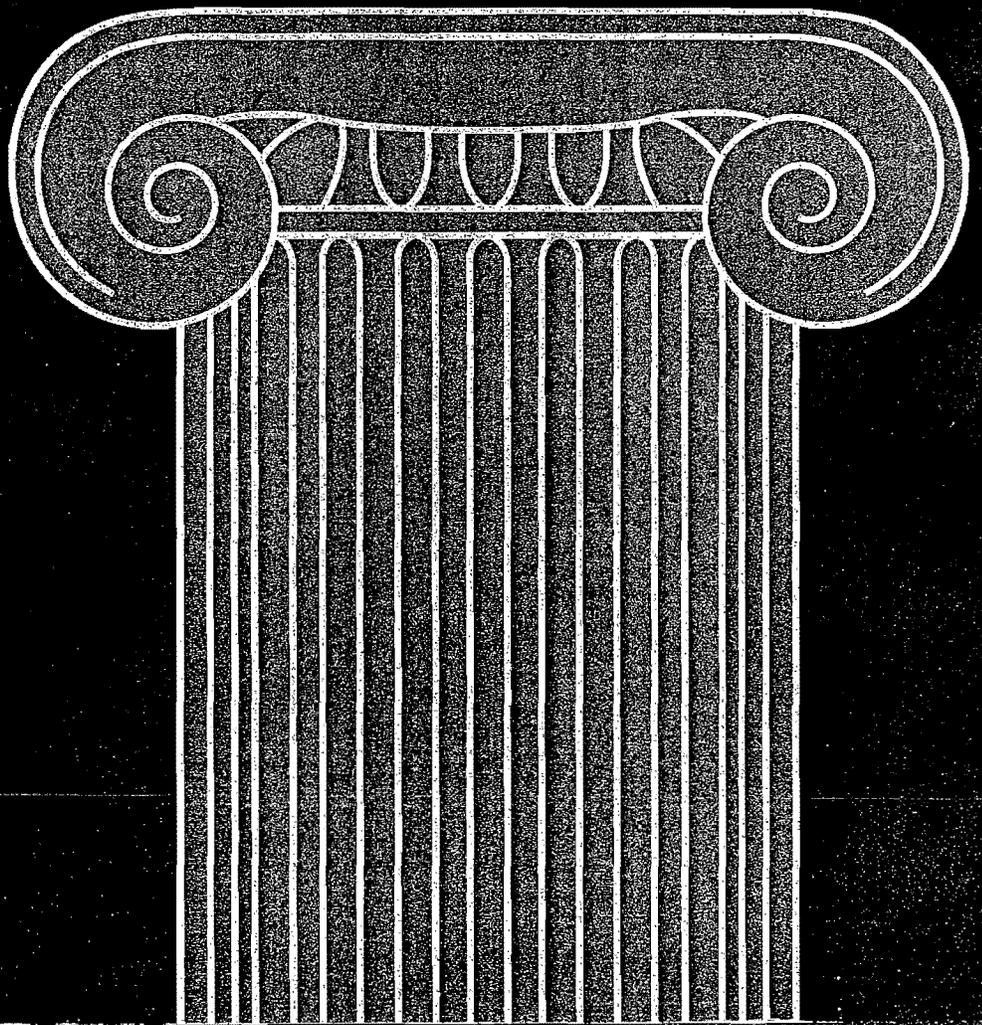


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Changing Contexts and New Rationales



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Federal Involvement in Higher Education Desegregation

An Unfinished Agenda

Clifton F. Conrad and David J. Weerts

Spanning several generations of debates, court cases, and compliance initiatives, the federal agenda to desegregate higher education remains unfinished. While a considerable distance has yet to be traveled, meaningful progress toward dismantling segregated statewide systems of higher education has been made—especially in the last decade. In particular, the leadership of the executive and judicial branches of the federal government has been instrumental in accelerating desegregation efforts. Guided by the U.S. Supreme Court's landmark ruling in *United States v. Fordice* (1992), many states and institutions—notably in the South—have implemented and continue to explore policies and practices aimed at eliminating dualism and reducing disparities between historically white and historically black institutions. Still, formidable barriers at the state and institutional level continue to stand in the way of completing the federal agenda to desegregate higher education.

