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Note

Ineligibility Under the Emergency School Aid Act: A Disparate Impact Standard

Board of Education v. Harris, 100 S. Ct. 363 (1979).

I. INTRODUCTION

Congress enacted the Emergency School Aid Act of 1972 (ESAA)1 to give school districts the opportunity to compete for federal financial assistance in order to reduce minority group isolation and to upgrade the quality of education for all students.2 Since the federal funds available under the ESAA are limited, it is the duty of the Department of Health, Education and Welfare (HEW) to determine school district eligibility and rank applications according to certain criteria.3

One applicant for ESAA assistance for the 1977-78 fiscal year was the City School District of New York City. Although a grant of $3,559,132 initially was considered, HEW later decided that the City School District failed to meet the ESAA's requirements for eligibility.4 Under section 706(d)(1)(B) of the ESAA, an educational agency is not eligible for aid if, after June 23, 1972, it has:

(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this

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1. Pub. L. No. 92-318, §§ 701 to 720, 86 Stat. 354 (1972) (current version at 20 U.S.C. §§ 3191-3207 (Supp. II 1978)). Statutory references in the text are to the 1972 Act, as amended, which was governing in Board of Educ. v. Harris, 100 S. Ct. 363 (1979), and was used by the Court in its opinion. See id. at 365 n.1.
2. 20 U.S.C. § 3192(a) (Supp. II 1978). The ESAA is a relatively obscure piece of legislation which was originally considered "a potential headache" that would divert attention from more serious concerns. Instead, the ESAA has become a powerful means of bringing about corrective change in the continuing battle for equal educational opportunity. Holmes, The Role of the U.S. Department of Health, Education and Welfare, 19 How. L.J. 51, 57 (1975).
section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency . . . .

The Board of Education of the City School District (Board) was denied funding under the ESAA because statistical studies compiled by HEW revealed that several schools could be identified by the racial composition of the teaching staffs as being intended primarily for either black or white students.

Rather than contesting the accuracy or sufficiency of the statistical studies, the Board contended that, under the second clause of section 706(d)(1)(B), HEW must show that any racial disparities in teacher assignments were the result of "purposeful or intentional discrimination in the constitutional sense." As such, the Board denied that the disparities were intentional. HEW countered by asserting that the second clause of section 706(d)(1)(B) relates back to the first clause, which denies eligibility where conduct "results in" even unintentional disparities. The district court upheld HEW's determination of ineligibility and the Second Circuit Court of Appeals affirmed. The Supreme Court granted certiorari to consider the important issue of statutory interpretation and, in Board of Education v. Harris, affirmed the ineligibility of the City School District for ESAA funds by holding that "impact or effect governs both prongs of the ineligibility provision of


7. 100 S. Ct. at 366. See also Pettigrew, A Sociological View of the Post-Bradley Era, 21 WAYNE L. Rev. 813, 823 (1975). Pettigrew recognizes the need for racially balanced teaching staffs:

It may be impossible to achieve genuine integration among students unless the staff furnishes a model. Black students report a greater sense of involvement when blacks as well as whites are in authority, and black and white teachers learn the subtleties of integration from each other when they can work together toward common goals as equals.

Id. (footnote omitted).


9. 100 S. Ct. at 367.


§ 706(d)(1)(B)." The majority speaking through Justice Blackmun, based this interpretation on the overall structure of the ESAA, statutory statements of purpose and policy, legislative history, and the text of section 706(d)(1)(B) itself. The Court found that all of these factors indicated a congressional intent to employ a "disparate impact" standard to discourage racial isolation and thereby to eliminate de facto as well as de jure segregation in public schools. However, Justice Stewart, joined by Justice Powell and Justice Rehnquist, dissented on the ground that the legislative history indicated that a school system is ineligible for ESAA funds only if it has demonstrated discriminatory intent in the hiring, promotion or assignment of teachers.

The Court's statutory interpretation in *Harris* will significantly affect the eligibility of school districts to receive millions of dollars in emergency aid. The disparate impact standard, rather than a discriminatory intent standard, for teacher employment discrimination will lessen HEW's burden in finding that a school system is ineligible for ESAA funding. Since the lack of discriminatory intent is not a defense, a school board's desire for extra funds should motivate it to ensure that a more complete racial balance exists. The Court's statutory interpretation should stimulate a stronger spirit of complicity in achieving the social goal of racial equity.

II. FACTUAL BACKGROUND OF *HARRIS*

In New York City, appointments of teachers and principals to public schools are customarily made by the Chancellor of the Central Board. The Chancellor selects high school teachers from a candidate list prepared by a Board of Examiners. He also has the power to abrogate unlawful teacher assignments and the power to

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12. *Id.* at 369-70. The Court also held that "a prima facie case of discriminatory impact may be made by a proper statistical study," such as the one made here, and that the burden of rebutting the statistical case is on the school board. *Id.* at 375.


