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Pass or Fail:
High-Stakes Testing and Education Policy by Litigation

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The nation's sustained appetite for education reform increasingly includes a taste for high-stakes testing.¹ Through various high-stakes tests, policymakers seek to increase student achievement and enhance student, teacher, and school accountability for academic progress. Consequences from high-stakes testing can be quite high. For students, results from high-stakes tests frequently determine their eligibility to graduate, be promoted from one grade to another, or to be placed in a particular curricular track.² Grade promotion decisions are particularly important as research consistently illustrates that involuntary grade retention correlates with a student's likelihood of dropping out.³ Because the high school diploma (or its equivalent) is a threshold requirement for access to higher education, the military, and many higher-paying jobs and careers, students who lack a high school diploma begin their adult lives at an enormous disadvantage. High-stakes tests implicate schools and districts as well. Under the federal No Child Left Behind Act,⁴ annual test results determine whether schools and districts achieve adequate yearly progress.⁵ An array of penalties awaits those schools and districts that fail to demonstrate necessary progress.⁶ Finally, now that NCLB requires that districts fill classrooms with "highly qualified" teachers in core subjects,⁷ states increasingly require that teachers pass competency tests.

Largely because of the consequences for students, teachers, schools, and districts, high-stakes tests pose a threat to the education status quo as well as individual and institutional interests. A review of modern education history in the United States illustrates that educational reform measures that threaten the status quo or entrenched interests—such as high-stakes tests—inevitably attract litigation. High-stakes testing policies are no exception to this trend and contribute to the increasingly congested educational policy and law intersection.

That high-stakes testing policies attract litigation is obvious. Far less obvious, however, is *how* litigation influences high-stakes testing policies, in particular, and educational policy more generally. The relation between litigation and high-stakes testing warrants careful attention as it illustrates how law can influence education policy as well as limitations to efforts seeking to use law to influence educational policy.

Two broad themes emerge from a review of a multi-decade litigation assault on high-stakes tests. First, litigation (and even the mere threat of litigation) influenced the development of high-stakes tests in ways that made them less vulnerable to legal challenge. States and school districts learned from past litigation failures and made high-stakes tests more attentive to due process and equal protection concerns. The broad legal parameters for high-stakes are now generally understood. So long as states and districts continue to develop and implement tests within the general legal boundaries, courts will remain reluctant to intervene. Such adjustments to high-stakes, combined with growing popular demand for greater accountability, have diminished the threat to high-stakes tests posed by lawsuits.

A second—and more normative—theme flows from the first. In addition to making high-stakes tests more sensitive to due process and equal protection concerns, policymakers reduced tests' legal exposure further by making the tests more forgiving. More forgiving tests generate fewer failing students, teachers, or schools which, in turn, generate fewer disgruntled plaintiffs seeking legal redress. The price for greater legal insulation, however, includes reducing the tests' efficacy as a meaningful lever for education policy reform. Thus, the effort to reduce high-stakes tests' legal vulnerability rendered the tests less useful as a mechanism for generating desired education reform.

High-stakes testing policies did not emerge in a policy vacuum. After describing the broad legal terrain surrounding high-stakes tests in Part I, Part II briefly considers various policy factors that prompted high-stakes tests' development. Part III surveys the major types of high-stakes tests, as well as the leading litigation challenging them. Insofar as the past influences the future, Part IV assesses what the future might hold for legal challenges to high-stakes testing policies. Although recent litigation trends evidence increased judicial reluctance to upset well-designed high-stakes testing policies, important challenges endure. One consequence of litigation's increasingly diminished threat to well-designed high-stakes testing programs is an increased focus on political efforts to influence high-stakes testing policies.

PART I: LEGAL TERRAIN FOR HIGH-STAKES TESTING

Although an array of factors help explain high-stakes tests' increasingly central position in current educational policy debates as well as the tests' increased popularity among many (but not all) parents, taxpayers, and policymakers, two factors warrant particular attention. One factor is a sustained effort to increase access to educational opportunities for historically disfavored student subgroups. The emergence of high-stakes tests in the mid-1900s—notably the Scholastic Aptitude Test (SAT)—reflected a growing desire to democratize access to elite higher education, long dominated by wealthy graduates of leading east coast boarding schools.⁸ Objective, high-stakes tests diluted the importance of more subjective teacher grading which, historically, tended to work against historically disfavored students.

A second—and more current—factor accounting for the development and popularity of high-stakes tests flows from a lingering unease with American student and school performance, especially since the 1983 *A Nation At Risk* report. The educational establishment's persistent

unwillingness or inability to assume accountability for student, teacher, and school performance only heightens this unease. The relative paucity of helpful and meaningful data from which to assess student and school performance both over time and across school districts, states, and nations also contributes to the general anxiety over American public K-12 education. Results from high-stakes tests contribute much-needed data.

Sources of Governmental Authority to Develop and Implement High-Stakes Tests

An array of factors, including persistent concerns about educational equity and quality, prompted state and local governments to develop and implement various high-stakes tests. As all three levels of government play varying roles in the development and implementation of education policy, federal, state, and local governments contribute to high-stakes testing. Although the federal government's authority is enumerated, state governments, by contrast, enjoy broader police and regulatory powers. Additionally, and especially salient for high-stakes testing, all fifty state constitutions say something about education.⁹ Finally, local governmental authority largely flows from state delegation. Although all three layers of government possess the legal authority to establish and implement high-stakes tests, the specific sources of authority vary.

Historically, the federal government's intersections with public K-12 schools focused on either specific types of schools, such as those predominately serving children from low-income households,¹⁰ or discrete subpopulations of students, such as those with qualifying disabilities.¹¹ In addition, particular subject areas, notably math and science, attracted federal lawmakers' attention and prompted periodic federal activity in the K-12 area. For example, the Soviet's launch of the Sputnik satellite prompted Congress to pass the National Defense Education Act, which President Eisenhower signed into law.¹² The Act included ample provisions for

strengthening instruction in math and science for the nation's elementary and secondary schools.¹³

Despite a long history of comparative disengagement, the federal government is now fully engaged with K-12 education policy, including the development of high-stakes tests through the No Child Left Behind Act of 2001 (NCLB).¹⁴ NCLB's significance flows partly from its vast scope that implicates every public K-12 school, regardless of whether a school receives Title I funding.¹⁵ NCLB's cornerstone is an expansion of school accountability pivoting on determinations of adequate yearly progress for student academic achievement determined through annual high-stakes testing.¹⁶

Congress invoked its Spending Clause authority to pass NCLB, and courts have interpreted this authority quite broadly over the decades. In *South Dakota v. Dole*,¹⁷ the Supreme Court indicated a willingness to defer to Congress to define the contours of Congress' Spending Clause authority. This deference, however, is not unlimited. When Congress exercises its Spending Clause authority it must make conditions for federal funding clear so that state decisions about whether to participate are informed.¹⁸ In a legal challenge to NCLB, local school districts raised questions about responsibility for costs flowing from the Act.¹⁹ Although the district court dismissed the lawsuit, in 2008 a federal appeals court, concluding that that NCLB violated the Spending Clause's clear-statement requirement, reinstated the lawsuit.²⁰ The circuit court decision in *Pontiac*, if it withstands appeals, hints at possible limits to federal authority in the K-12 area.

Although it is too early to dismiss the Sixth Circuit's *Pontiac* decision as an outlier, if Congress desires to do so it can easily fix any offending aspects of NCLB. Moreover, NCLB is due for a re-authorization that will almost certainly prompt a revisiting of the statute's major

components. While the Court may impose upon Congress the need to engage in some technical fixing, nothing in the *Pontiac* decision even hints that Congress does not possess the constitutional authority to promote high-stakes testing policies through the Spending Clause. Thus, Congress likely will continue to force states to confront a potentially stark choice: submit to NCLB and comply with, among other requirements, high-stakes testing, or forego full federal Title I funding.

Unlike the federal government, state governments possess inherent authority to promote overall citizen welfare. Despite the states' comparatively broader regulatory posture, various state laws constrain state governments. For example, state governments typically share the federal commitment to equal protection and substantive and procedural due process. Unlike the federal constitution, all state constitutions express some commitment to education.²¹ Local governmental units, including school districts and boards, face similar constraints even in areas where a state expressly has delegated specific authority.

Sources of Individual Rights

In addition to concerns about the source of a high-stakes test, testing opponents may also assert that a test violates students' rights. In the context of high-stakes testing, the crucial individual rights involve due process and equal protection. Sources of these crucial individual rights include the Fifth and Fourteenth Amendments of the U.S. Constitution, related state constitutional protections, and Title VI.

