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# Taas and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal for Redressing Problems with the Standardized Testing in Texas.

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# TAAS AND *GI FORUM V. TEXAS EDUCATION AGENCY*: A CRITICAL ANALYSIS AND PROPOSAL FOR REDRESSING PROBLEMS WITH THE STANDARDIZED TESTING IN TEXAS

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## I. INTRODUCTION

Although public education is a vital component of the equality, prosperity, and opportunity enjoyed in America, the United States Supreme Court has expressly refused to recognize education as a fundamental right.[1] In fact, since the original desegregation battles culminating in the busing cases of the 1970s,[2] courts have systematically failed to act on issues relating to education. Instead, the federal judiciary grants almost total deference to the states in this arena.[3] In a recent Texas case, *GI*

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1. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (establishing that education, being neither explicitly nor implicitly protected by the Constitution, is not a fundamental right under the Equal Protection Clause); *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 465 (1988) (affirming that a statute requiring public school children in certain school districts to pay user fees for bus service to and from school did not violate the Equal Protection Clause because this burden did not interfere with a fundamental right). *But see* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (expressing the importance of public education). In *Brown v. Board of Education*, the Supreme Court stated:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

*Id.*

2. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971) (sustaining busing as a plan to have children attend schools away from their neighborhoods in order to attain a racial balance in all the schools in a district). By the late 1980s, courts steadfastly began denying the existence of any dual education systems and distancing the judiciary from the plight of minority and poor school children. *See* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 755 (5th Cir. 1989) (upholding a district's use of classification by subject areas despite its adverse racial impact because the school district no longer operated under a segregated system); Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487, 502 (N.D. Miss. 1987) (finding that where a school district has been technically desegregated for over fifteen years, achievement groupings would only be used for enhancing students' opportunities to learn, and not as a method of maintaining a dual school system).

3. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L.

*Forum v. Texas Education Agency*,[4] a federal court reiterated this position with the unwavering declaration that the resolution of the case turned on "the [s]tate's right to pursue educational policies that it legitimately believes are in the best interests of Texas students."[5]

Historically, the disenfranchised have turned to the courts to find relief from social, governmental, and political injustices. By granting states unmitigated latitude in education policies, however, the judiciary has effectively denied those members of our community with the least status and least political access any remedy against policies that unfairly affect them or their children. This Comment evaluates the holding of *GI Forum* in terms of the deference the court gives to the State to impose standardized exit examinations despite demonstrated flaws in the test's structure and gross disparities in the test's results. Part II of this Comment examines the facts and consider the plaintiffs in *GI Forum*, and reviews educational testing practices in Texas. Part III considers avenues for legal challenges to education policies. Part IV analyzes the holding of the case. Finally, Part V presents proposals for courts and legislatures addressing similar issues.

## II. GI FORUM V. TEXAS EDUCATION AGENCY

In 1997, nine high school students who were denied their high school diplomas brought suit in U.S. District Court against the Texas Education Agency (TEA).[6] Each of these students had completed all requirements for graduation but was refused a diploma solely because he did not pass

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REV. 495, 518 (1999) (explaining that because education is not expressly mentioned in the Constitution, it has historically been regarded as a state concern); *see, e.g.*, Bd. of Curators v. Horowitz, 435 U.S. 78, 92 (1978) (declaring that "[c]ourts are particularly ill-equipped to evaluate academic performance"); *Rodriguez*, 411 U.S. at 42 (stating that although the law generally requires courts to defer to state legislative policy, this deference is even more warranted in the educational context); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754-55 (5th Cir. 1989) (upholding the school district's assertion that the use of achievement classifications in a formerly segregated school system was an educationally sound practice); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418-19 (11th Cir. 1985) (supporting a school district's claim that student placement by achievement classification was "educationally necessary"); Erik V. v. Causby, 977 F. Supp. 384, 390 (E.D.N.C. 1997) (declaring that "[t]here is a strong democratic interest in our society in deferring to the policy decisions made by our duly elected public bodies").

4. 87 F. Supp. 2d 667 (W.D. Tex. 2000).

5. GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 671 (W.D. Tex. 2000).

6. *Id.* at 668 n.1. Two civil rights organizations oriented toward Mexican-American issues, the GI Forum and Image de Tejas, also joined in the suit. *Id.* at 667; *see generally* Placido Gómez et al., *The Texas Assessment of Academic Skills Exit Test–"Driver of Equity" or "Ticket to Nowhere?,"* 2 SCHOLAR 187, 188 n.5 (2000) (describing the history of GI Forum as a leading civil rights organization for Hispanic causes).

some portion of the TAAS exit examination.[7] The students argued that the test presented an unconstitutional violation of their due process rights and also violated Title VI of the Civil Rights Act.[8] However, prior case law in this area made the plaintiffs' charges all but impossible to legally demonstrate.[9]

Following a long line of precedent, the district court found for the State and declared the TAAS test constitutional.[10] Case law requires a court to apply the lowest level of scrutiny to a state's educational policy.[11] The court's decision builds on the Supreme Court holding in *San Antonio Independent School District v. Rodriguez*,[12] which establishes that the responsibility for public education lies with state government.[13] The *Rodriguez* Court concluded that intruding on this responsibility takes a court beyond the sphere of the federal judiciary.[14]

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7. Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 505 (1999).

8. *GI Forum*, 87 F. Supp. 2d at 668.

9. *See* Placido Gómez et al., *The Texas Assessment of Academic Skills Exit Test–"Driver of Equity" or "Ticket to Nowhere?,"* 2 SCHOLAR 187, 190 (2000) (reviewing the district court's opinion in *GI Forum* and commenting that "the legal tests for unconstitutionality or invalidity of an educational policy are very difficult to meet" because "a state's educational choices are presumed to be valid, even if they have the effect of disadvantaging a significant group of students").

10. *GI Forum*, 87 F. Supp. 2d at 667, 668 (referring to Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990), *and* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

11. *Id.* at 679 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *and* Connecticut v. Teal, 457 U.S. 440 (1982) for the proposition that there only needs to be a legitimate educational goal met by the TAAS test).

12. 411 U.S. 1 (1973).

13. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

14. *See Rodriguez*, 411 U.S. at 42 (limiting judicial review of education to the traditional rational basis standard and asserting that "[t]he very complexity of the problems of managing . . . a statewide public school system suggests that . . . within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect") (quoting Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)). The impact of indulging state policy makers and bureaucrats circumvents the system of checks-and-balances rooted in our government and gives school administrators complete freedom to implement policies and programs regardless of the adverse impact these activities may have on a particular class of people. *See GI Forum*, 87 F. Supp. 2d at 684 (acknowledging that "[w]hile the TAAS test does adversely affect minority students in significant numbers, the TEA has demonstrated an educational necessity for the test" and upholds the use of the test as constitutional).

### A. *The* GI Forum *Plaintiffs*

Nine individual students sued the Texas Education Agency for refusing to issue their diplomas.[15] Each of these students failed to obtain a passing score of seventy on each section of the TAAS exit examination.[16] The students alleged that use of TAAS as a graduation requirement violated both due process and equal protection rights guaranteed by the Constitution, and violated the Civil Rights Act of 1964 (Title VI).[17]

These student-plaintiffs represent the compelling circumstances of those adversely affected by the high-stakes TAAS examination.[18] Not only did each pass the requisite number of high school classes, many also excelled in different areas.[19] For example, one of the plaintiffs, a Mexican-American female on her school's honor role for three years, was not permitted to graduate after failing a single section of the TAAS by a single point.[20] Ironically, each of these student-plaintiffs represent the end

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15. *See GI Forum*, 87 F. Supp. 2d at 668 n.1 (noting that the students were joined as plaintiffs by two Mexican-American civil rights organizations, the GI Forum and Image de Tejas); *see also* Placido Gómez et al., *The Texas Assessment of Academic Skills Exit Test–"Driver of Equity" or "Ticket to Nowhere?,"* 2 SCHOLAR 187, 188 (2000) (discussing the plaintiffs in *GI Forum*).

16. *See GI Forum*, 87 F. Supp. 2d at 668 n.1 (noting that a score of seventy is required to pass).

17. Plaintiffs' Proposed Findings of Facts and Conclusions of Law at 3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

18. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 505 (1999) (describing the student-plaintiffs as representative of the Mexican-American and African-American students who fail the TAAS test at a rate twice as high as white students).

19. *See id.* (identifying specific student-plaintiffs and portraying their individual circumstances); *see also* Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 2-3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (stating that the plaintiffs completed high school and satisfied the state's and their districts' attendance and course requirements as necessary to attain a high school diploma).

20. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 505 (1999) (describing a student-plaintiff from a San Antonio high school who was anticipating her graduation in 1997). Also included among the plaintiffs who were not permitted to graduate was a Mexican-American female denied her diploma after failing only the math portion of the test. *Id.* This student spent four years of high school serving in various leadership positions. *Id.* An African-American student from Paris Independent School District took the TAAS exam seven times but became ineligible to continue taking the test due to his age. *Id.* This student never received his high school diploma. *Id.*; *see also* Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (summarizing the circumstances of student-plaintiffs).

product of the Texas public school system,[21] and their inability to pass every section of the TAAS test reflects as much on the education provided by the State during the students' twelve years in the public school system as it does on the students individually. The repercussions for failing the exam, however, fall much more heavily on the students than the system.[22]

### B. *Education Reform and Testing in Texas*

Modern education reform in Texas began in the 1970s with a school financing challenge in *San Antonio Independent School District v. Rodriguez*.[23] Although the Supreme Court held the Texas method of financing public education constitutional, the evidence presented in the case showed discrimination against students attending schools in poor districts.[24] In response, the Texas Legislature passed the Equal Educational Opportunity Act mandating the State's first standardized assessment test, called the Texas Assessment of Basic Skills (TABS).[25] Texas utilized the TABS test from 1980 to 1985, but poor performance carried no sanctions for students.[26]

In 1984, accountability became the focus of education reform when a group of business leaders, led by Ross Perot, encouraged improvements in the State's public education system.[27] In a special session, the Texas

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21. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

22. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 9 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (discussing the stakes involved for the schools and noting that individual schools with high ratings are eligible for cash awards, while those with low ratings are subject to sanctions).

23. 411 U.S. 1 (1973).

24. Carlos Guerra, *Study Exposes 'Education Miracle' Myth*, SAN ANTONIO EXPRESS-NEWS, Sept. 5, 2000, at 1B.

25. *Id.*; *see also* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 2 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (discussing the recent history of standardized testing in Texas).

26. Carlos Guerra, *Study Exposes 'Education Miracle' Myth*, SAN ANTONIO EXPRESS-NEWS, Sept. 5, 2000, at 1B; *see* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 2 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (describing the TABS test).

27. Mirra Levitt, *Bush is a Little Too RANDy*, AM. PROSPECT, Sept. 11, 2000, at 8, *available at* 2000 WL 4739414. Texas businessman H. Ross Perot was appointed to chair the Governor's Select Committee on Education. Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 3 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/. The accountability minded reform stemming from the committee report included a statewide curriculum, referred to as the "Essential Elements"; the establishment of statewide passing score of seventy for all courses; a "no pass, no play" rule requiring all varsity athletes to pass their courses in order to participate in sports; a

Legislature passed a series of reforms, including smaller class sizes and enhancements in preschool programs.[28] The legislature also established an assessment system that held schools accountable for the performance of their students.[29]

During the 1984 special session, the Texas Legislature replaced the TABS test with the Texas Educational Assessment of Minimum Skills (TEAMS).[30] TEAMS tested students in odd numbered grades from one to eleven.[31] Although the legislature established the eleventh grade TEAMS test as an exit examination, making a passing score a requirement for graduation,[32] the TEAMS test did not spark much controversy as a graduation requirement because eighty-five percent of test-takers passed the exam on their first attempt.[33] Additionally, among those who failed the first time, the majority passed on the second try.[34]

Still dissatisfied with the results of the State's education program, public pressure initiated a third wave of school reform in 1990. The legislature responded by replacing TEAMS with the Texas Assessment of Academic Skills (TAAS) test.[35] The State intended TAAS to move the assessment focus from testing minimum skills to testing academic skills,

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proficiency examination for teachers; and a revised statewide standardized test. *Id.*; *see also* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 669 (W.D. Tex. 2000) (outlining briefly the history of public school testing in Texas).

28. Julie Mason et al., *Study Disputes Validity of Gains in TAAS Scores*, HOUS. CHRON., Oct. 25, 2000, at 1, *available at* 2000 WL 24521144.

29. Bridget Gutierrez, *TAAS Receives a Passing Grade: Progress Shown in Low-Income Districts*, SAN ANTONIO EXPRESS-NEWS, Sept. 27, 2000, at 1B, *available at* 2000 WL 27842448.

30. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 4 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (outlining the background behind the TEAMS test).

31. *Id.*

32. *See id.* (providing that under the 1984 law, Texas students were to take and pass the exit-level TEAMS test in order to graduate).

33. *See id.* (breaking down the statistics further to clarify that 88% of test-takers passed the math section and 91% passed the English section).

34. *See id.* (recognizing that students who failed the TEAMS that first year of utilization were permitted to retake the exam in May 1986).

35. Carlos Guerra, *TAAS Has Led to Mirages and Masking*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2000, at 1B.

such as high-order thinking and problem solving ability.[36] The initial implementation proved TAAS much more difficult than its predecessor.[37]

Today in Texas public schools, students first take the TAAS test in the third grade.[38] Students continue to take a form of the TAAS each year, with the exit-level version initially given in the eleventh grade.[39] Students must pass all four sections—Mathematics, English, Science, and Social Studies—to graduate.[40] Students who fail the exit-level examination receive remedial instruction and have additional opportunities to master the failed portions prior to the date of graduation.[41] Students who do not pass the exam by the close of their senior year are refused a high school diploma, even if such students have met all other graduation requirements.[42] As a result, a student with perfect attendance and passing grades in all classes,[43] having satisfied all graduation requirements, will not be permitted to receive a high school diploma because of a substandard score on a single, high-stakes test.

## III. LEGALITY OF HIGH-STAKES TESTING

There are three basic legal avenues for challenging a state's high-stakes testing program.[44] Two of these avenues arise under the due process and

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36. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 2, ¶ 5 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (referring to the data provided in the TEXAS EDUCATION AGENCY, TEXAS STUDENT ASSESSMENT PROGRAM TECHNICAL DIGEST FOR THE ACADEMIC YEAR 1996-97, 1 (1997)).

37. *See id.* at pt. 2, ¶ 6 (comparing the 80-90% rate of passage based on a passing score of 70% for the TEAMS test to the 40-60% rate of passage under the TAAS test based on the same passing score).

38. *Id.* at pt. 2, ¶ 5.

39. TEX. EDUC. CODE ANN. § 39.023(c) (Vernon Supp. 2001). The inclusion of science and social studies in secondary exit-level assessments was added by the 76th Texas Legislature in 1999. *Id.* At the time the plaintiffs were tested, only mathematics and English language arts were tested in the exit-level examination. TEX. EDUC. CODE ANN. § 39.023(b) (Vernon 1996).

40. *Id.* § 39.025.

41. *Id.* § 39.024. *But see* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 504 (1999) (noting that once a student has completed all high school course work, such remedial instruction is no longer offered).

42. Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 504 (1999).

