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Disaster by Decree: The Supreme Court Decisions on Race and the Schools, by Lino A. Graglia

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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. $11.50.

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There is little doubt that school desegregation is the most difficult and most divisive issue facing the Supreme Court in this century. Nor could the Court have avoided the issue—as it might in good conscience, for example, have avoided such divisive questions as legislative reapportionment,[1] and as it did avoid passing on the constitutionality of the Vietnam war.[2] The conditions of the 1950's made inevitable a decision on the constitutionality of legally separated public schools for blacks and whites. Once the issue was squarely presented to the Court, the equal protection clause mandated the result which the Court reached in *Brown v. Board of Education.*[3] One may quarrel over the role of social science research—whether, for example, footnote 11[4] should have been included at all—but such disputes do not affect the outcome of the cases or the principles of decision. One may also question, as many now do, the wisdom of deferring the implementation of a right once recognized[5]—although "deliberate speed" would almost certainly in fact have been the pace even if the Justices had ordered immediate desegregation throughout the land.

It is at this point that consensus breaks down. Critics of the Supreme Court's performance in the desegregation area have argued with increasing fervor that the implications of *Brown* should have been limited earlier and more narrowly. Among the most recent and sharpest of the critics is Prof. Lino Graglia, a constitutional scholar of ability and distinction, who traces the cycle back to its origins and follows the implications through 1975. The title, *Disaster by Decree,* might suggest that a single judgment bears the major onus for the current and (Graglia believes) unhappy condition of public education. But the central thesis is not so much that the Supreme

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[1]Which it decided in Baker v. Carr, 369 U.S. 186 (1962).

[2]A. D'AMATO & R. O'NEIL, THE JUDICIARY AND VIETNAM (1972).

[3]347 U.S. 483 (1954).

[4]*Id.* at 494 n.11.

[5]Brown v. Board of Educ., 349 U.S. 294 (1955).

Court strayed at a particular point along the path, as that the Court cumulated in the 1960's and compounded in the '70's errors initially made in the '50's.

Professor Graglia conscientiously goes back to the beginning, and argues that the Court in *Brown* did both more and less than it might have done. On one hand, the understanding of *Brown I* would have been aided, and some of the consequent confusion avoided, if the Court had been less conscientious in its attempt to avoid squarely overruling the prior separate-but-equal cases. On the other hand, the Court's objective could have been better achieved had the Court in *Brown II* decreed immediate compliance. Moreover, a simpler resolution of the remedy issue would have removed the need to call for a "desegregation plan"—a mandate Graglia believes sowed some of the seeds of the "disaster" which followed.

The chronicle proceeds in orderly fashion through the 1960's, which were surprisingly free of major Supreme Court desegregation cases. (What did characterize these years, but about which Graglia says relatively little, was the painful effort of the lower federal and state courts outside the South to decide how far *Brown* applied to racial imbalance resulting from residential patterns rather than formal color bars.) Not until 1968 did the issue really return to the Court, and then in a rather limited form.[6] Yet the decisions in these years did, in Professor Graglia's view, subtly if critically shift the focus from eliminating desegregation to mandating integration; while the context was still one of formal legal segregation, the reasoning arguably went beyond the facts, and thus invited dangerous extrapolation by the lower courts.

If there was a watershed, it was the 1971 cases from Charlotte-Mecklenburg, North Carolina.[7] Noting that it was Chief Justice Burger who administered the coup de grace, Graglia argues that in the Charlotte cases a formula for integration was announced which went well beyond the racial conditions of the South, and that new remedies (especially busing) were approved without the limits necessary to keep lower courts from using them liberally. Although the Court purported to reject precise mathematical formulas in favor of gentler structures, Graglia claims the essential damage had now been done. The Chief Justice's avowed misgivings soon after announcing the Charlotte decisions[8] only served to confirm the gravity of the error and the portent of the departure.

It might be well to pause at this point to appraise the quality of the analysis. It is careful, thorough, and extensive. But it may at critical points be tainted by an eagerness to fit untiday fragments into a mold. Take, for example, the author's claim that in a companion to the main Charlotte case, decided the same day, the Court ruled that "[b]using is 'absolutely essential to

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[6] *E.g.*, Green v. County School Bd., 391 U.S. 430 (1968).

