

EXPANDING STUDENT ACCESS TO AND SUCCESS IN HIGHER EDUCATION: CONFRONTING SYSTEMIC INEQUITIES*

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I. Introduction: Inequities and Linkages

The particular concern of this paper is the systemic inequities in access to higher education, and full participation in higher education, that affect low socioeconomic status, racial and ethnic minority, and other students in the United States. Paralleling this concern is an equal concern for related inequities in elementary/secondary (K-12) education in the United States.

* Substantial portions of this paper are drawn, with adaptations and updating, from W. Kaplin, “Fiscal Inequity and Resegregation: Two Pressing Mutual Concerns of K-12 Education and Higher Education,” in M. Dyson & D. Weddle (eds.), *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA’S CHILDREN* (Carolina Academic Press, 2009), used with the permission of the publishers. An earlier draft of this paper was presented to the U.S./U.K. Roundtable on Higher Education Law and Policy meeting at New College, Oxford University, on June 29-July 3, 2009.

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These inequities may arise even before students begin their formal public schooling, may persist throughout their K-12 education to graduation from high school (or not), and should they be admitted to a higher education institution, may accompany them to and through college. Since the paper has this dual concern, its focus is more on the interconnections between inequities evident in higher education and those evident in K-12 education than it is on higher education's inequities standing alone.

In the United States in recent years, there has been increasing recognition of such interconnections, or “linkages,” between higher education and elementary/secondary education. The existence and significance of these linkages (those pertinent to inequities and other linkages as well) is not an entirely new idea in the United States. The concept was articulated at least as early as 1968, for instance, in a publication of the Education Commission of the States¹ and emerged again in 1985 in a publication of the Institute for Educational Leadership.² The latter publication was then updated in 1999³ as part of a series of reports on “Perspectives in Public Policy: Connecting Higher Education and the Public Schools,” published by the Institute for Educational Leadership and the National Center for Public Policy and Higher Education. For the most part, however, the proponents of linkages were voices crying in the wilderness until the early 21st century when change began as more voices joined the conversation and more ears became attuned to the critique.⁴

¹ Michael Usdan, *et al.*, *The Politics of Elementary – Secondary Education* (Educ. Comm. of the States, 1968).

² Harold Hodgkinson, *All One System* (Inst. for Educ. Leadership, 1985).

³ Harold Hodgkinson, *All One System: A Second Look* (Inst. for Educ. Leadership and Nat'l Center for Public Policy and Higher Education, 1999).

⁴ For an important, and useful, example of such an uptick in the national conversation, see GATHERING MOMENTUM: BUILDING THE LEARNING CONNECTION BETWEEN SCHOOLS AND COLLEGES (The Institute for Educational Leadership & The National Center for Public Policy and Higher Education,

The linkage concept, in general, is that many legal and policy developments involving K-12 education in the United States also have important repercussions for higher education. Problems that develop at the K-12 level and resist satisfactory resolution there may sooner or later be transformed into problems at the level of higher education; challenges and opportunities that arise in K-12 education may sooner or later be transformed into challenges and opportunities for higher education. These cycles can also operate in reverse.

As suggested above, one key area for higher education linkages with K-12 education is the area of equity – equitable access to higher education as well as equitable opportunity for academic success and full participation in the campus community. Although equity linkages have potentially enormous policy and legal significance for the U.S. education system, they often are not accorded the priority attention they deserve in the developing national conversation. Higher education, it seems, has not yet realized the strong interdependency and mutuality of interests that it has with K-12 education regarding equity issues. In contrast, this paper emphasizes these linkages, identifies the key areas of inequity, and develops their policy and legal significance for U.S. higher education and the entire U.S. education system.

II. Examples of Inequities and Resulting Linkages between Higher Education and K-12 Education

Interconnections between the two levels of education are not particularly difficult to find if one looks for them. Here are some key examples regarding inequities.

A. Students with Disabilities

In 1975, Congress passed the Education of All Handicapped Children Act, which later became

2002) (Proceedings of The Learning Connection Conference).

(and remains) the Individuals with Disabilities Education Act (IDEA),⁵ a statute that provides funds for services for K-12 students with disabilities and establishes guidelines for such services. On implementation of the new law, local school districts began developing and expanding services for students with disabilities, and the numbers of students identified as disabled began to increase sharply. In due time, many of these students graduated from high school prepared to enter college and expecting special services from the institutions in which they enrolled.⁶ By 2006, nearly thirteen percent of public school students, or 6,217,000 students, had been classified as disabled under the IDEA,⁷ and the percentages and numbers continue to increase.

The huge increases in disabled students applying to and enrolling in college has thus created problems for higher education, as well as a historic opportunity – opportunity to confront and solve issues of access and inclusion that affect students with disabilities. Both the problems and the opportunities are made more difficult because IDEA does not apply to colleges and universities and therefore does not trigger the funding and the programmatic guidance for higher education that the federal government provides to K-12 education.

Before Congress stepped in in 1975, inequities concerning K-12 students with disabilities abounded. Many, if not most, did not receive adequate support services, and many received no public education at all, having been excluded from the public schools.⁸ But, since 1975, continuing Congressional and U.S. Department of Education action, documented through a series of amendments to,

⁵ 20 U.S.C. §1400 et seq.

⁶ See Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May be Heading*, 63 MD. L. REV. 122, 123–131 (2004).

⁷ U.S. Dept. of Education, Civil Rights Data Collection 2006: National and State Projections, available at <http://ocrdata.ed.gov/ocr2006rv30/xls/2006Projected.html>.

⁸ See, e.g., *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972); *PARC v. Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972).

and expansions of, the disability laws, has resulted in substantial progress and alleviated many of the inequities. But some problems remain, and these problems may interfere not only with the students' K-12 education but also their potential for later success in higher education. Some students with emotional/behavioral disabilities, for example, may be dealt with through a school's disciplinary processes (and perhaps suspended) rather than being provided with special and related services under the IDEA. Other students with emotional disabilities (the official category is "serious emotional disturbance," or SED) may receive services that fall short of their needs, either because the services are insufficiently comprehensive, or the intervention comes too late, or the service providers are not well qualified.⁹ Minority students may be "over-identified" for special education classes, in part because of academic deficits that are the result of inadequate instruction rather than mental deficiencies, resulting in racial and ethnic overrepresentation in special education classes.¹⁰ In the complex area of learning disabilities, students may be "missed" and thus not evaluated, or may be misdiagnosed, or may receive inappropriate or incomplete services. Students with other disabilities may be harassed, bullied, or subject to social isolation. And under the U.S. Supreme Court's interpretation of IDEA in *Board of Education v. Rowley*, students with disabilities have no valid claim to an education that maximizes their potential, or that is comparable to the education received by non-disabled students, but only to an education that provides "personalized instruction with sufficient support services to permit the child to benefit

⁹ Deanne Lechtenberger & Frank Mullins, "Achieving the Promise: The Significant Role of Highly Qualified Teachers in Transforming Children's Mental Health in America," in Dyson & Weddle (eds.), *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN* (Carolina Academic Press, 2009), pp. 508-518.

¹⁰ Robert Garda, "The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education," 56 ALA. L. REV. 1071 (2005). For an early example of overrepresentation, see *Larry P. v. Riles*, 343 F.Supp. 1306 (N.D. Ca. 1972), aff'd, 502 F.2d 963 (9th Cir. 1974); 495 F. Supp. 926 (N.D. Cal. 1979), aff'd in part, 793 F.2d 969 (9th Cir. 1984).

educationally from that instruction.”¹¹

B. *Undocumented Foreign Students*

In 1982, in *Plyler v. Doe*,¹² the U.S. Supreme Court invalidated a Texas statute that precluded undocumented alien children from receiving any public K-12 education. The Texas statute, the Court reasoned, discriminated against children who were not responsible for their undocumented status, denying these innocent children “a basic education” and thus saddling them with the “enduring disability” of illiteracy. Such discrimination violated the U.S. Constitution, specifically the equal protection clause of the Fourteenth Amendment. It is unconstitutional, the Court stated, for states (and by extension local school districts) to “deny to undocumented school-age children the free public education that [they provide] to children who are citizens of the United States or legally admitted aliens.”

This ruling opened previously closed doors of opportunity for undocumented students in many areas of the United States. Most undocumented students began attending public school; over time many of these students graduated from high school; and an increasing proportion of these students wanted to attend college.¹³ The *Plyler v. Doe* ruling, however, does not apply to higher education and thus does not provide undocumented students a constitutional right of access to state colleges and universities.¹⁴ The continuing growth of a pool of undocumented high school graduates, resulting from *Plyler*, therefore raised substantial issues for state university systems and individual public colleges and universities (as well as for state legislatures and the U.S. Congress). Should undocumented high school graduates be

¹¹ *Board of Education v. Rowley*, 458 U.S. 176, 203; *see generally* 458 U.S. at 188-204.

¹² 457 U.S. 202 (1982).

¹³ *See generally* Roberto Gonzales, *YOUNG LIVES ON HOLD: THE COLLEGE DREAMS OF UNDOCUMENTED STUDENTS* (College Board, 2009).

¹⁴ *See* William Kaplin & Barbara Lee, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, 4th Ed. (Jossey-Bass, 2006), secs. 8.2.4.6 and 8.3.6.2.

eligible for admission to state colleges and universities, and if so under what conditions? Should they be eligible for in-state tuition rates and/or for state financial aid? (This question is of particular importance to undocumented students, since they are more likely than U.S. citizens to come from low-income families, and since they are generally ineligible for federal government student aid programs.¹⁵) To what extent are these issues controlled by federal law, in particular the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and to what extent by state law?¹⁶ These issues are still being worked out, with considerable continuing controversy and substantial differences among the states.

C. English Language Learner (ELL) Students

The population of ELL students (also called Limited English Proficiency, or LEP, students) in the U.S. has been increasing rapidly in recent decades. The Education Trust has estimated that in the decade from 1994-95 to 2004-05, the number of ELL students grew by approximately 1.8 million, an increase of 56%.¹⁷ By 2006, there were approximately 4,150,000 public school students in ELL programs, about 8 ½% of the total school population.¹⁸ ELL student populations, of course, vary considerably by state. In Texas, one of the states with the highest concentrations of elementary/secondary ELL students, over 15% of students are ELL's, or approximately 685,000 students. Most of these ELL's are not recent immigrants

¹⁵ *Funding Education Beyond High School: The Guide to Federal Student Aid/2009-10* (U.S. Dept. of Educ. 2009), pp. 11, 48.