43. TEX. EDUC. CODE ANN. § 39.025(a) (Vernon Supp. 2001).

44. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506-14 (1999) (suggesting the possible legal strategies to challenging student accountability policies).

equal protection guarantees of the United States Constitution, while the third arises from statutory protections provided by the Civil Rights Act.[45] Although technically the constitutional avenues exist, the likelihood of prevailing on either of the two constitutional challenges is limited.[46] A claim under Title VI of the Civil Rights Act of 1964 offers a greater chance of success.[47] However, in the current judicial landscape most plaintiffs will fail on all three grounds.[48]

### A. *Equal Protection Challenges to High-Stakes Testing*

State policies can violate the Fourteenth Amendment's Equal Protection Clause[49] in two ways, either of which invokes heightened judicial scrutiny.[50] First, a policy may burden a fundamental right.[51] Second, a policy may create a raced-based classification.[52] Either violation will raise the level of review by the courts to strict scrutiny, the most onerous burden for a state to meet.[53] To attain this level of scrutiny, however, plaintiffs must first establish that a violation of the Equal Protection

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45. *Id.*

46. *See* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 9 (1985) (concluding that although parties affected by failing student competency testing programs may have numerous bases for legal claims, most of these claims have not been successfully argued in the courts); Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (accepting the shortcomings of constitutional challenges to student accountability policies).

47. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (identifying Title VI of the Civil Rights Act of 1964 as the most promising challenge to student accountability policies).

48. *See generally* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (addressing legal challenges to student assessment programs under Title VI of the Civil Rights Act of 1964).

49. U.S. CONST. amend. XIV, § 1 (stating, "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws").

50. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1247-48 (1991) (referring to Justice Stone's footnote in *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938), establishing a two-tiered standard for judicial review under equal protection)

51. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506-14 (1999) (delineating the equal protection argument in legal challenges against student accountability policies).

52. *Id.*

53. 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1248 (1991).

Clause based on a racial classification or fundamental right has occurred. In the context of state educational policies, this is an enormous hurdle to overcome.

1. Education Is Not a Fundamental Right

Fundamental rights are generally thought to be those necessary for justice and liberty to exist.[54] In *Palko v. Connecticut*,[55] the Supreme Court defined fundamental rights as those freedoms that represent "the very essence of a scheme of ordered liberty[,] . . . 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[56] The Court further narrowed this definition by limiting inclusion to those rights independently found and guaranteed by some provision of the Constitution.[57]

The fact that the Supreme Court expressly refused to declare education a fundamental right makes equal protection an unlikely route for plaintiffs challenging student accountability policies.[58] To succeed, a plaintiff must overcome one of two enormous burdens. The plaintiff must demonstrate either that the Supreme Court should reverse years of precedent and create a new fundamental right, or the plaintiff must prevail under the extremely deferential rational basis test.[59] Demonstrating the need for a new fundamental right would entail asking a court to contradict the Supreme Court's previous determination, and, thus, does not appear a

54. *See* Palko v. Connecticut, 302 U.S. 319, 328-29 (1937) (holding that where double jeopardy by the state does not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" there is no violation of the Fourteenth Amendment).

55. 302 U.S. 319 (1937).

56. *See Palko*, 302 U.S. at 325-26 (holding that only certain select protections from the Bill of Rights were absorbed into the due process guarantee of the Fourteenth Amendment and thus applicable to states). The Court refers to *Synder v. Massachusetts*, 291 U.S. 97, 114 (1934). *Id.*

57. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (finding that the right to interstate migration exists outside the Equal Protection Clause and, in turn, upholding as fundamental the right to travel between states based on "the nature of our Federal Union and our constitutional concepts of personal liberty unite[d] to require that all citizens be free to travel throughout the length and breadth of our land"). The Court recognized the extreme importance of *what* was being denied to new residents and weighed into consideration the fact that welfare aid is something "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life." *Id.* at 627.

58. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (finding that there is no fundamental right to education because no such right is "explicitly or implicitly guaranteed by the Constitution").

59. Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999).

realistic option. Accordingly, under this branch of equal protection, plaintiffs can only hope to succeed by prevailing against a state policy under the rational basis review.[60]

2. Race-Based Challenges Under the Fourteenth Amendment's Equal Protection Clause

Similar to a fundamental rights challenge, race-based challenges to state policies prove difficult for plaintiffs. Under the Equal Protection Clause, race-based classifications fall within a strict scrutiny analysis, creating a more substantial burden for the state than the rational basis review.[61] Before proceeding with this challenge, however, the plaintiffs first must demonstrate a discriminatory intention on the part of the state.[62]

In order to trigger the higher level of scrutiny of a race-based challenge, the plaintiff must initially prove that the motivating factor behind the state action had a discriminatory purpose or intent.[63] To determine

60. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1249 (1991) (noting that under the rational basis test, once applied only to economic issues, "legislation is invariably upheld"). The rational basis standard generally means that the state prevails under any justification it might give for a challenged practice. *Id.* Still, the courts have established a specific scenario related to testing programs which theoretically allows the plaintiff more of an opportunity to prevail. *See* Debra P. v. Turlington, 644 F.2d 397, 406 (5th Cir. Unit B 1981). In terms of high-stakes testing and other student accountability policies, it is possible that a plaintiff may succeed under the deferential standard if the plaintiff can prove that the test does not correspond to the material actually taught in class under the school curriculum guidelines because "fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not taught." *Id.* (comparing the state to a classroom teacher, the court declared, "so should the state give its final exam on what has been taught in its classrooms"); *see also* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 3 (1985) (discussing the Equal Protection Clause as a method of challenging student competency testing programs).

61. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (noting that where a state policy creates a classification based on race, that policy will be subject to review under strict scrutiny and is likely to be struck down as unconstitutional).

62. *See id.* at 513 (stating that discrimination must be purposeful to invoke strict scrutiny). This initial burden was established in *Washington v. Davis*, where the Court first differentiated racial classifications that show an obvious discriminatory purpose from those law which appear neutral on their face, and only incidentally affect one race disproportionately. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (setting the standard involved in establishing unconstitutional racial discrimination).

63. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (rejecting a demonstration of racially disproportionate impact as sole evidence of

whether a race-based discriminatory purpose motivated the law, courts consider the effect of the state's action on various racial groups.[64] As well, courts review whether the state failed to utilize an alternative practice that produces a less discriminatory effect.[65] Even after showing both a disparate impact and a viable alternative, however, courts may still refuse to find a discriminatory intent behind the state's policy.

At one time, the Fifth Circuit allowed a slightly more lenient standard for disparate impact analysis of education policies.[66] During the 1960s and 1970s, courts were suspicious of policies that resulted in *de facto* racial segregation because such practices perpetuated the past intentional segregation of a "dual school system."[67] For example, in *McNeal v. Tate County School District*[68] the Fifth Circuit abolished a system in which teachers grouped students based on a subjective evaluation of a student's

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racial discrimination under the Fourteenth Amendment and finding that proof of a discriminatory purpose or intent was necessary to establish a constitutional violation).

64. *See id.* at 266 (establishing that the resulting impact of an official action may provide one evidentiary basis for proving invidious discriminatory purpose); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (discussing the application of race-based classification in a Fourteenth Amendment challenge to student accountability policies).

65. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (stating that such evidence may demonstrate a pretext for discrimination).

66. *See* McNeal v. Tate County Sch. Dist., 508 F.2d 1017, 1020 (5th Cir. 1975) (announcing a standard of law for reviewing ability-grouping of public school students). Before such a grouping can be utilized, all the effects of educational disadvantage stemming from prior segregation must have ended. *Id.* Moses v. Wash. Parish Sch. Bd., 456 F.2d 1285, 1285 (5th Cir. 1972) (asserting that ability-grouping had the tendency of perpetuating segregated education systems); Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1219-20 (5th Cir. 1969), *vacated in part*, Carter v. W. Feliciana Parish Sch. Bd., 396 U.S. 226 (1969) (requiring the total implementation of a unitary school system before any ability-grouping by school would be permissible).

67. *See McNeal*, 508 F.2d at 1020 (holding that grouping systems demonstrating disproportionate racial effects in a school district previously segregated were not valid unless the district could show that the assignment method was not predicated on the present consequences of past segregation); Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 3 (1985) (defining a dual school system as one which "maintains separate and arguably unequal methods of schooling for blacks and whites while remaining a single entity on paper" with blacks, almost without exception, attending "the inferior schools within the system"); *see also* Anderson v. Banks, 520 F. Supp. 472, 501 (S.D. Ga. 1981) (referring to the *McNeal* balancing test in claiming that an educational policy, like a tracking system, which occurs in a unitary school, and has a racially discriminatory effect is legal if the policy aims to remedy the disparate impact with better educational opportunity).

68. 508 F.2d 1017 (5th Cir. 1975).

past performance.[69] The court noted that although the Constitution does not forbid ability-grouping, such grouping may not have a "racially discriminatory effect."[70] Requiring those who suffered under the dual system to compete on equal footing with those who benefited from that inequitable system clearly violates the Equal Protection Clause.[71]

Courts now consider racial segregation in our public schools an ill of the past, and the task of linking the racially disparate impact of current policies to previous segregation has become increasingly formidable.[72] Accordingly, the presumption of discriminatory impact no longer exists.[73] Under the modern view, regardless of any statistically demonstrable disparate impact, even protected populations will find the hurdles of a race-based challenge to a state's education policy insurmountable.[74]

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69. *See McNeal*, 508 F.2d at 1019 (referring to minority students of a dual education system as "victims of educational discrimination").

70. *See id.* at 1020.

71. *See Anderson*, 520 F. Supp. at 500 (concluding that as a result of the previous dual school system all-black schools were inferior to the white schools and the lower performance of blacks in exit examinations was attributable to this dual system, making diploma sanctions unconstitutional); *see also* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 3 (1985) (considering equal protection arguments against student competency testing programs).

72. *See* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1415 (11th Cir. 1985) (finding that where students had never attended school in a formally segregated school system, school grouping systems disproportionately affecting black students by placing them in lower groups did not perpetuate historical discrimination); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 506 (1999) (considering the use of racial classification under the Fourteenth Amendment as a constitutional challenge to education accountability systems).

73. *See* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 674 (W.D. Tex. 2000) (recognizing the substantial evidence that "Texas minority students have been, and to some extent continue to be, the victims of education inequality," but still concluding that under the present system minority students have a reasonable opportunity to learn the material tested on the exit exam). *But see* Plaintiffs' Post-Trial Brief at 44, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (criticizing the inferior educational opportunities currently provided to minority students in Texas by showing that minority students lag behind white students not only on TAAS scores, but on both SAT and ACT scores, attendance and drop out rates, and percentages who pass the TASP test).

74. *See* Jeffery J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 4 (1985) (noting that only where an affected student can demonstrate that he suffered under a "dual school system" will he find relief under the Constitution's equal protection guarantee).

B. *Due Process Challenges to High-Stakes Testing*

A second constitutional basis for challenging disparate impact in high-stakes testing falls under the Due Process Clause. Proving a due process violation involves two steps. First, the plaintiff must demonstrate a protected interest.[75] This may include either a property interest or a liberty interest.[76] Cases involving diploma sanctions fall under the property interest category.[77] Second, the plaintiff must demonstrate either a procedural or substantive violation of that property interest.[78]

1. Procedural Due Process

Procedural due process requires that a state provide adequate notice prior to depriving a citizen of a state-created property interest.[79] Correspondingly, substantive due process "holds that some rights are so profoundly inherent in the American system of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded an individual are fair."[80] The Fifth Circuit has indicated that high-stakes testing programs can violate both of these aspects of due process.[81]

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75. *See id.* (explaining that before a student can make a due process claim based on a legitimate entitlement to her high school diploma, she must establish either a property or liberty interest recognized under the Due Process Clause).

76. *See* Michael H. v. Gerald D., 491 U.S. 110, 119-22 (1989) (discussing the limits of a due process claim based on a liberty interest); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (finding that property interests protected under due process are those defined by current rules or "understandings that stem from an independent source such as state law").

77. *See* Debra P. v. Turlington, 474 F. Supp. 244, 266 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. Unit B 1981) (asserting that students in Florida had a property right in their high school diploma provided that all existing requirements for graduation were satisfied).

78. *See* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 6 (1985) (stating that upon demonstrating a deprivation of a property interest, the plaintiff must prove this interest was abridged without due process).

79. *See id.* at 6-7 (providing an overview of the plaintiff's burden of proving that a legitimate property interest was violated without due process of law when challenging a student competency test).

80. GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000); *see also* Regents of Univ. of Mich. V. Ewing, 474 U.S. 214, 222-23 (1985) (noting that in the interest of judicial restraint, substantive due process claims must be evaluated according to the precise facts of the case in question).

81. *See* Debra P. v. Turlington, 644 F.2d 397, 404 & n.9 (5th Cir. Unit B 1981) (recognizing that the due process violation of an implied property right in a high school diploma may deprive a student of both procedural and substantive due process protections).

The federal district court in *Debra P. v. Turlington*[82] outlined the due process standard in the context of high-stakes testing.[83] In *Debra P.*, the court considered high school graduation a "logical extension of successful attendance" based on the State's compulsory attendance law, which was in place prior to the introduction of the new exit examination requirement.[84] After acknowledging that students have a protected property interest in a high school diploma, the court focused on a discussion of what would constitute adequate notice for the purpose of procedural due process.[85]

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82. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B 1981).

83. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd, in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B 1981). *Debra P.* was initially brought in Florida district court to challenge the constitutional and statutory validity of student assessment exam implemented as a remediation and graduation requirement. *Id.* at 246-47. The district court found that the diploma aspect of the exam violated the Due Process Clause of the Constitution due to the state's failure to provide adequate notice to the students of the enhanced requirements for graduation and by failure to demonstrate that the material on the test was actually taught in the classroom. *Id.* at 269. On appeal, the Fifth Circuit affirmed the lower court's ruling that the exam's implementation schedule violated the notice requirement of the Due Process Clause and that the immediate application of the diploma sanction violated the plaintiffs' equal protection rights because it furthered the inequities created by a former dual school system. Debra P. v. Turlington, 644 F.2d 397, 404, 407 (5th Cir. Unit B 1981). As well, the circuit court remanded the case to determine whether the information on the test was part of the actual applied school curriculum as required by due process, equal protection, and Title VI of the Civil Rights Act. *Id.* at 402, 407-08. On remand, the district court found for the state on both issues. *See* Debra P. v. Turlington, 564 F. Supp. 177, 186, 188 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984) (holding that the state proved by a preponderance of the evidence that the assessment exam did reflect the classroom curriculum and that there was no demonstrable link between the present effects of past educational discrimination and the disparate failure rate of minority test takers). On appeal, the Eleventh Circuit (hearing the case following the Fifth Circuit split) affirmed the district court's decision. *See* Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).

84. Debra P. v. Turlington, 474 F. Supp. 244, 266 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B 1981); *see also* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 4 (1985) (discussing the establishment of a cognizable property right in a high school diploma under *Debra P. v. Turlington*); *see also* Bd. of Educ. v. Ambach, 436 N.Y.S.2d 564, 572 (1981), *modified by* 458 N.Y.S.2d 680 (1982) (holding that to establish a property interest in a high school diploma, a plaintiff must first demonstrate a legitimate expectation in receiving a diploma by reasonably expecting to meet all other graduation requirements).

85. *See Debra P.*, 474 F. Supp. at 266 (holding that the implementation schedule used for the high-stakes assessment in Florida was fundamentally unfair).

