

# COURTING TROUBLE: LITIGATION, HIGH-STAKES TESTING, AND EDUCATION POLICY

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## INTRODUCTION

Unanticipated consequences invariably flow from court decisions that venture too deeply into legislative and executive policy terrain. Many public policies embody a careful and somewhat delicate calibration of various political interests and compromises. Litigation, by contrast, is adversarial by design and, in general, is limited in scope and reach to the litigating parties' interests. Litigation—and sometimes the mere threat of litigation—frequently influences public policies. The blunt force trauma often inflicted by litigation onto public policies is rarely pretty and often discourages many, especially those impacted by the affected public policies.

Untidy fallout from the interaction between litigation and public policy is common in many policy sectors, especially education. With education policy in particular, this untidiness results partly from the inherent complexity of numerous education policies as well as from the importance of the stakes involved. Some examples of unanticipated consequences incident to legal decisions involving education policies are obvious and easily identified;<sup>1</sup> others are more subtle and nuanced.<sup>2</sup>

Although recent scholarship expresses confidence in the courts' ability to drive education policy and reform,<sup>3</sup> such confidence rests uneasily on optimistic

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1. For example, California's experience in the school finance context is particularly notable. Ironically, successful and path-breaking school finance litigation in California contributed to policies that resulted in a decrease in California's national ranking for per-pupil spending. The precise causal relation between the *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), decision and California's Proposition 13, CAL. CONST. of 1879 art. XIII A, §§ 1-6, remains in dispute. For a discussion, see, for example, William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's "Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13,"* 51 UCLA L. REV. 887, 890 (2004); Issac Martin, *Does School Finance Litigation Cause Taxpayer Revolt? Serrano and Proposition 13*, 40 LAW & SOC'Y REV. 525, 526-28 (2006); Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 807 (2003).

2. The “empiricization of the equal educational opportunity” doctrine is an often-overlooked consequence of the *Brown v. Board of Education* opinion. See, e.g., Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1310-11 (2002).

3. See, e.g., BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED

assessments of the courts' comparative ability to minimize consequences set in motion by legal decisions that unsettle education policies. The empirical evidence on the efficacy of court-driven education reforms over the past decades in this regard, however, is mixed.<sup>4</sup>

Even those persuaded by litigation's advantages and contributions to education reforms recognize that the likelihood of legal challenges successfully revolutionizing high-stakes testing policy is increasingly dim.<sup>5</sup> Moreover, even if litigants were poised to deliver positive contributions to high-stakes testing policy in the past, the prospects of legal challenges hoping to disrupt high-stakes tests have diminished over time. Policymakers' recent changes to high-stakes tests make the tests less exposed to legal challenges and, thus, less vulnerable to disruption from litigation and adverse court decisions. Although a complete explanation for why lawsuits challenging high-stakes tests are currently less likely to succeed needs to account for numerous variables and their complicated interactions, this Article focuses on one such variable. Specifically, this Article argues that increased judicial sensitivity to adverse policy consequences from court decisions contributes to the diminishing prospects of lawsuits seeking to upset high-stakes tests.

High-stakes testing policies did not emerge in an education policy vacuum. Part I of this Article includes a brief description of the major high-stakes tests and their policy rationales. Part II surveys recent litigation challenging one distinct genre of high-stakes testing—high school exit exams.<sup>6</sup> Two cases illustrate courts' current posture toward legal challenges of exit exams. Part III reviews evidence of courts' increased sensitivity to the policy consequences attributable to court decisions that interfere with the implementation of exit exams. Part IV concludes and notes the important normative questions raised by judges' concerns with policy consequences flowing from their decisions.

## I. HIGH-STAKES TESTS AND POLICY RATIONALES

High-stakes testing's position on the education policy landscape greatly increased in prominence when minimum competency tests (MCTs) emerged in

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EDUCATION REFORM 14 (2008) (noting the potential for courts to "have a significant and positive influence on the standards-based reform movement"); Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, in *LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 1, 3 (Jay P. Heubert ed., 1999) (concluding that law-based reform efforts "hold great potential for improving the educational opportunities of disadvantaged children").

4. See, e.g., Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2446-50 (2004) (summarizing the uneven empirical findings about litigation-initiated education reforms that seek to enhance equal educational opportunity).

5. SUPERFINE, *supra* note 3, at 14, 86.

6. See *GI Forum Image DeTejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000); *Valenzuela v. O'Connell*, No. CPF-06-506050 (San Francisco County Ct. Mar. 23, 2006), *vacated sub nom. O'Connell v. Superior Court*, 47 Cal. Rptr. 3d 147 (Ct. App. 2006).

the 1970s. MCTs were largely subsumed during the next decade by States' growing policy commitments to the educational standards and assessment movement. Presently, the federal No Child Left Behind Act (NCLB)<sup>7</sup>—particularly its adequate yearly progress requirements<sup>8</sup>—is the public face of high-stakes testing for K-12 education. NCLB also dramatically altered the high-stakes test setting and increased (and redirected) the consequences for schools and school districts.

