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Book Review: Graglia, Disaster by Decree

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BOOK REVIEW

Disaster By Decree. LINO A. GRAGLIA. Ithaca, New York: Cornell University Press. 1976. Pp. 351. $11.50.

Disaster by Decree, by Professor Lino A. Graglia of the University of Texas School of Law, is subtitled "The Supreme Court Decisions on Race and the Schools," and as the blurb on the book jacket states, it is a "sharply critical view of the court rulings that led to forced busing." My own views on the question of "forced busing," or as I prefer to call it, "integration by busing," are diametrically opposite to those of Professor Graglia; these views have been shaped by my experiences both as a teacher of a course in Civil Rights and as a lawyer who has represented the plaintiffs in desegregation litigation.[1] I favor busing because I favor integration, and busing is the only means by which schools can be racially integrated in most school districts today.[2] At the same time, I believe that it is possible to shift one's perspective from advocacy to scholarship, and to subject Professor Graglia's book to critical and scholarly analysis on at least a "reasonably objective" basis.

While I disagree with some of Professor Graglia's conclusions, I do think that he has effectively pointed up both the doctrinal and functional difficulties inherent in the Supreme Court's present approach to racial segregation in public schools. Specifically, I agree with his conclusions that (*1*) the Supreme Court has purportedly required racial integration for the purpose of remedying past discrimination, but has not directly related the extent of required racial integration to the extent of state-imposed segregation; and (*2*) it has not squarely faced the question of whether the Constitution requires racial integration because racial segregation, regardless of "cause," violates the rights of black children who are required to attend racially segregated schools. This Book Review will

[1] Louisville-Jefferson County, Kentucky: Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976); Newburg Area Council v. Gordon, 521 F.2d 578 (6th Cir. 1975); Newburg Area Council v. Board of Educ., 489 F.2d 925 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, *reinstated*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). Fayette County, Kentucky: Jefferson v. Board of Educ., 344 F. Supp. 688 (E.D. Ky. 1972). Charleston, Missouri: Davis v. Board of Educ. 216 F. Supp. 295 (E.D. Mo. 1963). I will also be acting as co-counsel in the Atlanta, Georgia metropolitan desegregation case, Armour v. Nix, No. 16708 (N.D. Ga., filed June 7, 1972).

[2] In many urban areas, effective integration will require an inter-district remedy, which despite the Supreme Court's decision in Milliken v. Bradley, 418 U.S. 717 (1974), may be imposed in appropriate cases. *See generally* Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winnings Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535.

focus on Professor Graglia's conclusions about what the Court has been doing and about the validity of the justifications that it has given for its actions.

Although Professor Graglia strongly criticizes the Court for assuming what he believes to be an improper "policy-making" role, the thrust of the book is not so much an attack on judicial "policy-making," as it is on the Court's decisions themselves, and on its "institutional behavior" in the area of "race and the schools." Professor Graglia's thesis is that the Court, while purportedly only "remedying" the school segregation found racially discriminatory and thus unconstitutional in *Brown I*,[3] has now required "the use of racial discrimination."[4] He relates this first to the Court's decision in *Brown II*,[5] where it held that school boards had to desegregate by submitting a "plan," but that there could be delay in full implementation of the plan. He contends that the Court should have ordered the immediate implementation of racially neutral school assignments across the board, particularly since at the time it was assumed that geographic attendance zoning, *i.e.*, "neighborhood school" assignment, was fully constitutional. In his view, such a holding would have remedied the constitutional violation that the *Brown I* Court found, and would have avoided any question about the "adequacy" of desegregation plans then or in the future.[6] But having taken the approach that it did, and being impatient with the failure of the school boards to achieve "adequate" desegregation, the Court in succeeding years made it clear, he asserts, that the "school racial separation being 'remedied' could not be attributed to unconstitutional school segregation and that, in fact, it was simply school racial separation or imbalance itself, however caused, that had become unconstitutional."[7] He is most critical, of course, of *Swann v. Charlotte-Mecklenburg Board of Education*,[8] which authorized extensive busing in some instances (and the resulting abolition of "neighborhood schools"), and is equally critical of the Court's approach to de jure segregation outside the South, as reflected in its decision in *Keyes v. School District No. 1, Denver*.[9] Although he approves of the decision in *Milliken v. Bradley*,[10] which limited the power of the federal courts to impose inter-district rem-