Both the Fifth and Fourteenth Amendments to the U.S. Constitution protect students from deprivations of "life, liberty, or property, without due process of law."²² Moreover, state constitutions typically contain their own due process protections.²³ High-stakes testing, especially tests that regulate access to high school diplomas, implicate a student's property and

liberty interests. Largely through various education clauses found in state constitutions, students possess an entitlement to and property interest in a public education, as well as core components of a public education. The Supreme Court has expressly held that governmental efforts to interfere with this property interest must satisfy due process requirements.²⁴ Similarly, students' liberty interests, including avoiding the stigma flowing from failing an improperly implemented state high school exit exam, receive due process protections.²⁵

Procedural safeguards generally endeavor to ensure that governmental action that interferes with students' property interests in education does so fairly. Critical in the high-stakes exam context is adequate notice. In this setting, notice speaks not only to adequate warning about a change in graduation requirements to include passing an exist exam but also to the scope of the exam's coverage. Additional factors, including the availability of remedial programs to students in need as well as opportunities to re-test, also bear on courts' assessments of procedural due process.

Along with procedural safeguards, due process protections have also been interpreted to afford substantive protections. Substantive due process is designed partly to protect individuals from arbitrary or capricious governmental action. In the context of high-stakes testing, one important substantive due process concern involves the test's curricular validity. Curricular validity includes two main parts. First, any high-stakes test must correspond and cohere with the curriculum required by a school or district. Second, a high-stakes test must also correspond with what a student was actually taught, regardless of what a school might require formally in terms of instruction.

To the extent that high-stakes tests' pass rates vary across student groups equal protection concerns arise. Federal law contains numerous and varied protections against discrimination

based on, among other characteristics, race, ethnicity, and gender. The relevant federal laws range from the Fourteenth Amendment to Title VI of the 1964 Civil Rights Act.²⁶ As it relates to high-stakes testing, however, the scope of equal protection is somewhat limited. For example, insofar as high-stakes tests neither set out to discriminate intentionally nor do so facially, equal protection challenges are typically grounded in a disparate impact theory. Specifically, when the adverse consequences from a high-stakes test disproportionately impact minority students, a potential disparate impact claim lurk.²⁷

One principle source of equal protection—Title VI—presents two major difficulties as a statutory platform for a legal challenge to high-stakes tests rooted in a disparate impact theory. First, Title VI’s text does not recognize disparate impact. Title VI remains relevant in this context, however, because its enabling regulations expressly forbid recipient schools from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination.”²⁸ Thus, only through its enabling regulations does Title VI provide a legal basis for a challenge to high-stakes test rooted in disparate impact theory. Second, Title VI has been judicially interpreted to preclude a private right of action.²⁹ What Title VI does provide, however, is for the Department of Education to withhold federal funds from any school that violates Title VI. For these and other reasons, however, Title VI has become less important in the high-stakes testing context.

PART II: HIGH-STAKES TESTS AND LITIGATION

During the past few decades an array of high-stakes tests has been implemented across the nation. These various tests share two key elements. First, the tests generally resemble one another both in terms of what they test as well as the consequences that flow from them. Second,

the introduction of high-stakes tests generates litigation. What has changed over the years, however, is the efficacy of litigation efforts designed to roll-back high-stakes tests. Schools, school districts, and states responded to losses in early litigation by adjusting their testing programs in ways that ensured greater resiliency to legal challenges. By the twenty-first century, efforts geared toward insulating high-stakes tests from litigation have largely succeeded.

High-Stakes Tests

High-stakes testing's place on the education landscape increased in prominence since the minimum competency test (MCT) emerged in the 1970s and was largely subsumed during the next decade by states' growing commitment to the standards and assessment movement. The current NCLB regime—including its adequate yearly progress requirements—dramatically changed the high-stakes testing regime and increased (and redirected) the consequences for schools and school districts.

Minimum competency tests. Responding to fears that social promotion policies, an unfocused curricula, and diluted academic standards had combined to debase the high school diploma's value,³⁰ states began to require MCTs as a condition for high school graduation. Introduced in Oregon in 1973, MCTs quickly gained in popularity and spread to other states. Within seven years, thirty-six states had enacted some form of minimum competency testing program, with eighteen states requiring satisfactory performance as a condition for graduation.³¹

It is disputed whether this precursor to the modern standards-based accountability movement achieved its dual goals of resurrecting the integrity of the high school diploma in the marketplace without unduly encouraging more students, particularly students from low-income households, to fail to complete high school. Emerging research on this question uncovers mixed results.³² These mixed results notwithstanding, what is clear is that students—in some cases,

many students—failed and that student failures were distributed unevenly across student subgroups.³³

Although most states found it relatively easy to enact MCT legislation, implementation encountered substantial political and legal impediments. Resistance emerged principally due to the political fallout incident to students' failing MCT. As various states began to implement MCTs, initial failure rates (of eighth or ninth grade students) sometimes exceeded 30 percent.³⁴ Because non-white students and students from low-income households failed MCTs at rates that exceeded their white student counterparts,³⁵ legal pressure against the tests increased. Many states sought relief from such pressures by simply reducing the MCT failure rate to below five percent (and frequently below one percent) by the time the initial cohort of students was poised to graduate from high school.

While MCTs dwelled on students' exam results, most of the state education reforms launched after 1983 took a more comprehensive view of the education system. To better assess student progress toward state standards, many states articulated (or refined) education standards for their students, tethered a curriculum around the state standards, and aligned the exit exams to the curriculum and standards. Additionally, the universe of accountability expanded from the individual student to the student's schools and school district. Despite differences that distinguish MCTs from more recent state assessment regimes, both typically included some high-stakes dimension with consequences to students.

Policy discussions about the accountability and consequence dimension of the reform efforts become more animated and focused as standards developed and implementation plans progressed.³⁶ More states began to link test results to high-stakes consequences for school districts, schools, and students. At the institutional level, schools or school districts risk a state

takeover for consistent unsatisfactory performance.³⁷ At the student level, students who do not achieve a certain mastery of core academic subjects are not promoted or graduated, or they receive a “certificate of attendance” rather than a full academic diploma.³⁸

Most observers assumed that lawsuits would quickly follow in states where standards and assessments triggered palpable consequences for students and schools. While fears of litigation from disappointed students and schools were not misplaced,³⁹ careful planning by policymakers, attention to policy implementation details, focused deployment of additional resources, student preparation, remediation, and an almost unlimited supply of second chances for students substantially reduced the number of successful lawsuits challenging the legality of high-stakes standards and assessments.⁴⁰

No Child Left Behind, high-stakes tests, and ‘adequate yearly progress’: the federal government steps in. At its core, NCLB leverages state-created standards and assessments, increases transparency by disseminating data on progress, and imposes consequences on local districts and schools for insufficient annual student progress. As commentators note, standardized tests are the fuel that runs the NCLB engine.⁴¹ Annual test scores must be generated and aggregated at the school-level and then *disaggregated* for a number of student subgroups that are traditionally underserved by public schools.⁴² All of these scores are used to assess whether a school is achieving adequate yearly progress. Although states currently enjoy significant latitude in establishing annual proficiency benchmarks, under NCLB by 2014, *all* students must achieve academic proficiency.⁴³

A sliding scale of consequences befalls schools that do not achieve adequate yearly progress (AYP).⁴⁴ Federally funded public schools that fail to achieve AYP are designated as “in need of improvement.”⁴⁵ Schools failing to achieve AYP for two consecutive years must

develop an improvement plan after receiving technical assistance from the U.S. Department of Education.⁴⁶ Also, students assigned to such schools are eligible to select another public school within the district.⁴⁷ Schools that fail to demonstrate AYP for three consecutive years must provide, at district expense, tutoring services to students attending the schools.⁴⁸ After four consecutive years, schools must undertake one of several measures, ranging from replacing school staff to implementing a more challenging curriculum.⁴⁹ A school that fails to achieve AYP for five consecutive years must either surrender to state control, dissolve, or re-constitute itself as a charter school.⁵⁰

As observers note, “schools that fail to make AYP will likely be deemed failures, which in turn will generate pressure on state and local officials to do something to avoid that label.”⁵¹ Such a characterization does not flow formally from NCLB itself, rather, “the media have translated ‘in need of improvement’ to mean ‘failing’.”⁵² One policy risk is that popular perception of schools that fail to achieve AYP will feed on itself thereby reducing the likelihood that the schools can improve in the future.