#### A. Examples of High-Stakes Tests

In an effort to blunt fears that social promotion policies, unfocused curricula, and diluted academic standards combine to devalue the high school diploma,<sup>9</sup> States began to implement MCTs. In general, students who fail to achieve a certain mastery of core academic subjects, measured by MCTs, are either not promoted or not graduated (or both).<sup>10</sup> If students who fail to achieve an acceptable score on MCTs are nonetheless still entitled to graduate, such students typically receive a “certificate of attendance” rather than a full academic diploma.<sup>11</sup> Introduced in Oregon in 1973, MCTs quickly gained popularity and spread to other states.<sup>12</sup> By 1980, thirty-six states enacted some form of minimum competency testing program,<sup>13</sup> with fifteen states requiring satisfactory performance as a condition for graduation.<sup>14</sup>

Most states found it far easier to enact MCT legislation than to implement the tests.<sup>15</sup> Resistance to MCTs quickly emerged due to the legal and political fallout incident to students' failing MCTs and, in particular, not graduating.<sup>16</sup> As various States began to implement MCTs, initial failure rates (of eighth or ninth grade students) sometimes exceeded 30%.<sup>17</sup> Because non-white students and

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7. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–6578 (2006)).

8. 20 U.S.C. § 6311(b)(3).

9. See Thomas S. Dee, *Learning to Earn*, EDUC. NEXT, Summer 2003, at 65, 65.

10. See *id.* at 66.

11. See, e.g., TENN. CODE ANN. § 49-6-6001 (West 2006 & Supp. 2008).

12. See Jeri J. Goldman, *Political and Legal Issues in Minimum Competency Testing*, 48 EDUC. FORUM 207, 208 (1984).

13. *Id.*

14. However, 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 Thomas S. Dee, *The “First Wave” of Accountability*, in NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 215, 217 (Paul E. Peterson & Martin R. West eds., 2003).

15. Frederick M. Hess, *Refining or Retreating? High-Stakes Accountability in the States*, in NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 55, 55-56 (Paul E. Peterson & Martin R. West eds., 2003).

16. *Id.* at 56.

17. *Id.* at 70.

students from low-income households failed MCTs at rates that exceeded their white counterparts,<sup>18</sup> legal pressure against the tests mounted. Many states sought relief from such pressure 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.<sup>19</sup>

Most observers assumed that lawsuits would quickly follow in states where standards and assessments triggered palpable consequences for students and schools. Although fears of litigation from disappointed students were not misplaced,<sup>20</sup> increasingly careful planning by policymakers, greater attention to implementation details, focused deployment of additional resources, increased student preparation and remediation options, and an almost unlimited supply of second chances for students substantially reduced the prospects of lawsuits challenging high-stakes exit exams.<sup>21</sup>

Unlike most minimum competency tests, NCLB focuses its attention on schools rather than the students who attend them.<sup>22</sup> At its core, NCLB leverages State-created standards and assessments, increases transparency by disseminating data on progress, and imposes consequences on local schools and districts for insufficient annual student progress.<sup>23</sup> As commentators note, standardized tests are the fuel that runs the NCLB engine.<sup>24</sup> 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.<sup>25</sup> All of these student test scores are used to assess whether a school is achieving adequate yearly progress (AYP). Although states currently enjoy significant latitude in establishing yearly proficiency benchmarks, under NCLB almost all students must achieve academic proficiency.<sup>26</sup>

A sliding scale of consequences greets schools that do not achieve AYP.<sup>27</sup>

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18. See generally Darryl Paulson & Doris Ball, *Back to Basics: Minimum Competency Testing and Its Impact on Minorities*, 19 URBAN EDUC. 5 (1984).

19. See Hess, *supra* note 15, at 70.

20. See, e.g., *Debra P. v. Turlington*, 644 F.2d 397, 407 (5th Cir. Unit B May 1981) (striking 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).

21. But see Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & EDUC. 185, 195–216 (2001) (detailing suits challenging high-stakes testing regimes).

22. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004) [hereinafter Ryan, *Perverse Incentives*].

23. *Id.* at 939–42.

24. *Id.* at 940.

25. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2006).

26. *Id.* § 6311(b)(2)(F).

