IMPLEMENTATION THEORIES AND DESEGREGATION REALITIES†

Mark G. Yudof*

I. INTRODUCTION

School desegregation litigation is perhaps the best example of what Professor Chayes has described as public law litigation. In contrast to traditional adjudication, the new litigation model is characterized by an amorphous, group-oriented party structure, the issuance of injunctive relief that is prospective in application and implicative of broad issues of social change, prospective factfinding, and the courts' retention of jurisdiction over a complex organization.

In the public law litigation context, as Professors Kirp and Clune have observed, the role of the judge becomes almost political in nature irrespective of the doctrinal roots of a decision. If judges in desegregation cases are engaged in politics and public policy decisions, they may encounter difficulties in managing social change similar to those encountered by legislatures and administrative agencies. The study of consequences arising from the attempted implementation of policy choices is termed "implementation re-

† Research for this Article was partially funded by a grant from the Ford Foundation.
* Marrs McLean Professor of Law, University of Texas. B.A. 1965, LL.B. 1968, University of Pennsylvania.
2. Id. at 1288-304.
The usefulness of implementation research hinges on the premises that things do not always work out as decision-makers—for example, judges—anticipate, that compliance with a legal norm is not automatic in a complex, institution-dominated, political environment, and that different implementation strategies may yield different outcomes. Desegregation decisions present a particularly compelling opportunity for implementation analysis because for more than 25 years such decisions have sought to effectuate countermajoritarian values. Professor Clune has stated the matter well:

There are no (or different) dilemmas to face if the object of a law is to benefit a well-represented majority . . . ; but if a legislative or administrative majority strongly disfavors a change, the implementation process becomes a universe of powerful constraints. Hence, the study of implementation is a product of the modern age of minority rights, usually enforced by the judiciary.  

In this speculative essay, I propose to examine different ways of characterizing and grouping the processes by which the federal courts have sought to implement desegregation decrees. In one sense this is a highly artificial endeavor because it is unlikely that judges consciously designed and employed various implementation techniques as part of a discrete, coherent implementation plan. In actuality, if the judges were guided by science, I suspect that, to borrow Charles Lindblom's phrase, it was the "science of muddling through"—their decisions, uninformed by any single, overarching theory, embodied a succession of incremental changes. But the abstract categories of implementation theory may yield insights about the relationship between judicial decisions and political and social change.

In the post-\textit{Brown} period, both the goals of desegregation plans and the judicial strategies employed to secure compliance with desegregation mandates have varied significantly. The effort to name these various strategies and to ground them in implemen-

\begin{enumerate}
\item Clune \& Lindquist, \textit{supra} note 3, at 72 (footnote omitted). See also C. \textsc{Willie} \& S. \textsc{Greenblatt}, \textit{Community Politics and Educational Change} (1980).
\item See id. at 85-86.
\end{enumerate}
Implementation theory may bear fruit. Implementation theory may expose suppositions and goals of institutional reform and assist in evaluating their utility or futility. In this enterprise, guidance has been sought in the general implementation literature and in literature dealing specifically with the history of implementation in the desegregation field. In large measure, my hope is to play the role of translator, interpreting implementation theory for legal decisionmakers, in the hope of providing guidance for future decisions.

II. General Implementation Theory

At the simplest level, implementation theory is concerned with the examination of organizational compliance with particular policy directives. The day is long gone when lawyers and social scientists assume that court decisions and legislative and administrative rules automatically are translated into the desired actions. Whether it is a judicial decision dealing with school prayer or desegregation, or a legislatively created federal program such as Title I of the Elementary and Secondary Education Act, compliance cannot be blithely assumed. Moreover, this notion of compliance is itself deceptive. There is a tendency to treat policies as having a single and unambiguous goal, when in reality the goals are often numerous, unclear, and contradictory. Indeed, a legislative body


11. See, e.g., Berman, supra note 4, at 160.


13. See McLaughlin, Implementation of ESEA Title I: A Problem of Compliance, 77 Tchrs. C. Rec. 397 (1976); Murphy, supra note 9. See also M. McLaughlin, supra note 9.

may wish to initiate a process of defining the purposes or goals of particular legislation—which is, arguably, what occurred in the Education for All Handicapped Children Act. Implementation, in a sense, is a continuation of the policymaking process. Even if the objectives are clear, difficulties in measuring compliance may arise, and compliance with the letter of the law may be substituted for compliance with the spirit of the law. Similarly, if some goals are not met, policymakers and implementers may carry out a strategic retreat on hard objectives and instead substitute process outcomes.