The purpose of this chapter is to examine the federal government's involvement in seeking to eliminate the vestiges of segregation in higher education and to illuminate the challenges that stand in the way of desegregation. To that end, we begin by tracing the history of federal involvement—including both the judicial and executive branches—in promoting statewide desegregation. We then critique the federal legacy by examining both the strengths and limitations of federal leadership and involvement. In so doing, we argue that the federal government has been very influential in addressing issues surrounding liability both in the executive and judicial branches, but at the same

time, it has not always been able to be a powerful vehicle by itself for bringing about change and reform at the state and institutional level—not least because meaningful change ultimately rests at those levels. Early in the new millennium some states are still grappling with designing desegregation policies and practices consonant with the aims of *Fordice*.

We conclude the chapter by identifying several major barriers through examining key desegregation challenges remaining at the state and institutional levels. We argue that—in light of the limitations of federal involvement and legal constraints surrounding practices such as affirmative action—the central remaining challenge is to encourage states and institutions to embrace desegregation. In particular, the political landscape at the state and institutional level and financial issues surrounding desegregation initiatives often stand in the way of finishing the agenda.

The Legacy of Segregation and the Federal Impetus toward Desegregation

The end of the Civil War marked the beginning of opportunities for blacks to experience the full rights of U.S. citizenship. But these opportunities emerged only gradually and unevenly as a number of states—particularly in the South—were slow to grant blacks full privileges, including the right to an education. It would not be until the second Morrill Act of 1890 that the benefits of higher education would begin to be extended to blacks, allowing for the establishment of dual systems—composed of both white and black institutions—so long as the funds were equitably divided. Subsequently, statewide dual systems of higher education were established and remained undisturbed until 1954, when the U.S. Supreme Court ruled in *Brown v. the Board of Education of Topeka* that “separate but equal” educational facilities were unconstitutional (Conrad and Shrode 1990).

Although dismantling segregated higher education systems was implied in the *Brown* decision, meaningful steps toward desegregating higher education would have to wait until the 1960s when President Lyndon B. Johnson signed the Civil Rights Act of 1964. Title VI of the act restricted federal funding to schools and colleges that discriminated on the grounds of race, color, or national origin. Using his executive powers, Johnson charged the Office of Civil Rights (OCR) within the Department of Health, Education, and Welfare (HEW)

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with the responsibility of enforcing state compliance with Title VI standards for admission. Following its mandate, HEW eventually found ten states to be in violation of Title VI and requested plans from each of these states to address desegregation.

Despite federal orders, the mandate was largely ignored by most states. Frustrated by states' lack of compliance with desegregation orders, the NAACP Legal Defense Fund filed suit in 1970, alleging that federal funds had continued to be granted to institutions in violation of the law. In *Adams v. Richardson* (1972), Judge John Pratt from the U.S. District Court for the District of Columbia found in favor of the NAACP Legal Defense Fund. Subsequently, HEW obtained state plans for desegregation, but in 1977 Judge Pratt ruled that the plans were ineffective. Throughout the late 1970s and 1980s, HEW guided states in their desegregation efforts. By 1985 the federal government determined that fourteen states were officially desegregated.

At the same time, other states continued to struggle to comply with Pratt's orders, often falling short of making significant progress—especially in terms of black students matriculating at white institutions and black faculty being employed in white institutions. Perhaps most significant, program duplication and inequality between traditionally white and historically black institutions was conspicuous in many of these noncompliant states. While the *Adams* litigation was dismissed in 1990, the desegregation agenda gained new strength in 1992 with a landmark case that continues to shape contemporary efforts toward desegregating higher education: *United States v. Fordice*.