¹⁶ See Kaplin & Lee, note 14, *supra*; and Kaplin & Lee, 2009 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION, 4th ed., sec. 8.3.6.2 (Nat'l Ass'n of College & Univ. Attys., 2009).

¹⁷ Katie Haycock, *Testimony before the House Appropriations Comm., Subcomm. On Labor, HHS, and Education* (Feb. 15, 2007), p. 3 of version available on Education Trust website, www.edtrust.org, under Press Releases.

¹⁸ U.S. Dept. of Education, Civil Rights Data Collection 2006: National and State Projections, available at <http://ocrdata.ed.gov/ocr2006rv30/xls/2006Projected.html> [under "Disability/LEP Categories"]. There were also another estimated 406,000 students needing LEP instruction but not enrolled in a program. The total of the two is approximately 4,556,000 or nearly 9 ½% of total school enrollment.

(documented or not); over 85% of them have attended U.S. public schools for three years or more.¹⁹

In 1974, the U.S. Congress passed the Equal Education Opportunities Act (EEOA), one provision of which requires states and local school districts “to take appropriate action to overcome language barriers that impede equal participation by [their] students in instructional programs.”²⁰ (The EEOA does not apply to higher education.²¹)

Moreover, Congress periodically has passed legislation providing grants to the states for language proficiency programs, beginning with the Bilingual Education Act, which was passed originally as Title VII of the Elementary and Secondary Education Act of 1965. The primary current legislation is the English Language Acquisition, Language Enhancement, and Academic Achievement Act, passed as Title III of the No Child Left Behind Act of 2001.²² (These grant programs generally do not apply to higher education.)

Over the years there has been limited enforcement of the EEOA by the federal government and the federal courts. It was not until 2009 that the U.S. Supreme Court decided its first major case on the EEOA’s application to ELL’s. In the long running case of *Horne v. Flores*,²³ the Court considered whether the state of Arizona and its Nogales Unified School District had remedied the violation of the EEOA that had been found by the federal district court in 2000. In siding with the state and remanding

¹⁹ See *United States of America and LULAC-GI Forum v. The State of Texas*, 572 F.Supp. 2d 726 (2008).

²⁰ 20 U.S.C. § 1720(a).

²¹ 20 U.S.C. § 1703(f).

²² The original Bilingual Education Act is P.L. No. 89-10, 79 Stat. 27 (1965). This Act was subsequently amended several times; see, e.g., P.L. No. 93-380, 88 Stat. 503-12 (1974), and P.L. No. 98-511, 98 Stat. 2366, 2370-71 (1984). The current (2001) legislation (Title III of the No Child Left Behind Act) is at 20 U.S.C. §§ 6811-6847.

²³ 129 S. Ct. 2579 (2009).

the case to the lower courts for further consideration, the Supreme Court did little to enhance the enforcement of the EEOA and may have made enforcement more difficult.²⁴ The Court did, however, speak importantly to the interrelationship between the EEOA and Title III of the No Child Left Behind Act.²⁵

Moreover, Congress' grant programs, over the years, often have been underfunded and have served only a small proportion of ELL students. In addition, various other problems and issues over the years have further limited the effectiveness of the federal government's efforts to serve ELL students. There have been controversies over what types of language instruction are effective (*e.g.*, bilingual education vs. English-as-a-second-language (ESL) instruction vs. immersion programs.) There has also been under-identification of ELL students, insufficient emphasis on program evaluation, and a lack of well-qualified instructors and suitable curricular materials.

At the state government level, similar problems and issues have hampered the development of effective state and local school district programs for serving ELL students. In addition, there have been severe inequities in funding. In general, ELL students have been short-changed in one or more of three ways. First, state legislatures have under funded, or delayed implementation of, programs and allocations specifically for ELL students. Second, even though the education of ELL students imposes substantial incremental costs on local school districts, beyond the per pupil costs of educating other students, states often do not take these additional costs into account, or take inadequate account of them, in their legislative formulas for funding local school districts²⁶ Third, regarding general funding of local school

²⁴ See *Horne*, 129 S. Ct. at 2615-2621, 2631 (Breyer, J., dissenting).

²⁵ See *Horne*, 129 S. Ct. at 2601-2604 (Alito, J., for the majority); *cf.* 129 S. Ct. at 2623-2624 (Breyer, J., dissenting).

²⁶ See *Flores v. Arizona*, 516 F. 3d 1140, 1147-1156 (9th Cir. 2008). (The appellate court's opinion was reversed and remanded in *Horne v. Flores*, notes 23-25, *supra*, and accompanying text. The

districts' educational costs, there is some data suggesting that, in states with the highest percentages of ELL students, the school districts with greater concentrations of ELL students often have less money to spend per enrolled pupil than districts with lower concentrations of ELL students.²⁷ As a result, districts with concentrations of ELL students are burdened with additional costs of providing education to these students without adequate increases in resources to help cover these costs.

There are therefore still many ELL (or LEP) students in U.S. public schools – indeed, increasing numbers of such students – who are receiving ineffective language instruction, or no such instruction at all. They are left struggling under the multiple negative effects that such programmatic failures have on their opportunity to learn and their progress in learning.²⁸

How do these inequities in K-12 education affect higher education in the United States? As is apparent, inadequate programs for ELL students affect their academic preparedness or readiness for a college education.²⁹ When ELL students drop out of school in disproportionate numbers, or otherwise fail to graduate, the applicant pools for colleges and universities shrink or fail to grow consistent with population growth. When ELL students do graduate from high school but remain deficient in English, or are deficient in other subjects because their learning has been hindered by their limited English

Supreme Court, however, did not challenge the facts that there are incremental costs or that some states do not take them into account.

²⁷ There is apparently no conclusive data or data analysis. This is an area that would benefit from the attention of researchers. For similar types of data comparing funding for school districts with high and low concentrations of low-income students and minority students, see notes 54-57 & 63, *infra*, and accompanying text.

²⁸ For extensive illustrative data from one state, and comprehensive analysis of the data, see the *United States of America and LULAC-GI Forum* case, note 19, *supra*. In its 2008 opinion and order in this protracted litigation, the court ruled that Texas had failed to provide appropriate education for thousands of ELL students in the state's secondary schools.

²⁹ See generally Jay Green, *Public High School Graduation and College Readiness Rates: 1991–2002* (Manhattan Institute, 2005), available at www.manhattan-institute.org/html/ewp_08.htm.

proficiency, colleges and universities may need to institute or expand remedial education programs -- an action that may affect not only admissions and budgeting but also curriculum and student advisement. Thus, responding to inadequacies or inequities in K-12 education's treatment of ELL students may create a variety of problems and challenges for higher education.

D. Low Socioeconomic Status Students and Racial Minority Students

These two areas of linkage between K-12 education and higher education have particularly significant policy and legal implications, both current and long-range. The first area concerns *inequities* in funding public K-12 education that affect the quality of this education and the availability of a college education, particularly for students of low socioeconomic status and minority students. The second area concerns racial and ethnic *resegregation* of K-12 education, its effects on the quality of K-12 education for minority students, and its effects on the racial diversity and racial climate of colleges and universities. Both areas are discussed in depth in Parts IV and V of this paper.

The numbers and percentages of students potentially affected by these two areas of concern are enormous. Nationally, in 2006, about 42% of public K-12 students were considered low income, and about 43% of public K-12 students were classified as minorities. These percentages have been increasing in recent years and are projected (especially the percentage of minority students) to continue to increase.³⁰

Fiscal inequity and racial segregation are two branches of what has been a protracted struggle for equal educational opportunity in the United States that began before *Brown v. Board of Education* in 1954 and continues to the present day. The struggle has often been manifested by litigation. "Decades ago race and school desegregation litigation forged the initial modern understanding of equal opportunity. More recently, school finance litigation displaced desegregation litigation as the major instrument for

³⁰ See, e.g., *Education Watch National Report* (Education Trust, April 2009), pp. 1, 3, 14, available at www.edtrust.org; Federal Interagency Forum on Child and Family Statistics, *America's Children: Key National Indicators of Well-Being, 2009* (U.S. Gov't Printing Office, 2009), pp. viii-ix, xi, xv, available at http://www.ChildStats.gov/pdf/ac2009/ac_09.pdf.

enhancing equal educational opportunity.”³¹ Now desegregation (or more pointedly resegregation) issues have re-emerged to resume their position alongside fiscal equity issues³², prompted both by worrisome data on the increasing racial identifiability of K-12 schools³³ and by the U.S. Supreme Court’s 2007 decision in the *Seattle School District* case³⁴

III. Barriers to Cooperation between K-12 Education and Higher Education

Just as it is not difficult to find areas of interconnection between elementary/secondary education and higher education in the U.S., it is not difficult to perceive why there are such interconnections. The two levels are, after all, two halves of a total education experience that now reaches from preschool education to advanced postdoctorate education. Neither level could perform its assigned and evolving roles if the other level did not exist or did not remain a going concern.

Nevertheless, the law and policy interconnections between K-12 and higher education for the most part have not been major concerns in the day-to-day functioning of the educators (and legal counsel)

³¹ Michael Heise, *Educational Adequacy as Legal Theory: Implications from Equal Educational Opportunity Doctrine*, CORNELL LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES, Paper 37, March 8, 2006, available at <http://www.lsr.nellco.org/cornell//srp/papers/37>

³² These recent developments have led to attempts to partially merge, or at least strategically interrelate, the desegregation and fiscal equity pathways to reform. *See, e.g.*, Preston Green, Bruce Baker, & Joseph Oluwole, *The No Child Left Behind Act and the Birth of Race-Conscious School Finance Litigation*, in Dyson & Weddle (eds.), note 9, *supra*, at pp. 163-192.

³³ *See, e.g.*, Erica Frankenberg, *et al.*, A MULTI-RACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? (Civil Rights Project at Harvard, Jan. 2003), available at www.civilrightsproject.ucla.edu/research/reseg03/AREWELOSINGTHEDREAM.pdf; Gary Orfield, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE (Civil Rights Project at UCLA, 2009), available at www.civilrightsproject.ucla.edu/research/deseg/revivingthegoalmlk2009.pdf.

³⁴ *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007). *See* Part V.B of this paper for an in-depth discussion of the case.

that serve U.S. colleges and universities or local school districts, nor have they been a priority of public policy makers. In large part, this lack of concern has existed because, both historically and presently, the two levels of education have been operated and governed separately from each other to a remarkable degree. State governments, as well as the federal government, have maintained clear structural boundaries separating policy making and funding for each level from that for the other.