Implementation is complicated by still other factors. Lawyers and judges frequently fail to distinguish between altering the behavior of an individual and altering the behavior of an institution. For example, criminal sanctions and damages may influence individual behavior, but be totally ineffective in the context of a public- or private-sector organization. The concept of individual fault may be attenuated in the latter context since a large number of people, in varying capacities and over an extended period of time, contribute to the formulation and implementation of institutional policies. This aspect of organizational existence also creates continuity problems. Those currently in charge of large public-sector organizations may not be fully aware of the decisions, policies, and information-gathering efforts of their predecessors. In


17. See Wildausky, The Strategic Retreat on Objectives, 2 POL'Y ANALYSIS 499 (1976); Yudof, An Essay: Federal Child Development Programs and the Helplessness of the Helping Professions, 56 Tex. L. Rev. 135, 136-37 (1977) (when confronted with failure of Head Start Program to accomplish one of its primary goals—improvement in the cognitive development of children—defenders of the program asserted that assessment of affirmative accomplishments of the program was too problematic and focused instead on means employed to accomplish the elusive goals).

18. See generally C. Stone, WHERE THE LAW ENDS (1975). One of the premises of Professor Stone's work is that the inadequacy of the law in dealing with deviant corporate behavior stems from the law's failure to recognize that the special nature of corporations makes the problem of controlling them distinct from that of controlling individual behavior. Id. at 107.

19. See id. at 27-69.

20. Cf. id. at 60-61 (top-level corporate employees often shielded from liability because they have insufficient knowledge of the wrongful activity, the responsibility for which is apt to be widely spread among many persons).
a strict sense, only people have memories; abstractions such as institutions do not. Still another factor that complicates implementation is that often the resources available to the implementors may be insufficient to accomplish the desired objectives.

Since organizations are composed of individuals, implementation may depend on (1) a system of rewards and punishments addressed to specific individuals holding particular bureaucratic positions within the organization,\(^2\) (2) authority and influence differentials among key actors,\(^2\) and (3) the normative commitment of each actor or group of actors to the purposes of the policy. An actor's position in the organization, previous experiences, professional orientation, and other such considerations may be critical to successful implementation. This is not to suggest that successful implementation depends primarily on the efforts of high-level organizational administrators, for some measure of cooperation by those who execute policies is also necessary.\(^4\) In its most stark form, the problem is one of the accommodation of discretion and control among those responsible for the day-to-day operations of an organization. Thus, grandiose policy schemes may well flounder unless the "street-level bureaucrats"\(^2\) are persuaded to cooperate.

---


22. See Note, Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy, 89 YALE L.J. 513, 521, 524 (1980) (judiciary should identify most influential actors within organization and fashion remedial decree to give leadership role to those actors who are most sympathetic to the goals of reform). See also G. ALLISON, ESSENCE OF DECISION 162-73 (1971) (describing the "bureaucratic politics" paradigm in which decisions and actions of governments are viewed as results of a process of compromise, conflict, and confusion among actors with diverse interests and unequal influence); H. KAUFMAN, THE FOREST RANGER (1960) (study of organizational behavior of the United States Forest Service).

23. See Note, supra note 22, at 520, 523-24 (a sense of "mission" among members of an organization fosters loyalty, cooperation, and dedication to organization's goals).

24. See Elmore, Organizational Models of Social Program Implementation, 26 Pub. POL'Y 185, 212-15 (1978). Professor Elmore notes, The result is that, in terms of the effective structure of organizations, the process of initiating and implementing new policy actually begins at the bottom and ends at the top. Unless organizations already have those properties that predispose them to change, they are not likely to respond to new policy. Id. at 215 (emphasis in original). See generally FEDERAL PROGRAMS SUPPORTING EDUCATIONAL CHANGE (Rand Corp. pub. 1974-1978) (eight-volume study of the implementation of four federally funded education programs) [hereinafter cited as FEDERAL PROGRAMS].

25. Weatherly & Lipsky, Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform, 47 HARV. EDUC. REV. 171 (1977). The phrase "street-level bureaucrat" refers to those persons actually responsible for the day-to-day
or compelled to cooperate in reaching particular objectives. On the other hand, since the elimination of all discretion may defeat the policy, "street-level bureaucrats" must be encouraged to exercise independence in furtherance of that policy.

The conflict between discretion and compliance with policies embodied in rules has been long recognized in the law. There are many similarities between jurisprudence and implementation theory as each seeks to unravel the complex relationship between coercive policies and rules and relatively autonomous decisionmaking. Dean Pound put the matter succinctly: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion. . . . Suffice it to say that both are necessary elements in the administration of justice, and that instead of eliminating either we must partition the field between them." The difficulties in partitioning, however, are perhaps more treacherous than Dean Pound imagined. One cannot partition discretion and rule on a permanent basis; rather, the boundaries must move as circumstances change. The boundaries may vary for different policies or particularized concepts of justice. Discretion may, in some circumstances, be a better method of achieving rule conformity than the application of rules in a coercive manner. In addition, the adjustment of discretion and rule to each other may lead to reformulations of the rule when rule and discretion stand in a mutually affecting relationship.

While some may argue that general theories of implementation are foolish because implementation is a context-specific idea, Richard Elmore has usefully divided implementation theory into four models: systems management, bureaucratic process, organization—operation of an organization—for example, teachers, police officers, welfare workers, legal assistance lawyers, and health workers. Id.

26. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 48-71 (rev. ed. 1954) (concluding that almost all jurisprudential problems are actually fundamental questions of rule and discretion). See generally P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 83-90 (1969) (bureaucratization of industry characterized by development of formalized rules designed to limit managerial discretion); Kirp, Proceduralism and Bureaucracy: Due Process in the School Setting, 28 STAN. L. REV. 841, 844, 874 (1976) (due process hearings, with their concomitant focus on defined rules, may deter beneficial exercise of discretion by school officials).

27. R. POUND, supra note 26, at 54.

28. Cf. id. (continual movement in legal history between wide discretion and strict, detailed rule).
tional development, and conflict and bargaining. These labels are elaborated upon below. At this point, I simply suggest that the approaches taken by courts and administrative agencies to achieve desegregation can be labeled in terms of implementation theory. My basic hypothesis is that the methods employed by the Supreme Court reflected different implementation models at different times. Specifically, I suggest that the Supreme Court initially relied upon an organizational development model, and finding it unavailing, then resorted to systems management techniques supported by bureaucratic process. This latter change roughly coincided with the Civil Rights Act of 1964, and the Court's revised approach was aided by the participation of the Office of Civil Rights and the Department of Justice.

For the period roughly from 1974 through 1978, Supreme Court pronouncements on the objectives and remedies for desegregation were clouded by divisions on the Court, but in the recent cases of Columbus Board of Education v. Penick and Dayton Board of Education v. Brinkman the Court has reaffirmed the objective of racial balance remedies for school districts found to have engaged in racially discriminatory practices. Depending on one's definition of the goals of desegregation suits, a strong argument may be made that a systems management approach proved much more efficacious for the actual mixing of black and white students than for the second generation objectives of attacking alleged racial discrimination in tracking, discipline, teacher transfer, and tenure policies. Indeed, as one moves beyond a narrow view of desegregation premised only on racially mixed student bodies and faculty and toward the broader view premised on learning goals, the promise of the systems management approach is substantially reduced. When the Court recently addressed the learning compo-

29. See Elmore, supra note 24, at 189-90.
31. See Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 LAw & CONTEMP. PROB., Autumn 1978, at 57.
35. See generally Cohen, The Effects of Desegregation on Race Relations, 39 LAw &
III. Brown II and Organizational Development

As every student of constitutional law knows, the implementation of the Brown decisions was left largely to the discretion of federal district judges. Initiation of desegregation plans was to come in the first instance from school boards, which were to take account of local concerns and problems in the desegregation process. This was the message of Brown II. The intention was to achieve desegregation by building a normative commitment, and hence a consensus, among those at the base of the organizations responsible for carrying out the Court’s directives. This was essentially an organizational development approach. During this initial phase of implementation the Court did not so much coerce or directly restrain discretion as it attempted to secure the cooperation of local federal judges, lawyers, law professors, interest groups, and local school districts. In other words, the approach relied on was a grassroots or bottom-up strategy. The expectation was that if interpersonal cooperation was high among the groups interested in desegregation—if, for example, blacks, school officials, and others could be brought together and persuaded to observe desegregation rules and policies—then desegregation would be more easily achieved.

It would be a gross distortion of the facts to say that the Su-

---

37. 349 U.S. at 299 (“School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . . ”).
38. See Elmore, supra note 24, at 209-17. The organizational development model is based upon the notion that effective implementation can best be achieved by encouraging among the implementors a sense of consensus and commitment to the desired policy. This model envisions a high degree of autonomy for and participation by those responsible for carrying out the policy. See id. The theory underlying the organizational development model is that “[o]rganizations should function to satisfy the basic psychological and social needs of individuals—for autonomy and control over their own work, for participation in decisions affecting them, and for commitment to the purposes of the organization.” Id. at 209.
39. See note 24 supra.
Implementation Theories

The Supreme Court consciously chose this organizational development approach. But if the Court feared that it could not force compliance with the Brown decision, that top-down orders would be ignored, the most feasible strategy was to co-opt those responsible for implementation and give them a shared sense of responsibility for it. In doing this the Court relied on the highest traditions of the moral authority of the Supreme Court. Under an organizational development model, a common consensus and commitment can be forged through strong local training programs, the involvement of local experts and constituent groups, and the use of highly motivated voluntary participants. During the early period of desegregation, however, the Court relied upon its own ability, through moral suasion and its position in the political order, to reach a consensus by instilling new values among the hostile and uncommitted. The Court attempted to articulate the principles of nondiscrimination in such a way that people would internalize them. Compliance would proceed from a realization of what was "right" and not from a sense of coercion by a higher authority. Put somewhat differently, implementation was as much or more dependent on the willing acceptance of the authority behind a command as on agreement with the command itself.

The Supreme Court's effort to gain cooperation at the grassroots level is perhaps best exemplified, ironically, by the 1958 decision of Cooper v. Aaron. The use of that case as such an example is indeed ironic because in an opinion signed by all nine Justices the Court placed its imprimatur on the use of federal troops to enforce a desegregation order in Little Rock, Arkansas. For the first time, however, one of the Justices wrote a separate concurring opinion in a desegregation case. Justice Frankfurter wrote that the success of desegregation depended upon "working together . . .