The Fordice Case (1992)

Although a number of states complied with Judge Pratt's orders in the 1970s and 80s, others, including Mississippi, argued that nondiscriminatory practices, as identified in *Brown*, were sufficient to meet federal standards for desegregation. Not convinced that this standard was just and adequate, Jake Ayers and other black citizens from the State of Mississippi filed a suit in 1975 demanding a more equitable state system of higher education. Emphasizing disparities in educational opportunities between historically white institutions and historically black colleges and universities (HBCUs), the plaintiffs called for increased funding for the state's three HBCUs. Over a twelve-year span Mississippi responded by adopting institutional mission statements that they considered race-neutral and by developing differentiated missions for the eight public institutions in the system. Although admissions policies no longer ex-

plicitly discriminated by race, the institutions remained largely segregated: historically black institutions remained predominantly black and historically white institutions remained predominantly white (Weerts and Conrad 2002).

The district court in Mississippi finally heard the Ayers case in 1987, and while the court raised issues of discriminatory admissions policies, funding inequities, and program duplication within the state system, it ruled that the state's legal duty of desegregation did not extend to these areas. Instead, the court declared that states were only responsible for creating policies that were racially neutral, were developed in good faith, and did not contribute to making the institutions racially "identifiable." This interpretation of the law was subsequently upheld by the U.S. Court of Appeals for the 5th Circuit.

Not satisfied with the outcome, the federal government, through the U.S. Department of Justice, joined the plaintiffs and brought the case to the U.S. Supreme Court in what became known as *United States v. Fordice*. Relying on the findings introduced in the district court, the Supreme Court pointed to multiple practices in Mississippi that perpetuated segregation among the eight public institutions. While not limiting themselves to these areas, the Court focused on four areas that needed to be addressed to eliminate the vestiges of de jure segregation: admissions standards, program duplication, institutional mission assignments, and the continued operation of separate universities. Informed by guidance from the Court, these policy areas became the touchstones for designing desegregation strategies in Mississippi, Maryland, and nine other states. A number of states continue to explore desegregation policies and practices consonant with the four policy areas advanced in *Fordice*.

Strengths of Federal Involvement to Desegregate Higher Education

In reflecting on federal involvement in desegregation over the last forty years, it is clear that the federal government has experienced considerable success as well as some failure in advancing its agenda. Still, while the journey to desegregate higher education has been long and challenging, meaningful progress has been made due in large part to the leadership of the executive and judicial branches of the federal government. The strengths of the federal involvement to desegregate higher education are amply illustrated by examining the role of both of these branches.

Executive Leadership

At the executive level, President Lyndon B. Johnson played a critical role in advancing serious desegregation efforts in the 1960s. Foremost, he signed the Civil Rights Act of 1964—which achieved two critical aims. First, it enabled the federal government to bring lawsuits on behalf of black plaintiffs. Second, it restricted the spending of federal funds in segregated schools and colleges. The Civil Rights Act of 1964 created a clear and unmistakable desegregation mandate for America's colleges and universities (Brown 1999).

No less important, President Johnson's leadership paved the way for enforcement of desegregation in the higher education arena as he directed HEW to take the lead with the enforcement of Title VI standards for admission. A major strength of HEW involvement was that it was very thorough in defining parameters with which the administrative procedures for the Civil Rights Act of 1964 could be developed (Brown 1999). Still, HEW struggled to bring about meaningful reform, not least because most states—including Mississippi, Florida, and North Carolina—argued that they were already in compliance with the law (Williams 1988).

Even after the dismissal of *Adams*, HEW continued in its attempts to enforce state compliance with the desegregation mandate. By the end of the *Adams* litigation, HEW had already referred several state systems of higher education—including Tennessee, Alabama, Louisiana, and Mississippi—to the U.S. Department of Justice for litigation (Brown 1999). In a nutshell, HEW played a key role in keeping the desegregation mandate alive during a time of inadequate compliance initiatives and significantly diminished support from the judicial branch of government.

