Book Review

DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS. By Lino A. Graglia.* Ithaca: Cornell University Press, 1976. Pp. 351. Clothbound $11.50. Reviewed by Michael J. Perry.**

Professor Graglia is extremely unhappy, even bitter, about the state of the law of school desegregation. His book makes that quite clear.

Disaster by Decree is a critical analysis of the major Supreme Court school desegregation opinions and of several important lower federal court opinions as well. Professor Graglia proceeds chronologically, beginning principally with *Brown v. Board of Education* (*Brown I*)[1] and ending with *Milliken v. Bradley*.[2] Most of the ground he covers is by now surely familiar, at least to students of constitutional law. For example, Graglia faults the Supreme Court's misplaced reliance on social science data in *Brown I*,[3] its misguided foot-dragging ("with all deliberate speed") in *Brown II*,[4] and the Court's failure to face forthrightly the important, fundamental distinction between prohibiting segregated schooling—*i.e.*, schooling in which students are purposely separated on the basis of race—and requiring racially balanced schooling.[5] The road from *Brown I* to *Milliken* makes for fascinating storytelling, especially for those interested in the relationship between constitutional law and politics.

Graglia's basic complaint is that the court opinions he dissects have been inept or, less charitably, dishonest. On this point he is surely right. In *Brown I* the Supreme Court ruled that the use of race as a criterion of selection in order to segregate violates the equal protection clause of the fourteenth amendment.[6] But what federal constitutional law has come to require now, in most circuits,[7] is the

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1. 347 U.S. 483 (1954).

2. 418 U.S. 717 (1974).

3. L. GRAGLIA, DISASTER BY DECREE 26-30 (1976) [hereinafter referred to as GRAGLIA]. This point is also suggested in P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 942-53 (1975).

4. Brown v. Board of Educ., 349 U.S. 294 (1955), *discussed in* GRAGLIA, *supra* note 3, at 33-45.

5. *E.g.*, GRAGLIA, *supra* note 3, at 203-57.

6. Although the Supreme Court's opinion in *Brown I* did not make this ruling clear, subsequent per curiam opinions citing *Brown I* did so. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 350 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

7. *See, e.g.*, United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976); United States v. School Dist., 521 F.2d 530, 537 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975);

use of a racial classification in order to increase racial balance in the classroom. This affirmative requirement of increased racial balance, contrary to the assertions of the court opinions, is neither an application nor a simple extension of *Brown I.* As Graglia argues throughout, the requirement of racial balance is different *toto caelo* from the negative prohibition of the use of a racial criterion to segregate. In order to comply with the principle of *Brown I* a school board need only cease using a racial criterion to segregate. But to comply with the requirement of racial balance the board must assign students to schools on the basis of race. Frequently, the requirement of racial balance is advertised as remedial only, an obligation to undo the present effects of past school segregation. But, as Graglia—like others, including Justice Powell[8]—points out, racially imbalanced classrooms today are less the result of past school segregation than the reflection of pervasive residential racial isolation. Indeed, racially imbalanced classrooms are a derivative problem; the more fundamental, and intractable, problem is residential racial isolation.[9]

It is one thing to criticize a constitutional case or line of cases by taking issue with a court's reasoning. It is quite another thing to suggest that no reasoning—neither the court's *nor any imaginable reasoning*—can justify the result reached. Although Graglia effectively criticizes the reasoning of the major school desegregation opinions, his higher aim is to demonstrate that no reasoning can justify the requirement of increased racial balance, that the requirement is wholly illegitimate. *Disaster by Decree* falls short of that aim.

The requirement of racial balance, Graglia contends, is counterproductive; it serves only to increase racial *im*balance in the school by causing "white flight" and to exacerbate racial hostilities.[10] However, there is reputable evidence to the contrary. First, a report of the United States Commission on Civil Rights released in August 1976[11] concludes that school desegregation cannot be held wholly or even primarily responsible for the exodus of whites from the cities

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Hart v. Community School Bd. of Educ., 512 F.2d 37, 54 (2d Cir. 1975); Morgan v. Kerrigan, 509 F.2d 580, 593 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 181 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *But see* Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 352 (9th Cir. 1974). *See generally* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 578-80 (1977).

8. Keyes v. School Dist. No. 1, 413 U.S. 189, 222-23 (1973) (Powell, J., concurring in result).

9. For discussion of this point, see *TRB: Blacks and Whites*, THE NEW REPUBLIC, April 10, 1976, at 2.

10. Graglia's several points against the requirement of racial balance appear mainly in his concluding chapter. GRAGLIA, *supra* note 3, at 258-83.

11. UNITED STATES COMMISSION ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS (1976) [hereinafter cited as DESEGREGATION REPORT].

that has been taking place since the end of World War II.[12] Moreover, given the pervasive reality of residential racial isolation, the absence of a requirement of increased racial balance would mean, in urban centers, at least, all-white or all-black student populations. Thus, it is difficult to understand how the requirement of racial balance has substantially *increased* the racial imbalance that would otherwise exist in the classrooms. Second, in the opinion of the U.S. Commission on Civil Rights, the extent to which school desegregation (and busing) exacerbate hostilities is linked to the extent to which community leaders encourage resistance to court-ordered desegregation.[13] The Commission's August 1976 report suggests that desegregation generally proceeds smoothly and peacefully where community leaders so wish.