[3] Brown v. Board of Educ. I, 347 U.S. 483 (1954).
[4] P. 15.
[5] Brown v. Board of Educ. II, 349 U.S. 294 (1955).
[6] Pp. 34-37.
[7] P. 16.
[8] 402 U.S. 1 (1971).
[9] 413 U.S. 189 (1973).
[10] 418 U.S. 717 (1974).

edies,[11] it is only because that decision did not "make a bad situation worse." He also argues that the same reasons that made inter-district busing improper there should also have made busing improper within the Detroit school district itself.[12]

Although the book is written in a popular style and fully conveys the author's strong feelings that busing is a "disaster," it is not a polemic, but rather a scholarly and critical analysis of what the author believes to be the Court's objective in requiring racial integration regardless of other "costs." There are, however, two points on which I think the author can be faulted for "scholarly inadequacy." First, there is his use of the term "racial discrimination," which he equates with racial classification. Graglia essentially argues that taking race into account for purposes of school integration constitutes racial discrimination in the same manner as taking it into account for purposes of school segregation.[13] He attacks the Court for "casually" saying in *Swann* that school boards can voluntarily integrate, even to the point of requiring that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."[14] Although correctly noting that the question of voluntary integration was not presented for decision in *Swann*, he goes on to say that when it is presented, "it should either be one of great difficulty or easily decided in the negative, on the ground that such a policy would grossly disadvantage individuals because of their race."[15] Professor Graglia's assumption, however, that racial classification is the equivalent of racial discrimination assumes the point in issue and completely ignores a substantial body of case law holding to the contrary. The Supreme Court has expressly held in other contexts that taking race into account is not unconstitutional[16]—the Constitution is not "colorblind"[17]—and that the Constitution prohibits only those racial clasifications that cannot be "shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Four-

[11] The decision may not significantly limit the power of the federal courts to impose inter-district remedies. *See generally* Sedler, *supra* note 2. Professor Graglia notes that the Court did not preclude inter-district busing after *Milliken*, and that "many lower courts will, in any event, not quickly be convinced that the time for busing is over." P. 257.

[12] Pp. 237-38.

[13] *See, e.g.*, pp. 15, 67, 72, 82, 85-87, 96, 97, 256, 260.

[14] 402 U.S. at 16.

[15] P. 118.

[16] *See, e.g.*, Soutb Carolina v. Katzenbach, 383 U.S. 301 (1966); Tancil v. Woolls, 379 U.S. 19 (1964).

[17] *See* Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512, 518-19 (1975) (discussion of "color-blind syllogism").

teenth Amendment to eliminate."[18] Presumably, assigning students to schools on a racial basis in order to provide them with an integrated educational experience is a permissible state objective, and thus would not necessarily be unconstitutional. It would be unconstitutional only if somehow it were found to violate the rights of the students who, in the absence of such racial assignment, would be attending a different school. Although Professor Graglia contends that students are severely disadvantaged by being bused from their "neighborhood schools,"[19] all of the courts passing on the question of "voluntary integration" have held that this supposed "disadvantage" does not rise to constitutional dimensions, and have emphasized that there is no constitutional right to attend a particular school or to avoid being "bused" in order to attend school with children of another race.[20] They have thus held that classification by race for purposes of school integration does not amount to racial discrimination and is fully constitutional. I think that it was incumbent upon Professor Graglia to discuss this matter fully, since he uses the term "racial discrimination" to characterize racial classification for integration purposes as unconstitutional per se.

Second, Professor Graglia tends to be somewhat elusive in his use of the term "racial balance," which has a well-settled legal definition. By his evasive use of this term, Professor Graglia implies that there is a Court-imposed requirement, which had never existed or been imposed by the lower courts. In *Swann*, the Court defined "racial balance" as a requirement that the black-white ratio be the same in every school as it is in the system as a whole.[21] The Court explicitly stated that "racial balance" was not the test to determine the adequacy of a desegregation plan.[22] Rather the test, as stated in *Swann*'s companion case, *Davis v. Board of School Commissioners*,[23] is the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation."[24]

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[18] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[19] P. 194.