In the U.S., the states have the primary role in establishing, overseeing, and funding education, and they have generally proceeded along two tracks, one for elementary/secondary education and one for higher education. There are typically two state agencies responsible for education in each state: a state board of education for K-12 education, and a state board of higher education (sometimes along with a state community college board) for higher education. The state legislatures typically have different oversight committees or subcommittees, and appropriations committees or subcommittees, for K-12 education and higher education. The federal government, which entered this picture much later, has also generally treated the two levels of education separately, setting the tone in 1965 when Congress passed the Elementary and Secondary Education Act, followed by a separate Higher Education Act.

As a result, education leaders at the two levels have not recognized or worked together on matters of mutual interest to anywhere near the extent that researchers and other outside observers might claim to be in the best interests of the total education enterprise. The reasons for maintaining this bifurcated system have begun to break down, however, in a world in which competitiveness in a global economy and mastery of technology are key considerations; and in which college degrees become ever more important to individuals while a college-educated workforce becomes ever more important to the nation. In such a world, education is becoming more a continuum than a series of separate stages, and the two levels of education are becoming more invested in each other's missions.³⁵

³⁵ See generally Peter Schmidt, *Powerful Forces Draw Academe into the Fray*, CHRONICLE OF HIGHER EDUCATION (March 10, 2006) at B4; TOUGH CHOICES OR TOUGH TIMES: THE REPORT OF THE

Another factor that has apparently inhibited greater awareness and collaboration between the two levels has been the relative lack of data and analysis that unearths the subtleties of the law and policy interconnections, or that identifies and measures particular negative effects that policies and practices at one level may have on the other. Similarly, and partly because of the lack of data and analysis, there were relatively few proven methods for resolving particular problems that arise when developments in K-12 education have negative effects on higher education or vice versa. In addition, there were few institutional incentives, financial or otherwise, for encouraging administrators and faculty to focus on collaboration between the two levels.

Fortunately, all of these factors inhibiting interaction between the two levels of education have been changing, quite rapidly, since the turn of the century. Various foundations, think tanks, governmental and nonprofit commissions, and advocacy organizations have issued recommendations on governance, collected pertinent data, and conducted or sponsored research of mutual concern to the two levels of education. Some of these same groups, as well as state agencies in various states, have undertaken demonstration projects and other initiatives to facilitate cooperation between the two levels. Some higher education institutions have also conducted research or operated demonstration projects. Many of the reports, papers, books, and policy statements resulting from these developments have focused on inequities, but others of them focus on issues and problems that pertain to students in general.³⁶

NEW COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE (Jossey-Bass, 2006); COMM. FOR ECONOMIC DEVELOPMENT, note 38, *infra*. See also, for data indicating that the United States' competitiveness, in terms of educating its workforce, is slipping, EDUCATION AT A GLANCE 2007 (Org. for Eco. Co-op and Devel., 2007), available at www.oecd.org/dataoecd/4/55/393/3286.pdf.

³⁶ See, e.g., Michael Kirst & Andrea Venezia, *Improving College Readiness and Success for All Students: A Joint Responsibility Between K-12 and Postsecondary Education* (U.S. Dept. of Educ., 2006), available at www.ed.gov/about/bdscomm/list/hiedfuture/reports/kirst_venezia.pdf.

IV. Fiscal Inequities

Equity issues in higher education may be divided into three categories: equity in preparedness for college, equity in access to college, and equity in progressing through and completing college.³⁷ For K-12 education, a similar division may be made: equity in preparedness for elementary school or high school;³⁸ equity in access to particular schools, programs, or courses—for example, advanced placement courses;³⁹ and equity in progressing through the grade levels and the testing requirements that culminate in high school graduation. For each category, the focus is usually on students from racial and ethnic minority groups and, increasingly, on students from families of low socioeconomic status.⁴⁰

Various recent studies have indicated that the United States is not doing well in promoting equity

³⁷ See generally Thomas Bailey & Vanessa Morest (eds.), *DEFENDING THE COMMUNITY COLLEGE EQUITY AGENDA* (Johns Hopkins University, 2006).

³⁸ One of the main factors regarding preparedness for elementary school is inequity in access to preschool (or pre-K) education. This factor has become increasingly important and is attracting considerable attention. See, e.g., Comn. for Economic Development, *THE ECONOMIC PROMISE OF INVESTING IN HIGH QUALITY PRESCHOOL: USING EARLY EDUCATION TO IMPROVE ECONOMIC GROWTH AND THE FISCAL SUSTAINABILITY OF STATES AND THE NATION* (2006), available at www.ced.org/docs/report/report_prek_econpromise.pdf.

³⁹ The WASHINGTON POST (via Jay Mathews, columnist) prepares an annual “Post Challenge Index” that compares and ranks Washington area high schools based on the number of Advanced Placement (AP), International Baccalaureate (IB), and Cambridge AICE exams that their students take each year. The data in the Indexes document substantial variances among schools suggesting substantial inequities that affect low-income students’ access to these courses and exams. (For the 2008 Index, see <http://projects.washingtonpost.com/challengeindex/ranking/2008/>.)

In addition, NEWSWEEK (via Jay Mathews, contributing editor) publishes an annual index of United States high schools that meet a certain standard for student participation in AP, IB, and Cambridge exams. See <http://www.newsweek.com/id/201160>.

There is also data on who passes the AP tests. This data suggests substantial inequities regarding preparation for the AP tests that affect certain minority groups. See *Education Watch National Report*, note 30 *supra*, pp. 12, 15 (data based on the College Board’s AP Summary Reports); Kristin Klopfenstein, “Advanced Placement: Do Minorities Have Equal Opportunity?” 23 *ECON. EDUC. REVIEW* 115 (2004).

⁴⁰ See, e.g., William Bowen, Martin Kurzweil, & Eugene Tobin, *EQUITY AND EXCELLENCE IN*

for these groups in either K-12 or higher education. A report on “Gauging Student Learning,” issued by the Editorial Projects in Education Research Center in January 2007, surveys inequities in K-12 education.⁴¹ A report issued by the Education Trust in August 2006, *Promise Abandoned*, uses national data sets to survey inequities in higher education.⁴² This report paints a disturbing picture, concluding that: “Instead of expanding and equalizing opportunity in our country, much of higher education has simply become another agent of stratification.”⁴³

Various findings in the report support this conclusion, including these:

- “Only about one-half of all ‘*college-qualified*’ students from low-income families enter a four-year college, compared to over 80 percent of similarly qualified students from high-income families.”⁴⁴
- “Among the *best-prepared* students in the country . . . more than 20 percent of those from low-income families don’t go directly on to college. Among high achievers from high-income families,

AMERICAN HIGHER EDUCATION (U. Va. Press, 2005).

⁴¹ *Gauging Student Learning*, QUALITY COUNTS 2007: FROM CRADLE TO CAREER (Education Week, 2007), available at www.edweek.org/go/qc07. See also Peter Sacks, *TEARING DOWN THE GATES: CONFRONTING THE CLASS DIVIDE IN AMERICAN EDUCATION* (U. Cal. Press, 2007).

⁴² Kati Haycock, *PROMISE ABANDONED: HOW POLICY CHOICES AND INSTITUTIONAL PRACTICES RESTRICT COLLEGE OPPORTUNITIES* (Education Trust, 2006), pp.1–20, available at [www.2.edtrust.org/EdTrust/Promise+Abandoned+Report.htm](http://www2.edtrust.org/EdTrust/Promise+Abandoned+Report.htm); quoted below with permission. For similar data focusing on low socioeconomic status students, see *White House Task Force on Middle Class Families STAFF REPORT: Barriers to Higher Education* (Sept. 9, 2009), available at http://www.whitehouse.gov/assets/documents/MCTF_staff_report_barriers_to_college_FINAL.pdf. See also *Gated Communities of Higher Education*, in POSTSECONDARY EDUCATION OPPORTUNITY, March 2007; INDICATORS OF OPPORTUNITY IN HIGHER EDUCATION: 2005 STATUS REPORT (Pell Institute, 2005), available at www.pellinstitute.org/files/6_Indicators.pdf; Thomas Mortenson, “Segregation in Higher Education Enrollment by Family Income and Race/Ethnicity, 1980 to 2004,” POSTSECONDARY EDUCATION OPPORTUNITY, Oct. 2005, p. 13; Timpane & Hauptman, *Improving the Academic Preparation and Performance of Low-Income Students in American Higher Education*, in Richard Kahlenberg (ed.), *AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION* (Century Foundation Press, 2004).

⁴³ *PROMISE ABANDONED*, p. 1.

only 3 percent don't enter college right away.”⁴⁵

- “From 1995 to 2003 . . . the portion of institutional aid awarded to low-income students shrunk from 56 percent to 35 percent in public colleges and from 44 percent to 27 percent in private colleges.”⁴⁶

- “College costs rapidly escalate without the commensurate increases in student aid necessary to help low-income families pay those costs.”⁴⁷

- “Through a set of practices known as enrollment management, leaders in both public and private four-year colleges increasingly are choosing to use their resources to compete with each other for high-end, high-scoring students instead of providing a chance for college-qualified students from low-income families who cannot attend college without adequate financial support.”⁴⁸

- “For the low-income, minority, and first-generation students who do get into four-year colleges and universities, frequent institutional indifference to their success has a similar effect on how many of them actually get a college degree. Yes, some colleges work at eliminating unnecessary obstacles to timely graduation. For far too many colleges, though, institutional responsibility stops at giving students access to college, and student success is often left up to the students themselves.”⁴⁹

- “By age 24, 75 percent of students from the top income quartile receive Bachelor's degrees. For students growing up in low-income families, on the other hand, . . . fewer than 9 percent . . .

⁴⁴ *Id.*, p. 8 (emphasis added).

⁴⁵ *Id.*, p. 3 (emphasis added).

⁴⁶ *Id.*, p. 8.

⁴⁷ *Id.*, p. 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

will earn a bachelor's degree by 24.”⁵⁰

- “Only about 40 percent of African-American *freshmen* and 47 percent of Latino *freshmen* obtain bachelor's degrees within six years, compared to 59 percent of White *freshmen* and 66 percent of Asian *freshmen*.” “African-Americans between 25 and 29 attain . . . bachelor's degrees at nearly one-half—and Latinos at one-third—the rate of Whites.”⁵¹

- “Instead of gradually getting better, most of these gaps are getting worse.”⁵²

Various factors contribute to these inequities, including some that may affect students even before their formal schooling begins,⁵³ and others that derive from inequities in K-12 education, whose effects are then passed on to higher education. For K-12 education, the factor that usually receives the most attention is government funding for public education. If government spends less money (on an average dollars per student basis) on schools with concentrations of low-income students or of minority students, it is argued, then these students have less opportunity to progress academically, compared with students in better funded schools that do not have such concentrations of low-income or minority students.