Consequences flowing from this risk, and others, implicate a broad array of key public school constituencies vested with various stakes in a school district’s success. These numerous and varied constituencies include educators, students, and parents. As education professionals, teachers and administrators do not want their efforts to contribute to a determination that their schools is, under federal law, “in need of improvement” or worse. Similarly, it is fair to assume that students assigned to such schools (as well as their parents) would at the very least prefer additional publicly-funded school options.⁵³

Fallout from under-performing schools extends beyond the schools. Increasingly, state and local politicians feel vicariously liable for school success. As states increasingly centralize

education policy control, governors' interest in the fate of public schools increases. Moreover, homeowners remain economically tethered to local public-school performance, especially in affluent suburban neighborhoods where public school reputations (real or perceived) influence home values.⁵⁴ This economic equity interest in a home persists independent of whether a homeowner has school-age children. Local economic and businesses interests, especially those with critical skilled-labor requirements, also have an important stake in the success of local public school systems. These constituencies' varied political, economic, and individual interests—combined with public school systems' democratic accountability systems—help ensure the salience of political economy for education policy.

Testing teachers. Concurrent with growing unease with student academic performance and school accountability is persistent anxiety over teacher quality. General concerns about the academic preparation of those seeking to become teachers, significant procedural barriers to entry into the teaching profession, and robust collective bargaining and public civil servant protections for existing teachers interact and fuel public misgivings about the quality of the teaching force. Partly in response to such misgivings, the NCLB expressly requires that only “highly qualified” teachers staff classrooms for core academic subjects.⁵⁵

To allay concerns over teacher quality and respond to NCLB requirements, many states and districts impose high-stakes tests on teachers. Although the testing policies vary across states, teacher tests fall loosely into three broad categories. One category—and the most common—involves testing for those seeking to enter the teaching profession or, more specifically, seeking a professional credential (certificate or license) necessary for public school employment. A second category involves competency (or re-currency) testing for teachers who already possess a teaching credential and desire to re-new that credential or convert it from a

temporary into a permanent teaching credential. Finally, a third category—and the least common—involves the use of high-stakes testing for purposes of teacher merit pay schemes, promotion schedules, or dismissal procedures.

An on-going effort by the National Board of Professional Teaching Standards (NBPTS) represents one of the more interesting, if controversial, developments in teacher high-stakes testing. In an effort to improve teaching quality and more closely resemble norms in more established professions, such as medicine and law, the NBPTS spent many years and hundreds of millions of dollars to develop tests necessary for a teacher to receive National Board certification. In stark contrast to traditional “high-stakes” tests, however, National Board tests are voluntary and teachers do not suffer direct consequences for either failing to earn certification or for declining to pursue it. Indeed, as of 2006, approximately one percent of the U.S. teaching force had received National Board certification. In many states and districts, however, teachers who have earned National Board certification are eligible for merit pay or salary schedule increases. Whether the NBPTS has achieved its goal of improving teacher quality through national board certification remains hotly contested.⁵⁶

High-Stakes Testing Litigation

As the consequences of high-stakes testing increased and extended from students to include schools, school districts, and states, so too did the litigation effort seeking to blunt the consequences flowing from high-stakes tests. Much of the litigation pursued one of three broad legal claims (or a combination of two or more claims): due process, equal protection, or statutory (notably Title VI). A review of key lawsuits illustrates important themes.

First, the *Debra P.* litigation involved Florida’s effort during the 1970s to impose successful passage of that state’s minimum competency exam as a condition for receipt of a full

public high school diploma. Second, the *GI Forum* litigation in Texas illustrates a trend in judicial receptivity to legal challenges to exit exams. During the 1980s, states like Texas implemented broader exit exams that also tethered mastery over substantive academic material as a condition for a full high school diploma. Third, the *Valenzuela v. O'Connell* litigation in California reflects the current judicial posture toward exit exams. Finally, high-stakes teacher testing is not immune from litigation and pursues many of the due process and equal protection themes pursued in legal challenges to student testing.

Florida and 'Debra P.' In 1976, Florida lawmakers passed the Educational Accountability Act, which included an exit-exam requirement for high school graduation.⁵⁷ Students who failed were provided remediation classes as well as another chance to pass the test thirteen months later. A student that failed the test for a second time did not receive a high school diploma and, instead, received a certificate of high school attendance.⁵⁸ Non-white students failed the initial test at a rate three times greater than their white student counterparts.⁵⁹ Results from the second administration of the test resembled the first—non-white students failed at a far higher rate than white students.⁶⁰ Students denied a high school diploma because they failed to pass Florida's exit exam sued the state arguing, in part, that the implementation of Florida's exit exam requirement violated their due process and equal protection rights. Although the lawsuit succeeded at the trial court level, a subsequent appeal and remand diluted the impact of the initial victory.

Notice and preparation defects moored the Florida students' procedural and substantive due process claims. After finding that students possessed a property right in a high school diploma,⁶¹ the trial court concluded the state's failure to provide adequate notice prior to altering high school diploma requirements constituted a procedural due process violation.⁶² The court

determined that the thirteen-month remediation program was insufficient to off-set the potential ten years of instruction provided prior to the development of the exit exam.⁶³ If the procedural defects in Florida's test were not enough, the trial court also found substantive due process problems. Critically, the court concluded that the state's curriculum did not adequately align with the material covered in Florida's exit exam.⁶⁴

In addition to due process defects, the trial court also concluded that Florida's exit exam posed equal protection problems. When combined with Florida's past *de jure* segregation policies, evidence of disproportionate failure rates across various student subgroups supported the trial court's conclusion that the exit exam discriminated against non-white students.⁶⁵ The distribution of failure rates, along with the State Commissioner of Education's anticipation of disproportionate failure rates, however, did not support a judicial finding of intentional discrimination.⁶⁶ Despite the absence of any intentional discrimination, the trial court enjoined the State of Florida from implementing its exit exam consequences.

The State of Florida's appeal met similarly skeptical appellate judges. After quickly agreeing with the equal protection and procedural due process problems noted by the trial court, the appeals court dwelled on the exit exam's validity and relation to the instruction that Florida students received in class. The appeals court could not determine whether the exit exam sufficiently related to the curriculum due to a paucity of direct evidence admitted at trial. Thus, the court remanded the case for a hearing on this issue. On remand, both parties submitted lengthy testimony from a platoon of experts, and District Court Judge Carr was persuaded that Florida's official curriculum, as implemented by a majority of the state's teachers, provided students with a fair opportunity to learn what was necessary to pass the state's exist exam. Moreover, by this point, enough time had passed so that every student in the system had attended

Florida schools deemed unitary. Consequently, Judge Carr removed the injunction, and upon affirmance by the appeals court, Florida was permitted to implement its exit exam in full in 1984—fifteen years after the initial trial court ruling that enjoined the exam’s implementation.⁶⁷

Three key themes emerge from the *Debra P.* litigation saga. First, litigants can successfully impede the implementation of high-stakes tests, at least those with procedural and substantive defects. Second, although litigants successfully delayed implementation of Florida’s exit exam, the success was relatively short-lived. In time, all of Florida’s students attended judicially-decreed unitary schools for their entire elementary and secondary schooling. Florida educators further refined the curriculum to better align with the content of the exit exam. After various appeals and remands, the circuit court concluded in 1984 that Florida’s use of the exit exam was permissible and that it could deny high school diplomas to those who failed the exit exam.⁶⁸ Third, by the end of the fifteen-year lawsuit, *Debra P.* hints at a growing judicial reluctance to impede satisfactorily designed testing programs.

Texas’ Exit Exam: ‘GI Forum.’ Similar to their Florida counterparts, Texas policymakers sought to improve student performance through the imposition of a high school exit exam. In 1985, after a decade-long struggle over the direction of school reform in Texas, state lawmakers implemented the Texas Educational Assessment of Minimum Skills (subsequently replaced by the Texas Assessment of Academic Skills (TAAS)) as one piece of a larger school reform initiative.⁶⁹ The Texas Assessment of Knowledge and Skills (TASK), introduced in 2003, replaced TAAS.⁷⁰ Results from the TASK not only implicated students, but schools and school districts were assessed from data generated by the exam.