[20] *See, e.g.*, Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm. of Boston v. Board of Educ., 362 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); Pennsylvania Human Relations Comm'n v. Chester Sch. Dist., 427 Pa. 157, 233 A.2d 290 (1967). *See also* Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

[21] 402 U.S. at 23-24.

[22] "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

[23] 402 U.S. 33 (1971).

[24] *Id.* at 37.

The "greatest possible degree of actual desegregation," in turn, relates to the elimination of racially identifiable schools, which, as the Court emphasized in *Swann*, is the primary objective of any desegregation plan.[25] In practice, this is accomplished by using minimum-maximum ratios: considering the racial composition of the school district as a whole, in which blacks generally are in the minority,[26] no school should have so few blacks as to appear to be a racially identifiable white school or so many blacks as to appear to be a racially identifiable black school. Ordinarily, the minimum-maximum ratios allow considerable flexibility—*e.g.*, in a district where blacks make up 20% of the population, a minimum of 10% black and a maximum of 40% black[27]—and where practical considerations so require, the courts will uphold plans that leave some schools as racially identifiable black schools.[28] Professor Graglia completely ignores this flexibility, stating that *Swann* established a "requirement of almost perfectly racially balanced schools regardless of cost."[29] He also equates "racial balance" with the elimination of racially identifiable schools[30]—concepts which, as pointed out above, are simply not analogous. Professor Graglia should have defined exactly what he meant by "racial balance," and should have indicated whether he was using the term in the sense that the Court used it in *Swann*, or simply to mean the elimination of racially identifiable schools.[31] He certainly should not have given the impression that the Court was requiring balance as *it* has defined that term, since it clearly has not done so.

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[25] 402 U.S. at 26.

[26] However, in metropolitan areas containing urban school districts surrounded by suburban districts, blacks will often be in the majority in the urban district, making desegregation of the urban district alone of doubtful efficacy because of the possibility of "white flight" to the adjoining suburban district. See the discussion in Sedler, *supra* note 2, at 538-43.

[27] The desegregation plan for the merged Louisville-Jefferson County (Kentucky) District, which was approximately 20% black, used a minimum-maximum ratio of 12% to 40% black for the elementary schools, and 12.5% to 35% for the secondary schools. Cunningham v. Grayson, 541 F.2d 538, 540 (6th Cir. 1976). In Denver, Colorado, the minimum-maximum ratio was computed with reference to whites, since blacks and Hispanic students were treated as a unit for desegregation purposes. The elementary school range was 40% to 70% white, with a "somewhat higher" range for the secondary schools. Keyes v. School Dist. No. 1, Denver, 521 F.2d 465, 475-76 (10th Cir. 1975).

[28] *See, e.g.*, Medley v. School Bd., 482 F.2d 1061 (4th Cir. 1973), *cert. denied*, 414 U.S. 1172 (1974); Goss v. Board of Educ., 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

[29] P. 116.

[30] P. 145.

[31] It has been my experience in practice that attorneys who represent school boards also tend to equate the elimination of racially identifiable schools with "racial balance." The courts have had no difficulty in drawing the distinction.

These "inadequacies," however, do not undercut the basic thrust of Professor Graglia's analysis and criticism. He maintains that what the Constitution prohibits is racial discrimination in public education—that is, the establishment of separate schools for blacks and whites—and that the remedies for such prohibited discrimination must be aimed at eliminating officially established separate schools. It is irrelevant, in Professor Graglia's view, that a substantial number of racially identifiable schools may remain after established separate schools are eliminated. He accuses the Court of imposing, in the guise of remedying the discrimination caused by the establishment of racially segregated schools, a requirement of racially integrated schools, even though the racially segregated character of the existing schools cannot be traced to the state-imposed discrimination.[32] In *Brown*, he argues, the Court should have struck down state-imposed segregation on the ground that "laws requiring school assignment on the basis of race to keep the races separate are unconstitutional,"[33] without regard to any harm such segregation may have had on the "educational achievement" of black children.[34] This explanation of *Brown*, with which I agree, is buttressed by the Court's decision in the companion case of *Bolling v. Sharpe*,[35] invalidating on due process grounds school segregation in the District of Columbia. In *Bolling*, racial segregation simply did not advance any legitimate state interest, so that the resulting restraint on the liberty of black and white children to attend the same schools was unconstitutional.[36]

