Cf.* Argun Saatcioglu et al., *Parental Expectations and Satisfaction with Charter Schools Evidence from a Midwestern City School District*, 20 KAN. J.L. & PUB. POL'Y 428, 432–33 (noting that parents of children enrolled in charters are likely satisfied with a school of their own choosing, even if its academic programs are lacking).

29. *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L. J. 814, 819 (2011).

education were as much, if not more, a product of the moral claims they asserted as any substantiating evidence. School desegregation, in particular, is a perfect example of the relevance of extrajudicial movements and claims. Desegregation was initially grounded in far more than legal doctrine. In its earlier stages, desegregation was a movement within and without courts that was also grounded in morals and politics.[30] During that period, courts were more than willing to ignore causal gaps in plaintiffs' claims and resolve uncertainties in plaintiffs' favor.[31] But once desegregation's moral claim receded and its popular movement fractured, it quickly fell victim to evidentiary battles that it could not win.[32] If charter schools can teach civil rights advocates anything, it is that they must begin once again to frame their claims in ways that appeal to moral- and value-based sentiments. Otherwise, educational civil rights reforms will remain subject to the inherent evidentiary limits of education that will perpetually doom them.

Currently, it is far from clear that educational civil rights advocates even recognize the common and inevitable source of their failure: the uncertain causal connection between educational policy and educational outcomes. Part I of this Article forces this realization to the fore by canvassing the major educational civil rights reform movements and identifying the specific causal assertions on which each was premised. Part I reveals that the claims of each movement share a common weakness and that, while courts may overlook these weaknesses for a period of time, external events eventually arise that encourage the exploitation of these weaknesses and the end of reform. Part II responds to those who would press for better evidence and social science under the belief that past failures are a result of evidentiary anomalies. This second Part demonstrates that a purely evidentiary-based approach to education reform results in inevitable failure because the nature of education is not susceptible to evidentiary certainty. Rather, causal gaps are inherent to education. After establishing these predicates that demand a new strategy, the Article in Part III examines how charter schools have been successful notwithstanding their weak evidentiary basis, concluding that their success is attributable to the values they promote and the wide constituency to which these values appeal. Successes in educational civil rights have, likewise, been tied to larger movements based on values and justice. Losses, however, correspond with an inability to sustain these value-based movements. Thus, this

30. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1994) (detailing the events of *Brown v. Board of Education*).

31. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 6 (1971); Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 434–35 (1968).

32. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 93, 95–96, 102, 120 (1995); Freeman v. Pitts, 503 U.S. 467, 499 (1992).

Article concludes by urging civil rights advocates to refocus on framing their educational concerns in terms of justice and values that can sustain movements and to avoid reducing their claims to battles over evidence and good policy.

I. EDUCATION'S REOCCURRING CAUSAL GAP ACROSS TIME AND CLAIMS

Professor Ronald Dworkin, as early as 1977, warned advocates against opening the Pandora's Box of causation in school desegregation.[33] To do so would lead courts down an analytical path from which desegregation could not escape victorious.[34] What he could not predict, however, was that so few would take note in desegregation and in other subsequent educational civil rights movements. While his comments were not directed to the latter, the connections and analogies to the latter should have been clear. Ironically, very few, if any, scholars and advocates have even paused in all of the subsequent years to reflect on the centrality of causation in limiting educational civil rights movements. The result has been a gross oversight of a key weakness and, thus, a perpetual inclination to succumb to it.

As the following Sections demonstrate, educational legal reform movements have largely been defined by the causation problems they confront. From school desegregation and school finance to the rights of English Language Learners and students with disabilities, causation issues have consistently constrained advocates' ability to substantiate claims and secure remedies. The extent to which courts overlook or examine these issues has been the difference in plaintiffs' success. 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 seriously examined causal questions, they have found evidentiary gaps or demanded such precise evidence that plaintiffs have been unable to provide it. As a result, causal inquiries have served to limit liability under existing claims or eliminate classes of claims altogether.

A. *School Desegregation*

The centrality of causation to the fall of educational claims is most obvious in school desegregation. In the earliest years of desegregation, causation was unquestioned and effectively irrelevant. Schools were emerging from a period in which they had entirely barred minorities from attending white schools. That those prohibitions were the cause of

33. *See* Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. EDUC. 3, 12 (1977).

34. *Id.*

segregation in schools was beyond question.[35] In addition, the Court's initial failure to specify any remedy other than eliminating mandated segregation avoided tough causal questions.[36] But once the Court demanded affirmative desegregation, the question of causation—at least theoretically—became important.

As later described by the Court, the goal of *Brown v. Board of Education*[37] was to restore victims of segregation to their former positions.[38] Since courts cannot turn back the clock, restoring victims to their former position necessarily raises the question of the extent to which current segregation is attributable to past discrimination. Past discrimination and segregation could be 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, avoided inquiries into these sorts of specific causal questions, because they are effectively impossible to resolve, and any attempt to do so would have undermined the moral interests in eradicating legally sponsored discrimination.[39]

As soon as desegregation moved outside the South, however, 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.[40] The requirement that plaintiffs identify a racial motivation to segregate students and connect it to actual segregative results represented a clear shift away from the previous paradigm to one that placed limits on schools' duty to desegregate and left segregation that is not causally connected to past discrimination untouched.[41]

The Court, however, was keenly aware that bringing these causal inquiries to the fore could end or prohibit desegregation just a few years after it had begun. As the end of de jure segregation became more distant in time, establishing liability would become increasingly

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35. *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 487–88, 494 (1954).

36. *Id.* at 495–96 (reserving the question of a remedy for subsequent argument).

37. 347 U.S. 483 (1954).

38. Milliken v. Bradley, 418 U.S. 717, 746 (1974).

39. *See generally* J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 62 (1979) ("No single decision has had more moral force than *Brown*"); Paul Bender, *Is the Burger Court Really Like the Warren Court?*, 82 MICH. L. REV. 635, 647 (1984) (describing segregation as a moral disaster).

40. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205–06 (1973).

41. Gayl Shaw Westerman, *The Promise of State Constitutionalism: Can It Be Fulfilled in* Sheff v. O'Neill*?*, 23 HASTINGS CONST. L.Q. 351, 371 (1996) (describing the effect of the intent–causation standard as devastating to desegregation).

difficult. New acts of intentional discrimination would not be as blatant as old ones,[42] nor would the causal connection between old policies and current circumstances be clear.[43] The passage of time alone would guarantee changes in school board membership, school district administration, neighborhood compositions, and school enrollments,[44] any of which would complicate causal inferences. To mitigate the possibility of immediately undoing vast desegregation remedies, the Court held that if a plaintiff could establish that intentional discrimination was the cause of a substantial portion of the segregation in a school district, it would presume that discrimination was the cause of all other segregation in the district.[45] This presumption would also apply across time, with past discrimination presumptively causing current segregation.[46] Thus, while the Court's intent standard marked a clear limitation on desegregation in many districts, this presumption would potentially authorize even more expansive desegregation remedies in those districts that could overcome the initial threshold questions of intent and causation.

Quickly realizing the possibility of the latter, the Court—shortly after adopting the causal presumption—began to curtail its application. Taken to its natural conclusion, there is very little racial inequality in schools to which the presumption would not apply.[47] Thus, just one year later, in *Milliken v. Bradley*, the Court made a crucial distinction between intra- and inter-district segregation, and refrained from applying the presumption to the latter.[48] 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.[49] The precise extent and cause of segregation in the entire metropolitan area were certainly vague, but applying the presumption to the established instances of segregation theoretically could have warranted

42. Keyes, 413 U.S. at 212–13 (describing how facially neutral assignment policies may in fact be discriminatory).

43. *Id.* at 211 (indicating 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").

44. *See, e.g.*, Thomas Cnty. Branch of the NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1351 (2004).

45. *Keyes*, 413 U.S. at 208.

46. *Id.* at 210.

47. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 195–201 (2003); *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.").

48. Milliken v. Bradley, 418 U.S. 717, 748 (1974).

49. *Id.*

desegregation in the wider metropolitan area.[50]

The Supreme Court, however, held that a metropolitan-wide remedy was unjustifiable in the absence of more substantial intentional discrimination by the suburban districts themselves.[51] 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.[52] In effect, the Court went from presuming a connection between current and past intra-district segregation in *Keyes* to presuming the opposite regarding the connection to inter-district segregation in *Milliken*.

Three years later, the Court in *Dayton Board of Education v. Brinkman*[53] 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."[54] Such a precise causal showing had never even been hinted at previously, but in *Dayton* it marked the outer limits of the desegregation remedy. The Court indicated that the remedy should do no more than "redress that [precise] difference, and only if there has been a systemwide impact may there be a systemwide remedy."[55] By forcing the plaintiffs to make these affirmative causal showings and demanding that plaintiffs close a practically unresolvable causal gap, the Court implicitly rejected the presumption and consequently limited desegregation. Ironically, the Court noted the problem it was creating, writing that such an inquiry was "a good deal more difficult than is typically the case in a more orthodox lawsuit"[56] and "not an easy one to resolve."[57]

Subsequent decisions distinguished *Dayton*'s facts and forestalled the rapid deceleration of desegregation that the incremental causal effects requirement would have wrought.[58] But *Dayton*'s fundamental

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50. In fact, courts in both the Sixth and Fourth Circuits had upheld an interdistrict remedy. Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973); Bradley v. Milliken, 338 F. Supp. 582, 593 (E.D. Mich. 1971). *See generally* Bradley v. Richmond, 338 F. Supp. 67, 92, 106 (E.D. Va. 1972) (holding that a plan to integrate schools in adjacent counties would be enforced).

51. *Milliken*, 418 U.S. at 745.

52. *Id.* at 748–49.

53. 433 U.S. 406 (1977).

54. *Id.* at 420.

55. *Id*.

56. *Id.* at 414.

57. *Id.*

58. *Dayton* involved a peculiar set of facts. The district court referred to a "cumulative

concern regarding the diminishing causal connection between the original acts of discrimination and current segregation resurfaced later to usher in the effective end of desegregation in most districts.[59] In *Freeman v. Pitts*, 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.[60] In earlier periods, the Court had assumed the connection to past discrimination because both the attribution and nonattribution of current imbalances were unclear.[61] But the Court's opinion in *Freeman* represented both 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—essentially presume that current segregation is the result of demographic shifts, rather than discrimination.[62]

The Court's rationale 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 was a "stubborn fact[] of history [that can] . . . linger and persist," it must not "overstate its consequences in fixing legal responsibilities."[63] 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."[64] In most instances, the Court indicated that such a connection no longer exists.[65] 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

violation" rather than a specific violation. *Id.* at 413. The facts also indicated that no intentional discrimination affected school attendance boundaries, but the district court faulted the school district for failing to take affirmative steps to desegregate. *Id.* at 412.

59. *See id*. at 417.

60. Freeman v. Pitts, 503 U.S. 467, 493 (1992) (emphasis omitted).

61. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 207 (1973).

62. *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, 794 (1993) ("*Freeman* allows the school district to rebut causation by showing that the violation was distant in time.").

63. *Freeman*, 503 U.S. at 495–96.

64. *Id.* at 496 (emphasis omitted).

65. *Id.* ("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.") (emphasis omitted).

> attenuated if the school district has demonstrated its good faith.[66]

The problem with this reasoning, however, is that the causal effects of past discrimination have always been "subtle and intangible."[67] 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, acted as though the presumption evaporates over time and, at worst, reversed it, effectively presuming that demographic shifts sever the connection between present and past segregation.[68] 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*.[69] Thus, a mere shift in the Court's approach to causal gaps has been enough to bring an end to desegregation in most districts.

One last option, however, remained for plaintiffs: seeking additional resources to improve predominantly minority schools and districts where integration was not required under Supreme Court doctrine. Yet, shortly after *Freeman*, the Court's opinion in *Missouri v. Jenkins*[70] 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 to remedy diminished African-American achievement.[71] 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,[72] which had the effect of depressing African-American achievement. This rationale had sufficed to justify qualitative

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66. *Id.* (emphasis omitted).

67. *Id.*

68. *See generally* Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 559 (1999) ("[T]he causation presumptions appear to lessen in validity over time"); Crump, *supra* note 62, at 786.

69. *See generally* GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007) (listing major metropolitan districts where desegregation decrees were dissolved after the Court's decisions in Dowell and Freeman).

70. 515 U.S. 70 (1995).

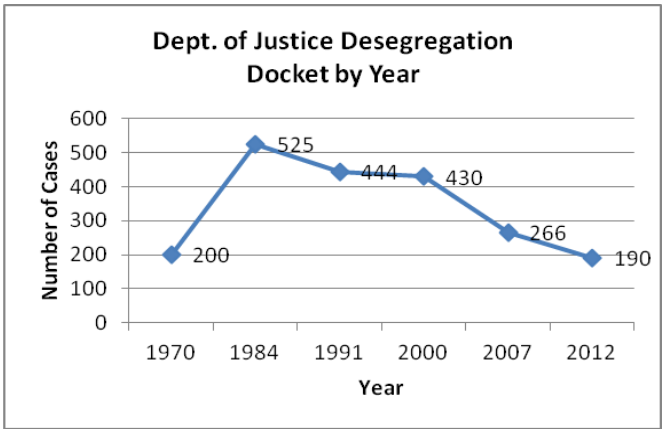
71. *Id.* at 73. The Court interpreted these improvements as an attempt to attract whites back to the district, which it flatly rejected as inconsistent with *Milliken v. Bradley*. *Id.* at 91–93.