Following the lead of HEW, the Department of Justice was instrumental in pursuing the unresolved issues remaining from the dismissal of *Adams*. In particular, the department relentlessly pursued the desegregation agenda through the *Fordice* litigation. Joining the plaintiffs in the *Ayers* case, the Justice Department took a strong position in combating the argument that states were only responsible for creating higher education policies that were racially neutral, were developed in good faith, and did not contribute to making the institutions racially "identifiable." In *Fordice*, the Justice Department effectively and successfully demonstrated how vestiges of segregation continued to propel dual systems of higher education. Arguably, the leadership of the Justice Department in *Fordice* was responsible in large measure for bringing about a

"sea change" in advancing desegregation effort by providing the legal and evidentiary foundation that persuaded the U.S. Supreme Court to develop a new standard for assessing liability in regard to segregation and desegregation in higher education.

Judicial Leadership

Noting the success of the executive branch's leadership—again, most recently through the U.S. Department of Justice—the judicial branch of the federal government has also played a pivotal role in advancing higher education desegregation. As evidenced by the effects of *Fordice* in terms of inviting and eventually bringing about statewide desegregation resolutions and remedies, the U.S. Supreme Court has had a very substantial impact by clarifying statewide responsibility for eliminating the vestiges of segregation.

The Supreme Court's leadership in *Fordice* was paramount because it set a legal standard for evaluating whether a state has addressed its duty to dismantle de jure segregation in its higher education systems. In so doing, the *Fordice* opinion made clear that the lower courts misinterpreted the law and failed to apply the correct legal standard for Mississippi's system of higher education. The Court noted that present policies perpetuated segregation even though racial neutrality was expressed in institutional missions. Simply put, the Court declared that a number of factors more or less predetermined an individual's choice of institution—and that this predetermination was based on race.

In *Fordice* the Court concluded that "if policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices." Stated another way, the Supreme Court through *Fordice* made clear its intent to eliminate policies and practices that made institutions racially identifiable and thus wittingly or unwittingly steered students to attend a particular college based on their race (Weerts and Conrad 2002). *United States v. Fordice* continues to stand as the judicial guidepost for desegregation efforts across the country (Brown 1999).

In summary, the progress of the higher education desegregation effort since the 1960s can be attributed in no small measure to the concerted efforts of the executive and judicial branches of the federal government. Beginning with the signing of the Civil Rights Act of 1964 and the efforts of the Department of Health, Education, and Welfare (HEW), the executive branch has been instrumental in marshalling efforts to eliminate the vestiges of segregation in higher

education. Most significantly, the U.S. Department of Justice and the U.S. Supreme Court have more recently fueled a powerful effort to finish the federal agenda to desegregate higher education. The Office of Civil Rights—now housed in the Department of Education—has successfully worked with several states in the last several years, including Maryland, to meet the standards set down in *Fordice* and continues to work with the remaining states in completing the desegregation agenda.

Limitations of Federal Desegregation Efforts

This chapter has thus far highlighted the successes of the federal government's involvement in advancing desegregation. As the history of desegregation shows, however, there clearly are limits to the federal government's leadership. The limitations of federal involvement in the desegregation of statewide systems of higher education are threefold. First, the *Fordice* case provided a template for states and institutions to explore policies and practices to desegregate, but this template has nonetheless left states with many questions about the appropriateness of specific courses of remedy. Second, the relationship between the federal courts and the U.S. Justice Department has, at times, been more adversarial than collaborative. Finally, the Office of Civil Rights has arguably had to negotiate trade-offs with some states that may eventually compromise desegregation touchstones as envisioned by the Supreme Court in *Fordice*. While the combination of these limitations has contributed to the sluggish pace of some states and institutions as they have gone about responding to the federal directive to desegregate, we discuss only the first limitation in depth here.

Conceptually, the Supreme Court template for desegregation following *Fordice* is anchored in two policy directives aimed at increasing the other-race presence in traditionally black and traditionally white institutions. One addresses dualism—namely, the unnecessary (nonessential) program duplication between historically white and historically black institutions. The second addresses unequalness—that is, states are expected to address historic disparities in mission, funding, programs, and facilities between historically white and historically black institutions.