But regardless of the doctrinal basis of *Brown*, the question is still how to remedy the condition of de jure segregation that existed in the states where segregation was required by law. Professor Graglia's contention, as pointed out above, is that de jure segregation is adequately remedied by the adoption of racially neutral assignment plans, even if this results in little actual integration and

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[32] Pp. 73-74.

[33] P. 18.

[34] Pp. 26-29.

[35] 347 U.S. 497 (1954).

[36] Professor Graglia points out that blacks and whites are "disadvantaged" by state-imposed school segregation, and that "[n]o resort to psychology is necessary to show this." P. 30. The unconstitutionality of state-imposed segregation, solely on the ground that it advances no legitimate state interest, is further demonstrated, as Professor Graglia notes, by the Supreme Court's per curiam decisions based on *Brown*—invalidating state-imposed segregation in public facilities, transportation, and the like. P. 29. I much prefer the "lack of legitimate interest" rationale of *Bolling* to the "tangible harm" rationale of *Brown*. The "lack of legitimate interest" rationale is buttressed by the Court's decision in Loving v. Virginia, 388 U.S. 1 (1967), invalidating Virginia's anti-miscegenation law because it could only advance the "illegitimate" state policy of "white supremacy."

the maintenance of a large number of racially identifiable schools. He further contends that an affirmative requirement of racial integration is in itself racially discriminatory and not related to remedying the constitutional violation found to exist.[37] Graglia says that in *Green v. County School Board of New Kent County*[38] the Court began to change the "constitutional mandate from a prohibition to a requirement of racial discrimination in school assignment"[39] and, while purportedly remedying de jure segregation, imposed a requirement of "racial mixing."[40] He does not necessarily disagree with the holding in *Green*, which invalidated "freedom of choice" plans that did not produce actual desegregation or eliminate the racially identifiable character of the schools, because, as he points out, these plans were only used in districts that were required to desegregate, the teaching staffs of the schools were still segregated, and there were many obstacles to truly "free choice."[41] Rather, his criticism goes to the requirement that actual desegregation must be achieved regardless of the "neutral" nature of the method of student assignment employed.

It was this requirement that reached fruition in *Swann*, where the Court held that "neighborhood school" assignment was inadequate to eliminate de jure segregation if a substantial number of one-race schools remained, and authorized the use of busing to "break up" the segregated character of the school system. Although *Swann* did not "establish a requirement of almost perfectly racially balanced schools regardless of cost,"[42] it did require, to the extent practicable, the elimination of racially identifiable schools. Professor Graglia criticizes the Court in *Swann* for requiring a "racial mix" in the schools under the guise of remedying de jure segregation.[43] This criticism completely ignores what I would call the "remedy dilemma" that confronted the Court in *Swann*, because it assumes the point in issue, which was the relationship between *past* state-imposed segregation and the *present* racially identifiable character of the schools. Professor Graglia states dogmatically that the "racial imbalance" existing in the school system "was not due to former segregation."[44] But the entire basis for the Court's holding in *Swann* was that the present racially identifiable

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[37] Pp. 86-87.
[38] 391 U.S. 430 (1968).
[39] P. 67.
[40] P. 73.
[41] P. 76-80.
[42] P. 116.
[43] Pp. 122-26.
[44] P. 115.

character of the school system *was* due to state-imposed segregation, or at least that it was presumed to be so, since the school board could not establish the contrary. Professor Graglia fails to confront this issue, and as a result, his criticism of *Swann* does not deal with the "remedies value judgment" that the Court made in that case.