The available data demonstrates that there are such disparities in funding—often called “funding gaps”—that serve to disadvantage low-income⁵⁴ and minority students in many schools and school

⁵⁰ *Id.*

⁵¹ *Id.*, pp. 2, 10 (emphasis added).

⁵² *Id.*, p. 2. The material quoted in the text accompanying notes 43-52 is used with the permission of the copyright holder, The Education Trust; *see* note 42, *supra* and accompanying text.

⁵³ *See, e.g.*, Valerie Lee & David Burkam, *INEQUALITY AT THE STARTING GATE: SOCIAL BACKGROUND DIFFERENCES IN ACHIEVEMENT AS CHILDREN BEGIN SCHOOL* (Economic Policy Institute, 2002), available at www.epinet.org/books/starting_gate.html; and *see generally* C. Michael Henry (ed.), *RACE, POVERTY, AND DOMESTIC POLICY* (Yale Univ. Press, 2004).

⁵⁴ Commentators and researchers sometimes use the term “low-income” rather than “low socioeconomic status” to describe the class of students that is subjected to fiscal and other inequities in

districts nationwide. According to *Funding Gaps 2006*, the sixth in a series of annual funding reports by the Education Trust:

Even as we've extended a free public education to all children, we've rigged the system against the success of some of our most vulnerable children. How do we do that? By taking the children who arrive at school with the greatest needs and giving them less in school. Our low-income and minority students, in particular, get less of what matters most; these students get the fewest experienced and well-educated teachers, the least rigorous curriculum, and the lowest quality facilities.

At the core of these inequities is a set of school finance policy choices that systematically shortchange low-income and minority students and the schools and districts that serve them.⁵⁵

As *Funding Gaps 2006* demonstrates, in K-12 education there are funding inequities on three levels. At the state government level, some states are poorer than others, with less money to spend on education but greater concentrations of low-income students ("interstate inequities"). At the local school district level, in many states, districts with the greatest concentrations of low-income students or minority

education. "Low income" is more easily quantifiable than "low socioeconomic status" and is thus often used in data studies such as the one that is discussed next. But "low socioeconomic status" is more descriptive than "low income," since the disadvantages affecting this class of students are not solely the result of the family's low income. See, e.g., Bowen, Kurzweil, & Tobin, note 40, *supra*, at 77–79, 90, 226, 228, 251. This paper generally uses the term "low socioeconomic status" but switches to the term "low income" when discussing a study using that term.

⁵⁵ Liu, Wiener, Pristoop, & Roza, *FUNDING GAPS 2006* (Education Trust, 2006), p. 1, available at www.edtrust.org. See also Jonathan Kozol, *THE SHAME OF THE NATION* (Three Rivers Press, 2005), pp. 244–248.

students have less money available for education than districts with the smallest concentrations of low-income or minority students (“inter-district inequities”). At the level of individual schools, in many districts, less money is allocated to schools with concentrations of low-income or minority students than to schools without such concentrations (“intra-district inequities”).⁵⁶ In addition, there are funding inequities evident in many of the largest urban areas in the United States, where central city school districts with high concentrations of low-income and minority students have substantially less funding per student than the surrounding suburban school districts (“metropolitan inequities”).⁵⁷

Such funding inequities have been evident and a source of controversy for many years. In the late 1960s, concerned interest groups and parents began challenging these inequities in court—in particular the inter-district inequities that are created or perpetuated by a state’s system of public school finance. Evidence of glaring inter-district inequities was introduced in these lawsuits, along with various legal theories for finding these inequities to be unconstitutional.⁵⁸ This litigation has continued into the twenty-first century. State courts have found many state systems to be unconstitutional under their state constitutions, which has necessitated state legislation to “fix” the unconstitutional school finance system, which in turn has led to future lawsuits challenging the new legislation.⁵⁹ Along the way, a dichotomy developed between genuine “equity” lawsuits, whose goal was to equalize, across school districts, the

⁵⁶ A major factor in intra-district inequalities often concerns lesser qualified teachers being assigned to (and their lower salaries allocated to) schools with higher concentrations of minority and low income students. See, e.g., *Out of Field Teaching Persists in Key Academic Courses and High Poverty Schools* (Education Trust, Nov. 2008, available at www.edtrust.org; Charles Clotfelter, et al., *High Poverty Schools and the Distribution of Teachers and Principals*, 85 N. CAR. L. REV. 1345 (2007).

⁵⁷ See Kozol, *supra* note 55 at 321–325 (appendix).

⁵⁸ See, e.g., *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (“Serrano I”).

⁵⁹ See generally Victoria Dodd, “School Finance Litigation: Beyond Equality,” in Dyson & Weddle (eds.) note 9, *supra*, pp. 193-214; Paula Lundberg, *State Courts and School Funding: A Fifty State Analysis*, 63 ALBANY L. REV. 1101 (2000).

financial resources available for K-12 education, and “adequacy” lawsuits, whose goal was to ensure that all districts had sufficient resources to provide an “adequate” education to each student in the district.⁶⁰

Over time, and increasingly through the “adequacy” approach, improvements have been made in the state school finance systems.⁶¹ Despite this long-running saga of interrelated judicial and legislative activity, however, serious and widespread inequities remain.⁶²

The *Funding Gaps 2006* report summarizes the school finance data, and conclusions based on the data, as follows:

In 26 of the 49 states studied, the highest poverty school districts receive fewer resources than the lowest poverty school districts. . . . [A]cross the country [in the aggregate] state and local funds provide \$825 per student less in the highest poverty districts than in the most affluent districts. . . . [S]tates . . . that allow funding gaps to persist . . . are compounding the disadvantages that low-income students face outside of school and undercutting public education’s ability to act as an engine of social mobility.

In 28 states, high-minority districts receive less state and local

⁶⁰ Compare *Serrano v. Priest*, note 58, *supra*, with *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (“Robinson I”); and *see generally* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory*, 32 GA. L. REV. 543 (1998).

⁶¹ For an illustrative case study, focusing on New Jersey, *see* Catherine Gewertz, *A Level Playing Field*, in QUALITY COUNTS 2005: NO SMALL CHANGE, Education Week, Jan. 6, 2005, vol. 24, issue 17, p. 41. *See also*, regarding New York State, Brian Nickerson & Gerard Deehihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 FORDHAM URBAN L. J. 1341 (2003).

⁶² In addition to the data that follow on inter-district fiscal inequalities, a variety of other data, much of it broken down by state, can be found in QUALITY COUNTS 2005, note 61, *supra*, Education Week, Jan. 6, 2005, vol. 24, issue 17. *See generally*, Koski & Reich, *When Adequate” Isn’t: The Retreat from Equality in Law and Policy and Why It Matters*, 56 EMORY L. J. 545 (2006).

money for each child than low-minority districts. Across the country [in the aggregate] \$908 less per student is spent on students in the districts educating the most students of color, as compared to the districts educating the fewest students of color.⁶³

Why should colleges and universities care about these inequities in K-12 education? The most obvious reason is because their effects carry over into higher education and may be perpetuated there. Data from the *Promise Abandoned* report support this conclusion with respect to a range of effects.⁶⁴ Moreover, the inequities fostered at the K-12 level may be exacerbated at the higher education level, or new inequities may be created, with effects more pronounced than would have been the case had there not been substantial inequities in K-12 education. A clear example is the current systems for providing and allocating student financial aid, which create inequity in access to college.⁶⁵

For higher education leaders, therefore, pressing questions arise concerning how they can avoid perpetuating inequities that arise from K-12 education and how they can desist from fostering any new inequities. Such questions implicate the recruitment functions, the admissions functions, the financial aid

⁶³ FUNDING GAPS 2006, note 55, *supra*, at 1–6. More recent data in the *Education Watch National Reports* and *Education Watch State Reports*, also available on the Education Trust’s web site, indicates improvements in some states and backsliding in others.

⁶⁴ PROMISE ABANDONED, notes 42-52, *supra*. See also Danette Gerald & Kati Haycock, ENGINES OF INEQUALITY: DIMINISHING EQUITY IN THE NATION’S PREMIER PUBLIC UNIVERSITIES (Education Trust, 2006); National Center for Education Statistics, PLACING COLLEGE GRADUATION RATES IN CONTEXT: HOW 4-YEAR COLLEGE GRADUATION RATES VARY WITH SELECTIVITY AND THE SIZE OF LOW-INCOME ENROLLMENT (U.S. Department of Education, 2006); and see generally Bowen, *et al.*, note 40, *supra*.

⁶⁵ See, e.g., Advisory Committee on Student Financial Assistance, MORTGAGING OUR FUTURE: HOW FINANCIAL BARRIERS TO COLLEGE UNDERCUT AMERICA’S GLOBAL COMPETITIVENESS (2006), available at www.ed.gov/acsfa; Edward St. John, *et al.*, EXPANDING COLLEGE ACCESS: THE IMPACT OF STATE FINANCE STRATEGIES (Lumina Foundation, 2004), available at www.luminafoundation.org; Lawrence Gladieux, *Low-Income Students and Affordability of Higher Education*, in Kahlenberg, note 42, *supra*.

functions, the academic and social support functions, and perhaps other functions of individual colleges and universities. At the same time, fiscal inequity issues at both levels of education raise broader public policy questions, for K-12 education and higher education policy makers in state governments and the federal government, concerning how to alleviate fiscal inequities throughout the United States' educational system and how K-12 education and higher education might collaborate in this crucial endeavor.

V. Resegregation

A. Segregation, Resegregation, and Affirmative Action

Just as recent studies indicate that the United States is not doing well in promoting fiscal equity in our educational systems (*see* Part IV above), other recent studies suggest that the U.S. is backsliding in its promotion of racial and ethnic integration or diversity in the nation's public schools. As one recent report put the matter,

The trends shown in this report are those of increasing isolation and profound inequality [in the United States' public schools]. The consequences become larger each year because of the growing number and percentage of nonwhite and impoverished students and the dramatic relationships between educational attainment and economic success in a globalized economy.⁶⁶

⁶⁶ Gary Orfield & Chungmei Lee, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (Civil Rights Project, UCLA, Aug. 2007), pp. 3–4, available at www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg-need.pdf. The data documenting these trends are on pp. 13–45 of the report; recommendations for alleviating racial isolation and resegregation in the schools are on pp. 49–50. *See also* Orfield, note 33, *supra*.

This problem in K-12 education manifests itself primarily through the phenomenon of “resegregation” of public schools and school districts previously desegregated by court decree or by voluntary action. In higher education, the problem manifests itself primarily in a retreat, sometimes legally compelled, from affirmative action plans for admissions and financial aid that explicitly take race into account to foster student body diversity.