72. Jenkins v. Missouri, 639 F. Supp. 19, 24 (W.D. Mo. 1985); Milliken v. Bradley, 433 U.S. 267, 286–87 (1977) (upholding remedial education where actual school desegregation was not an option).

improvement remedies since the 1970s.[73]

The Court in *Jenkins*, however, held that qualitative remedies are only justified when 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."[74] 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."[75] Thus, establishing the causal connection between past segregation and current achievement gaps would be no easier than connecting past segregation to current segregation. 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.[76]

The chart below of the Department of Justice's desegregation docket offers a broad picture of the real-world effects of these causal requirements. In the early 1960s, the federal government's involvement in desegregation was almost nonexistent. After the Civil Rights Act of 1964 and the Court's decision in *Green*, desegregation rapidly grew into the 1970s, but the Court's opinions in *Milliken* and *Bradley* imposed limits on this growth that the DOJ would quickly reach in the 1980s. The Court's decisions in the 1990s offered the exit strategy from desegregation that has resulted in its decline ever since.



73. *In re* Little Rock Sch. Dist., 839 F.2d 1296, 1309 (8th Cir. 1988).

74. *Jenkins*, 515 U.S. at 101.

75. *Id.* at 102 (emphasis omitted).

76. 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).

In sum, in the later stages of desegregation, the Court grew increasingly skeptical of the causal connection between past discrimination and either current segregation and the achievement gap. As a result, it implicitly rejected the *Keyes* presumption of causation and forced plaintiffs to make precise causal showings that, as a practical matter, have proven virtually impossible to establish. The nearly uniform failure of subsequent plaintiffs to meet these showings simply reaffirms this evidentiary quandary.[77] Various lower court decisions demonstrate that causal inquiries into segregation and the achievement gap necessarily involve ambiguities that most often can only be resolved through inferences or presumptions, not with precise evidence or certainty.[78] 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. Thus, the retreat from presumption regarding causation ultimately marked the end of mandatory desegregation and allowed resegregation to take its place.[79]

B. *English Language Learners*

The evidentiary gaps involved in causal inquiries, while common and most obvious in desegregation cases, similarly arise in other major areas of education law, dictating success and failure for English Language Learners, disabled students, and low income students and districts. 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 *Missouri v. Jenkins*—where the causal connection was to be made across time—these areas of education law are theoretically in a better position to resolve the causal

77. For instance, while almost every metropolitan school district in the country has experienced significant interdistrict segregation, only two courts have ever found that a plaintiff's evidence was sufficient to establish interdistrict segregation and the specific causation requirement. United States v. Bd. of Sch. Comm'rs of Indianapolis, 637 F.2d 1101, 1114 (7th Cir. 1980). Likewise, the basic existence of any significant demographic shifts has presented an insurmountable barrier for plaintiffs in sustaining desegregative school assignments. *See, e.g.*, NAACP, Jacksonville Branch v. Duval Cnty. Sch., 273 F.3d 960, 971 (11th Cir. 2001); Lockett v. Bd. of Educ. of Muscogee Cnty. Sch. Dist., 111 F.3d 839, 843 (11th Cir. 1997). On remand in *Missouri v. Jenkins*, the district court and Eighth Circuit concluded that plaintiffs presented sufficient evidence to connect the achievement gap to past segregation. Jenkins v. Missouri, 122 F.3d 588, 598–99 (8th Cir. 1997). Yet the courts sustained this conclusion largely by use of the *Keyes* presumption, rather than the impossible evidence the Supreme Court had seemed to demand. *Id*. at 593, 598. Moreover, other courts have refused to apply the presumption to the achievement gap. Coal. to Save Our Children v. State Bd. of Educ. of Del., 90 F.3d 752, 776–77 (3d Cir.1996); United States v. City of Yonkers, 833 F. Supp. 214, 222 n.3 (S.D.N.Y. 1993).

78. *See supra* note 77.

79. *See generally* GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 2, 8 (2004).

connection between particular educational policies or programs and student outcomes. Yet advocates have still struggled to make this connection in these areas 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 (EEOA), which obligates school districts "to take *appropriate action* to overcome language barriers that impede *equal participation* by its students in its instructional programs."[80] While the statutory language clearly establishes an affirmative duty to assist ELL students, exactly what schools must do is unclear.[81] Once a district takes some action, issues of causation immediately arise. Plaintiffs must establish that a district's current program is causing diminished achievement or failing to elevate students' achievement to the appropriate level. This showing is nearly impossible as a practical matter.

The causal question is embedded in the basic three-prong test for evaluating ELL programs articulated in *Castaneda v. Pickard.*[82] 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.[83] A district, however, need not establish academic consensus in regard to the educational theory, only some academic support.[84] As a result, these first two prongs can be relatively cursory.[85] The third prong tests whether the ELL program is, in fact, effective in helping students overcome language barriers.[86] This third inquiry directly implicates the causal connection between the ELL program and student outcomes.

As in desegregation, the party that 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

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80. 20 U.S.C. § 1703 (2006) (emphasis added).

81. Memorandum, U.S. Dep't of Educ., Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (Sept. 27, 1991), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html (indicating that a language program should be implemented, but "most court decisions in this area stop short of providing OCR [the Office of Civil Rights] and recipient institutions with specific guidance").

82. 648 F.2d 989 (5th Cir. 1981).

83. *Id.* at 1009–10.

84. *Id.* at 1009.

85. 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, 362, 387 (2005); *see, e.g.*, Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1019 (N.D. Cal. 1998), *aff'd*, 307 F.3d 1036, 1042 (9th Cir. 2002).

86. *Castaneda,* 648 F.2d at 1010.

plaintiffs in ELL cases.[87] 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 have made some progress—which is almost inevitable, regardless of the district's action—plaintiffs will struggle to establish that the progress they made was in spite of the ELL program and, thus, legally insufficient.[88]

The problem is intertwined with districts' extensive discretion under *Castaneda* in selecting an ELL program. That discretion makes identifying a baseline group against which to measure the students' achievement an elusive objective.[89] The fact that students might be performing significantly better in other programs that take a different pedagogical approach is of limited, if any, relevance because, under *Castaneda,* the district is free to adopt any program that has theoretical support.[90] And comparing the challenged district to others with the same program can be circular. If the program chosen by the district is simply pedagogically inferior as a general matter, then comparing it to other pedagogically inferior districts is largely pointless. Performing at or above the level of these equally inferior programs does not mean that the challenged program is effective. Only the worst of the worst would actually reveal themselves as ineffective under this analysis. 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 program 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. Plaintiffs have almost uniformly been unable to overcome the causal problems posed by the *Castaneda* standard.[91] So long as a district takes some action for which there is some pedagogical support, a plaintiff's claim is likely to fail.[92] Furthermore, because plaintiffs cannot easily resolve the causal burdens they bear, districts are largely free to adopt any ELL program they want with no qualitative check

87. *Id.* at 1000.

88. *See, e.g.*, Quiroz v. State Bd. of Educ., No. Civ. S-97-1600WBS/GGH, 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.'") (quoting Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 715 (N.D. Cal. 1989)).

89. *See id*.

90. 648 F.2d at 1009–10.

91. *See, e.g.*, *Teresa P.*, 724 F. Supp. at 715–16.

92. Haas, *supra* note 85, at 387.

through litigation.[93] In this respect, the *Castaneda* standard can render ELL services a right without a remedy.

The longstanding litigation over Arizona's ELL programs served as a meaningful exception for some time.[94] The litigation had avoided causal pitfalls by focusing on state-level support of district-level policy, rather than local policy itself.[95] The plaintiffs argued that the state was acting arbitrarily toward districts that were attempting to implement their obligations pursuant to the EEOA and *Castaneda*.[96] Accepting this theory, the district court had ordered the state to provide remedies for nearly a decade.[97]

The Supreme Court's recent decision in *Horne v. Flores*,[98] 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.[99] The Court indicated that the causal inquiry 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."[100] The Court's obvious assumption was 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 an ELL program.[101] The Court indicated that the plaintiffs must establish that money has a causal effect on educational quality, that educational quality has an effect on

93. *Id*.

94. *See, e.g.*, Flores v. Arizona, 480 F. Supp. 2d 1157, 1167 (D. Ariz. 2007); Flores v. Arizona, 405 F. Supp. 2d 1112, 1113 (D. Ariz. 2005); Flores v. Arizona, 172 F. Supp. 2d 1225, 1225–27 (D. Ariz. 2000).

95. *Flores*, 172 F. Supp. 2d at 1238.

96. *Id.* at 1239.

97. The court first ordered a remedy in 2000. *Id.* at 1240.

98. *See* Horne v. Flores, 129 S. Ct. 2579, 2605 (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).

99. *Id.* at 2588–89.

100. *Id.* at 2605 n.20.

101. *Id*. at 2603; *see also* Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 ECON. J. F64, F69–F70 (2003) (reviewing U.S. data regarding funding and school performance).

achievement, and that the achievement gap between ELL and other students is not caused by outside factors.[102]

In sum, 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 seen an expansion of programs beyond what existed prior to the EEOA. 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 somehow control for numerous variables and causally connect state policy to student outcomes. As a result, the initial promise of affirmative rights has been stymied by causal uncertainty.

C. *Poverty and School Finance Litigation*

1. Causation as a Limit on Past Reform

School finance litigation has faced the same problem of attributing student outcomes to school inputs as other reform movements, 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 student outcomes. As Professor 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."[103] Notwithstanding school finance litigation's relative success in the 1990s and the first decade of this century, both its initial and continuing limitations have been a function of an uncertain causal connection.

Early on, this causal gap forestalled school finance equality altogether and, in fact, contributed to the effective end of federal litigation. Plaintiffs initially pursued school finance reform under the theory that the Federal Equal Protection Clause prohibits certain inequalities.[104] In *San Antonio Independent School District v.*

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102. *Horne,* 129 S. Ct. at 2600–06 (reviewing factors that must be considered on remand before a judgment can be made as to whether the school district was taking "appropriate action").

103. Rebell, *supra* note 25, at 1484.

104. Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 497 (1995).

Rodriguez,[105] the Supreme Court rejected the claim on numerous 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 indicated that a causal flaw pervaded plaintiffs' claim. 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."[106] The Court further indicated that the lower court had incorrectly "assumed [a] correlation [in] . . . virtually every legal conclusion" it drew regarding money.[107] This rejection of school finance litigation on both legal and factual grounds effectively ended the movement in federal courts.

Plaintiffs responded by pressing claims in state courts under state constitutions.[108] State constitutions offered a different legal paradigm, but the uncertainty of the causal connection between money and educational outcomes remained. The way each respective state court has dealt with the causal uncertainty has largely 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;[109] (2) acknowledging the lack of consensus on the causal question, but determining that the weight of the overall social science or the evidence in a particular state is sufficient to establish a causal connection;[110] 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 fact that money buys access to certain tangible resources.[111]

The Colorado Supreme Court exemplifies the first category, which rejects plaintiffs' claims based on insufficient evidence of a causal connection between money and educational outcomes. In *Lujan v. Colorado State Board of Education*,[112] the court refused to seriously entertain the plaintiffs' claims, simply asserting that "a raging controversy" persists over whether "there is a direct correlation between school financing and educational quality and opportunity."[113] Absent evidence "that equal educational opportunity requires equal

105. 411 U.S. 1 (1973).
106. *Id.* at 42–43.
107. *Id.* at 43.
108. Underwood, *supra* note 104, at 498.
109. *See, e.g.*, Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982).
110. *See, e.g.*, Abbott v. Burke, 575 A.2d 359, 406 (N.J. 1990).
111. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976).
112. 649 P.2d 1005 (Colo. 1982).
113. *Id.* at 1018.

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."[114] Other courts have gone deeper into the factual and causal issues, but still come to the same conclusion regarding the causal connection. For instance, the Georgia Supreme Court found that the state's funding scheme created unequal access to certain resources, but refused to conclude that this inequality had a causal effect on the quality of education in particular districts or negatively impacted student outcomes.[115]

A significant number of courts fall into the second category, which finds a causal connection between money and outcomes.[116] Courts in this group, however, differ in the quality of evidence upon which they base this conclusion. Several courts have concluded that money is causally connected to school quality or student outcomes based on social science and statistical evidence,[117] while others are content to 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.

The New Jersey Supreme Court, for instance, clearly falls into the category of concluding that money matters,[118] but expresses serious ambivalence regarding the evidentiary basis for a causal connection. In *Abbott v. Burke*,[119] the court 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.[120] The research, the court wrote, is clear "that money alone has not worked," and that some strategies have shown promise even without money.[121] The court, however, distinguished itself from courts in the first category—those that reject

114. *Id.*

115. McDaniel v. Thomas, 285 S.E.2d 156, 160–61 (Ga. 1981).

116. Rebell, *supra* note 25, at 1484–85 (finding that twenty-nine out of the thirty courts that examined the question have "determined that money does indeed matter").

117. *See, e.g.*, Brigham v. State, 692 A.2d 384, 389 (Vt. 1997); Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *49–50 (Kan. Dist. Ct. Dec. 2, 2003).

118. In fact, this court has the most ardent commitment to this principle in the country. Its first decision was *Robinson v. Cahill*, 303 A.2d 273, 276–77 (1973). The New Jersey Supreme Court issued its twentieth decision in this line of cases in 2009 in *Abbott v. Burke*, 971 A.2d 989, 991–92 (N.J. 2009). For a discussion of the various remedies ordered by the court, see Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 917, 926–28 (1998).

119. 575 A.2d 359 (N.J. 1990).

120. *Id.* at 404.