27. *Id.* § 6316(b)(5), (8). A stricter set of consequences befalls schools that receive Title I funding and do not achieve 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 receive Title I funds. See Ryan, *Perverse Incentives*, *supra* note 22, at 942 (citing DEP'T OF EDUC., FACT SHEET ON TITLE I,

Federally-aided public schools that fail to achieve AYP are designated as needing “school improvement.”<sup>28</sup> Schools failing to achieve AYP for two consecutive years must develop a school improvement plan after receiving technical assistance from the U.S. Department of Education.<sup>29</sup> Also, students assigned to such schools become eligible to select and attend a different public school within their district.<sup>30</sup> Schools that fail to demonstrate AYP for three consecutive years must provide, at district expense, individual tutoring services to students attending these schools.<sup>31</sup> After four consecutive years, schools must undertake one of several measures, ranging from replacing school staff to implementing a more challenging curriculum.<sup>32</sup> A school that fails to achieve AYP for five consecutive years runs the risk of having to engage in significant restructuring, including surrendering to district control, dissolving, or reopening as a charter school.<sup>33</sup>

Although the NCLB consequences for under-performance focus on schools, the fallout extends beyond the schools. Increasingly, state and local politicians believe they have vicarious political liability for struggling schools. As states increasingly centralize education policy control, governors become more interested in the fate of public schools. 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.<sup>34</sup> A desire to protect home equity exists independent of whether the homeowner has school-age children.<sup>35</sup> Similarly, local economic and businesses interests, especially those with critical skilled-labor requirements, possess an important stake in the success of local public school systems.<sup>36</sup>

### *B. Policy Rationales for High-Stakes Testing*

High-stakes tests are one part of a larger standards and assessment movement. As Professor James Ryan notes, “[s]tandards and testing currently dominate the landscape of public education.”<sup>37</sup> The current standards and assessment policy push flows partly from a building desire to hold students,

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PART A (2002), available at <http://www.ed.gov/rschstat/eval/disadv/title1-factsheet.doc>.

28. 20 U.S.C. § 6316(a)(1)(B).

29. *Id.* § 6316(b)(1)(A).

30. *Id.* § 6316(b)(1)(E)(i).

31. *Id.* § 6316(b)(5)(B).

32. *Id.* § 6316(b)(7)(C)(iv).

33. *Id.* § 6316(b)(8)(B).

34. See, e.g., Sandra E. Black, *Do Better Schools Matter? Parental Valuation of Elementary Education*, 114 Q.J. ECON. 577, 578 (1999) (noting a correlation between student test scores and residential home values).

35. *Id.*

36. *Id.* at 583.

37. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1226 (2008) [hereinafter Ryan, *Standards, Testing, and Finance*].

schools, districts, and states more accountable for education results. Originally launched at the state level, the federal government, through NCLB, now functionally drives the standards and assessment policy.<sup>38</sup>

The 1983 publication of the *Nation at Risk* report,<sup>39</sup> along with other factors, helped launch the modern standards and assessment movement in many states. The report highlighted a curriculum that lacked focus, coherence, and rigor as well as a culture of low expectations for too many students.<sup>40</sup> The report's authors warned of an ominous "rising tide of mediocrity"<sup>41</sup> that posed a substantial threat to national economic security.<sup>42</sup> Reaction to the *Nation at Risk* report was both swift and substantial.<sup>43</sup> Proponents of heightened academic standards cited the report as support for increased attention to core academic subjects, high expectations and standards for all students, and greater accountability for outcomes through tests designed to gauge students' and schools' progress toward the academic standards.<sup>44</sup>

In response to *Nation at Risk*, many states began reviewing or, in some instances, articulating for the first time, goals for student educational outcomes. Writing in 1986 for the National Governor's Association report, *Time for Results*,<sup>45</sup> then-governor of Tennessee Lamar Alexander underscored the governors' collective commitment to meaningful standards and assessments.<sup>46</sup> Indeed, many governors boasted about their states' rigorous student performance standards and tethered them to efforts to make their states more economically competitive.<sup>47</sup> By 1992, nearly every state had increased course requirements for high school graduation.<sup>48</sup> The current education reform push continues to focus on refining challenging standards for student performance.

The impulse to centralize the standards and assessments efforts, however, did

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38. *Id.* at 1224.

39. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

40. *See* Dee, *supra* note 14, at 217-18.

41. NAT'L COMM'N ON EXCELLENCE IN EDUC., *supra* note 39, at 5.

42. *Id.*

43. *See, e.g.,* Karen MacPherson, *A Nation Still at Risk; Two Decades Later Reports Still Focusing on the Mediocrity of U.S. Education*, PITT. POST-GAZETTE, Aug. 31, 2003, at A11.

44. For a helpful summary of the social history of the standards and assessment movement, see generally CHESTER E. FINN, JR., *WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE* (1991); DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* (2000); Ryan, *Perverse Incentives*, *supra* note 22, at 938.

45. NATIONAL GOVERNORS' ASS'N, *TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION* (1991).

46. Lamar Alexander, *Chairman's Summary* to NATIONAL GOVERNORS' ASS'N, *supra* note 45, at 3.

47. *See, e.g.,* Tony Freemantle, *New Education Chief Hailed as "Visionary,"* HOUS. CHRON., Dec. 22, 1992, at A6; George Uhlig, *Alabama Needs Systemic Change, New Educational Vision*, MOBILE REGISTER (Ala.), Dec. 5, 1993, at C3.