In saying that the "racial imbalance" was not due to former segregation, Professor Graglia apparently assumes that in an urban school district, even in the absence of state-imposed segregation, there will always be a substantial number of one-race schools because of patterns of residential racial segregation. Although this is true, a school district located in a state where racial segregation was once required by law also has its particular *structure* because of state-imposed segregation. The structure of these school districts was necessarily established in conformity to requirements of state-imposed segregation; decisions as to school construction, site location, school size, and the like had to be made with reference to those requirements. That structure remains today, since the great majority of existing schools in most urban school districts in the South are pre-*Brown* schools.[45] Logically enough, black schools were located in black neighborhoods, and white schools were located in white neighborhoods. In addition, some white schools were located in close proximity to black schools to serve whites residing in adjacent or "mixed" residential areas. The present racial identity of these schools is thus attributable to past state-imposed segregation requirements. The school map would look very different today were it not for those requirements. No "rational" school planner, for example, would locate schools so close to each other, as is frequently the case in a dual system, where one was formerly a black school and the other was previously a white school.[46] Although there is simply no way of knowing what the structure of the school system would have been if not for state-imposed segregation, it is clear that it would have been different from what it is now.

[45] In Louisville, for example, 56 of the 65 schools in operation as of 1972 were pre-*Brown* schools, and 35 of them had never changed their racial composition. Newburg Area Council v. Board of Educ., 489 F.2d 925, 929-30 (6th Cir. 1973). In most urban districts, enrollments have remained relatively stable or have declined. The growth has been in the surburban districts, where middle-class whites with school age children are moving. 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 18-19 (1967).

[46] As residential patterns change, these former white schools can "contain" the expanding black population. In Louisville, for example, most of the pre-*Brown* white schools located in close proximity to the pre-*Brown* black schools became racially identifiable black schools, while a few were integrated.

The Court recognized this in *Swann*, when it observed that "[a]ll things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation."[47] At the same time, it cannot be denied that even in the absence of state-imposed segregation, there would have been a large number of racially identifiable schools, particularly at the elementary level, as a result of "neighborhood school" assignment and racially segregated residential patterns. The dilemma facing the Court in *Swann*, then, was clearly a "remedy dilemma." How was it to remedy de jure segregation where the structure of the system was established in accordance with the requirements of state-imposed segregation, resulting in a very large number of racially identifiable schools, but where, even in the absence of state-imposed segregation, there would still have been a substantial number of racially identifiable schools? Its options appear to have been as follows: (*1*) ignore the influence of state-imposed segregation on the structure of the school system and uphold "neighborhood school" assignment; (*2*) try to "sort out" the schools that would not have been racially identifiable in the absence of state-imposed segregation, and limit relief to those schools; (*3*) treat the school *system* as being racially segregated, and require its dismantling by a plan that would achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The Court made what I call a "remedy value judgment"—to opt for the third alternative—and refused to exempt the comparatively few urban district post-*Brown* schools from the integration requirement. The Court's articulation of its value judgment may have been less than ideal, but the value judgment was made, nonetheless.

Convinced that the Court was determined to require "racial balance" as a substantive right under the guise of remedying de jure segregation, Professor Graglia completely ignores the "remedy dilemma" facing the Court in *Swann*. There are arguments that could be advanced in criticism of the Court's value judgment, and a belief in the social utility of racial integration may have "tipped the scales" in favor of the integration alternative. But I do not think that *Swann* can be properly analyzed without regard to the "remedy dilemma." For this reason Professor Graglia's criticism of *Swann* is not well-founded.