121. *Id.*

plaintiffs' claims—by refusing to surrender to the lack of causal certainty and indicating that, while research may not have uniformly shown a positive causal connection, "it does not show that money makes no difference."[122] This conclusion, combined with the fact that students have an affirmative right to education in that state, prompted the New Jersey court to 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," the court wrote, 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."[123] That the court erred on the plaintiffs' side in regard to this causal question was clear when it wrote:

> [E]ven 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 urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.[124]

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 is largely kept at bay not by the evidence, but by the way in which courts approach it.

The last category of courts stands alone in avoiding the causal problem, but has done so only by ignoring it altogether or framing a much simpler inquiry. For instance, the California Supreme Court in *Serrano v. Priest*[125] upheld a challenge to the state's school finance scheme,[126] but relegated the causal issue to a single footnote, indicating that the differing scholarly findings were irrelevant.[127] Rather than substantively address the issue, the court simply took the plaintiffs' allegations that money affected quality as true, and noted "that the several courts which have considered contentions [to the contrary] have uniformly rejected them."[128] But the *Serrano* court's citations regarding other courts' conclusions are unpersuasive. The other courts' rejections of the argument that money does not matter were not necessarily based

122. *Id.*
123. *Id.*
124. *Id.* at 403.
125. 487 P.2d 1241 (Cal. 1971).
126. *Id.* at 1244.
127. *Id.* at 1253 n.16.
128. *Id.*

on evidence. In fact, at least two of those courts based their conclusions on intuitive inferences or assumptions, concluding, for instance, that money affected quality because "[p]resumably, students receiving a $1000 education are better educated tha[n] those acquiring a $600 schooling."[129]

In a second appeal in the *Serrano* litigation,[130] the court devoted slightly more analysis to the causal connection, but still ignored the possibility that there was an evidentiary gap. This time the court gave no hint of the debate, asserting in conclusory fashion that a causal connection existed. Without explanation or citation to authority, 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."[131] Similarly, it flatly asserted that "differences in dollars do produce differences in pupil achievement."[132] Ultimately, the court's only basis for finding a connection was to infer a connection based on the undeniable fact that the current financing system afforded wealthier districts an advantage in obtaining quality teachers, staff, equipment, and facilities.[133] 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 meaningful differences in educational quality and achievement.

Unsurprisingly, those courts falling into the first category uniformly reject school finance claims, and those falling into the second and third categories tend to uphold school finance challenges. Yet virtually no court is immune to 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.

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129. McInnis v. Shapiro, 293 F. Supp. 327, 331 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); s*ee also* Askew v. Hargrave, 401 U.S. 476, 477, 479 (1971); Hargrave v. Kirk, 313 F. Supp. 944, 947 (M.D. Fla. 1970) ("[I]t 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.").

130. Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

131. *Id.* at 939.

132. *Id.*

133. *Id.*

2. Causation as the Means to End Current School Finance

Even in those several states where school finance litigation has been successful and causal uncertainties purportedly resolved, the end or severe limitation of the movement remains a serious risk. The 2008 financial crisis placed immense pressure on state and local budgets. Some localities were nearly insolvent, and the rest faced "the biggest cutbacks they've seen in decades."[134] Only the influx of $53.6 billion in federal stimulus and emergency aid avoided educational catastrophe during the last two years.[135] With no more aid readily forthcoming, school districts have been fully confronting the harsh reality of falling state revenues that required staggering budget cuts.[136] Thirty-four states and the District Columbia have already made enormous cuts to public schools, some approaching one billion dollars.[137] Cuts of this sort have prompted claims that some states are failing to meet their state constitutional obligations in regard to education.[138]

These outside pressures are of the very sort that can force a reexamination of the underlying causal question in school finance. Courts that do not want to find themselves compromised by the collision of legal rights and practical reality can extricate themselves by demanding precise evidence of the causal connection at the center of plaintiffs' claims. While many of these courts have previously found a causal connection, they based their findings on simplistic reasoning or

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134. Anne Marie Chaker, *K-12 Schools Slashing Costs*, WALL ST. J., Dec. 11, 2008, *available at* http://online.wsj.com/article/SB122895665184096557.html.

135. Education Jobs Fund, Pub. L. No. 111–226 (2010) (allocating ten billion dollars during 2010–11 to save education jobs); U.S. Dept. Educ., *State Fiscal Stabilization Fund*, http://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html (last visited Aug. 24, 2012) (detailing the need for and disbursement of education funds as part of the larger economic stimulus bill of 2009).

136. Associated Press, *Record Number of Calif. Districts Struggling to Pay Bills*, EDUC. WEEK, June 30, 2010; Tamar Lewin & Sam Dillon, *Districts Warn of Deeper Teacher Cuts*, N.Y. TIMES, Apr. 20, 2010; Eric A. Hanushek, *Cry Wolf! This Budget Crunch Is for Real*, EDUC. WEEK, May 19, 2010; Leslie A. Maxwell, *K-12 Cuts Loom Again as States' Fiscal Woes Continue, With Budget Gaps Growing, About Half Expect K-12 Cuts*, ED WEEK (March 30, 2010).

137. Jane Stancill, *Teachers Protest N.C. Budget Cuts*, NEWS & OBSERVER (May 4, 2011); Nicholas Johnson et al., *An Update on State Budget Cuts*, CTR. ON BUDGET AND POL'Y PRIORITIES (Feb. 9, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=1214.

138. David Harrison, *New Budget Cuts Threaten School Funding Settlements*, STATELINE (Dec. 6, 2010), http://www.seniorwomen.com/news/index.php/stateline-new-budget-cuts-threaten-school-funding-settlements (discussing the problems that diminished educational funds create for complying with a past state finance settlement); Anthony Ramirez, *Further Education Cuts Spur Fear of Lawsuits*, LAS VEGAS SUN, Nov. 23, 2010 (discussing the potential for a lawsuit in Nevada as a result of education cuts); Michael A. Rebell, *Litigation Strategies for Hard Economic Times* (December 17, 2010), http://www.schoolfunding.info/news/litigation/12-2010Stateline.php3.

general principles derived from social science, not necessarily specific state-level causal evidence. Moreover, plaintiffs may be in an even worse position today than before, because courts and advocates have in increasing numbers relied on standardized test scores in making out their claims.[139] Where standardized test scores were used to prove a violation, it is only a matter of time before courts examine the effect of past remedies on these scores.[140] Yet, given the intractable causal gaps seen elsewhere, plaintiffs may find themselves unable to defend against this attack.

In effect, educational advocates have leveraged test score failures into education finance litigation success.[141] Without question, student achievement on standardized tests is relevant to educational adequacy. But that test scores are relevant does not mean that they resolve the question of whether students are receiving an adequate education. NCLB's apparent attempt to reduce educational quality to test scores, and states' curricular and statutory movements in this direction, signal that this distinction is getting lost. If this occurs, plaintiffs will be at the mercy of the courts. As Professor James Ryan has argued, plaintiffs perceive this move as being to their benefit, but it can backfire. Rather than leading "a court to order increased funding, poor test scores might just 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."[142] Thus, the centrality of test scores simply opens up the core causal problems that have been unresolvable elsewhere. Plaintiffs will be unable to demonstrate that a precise amount of increased funding leads to a precise increase, if any, in test scores. This evidentiary gap, rather than any flaw in plaintiffs'

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139. For instance, in the seminal 1989 adequacy case, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court wrote that "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." *Id.* at 197. Courts in other states have followed, explicitly indicating that test scores were an appropriate factor for assessing the constitutionality of their school systems. *See* Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (identifying assessments as an element of adequacy, but finding low test scores alone do not indicate inadequacy). Some courts have gone so far as to treat test scores as equivalent to a prima facie indicator. *See* Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 488–89 (Ark. 2002) (stating that test scores are a "serious problem"); Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *47 (Kan. Dist. Ct. Dec. 2, 2003) ("Kansas test results are informative and disturbingly telling."); Claremont Sch. Dist. v. Governor, 794 A.2d 744, 752 (N.H. 2002).

140. *See* Ryan, *supra* note 76, at 1673.

141. *Id*. at 338; James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1231 (2008); ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE (4th ed. 2008).

142. Ryan, *supra* note 141, at 1243.

claim or merit of the state's education system, can end or seriously constrain school finance reform in the courts.

The recent financial crisis and the slow exit from it only makes this scenario more likely. New claims will place the judiciary in an increasingly precarious situation. Most of the previous decisions recognizing education rights were issued during times of relative economic prosperity.[143] Today, courts are faced with demanding that state legislatures devote a larger portion of an already shrunken overall state budget to education, demanding that they raise taxes, treating students' constitutional right to education as contingent, or articulating less robust rights. Ordering financial remedies would test the institutional capacity of courts, while backing away from precedent might permanently undercut existing rights.[144] Either option would shrink educational opportunity.

These unenviable options will place pressure 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 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 a worse position. The point here is not to criticize, but simply to diagnose and warn. School finance litigation's most consistent success has come through its ability to assess adequacy and equality in terms of education inputs, with only tangential attention to causal effects on educational outcomes such as test scores. NCLB and the financial crisis create pressures to shift this balance. This shift could reverse school finance reform's trajectory, just as it has elsewhere.[145]

D. *Students with Disabilities*

To the extent that there is an exception to causation's negative impact on education reform movements, it may be in special education.

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143. *See, e.g.*, Rebell, *supra* note 25, at 1499–1500 (recounting the success of school finance litigation during the 1990s and the following decade).

144. *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 844–45 (Ala. 2002).

145. Recent scholarship, however, offers one important caveat. Professors Charles Sabel and William Simon suggest that modern public litigation has moved beyond the model offered by Professor Abram Chayes in the 1970s. They conclude that public law litigation can destabilize public structures that work to plaintiffs' disadvantage. The litigation helps plaintiffs gain a seat at the table of policy formation. Charles F. Sabel & William H. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1018–21 (2004). In this respect, school finance litigation might not present unreasonable challenges to the current system, but may simply force it to account for schools' needs as it navigates through this crisis.

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 rather than substantive in nature.[146] The Individuals with Disabilities in Education Act (IDEA) guarantees students access to a free and appropriate public education, which includes specialized educational services in many instances.[147] This right is a substantive right. 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.[148] While parents surely have substantive complaints about the quality of the educational services their children receive, school districts more often struggle 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, that they warrant relief.[149]

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.[150] Students do not have a right to integrated schools, but only a right to be free from discrimination.[151] 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.[152] With negative rights, the burden is on

146. *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) ("[C]ompliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals.").

147. 20 U.S.C. § 1400 (2006) (guaranteeing a free appropriate education); 20 U.S.C. § 1412 (2006) (requiring individualized education plans); 20 U.S.C. § 1413 (2006) (listing the special services on which funds may be spent).

148. 20 U.S.C. § 1415 (2006) (detailing various procedural protections).

149. *See, e.g.*, Jacobsen v. Dist. of Columbia Bd. of Educ., 564 F. Supp. 166, 169 (D.D.C.1983) (finding District of Columbia Public Schools obligated to fund private placement where it fails "to provide the necessary procedural safeguards in processing requests for special education"); M.M. v. Sch. Bd. of Miami-Dade Cnty., 437 F.3d 1085, 1097–98 (11th Cir. 2006) (finding that the failure to comply with IDEA procedural protections justified relief).

150. *See generally* Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER L.J. 127, 156–59 (1997) (discussing the negative rights conceptualization of school desegregation); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872, 885, 888 (1986).

151. *See* Bryant, *supra* note 150, at 166 (arguing that the Court betrayed its early commitments to desegregation and returned to a purely negative rights view).

152. *See id.*

the plaintiff, who must establish a wrongful act by the school, and the absence of any evidence means the school wins.[153] 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 the deprivation of the procedure itself, not the substantive educational right the procedure is designed to protect.[154] 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,[155] some students can still experience causal problems under IDEA. For instance, the pure question of whether a student actually has a disability implicates causal issues and precedes most procedural obligations. Most notably, a parent might believe that his child's academic problems are caused by a disability, but a school, not inclined to provide the requisite services, might assert that the academic problems are caused by other factors.[156] At this early stage, the school is in a far better position to win because of the inherent difficulty of the causal inquiry.[157] Thus, it is not surprising that parents frequently encounter school district resistance at this stage as opposed to later.[158]

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153. *See id.*

154. *See, e.g.*, *M.M.*, 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 (2006).

155. 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 Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 (2009). In effect, the student is harmed by the deprivation of the service itself, not by any differential educational outcome. Moreover, because the deprivation of the service is a violation, some courts permit students to attach emotional and other compensatory damages to the deprivation. *See* Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83, 83–84 (2002).

156. *See, e.g.*, Alvin Indep. Sch. Dist. v. A.D. *ex rel.* Patricia F., 503 F.3d 378, 384 (5th Cir. 2007); N.C. *ex rel.* M.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 537 (S.D.N.Y. 2007).

157. *See* P.J. v. Eagle-Union Cmty. Sch. Corp., 1999 WL 1054599, at *3 (7th Cir. 1999) (indicating that the student's improved academic performance during the year and pediatrician's finding that he was not learning-disabled were sufficient bases for the school to determine he was not in need of special education); Rodiriecus L. v. Waukegan Sch., 90 F.3d 249, 254 (7th Cir. 1996) (finding no basis for school to suspect disability when student's academic performance was average and student's guardian never requested special education services); Katherine May, *By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilities Education Act*, 2009 B.Y.U. EDUC. & L.J. 173, 185 (2009).

158. May, *supra* note 157, at 185.

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.[159] Just as in ELL cases, plaintiffs would need to demonstrate that the educational failure was attributable to the school's actions, rather than some other factor. While the school's actions may be a partial cause, a student's academic achievement or failure—as in other education paradigms—rarely occurs in a vacuum, and can be affected by various other factors.[160] Sorting these factors out in the absence of a reasonable baseline, indicating 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, this exception proves this Article's overall theory. The exceptions in disability law are limited to claims involving procedural violations, which themselves are unique because they involve affirmative rights. In contrast, 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.