48. *See* Dee, *supra* note 14, at 218.

not end with the governors. Seeking to leverage a movement already underway, the federal government launched efforts to complement the largely state-initiated standards and assessment movement. In his 1997 State of the Union Address, President Clinton called for “a national crusade for education standards—not Federal Government standards, but national standards representing what all of our students must know to succeed in the knowledge economy of the 21st century.”<sup>49</sup> In the mid-1990s, Congress staked its own claim in the education policy debate by passing the Improving America’s Schools Act (IASA),<sup>50</sup> which directed federal Title I funds towards state standards and assessment efforts.<sup>51</sup> States were required to develop challenging standards and assessments for all students and all schools. Critically, these requirements did not apply solely to Title I-eligible schools<sup>52</sup> as Congress sought to ensure that all states developed challenging academic expectations for all schools, regardless of a school’s student composition.

Even more dramatic legislative action soon followed. Congress passed NCLB in 2001 with significant bi-partisan support and fanfare.<sup>53</sup> The Act builds on earlier federal statutes in several important ways. Now, states desiring federal Title I funds must establish school accountability systems that include annual student tests of math, reading, and science proficiency for grades three through eight.<sup>54</sup> States are also obligated to gather, report, and disseminate aggregate test results for all students as well as for various student subgroups that contain a minimum number of students.<sup>55</sup> Although state standards must be “challenging,”<sup>56</sup> NCLB essentially leaves it to the states to establish their own standards and assessments, as well as proficiency thresholds.<sup>57</sup> However a state defines proficiency, virtually every student must achieve it by 2014.<sup>58</sup>

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49. *President Clinton’s Message to Congress on the State of the Union*, N.Y. TIMES, Feb. 5, 1997, at A20.

50. Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

51. *See, e.g.*, 20 U.S.C. § 6311(b)(1) (current version at 20 U.S.C. § 6311(b)(1) (2006)).

52. 20 U.S.C. § 6311(b)(3) (2006).

53. *See, e.g.*, Elisabeth Bumiller, *Focusing on Home Front, Bush Signs Education Bill*, N.Y. TIMES, Jan. 9, 2002, at A16; *The State of the Union: President Bush’s State of the Union Address to Congress and the Nation*, N.Y. TIMES, Jan. 30, 2002, at A16.

54. 20 U.S.C. § 6311(b)(3)(C)(v)(II) (providing for the addition of science testing beginning in the 2007 school year).

55. *Id.* § 6311(h).

56. *Id.* § 6311(b)(1).

57. *Id.* § 6311(b)(2). Although NCLB does not require states to submit their standards to the Secretary of Education for review, states must submit plans that demonstrate a commitment to challenging academic standards. *See id.* § 6311(b)(1)(A).

58. *Id.* § 6311(b)(2)(F).

## II. RECENT HIGH-STAKES TESTING LITIGATION

High-stakes testing is designed to impose consequences for many students, schools, and districts. The imposition of consequences for under-performance disrupts the education status quo along with individual and institutional interests. Not surprisingly, high-stakes tests stimulate litigation efforts seeking to blunt the consequences flowing from low test scores. Much of the litigation pursues one of three broad legal claims (or a combination of two or more claims): due process, equal protection, or statutory allegations (notably Title VI). A review of two recent lawsuits highlights important themes.

### A. GI Forum

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.<sup>59</sup> The Texas Assessment of Knowledge and Skills (TAKS), introduced in 2003, replaced TAAS.<sup>60</sup> Results from the TAKS not only implicate students, but also schools and school districts that are assessed based on data generated by the exam.

TAAS and TAKS 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.<sup>61</sup> TAKS is even more indulgent and gives students an unlimited number of chances to pass.<sup>62</sup> Moreover, students who leave high school without a full academic diploma can continue taking TAKS and will receive a diploma retroactively upon passage.<sup>63</sup>

Similar to the distributions in other states that impose exit exams, test failure rates in Texas were distributed unevenly across various student subgroups.<sup>64</sup> Notably, African-American and Hispanic students failed at disproportionate rates.<sup>65</sup> 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's exit exam violated students' equal protection, due process, and statutory rights.<sup>66</sup> Among the

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59. 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. Cruse & Jon S. Twing, *The History of Statewide Achievement Testing in Texas*, 13 APPLIED MEASUREMENT IN EDUC. 327, 329-30 (2000); Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 649.

60. TEX. EDUC. CODE ANN. § 39.025 (Vernon 2006).

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

62. TEX. EDUC. CODE ANN. § 39.025 (Vernon 2006).

63. *Id.*

64. *GI Forum*, 87 F. Supp. 2d at 675.