Although an exact definition of "proper notice" remains unclear,[86] the court suggested that perhaps more than four years should pass between the proclamation of new testing objectives and the application of actual diploma sanctions based on those testing objectives.[87] This period would allow students and teachers time to grow accustomed to the idea and prepare accordingly.[88] Additionally, this time would provide students, who may have been subject to a dual education system in the past, an opportunity to adjust and reap the benefits of the new, unitary educational system.[89]

2. Substantive Due Process

In addition to meeting the requirements of procedural due process, a state's action must also comply with substantive due process. Substantive due process jurisprudence remains unsettled,[90] prompting the Supreme Court to proclaim substantive due process a "treacherous field."[91] Nevertheless, the Fifth Circuit has established that a "fundamentally unfair" high-stakes test violates this constitutional guarantee.[92] Courts may re-

86. *See Debra P.*, 644 F.2d at 404 (finding that a high-stakes assessment instituted "at the eleventh hour and with virtually no warning" provided insufficient notice, but not stating exactly what would constitute sufficient notice). The district issued a four-year injunction on the diploma sanction which was upheld by the Eleventh Circuit as establishing an appropriate notice period. *See* Debra P. v. Turlington, 730 F.2d 1405, 1407 (11th Cir. 1984).

87. *See* Debra P. v. Turlington, 474 F. Supp. 244, 267 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B 1981) (reviewing the standards pronounced during expert testimony regarding the amount of time necessary to provide adequate notice in high-stakes testing situations).

88. *See Debra P.*, 644 F.2d at 404 (describing the situation faced by Florida High School students who were required to pass a test for which they had little time to prepare).

89. *See Debra P.*, 474 F. Supp. at 267 (proclaiming that the plaintiffs in the case "have been the victims of segregation, social promotion and various other educational ills but have persisted and remained in school and should not now, at this late date, be denied the diplomas they have earned"); *see also* Jeffrey J. Horner, Commentary, *A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 6 (1985) (discussing the due process issues in *Debra P. v. Turlington*). The notice requirement for graduation sanctions established in *Debra P.* was construed strictly by a Georgia district court which stated that "in light of the strong language in *Debra P.*, . . . [t]he [c]ourt can only conclude that where the award of a diploma depends on the outcome of a test, the burden is on the school authorities to show that the test covered only material actually taught." *Anderson v. Banks*, 520 F. Supp. 472, 509 (S.D. Ga. 1981).

90. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 326-35 (1991) (describing the ebb and flow of due process challenges in the Supreme Court of the United States).

91. Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977).

92. *See Debra P.*, 644 F.2d at 404.

view substantive due process challenges with heightened scrutiny.[93] The Supreme Court has determined that where substantive due process issues arise, courts should review the state's interest with "careful scrutiny."[94]

To comply with constitutional guidelines in this area, a state's high-stakes test must prove demonstrably valid and reliable.[95] In addition, *Debra P.* provides that a state may not enact a test that is arbitrary, capricious, fundamentally unfair, or that frustrates a legitimate government interest.[96] Finally, a test which exhibits a substantial deviation from accepted academic norms also may violate substantive due process.[97]

### C. *Title VI, Federal Civil Rights Act*

Title VI of the 1964 Civil Rights Act[98] provides a statutory basis for challenging high-stakes testing.[99] The Civil Rights Act prohibits the federal government from giving funds to any entity whose activities have the effect of discriminating against individuals based on race, color, or ethnic-

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93. *See Moore*, 431 U.S. at 546 (White, J., dissenting) (indicating that some fundamental interests deserve greater due process protection).

94. *Moore*, 431 U.S. at 502 (referring to Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497,542-43 (1961) (Harlan, J., dissenting)).

95. *See Debra P.*, 644 F.2d at 404-05 (proclaiming that a competency examination which was not scientifically valid was fundamentally unfair).

96. *Id.* at 404; *see also* St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974) (establishing that it would be fundamentally unfair for the state to interfere with a student's right to an education in a public education system by suspending a student based on her mother's conduct which was beyond the student's control).

97. *See Debra P.*, 474 F. Supp. at 261 (commenting that the constitutional requirement is only that the test bear a rational relationship to the state's goal, not that the test be "state of the art" or the best instrument available).

98. *See* 34 C.F.R. § 100.3(b) (2000) (applying the nondiscrimination policies effectuated under Title VI of the Civil Rights Act of 1964 to programs and agencies receiving federal funding through the Department of Education).

99. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 587-89 (1983) (extending the scope of Title VI to include private rights of action by allowing an individual to file a claim for unintentional discrimination resulting in a disparate impact where the funding agency's regulations specifically prohibit recipients from managing funds in a way that has the effect of discrimination). *Guardians Ass'n* is applicable to the TEA in that the federal Department of Education, the agency that distributes federal funds to state educational institutions, has adopted regulations expressly prohibiting unintentional discrimination. *See* 34 C.F.R. § 100.3(b)(2) (2000) (stating specifically that under Title VI, recipients of federal funding are not permitted to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin"); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 514-15 n.122-23 (1999) (discussing the application of Title VI to student accountability policies).

ity.[100] Unlike equal protection claims, Title VI claims may focus on the effect of discrimination rather than the intent of discrimination.[101] Courts refer to this results-oriented analysis as the Disparate Impact Doctrine.[102] Because test bias may be subtle, and even unintended, the opportunity to redress unfair testing practices generally proves better under the Disparate Impact Doctrine than under the discriminatory intent standard.[103]

Challenges applying Title VI to education policies that have a discriminatory effect or disparate impact usually turn on whether the court finds that the practice in question "is both valid and substantially related to the

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100. 34 C.F.R. § 100.3 (2000). State education agencies fall under Title VI both as state agencies overseeing and administering state and federal education programs and as recipients of federal funding. 42 U.S.C. § 2000d (2000). The Department of Education regulations promulgated under Title VI instruct that:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 100.3(b)(2) (2000).

101. *See Guardians Assoc.*, 463 U.S. at 607 (asserting that discriminatory intent is not a necessary element of a Title VI violation).

102. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (establishing the Disparate Impact Doctrine by proclaiming that under Title VII of the Civil Rights Act, practices, procedures, or tests which are neutral on their face cannot be continued if they function to "'freeze' the status quo of prior discriminatory employment practices"). In *Griggs*, the Supreme Court introduced the Disparate Impact Doctrine in the context of employment law under Title VII. *Id.* In this case it was established that analysis under the disparate impact test focuses on the consequences and effects of certain practices, not the motivations and intent behind those practices. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 516 & nn.126-128 (1999) (describing the Disparate Impact Doctrine and its evolution from a Title VII test to a Title VI test); *see also* Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1523-24 (M.D. Ala. 1991) (applying disparate impact previously used in Title VII to a Title VI claim relating to disparate impact in an undergraduate admission requirement).

103. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 516-17 (1999) (suggesting that because test bias is often not facially apparent and may stem from a variety of factors, proving intentional bias in this context would be an exceedingly difficult burden to satisfy).

advancement of education goals."[104] Although the courts have varied somewhat in the degree of judicial deference afforded to the educational authority, courts generally apply a lower level of scrutiny to these cases.[105] In the area of education, courts tend to rely on "accepted practices" and expert testimony of school officials to justify policies that adversely impact minority students.[106]

1. Disparate Impact

One of the first signs of a Title VI violation is the presence of a statistically demonstrated adverse affect on a minority group or groups due to a government practice.[107] In the area of education, particularly in standardized testing, the disparate impact analysis begins with the assumption that intellectual propensity is an inherent characteristic of an individual, not a racial or ethnic group.[108] The fact that a test has a disparate impact

104. *Id.* at 518.

105. *See* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 753-55 (5th Cir. 1989) (finding that a previously segregated school district's use of classifications was educationally justified); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418-29 (11th Cir. 1985) (requiring only that the defendants prove an educational necessity, in order to rebut the plaintiff's prima facie case); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 521 (1999) (discussing the low standard of review courts use in applying Title VI in suits challenging education policies). *But see* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 689 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (striking down the NCAA's use of a minimum standardized test score to establish eligibility for college athletics because the test had not been validated as a predictor of graduation rates for student-athletes); *Groves*, 776 F. Supp. at 1519 (concluding that the state's requirement of a minimum ACT examination score for admission to programs for teacher education violated Title VI because a significantly greater number of African-Americans than whites did not secure the minimum score and were thus prohibited from pursuing teaching careers); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 364-65 (S.D.N.Y. 1989) (overturning the state's exclusive use of SAT scores to award scholarships as the practice disadvantaged female students and the use of SAT scores had not been validated for this purpose).

106. *See Quarles*, 868 F.2d at 755 (deferring to the judgment of school administrators in determining that the state had a legitimate goal justifying placing a disproportionate number of minority students in classifications).

107. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 522 (1999) (stating that a "plaintiff must identify a specific practice that affects persons of a particular race or ethnicity more harshly than other races or ethnicity in that it results in disparity").

108. *See id.* at 517 (discussing the application of disparate impact analysis on student accountability policies).

contravenes this assumption and, therefore, warrants an investigation.[109] Where a racially disparate impact arises in test scores, courts should not presume that this reflects any real differences in test-takers' abilities.[110]

The disparate impact analysis under Title VI requires the plaintiff to first prove that a challenged practice has a disproportionate impact on a minority group or groups.[111] Once a plaintiff makes a prima facie showing of discrimination,[112] the defendant bears the burden of proving that the practice in question is necessary to achieve an educational goal and bears a substantial relationship to that goal.[113] If the defendant succeeds in demonstrating this burden,[114] the burden of production shifts to the

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109. Larry P. v. Riles, 793 F.2d 969, 976 (9th Cir. 1984) (discussing the state's failure to investigate disproportionate testing results among school children of different races as conclusive evidence of intentional discrimination).

110. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 517 (1999) (concluding that a demonstration of disparate impact in test scores should not be attributed to the test-takers, but to some bias in the testing instrument).

111. *See* Erik v. Causby, 977 F. Supp. 384, 390 (E.D.N.C. 1997) (requiring the plaintiffs to make a prima facie case demonstrating a disproportionate impact on minority students created by the student accountability policy); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 517-18 (1999) (outlining the burdens associated with proving, or disproving, a disparate impact claim).

112. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 522 (1999) (analyzing the burden of making a prima facie case of disparate impact as originally developed in the Title VII employment context). Under Title VII, to establish disparity in the workplace, a plaintiff must demonstrate that a particular practice or policy affects one racial or ethnic group more harshly than another. *Id.* The accepted evidentiary standard for adverse impact in selection rates is minority election of less than four-fifths (80%) of the group with the highest election rate. *Id.* (citing the Uniform Guidelines on employee selection procedures, 29 C.F.R. § 1607.4(D) (1998). The "Four-Fifths" rule also governs, by extension, Title VI claims related to educational practices. *Id.*

113. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 517 (1999) (explaining the development of burden shifting in the disparate impact analysis of Title VII and Title VI cases and noting that in a Title VII case, the defendant focuses on a business, rather than educational, goal); *see also* Larry P. v. Riles, 793 F.2d 969, 981 n.6 (9th Cir. 1984) (requiring a manifest relationship between the questioned practice and an educational goal in a Title VI claim); Connecticut v. Teal, 457 U.S. 440, 446 (1982) (reiterating the requirement of a business necessity in a Title VII disparate impact claim).

114. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 517-18 (1999) (noting that the defendant has not succeeded in meeting its burden if the plaintiff can substantiate that the tendered *necessity* is a mere pretext for intentional discrimination).

plaintiff to present an alternative practice that would achieve the same goal without the same negative discriminatory effect.[115]

Courts, in the past, have overturned education policies for such things as failing to offer all students in a school system "a meaningful opportunity to participate in the educational program,"[116] and improperly classifying minority students into special education programs.[117] Today, however, courts more commonly exercise a much lower level of scrutiny, particularly in questions of testing programs.[118] As a result, plaintiffs must not only prove their burdens of impact and alternatives, but also that the challenged practice fails both as to educational necessity and validity.[119]

2. Educational Necessity

Despite the structured analysis of the Disparate Impact Doctrine, with its clearly established burdens for both parties, courts have applied the doctrine to education cases with varying results.[120] Courts appear reluctant to second-guess policy decisions of state and local school administra-

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115. *See id.* (asserting that in disparate impact cases the burden shifts back to the plaintiff to offer an alternative practice of equal benefit).

116. *See* Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (holding that even though a school district's educational goal of ensuring English language mastery was legitimate, the means employed of denying Chinese-speaking students adequate instructional tools and procedures was discriminatory and in violation of Title VI).

117. *See* Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1984) (finding that a school district was using I.Q. tests to place black students in special education class when the tests were not validated for such purposes and that the disproportionate percentage of black children adversely impacted by the program indicated a discriminatory impact).

118. *See* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754-55 (5th Cir. 1989) (allowing the utilization of potentially discriminatory achievement exams to determine curriculum grouping within a previously segregated school system in deference to the district court's finding that the policy did not have a substantial racial impact); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418-19 (11th Cir. 1985) (deferring to expert testimony of school officials in determining that achievement classifications were "educationally necessary" and "accepted pedagogical practice"); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 521 (1999) (examining the level of scrutiny used by courts in deciding Title VI claims).

119. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 518 (1999) (discussing that courts applying the disparate impact doctrine to Title VI claims examine whether the educational practice is "both valid and substantially related to the advancement of educational goals").

120. *See id.* (declaring that the application of the Disparate Impact Doctrine in the education context has led to inconsistent outcomes).

tors.[121] Therefore, these cases usually depend on whether the defendant presents evidence that the challenged testing or educational practice operates as a valid and educationally necessary tool for the advancement of legitimate educational goals.[122]

After the plaintiff makes a prima facie case demonstrating disparate impact, the burden shifts to the defendant to rebut the case.[123] The defendant may accomplish such a rebuttal by establishing an educational necessity for the policy or practice.[124] Courts generally hold that to demonstrate an educational necessity, the state must prove that the educational practice bears "a manifest demonstrable relationship to classroom education."[125] However, because courts only rarely challenge the judgment of state educators and administrators, this analysis has become more of a technicality than a burden of substance.[126] As a result, plaintiffs actually bear the burden of proving that a questioned educational practice is *not* an educational necessity.[127]

A plaintiff can question the legitimacy of a testing practice by attacking the validity of the exam.[128] Validity pertains to the ability to legitimately

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121. *See* Erik V. v. Causby, 977 F. Supp. 384, 390 (E.D.N.C. 1997) (emphasizing the strong public interest, in a democracy, in deferring to policy decisions of locally elected school boards).

122. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 521-22 (1999) (discussing that although the established disparate impact analysis involves a shifting of burdens between the plaintiff and defendant, in reality, the plaintiff may need to go beyond her technical burden to meet the actual scrutiny of the court).

123. *Id.*

124. *See* Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979) (granting that the defendant may meet its burden in rebuttal by demonstrating an educational necessity); *see generally* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 523 (1999) (noting that the concept of "educational necessity" is similar to the "business necessity" justification utilized in Title VII claims).

125. Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985) (referring to Dothard v. Rawlinson, 433 U.S. 321 (1977)).

126. *See Erik V.*, 977 F. Supp. at 388 (expressing the inappropriateness of judicial review of decisions made by educational authorities related to evaluation policies); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 523 (1999) (reviewing the practicalities of the educational necessity test in Title VI claims).

127. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 523 (1999) (stating that "[u]ltimately, plaintiffs face a great burden in proving that a challenged practice is not educationally valid").

128. *Cf.* Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 102 (1998) (declaring that "[f]ederal . . . discrimination opinions related to the use of high-stakes tests point to one question: Is the

make certain inferences from test results.[129] For a testing instrument to qualify as valid, it must be designed specifically to measure the test's stated objectives.[130] Valid tests also must be free of bias[131] and fair to all test-takers.[132] Finally, a test must reflect the actual curriculum taught in school.[133] If a high-stakes test lacks validity, the test should also fail to maintain any educational necessity.[134]

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test in question valid for the purposes for which it is being used for all students taking the test?").

129. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 524 (1999) (referring to the definition of validity as stated in Standards for Educational and Psychological Testing (American Psychological Association 1985)).

130. *See* Dr. S.E. Phillips, The Texas Assessment of Academic Skills Exit Level Test 3 (Jan. 1999) (unpublished expert report, Exhibit D316, GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (defining the measurement of content validity of a testing instrument as the degree to which individual test items actually measure a student's knowledge and abilities related to the state mandated curriculum); *see, e.g.*, Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984) (holding that because an I.Q. test is not designed as a classification tool for special education students, using it as such is inappropriate); Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 712 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (rejecting the use of the SAT as a term of eligibility for participation in intercollegiate sports); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 354-55 (S.D.N.Y. 1989) (finding that the SAT is designed to predict performance in college and should not be used to measure achievement in high school). Therefore, the SAT should not be used to award scholarships based on merit and achievement in high school. *Id.* at 355.

131. *See generally* Parents in Action on Special Educ. (PASE) v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980) (identifying, but disregarding, test questions with cultural bias against black student test-takers). As examples, the court in *PASE* noted the following test questions reflected bias: "Why is it generally better to give money to an organized charity than to a street beggar?"; "Why is it better to pay bills by check than cash?"; and asking preschool children to select the prettier of two white women. *Id.* at 875.

132. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 524 (1999) (summarizing validity standards in testing used to determine grade retention or deny diplomas).

133. *See* Debra P. v. Turlington, 644 F.2d 397, 407-08 (5th Cir. Unit B 1981) (proclaiming that a high school exit examination must fairly test what is taught in the classroom); Anderson v. Banks, 520 F. Supp. 472, 509 (S.D. Ga. 1981) (negating the use of any high-stakes graduation testing unless the exam used reflects only what is actually taught in the classroom); *see also* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 528-29 (1999) (asserting that systematic failure in instruction is grounds for criticizing student accountability policies).

134. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 523-24 (1999) (recognizing challenges to student accountability policies that undercut arguments of educational necessity by showing (1) testing instruments are not ap-

A high-stakes exit examination measures whether a student has mastered the curriculum necessary for graduation.[135] Accordingly, the test must reflect the curriculum actually taught and provide an accurate assessment of the student's level of mastery of that curriculum. Under Title VI, states cannot use a test to serve a purpose for which it is not validated, such as for making determinations about which students may graduate, if that is not the specific purpose for which the test was designed.[136] Similarly, if the tests include any design biases, states cannot use them for a high-stakes purpose without violating Title VI.[137]

Finally, the reliability of the cut-score[138] raises an issue of test validity because an arbitrarily set cut-score impacts whether a test fairly reflects all test-takers' abilities.[139] The cut-score represents the line that separates passing scores from failing scores.[140] Obviously, where schools can show no demonstrable connection between a student's mastery of curriculum and the placement of the cut-score, the use of this score creates high-stakes decisions that threaten the validity of the test.[141]

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propriate for high-stakes consequences, and (2) the consequences of the testing policy do not further the educational necessity).

135. *See id.* at 524-25 (discussing the Texas student accountability policy and the use of the TAAS test to assess the essential knowledge for graduation).

136. *See* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 708 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (rejecting the use of SAT scores as determinative of eligibility for collegiate sports because SAT was never validated "as a predictor of student-athlete graduation rates").

137. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 528 (1999) (recognizing that cultural bias occurs when a facially neutral exam results in test score patterns by racial or ethnic lines which cannot be attributed to another factor like ability, socio-economics, or demography). *But see* Anderson v. Banks, 520 F. Supp. 472, 490-91 (S.D. Ga. 1981) (disregarding expert testimony evidencing that well over fifty percent of testing items in a high-stakes exit examination used in Georgia were statistically biased against minority test-takers).

138. U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Appendix A, at http://oeri4.ed.gov/offices/OCR/testing/ (last modified Feb. 23, 2001) (defining "cut-score" as "[a] specified point on a score scale, such that scores at or above that point are interpreted or acted upon differently from scores below that point").

139. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 526-27 (1999) (discussing the cut-score as significant component in establishing the validity of a high-stakes test).

140. *See id.* at 526 (explaining that the rationale behind a cut-score "is that students who have not yet met these cut-off points are not demonstrably prepared either for the next academic year or for a high school diploma").

141. *See id.* at 527 (noting specifically that where a technical design weakness renders a test unreliable, establishing the necessary link to uphold the cut-off score may be impos-

Under the final part of a Title VI claim, a plaintiff must provide an equally effective and less discriminatory alternative method for attaining the state's proven educational goal.[142] In the context of education, an equally effective alternative is one that is basically comparable.[143] A plaintiff able to present evidence of a viable, less discriminatory alternative, which the defendant refused to adopt, should be considered to have met her burden.[144] However, because courts usually defer to state and local administrators in the area of education, even a superior alternative to the challenged practice will likely be dismissed.

## IV. ANALYSIS OF THE EVIDENCE AND HOLDING IN *GI Forum v. Texas Education Agency*

In *GI Forum*, the plaintiffs claimed that the TAAS graduation requirement created a policy that "wreaks havoc on the educational opportunities of the State's African American and Hispanic students."[145] As such, the plaintiffs argued that the TAAS test violated Title VI of the Civil Rights Act,[146] as well as the due process and equal protection guarantees

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sible). *But see* Dr. S.E. Phillips, The Texas Assessment of Academic Skills Exit Level Test 10 (Jan. 1999) (unpublished expert report, Exhibit D316, GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (noting that nothing in Texas or federal law dictates how the state must arrive at the passing standard for a high-stakes test).

142. *See* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (describing the final element of a Title VI disparate impact claim as the plaintiffs' burden to "[proffer] an equally effective alternative practice which results in less racial disproportionality").

143. *See* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 713 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (declaring that the plaintiffs met their burden of persuasion when they offered "an equally effective alternative practice that results in less racial disproportionality while still serving the goal of raising student-athlete graduation rates"); *see also* Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 798 (3d Cir. 1991) (discussing the application of the burden shifting test for disparate impact cases related to Title VII claims and noting that the plaintiff may prevail where he is able to provide an alternative to the challenged practice).

144. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989) (establishing that in a Title VII claim, where other means which were less discriminatory were available to the employer which met the stated business needs, failure to use these alternatives demonstrated that the challenged practices were a pretext for discrimination); Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 798 (3d Cir. 1991) (referring to Title VII disparate impact claims which allow the plaintiff to succeed by establishing an alternative practice which is less discriminatory and which the employer has refused to adopt).

145. Plaintiffs' Post-Trial Brief at 1, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

146. *See id.* at 3 (arguing that because the exit exam has the effect of prohibiting a disproportionate number of minority students from graduating, the TAAS test violates the

of the Constitution.[147] Although the court conceded that the exit exam had a disparate impact on minority students, the court refused to find the exam illegal.[148] In fact, the district court held that State education authorities could best determine how to assess students and upheld the policy out of pure deference.[149]

### A. *Title VI of the Civil Rights Act*

After dismissing the equal protection claim,[150] the court permitted the plaintiffs to proceed with their due process and Title VI claims. Title VI,

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Title VI prohibition against any recipient of federal assistance from participating in discriminatory activities).

147. *See id.* at 56 (contending that by implementing the TAAS test as a graduation requirement, the state has violated the Due Process Clause); *see also* U.S. CONST. amend. XIV, § 1 (declaring that no state shall "deprive any person of life, liberty, or property without due process of law"). As well, plaintiffs alleged that this state action violated the Equal Protection Clause. Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment at 22, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

148. *See GI Forum*, 87 F. Supp. 2d at 668 (holding that "the use of the TAAS examination does not have an impermissible adverse impact on Texas's minority students and does not violate their right to the due process of law").

149. *See id.* at 670 (deferring to "the State of Texas [on] what a well-educated high school graduate should demonstrably know at the end of twelve years of education").

150. *See* Agreed Pre-Trial Order at 4, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (denying the plaintiffs' equal protection claims under summary judgment). Initially, plaintiffs made an equal protection challenge against the TAAS exit exam, asserting that the state's use of the high-stakes test was motivated by racial considerations and, therefore, was in violation of the constitutional guarantee to all citizens of equal protection under the law. *See* Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment at 22, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (referring to precedent established in *Hunt v. Cromartie*, 119 S. Ct. 1545, 1548-49 (1999), allowing facially neutral state actions to be violative of equal protection guarantees when they are motivated by a racial purpose). Because the alleged discriminatory state action "was 'motivated by a racial purpose,'" the plaintiffs charged that the court's review of the TAAS testing policy should be done with strict scrutiny. *Id.* (noting that state classifications of individuals based on race are constitutionally suspect and subject to strict scrutiny). To prove their claim, plaintiffs presented evidence that the State of Texas has a long history of school segregation and has consistently failed to provide equal educational opportunities to students of all races. *See id.* at 24 (surveying the history of litigation compelling state and local officials in Texas to end segregation in Texas and noting that forty school districts in Texas were still under federal desegregation orders); *see also* Tasby v. Wright, 713 F.2d 90, 91 n.1 (5th Cir. 1983) (recognizing that desegregation litigation regarding the Dallas Independent School District began in 1955 and was ongoing); United States v. CRUCIAL, 722 F.2d 1182, 1191 (5th Cir. 1983) (noting the unacceptable delay in desegregating the schools of Ector County); United States v. Tex. Educ. Agency, 564 F.2d 162, 174 (5th Cir. 1977) (expressing frustration with seven years of litigation attempting to desegregate Austin schools and proclaiming "for the third time, that the [Austin Independent School District] intentionally discriminated

as implemented by the Department of Education, prohibits a state agency receiving federal funds from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination

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against Mexican-Americans"); Alvarado v. El Paso Indep. Sch. Dist., 445 F.2d 1011, 1011 (5th Cir. 1971) (recognizing a valid Fourteenth Amendment claim by Mexican-American parents on behalf of their children for racial and ethnic discrimination in a Texas public school system); Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 144 (5th Cir. 1972) (finding that the *de facto* segregation, based primarily on residential patterns, of Mexican-American school children violated the Constitution).

Plaintiffs argued that because of this discriminatory background, any official action disproportionately affecting the state's minority students merits special consideration by the judiciary. *See* Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment at 24, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (appealing for judicial review of a facially neutral state act due to a history of discrimination and unequal treatment in reliance on *Washington v. Davis*, 426 U.S. 229, 242 (1976)). This argument is enhanced by evidence that the effects of discrimination against minorities continues within the public education system today. *See id.* (offering examples of the modern manifestations of historical discrimination such as the concentration of minority students in inferior educational tracks, the disproportionate number of black and Hispanic students attending schools employing teachers without the proper credentials, and the underrepresentation of minority students in advanced placement and college preparatory courses).

Two facts raised by the plaintiffs render suspect the state's introduction of a graduation requirement that has an acknowledged disparate impact on minority students. *Id.* at 24-25. First, minority students in Texas are concentrated in inferior educational tracks as compared with their white peers. *See* Jose A. Cardenas, Ed.D., Testimony: GI Forum v. TEA (2000) (unpublished expert report, Exhibit P7, GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (No. SA-97-CA-1278-EP) (on file with the *St. Mary's Law Journal*) (proclaiming that the Texas school system engages in extensive tracking). Second, a disproportionate number of minority students are taught by teachers lacking the proper credentials. *See* Philip Uri Triesman, Preliminary Expert Witness Report Appendix, Table 1 (c) (Feb. 25, 1999) (unpublished expert report, Exhibit D331, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (demonstrating a strong negative correlation between certified elementary and middle school teachers and minority students, meaning that minority students are more likely to be taught by teachers lacking the teacher certification).

Finally, MALDEF argued that use of the TAAS as a high-stakes test brings into question the state's declared motive of improving the educational environment of minority students and their performance. *See* Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, at 24-26, *GI Forum* (No. SA-97-CA-1278EP) (questioning the timing of the implementation of the TAAS exit exam which was imposed immediately following legal challenges to the state's public school financing system). In its brief, MALDEF declared that "the State's interest in 'raising standards and accountability' in its public school system are belied by its callous indifference to the education that its minority students had received prior to 1993 and which had ill-prepared them for the State's exit test." *Id.* at 25. Regardless, the district court dismissed the equal protection claim in summary judgment. Agreed Pre-Trial Order at 4, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

because of their race, color, or national origin."[151] The plaintiffs argued that the Texas Education Agency (TEA) violated this statute with its TAAS testing program because the use of the test as a graduation requirement created an education system harmful and arbitrary in its impact on minority students.[152] Since the TEA receives and administers federal funds, the plaintiffs argued that administering the TAAS violates Title VI.[153]

To evaluate this type of contention, courts implement a burden-shifting test to determine whether the plaintiffs presented a valid Title VI claim.[154] The first step requires the plaintiff to prove that the disputed testing practice created a disproportionate adverse effect.[155] By demonstrating this, a plaintiff establishes a prima facie case.[156] The second step

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151. 34 C.F.R. § 100.3(b)(2) (2000).

152. *See* Plaintiffs' Post-Trial Brief at 1, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (delineating the adverse effects the TAAS exit examination has on minority test-takers, including test results which consistently reflect worse performance by minorities than white students, insidious effects on non-tested students, and increased drop-out rates).

153. 34 C.F.R. § 100.3(b)(2)(2000); Plaintiffs' Post-Trial Brief at 3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

154. *See* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (adopting the burden shifting analysis established for Title VII employment issues for use in this education-related case). The analysis used here is modeled after employment discrimination burden shifting under Title VII and the steps are not significantly different from what previous holdings have outlined in the education arena. *See* Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 99 n.62 (1998) (referring to Larry P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984) as one instance where a court applied the disparate impact test and *Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518 (M.D. Ala. 1991), where the court surveyed standards related to federal disparate impact theory); *see also* Larry P. v. Riles, 793 F.2d 969, 981 n.6 (9th Cir. 1984) (establishing that the challenged practice must be necessary to achieve an important educational goal); Williams v. Austin Indep. Sch. Dist., 796 F. Supp. 251, 254 (W.D. Tex. 1992) (stating that the presence of disparate impact only initiates inquiry rather than acts as a per se violation). *But see* Washington v. Davis, 426 U.S. 229, 230-31 (1976) (specifying that judicial review of a Title VII claim involves a probing examination of, and less deference to, administrative acts).

155. *GI Forum*, 87 F. Supp. 2d at 677.

156. *See id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988), in noting that under the disparate impact theory governing racial discrimination, a court is permitted to overturn facially neutral practices which have "significant adverse effects on protected groups . . . without proof that the [actor] adopted those practices with a discriminatory intent"); Plaintiffs' Post-Trial Brief at 3, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (claiming that by showing by a preponderance of the evidence that the use of exit exams, although a facially neutral practice, has a disproportionate effect on minority students by denying thousands of minorities the ability to attain their diplomas, plaintiffs met their initial burden); *see generally* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (accepting disparate impact analysis as the proper test for a Title VI claim).

involves the burden shifting to the defendant to produce evidence that an educational necessity justified the practice.[157] If the defendant meets this burden, the plaintiff can still prevail by identifying an equally effective, alternative means for achieving the state's goal that has a less disproportionate impact.[158]

1. Disparate Impact

In *GI Forum*, the court found that the Mexican American Legal Defense Education Fund (MALDEF) made its prima facie case, on behalf of plaintiffs, by showing a large and disconcerting disparity between the pass rates of minority and majority test-takers.[159] MALDEF based this assertion on statistical evidence showing the adverse impact of the test on Mexican-American and African-American students.[160] In order to prove that this disparity did not represent an anomaly or isolated incident, plaintiffs produced multiple sets of data that covered a wide variety of methods used to examine the question of adverse impact.[161]

First, the plaintiffs presented evidence that the initial administration of the TAAS exit-level test during the students' tenth grade year reveals a disparate impact.[162] Test scores for first time, non-special education exit-examination test-takers from 1994 to 1998 show white students scoring

157. *GI Forum*, 87 F. Supp. 2d at 677.