E. *No Child Left Behind Act*

The causal flaws of educational civil rights, moreover, are not simply a function of the litigation process. Although litigation tends to accentuate the problem, the primary flaw is resting educational reform entirely on a causal assertion, regardless of the forum. The No Child Left Behind Act provides an almost audacious example of these same problems in statutory and regulatory reform. The Act's stated purpose

159. *See, e.g.*, D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 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."); Smith v. Alameda Cnty. Soc. Servs. Agency, 90 Cal. App. 3d 929, 941 (Cal. 3d Ct. App. 1979) (indicating precedent had rejected such claims because of "the difficulties of assessing the wrongs and injuries involved").

160. *See, e.g.*, May, *supra* note 157, at 182–85 (discussing the causal problems involved in determining whether a student's academic problems are related to a disability).

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."[161] More specifically, the Act was designed to close the achievement gap for poor and minority students and end what President George W. Bush termed the "soft bigotry of low expectations."[162] The Act would achieve this through an accountability system demanding 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 schools that failed to meet proficiency benchmarks.[163] The ultimate requirement was that 95% of students, including 95% of students in individual sub-groups, reach proficiency in every school by 2014.[164]

The Act dug its own grave by requiring that these unquestionably high achievement goals be met within a definite time frame,[165] and premising their attainment on a causal connection between standardized testing and improved student achievement. Unlike 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.[166] The expansion of assessment was relatively easy to achieve, as was the assertion of high expectations, but fairly meeting those expectations has proven unrealistic. All states instituted the standards and tests, but absent blatant manipulation of the tests the proficiency level goals would not be met, nor would the less-emphasized stipulation that all students be taught by highly qualified teachers occur.[167] More than 80% of schools were set to be labeled as failing in the fall of 2012.[168] The achievement gap between minority and white children or between poor and middle-income children has not significantly

161. 20 U.S.C. § 6301 (2006).

162. Sam Dillon, *Democrats Make Bush School Act an Election Issue*, N.Y. TIMES, Dec. 23, 2007, *available at* http://www.nytimes.com/2007/12/23/us/politics/23child.html.

163. 20 U.S.C. § 6301 (2006).

164. 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(b)(2)(E)–(H) (2006).

165. *Id*.

166. 20 U.S.C. § 6301 (1) (2006).

167. *See generally* NAOMI CHUDOWSKY & VIC CHUDOWSKY, CTR. ON EDUC. POL'Y, MANY STATES HAVE TAKEN A "BACKLOADED" APPROACH TO NO CHILD LEFT BEHIND GOAL OF ALL STUDENTS SCORING "PROFICIENT" (May 2008); SHELBY DIETZ AND MALINI ROY, CTR. ON EDUC. POL'Y, HOW MANY SCHOOLS HAVE NOT MADE ADEQUATE YEARLY PROGRESS UNDER THE NO CHILD LEFT BEHIND ACT? (August 2010).

168. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011, *available at* http://www.nytimes.com/2011/08/08/education/08educ.html?adxnnl=1&pagewanted=all&adxnnlx=1346024945-bv7UdeFstkq3JHBLrprr8Q.

decreased, nor has any widespread increase in scores occurred.[169] And in regard to high-quality teachers, the effect has been minimal at best in the neediest schools.[170]

These results mark NCLB as an enormous failure in the public's eyes, and stem from the master narrative surrounding its enactment that based its efficacy on an inherently problematic causal connection. In essence, NCLB was premised on the assertion that standardized testing and accountability would raise student achievement in general and close the achievement gap.[171] No significant research supported that conclusion.[172] At best, the experience of a few states that had implemented their own testing and accountability systems coincided with some educational gains.[173] But the reforms in those states were not limited to testing and accountability; they were part of larger education reforms.[174] Moreover, while these states experienced meaningful educational advances, they did not elevate all students to proficiency,[175] nor did the large achievement gaps between white and minority students vanish.[176] In short, NCLB promised results that it had no basis for

169. ANNA HABAS ROWAN ET AL., EDUC. TRUST, GAUGING THE GAPS: A DEEPER LOOK AT STUDENT ACHIEVEMENT 2–3 (2010), http://www.edtrust.org/sites/edtrust.org/files/publications/files/NAEP%20Gap_0.pdf. *But see* NAOMI CHUDOWSKY ET AL., CTR. ON EDUC. POL'Y, STATE TEST SCORE TRENDS THROUGH 2007-08, PART 1: IS THE EMPHASIS ON "PROFICIENCY" SHORTCHANGING HIGHER- AND LOWER-ACHIEVING STUDENTS 1 (2009).

170. Sarah Almy & Christian Theokas, EDUC. TRUST, *Not Prepared for Class: High Poverty Schools Continue to Have Fewer In-Field Teachers* 1, 2 (2010), http://www.edtrust.org/sites/edtrust.org/files/publications/files/Not%20Prepared%20for%20Class.pdf; EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 69 (2004), http://www.ecs.org/html/Special/NCLB/ReportToTheNation/docs/Report_to_the_Nation.pdf (indicating that no states were on track to meet the teacher requirements).

171. Nicholas Lemann, *Testing Limits: Can the President's Education Crusade Survive Beltway Politics?*, NEW YORKER (July 2, 2001) (indicating the intent to aim the bill at a narrow group of schools); Diana Jean Schemo, *The New Administration: News Analysis; Schoolbook Balancing Act*, N.Y. TIMES (Jan. 24, 2001) (excerpted Presidential speech).

172. *See* NAT'L RESEARCH COUNCIL, NAT'L ACAD. OF SCIENCES, COMMITTEE ON INCENTIVES AND TEST-BASED ACCOUNTABILITY IN PUBLIC EDUCATION 4-5 (Michael Hout & Stuart W. Elliot eds., 2011); *see also* Thomas J. Kane & Douglas O. Staiger, *Volatility in School Test Scores: Implications for Test-Based Accountability Systems*, BROOKINGS PAPERS ON EDUC. POL'Y, 2002, at 235, 248, 253, 267–68.

173. Kane & Staiger, *supra* note 172, at 268.

174. *See, e.g.*, W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 563, 565–66 (Tex. 2003) (recounting the history of education challenges in Texas); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 730 (Tex. 1995) (discussing the state standards system as a response to and in the context of school finance reform).

175. David S. Broder, *Long Road to Reform*: *Negotiators Forge Education Legislation*, 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).

176. *See* ROWAN, *supra* note 169, at 2, 5; *see also* Hoke Cnty. Bd. of Educ. v. State, 559 S.E.2d 365, 392 (N.C. 2004) (discussing the lower court's findings regarding achievement).

believing it could deliver.

The Act's causal assertion, more than its actual function and results, was its undoing. Viewed as a measure that was intended to meet the achievement levels it articulated, the Act was not simply a failure, but seems almost ridiculous in retrospect.[177] The bill's success, however, need not have been tied to this causal assertion. In fact, those closest to the bill may not have actually believed the assertion or seen it as the primary purpose of the bill.[178] The White House and congressional leaders appear to have incorporated the causal assertion in the bill's master narrative simply to rally support for it, when their actual expectations were much lower.[179]

The problem is that no one else seemed to appreciate this. The earliest versions of the bill incited the fear of governors, who doubted the credibility of the causal claim, and the spirited support of congressional leaders, who believed wholeheartedly in the claim.[180] The White House fell somewhere in between. While publicly trumpeting the efficacy of testing and accountability, the White House quietly admitted that one hundred percent proficiency was not possible,[181] and indicated that its goal was to establish standards high enough to identify the worst schools, but not so high that they condemned good schools as failures.[182] The final version of the bill was a compromise that retained high proficiency goals and explicit accountability for meeting those goals, but included several safety valves that would allow states or the Department of Education to mask the lack of meaningful

177. *See See* Matthew D. Knepper, Comment, *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, 907-08 (2009).

178. Chester E. Finn, Jr., *Leaving Education Reform Behind*, 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); *The President's Big Test*, FRONTLINE (March 28, 2002), http://www.pbs.org/wgbh/pages/frontline/shows/schools/nochild/lemann.html (interviewing Nicholas Lemann, who characterizes the bill as a step toward a nationalized curriculum, and distinguishes the bill's details from its rhetoric); Lorraine Woellert, *Why the Education Bill Is Likely to Fail*, BLOOMBERG BUSINESSWEEK (Dec. 25, 2001) (indicating that the "heart of the bill" was really about driving reform in the long term); *see also* James E. Liebman & 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 (2003) (finding that the bill creates the conditions for change rather than change itself).

179. FRONTLINE, *supra* note 178.

180. *See id.*; Woellert, *supra* note 178 (criticizing the bill for not being tough enough); Diana Jean Schemo, *Bush Seems to Ease His Stance on the Accountability of Schools*, N.Y. TIMES (July 10, 2001) (noting that the House version of the bill was far more strict).

181. Schemo, *supra* note 180; *see* Michael D. Barolsky, *High Schools Are Not Highways: How* Dole *Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 730–31 (2008).

182. Schemo, *supra* note 180.

improvement.[183] The assertion that testing and accountability would improve education and close the achievement gap, however, remained the dominant narrative.[184] In contrast, the safety valves went largely unnoticed. The safety valves, however, 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 state compliance. Knowing the Act could not produce full proficiency, those closest to the Act likely harbored a much narrower and more subtle set of goals.[185] Measured by these narrower, noncausal goals, the Act was arguably a smashing success, but a full discussion of those goals would warrant its own paper.[186]

In the end, even the safety valves proved insufficient to save the Act. The Act was simply too closely tied with its flawed causal assertion, the failure of which could not escape the public's eye. Meeting the Act's requirements may simply have required too much test manipulation for it to be seen as anything other than that. Parents, schools, and states knew they could not realistically meet the Act's requirements long before they had technically failed and, consequently, simply awaited the Act's deadlines, betting that Congress or the Department of Education would admit the flaw. Ultimately, few recognized or openly admitted the flaw, but only an eleventh hour statutory waiver by the Secretary of Education this past fall saved 80%

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183. *Compare* 20 U.S.C. § 6311(b)(3)(A) (2006) (setting proficiency goals of 100%), *with* 20 U.S.C. § 6311(b)(3), (c) (2006) (allowing states to develop their own assessments and proficiency levels). *See also* FRONTLINE, *supra* note 178; Liebman & Sabel, *supra* note 178, at 1724.

184. FRONTLINE, *supra* note 178.

185. *Infra* note 186

186. First, the Act required states to align their curriculum with their standardized assessments, and test students yearly. Prior to the Act, only nine states had aligned their curriculum and tests, and only fifteen tested students yearly. Liebman & Sabel, *supra* note 178, at 1731. Today, all fifty states are doing both. EDUC. COMM'N OF THE STATES, *supra* note 170. This was the only requirement in the Act that states could not avoid and, thus, possibly the Act's primary goal. A byproduct of this testing has been the development of a rudimentary national concept of an adequate education, as well as significant movement toward a nationalized curriculum. *See Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, http://www.corestandards.org/ (last visited Aug. 26, 2012). Second, rather than actually close the achievement gap, the Act's goal could have been merely to identify and draw attention to it, which it has done. See Liebman & Sabel, *supra* note 178, at 1715; Linda Darling-Hammond, *Evaluating 'No Child Left Behind*,' NATION (May 21, 2007); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race Conscious Accountability*, 47 HOW. L.J. 243, 244–45 (2004). Third, a federal educational accountability structure now exists and states grudgingly comply. *See, e.g.*, Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 584 F.3d 253, 256–57, 285–86 (6th Cir. 2009); Connecticut v. Duncan, 612 F.3d 107, 110 (2d Cir. 2010). On their face, these "successes" might appear modest, but these modest successes are consistent with more profound longterm reform. *See* Liebman & Sabel, *supra* note 178, at 1720, 1735.

of the nation's school districts from demonstrating the failure of this causal assertion and the severe sanctions that would have been triggered.[187]

II. EDUCATION'S INHERENT CAUSAL PROBLEMS

The forgoing Sections identified the role of causal gaps in limiting education reform across paradigms. The crucial underlying question, however, is whether these gaps are a result of poor litigation strategy and evidence-gathering, or a natural byproduct of education. On one level, the problem arises because education claims are framed, by litigants or courts, in ways that are premised on precise causation, which requires unobtainable evidence. Yet the precise framing of the claims does not create the causal problem in the first instance; it only exacerbates it. The real problem is that 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 we measure learning frequently defy precise explanation. Because these aspects of education defy clear explanation, plaintiffs might demonstrate that a school or state has engaged in inequitable or prohibited conduct, but they are unable to demonstrate how they have been harmed.

A. *General Ambiguity*

Education eludes causal clarity because education is ambiguous on several levels. First, how students receive education, what students actually receive, and how one demonstrates or verifies what students have received are not fully understood. Surely teaching fosters learning and that learning is later demonstrated by students, but our understanding of learning is far from a science.[188] At best, we know that certain things tend to work well or work poorly.[189] 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.[190] 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 tendencies to

187. 20 U.S.C § 6316(b)(7) (2006) (describing sanctions for schools that fail to make adequate yearly progress).

188. STACEY CHILDRESS, DENIS DOYLE & DAVID A. THOMAS, LEADING FOR EQUITY: THE PURSUIT OF EXCELLENCE IN MONTGOMERY COUNTY PUBLIC SCHOOLS at VI (2009).

189. *See generally* Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 657–58 (2009–10) (discussing our limited knowledge regarding education reform).