65. *Id.*

66. *Id.* at 668.



numerous legal claims asserted, only the students' statutory Title VI claim proceeded to trial.<sup>67</sup>

Within the Title VI context, the court dwelled on the stark disparity in pass rates between white and non-white students.<sup>68</sup> Expert witnesses helped frame the focus on the pass rate disparity as both sides agreed that the initial administration of the exit exam adversely impacted non-white students<sup>69</sup> and that statistically significant, though lower, disparities existed in the cumulative exam pass rates.<sup>70</sup> On the basis of largely uncontested statistical evidence, the trial court in *GI Forum* concluded that the plaintiffs successfully established a prima facie discrimination claim against the state's exit exam.<sup>71</sup>

Despite the minority students' victory in establishing a prima facie discrimination 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.<sup>72</sup> 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."<sup>73</sup> The court also rejected the plaintiffs' assertion that equally effective yet less disparate alternatives to the exit exam existed.<sup>74</sup> Moreover, the court noted that the State provided adversely affected students remedial classes expressly geared toward passing the exit exam.<sup>75</sup> Consequently, Judge Prado ruled against the students and declined to interfere with the Texas exit exam's implementation.<sup>76</sup>

### B. O'Connell

In 1999, California joined a growing line of states that imposed the successful completion of a state-wide exit exam as a condition for a student receiving a full high school diploma.<sup>77</sup> State lawmakers implemented the California High School Exit Exam (CAHSEE) in conjunction with a larger statewide effort that endeavored to bolster academic standards and assessments.<sup>78</sup> Students begin taking CAHSEE while in tenth grade and are afforded multiple

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67. *Id.*

68. *Id.* at 676-82.

69. See Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 398 n.106 (2007).

70. *Id.* at 397-98.

71. *GI Forum*, 87 F. Supp. 2d at 679.

72. *Id.* at 671.

73. *Id.* at 681.

74. *Id.* at 681-82 (citing *Debra P. v. Turlington*, 730 F.2d 1405, 1416 (11th Cir. 1989)).

75. *Id.* at 676.

76. *Id.* at 683-84.

77. See CAL. EDUC. CODE §§ 60850-60859 (West 2003 & Supp. 2008).

78. See Arturo J. González & 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*, 47 SANTA CLARA L. REV. 711, 715-16 (2007).

opportunities to re-take it.<sup>79</sup>

Testing began in 2001 for California's high school students (freshmen) planning to graduate in 2004.<sup>80</sup> By the summer of 2002, however, less than one-half of the class of 2004 had passed the exam.<sup>81</sup> Moreover, Latino, African-American, and low-income students were far less likely to pass.<sup>82</sup> As a consequence, the California State Board of Education voted to delay denying diplomas to students until 2006.<sup>83</sup> The two-year implementation delay was designed to provide students and schools with even more time to adjust to (and pass) CAHSEE. However, as graduation for the class of 2006 approached, many students still had not passed CAHSEE and, as a consequence, were ineligible to graduate.<sup>84</sup> With the looming prospect of denying high school diplomas to thousands of California high school students, a class action lawsuit was filed in state court to enjoin the State from withholding diplomas from those students who had not passed the exit exam.<sup>85</sup>

In *Valenzuela v. O'Connell*,<sup>86</sup> the trial court judge enjoined CAHSEE's 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.<sup>87</sup> Harms to the students included claims relating to equal protection and the right to an education.<sup>88</sup> Anxious to appeal the injunction and obtain quick and definitive legal guidance from the California Supreme Court, the State sought to bypass the court of appeals.<sup>89</sup> The supreme court sent the matter to the state appellate court rather than deciding the merits of the injunction.<sup>90</sup>

After hearing from both parties at oral argument and numerous others in amici curiae briefs, the three-judge appellate panel sided with the State and vacated the trial court's preliminary injunction.<sup>91</sup> While the appellate court agreed with the trial court that the plaintiffs were likely to prevail on their equal educational opportunity denial claims,<sup>92</sup> the appellate court nonetheless concluded that upholding the trial court's injunctive relief would amount to an

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79. *Id.* at 716.

80. *Id.* at 718.

81. *Id.*

82. *Id.* at 719.

83. *Id.* at 718.

84. *Id.* at 725-26.

85. *Id.* at 728-29.

86. *Valenzuela v. O'Connell*, No. CPF-06-506050 (San Francisco County Ct. Mar. 23, 2006), *vacated sub nom.* *O'Connell v. Superior Court*, 47 Cal. Rptr. 3d 147 (Ct. App. 2006).

87. *González & Hartwig*, *supra* note 78, at 731 (discussing the motions and disposition of *Valenzuela*).

88. *Id.* at 729.

89. *Id.* at 731.

90. *Id.* (citing *O'Connell v. Superior Court*, No. JCCP-4468, slip op. (Cal. May 24, 2006)).