In *Swann*, then, the Court made a decision with respect to the remedy necessary to eliminate de jure segregation. Given its *remedy* decision, however, it also defined the nature of the substantive

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[47] 402 U.S. at 28.

right recognized in *Brown I*: a right to attend school in a *school system* from which all vestiges of state-imposed segregation had been eliminated, and all vestiges of state-imposed segregation would not be considered eliminated until the school system had achieved the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." It was not a right, however, to attend an integrated, let alone a "racially balanced" school, as Professor Graglia implies, since considerations of practicability might result in the retention of some racially identifiable schools within the system.[48]

Keyes, on the other hand, did not directly involve a question of remedy—although the holding had significant remedy implications—but did involve a question of what constituted de jure segregation in a school system located in a state where racial segregation had not been required by law. Here the Court's approach to what constitutes de jure segregation—and its adherence to the de jure-de facto distinction—can be criticized on both doctrinal and functional grounds. Residential racial segregation and "neighborhood school" assignment had always been the justification for the massive racial segregation existing in the urban school districts of the North and West.[49] But, as the United States Commission on Civil Rights pointed out in a study in 1967,[50] residential segregation would not explain the *degree and extent* of school segregation existing in those districts. In fact, the school boards were making discretionary decisions concerning the location of schools, the closing of old schools and the building of new ones, the redrawing of boundary lines, the assignment of students and faculty, and the like, in such a way as to *maximize* actual segregation and maintain the racially identifiable character of the schools. Any attempt to justify these decisions in terms of supposedly neutral criteria would usually require, in the words of one court, "inconsistent applications of those criteria."[51] Beginning with cases in the late 1960's, the lower federal courts almost uniformly held that the school boards were pursuing policies of segregation that made the resulting actual segregation de jure rather than de facto, and required

[48] *See* notes 23-31 and accompanying text *supra*.

[49] As to the extent of such segregation, see U.S. SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY, 92d Cong., 2d Sess., Table 7-16, *reprinted in* S. LAW, N. CHACHKIN & N. DORSEN, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 1975 Supp. to vol. 2, at 92-94 (1975).

[50] 1 U.S. COMM'N ON CIVIL RIGHTS, *supra* note 45, at 60-70.

[51] Davis v. School Dist. of Pontiac, 443 F.2d 573, 576 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

the dismantling of the dual systems in the same manner as if the segregation had been required by law.[52]

Keyes was the first of these cases to reach the Supreme Court. Although it presented the Court with the substantive question of what constituted de jure segregation, the question of remedy could not be fully separated from the nature—and existence—of the substantive violation under the particular facts of the case. The district court found that the evidence established that the Denver School Board was practicing a policy of segregation in the Park Hill district, into which blacks had begun to move in the 1950's. The schools in the "core city," where all the blacks lived prior to the movement to Park Hill and where the Hispanic population was concentrated, were virtually all-black and Hispanic.[53] The district court found that the segregation existing in the "core city" schools was de facto rather than de jure, and the Tenth Circuit agreed.[54] The Supreme Court limited review to the question of the segregated character of the "core city" schools, and according to Professor Graglia, the Denver School Board was "subject to a kind of shell game and found to have lost."[55]

The Court, with Justices Douglas and Powell disagreeing on this point, adhered to the de jure-de facto distinction, and held that where segregation had not been required by state law the plaintiffs seeking to establish de jure segregation had to show a policy of segregation, or as the Court put it, "purpose or intent to segregate."[56] The Court went on to hold, however, that proof of segregatory intent with respect to a "substantial part" of the system[57] created a *presumption* with respect to the system as a whole,

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[52] *See, e.g.*, United States v. Board of Sch. Comm'rs of Indianapolis, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); Davis v. School Dist. of Pontiac, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), *cert. denied*, 402 U.S. 943 (1971); Booker v. Special Sch. Dist. No. 1, Minneapolis, 351 F. Supp. 799 (D. Minn. 1972).

[53] Professor Graglia critizes the district court's factual findings (pp. 162-78), but I think he puts too much emphasis on the board's rescission of a voluntary integration plan, and does not adequately deal with the evidence concerning the discretionary decisions that were made in the Park Hill area.

[54] Keyes v. School Dist. No. 1, 313 F. Supp. 61 (D. Colo. 1970), *aff'd in pertinent part*, 445 F.2d 990 (10th Cir. 1971). The district court, however, found that the "core city" schools were educationally "inferior" because of their racial-ethnic identifiability, and ordered their desegregation. 313 F. Supp. at 83. The Tenth Circuit overturned this holding, on the ground that the alleged educational inferiority was constitutionally irrelevant since the segregation existing in those schools was not de jure. 445 F.2d at 1004-05.