In general, racial segregation in education occurs when the racial composition of the student population of a particular public school (or school program) diverges substantially from the overall student racial composition of the district’s schools. When the divergence is particularly great -- as, for example, when a school has a black student population of 90 percent even though the total student population of the district’s schools is only 10 percent black -- the school is often called a “racially isolated” school. Colleges and universities (and individual programs) may also be racially segregated, but the segregation may be measured in a different way.

Not all racial segregation in education is unlawful in the U.S. Ever since *Brown v. Board of Education* in 1954, courts have distinguished between *de jure* segregation -- which is mandated or purposefully facilitated by government; and *de facto* segregation -- which is caused by private forces such as families’ voluntary private choices of where to live or, in higher education, students’ voluntary private choices of what college to attend. When a court finds segregation to be *de jure*, the school district (or college) must take affirmative steps to dismantle the present effects of the segregation it has caused. When the segregation is *de facto*, however, government has no legal duty to undo it, at least not under the federal Constitution and federal law.

That *de facto* racial segregation in education is generally not unlawful, however, does not mean that it is desirable or beneficial, either in terms of education policy or of public policy.⁶⁷ U.S. educators,

⁶⁷ “Socioeconomic segregation,” that is, segregation of students by family income or socioeconomic status, may also occur in public school districts as well as colleges and universities. Such

policy analysts, and public policy makers have therefore often argued that public school districts, and colleges and universities, should take affirmative steps to alleviate *de facto* segregation and its negative effects. In this context, questions have often arisen concerning whether government may voluntarily choose to take actions that would alleviate *de facto* segregation or increase student diversity in a particular school district, college, or university. Plans for doing so, sometimes called “voluntary affirmative action plans,” may assign or select students partly on the basis of race (sometimes called “reverse discrimination”). In such circumstances, contentious legal and policy issues frequently arise.⁶⁸ Beginning around the end of the 1990s, these issues have taken on new force and urgency as a result of data demonstrating that, across much of the nation, public schools that had been desegregated by court decree in the post-*Brown v. Board of Education* era are becoming resegregated, arguably by forces that would be considered *de facto*.

Higher education cases on voluntary affirmative action in admissions reached the U.S. Supreme Court before K-12 education cases on student assignment plans. An early (now classic) case is the *Bakke*

segregation is generally *de facto* and not unlawful but, as with *de facto* racial segregation, may nevertheless be undesirable as a matter of policy. For this reason, some school districts have recently adopted school assignment plans that take family income and related factors into account, with the goal of facilitating socioeconomic diversity of student bodies. *see generally* Richard Kahlenberg, *Socioeconomic School Integration*, 85 N. CAR. L. REV. 1545 (2007); Richard Kahlenberg, *Rescuing Brown v. Board of Education: Profiles of Twelve School Districts Pursuing Socioeconomic School Integration* (Century Foundation, 2007). School boards may expect that such plans will also foster racial diversity, but that is not necessarily the case; *see* Jonathan Glater & Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, NEW YORK TIMES, July 15, 2007, at A-24.

⁶⁸ Due to such controversies regarding race-based affirmative action, some colleges and universities recently have adopted or are considering admissions plans that take socioeconomic status into account in lieu of race (class-based affirmative action). The reasoning is usually that race and low income are sufficiently correlated that increasing socioeconomic diversity will at the same time increase racial diversity. (For examples regarding K-12 education, *see* note 67, *supra*; for examples regarding higher education, *see* Kathleen Sullivan, *After Affirmative Action*, 59 OHIO STATE L. J. 1039 (1998)). Although promotion of socioeconomic diversity would likely have some positive effect on racial and ethnic diversity as well, the effect is likely to be considerably less than what would result from a plan that explicitly takes race into account. *See* Bowen, *et al.*, note 40, *supra*, at 183–85, 361 n. 67.

case decided in 1978,⁶⁹ which invalidated an admissions plan of the University of California-Davis medical school and, through the various opinions of the Justices, set the legal parameters for the ensuing debate. Similar issues returned to the Court twenty-five years later in *Grutter v. Bollinger*⁷⁰ and *Gratz v. Bollinger*,⁷¹ companion cases involving two affirmative action admissions plans used at the University of Michigan. In upholding the law school plan and invalidating the undergraduate plan, the Court set out the law on voluntary, race-conscious plans for admissions.⁷²

Most recently, in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*,⁷³ the Court decided its first major case on student assignment plans in K-12 education, using much the same principles it had used for voluntary affirmative action plans. The case concerned race-conscious student assignment plans used by two school districts (one in Seattle, Washington, and one in Louisville [Jefferson County], Kentucky) as a means for achieving racial diversity in K-12 education. By a vote of five to four, the Court held that these plans used racial classifications in a way that violated the equal protection clause in the Fourteenth Amendment of the U.S. Constitution.

B. The Seattle School District Case

To understand the *Seattle School District* case, it is necessary to understand the divisions within the Court. The Justices issued five opinions. The lead opinion by Chief Justice Roberts contains four parts and various subparts, some of which speak for a majority of five Justices, and others of which speak

⁶⁹ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁷⁰ 539 U.S. 306 (2003).

⁷¹ 539 U.S. 244 (2003).

⁷² See generally Kaplin & Lee, note 14, *supra*, sec. 8.2.5.

⁷³ 127 S.Ct. 2738 (2007).

for a plurality of four Justices. Justice Kennedy provided the fifth vote for the parts that speak for a majority and declined to support the parts that speak only for a plurality. In addition to the Roberts opinion, there are four concurring and dissenting opinions, in particular a concurrence by Justice Kennedy (for himself alone) and a dissenting opinion by Justice Breyer (for four Justices).

The case's legal significance can be uncovered and elucidated by comparing and contrasting the Roberts, Kennedy, and Breyer opinions. One can discern two areas of great significance: (1) the case reaffirms the *Grutter* and *Gratz* requirements that colleges and universities must meet for a valid race-based admissions plan—but at the same time tightens up these requirements, thus signaling that courts should strictly enforce them in future cases; (2) the case makes it exceedingly difficult for K-12 school districts to justify any use of racial criteria in a voluntary plan for assigning students to schools (or programs) so as to alleviate *de facto* segregation or resegregation. This part of the paper focuses primarily on the second aspect of the case.⁷⁴ The emphasis is on how the Court's ruling serves to interconnect or link K-12 and higher education with respect to their mutual interest in racial diversity.

Chief Justice Roberts's opinion in the *Seattle School District* case emphasizes the strictness of the “strict scrutiny review” applicable to K-12 student assignment plans that employ racial classifications and indicates that courts are not to accord any deference to a school district's judgments about the importance of racial diversity to its educational mission or the best means for achieving diversity. According to the Chief Justice, the two plans before the Court both failed strict scrutiny review under the equal protection clause — in part because the school districts' alleged interests were essentially interests in racial balancing or racial proportionality, which are not “compelling” interests, and in part because the plans' provisions were not “narrowly tailored” to the achievement of any compelling interest.

⁷⁴ For analysis of the first aspect of the case, see W. Kaplin & B. Lee, 2009 CUMULATIVE SUPPLEMENT to THE LAW OF HIGHER EDUCATION, 4th ed. (Nat'l Ass'n of College & Univ. Attys, 2009), sec. 8.2.5.

In particular, the Roberts opinion emphasizes the importance of a particular “narrow tailoring” requirement: that school districts identify and consider “race-neutral” alternatives before employing any racial classification in a student assignment plan. This requirement, in fact, was central to the Court’s holding that the two student assignment plans at issue in the case both violated the equal protection clause. The Seattle School District had rejected race-neutral alternatives “with little or no consideration”; and Jefferson County had “failed to present any evidence that it considered alternatives.” The Roberts opinion also emphasizes that school districts have the burden of proving that “the way in which they have employed individual racial classifications is necessary to achieve their stated ends”; and that the use of racial classifications must be “indispensable” to achieving the school district’s diversity objectives and may be used only “as ‘a last resort.’”⁷⁵ Justice Kennedy used the same quoted language to make this same point in his concurring opinion in the *Seattle School District* case,⁷⁶ thus clearly aligning himself with the Roberts group to create a majority view regarding narrow tailoring.

Unlike the three other Justices aligned with Roberts, however, Justice Kennedy took pains to carve out some room for the permissible use of race-conscious measures. According to Justice Kennedy, “the [Roberts] opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”⁷⁷ Moreover, the Kennedy opinion emphasizes that the concept of a “color-blind” Constitution is “an aspiration [that] must command our assent,” but that “in the real world, it is regrettable to say, it cannot be a universal constitutional principle.”⁷⁸

⁷⁵ 127 S.Ct. at 2759–61 (Roberts, C.J., for the majority), quoting *Richmond v. Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

⁷⁶ 127 S.Ct. at 2792.

⁷⁷ 127 S.Ct. at 2791 (Kennedy, J., concurring).

⁷⁸ 127 S.Ct. at 2791–92 (Kennedy, J., concurring).

Justice Kennedy's differences with Chief Justice Roberts manifest themselves in the "compelling interest" analysis that is the other component of strict scrutiny review (along with narrow tailoring). Justice Kennedy is more amenable than the Chief Justice to finding compelling interests sufficient to support race-conscious plans. Whereas the Chief Justice rejected the school districts' compelling interest claims, Justice Kennedy did not. Instead, Justice Kennedy determined that for K-12 education, a "compelling interest exists in avoiding racial isolation [of students]" and that it is "a compelling interest to achieve a diverse student population," with "race [being] one component of that diversity."⁷⁹ In these respects, Justice Kennedy is aligned with the four dissenting Justices rather than with the four Justices joining in the Roberts opinion, thus potentially making the Kennedy view the majority view of the Court.

Of broader significance, Justice Kennedy's opinion emphasizes that in his view there are other "race conscious measures," beyond using racial classifications in student assignment plans, that "school boards may [use to] pursue the goal of bringing together students of diverse backgrounds and races." Examples that Justice Kennedy used include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion." According to the Kennedy opinion: "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."⁸⁰ If the four dissenting Justices would agree with this Kennedy reasoning, as seems likely, the Kennedy view could become the majority view. Moreover, Chief Justice Roberts, joined by three other Justices, used some examples similar to those of Kennedy, thus seemingly suggesting that some race-conscious planning and some race-conscious programs could

⁷⁹ 127 S.Ct. at 2797 (Kennedy, J. concurring).

⁸⁰ 127 S.Ct. at 2792 (Kennedy, J. concurring).

be permissible when race is not used as a criterion for making decisions about particular individuals.⁸¹ If any of the Roberts Justices were to affirm this reasoning, they too would help establish the Kennedy view on this point as the majority view.