41. See generally Rostow, The Democratic Character of Judicial Review, in Judicial Review and the Supreme Court 74, 88-89 (L. Levy ed. 1967). In his essay defending the appropriateness of judicial activism, Rostow comments, "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar. The prestige of the Supreme Court as an institution is high . . . and members of the Court speak with a powerful voice." Id. at 88.

42. 358 U.S. 1 (1958).

43. Id. at 20-26 (Frankfurter, J., concurring).
in a common effort\textsuperscript{44} to promote tolerance, understanding, and acceptance of desegregation orders. He was disturbed that "the process of the community's accommodation to new demands of law upon it,"\textsuperscript{45} begun so "peacefully and promisingly,"\textsuperscript{46} had been undermined by the interference of Arkansas State authorities. Rather than threaten sanctions, he referred to Lincoln's phrase about the need to "appeal to 'the better angels of our nature'"\textsuperscript{47} and specifically lectured public officials on their obligations in a democratic nation: "[T]he responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding . . . ."\textsuperscript{48} Writing to his friend C.C. Burlingham at the time Cooper was decided, Frankfurter left no doubt about his reasons for concurring separately:

Why did I write and publish the concurring opinion? I should think anybody reading the two opinions would find the answer. My opinion, by its content and its atmosphere, was directed to a particular audience, to wit: the lawyers and the law professors of the South, and that is an audience which I was in a peculiarly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the Harvard Law School, with a good many Southern lawyers and law professors. I myself am of the strong conviction that it is the legal profession of the South on which our greatest reliance must be placed for a gradual thawing of the ice, not because they may dislike termination of segregation but because the lawyers of the South will gradually realize that there is a transcending issue, namely, respect for law as determined so impressively by a unanimous Court in construing the Constitution of the United States.\textsuperscript{49}

Perhaps over the long run the Court has been successful in altering the attitudes toward black Americans and in obtaining acceptance of the idea that racial discrimination is morally and constitutionally wrong.\textsuperscript{50} In the short run, however, the strategy failed.

\textsuperscript{44} Id. at 20.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 26.
\textsuperscript{48} Id.
\textsuperscript{49} Letter from Justice Frankfurter to C.C. Burlingham, reprinted in Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 Geo. L.J. 1, 84 (1979).
\textsuperscript{50} See G. ORFIELD, MUST WE BUS? 108-09 (1978) (data shows growth of consensus in
Consensus proved impossible, resistance to school desegregation was unflagging, and the processes of persuasion yielded important but only incremental results.\(^5\) As Orfield and others have noted, federal district judges were more inclined to yield to local prejudices and pressures than to insist on the enforcement of Brown.\(^5\) Most judges did not even attempt to persuade, but rather helped to maintain existing barriers. Congress and the executive branch did not join in the crusade to create a new consensus against the dual school system.\(^5\) State legislators and local school boards did not accept the new wisdom, and far from being drawn into a process of mutual consent and open communication, they actively resisted desegregation. Compliance with neither the letter nor the spirit of Brown occurred.

The experience in the early years after Brown demonstrates the circularity of the organizational development approach in many implementation contexts. Under the organizational development theory, implementation is not perceived as a hierarchical process in which promulgators of rules and policies achieve adherence to their objectives whatever the hostilities and hesitations of those at the bottom of the hierarchy. Rather, it is assumed that implementation depends upon a consensus or at least acquiescence in the policies before they are imposed. Logically, therefore, the organizational development model appears to break down when the policies sought to be implemented are opposed to majoritarian values, which was the case with early desegregation efforts.

Values, on the other hand, are not static. There is no timeless equilibrium. Processes of persuasion can work. Although the law relies upon hierarchical controls and sanctions, it is a truism that compliance with the law usually occurs because people are already predisposed to obey laws. Organizational development, persuasion,

support of integrated schools between 1942 and 1970).


52. See, e.g., G. ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 15-18 (1969) (federal judges were part of a social structure almost totally opposed to desegregation and had neither political consensus to support their decisions nor standards or experience from which to shape them); J. PELTASON, FIFTY-EIGHT LONELY MEN 246 (1961) (even judges who favor desegregation are very hesitant to attack strongly entrenched local institutions).

53. See G. ORFIELD, supra note 52, at 17-18. President Eisenhower refused to endorse Brown and permitted local disturbances to thwart court orders in a number of cases. In 1956, 101 members of Congress signed the “Southern Manifesto,” which denounced Brown. Id.
and coercion may work in tandem. Deterrence of murder and rape is not entirely a function of fear of sanctions for violating laws that prohibit those acts; rather, the laws work to the extent they do largely because most persons agree with the values and judgment inherent in the laws. Those who break laws against murder and rape are deviant, atypical. Legislative bodies, by virtue of the electoral process, are likely to reflect an existing consensus in their policymaking. In the case of the Supreme Court, its success will frequently be a function of its capacity to ride the crest of a wave of changing mores and attitudes or to intrude when there is no already existent, deeply entrenched attitudinal hostility. At the time of Brown, however, racial discrimination was not sufficiently deviant to bring forth an affirmative response to the decision, whatever the longer term prospects for value inculcation and change. And perhaps the Court erred in vacillating between coercion and reconciliation, failing to rely simultaneously on command and persuasion to nurture support for desegregation.