If necessary, both TASS and TASK afforded students with remedial assistance and multiple opportunities to pass the exit exam. Under TAAS, students were permitted eight

chances to pass before the completion of their senior year.⁷¹ By giving students an unlimited number of chances to pass, the current TASK is even more indulgent. Moreover, students who leave high school without a full academic diploma can continue taking TASK and will receive a diploma retroactively upon passage.⁷²

Similar to the experience in Florida, test failure rates in Texas distributed unevenly across various student subgroups. Notably, African-American and Hispanic students failed at disproportionate rates. Representing minority students who failed the exit exam and were denied high school diplomas, attorneys from the Mexican American Legal Defense Fund (MALDEF) sued the state of Texas alleging that Texas' exit exam violated the students' equal protection, due process, and statutory rights. However, only the students' statutory Title VI claim proceeded to trial.

Within the Title VI context, the court dwelled on the stark disparity in pass rates between white and non-white students. Expert witnesses from both parties helped frame the focus on the pass rate disparity because both sides agreed that the initial administration of the exit exam adversely impacted non-white students⁷³ and that statistically significant, though lower, disparities existed in the cumulative exam pass rates.⁷⁴ On the basis of largely uncontested statistical evidence, the trial court in *G.I. Forum* concluded that the plaintiffs established a *prima facie* case against the state's exit exam.⁷⁵

Although minority students succeeded in establishing a *prima facie* case the state of Texas successfully defended its exit exam as a legitimate exercise in educational policymaking authority notwithstanding the exit exam's disparate impact on non-white students. The trial court concluded that the exit exam was intended to advance education reform in Texas and that the high-stakes graduation requirement was justified, in part, because it "encouraged learning."⁷⁶

The court also rejected the plaintiff's assertion that equally effective yet less disparate alternatives to the exit exam existed.⁷⁷ Moreover, the court noted that the state provided adversely affected students remedial classes expressly geared toward the exit exam. Consequently, Judge Prado ruled against the students and permitted the implementation of Texas' exit exam.

As commentators note,⁷⁸ the *GI Forum* decision supports two quite distinct interpretations. First, the outcome may be understood as a failure by the plaintiffs to rebut the state's arguments about the TAKS' efficacy in terms of achieving school reform. Second, the decision may also reflect the court's deference to states when it comes to establishing minimal standards necessary for graduation. These competing interpretations of *GI Forum* present starkly different implications for policymakers.

California. In 1999, California joined a growing line of states that imposed successful completion of a state-wide exit exam as a condition for a student receiving a full high school diploma.⁷⁹ Students begin taking the California High School Exit Exam (CAHSEE) in the tenth grade and are afforded multiple opportunities to re-take the exam. CAHSEE was implemented in conjunction with a larger statewide effort to bolster academic standards and assessments.⁸⁰

Testing began in 2001 and implicated students planning to graduate in 2004. By the summer of 2002, however, less than one-half of the class of 2004 had passed the exam.⁸¹ Moreover, Latino, African-American, and low-income students were far less likely to pass.⁸² As a consequence, the California State Board of Education voted to delay denying diplomas to students until 2006. As graduation for the class of 2006 approached with the looming prospect of denying thousands of California high school students' diplomas, a class-action lawsuit was

filed in state court to enjoin the state from withholding diplomas from students who had failed the exit exam.

In *Valenzuela v. O'Connell*,⁸³ the trial judge enjoined implementation for another year because the harm to the state in delaying implementation was outweighed by the harm arising from denying otherwise qualified students their high school diplomas. Harms to the students included claims about equal protection and the right to an education. Anxious to appeal the injunction and obtain definitive guidance from California's Supreme Court, the State sought to by-pass the court of appeals. California's Supreme Court, however, sent the matter to the state appellate court rather than decide the merits of the injunction.⁸⁴

After hearing from both parties at oral argument and numerous others in *amici curiae* briefs, the three-judge appellate panel vacated the trial court's preliminary injunction. While the appellate court agreed with the trial court that the plaintiffs were likely to prevail on their equal educational opportunity denial claims,⁸⁵ the appellate court nonetheless concluded that granting injunctive relief would be an improper encroachment upon legislative terrain.⁸⁶ Favoring the state's high-stakes test, the appellate court ruling prompted a settlement between the litigating parties.⁸⁷

The appellate court made clear its feeling that the trial court's injunction prohibiting CAHSEE's full implementation injected the judicial branch too deeply into legislative terrain.⁸⁸ In so doing, the appellate court noted that the trial court's remedy impermissibly limited policymakers' discretion to bring CAHSEE into constitutional compliance.⁸⁹ Although the political question doctrine is notoriously murky,⁹⁰ litigation efforts seeking to influence high-stakes testing policies invariably push the envelope of the separation of powers doctrine. A clear demarcation does not typically exist between a court protecting a student's procedural and

substantive due process rights and a plaintiff seeking to accomplish through litigation a policy objective that is not achievable through the legislative processes. This is especially true today as most states have clear understandings about what elements in a high-stakes test are necessary to address courts' due process concerns.

Much criticism dwells on the appellate court's decision to vacate the trial court's preliminary injunction. Specifically, critics argue that the trial and appellate courts did not appreciate fully how the students' due process rights were infringed by implementing CAHSEE.⁹¹ Commentators note that survey data suggested that not all students were provided with the instruction necessary to prepare for the exam, a factor that weighed heavily in Florida's *Debra P.*⁹² decision.

Despite the plaintiffs' disappointment with the outcome in *O'Connell*, the appellate court decision prompted significant settlement negotiations that culminated in new state legislation.⁹³ New California law generates important benefits for students who struggle with CAHSEE. First, students are entitled to two additional years of instruction if they have not passed the exam by the end of their senior year. This supplemental instruction focuses on preparing students for the exam. Second, students whose primary language is not English are entitled to receive two additional years of language instruction to enable them to pass the exam.

Teacher testing litigation. Similar to high-stakes tests for students, high-stakes tests for teachers invites litigation. However, the legal contexts for teacher and student high-stakes testing differ in important ways. Important differences involve teacher collective bargaining rights that bind teachers and school districts in addition to general employment and contract law. Among the various uses of high-stakes teacher tests their use for re-certification of existing teachers and for teacher dismissal procedures presents the greatest legal challenges. Despite an

array of various uses of high-stakes teacher tests by districts and states, most legal challenges to them pivot on teachers' due process and equal protection rights.

Along with fair notice, a critical due process concern for teacher high-stakes tests involves the test's psychometric validity. Simply put, to the extent that a teacher test seeks to measure teacher competence the test must, in fact, reliably measure some defensible construct of teacher competence. To assess test validity, courts frequently look to see whether appropriate validation techniques were used, such as those contained in the *Uniform Guidelines on Employee Selection Procedures* (adopted by the U. S. Equal Employment Opportunity Commission) or the *Standards for Educational and Psychological Testing* (adopted by the American Psychological Association).

States', schools', and districts' use of National Teacher Examinations (NTE) has generated considerable litigation focusing on content validity. In *United States v. South Carolina*,⁹⁴ judges upheld the state's use of NTE for the initial hiring as well as pay classification decisions of teachers and concluded that ample evidence existed of the NTE's content validity. An opposing judicial view of the NTE's validity is found in *Georgia Association of Educators, Inc. v. Nix*.⁹⁵ In *Nix*, the court concluded that Georgia's requirement of a minimum NTE score as a requirement for a six-year teaching certificate was arbitrary as no effort had been made to validate the minimum cut score and its intended purpose. Despite conflicting case law, courts appear increasingly reluctant to upset a state's and district's use of a professionally recognized test, so long as evidence of a serious effort to establish the validity of the test to the purpose used exists.

In addition to due process concerns, a second area of legal exposure for high stakes teacher tests involves teacher equal protection claims. Equal protection claims arose in *United*

States v. South Carolina,⁹⁶ where the federal government sued the State of South Carolina (and numerous educational agencies and officials) for its reliance on results from National Teacher Examinations (NTE) in its teacher certification program. Similar to many states, South Carolina officials used high-stake test results for decades. Also similar to the experience of many states, results from NTE broke along racial lines and prompted claims of racial discrimination. The plaintiffs asserted that teachers' rights guaranteed by the Fourteenth Amendment and Title VII were compromised by South Carolina's use of test results. Although, the legal mechanics of the Fourteenth Amendment and Title VII differ in important, technical ways, a few basic principles link the two sources of legal claims.