C. Longer Term Implications of the Seattle School District Case

The growth of resegregation of U.S. public schools is a well-documented phenomenon.⁸² Dissenting in the *Seattle School District* case, Justice Breyer reviewed the data on resegregation. He explained that despite gains in desegregating schools in the 1970s and 1980s, “progress has stalled” since then. In the 1990s, the percentage of children attending segregated schools “reversed direction,” with the percentages rising rather than falling. For example, “between 1968 and 1980, the number of black children attending school where minority children constituted more than half of the school fell from 77% to 63% in the Nation,” but by 2000 the figure had risen “from 63% to 72% in the Nation.” Similarly, between 1968 and 1980, the number of black children attending schools that were “more than 90% minority fell from 64% to 33% in the Nation” but by 2000 had risen from 33 percent to 37 percent.⁸³

Justice Breyer then asserted (for four Justices) that, given the current conditions depicted by the data, school districts have a “compelling interest” in “continuing to combat the remnants of segregation caused in whole or in part by . . . school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes.” This interest, Breyer claimed, “has its roots in preventing what gradually may become the *de facto* resegregation of

⁸¹ 127 S.Ct. at 2766 (Roberts, C.J., for a plurality).

⁸² See, e.g., Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation* (Civ. Rts. Project at Harvard, 2006), available at www.civilrightsproject.ucla.edu/research/deseg/deseg06.php; Orfield & Lee, note 66; *supra*; Frankenberg, *et al.*, note 33, *supra*.

⁸³ 127 S.Ct. at 2801–02 (Breyer, J., dissenting); see also 127 S.Ct. at 2833, 2837–39 (Breyer, J., dissenting). For comparable data cited in the 2003 *Grutter* and *Gratz* cases, see 539 U.S. at 345 (Ginsburg, J., concurring in *Grutter*); 539 U.S. at 298–301 (Ginsburg, J., dissenting in *Gratz*).

America's public schools." Similarly, according to Justice Breyer, school districts have "an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools."⁸⁴

Justice Kennedy, in his separate concurring opinion, appears to agree with some of the reasoning and sentiments in these parts of the Breyer dissenting opinion.⁸⁵

In contrast to Justice Breyer's dissent, Chief Justice Roberts's opinion in the *Seattle School District* case rejects the premise that the school district interests identified by Justice Breyer are "compelling" interests in the context of this case. What effect would the Roberts opinion's reasoning have on K-12 public education in the future? Justice Breyer's answer to this question is clear: "The Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools." It "will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools," and it "undermines *Brown* [*v. Board of Education*]'s] promise of integrated primary and secondary education that local communities have sought to make a reality."⁸⁶ Justice Breyer's conclusions are supported by the fact that many hundreds of school districts had used or were then using student assignment plans that took the student's race into account.⁸⁷

Such negative effects flowing from the *Seattle School District* case would be most apparent if future courts follow the reasoning of the four Justices that join all parts of the Roberts opinion. If later courts instead follow the reasoning of the Kennedy opinion, the potential negative effects would be alleviated to some significant extent.

⁸⁴ 127 S.Ct. at 2801–02 (Breyer, J. dissenting).

⁸⁵ See notes 77-79, *supra*, and accompanying text. See also 127 S.Ct. at 2789, 2791 (Kennedy, J. concurring).

⁸⁶ 127 S.Ct. at 2835, 2800 (Breyer, J., dissenting).

⁸⁷ See 127 S.Ct. at 2831–33 (Breyer, J., dissenting); see also Brief of [State Attorney Generals] as Amici Curiae, at 3–10, filed in the *Seattle School District* case, available at <http://www.naacpldf.org/volint/add-docs/volint-school-amicus.html>.

From this understanding of the *Seattle School District* case and its potential effect on initiatives to combat resegregation in K-12 education in the United States, we can also perceive the potential, longer range effects of the case on higher education. In the *Grutter* and *Gratz* higher education cases, the many *amicus curiae* briefs filed in these cases made clear that colleges and universities are strong proponents of racial and ethnic diversity. The prevailing view is that racial and ethnic diversity of student bodies has educational benefits for higher education, as well as civic benefits for the nation, and realizing such benefits is an important part of the mission of most institutions. This view was adopted by the Court in the *Grutter* case.⁸⁸ How institutions approach issues of diversity, however, and how hard they have to work to achieve diversity objectives, depends in large part on the extent of racial diversity in the nation's elementary and secondary schools.

To the extent that large numbers of K-12 schools become or remain racially isolated, for example, these schools will be hindered in doing the work of “promoting ‘cross-racial understanding,’ . . . break[ing] down racial stereotypes, and enabl[ing] students to better understand persons of different races.”⁸⁹ Consequently, the burden of playing “catch up” with this important work would fall on higher education. Similarly, if racially isolated K-12 schools tend to be environments that are less amenable to learning and that disproportionately place minority students at risk,⁹⁰ then these schools will graduate fewer minority students qualified and prepared for higher education. Consequently, the applicant pools

⁸⁸ 539 U.S. at 330–33 (O'Connor, J., for the majority).

⁸⁹ *Id.* at 330.

⁹⁰ See 127 S.Ct. at 2820–21 (Breyer, J., dissenting); see also *Brief of the American Education Research Ass'n as Amicus Curiae*, *Brief for Amici Curiae The American Psychological Ass'n and The Washington State Psychological Ass'n*, and *Brief of 553 Social Scientists as Amici Curiae*, all filed in the *Seattle School District* case, available at <http://www.naacpldf.org/volint/add-docs/volint-school-amicus.html>. In addition, see generally Erica Frankenberg & Gary Orfield (eds.), *LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS* (U. Va. Press, 2007).

for higher educational institutions would not become more diverse over time, and could become less diverse, making it more difficult for institutions to achieve racial and ethnic diversity of their student bodies. Some institutions may lower their expectations and settle for less diversity. Other institutions may be led to admit students who are to some extent unqualified and then cure these deficits through offering remedial courses. Either way, there could be substantial negative effects on the institution.

Here is how one college president and recognized expert on race relations put the matter in an interview conducted shortly after the U.S. Supreme Court had issued its decision in the *Seattle School District* case:

For [Beverly Daniel] Tatum, the Spelman [College] president, the decision . . . [has] all sorts of implications By making it more difficult for school districts to desegregate, or to promote diverse student bodies in areas that are racially segregated in terms of housing, Tatum said, more students are going to grow up without meaningful interaction with students from other racial and ethnic groups.

“What this means is that their views are going to be based on stereotypes,” she said, and . . . that leads to all kinds of insensitivities and incidents on college campuses.

Tatum . . . said that colleges are going to need to do “remedial work” with students who don’t know how to interact with those who are different from themselves

So too, she said, [the decision will hurt] the low-income, minority students whose reality isn’t reflected by the Supreme Court’s talk of a race-neutral society “There is so much at risk now to

students of color in K–12 who are concentrated in low-income areas.”⁹¹

VI. Examples of Current Collaborative Efforts

The growing interconnections (linkages) between K-12 education and higher education in the United States, and the resultant problems and challenges that arise, have by no means escaped the attentions of all education leaders and policy analysts. There are many “pockets of progress”—important ongoing efforts, large and small—that provide a base on which other colleges and universities, school districts, and their education associations can build. This part of the paper lists selected, illustrative examples of such efforts, in particular efforts to alleviate systemic inequities. It is by no means a comprehensive list.⁹²

- UCLA partners with local K-12 schools through the Teach LA Urban Internships program that provides and supports teachers for the L.A. public schools.⁹³
- Arcadia University in Glenside, PA has a Guaranteed Investment for Tomorrow’s Scholars (GIFTS) program, which it operates in collaboration with an inner-city Philadelphia middle school. A cohort of eighth grade low-income students is selected each year for the program, and the

⁹¹ Scott Jaschik, *Mixed Messages on Affirmative Action*, INSIDE HIGHER ED (June 29, 2007) at 4; available at insidehighered.com/layout/set/print/news/2007/06/29/affirm. See generally, Brief of Amici Curiae American Council on Education and 20 other Higher Education Organizations, filed in the *Seattle School District* case, available at <http://naacpldf.org/volint/add-docs/volint-school-amicus.html>.

⁹² For other examples and general discussion, see G. Maeroff, P. Callan & M. Usdan (eds.), *THE LEARNING CONNECTION: NEW PARTNERSHIPS BETWEEN SCHOOLS AND COLLEGES* (Teachers College Press, 2001).

⁹³ See centerx.gseis.ucla.edu/TLA.

students then receive tutoring and various other academic and support services throughout high school (including the prospect of scholarships to attend Arcadia).⁹⁴

- Merrimack College in North Andover, Mass., operates an Accept the Challenge program that targets low-income immigrant students who are English as a Second Language (ESL) learners. The college collaborates with a nearby high school in Lawrence, Mass., a low-income area with a large immigrant population. Selected students participate in after-school and summer programs, and receive various other support services that emphasize academic skills, cultural awareness, and community engagement. Scholarships to attend the College are also available.⁹⁵

- Various colleges and universities have black male initiatives that provide programs to help black males get into and succeed in college. For example, the University System of Georgia has such an initiative in which it sponsors a variety of programs on its various campuses. Most programs provide some type of academic programming designed for black male K-12 school students and entail partnerships with local school systems.⁹⁶

- The University of Southern California, through its Center for Higher Education Policy Analysis, operates a mentoring program (Increasing Access via Mentoring, or I AM) for graduating seniors in nine Los Angeles public high schools, focusing particularly on first-in-family, minority, and low-income students.⁹⁷

- Coppin State University in Baltimore, Maryland, operates a public elementary school and

⁹⁴ See *Arcadia University: Starting with Eighth Graders*, in POWERFUL PARTNERSHIPS: INDEPENDENT COLLEGES SHARE HIGH-IMPACT STRATEGIES FOR LOW-INCOME STUDENTS' SUCCESS (Lumina Foundation, 2004), pp. 39 et seq., available at www.luminafoundation.org.

⁹⁵ See *Merrimack College: Accept the Challenge Program*, in POWERFUL PARTNERSHIPS, note 94, *supra*, at p. 47 et seq.

⁹⁶ See <http://www.usg.edu/aami/>; and see generally Peter Schmidt, "A Sampling of Efforts to Help Black Males," THE CHRONICLE OF HIGHER EDUCATION, 10/10/2008, p. A24.