IV. SYSTEMS MANAGEMENT TECHNIQUES AND THE CIVIL RIGHTS ACT OF 1964

After enactment of the Civil Rights Act of 1964, as well as the involvement of the federal executive branch in the enforcement of Brown and the toughening of the judicial approach in the Fifth Circuit and the Supreme Court, a systems management approach to the implementation of the desegregation cases began to

54. See generally B. RADIN, supra note 10 (study of implementation of desegregation policies by the Department of Health, Education, and Welfare from 1964 to 1968).
55. See, e.g., United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967). The Fifth Circuit signaled its more coercive approach in the following language:

Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have ... schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children. The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed."

372 F.2d at 896.
57. See Elmore, supra note 24, at 191-99. The systems management approach views implementation as an ordered, goal-directed activity. The organization is expected to clearly define its objectives and use hierarchical control to accomplish them. See id.
appear. No longer was an effort made to create a consensus among district court judges, local school authorities, and interest groups engaged in the desegregation effort. Consensus yielded to strategies purposefully designed to maximize the achievement of objectives. Ambiguities concerning the objectives of desegregation were reduced as the Office of Education in the Department of Health, Education, and Welfare, the Office of Civil Rights, the Department of Justice, and the courts began to embrace numerical formulas for deciding whether a dual school system had been eliminated.\textsuperscript{58} 
While objectives were clarified, emphasis was placed on obedience to rules emanating from both administrative and judicial hierarchies.\textsuperscript{59} Desegregation plans became more detailed, covering faculty desegregation and promotion and demotion policies. Goal-directed behavior, accountability, strategic planning, and decisional rules were the hallmark of the \textit{Green}\textsuperscript{60} to \textit{Keyes}\textsuperscript{61} era—the second phase in desegregation implementation. The role of the Civil Rights Division of the Department of Justice in filing desegregation suits upon complaints of discrimination, the bureaucratic monitoring activities and guidelines of the Office of Education, and the rejection by the Supreme Court of freedom of choice plans that did not work are all examples of this new approach.\textsuperscript{62} Developmental processes were subordinated to strategies that secured results—that is, desegregated school systems. In order to alter the behavior of school officials, sanctions such as the termination of federal education funds were threatened.\textsuperscript{63} Lower federal courts were more severely instructed on the rules they should follow in

\textsuperscript{58} See United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966) (in determining whether school desegregation plans meet \textit{Brown} standards, courts should be guided by HEW guidelines), \textit{aff'd en banc}, 380 F.2d 385, \textit{cert. denied}, 389 U.S. 840 (1967); authorities cited in note 10 supra. The trend toward numerical rules of thumb for desegregated schools reflected an effort to simplify and routinize decisions about the efficacy of desegregation plans. This is a bureaucratic approach, \textit{see} text accompanying note 78 infra, in support of a systems approach.


\textsuperscript{60} Green v. County School Bd., 391 U.S. 430 (1968).


\textsuperscript{63} \textit{See} U.S. \textit{Comm'n on Civil Rights, Federal Civil Rights Enforcement Effort} 1058-59 (1970).
entertaining desegregation suits. 64

In the light of the alleged failure of so many federal programs enacted during the Johnson administration, many commentators assert that the systems management approach does not work in a complicated federalist system that includes semi-autonomous local and state governments. 65 The problem is the lack of a direct, subordinate relationship between federal authorities and other levels of government—even if the basis of decision is the Constitution of the United States or duly enacted federal statutes. Consequently, there are multiple and overlapping lines of authority, conflicting and ambiguous goals, and frequently a lack of normative commitment by those expected to execute federal policies. Nonetheless, if there is anything that the desegregation experience demonstrates, it is that hierarchically imposed rules, within defined limits and as adapted to local conditions, can work. In the 10-year period between 1964 and 1974, the country did move closer to desegregation even if the world was far from perfect. 66 The aggregation of federal resources and the clarification of goals and strategies did have an enormous impact on the accomplishment of the narrowly defined desegregation objective of nondiscriminatory student assignment policies. Failure occurred only as the aspirations and goals of the desegregationists expanded, as courts became involved in decisional complexity, and as new goals were piled on old ones. The courts began to move toward broader definitions of illegal segregative activities in the schools, and the remedy moved from nondiscrimination to one of racial balance. 67 Even in the context of these more difficult objectives, some progress was made—particularly in the Deep South. 68

This last point requires some elaboration. If the goal of desegregation suits is to ensure nondiscrimination in the assignment of