190. *Id.* at 690–91 (discussing the highly contextualized variability at the classroom level).

emerge at the macro level, but causal factors also operate at much lower levels that defy larger narratives and measurement.[191] In short, when we analyze education, we are often working with imprecise generalizations.

Third, education is continually evolving and changing. Education is a process rather than a finite and static resource that students receive.[192] As such, there are nearly an infinite number of potential points of causation,[193] and no point of causation alone is necessarily sufficient to produce an identifiable effect or significant outcome.[194] This creates an internal conflict in measuring educational effects.[195] Educational effects tend to be reliably assessed only at the cumulative level.[196] Yet at the cumulative level, attribution is more complex because many more variables come into play—not all of which are measurable—and the measureable variables are not necessarily constant.[197] In addition, as the number of variables increases, so too does the possibility that the variables will cancel each other out, which can result in otherwise important variables manifesting minimal effects.[198]

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

191. *Id.*; *see also* Glenn Israel et al., *The Influence of Family and Community Social Capital on Educational Achievement*, 66 RURAL SOC. 43, 45–48 (2001) (discussing the impact that community and familial factors play in school performance).

192. *See, e.g.*, Robert Balfanz & Vaughn Byrnes, *Closing the Mathematics Achievement Gap in High-Poverty Middle Schools: Enablers and Constraints*, 11 J. EDUC. STUDENTS PLACED AT RISK 143, 150–51 (2006) (discussing the varying gains that students make in math across years and the inability to identify any consistent trend and explanatory factor).

193. *See generally* Terri A. DeMitchell & Todd A. DeMitchell, *A Crack in the Educational Malpractice Wall*, AM. ASS'N OF SCH. ADM'RS, *available at* http://www.aasa.org/SchoolAdministratorArticle.aspx?id=6516 (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); James Traub, *No Child Left Behind; Does It Work*, N.Y. TIMES, Nov. 10, 2002, at A24, *available at* http://www.nytimes.com/2002/11/10/education/no-child-left-behind-does-it-work.html?pagewanted=all&src=pm (referring to an essay by E.D. Hirsch Jr., which argued that "so many variables go into learning" that virtually no study can draw firm conclusions regarding reform).

194. Balfanz & Byrnes, *supra* note 192, at 151; Traub, *supra* note 193 (stating that subjectivity makes it impossible to result in an objective answer as to how to better educate); *see also* Thomas Kane & Douglas O. Staiger, *Improving School Accountability Measures* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 8156, 2001) (proposing more sophisticated statistical analysis for education outcomes that would account for the infinite number of variables that potentially influence academic performance).

195. Kane & Staiger, *supra* note 194, at 1–4.

196. *Id.*

197. *Id.*; *see also* Balfanz & Byrnes, *supra* note 192, at 151.

198. Kane & Staiger, *supra* note 194, at 1–4.

those areas, but less in others.[199] The reduced instruction in other areas, such as physical education and art, however, can result in less emotionally and physically healthy children.[200] Their diminished health can offset some of the gains they would otherwise have made in math and science.[201] Similarly, states might increase teacher qualification standards to improve education, but increasing standards will exclude some poor teachers and dissuade other potentially good teachers from pursuing teaching at all. The result could be a near-term shortage of teachers and, consequently, larger class sizes, which can have counterbalancing negative effects.[202] In short, education's polycentricism makes conceptualizing effective educational policy difficult. And education's prevailing ambiguity can make the effects of even well-crafted policy immeasurable.

B. *Externalities to Student Achievement*

Extensive externalities operate on student achievement. The externalities of greatest relevance arise from students' experiences outside of school. Regardless of the efforts schools make during the day, these externalities can either support or undermine schools' efforts once the school day is over.[203] Students' varying socioeconomic, familial, housing, and medical situations (just to name a few) tend to correlate with experiences outside of school that significantly affect educational outcomes.[204] Yet the effect is not only on a student's own individual achievement, but also on the achievement of those around him. The concentration of students with particular characteristics—such as low or high socioeconomic status—in a school impacts all of the students in that school.[205] In short, not only do a student's own externalities affect his achievement; other students' externalities affect

199. George R. Weiher & Kent L. Tedin, *Minority Student Achievement*, 23 REV. POL'Y RES. 963, 963–67 (2006).

200. Ken Petress, *Perils of Current Testing Mandates*, 33 J. INSTRUCTIONAL PSYCHOL. 80 (2006).

201. Suzanne M. Winter, *Childhood Obesity in the Testing Era: What Teachers and Schools Can Do!*, 85 CHILDHOOD EDUC. 283, 289 (2009).

202. *See, e.g.*, Thomas Nechyba et al., *Public School Finance and Urban School Policy: General Versus Partial Equilibrium Analysis*, *in* BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS 139, 177 (2003).

203. Maryah Stella Fram et al., *Poverty, Race and the Contexts of Achievement: Examining Educational Experiences of Children in the U.S. South*, 52 SOC. WORK 309, 309–11 (2007).

204. *See generally* COLEMAN REPORT, *supra* note 25; Fram, *supra* note 203, at 312–16; Sara Sepanski Whipple et al., *An Ecological Perspective on Cumulative School and Neighborhood Risk Factors Related to Achievement*, 31 J. APPLIED DEV. PSYCHOL. 422, 422 (2010).

205. *See* Borman & Dowling, *supra* note 25, at 1239 (finding group level effects to be greater than individual factors).

that student's achievement.[206] Thus, the overall demographic characteristics of a school will significantly impact achievement in that school, regardless of the school's 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 at home and over the summer in addition to what they are learning at school. In contrast, 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.[207]

The temporal dispersion of learning also increases the number of externalities at play and the likelihood that externalities have intervened.[208] Because student learning occurs across extended 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 come into play. And the more external possibilities one identifies, the more difficult it becomes 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.[209] In the absence of temporal proximity, our propensity to infer causation dissipates.[210] Thus, the mere passage of time can raise courts' skepticism toward an educational claim, prompting them to demand more specific causal evidence. In short, there are an indefinite number of factors affecting student outcomes.[211] Time only highlights the

206. *See id.*; *see also* SUSAN EATON, NAT'L COALITION ON SCH. DIVERSITY HOW THE RACIAL AND SOCIOECONOMIC COMPOSITION OF SCHOOLS AND CLASSROOMS CONTRIBUTES TO LITERACY, BEHAVIORAL CLIMATE, INSTRUCTIONAL ORGANIZATION AND HIGH SCHOOL GRADUATION RATES, 1–6 (2010) (reviewing research on "the relationship between the racial and socioeconomic composition of a school"); James Paul Gee, *Critical Issues: Reading and the New Literary Studies: Reframing the National Academy of Sciences Report on Reading*, 31 J. LITERACY RES. 355, 360 (1999).

207. Sarah Archibald, *Narrowing in on Educational Resources that Do Affect Student Achievement*, 81 PEABODY J. EDUC., 23, 35–36 (2006).

208. *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); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 42–44 (1992) (discussing the importance of temporality in causation and ruling out other factors).

209. *See* Brown, *supra* note 208, at 30.

210. *See id.*

211. MARTHA MINOW ET AL., JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE 26–27 (2008).

problem.[212]

C. *Educational Policy's Capacity to Counterbalance Externalities*

The point of accounting for student externalities is to determine the extent to which school policy matters, particularly to student achievement. Getting to this question, however, is never easy, and the answers are rarely satisfying. For instance, 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 segregation would bear positive academic results.[213] But as the commitment to desegregation waned, both courts and scholars began to examine the connection between improved academic achievement and integration.[214] Although the connection definitely exists,[215] advocates and courts expected a far stronger and more certain connection to justify the continuation of all-out desegregation.[216] The nearly impossible standards from *Dowell* and *Jenkins* are reflections of the concern over this causal connection.[217] Even today, when social scientists have more clearly established a connection between racial segregation and academic achievement (primarily because of the socioeconomic isolation that accompanies it),[218] some members of the Court still question the academic impact of integration.[219]

The fundamental problem, however, is not that integration and money fail to impact student outcomes, but that they are not silver bullets and their impact is not as overwhelming as courts and policy makers might expect. Decades of research, including federally funded

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212. Wessman v. Gittens, 160 F.3d 790, 802–04 (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, 653, 655, 658, 660 (2001) (discussing the multitude of factors relating to the achievement gap).

213. Ryan, *supra* note 76, 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* Brown, *supra* note 208, at 50.

214. MINOW, *supra* note 211, at 26–27; Liebman & Sabel, *supra* note 178, at 1706.

215. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 839–40 (2007) (Breyer, J., dissenting); *see also* Liebman & Sabel, *supra* note 178, at 1624–35.

216. Liebman & Sabel, *supra* note 178, at 1509–13; *see* Parker, *supra* note 68, at 522–34 (analyzing the Court's tightening of the evidentiary basis for desegregation remedies).

217. Parker, *supra* note 68, at 519–21, 524; Ryan, *supra* note 76, at 1673.

218. *See* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 85 (1995).

219. *Parents Involved*, 551 U.S. at 761 (Thomas, J., concurring); *see also* Michael Heise, Brown *Undone?: The Future of Integration in Seattle after* Pics v. Seattle School District No. 1, 31 SEATTLE U. L. REV. 863, 863–64 (2008).

studies by the Department of Education, indicate that socioeconomically integrative and segregative policies significantly impact student achievement.[220] Even opponents of desegregation concede this point.[221] The problem is that neither integrative policies, nor any other school policy for that matter, fully controls 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,[222] and no single factor or educational policy can explain or eradicate education failure alone.[223] Thus, the analytical flaw of courts and skeptics can be to expect an overwhelming causal effect from educational policy. No one can fairly criticize integration as failing to affect student achievement. At best, one might criticize the academic effect of integration as being 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 implicit expectation remains that individual educational policies render externalities moot,[224] while the stated assumption is that externalities are so significant that courts doubt reforms can do anything to close achievement gaps. In short, skeptics charge that achievement gaps are intractable but then criticize education reform for failing to wipe them out.

A similar set of expectations regarding the connection between school policy and student outcomes exists in school finance. But there, the connection can be even more difficult to discern because certain fundamental underlying variances between districts can appear to cancel out the effect of varying financial resources in some localities. First, the basic cost of schooling and the capacity to finance it varies from district to district.[225] School districts vary in terms of their tax base, student needs, and costs of operation.[226] As of yet, no reliable, exact standard

220. COLEMAN REPORT, *supra* note 25, at 21–22.

221. ARMOR, *supra* note 218, at 83–86 (indicating that poverty isolation was a cause of low African-American achievement).

222. *See* Whipple, *supra* note 204, at 426.

223. Balfanz & Byrnes, *supra* note 192, at 151; *see also* DeMitchell & DeMitchell, *supra* note 193.

224. *See* Adams, *supra* note 212, at 652, 660 (critiquing a requirement that past segregation be the sole or primary cause of the achievement gap to justify an affirmative action plan).

225. *See generally* BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 5, 7, 14–18 (2010), http://www.schoolfundingfairness.org/National_Report_Card_2010.pdf; Nechyba et al., *supra* note 202, at 142–44.

226. BAKER ET AL., *supra* note 225, at 14–18; Nechyba et al., *supra* note 202, at 142–44.

exists to compare districts across these measures.[227] One might account for the variances in local costs associated with facilities, transportation, and other noninstructional 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 some level of speculation or assumption.[228] For instance, teachers have preferences as to where they teach and live that affect the cost of hiring them.[229] While some studies offer broad generalities regarding how much it would cost to attract high-quality teachers to needier schools and localities,[230] 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 a particular location needs.

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.[231] For instance, money might not appear to matter much if all schools have resources in excess of

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227. BAKER ET AL., *supra* note 225, at 12.

228. The estimates have ranged from an additional 40%–60%. *See, e.g.*, No Child Left Behind Act, 20 U.S.C. §§ 6333(a)(1), 6337(b)(1) (2006) (40% funding increase adjustment); NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., INEQUALITIES IN PUB. SCH. DIST. REVENUES 62 (1998) (40% adjustment appropriate); U.S. GEN. ACCT. OFF., SCH. FIN.: PER-PUPIL SPENDING DIFFERENCES BETWEEN SELECTED INNER CITY AND SUBURBAN SCHOOLS VARIED BY METROPOLITAN AREA 30 (2002); Ross Wiener & Eli Pristoop, Educ. Trust, *How States Shortchange the Districts That Need the Most Help*, *in* FUNDING GAPS 2006, 5, 6 (2006) (noting a 60% adjustment, but using 40%).

229. Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 337 (2004) (finding "strong evidence that teachers systematically favor higher achieving, nonminority, nonlow-income students"); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 37 (2008); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 294 (1999).

230. *See, e.g.*, ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf (finding pay incentive alone has been insufficient to attract teachers); Hanushek, *supra* note 229, at 350 (finding a 10% salary increase necessary for each increase of 10% in minority student enrollment to induce white females to teach in the school); *id*. at 351 (finding that a 25%–40% 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).

231. *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); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART 7–8 (2010).

their need, as the surplus funds are spent on frivolous items.[232] 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 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.[233] Thus, while we know that districts vary substantially in what they spend on schools and in their capacity to raise more funds,[234] precisely identifying the extent to which money matters even in the poorest and wealthiest districts is more 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.

None of the foregoing is to suggest that money does not matter. 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]"[235] 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.

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 reliable measure. Currently, the primary method for student outcome evaluation is through standardized tests.[236] Yet standardized tests do not necessarily capture the full effect of particular educational policies.[237] While

232. Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990) ("[S]ince 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.").

233. *Id.* at 404 (noting that money likely matters, but "can be used more effectively than it is being used today").