Many scholars and policymakers acknowledge that the general template advanced in *Fordice* has been useful in informing desegregation initiatives but also argue that its interpretation and subsequent implications for implemen-

tation remain murky. To illustrate, the Court made it clear that more than racial neutrality and good faith efforts are needed to eliminate the effects of prior discriminatory systems but left it up to the states to achieve these ends using "sound educational policy." Some scholars have interpreted "sound educational policy" with an emphasis on intangible elements—such as the quality of education for blacks—not necessarily the racial balance between whites and blacks (Brown 1999). Interpreted slightly differently, the basis for evaluating policy may be focused on the *intention* to discriminate. Thus, "sound educational policy" arguably may allow for the preservation of HBCUs while requiring white institutions to integrate (Brown-Scott 1994).

Adding to the uncertainty following *Fordice* is confusion over federal guidelines for Title VI compliance. Brown (1999) argues that "a lack of consensus exists regarding the remedy necessary to overcome the continuing discriminatory effects on higher education institutions plagued with vestiges of *de jure* segregation. The confusion surrounding the construction of universal standards for Title VI compliance leaves higher education grappling to articulate what it means to be desegregated or to have dismantled dual educational structures. This ambiguity allows states to continue circumventing and misinterpreting the legal guidelines issued in *Fordice*." Following this line of criticism, some scholars are critical that *Fordice* makes no official statements about whether additional funding is needed to achieve full dismantlement under the new judicial standards. They also point out that *Fordice* lacks an aggressive mandate for traditionally white colleges and universities' increasing their numbers of blacks and fails to create a long-term plan for continuous monitoring of the desegregation effort (Brown 1999). Anchored in these issues, some scholars claim that "*Fordice* raises more concerns than it resolves" (Stefkovich and Leas 1994). At the least, a major limitation of federal desegregation involvement is that important questions regarding remedy remain unanswered.

In light of these limitations—more precisely, constraints—concerning federal involvement in the desegregation of higher education, the next major phase toward collegiate desegregation will ultimately be left in the hands of states and institutions. Three major barriers to desegregation stand out. For one, at both at the state and institutional levels, the politics of desegregation has not infrequently interfered with advancing meaningful reform in state systems of higher education. For another, the policy of affirmative action has not been a significant tool in advancing desegregation because it stands at the

crossroads of political and legal disagreement. For still another, states continue to struggle to secure state funding to meet the aims articulated in *Fordice*—a critical factor that is central to the success of desegregation.

The Politics of Desegregation

Because the act of policymaking is deeply embedded in the political process, it is difficult to arrive at noncompromising solutions for many government initiatives and policies. Efforts to desegregate higher education are no different. As seen in the cases of *Adams* and *Fordice*, it is the breakdown of the political process that has led to litigation in states. As the Supreme Court declared in the desegregation case *Knight v. Alabama* (1994): "Many of the issues involved in this case essentially require political solutions. . . . The failure of politics has left this matter with the court" (Brown 1999). Still, the formation of policies and practices to advance desegregation are ultimately filtered through political means to more or less create "sound educational policy." As Brown (1999) put it, "the political dimensions of the policy making process are often played out between forces that advocate rational, systemic change and those that desire more incremental steps that maintain power and the status quo." These opposing forces are at work in many states and have resulted in desegregation plans that remain variously stalled in the political arena.

One striking example of a political standoff between factions can be seen in the debate over closing or merging black colleges with neighboring white institutions as a way to accomplish desegregation. Proponents of this policy argue that such a measure would be consonant with the *Fordice* mandate to address dualism and have the added benefit of promoting cost savings within the system. However, members of the black community often cite this option as an inappropriate remedy, pointing out the irony of closing the very institutions that sustained blacks during segregation as a way to combat its vestiges. Many black scholars and activists argue for the importance of black institutions as environments that preserve black culture and provide shelter, networks, and comfort for blacks (Brown and Hendrickson 1997). The debate over the future of black institutions is at the heart of the *Fordice* mandate to address dualism, which not least aims to increase the other-race presence in historically black colleges and traditionally white institutions. But whether closing or merging black colleges for the purposes of desegregation is "sound educational policy" has been subject to lively political debate—not the least in Mississippi, where

one state plan proposed the closing of historically black Mississippi Valley State University.