Another basic point Graglia directs against the requirement of racial balance is that greater racial balance in the classroom, contrary to the hopes of many, has not materially improved the academic achievement of minority students. It may be too soon to tell. Nonetheless, the notion that greater racial balance improves minority academic achievement is, at this point at least, a dangerously weak reed on which to place the requirement of racial balance.[14]

The fundamental justification for increased racial balance is also the most obvious: interracial associations in the schools, especially among young children, can go a long way toward undermining the prejudices and stereotypes that are the heart of racial intolerance. We do not need a social scientist to tell us that prejudice is the child mainly of ignorance. Graglia cites a study suggesting that compulsory integration heightens racial consciousness and "enhances ideologies that promote racial segregation."[15] Surely it is to be expected that in the beginning compulsory integration will breed resistance and self-defensive insularity, at least among older students and parents.[16] However, in the long run this resistance and insularity—born largely of fear—may be reasonably expected to yield to acceptance and, beyond that, to understanding,[17] unless the flames of racial

12. *Id.* at 161. *See* Wicker, *The Myth of Busing: Some Contradictory Evidence*, N.Y. Times, September 19, 1976, sec. 4, at 15, col. 5.

13. DESEGREGATION REPORT, *supra* note 11, at 92-100, 155-56; *see Rights Panel Is Critical of Ford on Schools*, N.Y. Times, August 29, 1976, sec. 4, at 4, col. 1.

14. *See* Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 307-310 (1972).

15. GRAGLIA, *supra* note 3, at 276 (citing Armor, *The Evidence on Busing*, THE PUBLIC INTEREST, No. 28, at 90, 102 (Summer 1972)).

16. *Cf.* T. COTTLE, BUSING (1976) (reporting conversations with various Boston residents personally affected by court-ordered busing in that city).

17. *See* DESEGREGATION REPORT, *supra* note 11, at 138-42. For authorities emphasizing the importance of interracial association in the classroom in laying a groundwork for interracial harmony in society, see Hart v. Community School Bd. of Educ., 383 F. Supp. 699, 729-32 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); Hobson v. Hansen, 269 F. Supp. 401, 419, 504 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 109-10

prejudice are insistently flamed by community leaders and opportunistic politicians.[18]

Even if one assumes that racial balance in the classroom lays the groundwork for subsequent interracial tolerance and understanding, a basic issue remains: by what warrant does the federal judiciary, principally the Supreme Court, impose this requirement in the name of the Constitution?[19] Professor Graglia does not speak to this issue —the role of the judiciary in American government—except in simplistic terms that disserve his cause. For example, in a hyperbolic rather than reflective spirit, Graglia accuses the Supreme Court and certain lower federal courts of "lawless tyranny,"[20] of "unrestrained tyranny,"[21] and of "essentially lawless" action.[22] Professor Graglia's critique of the school desegregation cases is far from the careful, deliberate study of the role of the judiciary in American government that it might have been *and, indeed, sought to be.*[23] To paraphrase Pascal, a scholarly work does not show greatness by being at one extremity, but by touching both at once.[24]

Relatedly, Professor Graglia suggests that although the principle of *Brown I*—the prohibition of the use of racial criteria to segregate—is ethically unassailable, there is a serious question whether the Supreme Court, because it is unelected and thus politically unaccountable, should have imposed the principle on the political processes:

> [I]t is hardly possible to quarrel with the *Brown* decision—as distinct from the opinion—except on the ground that so important a social change should not have been made by unelected, lifetime appointees. The *Brown* case was less a traditional law suit than a call for a social revolution, and in a healthy democracy social revolutions are made by elected representatives authorized to effectuate their political views and accountable for the results.[25]

To this reviewer a basic function of the Supreme Court in constitu-

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(1967); Emerson, Frank, Frey, Griswold, Hale, Havinghurst and Levi, *Brief for the Committee of Law Teachers Against Segregation in Legal Education*, 34 MINN. L. REV. 289, 319-20 (1950).

18. *See* note 13 *supra* and accompanying text.

19. Actually, the Supreme Court has not imposed this requirement in so many words. It has, however, declined to review several lower court cases that have done so. *See* note 7 *supra*. *But cf.* Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976) (district court order requiring reassignment of students to compensate for changing demographic patterns held abuse of discretion); Washington v. Davis, 96 S. Ct. 2040 (1976) (employment practice having disproportionate racial impact held not violative of equal protection clause of fifth amendment, even though not "job-related," absent showing of "discriminatory purpose").

20. GRAGLIA, *supra* note 3, at 94.

21. *Id.* at 144.

22. *Id.* at 158.

23. *Id.* at 14.

24. "A man does not show his greatness by being at one extremity, but rather by touching both at once." *Quoted* in A. CAMUS, RESISTANCE, REBELLION, AND DEATH 1 (Vintage Books ed. 1974).

25. GRAGLIA, *supra* note 3, at 31-32. *See id.* at 258.

tional cases is to act in accord with "basic shared national values"[26] when other agencies of government have been unable or unwilling to do so. A great virtue of the Court in this regard is precisely its insulation from the exigencies and expediencies of practical politics.[27]

The problem of race and the schools—particularly of busing to achieve racial balance—is as complex as it is controversial. Professor Graglia has ably demonstrated the various infirmities of the principal court opinions on school desegregation. Regrettably, however, he has failed to deal adequately with the subtleties of the larger issues he addresses. In the end, *Disaster by Decree*, notwithstanding its careful, sustained critique of judicial opinions, contributes little to our comprehension of what must surely be one of the most perplexing domestic problems of our time.[28]

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26. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 709 (1975).

27. This reviewer has discussed the role of the judiciary in constitutional adjudication elsewhere. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976). *See also* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976).

28. For two recent works that contribute more substantially to our understanding of the problem of race and the schools, *see* T. COTTLE, BUSING (1976), and SCHOOL DESEGREGATION: SHADOW AND SUBSTANCE (F. Levinson & B. Wright eds., 1976).

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