234. BAKER ET AL., *supra* note 225, at 26; Nechyba et al., *supra* note 202, at 155, 157.

235. *Abbott*, 575 A.2d at 404 (alteration in original) (quoting Robinson v. Cahill, 355 A.2d 129, 132 (1976)) (internal quotation marks omitted).

236. Michael Heise, *Courting Trouble: Litigation, High-Stakes Testing and Education Policy*, 42 IND. L. REV. 327, 341 (2009); W. James Popham, *Standarized Testing Fails the Exam*, EDUTOPIA (Mar. 23, 2005), http://www.edutopia.org/standardized-testing-evaluation-reform.

237. *See, e.g.*, Peter Schrag, *High Stakes Are for Tomatoes*, ATLANTIC MONTHLY (August 2000); Robert L. Linn, *Assessments and Accountability*, EDUC. RESEARCHER 4, 7, 10, 12 (2000);

standardized testing data is valuable, educational researchers have lodged a bevy of criticisms against standardized tests, including that they do not accurately reflect student learning or, at least, the most important types of learning.[238] Regardless, a policy might very well impede a student's learning, but not in a way that affects the student's standardized test achievement.[239] Or the effect may not be large enough to produce a significant change on a standardized test.[240] Thus, the primary method of establishing harm leaves plaintiffs in a quandary by failing to reveal harms that otherwise exist. Second, even were standardized tests a valid indicator of student learning, knowing whether an education policy 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.[241] Thus, the best one can do is to infer a general harm based on statistical analyses of how other students perform.

Third, and related, educational harms tend to be marginal. Rather than absolute deprivations of opportunity, students most often experience marginal differences in educational opportunity.[242] Likewise, student achievement operates on a sliding rather than an absolute scale.[243] Thus, the harm an inequality might cause is marginal, particularly when measured by standardized tests (which continue to be affected by student externalities). For instance, consider a student who is incorrectly suspended for three days of school, a school that incorrectly diagnoses a student's disability in the fall semester but corrects it in the spring, or a student assignment policy that causes the poverty level in a school to rise from 60% to 70%. Even if the conduct were faulty in all of these examples, the change in most students' end-of-year performance on 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 a substantial harm can

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W. James Popham, CTR. ON EDUC. POL'Y, *The Role of Assessment in Federal Education Programs* 1 (2008).

238. Shrag, *supra* note 237; MINOW ET AL., *supra* note 211, at 38–39.

239. *See* Linn, *supra* note 237, at 7–8.

240. *See, e.g.*, W. James Popham, *A Test is a Test—Not!*, 64 EDUC. LEADERSHIP 88 (2006) (critiquing standardized tests results as "fog[ging] over the effects of the instructional interventions under study").

241. *See* Kane & Staiger, *supra* note 194, at 2–3.

242. *See generally* W. James Popham, *Why Standardized Tests Don't Measure Educational Quality*, 56 EDUC. LEADERSHIP 8 (1999), *available at* http://www.ascd.org/publications/educational-leadership/mar99/vol56/num06/Why-Standardized-Tests-Don't-Measure-Educational-Quality.aspx (arguing that tests, at most, assess generalized group learning).

243. *Id.* (explaining how students learn material that is not tested on standardized exams).

be the legal equivalent of not causing any harm at all. For instance, despite what might be gross educational failures by a school, some courts have dismissed educational malpractice claims because they questioned whether the student could demonstrate that the school had caused a measurable harm.[244] 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 harm.[245] In this respect, education tends to stand in stark contrast to other areas of the law. Harms to noneducational interests—either because they are conceptualized differently or are absolute—are not subject to the ambiguities that breed skepticism about education claims. For instance, in housing, individuals are denied and granted apartments or homes; in employment, jobs, promotions, or raises. 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 was faulty.[246] In contrast, with the exception of proving intentional discrimination, the faulty educational conduct that creates unequal funding, denies opportunity, or mislabels students can be relatively obvious, while causation and harm are not.

Fourth, as suggested above, because educational harms are marginal, they are often only reliably identifiable at the aggregate level.[247] 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. By analyzing statewide or national data, one might establish the general principle that concentrated poverty or teacher quality affects student achievement. Yet 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 fully expose children to appropriate reading opportunities in early grades may not manifest itself for years.[248] Because all children are initially novice or developing readers, the differences between the properly educated child and other children are smaller in early grades.[249] Consequently, immediately identifying the

244. *See supra* notes and accompanying text.

245. *See supra* notes 48–72 and 156–162 and accompanying text.

246. *See generally* RESTATEMENT (SECOND) OF TORTS § 328A (1965).

247. Balfanz & Byrnes, *supra* note 192, at 145.

248. *See generally* GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY'S EXPENSIVE EFFORT TO CLOSE THE ACHIEVEMENT GAP (2009), at 8 (explaining that kindergarten through third grade is when students learn to read, but in later grades students must read to learn).

249. In fact, students learn to read in various different ways, which researchers do not fully understand, and which make comparison among students and attribution of cause difficult. *See*

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.[250] 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 because 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 realize that a school's action years ago may have contributed to the harm. In effect, the long-past educational decision can get lost among the numerous other potential causes, from which little sense will likely be made.

In sum, the general ambiguity of education manifests itself in a series of concrete evidentiary 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 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 tend to reject educational claims, notwithstanding otherwise faulty conduct by a defendant.

III. SUSTAINING EDUCATION REFORM MOVEMENTS IN SPITE OF EVIDENCE: THE LESSON OF CHARTER SCHOOLS

The success of charter schools suggests a potential way out of the general rule of inevitable reform failure. Charter schools have a weaker evidentiary basis than most other educational civil rights reforms, but have nonetheless continued to expand. In fact, charter schools have expanded in spite of evidence that very few outperform regular public schools. Other educational civil rights movements have been cut short based on far less. Charter schools have managed to succeed where others have failed because their existence is not primarily based or contingent on an evidentiary argument. Instead, charter schools make particular value- and moral-based claims that resonate with broad constituencies. These constituencies amount to a social movement for charter schools that demands attention and is not easily dissuaded. In contrast, educational civil rights movements, as of late, have failed to make compelling value-based demands on society or inspire social movements. As a result, these movements have remained at the mercy of education's inherent ambiguities. While civil rights advocates raise

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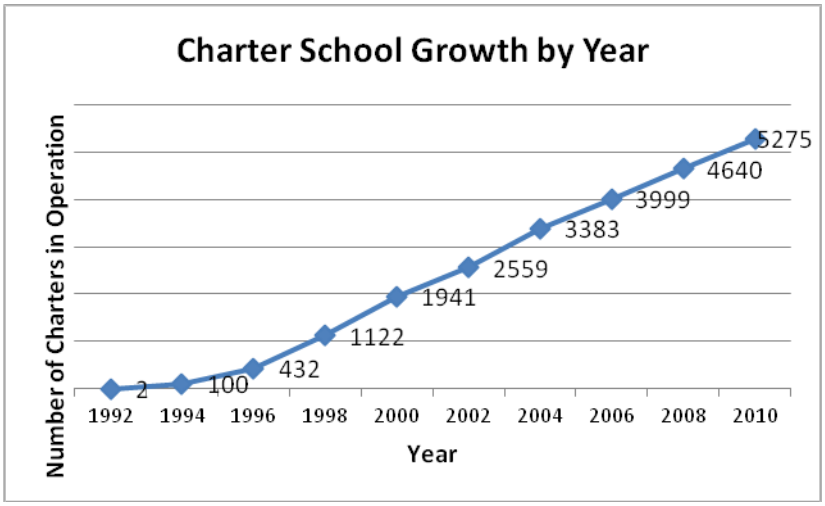
generally MACINNES, *supra* note 248.

250. *See generally* MACINNES, *supra* note 248.

valid concerns with charter schools, they would be better served by learning from charter schools than by attacking them. Halting the decline of educational civil rights reforms will only come from rekindling their moral base, not from waging the same policy and evidentiary wars that have lead them to their current situation.

A. *The Rapid Rise of Charter Schools*

Charter schools have enjoyed tremendous growth and policy support over the past two decades. The first charter school did not open until 1992 in Minnesota and, at the time, only one state other than Minnesota had legislation that even authorized the creation of a charter school.[251] The next year, eight states authorized the creation of charter schools, and the actual number of charter schools in operation grew to thirty-six.[252] Three years later, over half of the states had authorized the creation of charter schools, and the number of charter schools continued to expand exponentially, doubling each year for several consecutive years.[253] Today, there are over five thousand charter schools in operation[254] and approximately 1.6 million children enrolled in them.[255] Only ten states now lack charter school legislation, five of which are in the upper northwest where student populations are relatively small and deconcentrated.[256]



251. *See* U.S. DEP'T OF EDUC., *supra* note 1, at 3–4; *see also* Peterson, *supra* note 13.

252. *Id.* at iii.

253. *Id.*

254. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 2; *see also* CTR. FOR RES. ON EDUC. OUTCOMES, *supra* note 2, at 9.

255. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *About Public Charter Schools*, http://dashboard.publiccharters.org/aboutschools (last visited Aug. 29, 2012).

256. NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 3.

Federal legislation has likewise rapidly changed over the past two decades. It has gone from expressing passing interest to now attempting to force states to adopt charters. The first federal funding of charter schools was in 1995 and a mere $6 million appropriation.[257] Within just five years, Congress had increased the appropriation to $145 million,[258] which represented incredible growth but was still a small amount relative to other education funding. This trend of increase, however, continued in subsequent years, and charter schools are currently a dominant federal strategy. In 2009, the Obama administration created a $4.3 billion competitive grant program ("Race to the Top") designed to spur specific changes in educational policy.[259] States' eligibility for a grant was contingent on promoting charter schools and eliminating barriers to their growth.[260] As the Secretary of Education proclaimed: "States that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund . . . We want real autonomy for charters combined with a rigorous authorization process and high performance standards."[261] In response, many states quickly dropped their traditional resistance to charters, the most important of which were explicit caps on the number of charter schools that could operate in a state.[262] Today, quite simply, the fascination with charter schools is so intense that charter schools effectively suck the air out of the conversation regarding education reform. Other reform policies do not appear to be judged on their merits, but rather on their consistency with or relationship to a charter school agenda. It is increasingly revealing that charter schools have become the default reform strategy and alternative to traditional public schools.[263] The most obvious example is in New Orleans, where the plan to rebuild the city's ineffective system after Hurricane Katrina was almost exclusively based on charter schools. After the storm, nearly 60% of the schools in the city were charters.[264]

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257. U.S. DEP'T OF EDUC., *supra* note 1, at i.

258. *Id.*

259. Sam Dillon, *Administration Takes Aim at State Laws on Teachers*, N.Y. TIMES, July 24, 2009, at A15, *available at* http://www.nytimes.com/2009/07/24/education/24educ.html.

260. Sam Dillon, *After Criticism, the Administration Is Praised for Final Rules on Education Grants*, N.Y. TIMES, Nov. 12, 2009, at A20, *available at* http://www.nytimes.com/2009/11/12/education/12educ.html.

261. Press Release, U.S. Dep't of Educ., States Open to Charters Start Fast in 'Race to Top': Education Secretary Seeking Autonomy with Real Accountability for School Innovators (June 8, 2009).

262. *See, e.g.*, Christensen, *supra* note 6.

263. *See, e.g.*, Holley-Walker, *supra* note 27, at 128–29; Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57, 57–58, 68 (2011).

264. Holley-Walker, *supra* note 27, at 127–28.

B. *Charter School Performance*

The meteoric rise of charter schools implies that a solid research base or track record establishes their effectiveness in delivering quality education and improving educational outcomes. No such reliable evidence or track record exists, which would come as a surprise to many, including parents who have their children enrolled in charter schools. To be clear and fair, several charter schools perform amazingly well. For instance, the KIPP charter schools (Knowledge is Power Program) have produced impressive results, in large part by using the flexibility of the charter school model to deliver 60% more instructional time than traditional public schools.[265] Students who remain in KIPP charter schools have made huge achievements,[266] moving from being several years behind their peers in learning to outperforming almost all of their peers.[267] Several non-KIPP charter schools are likewise successful. In Massachusetts, already a top state in academic performance, charters schools held three of the top ten slots on the state's tenth grade math test in 2008.[268] While these results are not the norm for charter schools, several studies indicate that a substantial portion of charter schools have outperformed public schools. In fact, nationally, 15% to 20% of charter schools significantly outperform public schools.[269]

The value these charter schools add to the communities they serve cannot be overstated, but on the whole, charter schools struggle to perform at levels comparable to public schools and frequently underperform significantly. Only a few national studies of charter schools have been completed, but when comparing similarly situated students in traditional public schools and charter schools, the studies reach the same result: students in charter schools underperform. The U.S. Department of Education studied the results of the 2003 and 2007

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265. DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 135 (2010); Andrew C. Mendrala, Comment, *Wasted Money and Insufficient Remedies in Adequacy Litigation: The Case for an Extended School Day and Year to Provide Students Access to Constitutionally Mandated Curriculum*, 54 HOW. L.J. 175, 212–14 (2010).

266. Critics have charged that unusually large number of students drop out or are kicked out of KIPP schools, which deceptively skews achievement scores upward. *See* Gary Miron et al., What Makes KIPP Work? A Study of Student Characteristics, Attrition, and School Finance ii (March 2010), http://www.edweek.org/media/kippstudy.pdf (finding the drop-out rate for African-American males is 40% between the sixth and eighth grades in KIPP).

267. *See generally*, *Independent Reports*, KNOWLEDGE IS POWER PROGRAM, http://www.kipp.org/about-kipp/results/ independent-reports (last visited June 23, 2012) (summarizing the results of various independent studies of achievement results in KIPP schools).