Embedded in some of these political struggles are racial disputes related to desegregation. For example, claims of racial discrimination in Louisiana have plagued efforts to assemble a leadership team at a new community college in Baton Rouge aimed at advancing desegregation. In Mississippi, a proposal to expand the Gulf Coast campus of the University of Southern Mississippi has fueled great controversy as black critics argue that funds to be used for expansion are better spent enhancing the state's three HBCUs (Lords 2000).

Political obstacles at the board and system level have also existed. In attempts to increase the "other-race presence" at some institutions, there has sometimes been a lack of cooperation between four-year and two-year systems, thereby creating an obstacle to smooth student transfer between institutions (Conrad and Shrode 1990). Since governing and consolidated boards play an important role in promoting statewide desegregation efforts, states would be well advised to give fuller support to boards as they navigate the politics associated with desegregation.

Affirmative Action and Desegregation

Much of the activity surrounding increased access for blacks in traditionally white institutions lies in the politically charged—and legally challenged—policy of affirmative action. Affirmative action initiatives have taken a variety of forms both inside and outside the walls of the academy. On the inside, such policies seek to promote access based on characteristics associated with the economically or academically disadvantaged—factors that would disproportionately benefit blacks as a whole. Outside of the institution, efforts continue to be made to diversify boards of trustees, state coordinating boards, and planning commissions (Weerts and Conrad 2002).

During the last six years affirmative action policy has struggled to gain a consistent ruling in the courts concerning race-based scholarships and admissions. Guided by the Supreme Court's 1978 *Bakke* decision, for nearly two decades many institutions have taken race into consideration for the purposes of advancing educational diversity in higher education. However, in the *Hopwood* decision (1996), the 5th U.S. Court of Appeals suspended the University of Texas Law School's affirmative action admissions program, ruling that the *Bakke* decision was invalid. The court rejected the legitimacy of diversity as a

goal, asserting that "educational diversity is not recognized as a compelling state interest." In deciding not to hear the case, the Supreme Court allowed the ruling to stand (Greve 2001).

Since *Hopwood*, other institutions have come under legal attack for giving minority applicants a specific point "boost" or putting them on a separate track in the admissions process. In September 2001, the 11th Circuit Court ruled that that University of Georgia's admissions system of awarding a half point to black applicants in the admissions process was in violation of the Constitution (Gose and Schmidt 2001). In 2003, the Supreme Court ruled that the University of Michigan's undergraduate admissions policy's automatic distribution of 20 points (out of 150 possible) to every member of an underprivileged minority was unconstitutional because it was not narrowly tailored to achieve the compelling state interest of educational diversity that the university claimed justified the program (*Gratz v. Bollinger*, 2003).

Eradicating affirmative action policy has already gone into effect in some states like Florida, where Governor Jeb Bush barred the use of race-conscious admissions by public colleges in an executive order. Bush's decision was upheld in July 2000 by Judge Charles Adams, who held that "affirmative action is no longer needed to ensure equal access to higher education" (Selingo 2000).

The juxtaposition of *Fordice* and the recent court cases challenging affirmative action policies has left some states and institutions puzzled as to how to fully realize their legal responsibilities to desegregate as well as their strategies for increasing diversity. In particular, the ambiguity surrounding affirmative action policy has been a barrier to desegregation as outlined in *Fordice*. The desegregation mandate is focused on eliminating policies and practices that make institutions racially identifiable; and affirmative action policy, by promoting a diverse student body, can be highly compatible with advancing desegregation. The present legal disputes about affirmative action as a means to advance diversity undermine institutional efforts to move forward with their legal duty to eliminate the vestiges of segregation. Simply put, progress toward desegregation has been undercut because states and institutions are unclear about the legal implications of improving black access to historically white institutions through affirmative action.