66. See G. ORFIELD, supra note 50, at 421.


68. See G. ORFIELD, supra note 50, at 56-59.
Implementation Theories

racial minorities, then, by any measure, enormous progress has been made. So too, if the goal is to create integrated schools reflecting the proportions of the races in the school district, then the achievement of the courts, utilizing a coercive approach, has been substantial.69 If, however, a unitary school system suggests the need for majority white schools and the elimination of all predominantly black schools, then the results of judicial intervention have been quite mixed.70 Most of America's largest cities have predominantly minority student populations,71 and intradistrict desegregation may contribute to the exodus of whites from the cities.72 As Justice Powell recently stated in his dissent from the dismissal of the writ of certiorari as improvidently granted in Estes v. Metropolitan Branches of Dallas NAACP, "The pursuit of racial balance at any cost [within districts] . . . may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems."73 Powell, like Frankfurter before him, worries about the lack of community support: "A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move."74 Obviously, however, if the Court had pursued the racial balance goal to its logical conclusion—metropolitan remedies—this result probably would not have occurred.75 Whites could not flee to majority white suburban school districts, and private schools would be too expensive for most white families. The failure to endorse metropolitan desegregation plans may be consistent with other constitutional and policy objectives, but it is not consistent with the majority white school remedy.76

71. See G. Orfield, supra note 50, at 55-76, 151-95.
72. It is not disputed that some loss of white students is usually associated with school desegregation. See Armor, supra note 70, at 196. Scholars disagree, however, over the extent, measurement, and conditions of white flight. See, e.g., Pettigrew & Green, School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis, 46 HARV. EDUC. REV. 1 (1976); Rossell, School Desegregation and White Flight, 90 Pol. Sci. Q. 675 (1975).
74. Id.
75. See G. Orfield, supra note 50, at 195-97.
The systems management strategy may have worked as well as it did because of the earlier devotion to organizational development. Perhaps the two models of implementation stand in a symbiotic relationship to each other. Because a broader consensus was built around the proposition that racial discrimination was wrong, the ability to devise and succeed with a more coercive approach improved. Perhaps there is a basic threshold point of agreement and acquiescence among portions of the population or among particular elites that is a prerequisite to more goal-directed implementation approaches.

The systems management approach may work reasonably well in the context of a relatively simple goal. The remedy is to mix black and white students and faculties in some designated proportions. Compliance can be measured with relative ease. The achievement of more complex and difficult to monitor objectives, however, may not be as amenable to the systems management approach. Moreover, compliance with the letter of the law may be more easily achieved than compliance with the spirit of the law. An excellent example is the implementation of Title I of the Elementary and Secondary Education Act of 1965. 77 After it became clear that state and local school authorities were not providing the type of compensatory education envisioned in the statutes, more detailed regulations were issued and various mechanisms such as audit reports, data collection, policy evaluations, and law suits were used to force compliance. These mechanisms worked best when the violations were blatant and easily discernable. Local school districts could not use Title I monies to purchase fire engines, they could not reduce expenditures on the poor and then substitute federal dollars, they could not make Title I programs available to all children irrespective of poverty or educational disadvantages. In this regard, the enforcement effort has been something of a success, albeit there are still discrepancies. But if implementation means that poor children receive a truly compensatory education, that their cultural disadvantages are overcome, that their achievement levels rise dramatically, and that creative and innovative programs are initiated, then Title I must be adjudged, on the whole, a failure.


Systems management can perhaps achieve basic compliance with the letter of the compensatory education law, but its utility in reaching larger and more complex goals is more dubious. So too, if desegregation is aimed at improving race relations, improving black achievement, and motivating black students to learn to pursue higher education, a systems management approach may not be effectual. This does not necessarily mean that such goals will be forever beyond the grasp, but only that devices for control, monitoring, and accountability, for limiting discretion through hierarchically imposed rules, may not be the way to go about these tasks.

V. BUREAUCRATIC PROCESSES

Overlapping the period of systems management implementation by courts and administrative agencies—1964 to the present—is an interesting period in which the Supreme Court, on paper at least, appeared to move toward a bureaucratic process model. Professor Elmore describes the bureaucratic process model in the following terms:

The two central attributes of organizations are discretion and routine; all important behavior in organizations can be explained by the irreducible discretion exercised by individual workers in their day-to-day decisions and the operating routines that they develop to maintain and enhance their position in the organization.

... The dominance of discretion and routine means that power in organizations tends to be fragmented and dispersed among small units exercising relatively strong control over specific tasks within their sphere of authority.\(^7^6\)

For our purposes, we should think of judges as “workers” exercising discretion in desegregation cases in accordance with the discretionary principles outlined in *Swann v. Charlotte-Mecklenburg Board of Education*.\(^7^9\) In *Swann* the Court emphasized the need for prompt desegregation and affirmed the use of racial balance remedies; in doing so, it conferred broad remedial discretion on lower court judges.\(^8^0\) The issues were framed on review as if the only question was whether the judge had abused his discretion in

---

\(^7^8\) Elmore, *supra* note 24, at 199.
\(^7^9\) 402 U.S. 1 (1971).
\(^8^0\) See *id.* at 15.
approving a particular desegregation plan. Unlike *Brown II*, discretion lay more with judges than with local school authorities.