Although a state's policy to use high-stakes teacher tests for teacher certification (and other) purposes is facially race-neutral, courts will nonetheless assess whether sufficient evidence of an intent to discriminate exists if test results skew along racial, gender, or ethnic lines. After reviewing more than three decades of use in South Carolina of teacher high-stakes testing, the court did not find any evidence of discriminatory intent. In the absence of any intentional discrimination, South Carolina needed only to defend its use of teacher testing as "rationally-related" to its stated policy goal of improving public education. In concluding that South Carolina's reliance on NTE was not irrational from a policy perspective, the court placed important significance on the extensive efforts to validate NTE and certification minimums with policy objectives relating to basic teacher competence.⁹⁷

Similarly, for Title VII purposes, the plaintiffs in *United States v. South Carolina* succeeded in establishing that a disproportionate number of non-white teacher applicants failed to receive certification due to their failure to achieve the necessary minimum NTE score. As a result, the legal burden shifted to South Carolina officials to justify such a result. Emphasizing,

once again, the importance of psychometric test validation efforts, the court concluded that the state had sustained its evidentiary burden and upheld the state's use of NTE.⁹⁸

Finally, policies designed to link teacher performance assessments and student high-stakes test results not surprisingly trigger litigation. For example, in 2003 the Palm Beach County (FL) school board initiated proceedings to dismiss a teacher. At that time, Florida law required school boards to base annual teacher assessments "primarily" on student performance on state and local tests, including the Florida Comprehensive Assessment Test.⁹⁹ Although the school board's evidence of teacher incompetence presented at a teacher dismissal hearing was overwhelming, the evidentiary record did not include any student performance data from Florida's high-stakes tests.¹⁰⁰ Consequently, concluding that applicable Florida law did not provide for any discretion in the matter, a Florida court in 2006 reversed a teacher's dismissal.¹⁰¹

Ironically, a Florida law designed to boost student achievement through high-stakes tests was successfully used by incompetent teachers in *United States v. South Carolina* to reverse their dismissals on procedural grounds. Recognizing that motivated students may succeed on high-stakes tests *despite* teacher incompetence, Florida lawmakers quickly amended the relevant state statute in a way that prevents what happened in *Sherrod* from happening in the future.¹⁰²

PART III: HIGH-STAKES TESTING'S LEGAL FUTURE

Regardless of various (and potentially competing) interpretations, the *GI Forum* decision remains the most recent explication of the judiciary's posture toward legal challenges to state exit exams. Standing alone or in conjunction with the earlier *Debra P.* decision, the *GI Forum* decision signals courts' reluctance to dislodge state exit exams. The arc of the multi-decade

litigation project aimed at high-stakes testing suggests that judges are increasingly hesitant to second-guess policymakers who design and implement high-stakes test with care and rigor.

Although emerging litigation trends indicate an increased reluctance of courts to second-guess high-stakes testing programs, litigation continues to influence such programs. The mere specter of litigation—including lawsuits unlikely to prevail—imposes concrete costs on policymakers inclined to pursue high-stakes testing. Even though the clear litigation trend suggests that legal challenges to high-stakes tests are unlikely to succeed against tests that are carefully planned and crafted, successfully defending against a lawsuit generates financial costs as well. For cash-strapped states in particular, these potential financial costs might be sufficient to prompt states to lower student proficiency thresholds in an effort to reduce both legal exposure and political fallout. Additionally, the nation’s on-going experience with NCLB suggests that political pressure might be a more efficacious instrument to blunt the consequences of poor test results. Finally, those advocating increased school spending increasingly leverage poor test results into legal claims of inadequate education services.

Litigation, High-Stakes Testing, and Perverse Incentives: Turning a Race to the Top Into Race to the Bottom

The existence of high-stakes or consequences flowing from academic performance generates pressure to dilute academic standards. States’ experiences with setting (or resetting) standards after NCLB illustrate how such perverse incentives operate. Prior to NCLB, many states, notably Southern states, began a campaign to increase state standards for their students.¹⁰³ Indeed, prior to 1989, many states engaged in something resembling a “race to the top” in terms of developing and implementing rigorous student achievement goals.¹⁰⁴

NCLB changed states' incentives dramatically, however, and helped transform a "race to the top" into a "race to the bottom."¹⁰⁵ Built into NCLB's statutory architecture, however, is the incentive and ability for states to "dumb-down" their proficiency standards with virtual impunity. States are incented to dilute academic standards because those states that do not achieve AYP face a series of escalating NCLB consequences.¹⁰⁶ States have the ability to dilute proficiency standards because states themselves (with minimal Department of Education oversight), define the student proficiency standards that are used to assess whether AYP is achieved.¹⁰⁷

A review of states' proficiency standards reveals sometimes-considerable variation over time. Commentators note that variation in state standards ranges from "world-class" to "laughable" and that such variation renders the notion of student "proficiency" almost "meaningless."¹⁰⁸ A study of state standards from 2003 through 2007 finds that while proficiency level differences among states are shrinking over time, the overall trend is downward, not upward.¹⁰⁹

Non-Litigious Resistance, Political "Side Doors," and NCLB

One lesson emerging from the still-unfolding NCLB experience includes the efficacy of non-litigious pressure for those displeased with the results of high-stakes testing. This political pressure takes various forms, including legislative and administrative.

On the legislative front, lawmakers proposed ways to alter NCLB even before the legislation formally expired.¹¹⁰ While Democrats focused on ways to increase federal funding attached to NCLB,¹¹¹ Republicans considered ways to relieve states from high-stakes testing requirements.¹¹² These various legislative strategies will culminate soon when Congress formally undertakes NCLB reauthorization.

In addition to legislative avenues, states and schools districts have also expressed their displeasures with NCLB through administrative channels, principally with petitions for waivers from the U.S. Department of Education. Pursuing a waiver strategy can provide something of a “side-door” escape from some of NCLB’s more onerous requirements. Commentators describe the waiver strategy as a “safer and more successful way to cope with NCLB.”¹¹³

Indeed, the act itself formally accommodates waiver applications.¹¹⁴ States and school districts can apply for a waiver if the proposed modification will increase the quality of academic instruction and improve student academic achievement.¹¹⁵ Waivers may provide relief from NCLB requirements for no more than four years.¹¹⁶ Despite NCLB’s waiver provision, commentators describe the requirements necessary to obtain a waiver as “burdensome.”¹¹⁷ Anxious to reduce political criticism of NCLB, Education Secretary Margaret Spellings appeared to display a robust appetite for waivers, despite strong public rhetoric to the contrary.¹¹⁸ Moreover, waivers have provided relief on matters ranging from tutoring restrictions for large urban districts,¹¹⁹ to measuring adequate yearly progress,¹²⁰ to relieving districts devastated by Hurricane Katrina.¹²¹

The political aspects of waivers can be tricky. On the one hand, Education Secretary Margaret Spellings has announced frequently that NCLB is “working” and here to stay.”¹²² Thus, Secretary Spellings cannot be seen to undermine this position by granting too many waivers. On the other hand, political opposition to NCLB—even bi-partisan opposition—is not hard to find.¹²³ This is particularly ominous as the law approaches reauthorization.

An unsuccessful pursuit of waivers, however, can fuel litigation. In *Connecticut v. Spellings*,¹²⁴ the State of Connecticut sued the U.S. Department of Education because of the Department’s failure to grant Connecticut’s waiver requests.¹²⁵ In denying the State of

Connecticut's claims, the court noted that not only had Secretary Spellings declined to withhold federal education funding but also that courts lack judicially manageable standards with which to review a waiver denial.¹²⁶

High-Stakes Testing and School Finance Litigation

Another policy consequence involves costs associated with school finance advocates who successfully leverage poor test results into legal claims for increased educational spending, principally through adequacy lawsuits.¹²⁷ Although the school finance litigation and high-stakes testing movements began independent of one another, the emergence of adequacy theory in school finance litigation helped forge a link between the two movements. Specifically, results from high-stakes tests—in particular, poor results—provided critical evidence for litigants seeking from courts a declaration that schools or districts were “inadequate” as a matter of state constitutional law.¹²⁸

Litigation in Kansas¹²⁹ perhaps most cleanly illustrates how high-stakes testing and school finance litigation can conflate. The Kansas Constitution, as amended in 1966, mandates that the legislature “make suitable provision for finance of the educational interests of the state.”¹³⁰ In 1992, Kansas lawmakers enacted the School District Finance and Quality Performance Act (SDFQPA) to meet its constitutional duty.¹³¹ The SDFQPA created a statewide property tax and a statewide system for collecting and disbursing property tax revenues. Although the SDFQPA presumes equal per pupil spending, district-specific weighting factors modify this presumption. In addition, the SDFQPA established a guaranteed per pupil spending floor along with an accountability system tied to state minimum student performance standards in specific subjects.¹³² Despite a guaranteed per pupil spending floor, a school finance lawsuit challenging the SDFQPA succeeded in 2003.¹³³