268. *Top Scoring Schools on the 10th Grade MCAS*, BOS. GLOBE, http://www.boston.com/news/special/education/mcas/scores08/10th_top_schools.htm (last visited Aug. 29, 2012).

269. CTR. FOR RES. ON EDUC. OUTCOMES, *supra* note 1, at 46.

National Assessment of Educational Progress and found that charter school students underperformed regular public school students in fourth grade reading, fourth grade math, and eighth grade math.[270] The only area in which they even performed on par with public schools on these measures was in eighth grade reading.[271] A 2009 national study by Stanford University researchers was even more pointed. The study found that over 80% of charter schools perform the same or worse than public schools.[272] A full 37% of charter schools performed significantly worse than comparable public schools.[273]

Those studies that present charter schools as high-performing and good alternatives to traditional public schools tend to leave out important facts and compare apples to oranges. First, these studies do not establish that inner-city charter schools are outperforming public schools in general. Rather, at most, they establish that charter schools are outperforming nearby public schools or public schools in their school districts.[274] Second, although some charter schools do outperform local public schools, studies promoting this conclusion want to have their cake and eat it, too. They argue comparisons to public schools in general are unfair because of demographic differences, and suggest that the appropriate comparison is to local public schools because they have comparable demographics.[275] While the former point may be accurate, the latter is not because charter schools frequently enroll substantially smaller proportions of special education and English Language Learner students than the schools in their communities.[276] In addition, the fact that charter schools require affirmative effort by parents to enroll their children would tend to indicate that charter schools have student bodies with highly motivated students or parents who are predisposed toward higher achievement,[277] which again distinguishes them from the general student population, even if that population is local. In short, studies finding that charter schools are outperforming public schools compare a motivated, monolithic group of

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270. NAT'L ASSESSMENT OF EDUC. PROGRESS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: AMERICA'S CHARTER SCHOOLS—RESULTS FROM THE NAEP 2003 PILOT STUDY 1, 7 (2004), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2005456.pdf; Erik W. Robelen, *NAEP Gap Continuing for Charters; Sector's Scores Lag in Three Out of Four Main Categories*, 27 EDUC. WEEK 1 (2008).

271. Robelen, *supra* note 270.

272. *See* CTR. FOR RES. ON EDUC. OUTCOMES, *supra* note 2, at 1.

273. *Id.*

274. *See generally* RAVITCH, *supra* note 265, at 138–44.

275. *See generally* RAVITCH, *supra* note 265, at 138–44.

276. FRANKENBERG ET AL., *supra* note 8, at 2, 3, 12; *see also* Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 657, 659 (2012) (discussing how charter schools struggle to enroll disabled students).

277. RAVITCH, *supra* note 265, at 144.

nondisabled students who speak English as a first language to a local population that includes students with low levels of familial support, low levels of motivation, learning disabilities, and language barriers. When the achievement of students in charter schools is compared to the achievement of demographically similar students in regular public schools, the illusion of outstanding performance disappears. Once these factors are taken into account, the most favorable appraisal of charter schools is that "none of the studies detects huge effects—either positive or negative" of attending a charter school.[278]

C. *Value-Based Movements Versus Evidentiary Claims*

The crucial question for educational civil rights advocates is how charter schools have garnered so much support in the past two decades, based on such thin evidence, when civil rights remedies have lost so much ground, despite relatively strong evidence supporting them. The answer is that charter schools have gained traction, in large part, based on the values and principles they represent, not the evidence behind them.[279] Charter schools are premised on the importance of individual choice and the power of markets to produce beneficial outcomes.[280] Charter school advocates argue that, because traditional public schools are insular bureaucracies, they are shielded from competitive pressure and lack the capacity to change. A market-based system of schooling would weed out weak schools, reward good ones, and over time produce a system of high-quality schools.[281] Parental autonomy and individual rights also dictate that parents and students should not be restricted to the poor public schools to which a district might assign them, but rather should have the choice to attend school elsewhere.[282]

Regardless of what the evidence suggests about charter school performance, these two key values create a built-in constituency for charter schools: communities with low quality schools, parents in all

278. Tom Loveless & Katharyn Field, *Perspectives on Charter Schools*, *in* HANDBOOK OF RESEARCH ON SCHOOL CHOICE (Mark Berends et al. eds., 2009) (reviewing research on charter schools).

279. RAVITCH, *supra* note 265, at 143.

280. *See, e.g.*, CHUBB & MOE, *supra* note 20, at 1–25.

281. *Id.* at 20–21 (explaining how the educational choices of everyone from students and teachers to interest group leaders and politicians, and the consequences of these choices, are influenced by their institutional context—which in turn explains "why different kinds of organizations emerge, prosper, or fail within them"). *But see* Minow, *supra* note 7, at 269–70 (arguing that while some degree of competition could improve school systems plagued by bureaucracy, the assumptions at work in market competition to produce better products are not mirrored in the school context).

282. The federal government premised its school transfer provision in NCLB on this principle. *Choices for Parents*, U.S. DEP'T OF EDUC., http://www2.ed.gov/nclb/choice/index.html (last visited Aug. 29, 2012).

communities who want choice for various personal reasons, and the business community. Many inner-city communities have been disaffected from the educational system for some time, as meaningful and stable school desegregation never occurred and adequate resources, teachers, curriculum, and pedagogy have generally been in short supply.[283] In addition, some inner-city communities see public schools as simply a small piece of a much larger system designed to move poor minority students seamlessly toward jail.[284] Thus, despite national civil rights leaders' opposition to charter schools,[285] inner-city communities have been quick to seize the opportunity to opt out of traditional public schools.[286] Even if a charter school proved no more academically effective than a public school, parents express value in the opportunity to control their children's destiny for the first time, and skepticism toward waiting for the eventual vindication of civil rights principles.[287]

Although smaller in number, parents from other communities also share inner-city parents' interest in school choice. A substantial number of parents believe in choice not because they need an alternative to traditional public schools, but because choice is a fundamental value for them.[288] Even where public schools are effective, substantial numbers of parents send their children to private school or home school, for a variety of reasons. For these parents (and libertarians), the ability to choose their children's schools and more directly control their education is a basic parental right that the state has no legitimate basis to constrain.[289]

Finally, charter schools appeal to the business community on both a practical and theoretical level. Charter school legislation creates a new

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283. *See, e.g.*, Preston C. Green, III, *Preventing School Desegregation Decrees from Becoming Barriers to Charter School Innovation*, 144 EDUC. L. REP. 15, 19 (2000) (noting African-Americans' dissatisfaction with desegregation and attraction to charters).

284. Sarah J. Forman, *Ghetto Education*, WASH. U. J. L. & POL'Y (forthcoming 2012).

285. *See generally* Fernanda Santos, *N.A.A.C.P. on Defensive as Suit on Charter Schools Splits Group's Supporters*, N.Y. TIMES, June 10, 2011, at A16, *available at* http://www.nytimes.com/2011/06/11/nyregion/naacp-on-defensive-for-suit-against-charter-schools.html?_ref=charterschools (discussing the NAACP's choice to defend public schools against charters because of the resulting educational inequalities); *cf.* Gary Orfield, *Foreword*, *in* CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 1–3 (2010) (discussing how the charter school movement has been a civil rights failure).

286. *See* Green, *supra* note 283, at 19.

287. *See id.* at 23. *See generally* Saatcioglu et al., *supra* note 28, at 434 (discussing factors that are more important than academics for charter school parents).

288. Ellen B. Goldring & Kristie J.R. Phillips, *Parent Preference and Parent Choices: The Public-private Decision About School Choice*, 23 J. EDUC. POL'Y 209, 212 (2008); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 85–107 (2002).

289. *See* Goldring & Phillips, *supra* note 288; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Troxel v. Granville, 530 U.S. 57, 66 (2000).

market for business.[290] In the past, the business community's only opportunity to enter the primary and secondary education sector was through private schools. But this market is relatively small because it is limited to wealthier individuals who can finance their children's education.[291] Charter school legislation effectively opens the public education market up to private competition, and finances that competition by covering the cost of sending students to privately managed schools. But most in the business community have little interest in running a school and reap no direct monetary benefit from charter schools. For this larger business community, charter schools have a value-based appeal because they are run more like businesses and subject to competition that they believe is sorely needed in education.[292] In short, charter school legislation amounts to no less than a validation of the business model.

These charter school constituents are important because they help create a movement rather than just a policy agenda for charter schools.[293] This movement is based on values, not social science or academic outcomes.[294] Thus, these constituents can remain in favor of charter schools regardless of the charges detractors might levy. Parents can severely discount evidence that charter schools do not improve educational outcomes when their primary support for charter schools is based on choice, not results.[295] This is not to say that such evidence is irrelevant, as surely all hoped charter schools would offer their children better educational opportunities, but the evidence is not decisive or fatal. The business community may be even less susceptible to persuasion. It is hard to imagine how one convinces the business community that market principles do not work in schools. Regardless of what evidence is available, the business community is not going to concede that the very values upon which it has succeeded are flawed. Moreover, the business community is quick to respond that the market

290. James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 865 (2007) (charter school legislation "make[s] it relatively easy for new providers to enter the market").

291. Private schools serve 10% of the student population, and the average tuition at private secular schools is approximately $17,000 per year. *Facts and Studies*, COUNCIL FOR AM. PRIVATE EDUC., http://www.capenet.org/facts.html (last visited Aug. 29, 2012).

292. *See* CAROL ASCHER ET AL., HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION 14–15 (1996).

293. RAVITCH, *supra* note 265, at 143.

294. *See, e.g.*, Gregg A. Garn, *Arizona Charter Schools: A Case Study of Values and School Policy*, 3 CURRENT ISSUES IN EDUC. 7 (Oct. 12, 2000), http://cie.asu.edu/volume3/number7/; Loveless & Field, *supra* note 278, at 111–12.

295. *Cf.* Saatcioglu et al., *supra* note 28, 432–33 (noting that parents of children enrolled in charters are likely satisfied even if their academic programs are lacking).

will work if given enough time.[296]

For these reasons, charter school policy has been heavily supported and resistant to critique. By promoting charters based on values as much as evidence, supporters created a valued-based movement that has propelled charter schools into expanded existence. A movement based on values, unlike one based on evidence, draws far more committed supporters, and their primary motivations are not really subject to debate or contingent on effective performance of the underlying policy. Thus, the causal gaps that have ultimately operated to limit every major civil rights education reform movement have not impeded charter schools. Of course, they may still bring down charter schools at some point, but the point here is that charter schools have made it this far in spite of the evidence because of a powerful value-based movement.

When viewed in this light, charter schools stand in stark contrast to the current status of most educational civil rights movements. Yet they also resemble civil rights movements at various times in the past. By focusing on the extent to which value-based social movements and interests were afoot, the failures and uneven trajectories of civil rights and other education reforms make far more sense. For instance, as described earlier, the struggle for desegregation is really a tale of two different histories: one of rapid expansion and another of consistent contraction. But what the earlier Section did not thoroughly address was desegregation's value-based claim. In its earliest stages, desegregation was as much a moral claim as a legal claim.[297] Its moral claim was hard to deny, while its legal and evidentiary claims were far less certain.[298] Likewise, improving academic outcomes for minority students was important, but not necessarily the driving force. Rather, bringing down racial apartheid was an end in and of itself.[299] The very existence of forced segregation was an affront to African-Americans' humanity, regardless of the academic effect. Moreover, segregation created serious internal contradictions in society. As Professor Derrick Bell emphasized for decades, the country's need to resolve the contradiction between its theoretical commitment to freedom and equality and its domestic reality of discrimination and inequality lead to the Court's holding in *Brown*.[300]

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296. *See* ASCHER ET AL., *supra* note 292, at 8.

297. *See generally* WILKINSON, *supra* note 39, at 62.

298. *Compare Brown*, Legislative History *with* Liebman & Sabel, *supra* note 178, at 1743–44.

299. *See* Michael R. Belknap, *The Real Significance of* Brown v. Board of Education: *The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 882, 891 (2004); *see generally* Brown v. Board of Educ., 347 U.S. 483, 495 (1954); WILKINSON, *supra* note 39, at 46.

300. DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49–58 (2004); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).

Value-based arguments, focused on these issues—rather than any particular evidence—eventually made it possible for a moral majority to rally around desegregation.[301] The coalescing of a moral majority brought supportive civil rights legislation, judicial enforcement, and a rapid expansion of desegregation throughout the South during the late 1960s and early 1970s.[302] But when desegregation moved outside the South and the image of stark apartheid was no longer apparent, the moral imperative weakened, and various other practicalities suddenly became relevant.[303] In fact, it was this very dilemma that Justice Lewis Powell emphasized in his opinion in *Keyes* when he wrote:

> No comparable progress has been made in many nonsouthern cities with large minority populations primarily because of the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.[304]

The majority of the Court saw the issue differently.

Beginning in *Keyes* and continuing the next year in *Milliken*, desegregation morphed from a moral imperative that commanded a movement, to legal and social policy that was up for debate and scrutiny. Once that shift occurred, the inherent causal gaps of education were readily available to limit and end desegregation.[305] Since then, desegregation has never been able to rearticulate itself in strong value- or justice-based terms.[306] Instead, desegregation today is largely relegated to being an effective academic policy that school districts ought to adopt of their own volition,[307] but it is largely devoid of a

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301. *See, e.g.*, Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 440 (1999) ("More importantly, desegregation was achieved less by legal enactment than by . . . moral leadership."); Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61, 105 (2008).

302. ORFIELD & LEE, *supra* note 79.

303. *See* Oakes, *supra* note 301, at 64.