91. *O'Connell*, 47 Cal. Rptr. 3d at 150.

92. *Id.* at 157.

improper encroachment onto legislative terrain.<sup>93</sup> The appellate court ruling, which supported California's high-stakes exit exam, prompted a settlement among the litigating parties.<sup>94</sup>

Despite the plaintiffs' disappointment with the outcome in *O'Connell*, the subsequent settlement culminated in new state legislation that established important benefits and services for students who struggle with CAHSEE.<sup>95</sup> Under the new law, students are entitled to two additional years of instruction if they have not passed the exam by the end of their senior year.<sup>96</sup> This supplemental instruction focuses on preparing students for the exit exam. Also, the law entitles students whose primary language is not English to two additional years of language instruction to better prepare them to pass the exam.<sup>97</sup>

### III. AN EMERGING JUDICIAL AWARENESS OF UNANTICIPATED POLICY CONSEQUENCES

During the early 1980s, prior to the Texas and California exit exam litigation, Florida courts struggled mightily with that state's exit exam, principally due to discrimination claims.<sup>98</sup> Unlike what Texas and California policymakers experienced, however, in Florida, protracted litigation and numerous court decisions contributed to a multi-year delay in the implementation of the Florida exit exam. What explains the difference between the litigation experience in Florida and the more recent litigation in Texas and California? After all, similar to the Florida courts, the Texas<sup>99</sup> and California<sup>100</sup> courts noted the exit exams' disparate impact on non-white students. Indeed, in *O'Connell*, the appellate court felt that the plaintiffs were likely to *prevail* in establishing their equal educational opportunity denial claims.<sup>101</sup> Notwithstanding the high-stakes exams' deleterious impact on non-white students, however, the Texas<sup>102</sup> and California<sup>103</sup> courts declined to meaningfully interfere with the state exit exams.

Among the factors that influenced the outcomes in *GI Forum* and *O'Connell*

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93. *Id.* at 165.

94. For a discussion of the settlement, see González & Hartwig, *supra* note 78, at 743–51.

95. Assemb. B. No. 347, 2007 Leg., 2007-08 Sess. (Cal. 2007) (amending CAL. EDUC. CODE §§ 1240, 35186, 37254, 52378, and 52380), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0301-0350/ab\\_347\\_bill\\_20071012\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0301-0350/ab_347_bill_20071012_chaptered.pdf).

96. *Id.*

97. *Id.*

98. See *Debra P. v. Turlington (Debra P. I)*, 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B May 1981), *remanded to* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

99. *GI Forum Image DeTejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 675-76 (W.D. Tex. 2000).

100. *O'Connell v. Superior Court*, 47 Cal. Rptr. 3d 147, 170 (Ct. App. 2006).

101. *Id.* at 157.

102. *GI Forum*, 87 F. Supp. 2d at 683-84.

103. *O'Connell*, 47 Cal. Rptr. 3d at 171.

were the states' and school districts' modifications to their high-stakes tests, which made them less vulnerable to legal attack. Specifically, Texas and California policymakers benefitted from prior litigation in other states, notably Florida, and adjusted their high-stakes testing policies in ways that made them more sensitive to the important due process factors that exit exams implicate. In particular, exit exams in Texas and California paid greater attention to procedural and substantive concerns, including notice, multiple chances to take tests, greater supplemental resources to needy students, and serious attention to the tests' content validity.<sup>104</sup>

In addition to states crafting more litigation-sensitive exit exams, the more recent court decisions also suggest that courts became increasingly sensitive to the unanticipated consequences that flow from court decisions that disrupt high-stakes testing policies. These consequences include various financial costs triggered by high-stakes testing litigation. Other policy consequences, including those that the *GI Forum* and *O'Connell* decisions specifically reference, involve efforts to shore up the currency of the high school diploma and to improve student and school performance.<sup>105</sup>

*A. Secondary and Tertiary Policy Consequences Flowing from  
High-Stakes Testing Litigation*

Litigation challenging high-stakes tests imposes important financial and policy costs. Indeed, the mere specter of litigation, including lawsuits *unlikely* to prevail, imposes such costs. Even though the 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 claims financial resources. For cash-strapped states in particular, the potential for such costs might be sufficient to prompt States to lower student proficiency thresholds in an effort to reduce both legal exposure and political fallout.

Another financial implication, though derivative, involves costs associated with school finance advocates who successfully leverage poor test results into legal claims for increased education spending, principally through adequacy lawsuits.<sup>106</sup> Although the school finance litigation and high-stakes testing movements began independently of one another, the emergence of adequacy theory in school finance litigation helped forge a link between the movements.

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104. *GI Forum*, 87 F. Supp. 2d at 672-73; *O'Connell*, 47 Cal. Rptr. 3d at 156-57.

105. *GI Forum*, 87 F. Supp. 2d at 681-82; *O'Connell*, 47 Cal. Rptr. 3d at 160-61.