Kansas' student proficiency standards—a necessary component under NCLB—played a critical role in the courts' assessment as to whether the Kansas school finance system passed state constitutional muster. At trial, NCLB data were essential to the court's conclusion that the SDFQPA violated the Kansas Constitution.¹³⁴ Although part of the trial court decision was reversed on appeal,¹³⁵ even the Kansas Supreme Court interpreted educational adequacy in terms of student achievement measured incident to NCLB requirements.¹³⁶

Notably, in the Kansas school finance litigation both the plaintiffs *and* defendants turned to NCLB data to support their respective legal positions. The plaintiffs pointed to 2002 and 2003 math and reading proficiency scores for fifth, eighth, and eleventh grade students as evidencing substantial achievement gaps between and among various student cohorts.¹³⁷ The court noted that this evidence was both “informative and disturbingly telling.”¹³⁸ Despite the glaring gaps in student achievement highlighted by the plaintiffs, the defendants noted that even these gaps were not enough to preclude the schools and districts from achieving AYP under NCLB. Although unsuccessful, the defendants argued that achieving AYP under NCLB precluded a finding that the schools and districts provided an inadequate education.¹³⁹ Setting aside debates about whether the Kansas courts correctly interpreted NCLB data for school finance purposes, the critical point is that the courts construed a key school finance concept—educational adequacy—in terms of student academic outcomes prompted by the high-stakes testing incident to NCLB.

Of course, as litigants are beginning to find, results from high-stakes testing—long presumed to be a *sword* for plaintiffs in school finance lawsuits—may also be used as a *shield* by districts and states to defend against claims that resources are inequitably or inadequately distributed.¹⁴⁰ The torturous school finance litigation in Texas illustrates this possibility.

In 2005, after protracted litigation, the Texas Supreme Court adopted student test results as its focus rather than such inputs as per pupil spending.¹⁴¹ The court concluded that Texas was required to fund public K-12 education necessary to achieve a “general diffusion of knowledge.”¹⁴² The court declared that it would adopt a “plainly [test] result-oriented” perspective to assess whether the state was meeting its constitutional obligation.¹⁴³ In rejecting the plaintiffs’ argument that per pupil spending gaps influenced student achievement disparities the court endeavored to separate student inputs (resources) and outcomes (test results). To justify its decision to separate inputs and outcomes, the Texas court noted that even though per pupil spending differences remained static, student test scores improved.¹⁴⁴ Moreover, student test scores increased even though the tests and the material covered in them became more difficult.¹⁴⁵

Teacher Testing

Similar to legal trends in student high-stakes testing, courts appear increasingly unlikely to strike down properly designed high-stakes teacher tests. Aside from critical procedural due process concerns, notably fair notice, what makes teacher testing more complicated than student testing is aligning the test to a measurable outcome. Simply put, consensus more readily exists on how to operationalize desired student outcomes than desired teacher outcomes. Complicating the issue further is that teacher competency can be plausibly assessed by tests designed to gauge teacher skill levels or, in contrast, by results from student achievement tests. Whether a teacher’s effectiveness should be measured by student improvement will persist as a policy debate. The debate takes on particular salience in those states and districts that consider implementing various teacher merit pay schemes. Central to this debate is uncertainty about the relation

between the quality of teaching and student learning. The uncertainty about this critical relation makes courts, in general, less likely to intrude into substantive disputes about it.

Two recent changes in the policy arena also evidence policymakers' increased commitment to high-stakes teacher testing. Most important, of course, is NCLB's command for "highly qualified" teachers for core academic subjects. Although not mandatory, the development of National Board certification for teachers provides independent momentum for teacher testing. Required high-stakes test for purposes of certification (and/or re-certification) and the voluntary National Board certification process illustrates states' receptivity to policy "carrots" as well as "sticks" when it comes to assessing teacher quality and the central role that high-stakes tests play.

PART IV: CONCLUSION

Litigation trends involving high-stakes testing illustrate the dynamic relation between law and education policy. High-stakes tests' initial design limitations as well as residual concerns about the vestiges of segregated schooling prompted courts to impede early high-stakes tests. Once formerly segregated districts achieved unitary status and tests displayed greater attention to students' due process concerns, however, courts became more reluctant to interfere with the increasingly popular high states testing policies. NCLB's incorporation of high-stakes tests has further embedded testing into the American educational landscape. Although policymakers disagree about the usefulness of such tests, few disagree about their potential consequences for students, schools, and districts.

Even if one desired to turn back the judicial clock to an era when courts were far more aggressive in striking down state and school district efforts to impose high-stakes tests, one

critical policy argument suggests that the test instrument should remain even if the consequence is removed. Although policymakers might debate high-stakes tests' policy efficacy, most concede that such tests generate valuable data on student academic performance. At the very least, to ensure that such data exist districts and states should be able to require testing even if a student's performance will not implicate that student's status in school. That is to say, schools and districts should continue administering high-stakes tests, even if courts were to strip the high-stakes component from the tests.

One helpful model in this regard flows from NCLB and involves National Assessment of Educational Progress (NAEP) participation. Prior to NCLB state participation in NAEP tests was purely voluntary. NCLB requires that participating states annually administer state student performance tests in math, reading, and science to, in part, determine whether a school or district has achieved adequately yearly progress under NCLB. Despite requiring that states participate in NAEP, NAEP results, however bad, pose no adverse consequence to the states (aside from potentially bad publicity). Although NAEP tests do not include any "high-stakes" consequence, participation in NAEP serves important policy functions by fueling comparisons across states and generating helpful student performance data.

For better or worse (or, more accurately, for better *and* worse), high-stakes testing increasingly dominates the American K-12 educational terrain. The policy stakes surrounding the fate of high-stakes testing are high. The arc of multi-decade litigation suggests that high-stakes testing's policy fate will be determined in the political rather than judicial arena.

ENDNOTES

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¹ See Paul T. O’Neill, “High Stakes Testing Law and Litigation,” *Brigham Young University Education and Law Journal*, vol. 2003 (2003), p. 623, noting that the number of states imposing some form of high-stakes exam has “consistently risen over the last decade” and the numbers are likely to “continue to climb.”

² See National Research Council, *High Stakes: Testing for Trackings, Promotion, and Graduation*, edited by Jay P. Heubert and Robert M. Hauser (Washington: The National Academies Press, 1999), p. 1.

³ See generally Shiri Klima, “The Children We Leave Behind: Effects of High Stakes Testing on Dropout Rates,” *Southern California Review of Law and Social Justice*, vol. 17 (2007), p. 3.

⁴ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 28 U.S.C. §§ 6301–6578 (Supp. II 2002)).

⁵ 20 U.S.C. § 6311(b)(3).

⁶ See, for example, 20 U.S.C. §§ 6316(b)(7)(C)(i)–(vi).

⁷ 20 U.S.C. § 6319(a)(2).

⁸ For a summary of public opinion support for testing, see Braceras, “Killing the Messenger,” pp. 1127–28; Rebecca Zwick, *Rethinking the SAT: The Future of Standardized Testing in University Admissions* (New York: Routledge, 2004), p. 109. For recent critiques of college admissions practices at elite, selective colleges and universities, see, for example, Daniel Golden, *The Price of Admission: How America’s Ruling Class Buys Its Way Into Elites Colleges—and Who Gets Left Outside the Gates* (New York: Three Rivers Press, 2007); Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (New York: Houghton Mifflin, 2005).

⁹ Jessica R. Berenyi, “‘Appropriate Action,’ Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974,” *Washington and Lee Law Review*, vol. 65 (2008), p. 643, n. 23.

¹⁰ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 26 U.S.C.).

¹¹ Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–61) (amended by Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37).

¹² Pub. L. No. 85-864, § 1001 *et seq.*, 72 Stat. 1580.

¹³ Arthur S. Flemming, “The Philosophy and Objectives of the National Defense Education Act,” *Annals of the American Academy of Political and Social Science, Perspectives on Government and Science*, vol. 327 (1960), p. 136, noting the federal funding implications for K-12 schools.

¹⁴ Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

¹⁵ NCLB involves every state as all receive some level of federal Title I funding. Not every individual school district within a state, however, receives Title I funds. Nevertheless, various parts (but not all) of NCLB apply even to districts that do not receive Title I funds. For a helpful summary of NCLB’s key parts, see James E. Ryan, “The

Perverse Incentives of the No Child Left Behind Act,” *New York University Law Review*, vol. 79 (June 2004), p. 944.