158. *Id.*

159. *Id.* at 679.

160. *See id.* at 677-78 (adopting the Equal Employment Opportunity Commission's Four-Fifths Rule to determine whether an adverse impact exists in the case). *But see* Connecticut v. Teal, 457 U.S. 440, 443 nn.3-4 & 451 (1982) (inferring that there are no guidelines to determine the statistical significance of disparate impact cases and that courts may look to a variety of factors).

161. *See* Plaintiffs' Post-Trial Brief at 6-15, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (outlining the statistical proof and expert testimony for demonstrating a Title VI violation).

162. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 4 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (indicating that in 1994 the passing rates for whites taking the first administration of the TAAS exit examination was 67%, for Hispanics the passing rate was 35%, for African-Americans the passing rate was 29%; in 1995 the passing rate for whites was 70%, for Hispanics was 37%, and for African-Americans was 32%; in 1996 the passing rate for whites was 74%, for Hispanics was 44%, and for African-Americans was 38%; in 1997 the passing rate for whites was 81%, for Hispanics was 52%, and for African-Americans was 48%; in 1998 the passing rates for whites was 85%, for Hispanics was 59%, and for African-Americans was 55%); *see also* Dr. S.E. Phillips, The Texas Assessment of Academic Skills Exit Level Test 13 (Jan. 1999) (unpublished expert report, Exhibit D316, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (acknowledging, as an expert for the defense, that an adverse impact against minority students is present in the first administration of the TAAS exit examination).

twenty-nine to thirty-three percent higher than Hispanic students and thirty to thirty-eight percent higher than black students.[163] When examined under the Four-Fifths Rule used in employment discrimination case law, this disparity meets the accepted legal standard for disproportionate impact.[164] The Four-Fifths Rule finds a legally disproportionate impact where the minority passage rate equals less than eighty percent, or four-fifths, of the white passage rate.[165]

A disparate impact is also evidenced during the last administration of the test prior to the conclusion of the students' senior year.[166] In 1997, approximately 10,000 students took the TAAS test during their senior year in hopes of passing before their scheduled graduation date.[167] Of these repeat test-takers, eighty-seven percent were minority students.[168] Still, despite the significantly higher number of minority students repeating the test, the same disparate passage rates resulted with only twenty-seven percent of Hispanic test-takers and thirty-two percent of black test-takers passing, while forty-one percent of white test-takers passed the final administration of the test.[169]

Finally, an adverse impact exists for minority students even after removing many common factors influencing poor performance on standardized tests, such as socioeconomic level and English proficiency.[170] By statistically removing these "other factors" for poor performance in

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163. Plaintiffs' Post-Trial Brief at 7, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

164. *See id.* at 7, 12 (presenting statistics which show that for minority test-takers to pass the exit exam at a rate of four-fifths of the average white score for 1994, Hispanic and African-American students would need a passing rate of 53.6%; for 1995, minorities would need a passing rate of 56%; for 1996 minorities would need a passing rate of 59.2%; for 1997 minorities would need a passing rate of 64.8%; and for 1998 minorities would need a passing rate of 68%).

165. *See* Dr. S.E. Phillips, The Texas Assessment of Academic Skills Exit Level Test 12-14 (Jan. 1999) (unpublished expert report, Exhibit D316, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (confirming the existence of disparity meeting the legal standard of the Four-Fifths Rule).

166. Plaintiffs' Post-Trial Brief at 9, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

167. *See id.* (referring to statistical evidence demonstrating that the final administration of the exit exam for 1997 shows African-American scores right at eighty percent and Hispanic scores below eighty percent of the average white passing rates).

168. *Id.*

169. *Id.*

170. *See* Mark Fassold, Written Report of Mark Fassold 3 (Nov. 15, 1998) (unpublished expert report, Exhibit P10, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (explaining that even after removing the usual factors for test performance differences, significant differences still exist between passing rates for whites, Hispanics, and African-Americans).

testing, minority students can be evaluated against white students from similar backgrounds.[171] Those left in the analysis, after removing the traditional factors negatively affecting student performance, might be expected to perform the highest on the test.[172] However, a gross disparity between racial and ethnic groups still exists. Ninety-two percent of the remaining white students passed the exit test, compared to seventy-six percent of remaining Hispanic students and sixty-four percent of remaining black students.[173] These results show that a white student, subjected to economic disadvantage or otherwise at risk, still has a substantially greater likelihood of passing the TAAS exit exam than a minority student without similar disadvantages.

After evaluating this alarming statistical evidence, the district court reported that "[t]he variances are not only large and disconcerting, they also apparently cut across such factors as socioeconomics."[174] Convinced by the plaintiffs' evidence, the district court proclaimed the presence of a disparate impact in the Texas testing scheme.[175] Thus, the plaintiffs succeeded in establishing their prima facie case.

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171. *See* Plaintiffs' Post-Trial Brief at 12 n.11, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (outlining the categories generally considered to be the real causes of discrepancies in test performance as "(1) economically disadvantaged; (2) eligible for Chapter I/Title I financial support; (3) participating in special education programs; (4) identified as At-Risk; (5) participating in vocational education programs; (6) foreign exchange students; (7) participating in bilingual education programs; (8) participating in English as a Second Language (ESL) programs; (9) designated as limited English proficient; and (10) designated as migrant students").

172. *See id.* at 12 (referring to the remaining students as 'non-special' students and stating that these would be expected to be the 'cream of the crop' among test-takers).

173. *See id.* (presenting test scores from 1997, and claiming the same pattern prevails for each year examined, including 1993, 1994, 1995, and 1996).

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

175. *See id.* (finding that the plaintiffs "made a prima facie showing of significant adverse impact" based on "the sobering differences in the pass rates and their demonstrated statistical significance"). In making this assertion, the court relied primarily on the evidence supporting the legally significant adverse impact on first-time administration of the TAAS exit-level test. *See id.* at 675 (clarifying that legally significant impact should be demonstrable under one of the established methods of statistical analysis). The court recognized two methods of statistical analysis used by the experts in this trial. *Id.* The first is the Four-Fifths Rule which finds an adverse impact when the minority group's passing rate is less than eighty percent of the majority group's passing rate. *Id.* at 675 n.7. The second method used in this trial is referred to as the *Shoben* formula. *See GI Forum*, 87 F. Supp. 2d at 675. This technique assesses the statistical significance of numerical disparities through the determination of differences between independent proportions. *See id.* at 675 n.8; Frazier v. Consol. Rail Corp., 851 F.2d 1447, 1450 n.5 (D.C. Cir. 1988).

2. Educational Necessity

After accepting the existence of a significant adverse impact, the burden of production shifted to the State to demonstrate that the TAAS test represents an educational necessity.[176] The *GI Forum* court established a deferential standard for reviewing the defendant's evidence. The court stated that "[t]he word 'necessity,' as an initial matter is somewhat misleading; the law does not place so stringent a burden on the defendant as that word's common usage might suggest."[177] Following the precedent established in *Connecticut v. Teal*,[178] the district court proclaimed that the TEA must only produce evidence of a manifest relationship between a legitimate educational goal and the TAAS exit examination to prove its educational necessity.[179]

MALDEF disputed this deferential standard, claiming that the court cannot equate a mere rationality to an educational necessity.[180] In another disparate impact case, *Wards Cove Packing v. Atonio*,[181] the Supreme Court utilized a justification stage to determine whether a challenged practice served a legitimate goal in a significant way.[182] Following this model, MALDEF argued that the court should require the state to prove that the exit examination "serves in a significant way the [s]tate's goal of having students show a mastery of high school level

176. *See GI Forum*, 87 F. Supp. 2d at 679 (introducing the second element of the burden shifting test to establish a Title VI claim).

177. *Id.* In outlining this liberal interpretation of "necessity," the court refers to standards established in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), and *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). *Id.* The court limits the standard in *Wards Cove* by requiring that the state's educational goals be legitimate. *Id.*

178. 457 U.S. 440 (1982).

179. *See GI Forum*, 87 F. Supp. 2d at 679 (evaluating the educational necessity under a very relaxed standard).

180. Plaintiffs' Post-Trial Brief at 21, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

181. 490 U.S. 642 (1989).

182. *See Wards Cove*, 490 U.S. at 659 (reviewing a Title VII employment discrimination case under the disparate impact theory); *see also* Plaintiffs' Post-Trial Brief at 21, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (analogizing the *Wards Cove* standard to the burdens of production in a Title VI claim of disparate impact); *accord* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997-99 (1988); N.Y. Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). The higher standard of production for the defendant described in *Wards Cove Packing* was applied in the context of a Title VI challenge in *Cureton v. National Collegiate Athletic Ass'n. See* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 701 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (replacing the notion of business goals utilized in the employment context with educational goals).

skills."[183] The court, however, rejected this approach and instead noted that *any* evidence of a relationship between the State's education goals and the test sufficiently demonstrates educational necessity.[184]

a. State's Education Goals

With the TAAS, the State sought "to hold schools, students, and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities."[185] The court found Texas's twin educational purposes for the TAAS within the State's authority over public education.[186] Because the court accepted the State's purposes for the test, the actual means of achieving these purposes lie solely within the State's discretion.[187] As a result, the court allowed Texas to prove educational necessity by "merely produc[ing] evidence that there is a manifest relationship between the TAAS test and a legitimate educational goal."[188] Aside from the court demanding very little of the State in determining an issue of great importance, the State's arguments in support of the educational necessity of the TAAS examination are problematic.

1. Accountability

First, the court links the goal of accountability with effective motivation, finding that the high-stakes of the TAAS test effectively motivate students, schools, and teachers to boost educational standards.[189] In fact, under the pressure of accountability, school districts, administrators, principals, and teachers often resort to extreme measures, including cheating,

183. Plaintiffs' Post-Trial Brief at 21, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (applying the educational necessity test used in *Cureton*, which requires that the defendant identify a specific educational goal and then present evidence to demonstrate how the challenged practice significantly furthers that goal); *see also* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 707 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (rejecting the NCAA's argument that SAT scores were predictors of a student's likelihood of graduating from college because without accounting for other factors that impact graduation rates, the NCAA could not demonstrate that its use of SAT minimum scores significantly served the goal of assuring athletes graduated from college).

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

185. *Id.*

186. *See id.* at 680 (recognizing that the assessment in question was legislatively established and that these exercises are within the state's powers).

187. *Id.*

188. *Id.* at 679.

189. *GI Forum*, 87 F. Supp. 2d at 683.

to avoid receiving low scores.[190] This kind of behavior should be anticipated when using high-stakes testing as a sole measure of performance. For this specific reason, professional standards discourage giving a single measurement tool so much weight.[191]

Considering the TAAS test as a motivator for educational improvement also fails to appreciate other byproducts of the efforts made by test administrators to attain high passing rates. For example, some schools retain ninth-grade students or move them into special education programs to circumvent failure on the tenth-grade TAAS test.[192] This practice has the opposite effect of motivating students. In fact, evidence shows that retained students drop out of school at higher rates than their peers.[193]

### 2. Adequate Learning Opportunities

The TAAS test also impedes the second prong of the State's expressed goal. Specifically, Texas claims that the TAAS test helps "ensure that all Texas students receive the same, adequate learning opportunities."[194] Rather than simply measuring students' mastery of certain essential elements, however, TAAS preparation has permeated and overtaken the curriculum used before the State adopted the high-stakes test.[195] Research shows that schools across the State have replaced time formerly

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190. *See generally* Edmund S. Tijerina, *Lawmakers Eye Education Report; Hispanics' Performance at Issue*, SAN ANTONIO EXPRESS-NEWS, Sept. 27, 2000, at 9B (quoting Professor Angela Valenzuela as stating that "[t]he whole system of rewards and punishments creates perverse incentives to beat the system"), 2000 WL 27842423.

191. *See* U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Appendix B:7, *at* http://oeri4.ed.gov./offices/OCR/testing/ (last modified Feb. 23, 2001) (referring to Standard 13.7, of the Joint Standards, providing that "[a] decision or characterization that will have a major impact on a student should not be made on the basis of a single test score").

192. Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 5, ¶ 38 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/.

193. *See id.* at ¶ 34, *at* http://epaa.asu.edu/epaa/v8n41/ (citing the TEA as stating that "research has consistently shown that being overage for grade is one of the primary predictors of dropping out of school in later years" and concluding, "[b]eing overage for grade is a better predictor of dropping out than underachievement").

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

195. Gilberto Hinojosa, *TAASmania Takes Over Schools*, SAN ANTONIO EXPRESS-NEWS, Sept. 27, 2000, at 5B (exclaiming that "[t]he basic problem [with the Texas education reform] is that the TAAS has become the driving force of the school curriculum"), *available at* 2000 WL 27329557; Mike McDaniel, *Houston Educators Speak Out about TAAS on '60 Minutes,'* HOUS. CHRON., Sept. 9, 2000, at 8 (reviewing an interview with Houston-area public school teachers who charged "that an all-out emphasis on raising test scores is costing students a comprehensive education"), *available at* 2000 WL 24510273.

dedicated to non-tested subjects, including science and social studies, with test preparation.[196] Studies of Texas teachers also demonstrate a concern over the "drill and kill" mentality that has invaded the classroom.[197] It is questionable whether a solely TAAS-based curriculum provides any student an adequate learning opportunity.

Additionally, the pressures of preparing students for a high-stakes test can impact the State's ability to ensure that all students receive the same adequate learning.[198] For example, in traditionally low performing schools, the standard curriculum is more likely to be replaced with a test preparation curriculum.[199] Not surprisingly, these schools, typically with high minority and poor student populations, also have a history of being under-resourced.[200]

According to Dr. Angela Valenzuela, professor of education at the University of Texas, while "[m]iddle-class children in white, middle-class schools are reading literature, learning a variety of forms of writing, and studying mathematics aimed at problem-solving and conceptual understanding[,] . . . poor and minority children are devoting class time to practice test materials whose purpose is to help children pass the TAAS."[201] In this sense, instead of acting as an education-equalizer, the TAAS test actually widens the gap between the education that minority and poor

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196. *See* Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept./Oct. 2000, at 31, 44 (stressing that "[t]he study of science, social studies, art, and other subjects that are not examined by the TAAS are all undermined by the TAAS system"). Science and social studies were added to the exit-level assessment by the 76th Texas Legislature. TEX. EDUC. CODE ANN. § 39.023(c) (Vernon Supp. 2001).

197. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 6, ¶ 13 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (referring to an independent study in which the authors claim that "'drill and kill' coaching and preparation for TAAS are taking a 'toll on teachers and students alike'"). The survey of Texas teachers cited by Haney was conducted by Stephen P. Gordon and Mariane Reese. *See* Stephen P. Gordon & Mariane Reese, *High-Stakes Testing: Worth the Price?*, 7 J. SCH. LEADERSHIP 345, 357 & 360 (1997) (describing students as demoralized and teachers as frustrated).

198. *GI Forum*, 87 F. Supp. 2d at 679 (describing the state's professed educational goals).

199. Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept./Oct. 2000, at 31. Dr. Valenzuela reports that "many science teachers in schools with poor and minority children are required by their principals to suspend the teaching of science for weeks, and in some cases for months, to devote science class time to drill and practice on the math sections of the TAAS." *Id.* Dr. Valenzuela summarizes the losses based on this practice: "The first loss, of course, is the chance to learn science. The second is the chance to learn to become highly knowledgeable in mathematics." *Id.*

200. *Id.*

201. *Id.*

students receive as compared with white students attending wealthier schools.[202] This effect is directly contrary to the State's asserted goal.

b. Questions of Validity and Reliability

The plaintiffs, relying on case law, contended that in order to demonstrate an educational necessity the State must establish the TAAS exit examination as both valid and reliable for its intended purpose.[203] Because of the serious and manifest deficiencies in the TAAS exit exam, the plaintiffs argued that the test is neither valid nor reliable.[204] Accordingly,

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202. Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept./Oct. 2000, at 31.

203. *See* Plaintiffs' Post-Trial Brief at 22-23, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (presenting a variety of case law to support this claim); *see also* Washington v. Davis, 426 U.S. 229, 247 (1976) (stating that under Title VII, hiring and promotion practices which disqualify a substantially disproportionate number of minorities must be "validated" as related to job performance); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (discussing the Equal Employment Opportunity Commission's (EEOC) guidelines for professional validation of employment tests); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985) (extending the Title VII business necessity requirement to a Title VI education-related claim, stating that in a school district, achievement grouping programs must bear a "manifest demonstrable relationship to classroom education"); Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 354 (S.D.N.Y. 1989) (noting that professional standards related to educational testing require validation through statistical analysis to demonstrate that a test is "properly used for its intended purpose"). By demonstrating that the test is invalid for the purpose for which it is being used, Plaintiffs can rebut a showing of educational necessity. *See* Plaintiffs' Post-Trial Brief at 22-23, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (citing relevant case law supporting this proposition); *see also* Debra P. v. Turlington, 644 F.2d 397, 402 (5th Cir. Unit B 1981) (holding that a standardized test would be invalid for failing to cover material actually taught in the state's public school classrooms); Larry P. v. Riles, 793 F.2d 969, 980-81 (9th Cir. 1984) (holding a test which had not been validated for the various testing populations or for the classification of students in special education to be invalid); Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 707-08 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (refusing to uphold a cut-score where the defendant was unable to demonstrate that the set score was reasonable and consistent with ordinary expectations of high school proficiency); Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1531-32 (M.D. Ala. 1991) (stating that random selection of a cut-score would not be valid and, in turn, not educationally necessary); Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 823-24 (M.D. Ala. 1989) (denying a cut-score which lacked any relationship to a legitimate measure of competence).

204. *See* Plaintiffs' Post-Trial Brief at 24-25, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (making several additional arguments against the educational necessity of the TAAS test beyond the validity and reliability of the testing procedures, including that: (1) the state cannot demonstrate a necessity between the exit exam as a diploma requirement and the objectives of accountability in public education and legitimate value in a high school diploma, (2) the negative effects on the educational progress based on the TAAS exit test, and (3) the state's failure to demonstrate that the

the plaintiffs concluded that the test, therefore, cannot logically relate to any legitimate educational goal.[205]

The plaintiffs' argument relied on data regarding the test's content, construction, cut-score, and the use of the exit exam as the sole criterion for graduation.[206] The plaintiffs alleged that the content of the TAAS exit exam has an unnecessary negative impact on minority test-takers, making the testing instrument invalid for its intended purpose.[207] Expert witnesses in the case presented testimony that the testing instrument bears an inverse relationship between minority performance on a specific test item and the point biserial of the item.[208] "Point biserial" is a technical term referring to "the degree to which persons who answer an item correctly tend to also have high total test scores and vice versa."[209]

The plaintiffs charged that with regard to individual field-test questions, the more poorly minority students perform on a given question, the more likely it is that the question will appear on the TAAS test.[210] The process used by the TEA for test development actually tends to place those items with substantial variances between the test scores of white and minority test-takers on the exam, rather than those items with less variances between the races.[211] An expert witness for the plaintiffs charged that "the test construction methods employed by the [d]efendants not only fail to detect and reduce potential item bias, but

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exit exam is the basis for any alleged improvement in achievement among minority students).

205. *Id.*

206. *See id.* at 33-49 (identifying case law in support of their rebuttal); *see also* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 681 (W.D. Tex. 2000) (discussing Plaintiffs' arguments related to validity and reliability).

207. *See* Plaintiffs' Post-Trial Brief at 33-38, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (asserting that specific items on the TAAS exit examination have a differential negative impact on African-American and Hispanic test performance).

208. *See id.* at 33-34 (reporting the testimony of Drs. Shapiro and Phillips).

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

210. *See* Plaintiffs' Post-Trial Brief at 34-35, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (stressing that items on the TAAS exit level test have differential negative affects on minority students).

211. *Id.* Two different items on the same test, both testing the same objective, may have different rates of passing for various racial subpopulations. *Id.* at 35. For example, on one test item "84% of whites, 80% of Hispanics and 79% of African Americans answered the question correctly with a point biserial of 0.16" *Id.* On the same test, testing the same objective, another item was answered correctly by "60% of whites, 36% of Hispanics and 26% of African Americans . . . with a point biserial of 0.56." *Id.* In this case, both items were included in the test even though it is obviously possible to test the objective without furthering the negative impact on minorities. *See* Plaintiffs' Post-Trial Brief at 35, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*).

actually incorporate, generate, perpetuate and enhance any existing or potential item bias and overall test bias for both African American and Hispanic test takers."[212]

In addition to claiming that the State knowingly includes items in the exit test that adversely affect minority test-takers, plaintiffs also alleged that the State's test construction practices are inconsistent with professional standards.[213] For example, plaintiffs noted that the TAAS questions often employ misleading and unnecessarily confusing language.[214] Professional standards do not support this type of trickery in test construction.[215]

The method used to set the cut-score for the TAAS exit examination creates another problematic area for the test's validity.[216] Texas bases the established cut-score of seventy for the exit exam on the use of seventy as the minimum grade required to pass a high school course and the minimum grade average for graduation from high school.[217] No correlation exists, however, between points scored on the TAAS exam and course

212. *See id.* at 36-37 (utilizing expert testimony as evidence in support of problems with TAAS test content).

213. *Id.* at 37.

214. *See* Ernesto M. Bernal, Ph.D., Item-factor Analysis of the 1997 TAAS Exit-level Tests 3-4 (July 10, 1999) (unpublished expert report, Exhibit P1, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (warning that some of the TAAS items have been made tricky, or artificially difficult, to lower the passage rates for these items). The practice of including irrelevant information in test questions is particularly damaging to students with limited English language proficiency. *Id.*

215. *See* U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Chapter 1:6, *at* http://oeri4.ed.gov/offices/OCR/testing/ (last modified Feb. 23, 2001) (defining "construct irrelevance" as a type of validity error in a standardized test). Construct irrelevance is a source of error created when a test item measures material that is beyond the intended construct. *Id.* The example given to explain this idea is a mathematics test score which is influenced by how well a student reads the test, rather than solely measuring the skill of computation. *Id.*

216. *See* Plaintiffs' Post-Trial Brief at 46, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (arguing that because the test is invalid at its cut-score, the test is invalid for the purpose for which it is used).

217. *See id.* at 46-47 (discussing the method the State Board of Education used to set the cut-score for the TAAS test); *see also* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 673 (W.D. Tex. 2000) (noting that "the selection of the [cut] score reflected a general sense that 70% of the required essential elements was sufficient 'mastery' for the purposes of graduation").

grading standards.[218] This arbitrary and unscientific method contradicts the legally accepted practice for setting cut-scores.[219]

Finally, plaintiffs asserted that the TAAS test is invalid because it is used as the sole criterion for high school graduation.[220] Although de-

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218. Plaintiffs' Post-Trial Brief at 47, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (explaining that "[t]he cut score was set without any information from statewide surveys of teachers, students, text books or school districts); *see also* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 706-08 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (rejecting the use of SAT scores, where the cut-score was chosen arbitrarily, as determinative of eligibility for students' participation in intercollegiate athletics).

219. *See Cureton*, 37 F. Supp. 2d at 706-08 (invalidating the use of SAT scores as determinative of student eligibility for participation in intercollegiate athletics because the cut-score was chosen arbitrarily). Where there is no significant evidence establishing a manifest relationship between the selected cut-score and the state's goal, a cut-score is arbitrary. *See id.* at 706 (showing that the NCAA failed to meet its burden of demonstrating a factual nexus between the particular cut-score and the goal); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 105 (2d Cir. 1980) (stating that "[n]o matter how valid the exam, it is the cutoff score that ultimately determines whether a person passes or fails" and when a cut-score, unrelated to the stated purpose produces disparate results, a violation of Title VII occurs); *see also* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, ¶ 28, at 6 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (negating the manner in which the cut-score for the TAAS exit exam was selected with the following criticisms: "(1) [t]he process was not based on any of the professionally recognized methods for setting passing standards on tests; (2) [the process] appears to have failed completely to take the standard error of measurement into account; and (3) . . . the process yielded a passing score that effectively maximized the adverse impact of the TAAS exit test on [b]lack and Hispanic students"). Haney alleges that the TEA cannot explain their process under professional standards in selecting cut-score. *Id.* at 6-7; *see also* AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 59 (1999) (stating in standard 4.19 that "[w]hen proposed score interpretations involve one or more cut scores, the rationale and procedures used for establishing cut scores should be clearly documented"). *But see GI Forum*, 87 F. Supp. 2d at 680 (holding that although the cut-score was based subjectively on examiners' judgments, the chosen cut-score was not "arbitrary or unjustified").

220. *See* Plaintiffs' Post-Trial Brief at 49, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (discounting the defendant's argument that the TAAS test is one of multiple, conjunctive criteria used to determine graduation eligibility); *see also* AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 59 (1999) (declaring in standard 13.7 that "[i]n educational settings, a decision or characterization that will have a major impact on a student should not be made on the basis of a single test score," rather, "other relevant information should be taken into account if it will enhance the overall validity of the decision"); U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Chapter 1:1, *at* http://oeri4.ed.gov./offices/OCR/testing/ (last modified Feb. 23, 2001) (stating expressly that "[a]s the stakes of testing increase for individual students, the importance of considering additional evidence to document the validity of score interpretations and the fairness in testing increases accordingly").

fendants claim that the State uses the exit test as a conjunctive, rather than exclusive, requirement for graduation,[221] failing the TAAS test prohibits a student from graduating even if the student meets all other criteria.[222] This use, in turn, makes the TAAS exit exam a "high-stakes" test,[223] giving the test more weight than professional standards recommend for a single assessment tool.[224]

Logic dictates that a test which fails to meet professional standards and has problems with validity cannot be educationally necessary. No nexus can exist between an invalid selection device and an educational goal.[225] Where a state uses an invalid testing instrument, the scores will not accurately reflect the concept the state intends the test to measure.[226] To avoid unfair misclassification of students, the state must guarantee that the scores adequately measure student skills and that the state can interpret the scores accurately and fairly.[227] Particularly in the high-stakes

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221. *See* Plaintiffs' Post-Trial Brief at 49, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (explaining conjunctive criteria to mean that there is more than one criterion necessary to satisfy the requirements to attain a diploma; e.g. a student must pass the TAAS test, and must complete and pass all required courses, and must meet all attendance and other requirements).

222. *See GI Forum*, 87 F. Supp. 2d at 675 (questioning whether the TAAS test is the sole criterion for graduation or one of three independent criterion and acknowledging that the factors for graduation are not weighed against each other); Plaintiffs' Post-Trial Brief at 49, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (arguing the significance of test scores in graduation requirements); *see also* 19 TEXAS ADMIN. CODE § 74.11 (c), (d) (West 2000) (outlining the requirements for high school graduation as completion of the high school curriculum, completion of the appropriate number of credits, and the testing requirements for graduation).

223. *See GI Forum*, 87 F. Supp. 2d at 675 (declaring that the "exam is properly called a 'high-stakes' test"); Plaintiffs' Post-Trial Brief at 49, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (referring to expert reports presented by both parties in the suit supporting the contention that this exam is high-stakes and thus violates recommended professional standards).

224. *See GI Forum*, 87 F. Supp. 2d at 674-75 (recognizing that "[c]urrent prevailing standards for the proper use of educational testing recommend that high-stakes decisions, such as whether or not to promote or graduate a student, should not be made on the basis of a single test score").

225. *See* Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 701 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (discussing the defendant's burden to present evidence of a nexus).

226. *See* U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Chapter 1:20, *at* http://oeri4.ed.gov./offices/OCR/testing (last modified Feb. 23, 2001) (outlining issues related the validity of score inferences).

227. *See* U.S. Department of Education Office for Civil Rights, The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers (July 6, 2000) Chapter 1, ¶ 25 (on file with the *St. Mary's Law Journal*) (offering an example of a state incorrectly concluding that low test scores reflect a lack of

context, any alternative which accurately measures student ability and avoids the disparate impact on minority students would seem preferable.

3. Alternative Methods for Achieving the Same Purpose

Once the court established that the defendant satisfied its burden of demonstrating an educational necessity, the plaintiffs still had an opportunity to succeed by demonstrating the availability of an equally effective, less discriminatory means of achieving the stated purpose of the TAAS exit exam.[228] Although MALDEF offered several alternative plans to meet the State's objectives, the court held that none of the proposals would produce the same level of student motivation as that produced by the TAAS test. The court explained that "the present use of the TAAS test motivates schools and teachers to provide an adequate and fair education, at least of the minimum skills required by the State, to all students."[229]

The plaintiffs proposed three alternatives to the high-stakes TAAS test to the court. First, MALDEF suggested that Texas should return to the pre-1987 system in which students received high school diplomas upon the successful completion of the high school curriculum and upon meeting other state and district requirements.[230] The plaintiffs based this proposal on the fact that minority students in Texas pass classes at rates significantly higher than these same students pass the exit examination.[231] This option would allow the State the option to continue using a standardized test as an instrument of accountability for school districts, schools, and teachers, and perhaps even for remediation. The proposal

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ability to master the essential curriculum, when instead, the low test scores may actually reflect the restricted educational opportunities for those students, and noting that while it would be inappropriate to use the low test scores to place students in remediation programs, it would be appropriate to use the test scores to measure the effectiveness of the education program).

228. *See GI Forum*, 87 F. Supp. 2d at 681 (holding that although plaintiffs offered evidence of alternative methods for ensuring equal opportunities to learn, plaintiffs failed to suggest different, but equally effective, means for promoting systemic accountability).

229. *Id.*

230. *See* Plaintiffs' Post-Trial Brief at 52, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (contending that issuing a diploma based on a student's course performance is a less discriminatory way to maintain high standards for graduation).

231. *See id.* (referring specifically to the state's correlation studies between the TAAS exit examination and public school courses which show minority students are more likely to pass their classes than they are to pass corresponding subjects on the TAAS test).

would end, however, the use of a single, high-stakes test as criterion for attaining a high school diploma.[232]

Second, MALDEF proposed implementing a sliding scale formula incorporating a student's grade point average (GPA) with his TAAS score to determine eligibility for graduation.[233] This proposition, based on a recommendation by Dr. Walt Haney,[234] would implement the following procedure.[235] Schools would first add a student's GPA to the student's TAAS score.[236] The combined total would need to meet or exceed a score of 140, the minimum needed for graduation based on the current requirements of a minimum GPA of seventy and a TAAS score of sev-

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232. *See id.* (encouraging the state, under this proposal, to continue administering the test and reporting the scores, but base graduation solely on successful course completion); *see also* U.S. Department of Education Office for Civil Rights, The Use of Tests as Part of High-Stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers (Dec. 2000) Introduction, *at* http://oeri4.ed.gov./offices/OCR/testing/ (last modified Feb. 23, 2001) (asking the question of whether it is "ever appropriate to test students on material they have not been taught" and answering affirmatively if the test is a mechanism to evaluate the schools and teachers).