[55] P. 161.

[56] 413 U.S. at 208 (emphasis omitted).

[57] Close to 40% of the black students in the district were attending school in the Park

and shifted the burden to the school board to show that the segregated character of the rest of the system was not the result of "intentionally segregative actions."[58] This presumption could only be rebutted by a showing that segregatory intent was not *among the factors* that motivated the school board's actions.[59] The Court advanced a twofold justification for this presumption. First, if state-imposed segregation is found in a substantial portion of the school system, "it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system,"[60] since parts of a school district are generally not administered in isolation. Second, if segregatory intent is present in the operation of part of the system, it is also likely that it is present in the remainder of the system.[61] As Justice Powell pointed out in his separate opinion, it will be a practical impossibility for a school board to rebut the presumption of segregatory intent;[62] there is no way that the board can show that segregatory intent was not among the factors that influenced its decisions. This is what has happened in practice, both when *Keyes* was remanded to the district court,[63] and in practically all of the post-*Keyes* cases involving challenges to board policies of segregation.[64] Once a court finds that a school board has been pursuing a policy of segregation, it is required to dismantle the dual system in the same manner as a school system located in a state where segregation was once required by law, by achieving the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Again, no effort is made to sort out the schools that would have been segregated "naturally" from those that were segregated because the board was pursuing a policy of segregation.[65]

Justices Douglas and Powell, coming from different directions and reaching ultimately different conclusions, both urged the Court to abandon the de jure-de facto distinction and to hold that the maintenance of racially segregated schools was harmful to black children. Justice Douglas apparently would require the inte-

Hill area. Segregatory intent was also shown by a racially discriminatory pattern of teacher assignment. 413 U.S. at 199-200.

[58] *Id.* at 208.

[59] *Id.* at 210-11.

[60] *Id.* at 201.

[61] *Id.* at 207-09.

[62] *Id.* at 236-37.

[63] *See* Graglia's discussion of the case on remand. Pp. 198-202.

[64] *See, e.g.*, United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir. 1975); cases cited at *id.* 535 u.7.

[65] *See* the discussion of this point in the Tenth Circuit's opinion in *Keyes* on remand. Keyes v. School Dist. No. 1, 521 F.2d 465, 471-75 (10th Cir. 1975).

gration of all racially identifiable black schools to the fullest extent practicable.[66] Justice Powell would balance the harm to black children from the maintenance of racially segregated schools against other values, such as attendance at "neighborhood schools," and would not require the elimination of racially segregated schools if this could only be achieved by cross-busing.[67]

Professor Graglia sharply criticizes *Keyes*, and I think that his criticism is warranted.[68] He attacks the Court's presumption rationale as applied to the facts of *Keyes*, by noting that the "core city" schools were black before blacks began to move into the Park Hill section. Thus, there was no way that segregation in the Park Hill area could have had any effect on the segregation of the "core city" schools. Additionally, it was not rational to presume that segregatory intent existing in the 1960's, when the actions were taken with respect to the Park Hill schools, had any application to the actions taken in the 1950's and earlier with respect to the "core city" schools.[69] There can be no doubt that the "core city" schools would have been segregated regardless of "segregatory intent," and there was no showing that the board tried to maximize the segregation, given the patterns of residential segregation existing in the "core city." Moreover, the "remedy dilemma" that the Court faced in *Swann* was not present in *Keyes*. In a state where school segregation was never required by law, the present structure of the school system cannot be related to state-imposed segregation. To the extent that the school system is segregated because of board policy, the specific consequences of that policy—which schools are segregated as a result of it—can generally be shown. Although in some cases the consequences will be system-wide,[70] *Keyes* was not such a case, and it would not have been difficult to sort out the de jure from the de facto segregation. Clearly, the decision in *Keyes* is subject to Professor Graglia's criticism that the Court has not directly related the extent of required racial integration to the extent of state-imposed segregation. If "segregatory intent" is the test, then Professor Graglia can legitimately contend that only the actual seg-

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[66] Justice Douglas did not expressly discuss the remedy question in his opinion, but he said nothing to indicate that anything less than "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation" would be required. 413 U.S. at 214-17.