[7] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[8] L. GRAGLIA, DISASTER BY DECREE 140-41 (1976).

fulfillment of [the] constitutional obligation to eliminate existing dual school systems.' "[9] The quotation is technically correct. And the case did deal with a state law which, inter alia, forbade busing. But the *context* of the statement was a bit different. The North Carolina law actually forbade *any* assignment of students on the basis of race, thus foreclosing the very remedies which the Court had just held might be warranted in such a case. The Chief Justice, observed that as race must be considered in deciding whether constitutional rights had been violated, "so also must race be considered in formulating a remedy."[10] Then follows the sentence containing the quoted phrase: "To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool *absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.*"[11] It is risky to draw from this language the inference which Professor Graglia ties to busing alone, even though busing was the central issue of the case.

Perhaps a comment about the book's style may be in order here, since it reinforces the observation above. Strong criticism should employ vigorous and forceful language, no less about Supreme Court decisions than about the acts or omissions of lesser mortals. Certain of the opinions, however, come in for extremely harsh attack. The majority in the *Green* case, for example, found unlawful segregation by "a rarely equaled feat of sophistry."[12] In the Denver case, Justice Brennan's opinion for the Court "strains logic and credulity to an extent rarely equaled even in 'desegregation' cases."[13] The two dissenters in the Detroit case fared even less well; Justice White "apparently failed to read what the Court had said";[14] Justice Marshall was "obtusely unable to grasp the basis of the Court's decision";[15] and the two dissenters were "less than scrupulous in their use of facts or logic."[16] These are strong words indeed, and have a somewhat jarring effect on the scholarly reader who welcomes disappassionate conclusions consistent with the painstaking analysis of the cases.

In at least one other respect the book is disappointing. In the final chapter, after a careful and thoughtful analysis of essentially legal issues in each of the major cases, the author turns his attention to the practical consequences of the decisions. There is a troubling threshhold question—not fully articulated or answered in the book—how far a court deciding constitutional issues should or even can weigh practical consequences. (Graglia does not challenge, for example, the Court's insistence in *Cooper v. Aaron*[17] that prac-

[9] *Id.* at 137.
[10] North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).
[11] *Id.* (emphasis added).
[12] L. GRAGLIA, *supra* note 8, at 71.
[13] *Id.* at 179.
[14] *Id.* at 244.
[15] *Id.* at 247.
[16] *Id.* at 255.
[17] 358 U.S. 1 (1958).

tical barriers to implementation of a desegregation decree could not impair constitutional rights of black citizens). Even if some attention to the impact of constitutional judgments on people and institutions is appropriate, it is questionable whether the Supreme Court should be faulted for disorder in urban public schools, or for the added costs of busing, or for a decline in academic standards, in some school districts. As a matter of public policy, such concerns may well argue for legislation limiting (to the extent the constitution allows) of judicial intervention in this area. But such effects, even if they amount to a "disaster," do not blunt the force of the constitutional claims which the Supreme Court has addressed since *Brown v. Board of Education.* Even less can the Justices fairly be faulted for the flight of many white families to the suburbs, or for parental resort to private segregated academies —although since the completion of the book the Court has in fact closed to a degree the latter avenue of evasion.[18] It is not inappropriate, of course, for a comprehensive study of school desegregation to consider the practical effect of the decisions which comprise its principal focus, and this may well be all that is intended. But calling the Court's decision "ineffective and self-defeating and, therefore, mistaken according to any standard"[19] suggests that practical detriments should defeat constitutional imperatives. That implication would be most dangerous, and as *Cooper v. Aaron* makes clear, is not sound constitutional law.

Such reservations about the book take nothing away from its significant value. It is a careful study by a deeply concerned constitutional scholar who believes that a fundamental question has been misperceived and incompletely analyzed by the courts. There is much new and valuable material in the book; it bears careful reading—more by those who favor the desegregation decisions than by these who share the author's contrary view. Much has been written on the positive side of the case, and the opposing position deserves the kind of scholarship which Graglia brings to it.

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[18]Runyon v. McCrary, 427 U.S. 160 (1976).

[19]L. GRAGLIA, *supra* note 8, at 279.