The Challenge of State Funding

Adding to the political and legal challenges faced by institutions attempting to desegregate is their constant struggle to obtain the necessary state re-

sources to implement desegregation plans. A core expense of the effort lies in strengthening the institutional identities and uniqueness of HBCUs as a way to reduce program duplication and thereby eliminate unequalness and promote white matriculation. To achieve these goals, states are aiming to enhance missions, programs, and facilities of HBCUs. A central priority is to create high-demand, high-quality programs at the master's and doctoral level (Weerts and Conrad 2002).

But the current economy may interfere with the desegregation plans as public colleges face new reductions in state support. During the last budget cycle, governors of nine states instructed public universities to prepare for midyear cuts in state appropriations in the range of 1 to 7 percent. Many other states received the same warning signs of forthcoming reductions in support (Schmidt 2001).

To illustrate, the sluggish economy may significantly affect Mississippi's ability to deliver on its \$503 million settlement plan to enhance Mississippi's HBCUs. The proposal calls for \$246 million to support new academic programs, \$75 million for construction projects, and \$70 million for a publicly financed endowment over a 17-year period. The plan also calls for a \$35 million privately financed endowment (Hebel 2002). State Senator Ronald D. Farris, a Republican, spoke out against the plan, saying that it would drain too many resources from the state's higher education system during tough budget times. Farris declared that lawmakers had to cut \$60 million from college budgets in 2001, and the financial picture looks as bad, or worse, for next year, he added. "The money is not there," said Farris (Hebel 2002).

On the other side of the spectrum, opponents of the proposal argue that the settlement is not enough to adequately expand the roles of the state's three public historically black universities. In particular, critics argue that the proposal does not sufficiently improve college access for Mississippi's black students (Hebel 2002). Despite these criticisms, Mississippi senators have passed a resolution supporting the \$503 million plan, which has since been approved by U.S. District Judge Neal B. Biggers Jr. (Gose 2002).

Like the plans themselves, financing higher education desegregation is mired in politics. Policymakers, scholars, and administrators have varying views on what should inform the dollar amounts to meet the aims of *Fordice*. As Senator Farris declared about the Mississippi settlement, "This settlement appears to be more about money than about desegregation. These expenditures, in my view, amount to mere reparations" (Hebel 2002). But others poin

to larger goals, such as enhancing the educational attainment for blacks, as the definitive measure for resources allocated to the desegregation effort (Brown 1999). Clearly, the issue of funding will continue to be debated as the remaining segregated states attempt to comply with *Fordice*.

Conclusion

The path to desegregation can be portrayed as a winding road that leads to a faraway and uncertain destination. On a path littered with more than century-old remnants of discrimination, obstacles still remain on the way to completing the journey. Nonetheless, the very considerable movement down this path, especially in the last decade and a half, has been fueled in no small measure by the strong involvement of the federal government. Executive branch leadership, initially through the Department of Health, Education, and Welfare (HEW) and the U.S. Department of Justice, and most recently the Office of Civil Rights in the U.S. Department of Education as well, has been crucial in moving the desegregation agenda forward. The U.S. Supreme Court—in *Fordice*—has set a standard by which states are held liable for perpetuating dual and unequal systems of higher education.

Still, the federal government's success in desegregating higher education is mixed. Notwithstanding strong leadership in the executive and judicial branches, questions still remain about the appropriate course of remedy to achieve desegregation. In light of constraints on the federal government, it will ultimately be up to states and institutions to finish the agenda. Challenged by the political process, continuing ambiguity surrounding affirmative action, and financial struggles, state policymakers and college and university representatives have their own barriers to overcome as they seek to follow the desegregation template advanced by the federal government. In the end, the extent to which federal efforts to desegregate higher education throughout the nation are fully realized will be left in the hands of states and institutions—and the public officials and institutional leaders who are responsible for, and committed to, maintaining fidelity to advancing desegregation.

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