¹⁶ 20 U.S.C. § 6311(b)(2) (Supp. II 2002).

¹⁷ 483 U.S. 203 (1987).

¹⁸ *Ibid.*, at 207.

¹⁹ *School District of City of Pontiac v. Spellings (Pontiac I)*, No. 05-CV-71535-D, 2005 WL 3149545 (E.D.Mich. Nov. 23, 2005).

²⁰ *School District of City of Pontiac v. Secretary of United States Department of Education (Pontiac II)*, 512 F.3d 252 (6th Cir. 2008), *vacated en banc* May 1, 2008.

²¹ Berenyi, “Appropriate Action,” p. 643, n. 23.

²² U.S. Const. amends. V; XIV § 1.

²³ See, for example, Cal. Const. art. I § 3, subdiv. (b)(4), which provides that “[n]othing in this subdivision supercedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law”

²⁴ See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

²⁵ *Ibid.*, at 574–75.

²⁶ U.S. Const. amend. XIV; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C.).

²⁷ For an argument that disparate impact theory should not be applied in the high-stakes testing context, see Jennifer C. Braceras, “Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High Stakes Educational Tests,” *Vanderbilt Law Review*, vol. 55 (May 2002), p. 1120, arguing that high-stakes tests are inappropriate targets of disparate impact theory.

²⁸ 34 C.F.R. § 100.3(b)(2) (2001).

²⁹ See *Alexander v. Sandoval*, 532 U.S. 275 (2001). Similarly, lower court decisions suggest that NCLB does not create a private right of action. See *Association of Community Organizations for Reform Now v. New York City Department of Education*, 269 F.Supp.2d 338, 344 (S.D.N.Y. 2003).

³⁰ See Thomas S. Dee, “Learning to Earn,” *Education Next*, vol. 2003 (2003), p. 65.

³¹ See Jeri J. Goldman, “Political and Legal Issues in Minimum Competency Testing,” *The Educational Forum*, vol. 48 (June 1984), pp. 207–16. It is important to note, however, that many states that made successful passage of MCT a condition for full high school graduation delayed the implementation of the graduation requirement to reduce legal exposure. See Dee, “First Wave,” p. 217, n. 12.

³² For a discussion see Dee, “First Wave,” pp. 233–34.

³³ See Frederick M. Hess, “Refining or Retreating? High Stakes Accountability in the States,” in *No Child Left Behind*, edited by Peterson and West, p. 70.

³⁴ *Ibid.*

³⁵ See Doris Ball and Darryl Paulson, “Back to Basics: Minimum Competency Testing and Its Impact on Minorities,” *Urban Education*, vol. 19 (April 1984), pp. 5–15.

³⁶ Linn, “Comparing to National Norms,” pp. 3–6; Boser, “Pressure Without Support,” *Education Week*, January 11, 2001, p. 68, www.edweek.org/media/ew/qc/archives/QC01full.pdf [June 2008].

³⁷ For example, New Jersey gives the state education agency the power to take over a school district that is performing poorly in terms of student achievement. See, N.J. Stat. Ann. §§ 18A:7A-15, 7A-15.1, 7A-34 to -35, 7A-38 to -40, 7A-42, 7A-44 to -45 (West 1989 & Supp. 1997). For a description of this process, see Sally B. Pancrazio, “State Takeovers and Other Last Resorts,” in *School Boards: Changing Local Control*, edited by Patricia F. First and Herbert J. Walberg (Berkeley, CA: McCutchan Publishing Corporation, 1992), p. 71.

³⁸ See, for example, Tenn. Code Ann. § 49-6-6001 (2001).

³⁹ See, for example, *Debra P. v Turlington*, 644 F.2d 397 (5th Cir. Unit B 1981), which struck Florida’s use of a minimum competency exam that was a requirement for a full academic diploma due to the lingering legacy of school segregation.

⁴⁰ But see Paul O’Neill, “Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy,” *Journal of Law and Education*, vol. 30 (April 2001), pp. 195–216.

⁴¹ See Ryan, “Perverse Incentives,” p. 940.

⁴² 20 U.S.C. § 6311(b)(2)(C)(v)(II).

⁴³ 20 U.S.C. § 6311(b)(2)(F)

⁴⁴ § 6316(b)(5), (8). A stricter set of consequences befalls schools that receive Title I funding and do not achieving AYP. Although Title I public schools are a subset of the entire population of public schools, over one-half of all public K-12 schools receives Title I funds. See Ryan, “Perverse Incentives,” p. 942, n. 46.

⁴⁵ § 6316(a)(1)(B).

⁴⁶ § 6316(b)(1)(a).

⁴⁷ § 6316(b)(1)(E)(i).

⁴⁸ § 6316(b)(5)(B).

⁴⁹ §§ 6316(b)(7)(C)(iv)(I)–(VI).

⁵⁰ § 6316(b)(8)(B).

⁵¹ Ryan, “Perverse Incentives,” p. 945.

⁵² *Ibid.*

⁵³ How many students provided school options would exercise options is a matter of dispute. See, for example, Jay Mathews, “The Wrong Yardstick,” *Washington Post*, April 3, 2008, p. W22.

⁵⁴ See, for example, Sandra E. Black, “Do Better Schools Matter? Parental Valuation of Elementary Education,” *Quarterly Journal of Economics*, vol. 114 (May 1999), p. 578, noting a correlation between student test scores and residential home values.

⁵⁵ 20 U.S.C. § 6319(a)(2).

⁵⁶ For a discussion and summary, see William L. Boyd and Jillian P. Reese, “Great Expectations,” *Education Next*, Spring 2006, pp. 50-57.

⁵⁷ Fla. Stat. §232.245(3) (1977).

⁵⁸ Results from a third administration of the test, released during the trial, were consistent with results from the prior two iterations. Of the students required to take the test, 5.8% failed to pass prior to the end of their senior year in high school. Of those that failed, the failure rate of black students was approximately ten times that of white students. *Debra P.*, 474 F.Supp. at 249.

⁵⁹ See *Debra P. v. Turlington (Debra P. I)*, 474 F.Supp. 244, 248–49 (M.D. Fla. 1979), *aff’d in part, vacated in part (Debra P. II)*, 644 F.2d 397 (5th Cir. Unit B 1981), *remanded to* 564 F.Supp. 177 (M.D. Fla. 1983), *aff’d sub nom. Debra P. by Irene P. v. Turlington (Debra P. III)*, 730 F.2d 1405 (11th Cir. 1984). See also Betsy A. Berbe, “High Stakes Testing: A Potentially Discriminatory Practice with Diminishing Legal Relief for Students at Risk,” *Temple Law Review*, vol. 75 (2002), pp. 868–69.

⁶⁰ *Debra P. I* at 248–49; Berbe, “High Stakes,” pp. 868–69.

⁶¹ *Debra P. I* at 266.

⁶² *Ibid.*, at 267.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at 265.

⁶⁵ *Ibid.*, at 255–56.

⁶⁶ *Ibid.*, at 254–55.

⁶⁷ *Debra P. v. Turlington*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff’d sub nom. Debra P. by Irene P.*, 730 F.2d 1405 (11th Cir. 1984).

⁶⁸ *Debra P. by Irene P. v. Turlington*, 730 F.2d 1405, 1416 (11th Cir. 1984).

⁶⁹ For a discussion of the Texas Assessment of Academic Skills (“TAAS”) as well as its even more rigorous successor, the Texas Assessment of Knowledge and Skills (“TAKS”), see Keith L. Cruise and Jon S. Twing, “The History of Statewide Achievement Testing in Texas,” *Applied Measurement in Education*, vol. 13 (2000), pp. 329–30; O’Neill, “Law and Litigation,” p. 649.

⁷⁰ Tex. Educ. Code Ann. § 39.025.

⁷¹ *GI Forum Image De Tejas v. Texas Education Agency*, 87 F.Supp. 2d 667, 673 (W.D. Tex. 2000).

⁷² Tex. Educ. Code Ann. § 39.025.

⁷³ See Olatunde C.A. Johnson, “Disparity Rules,” *Columbia Law Review*, vol. 107 (March 2007), pp. 397–98, n. 106 (2007).

⁷⁴ *Ibid.*

⁷⁵ *GI Forum*, 87 F. Supp. 2d at 676.

⁷⁶ *Ibid.*, at 681.