233. *See* Plaintiffs' Post-Trial Brief at 53, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (suggesting a less discriminatory effect under this proposal as developed by Dr. Walter Haney); *see also* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 4 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (professing that by using a sliding scale model incorporating test scores and grades, the assessment would be more consistent with professional testing standards).

234. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, About the Author, ¶ 1 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (describing Haney's qualifications to evaluate and analyze the TAAS test both independently and as an expert for the plaintiff's in *GI Forum*). Walt Haney, Ed.D., is a "Professor of Education at Boston College and Senior Research Associate in the Center for the Study of Testing Evaluation and Educational Policy (CSTEEP) [where he] specializes in educational evaluation and assessment and educational technology." *Id.*

235. Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 68-72 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/part4.htm/. Dr. Haney qualifies this proposal by noting that before implementing such an approach, the sliding scale method must first be subject to empirical validation studies. *Id.* at 21. Dr. Haney notes that the sliding scale approach illustrates an alternative assessment practice that meets the state's objectives in a manner more aligned with modern professional standards and with less adverse impact on minority students. *Id.*

236. *See* Plaintiffs' Post-Trial Brief at 53, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (describing the steps of the proposed procedure); Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 68-69 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (equating this sliding scale method to the manner in which institutes of higher education in Texas consider test scores and GPA together for college admissions and asserting that "[l]iterally decades of research on the validity of college admissions test scores show that such an approach, using test scores and grades in sliding scale combination[,] produces more valid results than relying on either GPA or admissions tests scores alone").

enty.[237] Under this plan, the State could still require a student's GPA to equal or exceed seventy, but a GPA greater than seventy would offset a TAAS score less than seventy.[238] Thus, a student with a GPA of eighty would graduate with a score of sixty on the exit examination, but a student with a GPA of seventy would need to achieve at least a seventy on the TAAS test to earn a diploma.[239] The sliding scale method is attractive because it maintains the incentive for students to do well on the TAAS test while reducing the high-stakes nature of the current system.[240]

Plaintiffs asserted that the sliding scale proposal would reduce the number of minority test-takers who fail the exit test from thirty-four percent to twenty-one percent.[241] Similarly, the sliding scale proposal would reduce the number of white test-takers who fail the exam from eleven percent to six percent.[242] At the same time, the TAAS exit test score would still receive significant weight.[243]

Third, MALDEF suggested that the court consider the alternatives included in an independent study presented to the Texas Legislature by a TEA consultant in 1996.[244] These ideas included the filing of remedia-

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237. Plaintiffs' Post-Trial Brief at 53, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*); *see also* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 72 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (noting that under the sliding scale approach, a higher GPA would compensate for lower exam scores and vice versa).

238. *See* Plaintiffs' Post-Trial Brief at 53, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (claiming that under this more flexible system, a higher percentage of both minority and white students would receive their diplomas); *see also* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 4, ¶ 73 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (projecting that by using a sliding a scale method, the number of minority students eligible for graduation would increase by 27%).

239. *See* Plaintiffs' Post-Trial Brief at 53, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (proposing that this model is more reflective of the preferred method of using multiple criteria when high-stakes are at issue).

240. *See id.* at 55 (discussing the alternative assessment methods reviewed by experts during trial).

241. *Id.* at 53.

242. *Id.*

243. *See id.* (suggesting further that combining the three TAAS scores, as opposed to having a separate cut-score for each subject area, would also be less discriminatory towards minority students).

244. *See* Plaintiffs' Post-Trial Brief at 54, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (listing the alternatives to the TAAS test initially presented by a private consulting firm hired by the TEA in 1996). Where alternative selection or assessment devices are available and capable of meeting the state's legitimate interest without resulting in similar undesirable discriminatory effects, the refusal to adopt one or all of these alternatives may be evidence of a pretext for discrimination. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989) (noting that the costs and other

tion plans for those students scoring below some level on the TAAS, and allowing students to receive their high school diploma upon earning an associates degree.[245] The TEA proposal also suggested allowing additional criteria to impact a student's ability to graduate, such as workplace certifications or evaluation of student performance based on work product portfolios.[246] Finally, the consultant suggested basing the TAAS passing score on the cumulative score of all three sections of the exam.[247] All of these proposals would create less discriminatory effects on minority passage rates than the current use of the TAAS exit examination.[248]

Although the alternatives proposed by the plaintiffs more consistently mirrored professional standards for testing policies and use,[249] the court denied that any of the recommendations could motivate students to perform at their highest level of ability during assessments.[250] The court saw the lack of a truly high-stakes consequence for students as a barrier to linking any of the proposed alternatives to the State's articulated goal of utilizing the TAAS test as a tool for student accountability.[251] Furthermore, the court concluded that the alternatives did not adequately address the State's goal of systemic accountability.[252]

What the court failed to acknowledge in its commitment to maintaining a strong motivation factor in the State's accountability program is that using the TAAS for high-stakes purposes may actually detract from the real goals of the assessment. In fact, the pressure to raise scores, in Texas and other states, has led to "inappropriate test preparation practices, in-

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burdens of the alternative are considered in determining whether the alternative will be effective); Albarlme Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (indicating that the complaining party has the burden of proving that the alternatives meet the legitimate interests of the opposing party).

245. *See* Plaintiffs' Post-Trial Brief at 54, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (outlining the suggestions made to the state legislature by an outside consultant). Focusing on an associates degree allows students who have met the basic requirements for graduation and who pass the Texas Academic Skills Program (TASP) to receive their diplomas. *Id.*

246. *Id.*

247. *See id.* at 55 (reviewing the proposal made to the state and contending that each of the suggestions would be less discriminatory than the system in place).

248. *Id.* at 55-56.

249. *Id.* at 56.

250. *See* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 681-82 (W.D. Tex. 2000) (correlating the need to stimulate students to give their best performance on an assessment with the state's goal of holding schools, teachers, and students accountable for teaching and learning).

251. *See id.* (emphasizing that an equally effective alternative must bear a manifest relationship to the state's legitimate purpose in instituting the current practice).

252. *See id.* (stressing that assessment and accountability relate to school districts, individual schools, and teachers, as well as students).

cluding outright cheating."[253] Although over-zealous test preparation practices outnumber episodes of administrative cheating on the TAAS test, this provides little comfort. Teaching to the TAAS in lieu of providing a standard, well-rounded curriculum can prove detrimental to the education students receive.[254]

In denying all the proposed alternatives, the district court completely frustrated the plaintiffs' Title VI claim. This decision closed the door to any relief for Texas's minority students adversely impacted by the TAAS test under the Civil Rights Act.[255] Further, the court's finding with respect to the test's validity and reliability not only artificially supports the Title VI educational necessity burden, but also discounts the issue of fairness raised under the plaintiff's second claim, that the test violated their due process rights.

### B. *Due Process*

Because Texas students have a protected property interest in their high school diplomas,[256] high-stakes testing, which places the State in the position to refuse this protected interest, raises due process concerns.[257] Procedural due process requires that the state provide notice before denying any student of her state-created interest in a diploma.[258] Substantive due process holds that some rights "are so profoundly inherent in the Ameri-

253. *See* Stephen P. Klein, et al., *What Do Test Scores in Texas Tell Us?*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 49, ¶ 10 (Oct. 26, 2000), *at* http://epaa.asu.edu./epaa/v8n49 (reporting that there have been multiple documented cases of cheating in Texas and across the nation which, if widespread, would significantly distort inferences from gains in test scores).

254. *See* Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept.-Oct. 2000, at 21 (exclaiming that "the obsession with the TAAS test is ruining a generation of students").

255. *See GI Forum*, 87 F. Supp. 2d at 683-84 (concluding that "the TAAS exit-level examination does not violate regulations enacted pursuant to Title VI of the Civil Rights Act of 1964").

256. *See* Debra P. v. Turlington, 474 F. Supp. 244, 266 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B 1981) (establishing that students possess a property right in their high school diplomas). The State of Texas created this protected interest. *See GI Forum*, 87 F. Supp. 2d at 682 (citing TEX. EDUC. CODE ANN. §§ 4.002, 25.085(b), 28.025(a)(1) to find that Texas affirmatively provided this interest for students by establishing certain graduation requirements).

257. *See GI Forum*, 87 F. Supp. 2d at 682 (discussing the application of due process to the state's testing situation).

258. *See id.* (recognizing the Fifth Circuit's established precedent related to procedural due process and state-created interests); *see also* Frazier v. Garrison Indep. Sch. Dist., 980 F.2d 1514, 1528-29 (5th Cir. 1993) (relating that once the state confers a property interest, that interest is protected by the Due Process Clause procedural guarantees).

can system of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded [the] individual are fair."[259]

The plaintiffs claimed that the TAAS graduation requirement violated both procedural and substantive due process.[260] In *Debra P. v. Turlington*, the Fifth Circuit determined that failure to teach material tested not only violates procedural due process, such a practice also violates substantive due process.[261] MALDEF raised the question of whether all Texas students actually learn the designated TAAS objectives, noting that when the State initially implemented the test, the State made no effort to establish that schools properly incorporated the objectives into classroom lessons.[262] When students have no opportunity to learn the material, administration of a high-stakes test becomes fundamentally unfair.[263] The district court, however, denied the plaintiffs' procedural due process claim, finding that every student in Texas had both notice of the test's consequences and an opportunity to learn the material.[264] Although this determination dismissed both the procedural and substantive aspects of this issue, other substantive due process issues remained before the court.

Next, the court analyzed the TAAS exit examination for substantive due process violations based on four categories. The first three categories

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259. *GI Forum*, 87 F. Supp. 2d at 682 (citing to Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985), *and* Robertson v. Plano City, 70 F.3d 21, 24 (5th Cir. 1995)).

260. *See* Plaintiffs' Post-Trial Brief at 56-57, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (arguing that the tested material on TAAS is not taught in the classroom, and that this violates both substantive and procedural due process).

261. *See* Debra P. v. Turlington, 644 F.2d 397, 402 (5th Cir. Unit B 1981) (declaring that a high-stakes test which covers materials not incorporated in the classroom curriculum was unfair and violative of due process).

262. *See* Plaintiffs' Post-Trial Brief at 56, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (emphasizing that "part of the procedural due process analysis is to determine whether teachers adequately taught the materials covered on the test with enough notice that students could reasonably have answered the questions on the test").

263. *See Debra P.*, 644 F.2d at 404 (holding that "the state administered a test that was . . . fundamentally unfair in that it *may* have covered matters not taught in the schools of the state").

264. *See GI Forum*, 87 F. Supp. 2d at 684 (concluding that the "TAAS test violates neither the procedural nor the substantive due process rights of the [p]laintiffs" because "[t]he TEA has provided adequate notice of the consequences of the exam and has ensured that the exam is strongly correlated to material actually taught in the classroom"); *see also* U.S. Department of Education Office for Civil Rights, The Use of Tests a Part of High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers, Letter from the Assistant Secretary: 5, *at* http://oeri4.ed.gov./offices/OCR/testing/ (last modified Feb. 23, 2001) (noting that "[t]he guarantee under federal law is for equal opportunity, not equal results").

stem from the Fifth Circuit's decision in *Debra P.*, which held high-stakes testing policies invalid when the tests prove to be arbitrary and capricious, frustrate a legitimate state interest, or prove to be fundamentally unfair.[265] The fourth category arose from the United States Supreme Court holding in *Regents of the University of Michigan v. Ewing*.[266] In *Ewing*, the Court prohibited the use of educational policies which substantially depart from academic norms when such policies affect a property interest.[267]

The court in *GI Forum* did not directly address the first possibility for a substantive due process violation—whether the educational policy was arbitrary and capricious. In fact, due to the judiciary's recognition of state plenary power over public education, a federal court is unlikely to ever find a state's educational policy arbitrary and capricious, virtually barring this claim. In *Debra P.*, the court acknowledged the limits set by judicial restraint in addressing problems in public education when it expressed reluctance to substitute its "judgment for that of the state legislature on a matter of state policy."[268]

A second avenue under substantive due process is available when a governmental policy frustrates a legitimate state interest. The TEA identified two educational purposes behind the TAAS test.[269] First, the State seeks "to hold schools, students, and teachers accountable for education."[270] Second, the State seeks "to ensure that all Texas students receive the same, adequate learning opportunities."[271] The TAAS test potentially frustrates both of these goals.

Although a high-stakes test can provide a vehicle for accountability, the TAAS examination does not ensure that all Texas students receive an adequate education. In fact, the TAAS test displaces substantive curriculum in many classrooms and draws certain students completely away from the adopted high school curriculum and into full-time remediation programs. As well, it has been documented that some schools retain, in the ninth grade, students at-risk of failing the test to avoid administration of the exam.[272] Some studies even link TAAS failure rates to high school

265. *Debra P.*, 644 F.2d at 404.

266. 474 U.S. 214 (1985).

267. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 227 (1985).

268. *Debra P.*, 644 F.2d at 406.

269. *GI Forum*, 87 F. Supp. 2d at 683.

270. *Id.* at 679.

271. *Id.*

272. Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 5, ¶ 38 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/.

drop out rates.[273] Viewed in totality, the TAAS test hinders the very goals the State wants the test to achieve.

Additionally, educators disagree about whether TAAS remediation programs for students who fail the test provide an equal educational opportunity.[274] In fact, remediation solely focused on passing the TAAS actually detracts from educational opportunities in other important areas.[275] Although a remediation program may eventually help a student pass the TAAS, it cannot correspond to the educational opportunities afforded other students. Accordingly, the State should not rely on remediation to act as a substitute for true improvement in opportunities to learn.[276]

The district court's assumption that remediation equates to an educational benefit fails to recognize that remediation is hardly a substitute for true improvement in opportunities to learn. Despite the score differentials reflecting disparity between white and minority students, minority students continue to be taught by a disproportionately higher number of teachers lacking proper credentials.[277] Additionally, minorities are underrepresented in gifted-and-talented, advanced placement, and college

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273. *See id.* at pt. 7, ¶ 7 (comparing different studies on the yearly Texas high school dropout rate).

274. *See* Ernesto M. Bernal, Ph.D., Item-factor Analysis of the 1997 TAAS Exit-level Tests 5 (July 10, 1999) (unpublished expert report, Exhibit P1, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (reporting that once students fail the TAAS test, they are relegated to the minimal curriculum program to provide time for TAAS remediation). Dr. Bernal also notes that, among other serious consequences, this lower-level curriculum reduces the chances these students have of being admitted to college. *Id.*

275. *See GI Forum*, 87 F. Supp. 2d at 681 (determining that "the question of whether the education of minority students is being limited by TAAS-directed instruction is not a proper subject for its review").

276. *See* Linda McSpadden McNeil, The Testimony 5-6 (2000) (unpublished expert report, Exhibit P3, GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (presenting a true scenario of a largely Hispanic, low performing high school which spent almost $20,000 for commercial test preparation materials to raise student's TAAS reading scores, when the school lacked the fundamental necessities for educating high school students, like a library, text books and laboratory equipment).