⁹⁷ See www.usc.edu/dept/chepa.

a public high school, the former adjacent to the university's campus and the latter on the campus, with the goal of serving low-income and minority students and preparing them for college.⁹⁸

- The University of Washington pairs undergraduate students with first-generation and low-income college-bound students in Seattle high schools in the “Dream Project,” which began as part of a college course about social justice, educational opportunity, and socioeconomic mobility. The undergraduates work with students in eight high schools that are project partners, helping the students prepare for the SATs, fill out college applications, and apply for scholarships; some scholarships to UW are also available.⁹⁹

- The University of Chicago, through its Urban Education Institute, has established and operates the University of Chicago Charter School. It has four campuses on Chicago's South Side; two are public elementary schools, one a public middle school, and one a public secondary school for grades six to twelve. The Charter School partners with various community organizations to provide students and parents with various types of support and enrichment activities. The schools “share a single overarching mission: to prepare students for success in four-year colleges.”¹⁰⁰

- Arizona State University has established the “ASU Advantage” program and the “Sun Devil Promise” to pay college costs for Arizona students from low-income families and to provide related parent education programs, partnerships with elementary and secondary schools, and support programs

⁹⁸ See “Growing the Talent Pool,” INSIDE HIGHER ED (December 19, 2006).

⁹⁹ Anna Weggel, *In Seattle, a Firsthand Lesson in College Access*, THE CHRONICLE OF HIGHER EDUCATION, 12/14/07, p. A27; see <http://depts.washington.edu/uwdrmprj>. Another such example is the COACH program (College Opportunity and Career Help), operated by Harvard University through its Kennedy School of Government and serving students in the Boston Public Schools; see <http://www.hks.harvard.edu/service/programs.htm>.

¹⁰⁰ See <http://www.uei-schools.org/uccs/site/default.asp>.

for students entering college.¹⁰¹

- Philadelphia Futures, a nonprofit organization, operates a “Sponsor-A-Scholar” program that brings together selected urban neighborhood schools, their teachers and counselors, and area colleges and universities in a partnership to assist economically disadvantaged students to obtain a college education. The program provides promising students with an adult mentor, academic support, and guidance on college selection during high school, as well as financial assistance, academic support, and guidance during college.¹⁰²

- Sinclair Community College in Dayton, Ohio; Mott Community College in Flint, Michigan; and other institutions provide college learning and career counseling for high school students under the auspices of the American Youth Policy Forum.¹⁰³

- As part of a movement called “early college high schools,” various colleges are partnering with local high schools to provide college-level classes, along with tutoring and other support, to disadvantaged and at-risk high school students.¹⁰⁴

¹⁰¹ See www.asu.edu/promise.

¹⁰² See <http://www.philadelphiafutures.org/sas>. Another example of such a partnership program is “Boston Connects,” in which Boston College is a partner. See Alvin Sanoff, *Boston College Reaches Out to Students and Teachers in the City’s Public Schools*, CHRONICLE OF HIGHER EDUCATION, March 10, 2006, at B26; and http://www.bc.edu/bc_org/avp/soe/bostonconnects/.

¹⁰³ See <http://www.aypf.org>. See also *Secondary–Postsecondary Learning Options: Mott Middle College and Miami Valley Tech Prep: A Forum*, available at www.aypf.org/forumbriefs/2006/fb092906.htm; Jennifer Brown Lerner & Betsy Brand, THE COLLEGE LADDER: LINKING SECONDARY AND POSTSECONDARY EDUCATION FOR SUCCESS FOR ALL STUDENTS AYPF 2006, an AYPF compendium describing and evaluating various other secondary–postsecondary learning options (SPLOs).

¹⁰⁴ See, e.g., Anne Newton, *Empowering Students: How Georgia College Early College Changes Student Aspirations* (Jobs for the Future, 2008), available at <http://www.jff.org/publications/education/empowering-students-how-georgia-college-/227>; M. A. Chandler, *A New Tack to Help High-Schoolers at Risk: College*, WASHINGTON POST, November 11, 2006, at A4:1. For a study of the positive effects of such “dual enrollment” programs, see Karp, Calcagno, Hughes, Jeong, & Baily, THE POSTSECONDARY ACHIEVEMENT OF PARTICIPANTS IN DUAL

- Various universities and researchers are collaborating with local K-12 schools to develop alternative models for teacher education, or for preservice and in-service teacher training, that emphasize cross-cultural learning and preparation for cross-cultural teaching in racially diverse or low-income urban schools. Some universities involved in such efforts also have degree programs emphasizing the recruitment and preparation of teachers of color.¹⁰⁵

- Various universities, through their law schools, are participating in the Wingspread P20 Leadership Pipeline Consortium. The consortium’s purpose, according to its mission statement, is to work “across the educational continuum to improve the participation, persistence, and success of diverse students in high school and college, with the goal of enhancing their aspirations and capacity to move into positions in the legal profession and in leadership of the nation.”¹⁰⁶

- Various states have adopted programs to support the education of low-income students by providing help in preparing for college and paying for college. Indiana, for example, has a Twenty-first Century Scholars Program, established in 1990, that provides financial and other support for selected low-income students from eighth grade through college.¹⁰⁷

- With encouragement from the Education Trust and others, state higher education and K-12 leaders in various states have joined with state governors and business and community leaders to create state-level “K–16 initiatives” or “P-16 initiatives” that are developing strategies for cooperation and joint action between colleges and universities and K-12 schools. A related development is the “P-16

ENROLLMENT: AN ANALYSIS OF STUDENT OUTCOMES IN TWO STATES (Nat’l Research Center for Career and Technical Education, 2007).

¹⁰⁵ See, e.g., Christine Sleeter, *Preparing Teachers for Multiracial and Historically Underserved Schools*, in LESSONS IN INTEGRATION, note 90, *supra*, at 171–89 (note especially 177–80 and 185–86).

¹⁰⁶ See www.mcgeorge.edu/government_law_and_policy/education_law/index.htm.

¹⁰⁷ See www.jcsc.org/21st%20Century/Actual/home.html; St. John, Musoba, Simmons, & Chong-Geun Chung, MEETING THE ACCESS CHALLENGE: INDIANA’S TWENTY-FIRST CENTURY SCHOLARS PROGRAMS (Lumina Foundation, 2002).

Council” movement that is spawning state, regional, and local councils whose task is to better align high school and college academic standards. Spinning off from or sometimes preceding these developments, individual colleges and universities have established local “K–16 partnerships” with schools or school districts in their vicinity.¹⁰⁸

There is clearly a need for increased support, financial and otherwise, for such pockets of progress. There is a need for increased collaboration and coordination among the leaders of such efforts. There is a need for further evaluation of such efforts and for expansion or replication of the most successful efforts. There is a need for additional, new types of initiatives that maintain a clear focus on assisting low-income students, minority students, and others subjected to inequities—in particular initiatives that challenge the systemic features of American education that serve to create or perpetuate the types of inequities addressed in this paper.

VII. The Work Ahead

Developing and maintaining “pockets of progress,” such as those highlighted in Part VI above, is a key part of the work to be done to alleviate the inequities elucidated in this paper. Such projects provide excellent opportunities to build linkages between higher educational institutions and K-12 schools and to experience the power of these linkages. As the examples in Part VI suggest, the focus of these projects is usually on local (rather than statewide or national) activities, and on specific plans and hands on, practical work. The strategy, in short, is one of “working locally and on the ground, not nationally and in the

¹⁰⁸ See, e.g., State and Local K–16 Initiatives, at www.edtrust.org. See generally Peter Schmidt, A Tough Task for the States: Efforts to Get Schools and Colleges to Cooperate Yield Both Fixes and Frustration, CHRONICLE OF HIGHER EDUCATION, March 10, 2006, at B6; *Diplomas Count 2008: School to College: Can State P-16 Councils Ease the Transition?* (Education Week, June 5, 2008), available at <http://www.edweek.org/ew/articles/2008/06/05>.

ether.”¹⁰⁹

Beyond a proliferation of pockets of progress, the work to be done also includes larger-scale, statewide and national, efforts focusing on systemic reform – specifically, reforms designed to alleviate the systemic inequities highlighted in this paper. This work typically implicates Congress, the state legislatures, and federal and state education agencies, which is not usually the case with pocket-of-progress projects. In this different setting, higher educational institutions and K-12 schools may work through their national (or state) associations or through foundations and education policy organizations.

Such national and statewide systemic reform efforts may intersect with the current accountability movement in education (especially K-12 education) and its emphasis on standards, assessment, and transparency.¹¹⁰ Such efforts may also intersect with the evolving movement to enhance the quality and professional status of K-12 teachers.¹¹¹ In this sense, some systemic reform efforts will focus on improving education for everyone, rather than on alleviating systemic inequities affecting particular groups of students. The students in these groups, however, may have much to gain from, and indeed may become the primary beneficiaries of, many reforms designed to benefit all students.

There is, of course, a societal context in which all work on alleviating educational inequities is done.¹¹² Current societal, particularly economic, trends suggest that the work to be done is even more

¹⁰⁹ The Hechinger Institute for Education and the Media, The Institute for Educational Leadership, and The National Center for Public Policy and Higher Education, *GATHERING MOMENTUM: BUILDING THE LEARNING CONNECTION BETWEEN SCHOOLS AND COLLEGES* (The Institute for Educational Leadership, 2002), pp. 3, 6.

¹¹⁰ See *GATHERING MOMENTUM*, note 109, *supra*, at 16, 30-38, 44-45. See also Kirst & Venezia, note 36, *supra*. For accountability developments in higher education, see Commission on the Future of Higher Education, *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION* (U.S. Dept. of Education, 2006).

¹¹¹ See *GATHERING MOMENTUM*, note 109, *supra*, at 11-12, 41; Arthur Levine, *EDUCATING SCHOOL TEACHERS* (Education Schools Project, 2006), available at www.edschools.org.

¹¹² The discussion below emphasizes the economic and socio-economic aspects of the current

pressing and consequential than may be inferred from the discussion in parts II - V above. The following is a listing, with brief explanation, of some trends that are particularly important to take into account.

- There is an increasing economic mobility gap between blacks and whites in the United States. According to a recent report of the Pew Charitable Trusts, the economic status of the neighborhood in which a child and his family lives has a marked effect on the later economic mobility of the child. The phenomenon negatively affects black children far more than white children, since “[o]nly a very small percentage of white children live in high-poverty neighborhoods throughout childhood while a majority of black children do”¹¹³ The black children that are affected come not only from low-income families but also from middle class black families, many of whom live in high poverty neighborhoods. The result is that many more black children than white children from high poverty neighborhoods, even middle class black children, suffer downward economic mobility as adults.¹¹⁴ It is not a stretch to expect that public schools in high poverty neighborhoods often have a role in creating these debilitating effects and that enhanced educational services would also have an important role in alleviating these

societal context. There are also, of course, extremely important political aspects that must be taken into account by those engaged in or advocating for reforms that alleviate educational inequities. These considerations of political power, political trends, and political strategies -- formal and informal; federal, state, and local -- are beyond the scope of this paper.