106. See, e.g., Michael Heise, *Adequacy Litigation in an Era of Accountability*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 262-66 (Martin R. West & Paul E. Peterson eds., 2007); Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in *SCHOOL MONEY TRIALS* 1, 6 (Martin R. West & Paul E. Peterson eds., 2007); James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 378 (1990); cf. Ryan, *Standards, Testing, and Finance*, *supra* note 37, at 1224 (noting, although disagreeing with, the conventional wisdom); Marshall S. Smith, *What's Next?*, *EDUCATION WEEK*, Jan. 5, 2006, at 66.

By design, high-stakes exit exams generate data germane to student and school performance. Results from high-stakes tests—in particular, poor results—provide critical evidence for litigants seeking a declaration from courts that schools or districts are “inadequate” as a matter of state constitutional law.<sup>107</sup> Thus, litigation that interferes with high-stakes tests unsettles a link between high-stakes testing and school finance litigation efforts.

Litigation challenging high-stakes exit exams imposes non-financial costs as well. One such cost prompted by legal exposure from exit exams is pressure to dilute academic standards, such as exit exam “cut-scores.” In Texas, as the *GI Forum* opinion notes, policymakers temporarily bowed to such pressures by initially setting the exit exam cut-score at 60% and phasing-in the 70% cut-score one year later.<sup>108</sup> The initial 60% cut-score was used even though policymakers generally felt that a 70% score reflected sufficient “mastery” of essential academic skills for purposes of awarding a high school diploma.<sup>109</sup> By reducing the passing score in the exit exam’s initial year, however, Texas policymakers substantially reduced the number of failing students and, in so doing, reduced initial political (and legal) opposition to the exit exam.<sup>110</sup>

States’ experiences with setting (or resetting) standards after NCLB also illustrate how such perverse incentives operate. Prior to NCLB, many states, notably Southern states, began a campaign to increase standards for their students.<sup>111</sup> Indeed, prior to the late 1990s, many states engaged in something resembling a “race to the top” in terms of developing and implementing rigorous student achievement goals.<sup>112</sup> Transforming high academic standards into a legal sword against schools and districts, however, blunted a policy drive toward more rigorous standards. Diluting standards and proficiency levels directly reduces the number of potential plaintiffs with standing to legally challenge exit exam policies.

It is important to note, however, that litigation challenging high-stakes testing did not generate only dead-weight financial and policy costs. Early litigation influenced the design of more recent high-stakes tests. For example, many states and districts now provide greater supplemental services and remedial resources to at-risk students to better prepare them for high-stakes tests. In addition, states take greater pains to content validate their tests.<sup>113</sup> Although such changes undoubtedly add to the financial cost of implementing high-stakes tests, such

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107. See, e.g., sources cited *supra* note 106.

108. *GI Forum*, 87 F. Supp. 2d at 673.

109. *Id.*

110. See *id.*

111. See Michael Heise, *The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119, 128–31 (2007).

112. See Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 159 (2000).

113. *GI Forum*, 87 F. Supp. 2d at 681–82; *O’Connell v. Superior Court*, 47 Cal. Rptr. 3d 147, 160–61 (Ct. App. 2006).

changes also contribute to more accurate and equitable tests.

*B. Evidence of Increased Judicial Awareness of Policy Consequences*

The *GI Forum* and *O'Connell* opinions contain language that hints at increased judicial awareness of the policy consequences that flow from court decisions disrupting high-stakes testing policy. Of particular note to both courts were consequences to the integrity of the high school diploma as well as broader State efforts to improve student and school performance.<sup>114</sup>

To be sure, the *GI Forum* opinion conveys the Texas court's distinct unease with the prospect of the judiciary having to take sides in these education policy fights. The opinion notes that it would be improper for the court to assess the policy wisdom of Texas' high-stakes exit exam.<sup>115</sup> The Texas judge also observed that the State's requirement that students pass an exit exam reflected the State's "insistence on [educational] standards."<sup>116</sup> Moreover, in discussing the policymakers' decision about where to set proficiency levels, the opinion makes clear that "the Court cannot pass on the State's determination of what, or how much, knowledge must be acquired prior to high school graduation."<sup>117</sup>

Although portions of the *GI Forum* opinion convey the court's desire to remain policy-neutral, other parts of the opinion illustrate how the court expressly engaged with various components of high-stakes testing policy. In its assessment of various testing policies, the court makes clear that it had "taken into account the immediate impact of initial and subsequent in-school failure of the exam."<sup>118</sup> The opinion also notes with approval that through the exit exam, Texas officials sought to "hold schools, students, and teachers accountable for education"<sup>119</sup> and that the high-stakes test effectively achieves its objectives.<sup>120</sup> More specifically, the court concluded that the Texas exit exam "boosted student motivation and encouraged learning."<sup>121</sup> In so doing, according to the court, the Texas exit exam helps make high school diplomas in Texas "uniformly meaningful."<sup>122</sup>

California judges in the *O'Connell* opinion displayed a similar desire to remain above the education policy fray yet not blind themselves to the consequences of court interference with high-stakes testing. The *O'Connell* opinion begins by dutifully noting the court's obligation to "respect the separate constitutional roles of the Executive and the Legislature."<sup>123</sup> In the opinion's

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114. *GI Forum*, 87 F. Supp. 2d at 681-82; *O'Connell*, 47 Cal. Rptr. 3d at 160-61.