277. *See GI Forum*, 87 F. Supp. 2d at 674 (acknowledging that, in a general sense, minority students are not provided the same educational opportunities as whites, but still holding that minorities have a reasonable opportunity to master the information covered on the TAAS test); Philip Uri Triesman, Preliminary Expert Witness Report 13-14 (Feb. 25, 1999) (unpublished expert report, Exhibit D331, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (offering statistical data to prove that "schools with large proportions of African American and Hispanic students are likely to have fewer certified teachers than schools with small proportions of African American and Hispanic students").

preparation courses.[278] Perhaps if Texas truly equalized the opportunities to learn for all students, minority students would not disproportionately need the "benefit" of TAAS-oriented remediation.[279]

Worse still, for many minority students at-risk of failing the TAAS exam, neither increased educational opportunities nor remediation will be made available. Instead, studies show that minority students at risk of failing the TAAS test are disproportionately more likely to be retained in the grade preceding the exam[280] or filtered into special education[281] where test results do not count toward the school's average.[282] Schools presumably take these actions to protect overall scores and ratings.[283] Unfortunately for the students, grade retention and lower-level tracking encourage students to drop-out of school altogether.[284]

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278. *See* Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment at 9, *GI Forum* (No. SA-97-CA-1278EP) (on file with the *St. Mary's Law Journal*) (providing statistics to demonstrate that fewer Hispanic and African-American students take advanced courses than do white students). In the 1995-96 school year, twenty-one percent of whites students took the advanced placement test, as compared to twelve percent of black and Hispanic students). *Id.*

279. *See GI Forum*, 87 F. Supp. 2d at 674 (claiming that the "immediate effect of poor performance on the TAAS examination is more concentrated, targeted educational opportunities, in the form of remediation").

280. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 5, ¶ 26 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (stating that minority students are retained in ninth grade at a rate of 2.5 to 3.0 times that of white students). These ninth grade retention rates exceed national trends. *See id.* at 12. The court acknowledged that "retention rates for minorities are peculiarly high at the ninth grade, just before the first administration of the exit-level TAAS." *GI Forum*, 87 F. Supp. 2d at 676.

281. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 5, ¶ 37-38 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (establishing that from 1994 to 1998, the number of minority students taking the TAAS test under the special education category more than doubled).

282. *See id.* at pt. 5, ¶ 38 (noting that these students are removed from school accountability ratings).

283. *See id.* at pt. 5, ¶ 38-40 (presenting evidence that portions of the gain made in the State's passing rates on the exit exam are attributable to an "illusion" created by the increase in the numbers of students either dropping out of school prior to taking the tenth grade test or being filtered into special education programs where their grades are excluded from the official accountability results). However, the district court concludes that no causal connection was demonstrated between the introduction of the TAAS test and the increased rates of minority exclusion from the TAAS test. *GI Forum,* 87 F. Supp. 2d at 676, 681.

284. *See* Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41, pt. 5, ¶ 33 (Aug. 19, 2000), *at* http://epaa.asu.edu/epaa/v8n41/ (asserting that "research shows clearly that retention in grade is a common precursor to dropping out of school").

The third avenue for a substantive due process challenge arises when a state's testing policy is fundamentally unfair. Courts acknowledge two specific circumstances in which a testing procedure violates due process under this standard. First, a test is fundamentally unfair if the test covers matters not taught in the classroom.[285] The court in *GI Forum* established that the material taught in Texas classrooms corresponds appropriately with the material tested by the TAAS test.[286]

The second way a plaintiff can show fundamental unfairness is when a testing program holds students accountable for an inadequate education system. The court in *GI Forum* recognized the long history of inequality in the Texas education system and noted that the effects from such inequality continue today.[287] The court concluded, however, that the State did not use the TAAS test in such a way as to hold students responsible for the failure of the school system because the test represents the State's plan to address and eradicate such inequalities.[288] This argument works by weighing more heavily the State's interest in pursuing its chosen program for remeditating inequalities than the student's interest in not being penalized as a result of the same inequalities.

Finally, a plaintiff can make a fourth substantive due process challenge when the state's educational determinations reflect a "substantial departure from accepted academic norms."[289] Such a departure is demonstrated when, for example, the cut-score is selected in an arbitrary and unscientific method.[290] Or, a departure may be evidenced by using a test as a sole criterion for an important decision.[291] The most troubling departure in the context of the TAAS test, however, is in the test item selection system used in the design of the exam. The item selection system used in the creation of the TAAS examination often results in the favor-

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285. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. Unit B 1981) (stating that it is unconstitutional for the test to cover material not taught in the classroom).

286. GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000).

287. *Id.* at 674.

288. *See id.* (admitting that while the TAAS does disadvantage minority students, the intent of the examination is to identify and eradicate disparities).

289. *Id.* at 682 (quoting from Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

290. *See* Cureton v. Nat'l Collegiate Athletics Ass'n, 37 F. Supp. 2d 687, 706-08 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (establishing that where there is no significant evidence proving a manifest relationship between the selected cut-score and the states goal, a cut-score is arbitrary).

291. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 146 (1999) (stating in standard 13.7 that "[i]n educational settings, a decision or characterization that will have major impact on a student should not be made on the basis of a single test score").

ing of items on which minorities will perform poorly, while disfavoring items where discrepancies are not as wide.[292]

In full recognition of the evidence demonstrating significant problems with the test construction and application, and despite the showing that the TAAS imposes "standards on minority students whose failure to meet those standards is directly attributable to state action," the district court still failed to find a due process violation.[293] The court justified this oversight by balancing the test construction problems against the State's interest in identifying and remeditating problems within its educational system.[294] However, the court's effort to balance the State's interest in eradicating inequalities against the test's substantial departure from accepted norms misplaces the rational basis standard of review. Instead, the court should have required the State to produce a more substantial interest to justify this violation of substantive due process.[295]

## V. PROPOSALS

The problems arising under the TAAS in Texas continue to plague minority students at a disproportionate rate. Despite the district court's holding in *GI Forum*, however, avenues still exist for courts to forge a solution. First, courts should use a higher level of scrutiny when addressing constitutional challenges to state policies affecting a child's education. Second, federal courts should reduce the level of deference given to states in Title VI claims under the Civil Rights Act. A more appropriate solution to the problems associated with the TAAS, however, should come from the State. Texas can legislate a better method of holding school districts accountable by acknowledging the limitations of standardized assessments and by following professional testing guidelines.

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292. *Id.* at 683.

293. *GI Forum*, 87 F. Supp. 2d at 683 n.12.

294. *Id.* at 683.

295. *See* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (recognizing that there are occasions which warrant greater scrutiny from the courts than mere rational basis). In *Moore*, the Supreme Court professed:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the mere specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment . . . .

*Id.*

A. *Proposals for the Courts*

Federal courts have long recognized the importance of public education.[296] The Supreme Court found providing public education one of the most important functions of a state.[297] As a result, the state enjoys tremendous control over public education.[298] Still, the state must exercise this power within constitutional limitations. Thus, once a state provides public education, the state must do so "in a non-discriminatory fashion."[299]

If the federal courts are to uphold this constitutional limit on a state's exercise of plenary power in the area of public education, state policies having a discriminatory impact on minority students must be reviewed under a less deferential standard. The courts can reduce the level of deference in one of two ways. First, courts can simply create a heightened level of scrutiny for minority school children, similar to the standard applied in *Plyer v. Doe* for alien school children.[300] Second, the courts could avoid making changes to the constitutional standards and achieve a result by adjusting the balancing test under Title VI.

1. Establishing a Heightened Level of Scrutiny

First, by establishing a heightened level of scrutiny for minority school children, the courts would remove cases of disparate impact from a classification designed to govern economic legislation. The current level of review was never designed for inequities in something as fundamental as the opportunity to learn.[301] Under heightened scrutiny, courts would re-

296. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (stating that education is essential for preparing citizens to effectively and intelligently participate in our political system); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (proclaiming that education "is required in the performance of our most basic public responsibilities").

297. *See Yoder*, 406 U.S. at 213 (stating that "[t]here is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education").

298. *Id.*

299. *See* Debra P. v. Turlington, 644 F.2d 397, 403 (5th Cir. Unit B 1981) (referring to the Supreme Court's ruling in *Goss v. Lopez*). The Supreme Court stated, "[A]mong other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." Goss v. Lopez, 419 U.S. 565, 574 (1975).

300. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that "[i]f the [s]tate is to deny a discrete group of innocent children the free public education that it offers to other children . . ., that denial must be justified by showing that it furthers some substantial state interest").

301. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1248-49 (1991) (explaining judicial review under equal protection). Under the minimal scrutiny standard of the rational basis test, legislation is almost cer-

view state education practices adversely affecting minority students under a standard referred to as "exacting scrutiny" or "strict rationality."[302] Such a standard would force the state to demonstrate a "substantial relationship" between the educational practice and the educational goal,[303] rather than only producing any manifest relationship to justify the practice.

Problems arise, however, in that the contemporary Supreme Court appears resistant to efforts that extend heightened review to new classifications.[304] Therefore, the more likely solution is to alter the manner in which courts apply Title VI to disparate impact cases. This proposal would return the Title VI analysis to the Title VII format originally used.[305]

2. Adjusting the Balancing Test Under Title VI

In *Newark Branch, NAACP v. Town of Harrison*,[306] the Third Circuit gave a clear outline of the application of Title VII analysis in a disparate impact employment case.[307] First, the plaintiff must present a prima facie case of disparate impact.[308] Then, the burden shifts to the defendant to present a business justification for the challenged act.[309] Under this element of the analysis, the employer bears the burden of production to show that the challenged practice serves, in some significant way, its legitimate employment goals.[310] The plaintiff carries the burden of persuasion to discredit the asserted business justification, or to suggest a viable alternative that would reduce the disparate impact.[311]

A significant difference exists between the Title VII level of analysis and the level of analysis currently used for Title VI claims. Under Title

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tainly upheld. *Id.* at 1249. Since 1937, only two economic regulations have been overturned under this standard of review. *Id.*

302. *Id.* at 1250.

303. *Id.*

304. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1250 (1991) (stating that "the Rehnquist Court is inclined to evaluate claims of racial discrimination under the strict scrutiny test and all other equal protection claims under the rational basis test").

305. *See* Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students & Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 520 (1999) (discussing Title VI challenges in education cases).

306. 940 F.2d 792 (3d Cir. 1991).

307. Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 798 (3d Cir. 1991).

308. *See id.* (stating that a prima facie case is established by showing that a facially neutral hiring policy has a significant discriminatory effect).

309. *Id.* (citing Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659 (1989)).

310. *Id.*

311. *Id.*

VI, courts extend an extraordinary amount of deference to the state.[312] The same heightened level of deference, however, is not granted to businesses under Title VII. As demonstrated in *GI Forum*, such deference makes the plaintiff's burden of proof related to the educational goal virtually impossible to realize. In contrast, the Supreme Court has noted that under Title VII the statutory standard demands less deference to seemingly reasonable acts and more probing judicial review.[313] Actions that place unreasonable obstacles before minority students justify this same level of probing review because such actions impact the students' ability to prepare themselves to be self-reliant participants in our economy.[314]

### B. *Proposals for the Legislature*

In addition to the necessary changes in legal standards used to govern this area of the law, Texas and other state legislatures must diligently ensure that accountability policies work towards improving education without serving as a stumbling block to learning.[315] Although the district court in *GI Forum* upheld the TAAS exit examination, the State should not consider this holding as an endorsement of the program. The final statement in the court's opinion reveals reluctance in supporting Texas's assessment program. The court remarked that "[i]t is not for this [c]ourt to determine whether Texas has chosen the best of all possible means for achieving [its educational] goals. The system is not perfect, but the [c]ourt cannot say that it is unconstitutional."[316] Regardless of the constitutional determinations of this case, the legislature has much work to do before the State can ensure that the current assessment program in Texas proves both valid and reliable, while best serving the interests of the State.

#### 1. Acknowledging the Limitations of Standardized Assessments

The first step in improving the way Texas evaluates students, teachers, schools, and districts is to recognize that test-based accountability pro-

312. GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 683 (W.D. Tex. 2000).

313. Washington v. Davis, 426 U.S. 229, 247 (1976).

314. *See* Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (using these terms to describe the importance of education).

315. *See* Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept./Oct. 2000, at 44 (warning that "[b]y shifting funds, public attention, and scarce organizational and budgetary resources away from schools and into the coffers of the testing industry vendors, the futures of poor and minority children and the schools they attend are being compromised").

316. *GI Forum*, 87 F. Supp. 2d at 684.

vides incentives to raise scores, not achievement.[317] The limitations of this type of assessment program include score inflation, erroneous causal inferences, and high misclassification rates.[318] All of these rely on a common misperception that numerical indices have greater precision and accuracy in evaluating subjects than other forms of evaluation.[319]

One way to counter some of these inherent flaws in standardized testing is to use the test as a starting, not ending, point for schools and students.[320] Such a method places the initial test score for a student as a base line against which to compare achievement on future tests. By allowing scores to reflect individual progress, variances in opportunity to learn do not weigh down scores unexpectedly. Further, achievement and progress by students, teachers, and the education system are reviewable in a meaningful way.[321]

Some smaller adjustments can also address flaws in the testing program. For example, if the State continues the current program of assessing through TAAS, the State should incorporate some form of audit testing to minimize score inflation and bias.[322] The State should also implement other efforts to protect fairness. For example, all unintended and unnecessarily complex language should be removed from test questions.

2. Following Professional Testing Guidelines

Finally, the State should follow professional testing guidelines. With high-stakes consequences, the State should use multiple measures to assess student performance.[323] Even for the best testing instruments, misclassification rates for students remain high.[324] High-stakes testing operates to amplify these errors because of the harsh and unforgiving

317. Daniel Koretz, Presentation at the National Center for Research on Evaluation Standards and Standard Testing (CRESST) 2000 National Conference: Educational Accountability in the 21st Century (Sept. 14, 2000).

318. *Id.*

319. Robert Linn, Presentation at the National Center for Research on Evaluation Standards and Standard Testing (CRESST) 2000 National Conference: Educational Accountability in the 21st Century (Sept. 14, 2000).

320. Daniel Koretz, Presentation at the National Center for Research on Evaluation Standards and Standard Testing (CRESST) 2000 National Conference: Educational Accountability in the 21st Century (Sept. 14, 2000).

321. *Id.*

322. *See id.* (suggesting specifically that where evidence of disparate impact arises, auditing should be accompanied by an assessment of students' opportunity to learn).

323. *Id.*

324. Eva Baker, Presentation at the National Center for Research on Evaluation Standards and Standard Testing (CRESST) 2000 National Conference: Educational Accountability in the 21st Century (Sept. 14, 2000).

consequences of failure. Contrary to the district court's assertion that the TAAS test does not constitute the sole criterion for high school graduation because students have multiple opportunities to pass, the touchstone for "multiple measures" is actually multiple types of measures, not multiple opportunities on the same measure.[325] Texas does not meet this standard.

## VI. Conclusion

Texas's use of the TAAS as an accountability program has numerous negative and far-reaching effects. To date, over a hundred thousand students, primarily minorities, otherwise qualified to graduate have been denied diplomas and other opportunities for economic and social success because they failed to pass this standardized test. Such a result is not the answer to the education problems in Texas. Rather, it is a source of new problems, including a further entrenched underclass that will ultimately cost our state dearly. Courts must stop avoiding their role in protecting the disenfranchised from this type of discrimination. As well, the Texas Legislature must focus on meaningful education reform to improve the opportunity for all of our children to achieve.

325. *Id.*