This line of thinking was continued, at least superficially, in *Keyes*\(^81\) and in a series of post-*Keyes* cases\(^82\) in which it appeared that the Court might be retreating from broad racial balance remedies.\(^83\) This occurred at roughly the same time that the Nixon administration confusingly vacillated on executive branch enforcement of the Civil Rights Act of 1964. The emphasis on discretion—the notion that different local conditions might require different sorts of remedies—led to tremendous variations of remedies in factually indistinguishable circumstances.\(^84\) Ultimately, however, the emphasis on bureaucratic discretion was undermined by later Supreme Court cases. Invariably, the Court either permitted a racial balance remedy to go into effect\(^85\) or remanded the case for further consideration,\(^86\) with the exception of the Detroit metropolitan desegregation case.\(^87\) Thus, the Court affirmed a discretionary-bureaucratic approach in the language of its opinions, but sent a quite different message in terms of what it actually required of federal district court judges.\(^88\) This was made even clearer in the *Columbus*\(^89\) and *Dayton*\(^90\) decisions when the Court reaffirmed that racial balance remedies were still required in desegregation cases.\(^91\)

Perhaps part of the reason that the bureaucratic approach broke down is that federal judges ostensibly decide individual


\(^83\) See Yudof, supra note 31, at 97-102.

\(^84\) Id. at 93 (although trend was toward systemwide integration, vastly different standards for determining existence of and appropriate remedies for de jure segregation were employed by federal judges); see, e.g., Medley v. School Bd., 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974) (White & Powell, JJ., dissenting); Goss v. Board of Educ., 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974) (White & Powell, JJ., dissenting).


\(^88\) See L. Graglia, Disaster by decree 124-25 (1976) (Supreme Court actually required almost complete racial balance in every school of formerly segregated system).


\(^91\) "The result of these latest Supreme Court decisions is to return the law to the position it was in at the time of *Keyes* and virtually to cancel all subsequent developments." Graglia, supra note 67, at 96.
cases, and in this sense it is difficult to routinize desegregation policy. Factual circumstances almost invariably differ from case to case, and indeed legal reasoning frequently means reasoning by example. The federal judiciary is an organization only in the loosest sense since each judge has enormous discretion over operating procedures, trial procedures, evidentiary questions, and substantive decisions. This is true notwithstanding the federal rules of procedure, appellate review, and other checks. Further, with promotion in the hands of the President and Senate, enhancement of a judge's position should not be equated necessarily with pleasing appellate judges—those higher up in the judicial hierarchy. Thus, in the context of the organization and nature of the federal judiciary, a bureaucratic approach is not conducive to achieving national and uniform desegregation policy objectives. A rule-oriented approach for federal judges is more consistent with the nature of their organization and with their professional training.

VI. CONFLICT AND BARGAINING

Another implementation model—conflict and bargaining—was also used in the 1970s. Under this model, organizations are viewed as arenas of conflict in which different groups at different times compete for power and control of scarce resources.\textsuperscript{92} Implementation is not so much compliance with top-down policies, as it is decisionmaking among various groups when no consensus exists.\textsuperscript{93} A series of complex bargaining sessions is a manifestation of the implementation processes, and no single set of purposes and no single definition of success is adopted.\textsuperscript{94} The process is one of mutual adjustment while the parties bargain within legal constraints.

The conflict and bargaining approach maintains that successful implementation is relational, being dependent on the achievement of the goals of particular parties occupying a particular place in the process. The distribution of power is unstable and changes over time.\textsuperscript{95} This political view of implementation can be seen in the desegregation context in terms of proposals for minority con-

\begin{itemize}
\item \textsuperscript{92} See Elmore, supra note 24, at 217.
\item \textsuperscript{93} See id. at 218.
\item \textsuperscript{94} See id.
\item \textsuperscript{95} See id. at 217-26.
\end{itemize}
The conflict and bargaining approach can also be seen in those school districts in which some segment of the black community appears willing to exchange racial balance for opportunities for black educators, compensatory programs, upgrading of facilities in black schools, and similar benefits. Even though such bargaining has been approved by some lower courts, the Supreme Court has never explicitly taken the position that the black community may yield on the demand for total integration in order to achieve some other set of educational, political, or social goals. Several recent rulings appear to indicate that the Court will not be receptive to a political implementation model that deviates so markedly in outcome from the racial balance remedies it desires to produce.

The conflict and bargaining approach may be inconsistent with the organizational development approach. The latter depends on the mobilization and legitimation of local support in order to achieve compliance. As Richard Elmore asks, "What happens when the local constituency for desegregation begins to interpret its role not as the representative of a new moral order but as a political bloc with bargaining power and objectives of its own, independent of the federal government's desegregation objectives?" The question is not easily answered. One thing that may happen is that a court's ability to mobilize support for implementation may be diminished. Another is that national minority group leaders will continue to press for integration with equal success in the courts, and that grudging local compliance will take place. Still a third possibility is that the political agenda of local minority groups will lead to changes in federal policy and in the selection of national minority group leaders. In any event, it is entirely possible that judicial perceptions of nondiscrimination in the schooling context at some

96. The most noteworthy example of this development is the Atlanta desegregation litigation. See G. Orfield, supra note 50, at 400-02 (Atlanta branch of National Association for the Advancement of Colored People (NAACP) accepted a compromise whereby busing was discontinued in return for black control of administrative leadership positions in school system).