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- ⁷⁷ *Ibid.*, at 681–82, referencing *Debra P. by Irene P.*, 730 F.2d at 1416.
- ⁷⁸ Johnson, “Disparity Rules,” p. 399.
- ⁷⁹ See Cal. Educ. Code § 60850 *et seq.*
- ⁸⁰ See Arturo J. González and Johanna Hartwig, “Diploma Denial Meets Remedy Denial in California: Tackling the Issue of Remedies in Exit Exam Litigation After the Vacated *Valenzuela v. O’Connell Preliminary Injunction*,” *Santa Clara Law Review*, vol. 47 (2007), p. 716.
- ⁸¹ *Ibid.*, at 718.
- ⁸² *Ibid.*, at 719.
- ⁸³ *Valenzuela v. O’Connell*, No. CPF-06506050 (Super. Ct. of Cal., County of San Francisco, Mar. 23, 2006).
- ⁸⁴ *O’Connell v. Super. Ct.*, No. JCCP-4468, slip op. (Cal. May 24, 2006).
- ⁸⁵ *O’Connell v. Superior Court*, 47 Cal.Rptr.3d 147, 157 (Ct. App. 2006).
- ⁸⁶ *Ibid.*, at 167–68.
- ⁸⁷ For a discussion of the settlement, see Gonzalez and Hartwig, “Diploma Denial,” pp. 743–51.
- ⁸⁸ *O’Connell*, 47 Cal.Rptr.3d at 162–66.
- ⁸⁹ *Ibid.*, at 165.
- ⁹⁰ See, for example, Robert J. Pushaw, “Justiciability and Separation of Powers: A Neo-Federalist Approach,” *Cornell Law Review*, vol. 81 (1996), pp. 395–512.
- ⁹¹ See, for example, Gonzalez and Hartwig, “Diploma Denial,” pp. 740–43.
- ⁹² See *supra* Subpart II.B.1.
- ⁹³ A.B. 347, 2007 Leg., 2007-08 Sess. (Cal. 2007) www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0301-0350/ab_347_bill_20071012_chaptered.pdf [July 2008], amending sections 1240, 35186, 52378, and 52380 of the California Education Code.
- ⁹⁴ 445 F. Supp. 1094 (D.S.C. 1977), *aff’d mem. sub. nom.* National Educ. Ass’n v. South Carolina, 434 U.S. 1026 (1978).
- ⁹⁵ 407 F. Supp. 1102 (N.D. Ga. 1776).
- ⁹⁶ 445 F. Supp. 1094 (D.S.C. 1977), *aff’d mem. sub. nom.* National Educ. Ass’n v. South Carolina, 434 U.S. 1026 (1978).
- ⁹⁷ *Id.* at 1107.
- ⁹⁸ *Id.* at 1114.
- ⁹⁹ FLORIDA STAT. ANNOT. § 1012.34(3) (2003).
- ¹⁰⁰ See *Sherrod v. Palm Beach County School Board*, 963 So.2d 251, 251-53 (FL. App. 4 Dist., 2006).

¹⁰¹ Id. at 253.

¹⁰² FLORIDA STAT. ANNOT. § 1012.34(3) (2008).

¹⁰³ See Michael Heise, “The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act,” *Nebraska Law Review*, vol. 86 (2007), pp. 128–31.

¹⁰⁴ See Molly O’Brien, “Free at Last? Charter Schools and the ‘Deregulated’ Curriculum,” *Akron Law Review*, vol. 34 (2000), p. 159.

¹⁰⁵ See Peterson & Hess, *supra* note 143, arguing that a race to the bottom exists. But compare James S. Liebman and Charles F. Sabel, “A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform,” *New York University Review of Law and Social Change*, vol. 28 (2003), p. 294, who argues that a race to the bottom does not exist.

¹⁰⁶ Heise, “Unintended Consequences,” p. 129.

¹⁰⁷ *Ibid.*, at 133; 20 U.S.C. § 6311(e)(1).

¹⁰⁸ Peterson & Hess, *supra* note 143, at 70-72.

¹⁰⁹ *Ibid.*, at 73.

¹¹⁰ See, for example, Stephan Langel, “Miller Unveils No Child Left Behind Proposal with Performance Bonuses for Teachers,” *Roll Call*, September 7, 2007, which notes that NCLB expired on September 30, 2007.

¹¹¹ See, for example, Jonathan Weisman and Amit R. Paley, “Dozens in GOP Turn Against Bush’s Prized ‘No Child’ Act,” *Washington Post*, March 15, 2007, p. A01, which notes Democrats’ demands for increased funding.

¹¹² *Ibid.*, which notes Republican-initiated proposals to permit states to opt-out of NCLB testing requirements.

¹¹³ Kristina P. Doan, “No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?,” *Administrative Law Review*, vol. 60 (2008), p. 212.

¹¹⁴ See 20 U.S.C. § 7861 (Supp. V. 2005).

¹¹⁵ *Ibid.*, at § 7861(b)(1)(B)(i)-(ii).

¹¹⁶ *Ibid.*, at § 7861(d)(1)

¹¹⁷ See Doan, “Waivers: Flexibility or Failure,” p. 179.

¹¹⁸ Sam Dillon, “Education Law Is Loosened for Failing Chicago Schools,” *New York Times*, September 2, 2005, p. A12; Lois Romano and Shankar Vedantam, “‘No Child’ Rules to be Eased for a Year, Schools Would Have to Show That Displaced Students Hurt Test Scores,” *Washington Post*, September 30, 2005, p. A10.

¹¹⁹ See Nick Anderson, “Bush Administration Grants Leeway on ‘No Child’ Rules,” *Washington Post*, November 22, 2005, p. A01. Anderson notes the Bush Administration exempted New York, Boston, and Chicago public schools from prohibitions of subsidized tutoring in regions that included schools deemed “in need of improvement.”

¹²⁰ Doan, “Waivers: Flexibility or Failure,” p. 223.

¹²¹ *Ibid.*, at 218.

¹²² See, for example, Dan Liston and others, “NCLB and Scientifically-Based Research: Opportunities Lost and Found,” *Journal of Teacher Education*, vol. 58 (2007).

¹²³ See, for example, Claudia Wallis and Sonja Steptoe, “How to Fix No Child Left Behind,” *Time*, May 24, 2007, p. 34; Brandi M. Powell, “Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments,” *Loyola Journal of Public Interest Law*, vol. 6 (2005), p. 182, describing various proposed legislative amendments to NCLB.

¹²⁴ 453 F.Supp. 2d 459 (D. Conn. 2006).

¹²⁵ *Ibid.*, at 482.

¹²⁶ *Ibid.*, at 482, 495, 499.

¹²⁷ See, for example, Heise, “Era of Accountability,” pp. 262–66; Marshall S. Smith, “What’s Next?,” *Education Week*, January 5, 2006, pp. 66, 70; Martin R. West and Paul E. Peterson, “The Adequacy Lawsuit: A Critical Appraisal,” in *School Money Trials*, edited by West and Peterson, pp. 1, 6; Michael A. Rebell, “Educational Adequacy, Democracy, and the Courts,” in *Achieving High Educational Standards for All: Conference Summary*, edited by Timothy Ready and others (Washington: The National Academies Press, 2002); James S. Liebman, “Implementing *Brown* in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform,” *Virginia Law Review*, vol. 76 (April 1990), p. 378; compare Ryan, “Standards, Testing, and Finance,” p. 1224, who notes though disagrees with the conventional wisdom.

¹²⁸ *Ibid.*

¹²⁹ *Montoy v. State (Montoy II)*, 102 P.3d 1160, 1164 (Kan. 2005) (per curiam), *republished with concurring opinion (Montoy III)*, 120 P.3d 306 (Kan. 2005), *supplemented by (Montoy IV)* 112 P.3d 923 (Kan. 2005).

¹³⁰ Kans. Const. art. VI, § 6.

¹³¹ School District Finance and Quality Performance, 1992 Kan. Sess. Laws § 280.

¹³² Charles Berger, “Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District and Quality Performance Act,” *Journal of Law and Education*, vol. 27 (1998), p. 28.

¹³³ *Montoy v. State (Montoy I)*, No. 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dec. 2, 2003).

¹³⁴ *Ibid.*, at *45.

¹³⁵ See *Montoy II*.

¹³⁶ *Ibid.*, at 1164.

¹³⁷ *Montoy I*, at *47.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, at *41.

¹⁴⁰ See Ryan, “Standards, Testing, and Finance,” p. 1224.

¹⁴¹ See *Neeley v. W. Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746, 769–70 (Tex. 2005).

¹⁴² *Ibid.*, at 788.

¹⁴³ Ibid.

¹⁴⁴ Ibid., at 789–90.

¹⁴⁵ Ibid.