304. Keyes v. School Dist., 413 U.S. 189, 218–19 (1973).

305. *See supra* notes 42–52 and accompanying text.

306. *See supra* notes 53–79 and accompanying text.

307. *See generally* U.S. DEP'T OF JUST., CIV. RTS. DIV., & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 1 (2011).

compelling moral or value claim. As a result, desegregation continues to decline in relevance with each year that passes.[308]

The successes and failures of school finance do not fit as neatly into the framework of value- and justice-based claims as desegregation because of the myriad different circumstances and factors at play in the various states. But the idea that long-term school finance success is as dependent on building an extrajudicial movement and appealing to values as the strength of any underlying evidentiary claim still resonates. As a general matter, successful school finance litigation has often resulted in judicial opinions that are about far more than the evidence, the text of the constitution, or the existence of inequality. First, successful school finance opinions have frequently arisen out of the existence of deplorable schools that shame the state.[309] For instance, in New York, the plaintiffs presented evidence that school buildings were overcrowded and suffered from "leaky roofs, deficient heating, and other problems,"[310] and raised the question of whether some were hazardous.[311] The evidence presented an even bleaker picture in Ohio. There, the state supreme court wrote of floors so thin that teachers' feet would fall through them, structures beset by asbestos but denied the money to abate it, coal heating systems that would cover student desks with coal dust overnight, walls that were literally crumbling, and plaster that was literally falling.[312] Like *Brown*, conditions of this sort appear unjust and, regardless of the details of constitutional intent, jurists and the public must struggle with the question of how the Constitution could possibly tolerate the situation.

Second, courts have framed these cases in terms of how much is at stake for disadvantaged students as a way of elevating the state's responsibility. A trial court in South Carolina emphasized the negative effects of poverty and the fact that the education system was students' primary opportunity to escape. The court found that "poverty is . . . both the parent and the child of poor academic achievement. Each follows the other in a debilitating and destructive cycle until some outside agency or force interrupts the sequence."[313] Thus, the effects of poverty on education must be addressed "as early as possible in the lives of the children affected by it."[314] This judicially articulated moral imperative

308. *See generally* RYAN, *supra* note 231, at 14, 273 (noting that desegregation has become "unfashionable").

309. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. New York, 719 N.Y.S.2d 475, 501 (N.Y. Sup. Ct. 2001); Opinion of the Justices, 624 So. 2d 107, 121 (Ala. 1993).

310. Campaign for Fiscal Equity, Inc. v. New York, 100 N.Y.2d 893, 911 (N.Y. 2003).

311. *Id.*

312. DeRolph v. Ohio, 677 N.E.2d 733, 742-43 (Ohio 1997).

313. Abbeville v. State, Case No. 93-CP-31-0169155, at 155 (S.C. Ct. Com. Pl. Dec. 29, 2005).

314. *Id.* at 158.

helps explain why the trial court followed the supreme court's mandate and ordered not just reforms to the education system, but prekindergarten services for poor students.[315] The New Jersey Supreme Court has been even more forthright in its equity and justice concerns over poor children's plight, writing:

> We realize . . . that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages [and] that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, [and] welfare will make the difference for these students . . . . [But] 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 urban districts to satisfy the thorough and efficient test, the constitutional answer is that they are entitled to pass or fail with at least the same amount of money as their competitors.[316]

Although not as pointedly, other courts have seized upon similar themes in describing the long-term effects of inequitable and inadequate education on society. A common rhetorical method in some states has been to speak of education in terms of what students need to succeed in life,[317] deserve as a matter of fairness, or would be entitled to if they lived in some other neighboring state.[318] When courts write in these terms, they are not making the case that their respective state constitutions intended to guarantee a specific result, but that if their constitutions are just they must.

Finally, the most important factor in the implementation of meaningful remedies in school finance is the existence of popular support or a coordinated movement. Extrajudicial support is at least indirectly, if not directly, motivated by moral and social claims. Litigation alone is but a piece of a much larger puzzle in the struggle to secure equal or adequate education. The events that follow a judicial opinion, rather than the opinion itself, dictate success.[319] The most

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315. Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999).

316. Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990).

317. *See* Montoy v. State, 120 P.3d 306, 317 (Kan. 2005) (Beier, J., concurring) ("Education is vital for each citizen and no less imperative for the survival and progress of our republic.").

318. Brigham v. State, 692 A.2d 384, 391 n.6 (Vt. 1997).

319. *See* Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 187 (2006); Richard E. Levy, *Gunfight at*

obvious examples are in those states where voters have simply removed justices who supported education reform from office, and replaced them with others who promptly reversed the decision.[320] In these states, school finance advocates failed to build larger social movements and gain political support, which allowed raw political power to trump constitutional history, precedent, and rights.

Though not always as dramatic, similar principles play out in state legislatures after a court issues its decision. As Professor James Ryan's scholarship reveals, the most meaningful battle for school finance reform is won or lost in the legislature.[321] Separation of powers prevents courts from compelling the legislature to act.[322] An actual remedy for educational inadequacy and inequity only comes through legislation that is palatable to political majorities in the legislature. Certainly, state supreme courts play an important role in initiating reform and offer legislators cover in doing the right thing, but moral, racial, and social concerns weigh heavily regardless of a court's decision.[323] Thus, bringing actual reform to schools ultimately depends on elections, social movements, and the persuasiveness of the justice claims advocates frame. As Professors Charles Sabel and William Simon argue, school finance is an example of reform litigation whose primary role is securing a seat at the decision-making table for otherwise excluded groups.[324] But a seat, of course, does not guarantee a desired result. Rather, a seat at the table only provides the opportunity to exert influence on decision makers and popular sentiment,[325] both of which are dependent on public values and support, not necessarily evidentiary and legal conclusions.

The No Child Left Behind Act may be the most recent and salient example of education reform quickly doomed by disregard for developing a constituency. As noted above, NCLB also had a serious problem with its causal claim, but that the flaw was so quickly exposed as a result of its lack of a constituency. To suggest the Act lacked a broad-based constituency from the outset seems counterintuitive, given

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the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation, 54 U. KAN. L. REV. 1021, 1024 (2006).

320. *See, e.g.*, *Ex parte* James, 836 So. 2d 813, 820 (Ala. 2002) (Houston J., concurring); State v. Lewis, 789 N.E.2d 195, 198, 202–03 (Ohio 2003).

321. *See, e.g.*, James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 432, 433–44, 458, 462, 470, 476 (1999).

322. Scott R. Bauries, *Is There An Elephant In The Room?: Judicial Review of Educational Adequacy and The Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704, 708, 759–60 (2010).

323. Ryan, *supra* note 321, at 432, 448–49, 451, 463.

324. *See* Sabel & Simon, *supra* note 145, at 1024–25.

325. *See, e.g.*, *id.* at 1021–28.

that it was passed with bipartisan support.[326] Yet NCLB's ardent supporters were largely limited to the Washington political establishment, corporate interests demanding "results," and testing agencies.[327] States were immediately fearful of the Act's unobtainable goals and sanctions,[328] and only reluctantly capitulated to the Act after they were promised funding and safety valves for failure.[329] Communities were not necessarily hostile toward the bill, but neither were they supportive. Whether a community had good or bad schools, no significant constituency was calling for increased testing as a means to improve education.[330]

As previously described, NCLB was a bill that had to be sold to the public rather than a bill the community demanded. While the causal claim was central to selling the bill, supporters also offered a moral or justice claim. The Act's title itself indirectly asserted that we had abandoned a subset of children and were now obligated to respond. President Bush consistently pushed this claim to its moral extremes, arguing that poor and minority children were suffering from the "soft bigotry of low expectations."[331] The notion that schools were not intentionally discriminating against students, but that their low expectations were a subtle form of discrimination, resonated.[332] This claim made the Act difficult to oppose and allowed many to go along with the bill, even though they were not committed supporters. For instance, civil rights leaders could easily condone a bill aimed at eliminating this bias, even if it was ineffective. And if nothing else, civil rights leaders believed the Act's testing and data regime, more than any other policy in the past, would expose the vast inequality and hypocrisy

326. PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, 177 (2006).

327. Stephen Metcalf, *Reading Between the Lines*, THE NATION (Jan. 28, 2002), http://www.thenation.com/article/reading-between-lines?page=full[8/30/2012.

328. FRONTLINE, *supra* note 178.

329. *Id.*

330. *See* David S. Broder, *Long Road to Reform: Negotiators Forge Education Legislation*, WASH. POST, Dec. 17, 2001, at A01 (describing intense suspicion of the bill from members of both parties and the extreme criticism of Senator Edward Kennedy for helping broker a deal to pass the bill).

331. *See, e.g.*, Dillon, *supra* note 162; *see also* Rod Paige, U.S. Sec'y of Educ., Remarks at the Kennedy Sch. of Gov't: Fifty Years After *Brown*: What Has Been Accomplished and What Remains to Be Done? (Apr. 22, 2004) (castigating "de facto educational apartheid").

332. *See generally* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why it Matters*, 56 EMORY L.J. 545, 577 (2006) (indicating that this rhetoric served as a "rallying cry" that brought Senator Kennedy and President Bush together). James Foreman, Jr. points out, however, that his claim was little more than a cliché, because no one would really disagree with high expectations for all students. James Foreman, Jr., *Education for Liberation*, 2 HARV. L. & POL'Y REV. 75, 79 (2008).

in public education.[333] The point is that neither the civil rights nor any other community was leading the fight for this bill. Rather, the small Washington constituency pushing the Act secured others' tacit agreement by asserting a moral claim. But when the central causal premise of the Act failed, its moral claim rang hollow and its lack of a committed constituency was exposed. States and communities quickly lost all tolerance for the Act.[334] Even the Act's initial supporters began harshly criticizing it.[335] By the 2008 elections, presidential and congressional candidates almost uniformly opposed the continuance of the Act and promised to gut or seriously revamp it.[336] In short, NCLB is just another example of education reform premised on an evidentiary claim and lacking a movement, the absence of which spells the quick end of reform.

CONCLUSION

The various educational civil rights movements have had a long and storied history, which includes periods of both significant rights expansion and contraction. Because litigation has been so central to these movements, the temptation is to view them solely through the evidence they develop and the judiciary's evaluation of it. Viewed in this light, the successes and failures of movements appear dependent on the quality of the war waged at trial and the potential predilections of appellate courts. To be clear, strong litigation movements have achieved numerous successes, but these litigation reform movements have also uniformly and inevitably been cut short.

While the instinct of many litigators and civil rights advocates is to marshal better evidence, evidence cannot provide the solution. Even during times of success, educational civil rights claims have not been free from evidentiary gaps. Rather, courts were simply willing to overlook them. The unfortunate truth is that the nature of education itself breeds causal ambiguity. Because so many factors affect educational outcomes, and learning occurs over time rather than instantaneously, it is nearly impossible to establish that a given

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333. *See, e.g.*, Losen, *supra* note 186, at 245.

334. *See, e.g.*, *Criticism of NCLB Mounts as Numerous Schools Are Identified as "In Need of Improvement,"* EDUCATION ACCESS (Aug. 28, 2003), http://www.schoolfunding.info/news/federal/8-28-03nclbcriticism.php3 (indicating that criticism of the Act from the local level was already mounting just one year after the Act was passed).

335. Gail Russell Chaddock, *"No Child Left Behind" Losing Steam*, CHRISTIAN SCIENCE MONITOR (March 21, 2007), http://www.csmonitor.com/2007/0321/p01s01-legn.html.

336. Interestingly, the Act has yet to be reformed. This is attributable to various factors having nothing to do with education. Regardless, the Department of Education has agreed to waive the Act's various requirements rather than wait for Congress to revise it. *See* Dillon, *supra* note 168.

educational policy—such as an additional $1,000 of per pupil spending—will produce a particular outcome for any particular group of students. In general, the most evidence can do is reveal trends and identify the likelihood of outcomes. And as movements age, courts (and legislatures) eventually grow skeptical of the claims, and generalized evidence becomes insufficient to sustain the movement. In fact, some are skeptical from the outset of a movement, and the evidence does nothing to change their minds. No examples exist where educational civil rights advocates have been able to reverse skepticism or retraction with newfound and better evidence. The required evidence simply does not exist in education.

Given this unfortunate reality, educational civil rights reform either is futile in the long term or must fortify itself with more than evidence. The recent rise of charter schools reveals that the answer may be in the latter. In comparison to the other civil rights movements, the evidence supporting charter schools is less than impressive. Yet charter schools have expanded exponentially, while most traditional civil rights movements have done the converse, and the rest are on the verge. Charter schools have been able to defy the odds because they are reliant on a social movement and values, rather than evidence. In important respects, the evidence supporting charter schools is simply irrelevant and overshadowed by charter schools' direct appeal to parents' and business leaders' fundamental values, who comprise an unflinching constituency that pushes charter school policy forward at all levels of government.

Of course, educational civil rights claims have not always been without their moral- and value-based claims. In fact, a holistic review of the trajectory of past victories suggests that the moral- and value-based claims, rather than actual evidence, propelled these movements. Today, however, advocates often struggle to articulate educational civil rights in terms of compelling values and morals, which are predicates to building the extrajudicial movements and political support necessary to sustain movements. Without such claims and broader support, educational civil rights reforms devolve into mere policy options that are in competition with various others. Unfortunately, a battle of evidence has not been and will not be enough to protect or expand educational civil rights. Thus, the imperative for school integration, school finance, English Language Learners, and disability reform is to reclaim and rearticulate their moral- and value-based core. Indentifying what those claims look like for each of those movements is the subject of another article, but recognizing that this work must be done is the only viable step to stem their trend of limited relevance.