[67] *Id.* at 237-52.

[68] I say this from an academic rather than a litigative perspective, since *Keyes* makes it easy to prove the existence of de jure segregation in most urban school districts.

[69] Pp. 179-85.

[70] This appeared to be the case in United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir. 1975).

regation traceable to "segregatory intent" is constitutionally impermissible and subject to judicial remedy.[71]

More significantly, perhaps, *Keyes* points up the questionable justification for continued adherence to the de jure-de facto distinction. As Justice Powell emphasized in his separate opinion, the harm to black children from attendance at segregated schools is the same regardless of the "source" of the segregation, and their entitlement to relief should not depend on a showing of something as elusive as "segregatory intent."[72] In this regard, Professor Graglia's criticism of the Court's approach to "race and the schools" is most telling. While making it clear that he does not see the Constitution as creating a substantive right on the part of black children to attend integrated schools, Professor Graglia emphasizes that the Court has never explicitly come to grips with this question, and as he puts it, "a requirement of integration must be of nationwide application and justified, on its own merits, as such."[73] Similarly, as he states in attacking the requirement of "segregatory intent":

> The concern of the law, here as elsewhere, is presumably with the objective consequences of actions, not with mental states. When an action, such as the use of neighborhood assignment in a racially imbalanced neighborhood, has both desired and undesired consequences, a value judgment as to gains and losses is unavoidably involved. To purport to test the legality of the action by "intent" is only to make the basis of that judgment obscure.[74]

It is this value judgment that the Court has not yet made.

Disaster by Decree is a most stimulating and interesting book. Although I disagree with some of Professor Graglia's conclusions, I agree with him on many points. I do not think that the Court has, under the guise of remedying past segregation, imposed a requirement of "racial balance," or more accurately, imposed a requirement of "maximum desegregation," because it has engaged in "policy-making" and has concluded that racial integration is "socially desirable." Rather, I think that in the state where segre-

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[71] Pp. 188-93. Professor Graglia's view on this point now seems to be shared by Chief Justice Burger and Justices Powell and Rehnquist. *See* Austin Indep. Sch. Dist. v. United States, 97 S. Ct. 517, 517-19 (1976) (concurring opinion, Burger, C.J., Powell, J., & Rehnquist, J.), where the Court vacated the lower court judgment and remanded the case for a reconsideration of "segregatory intent." The concurring Justices would have had the remand order include a reconsideration of the scope of the remedy in the event that segregatory intent were found to exist.

[72] 413 U.S. at 230-35.

[73] P. 84.

[74] P. 186.

gation was formerly required by law, the Court has made the "remedy value judgment" that such segregation can only be effectively eliminated by requiring the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Although arguments can be advanced in opposition to that value judgment, it cannot be attacked without regard to the remedy context in which it was made. Professor Graglia's criticism of the Court is well-founded in its treatment of segregation in school districts located in states where segregation was not required by law. The Court has imposed a substantive test of "segregatory intent," which ordinarily is not difficult to meet, but which is subject to the criticism of doctrinal and functional inconsistency; if the test is "segregatory intent," as Professor Graglia argues, then only the actual segregation that can be traced to "segregatory intent" is constitutionally impermissible and subject to judicial remedy. Moreover, the Court has never explained why actual segregation not resulting from "segregatory intent" is any less harmful to black children, and it has failed to come to grips with the underlying question of whether the Constitution requires the state, to the extent that it is practicable, to provide an integrated education for all black children.

Unlike Professor Graglia, I do not believe that court-ordered busing is a "disaster." Quite to the contrary, I believe that the values embodied in the fourteenth amendment, particularly the value of black freedom,[75] render constitutionally intolerable the maintenance of racially segregated schools, regardless of whether they constitute "vestiges of state-imposed segregation," as in *Swann*, or "manifestations of segregatory intent," as in *Keyes*. It is this point of difference between Professor Graglia and myself that involves crucial value choices, and as *Disaster by Decree* demonstrates most clearly, these value choices remain to be made.

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[75] *See* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

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