115. *GI Forum*, 87 F. Supp. 2d at 670.

116. *Id.*

117. *Id.*

118. *Id.* at 678.

119. *Id.* at 679.

120. *Id.* at 679-80.

121. *Id.* at 681.

122. *Id.*

123. *O'Connell v. Superior Court*, 47 Cal. Rptr. 3d 147, 155-56 (Ct. App. 2006) (quoting Butt

very next sentence, however, the judges evidenced a certain level of policy sensitivity when noting their obligation to “‘strive for the least disruptive remedy adequate to . . . [the judiciary’s] legitimate task.’”<sup>124</sup> In even blunter language elsewhere in the opinion, the California judges make clear their awareness of the “fundamental issues of public policy implicated in the case now before” them.<sup>125</sup>

Similar to the *GI Forum* opinion, the *O’Connell* opinion also pays homage to the policy goal of trying to resurrect the integrity of the high school diploma. The California court noted that if it was to strike down California’s exit exam and thereby permit students who have failed to master basic academic content to graduate with full diploma privileges, the high school diploma would be “debase[d]” and thus lose further meaning and currency.<sup>126</sup> The *O’Connell* opinion also conveys the judges’ desire to not interfere with the State’s policy goal of raising academic standards in California’s public schools.<sup>127</sup> Enjoining the State’s use of exit exams, the judges implicitly suggested, would impede this policy goal.

#### CONCLUSION

For better or worse (or, more accurately, for better *and* worse), high-stakes testing increasingly dominates the American K-12 education policy terrain. Litigation seeking to disrupt high school exit exams implicates important education policy interests. As both the *GI Forum* and *O’Connell* decisions illustrate, however, courts today appear reluctant to interfere with the implementation of well-crafted exit exams due to complexities inherent in such judicial intervention.

There are many reasons for emerging judicial reluctance. One critical reason is that today’s exit exams have learned from the past and have evolved in ways that reduce their legal exposure. Language in the *GI Forum* and *O’Connell* decisions also suggest that courts have become increasingly mindful of the policy consequences that flow from court decisions interfering with exit exams.<sup>128</sup> These policy consequences include financial repercussions, ranging from the legal costs incident to litigation to the growing link between data from exit exams and school finance litigation. Reflecting a consensus that has gained momentum since the late-1980s—that school reform is necessary—the *GI Forum* and *O’Connell* opinions convey important deference to a state’s desire to take responsible steps designed to enhance the integrity of the high school diploma and improve academic achievement,<sup>129</sup> even if it means that a disproportionate

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v. State, 842 P.2d 1240, 1258 (Cal. 1992)).

124. *Id.* at 156 (quoting *Butt*, 842 P.2d at 1258).

125. *Id.* at 170.

126. *Id.* at 161.

127. *Id.*

128. *See supra* Part III.B.

129. *GI Forum Image DeTejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 681-82 (W.D. Tex. 2000); *O’Connell*, 47 Cal. Rptr. 3d at 160-61.

number of non-white students will not receive high school diplomas.

To the extent that the central point of this Article is correct—that court decisions display a sensitivity to the education policy consequences from disrupting exit exams—a normative question quickly arises: *Should* judges concern themselves with the practical policy fallout from their decisions? Although such a discussion extends far beyond the contours of this Article, a few points help frame some of the question's salient aspects. On the one hand, the traditional separation of powers doctrine suggests that judges should confine themselves to legal arguments and leave policy arguments and concerns to their legislative and executive counterparts. Moreover, by definition, arguments about policy consequences triggered by decisions not yet rendered are, to some unknown degree, speculative. On the other hand, as difficult separation of powers cases make clear, the line between law and policy is frequently blurred. In some instances policy consequences might necessarily follow from the resolution of purely legal questions. While the policy consequences in any individual case may be speculative in the formal sense, causation between a legal decision and policy consequences might be robustly established by prior cases.

Regardless of whether judges should concern themselves with the policy ramifications incident to litigation seeking to disrupt the implementation of exit exams, as an empirical matter the *GI Forum* and *O'Connell* decisions suggest that they are concerned. Whether legal scholars, lawmakers, policymakers, or citizens should, in turn, be concerned about judges' policy concerns is a question for another day.