¹¹³ Patrick Sharkey, Neighborhoods and the Black-White Mobility Gap (Pew Charitable Trusts, 2009), p. 2. The report is available at <http://www.pewtrusts.org/uploadedfiles/wwwpewtrustsorg/Reports/EconomicMobility/PEWSharkey-v1n=1399>

¹¹⁴ *Id.*, p. 3; *see also* White House Task Force on Middle Class Families STAFF REPORT, note 42, *supra*, pp. 12-13.

effects.¹¹⁵

- The poverty rate, and in particular the child poverty rate, is increasing once again in the United States. From 2000 to 2007, the rate flattened out and then grew by 6%, adding about 900,000 children to those who live in poverty. As of 2007, 18% of America's children, a total of 13.1 million children, lived in poverty, with consequent effects on their education, health, and well-being. Further inequities arise because the child poverty rate varies by race and ethnicity; a much greater percentage of black/African American children (35%) and Hispanic/Latino children (27%) than white children (11%) live in poverty. The child poverty rate also varies substantially among the states, ranging from a low of 9% to a high of 29%.¹¹⁶ These economic trends serve to exacerbate inequities already inherent in the U.S. education system and will likely enlarge the enormous challenges already facing urban school systems.
- The nationwide recession, underway by 2008 and continuing apace at the time this paper is written, is having a marked negative impact on the entire spectrum of education. There is now broad-based income stagnation, a decline in median household income that has offset income gains in the past several years and is a steeper decline for

¹¹⁵ Neighborhoods and the Black-White Mobility Gap, note 113, *supra*, p. 22 (discussion of Harlem Children's Zone); *see also* Kahlenberg, *Socioeconomic School Integration*, note 67, *supra*, pp. 1549-1550.

¹¹⁶ 2009 KIDS COUNT Data Book (Annie E. Casey Foundation, 2009), pp. 36-37, 58, 64, available at: http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186_2009_KCDB_FINAL%2072.pdf. *See also* Federal Interagency Forum on Child and Family Statistics, American's Children: Key National Indicators of Well-Being (U.S. Gov't Printing Office, 2009), pp. viii, xi, 13-15, available at http://www.childstats.gov/pdf/ac2009/ac_09.pdf. For the effects of poverty on children's well-being, *see, e.g.*, G. Duncan & J. Brooks-Gunn (eds.), *CONSEQUENCES OF GROWING UP POOR* (Russell Sage Press, 1997).

minority families than for white families,¹¹⁷ and a shrinking economy that is transitioning to a slow-growth economy much more sluggish than what the country had become accustomed to. Under such conditions, more students may be unable to afford college and may be discouraged from applying or enrolling, or may drop out if already enrolled or switch from full time to part time. In addition, more students will find that there is no place for them in higher education, since the schools they are seeking to enter or transfer to have had to cap enrollments. The resulting access problems particularly affect low-income and minority students, the very groups that already labor under inequities in access. For their part, K-12 schools are wrestling with diminished government support and cost-cutting measures that may harm their educational programs, while colleges and universities also face such problems as well as shrinking endowments, capped enrollments, and pressures to raise tuition or enroll more students who do not need financial aid at a time when that would be counter-productive in its effects on access.¹¹⁸

- Community colleges, which have long had an important role in American higher education, can no longer be expected to be the primary tool for alleviating the types of inequities in access discussed in this paper. In part, this is because community colleges have become excessively burdened by diminishing budgets, expanding enrollments, overcrowded conditions, and the challenges of multiple missions to perform and needs to

¹¹⁷ See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* (Current Population Reports, 60-236) (U.S. Gov't Printing Office, 2009), pp. 5-12, available at <http://www.hudhre.info/documents/4thHomelessAssessmentReport.pdf>.

¹¹⁸ See Andrew Delbanco, *The Universities in Trouble*, in THE NEW YORK REVIEW OF BOOKS, vol. 56, no. 8 (May 14, 2009); White House Task Force on Middle Class Families STAFF REPORT, note 42, *supra*, pp. 1-3, 12-13.

serve.¹¹⁹ But more particularly, community colleges cannot be the primary tool for alleviating inequities because they are an integral part of a higher education system that has increasingly institutionalized these inequities and allowed them to grow over time. Due to these developments, U.S. higher education has become a two-tiered system, with the top tier comprised of baccalaureate and doctoral institutions that primarily serve economically and socially “well-to-do” students and families and have relatively low percentages of minority and low SES students; and the second tier comprised of community colleges that primarily serve the less “well-to-do” and have relatively high percentages of minority and low SES students.¹²⁰ To alleviate such systemic inequities, community colleges would have to prepare large portions of their student bodies for transfer to four-year colleges; the students would have to successfully complete their programs, apply to transfer and be accepted to the full range of four-year colleges; and the students would have to complete their baccalaureate degrees in percentages that do not differ greatly from the percentages for students who began their education in a four-year college. The available data indicate that community colleges and their students are not achieving this track record.¹²¹ This is not a criticism of community colleges as such,

¹¹⁹ See, e.g., Daniel de Vise, “Community Colleges Leave the Lights on a Lot Longer,” WASHINGTON POST B:1 (Sept. 24, 2009). *Compare A Stronger Nation Through Higher Education* (Lumina Foundation, 2009), p. 3, available at www.luminafoundation.org; Bailey & Morest, note 37, *infra*.

¹²⁰ Compare Peter Sacks, TEARING DOWN THE GATES, note 41, *supra*, pp. 117-121 (higher education as three-tiered pyramid).

¹²¹ See, e.g., Bridget Long & Michal Kurlaender, *Do Community Colleges Provide a Viable Pathway to a Baccalaureate Degree?* (NBER Working Paper No. 14367) (Nat’l Bureau of Economic Research, 2008); U.S. Department of Education, National Center for Education Statistics, *Community College Students: Goals, Academic Preparation, and Outcomes – Post-secondary Education, Descriptive Analysis Reports*, NCES 2003-164 (U.S. Gov’t Printing Office, 2003); American Ass’n of Community Colleges, <http://www2.aacc.nche.edu> (go to Community College Statistics, then to “students,” and then to

but of the overall system; it would be unfair to expect community colleges to give top priority to creating such a track record, at the expense of their other important priorities, or otherwise to play the lead role in alleviating inequities that are the responsibility of the entire system, not just one part of it.

- Globalization is enhancing the long-term importance of inequities in access to higher education and is creating pressures to alter the roles and goals of higher education (and K-12 schools). For example, “[c]ollege attainment is increasingly important to the U.S. economy as the workforce demands education and training that properly prepare [U.S.] citizens for success in the global, knowledge economy.”¹²² This goal should encompass all U.S. citizens, not merely an “elite,” as well as permanent residents and arguably some other non-citizens,¹²³ and should be of concern to all U.S. educational institutions. Yet, according to the annual reports of the Organization for Economic Cooperation and Development, the United States’ ranking on college attainment among developed nations has been falling considerably in recent years.¹²⁴ Reversing this trend, and preparing students for success in a global economy cannot be achieved without attacking and alleviating the types of inequities addressed in this paper.
- Globalization and the information society are serving to expand the reach and

“degree attainment”).

¹²² A Stronger Nation Through Higher Education, note 119, *supra*, p.1.

¹²³ *See, e.g.*, Part II.B above.

¹²⁴ *See* Education at a Glance 2007, note 35, *supra*; and *see also* A Stronger Nation Through Higher Education, note 119, *supra*, pp. 1-3.

importance of colleges and universities. It is thus more important than ever that higher education be deeply involved in the attack on education's inequities and in other reforms of U.S. education. The leadership role of colleges and universities in a global, information society, their expanding societal and global influence, and more specifically their crucial role in preparing teachers and supporting the professionalization of teachers, all point to an enhanced role in education reform. As recognized in one of the earlier reports on linkages between higher and K-12 education:

The societal, indeed global, reach of universities makes them particularly important partners in school system and community-wide reform. In this era of global information and communication, local school systems are powerfully affected by the larger national and global schooling systems. Local changes cannot be sustained if they remain only local and unconnected to broader national developments. Systemic change needs not only to be locally rooted and generated, but also to be part of a national/global movement for change. For that to occur, an agent is needed that can simultaneously function on the local, national and global levels. Universities are the preeminent local institutions (for they are embedded in their communities) and national/global institutions (for they operate with an increasingly interactive worldwide network).¹²⁵

¹²⁵ Ira Harkavy, *Governance and the Connection Between Community, Higher Education, and Schools*, in GATHERING MOMENTUM, note 109, *supra*, p. 23.

VIII. Conclusion

After addressing the growing interconnections (or linkages) between K-12 education and higher education in the United States, this paper has surveyed illustrative examples of inequities in access to and success in education that link the two levels of education. The paper then considered how structures and processes of governance for both K-12 education and higher education inhibit the capacities of both levels to collaborate on inequities and other matters of mutual interest, thus prompting a need to reform governance structures. Next, the paper explored developments regarding two particularly important inequities – inequities in governmental funding of public K-12 education and inequities caused by racial and ethnic resegregation in public K-12 education. Both types of inequities have corrosive effects on higher education and present great challenges to which leaders at each level might productively direct their attentions. Last, the paper has provided various examples of “pockets of progress” -- collaborative initiatives that are now under way to address concerns and challenges of the type the paper has identified -- followed by various examples of societal developments that make this work even more crucial than earlier discussion in the paper may have suggested.

From the presentation in this paper, numerous challenges arise for state and federal policymakers for both K-12 education and higher education, as well as for national and state education associations, individual colleges and universities, and local school districts. It also becomes clear that higher education and K-12 education have a strong mutuality of interest regarding these challenges, in particular the endemic problems of inequity in access to and success in education. The issues addressed in this paper cannot be resolved by higher education working on its own -- either individual institutions, higher educational associations, or state boards or commissions of higher education. Nor can the issues be resolved by K-12 education working on its own. There must be sustained collaboration between higher education and K-12 education that extends to the entire education continuum, from pre-school (pre-K) education to post-graduate education. Such efforts must harness the best of the collaborative capacities of

both levels of education and focus on the linkages between them. Linkages must also be formed with government and private agencies (federal, state, and local) that concern themselves with the well-being of children and young adults. Only through such collaboration will the systemic problems of inequity in the United States be substantially ameliorated.