98. Letter from Richard Elmore to Mark Yudof (Oct. 9, 1980) (on file in the library at The University of Alabama School of Law).
VII. ORGANIZATIONAL DEVELOPMENT REVISITED

Finally, there have been some recent developments which indicate that the Supreme Court may be aware of the limitations on the systems management approach in fulfilling the higher aspirations of desegregation. In a cyclical manner, the Court may be returning to a variation of the organizational development model that failed in the 1950s. After student bodies and faculties are racially integrated, a myriad of educational, disciplinary, and social decisions need to be made concerning student life and achievement in schools. The issues include such diverse matters as tracking, grade structure, bilingual education, compensatory education, availability of vocational programs, and student counselling. In *Milliken v. Bradley* (*Milliken II*) the Court affirmed a broad remedy that addressed itself to these matters and appeared to affirm the need to enlist the aid of local school authorities in devising the most efficacious desegregation order. The Court, in effect, affirmed a compact among the district judge, school authorities, and, to a much lesser degree, plaintiffs about altering the quality and nature of education in the Detroit School District. The affirmation took place against the backdrop of schools that could not be integrated, in the sense of creating predominantly white schools, since Detroit was predominantly black and the Court had rejected a metropolitan remedy.

The *Milliken II* approach has much to commend it. If desegregation is to succeed in an educational sense, the cooperation of teachers and administrators must be secured. Learning takes place at the microlevel in the classroom and cannot be assured by gross formulas allocating students to different schools within the system. Systems management models applicable to racial balance remedies

---


100. See Levin & Moise, *supra* note 34.


are likely to be of little avail. Consider the relevant characteristics of school organizations. First, educational institutions are social institutions in the public sector with vague, contradictory, and often highly abstract objectives. Decisional rules are difficult to formulate, and discretion may be precisely what is needed to improve learning. In any event, one's view of good faith, compliance, efficacy, and related matters is likely to be a function of social values and ideology.

Second, education is labor intensive. Implementation in the learning context depends, therefore, upon the cooperation of a large number of actors—teachers and principals—and not just those in the central administration charged with student and faculty school assignments. Further, the technology employed by these actors is one “of learning, development, and change in people.” Such technologies are frequently elusive—so elusive that it is difficult to tie particular means to ends.

Third, there is a tremendous amount of movement of personnel in and out of education positions: “[M]ost educational administrators attain the best job they will ever have at an early age and leave it considerably before normal retirement age; and most educational administrators will spend most of their working lives doing something else.” This may pose severe problems of continuity of leadership. Further, since there are no profits to be privately appropriated, administrators may seek to maximize “profits in kind”—for example, prestige, autonomy, and budgets.

Fourth, “[e]ducational administration is only loosely coupled to educational activities in the classroom.” Far from being a rigid hierarchy or typical bureaucracy, activities and components are only loosely coordinated and related to the formal structure of the school system. There are few rules regarding instructional

103. See generally A. Wise, supra note 35.
105. See id.
106. See id.
107. Id.
108. Id. at 227.
practices, formal evaluation is infrequent or nonexistent, and decisionmaking tends to be decentralized. Although this picture is admittedly oversimplified, the "loose-coupling" view appears to make monitoring and implementation within school organizations difficult—particularly if the objective is to alter classroom regularities. Thus, Professor March has come to think of educational organizations as "organized anarchies":

The term [organized anarchies] is used to describe organizations in which technologies are unclear, goals ambiguous, and participation fluid... Educational technology is poorly understood; assured educational objectives tend to be vague, contradictory, or not widely shared; participants in educational organizations include individuals and groups who move in and out of activity in the organization sporadically.

VIII. CONCLUSION

If the goals of desegregation decisions are to be achieved, the federal courts must continue along two lines of implementation. With respect to the physical mixing of the races, the courts should adhere to the more coercive systems management approach. Experience shows that nondiscrimination or racial balance remedies cannot be successfully implemented without strong hierarchical constraints. With respect to learning—after physical integration has taken place—the most productive path lies in the organizational development route. School systems should be encouraged to produce innovative programs, provide in-service training for teachers, and exercise their discretionary powers to achieve the broader objectives of the process. One cannot order a teacher to provide a meaningful reading or social studies program for black children; rather, the teacher must be normatively committed to the need for the programs and be willing to act on that belief. Ultimately the success of the learning enterprise will be a function of local expertise, local talent, parental involvement, locally developed programs, and the participation of highly motivated school personnel. At best, the federal courts can seek to facilitate the processes of mutual agreement, communication, and consensus building. They will

---

112. March, supra note 104, at 223.
fail if they seek to order changes in practices and routines designed to improve educational productivity within schools and classrooms.¹¹³

¹¹³ See generally A. Wise, supra note 35.