A *de jure* racially segregated school system is one in which local or state school authorities deliberately and willfully establish public school attendance boundaries or regulations to enroll students in particular schools on strictly or primarily a racial basis; a *de facto* racially segregated school system is one in which pupils attend schools of a predominantly racial sameness simply because they live in neighborhoods characterized by the racial sameness reflected in the student enrollment of the local public schools.

*Id.* at 588 n.2.

transfer teachers between schools.\textsuperscript{15} On November 9, 1976, the HEW Office for Civil Rights sent a letter to the Chancellor stating that the assignment of teachers, assistant principals and principals in his district tended to characterize certain schools as intended for certain racial or ethnic classes.\textsuperscript{16} HEW later notified the Board of Education that it would not grant assistance under the ESAA since eligibility was not established under the HEW regulations.\textsuperscript{17} Although the Secretary of HEW has the power to grant a waiver of the Board's disqualifying practice,\textsuperscript{18} the Board did not invoke the ESAA waiver provision.\textsuperscript{19}

HEW's determination of the Board's ineligibility was based upon statistics compiled by the HEW Office for Civil Rights for the school year 1975-76 which revealed that while 62.6\% of the district's high school students were minority members, only 8.3\% of their teachers were members of a minority. Moreover, 70\% of the minority high school teachers were sent to teach at schools where minority student enrollments were over 76\%. On the other hand, the percentage of minority teachers was disproportionately low in high schools where minority student enrollments fell below 40\%. Similar figures were reported on the junior high and grade school levels.\textsuperscript{20}

The Board did not dispute the accuracy of the HEW statistics. Rather, it contended that the disparate teacher assignments were

\begin{table}[h!]
\centering
\begin{tabular}{|l|c|c|}
\hline
High Schools With Minority Student Enrollments Over 97\% & \% Minority Teachers \\
\hline
Harlem & 100.0\% & 70.0\% \\
Lower East Side & 100.0 & 63.2 \\
Boys & Girls & 99.9 & 20.9 \\
Pacific & 99.8 & 37.5 \\
Jane Addams & 98.7 & 34.3 \\
Harlem Prep & 98.4 & 69.2 \\
Ben Franklin & 98.3 & 27.9 \\
Redirection & 97.7 & 47.6 \\
August Martin & 97.6 & 16.7 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{15} 584 F.2d at 581-82.
\textsuperscript{16} 45 C.F.R. \textsection 185.43(b)(2) (1979) provides that one of the practices which will disqualify a school board from ESAA funding is an "assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin." \textit{Id.}
\textsuperscript{17} 100 S. Ct. at 585-86.
\textsuperscript{18} \textit{See} 20 U.S.C. \textsection 3196(c)(3) (Supp. II 1978).
\textsuperscript{19} 100 S. Ct. at 366 n.2.
\textsuperscript{20} \textit{Id.} at 366-67. The court of appeals opinion listed high schools with high or low proportions of minority teachers, including:
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the result of certain uncontrollable and unintentional factors, including: (1) state law provisions, (2) provisions from collective-bargaining agreements, (3) licensing requirements, (4) a consent decree concerning bilingual education, and (5) demographic changes. The district court requested that HEW consider these justifications, but after an administrative hearing on remand, HEW notified the Board that the justifications offered either were not sufficient as a matter of law to rebut the prima facie showing of discrimination, or were not supported by the facts. The Board appealed HEW’s determination to the district court and the circuit court of appeals, but both courts agreed with HEW and rejected the Board’s position that both clauses of section 706(d)(1)(B) require a showing of intentional discrimination before ineligibility can be established. The Second Circuit opinion stated that Congress has the power “to establish a higher standard, more protective of minority rights than constitutional minimums require.” The court found that Congress intended section 706(d)(1)(B) to

<table>
<thead>
<tr>
<th>High Schools With Minority</th>
<th>Student Enrollments Under 30%</th>
<th>% Minority Teachers</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. D. Roosevelt</td>
<td>29.4%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Lafayette</td>
<td>29.2</td>
<td>0.6</td>
</tr>
<tr>
<td>Richmond Hill</td>
<td>28.5</td>
<td>3.4</td>
</tr>
<tr>
<td>New Utrecht</td>
<td>22.5</td>
<td>0.0</td>
</tr>
<tr>
<td>William Grady</td>
<td>22.2</td>
<td>0.0</td>
</tr>
<tr>
<td>Ralph McKee</td>
<td>19.1</td>
<td>3.1</td>
</tr>
<tr>
<td>Susan E. Wagner</td>
<td>13.0</td>
<td>2.5</td>
</tr>
<tr>
<td>New Dorp</td>
<td>4.3</td>
<td>0.0</td>
</tr>
<tr>
<td>Tottenville</td>
<td>3.7</td>
<td>1.9</td>
</tr>
</tbody>
</table>

Board of Educ. v. Califano, 584 F.2d at 583 n.25.
21. 100 S. Ct. at 367.
23. A question that must be asked is whether demographic balance can ever be achieved in our nation’s urban centers. One thoughtful opinion, Calhoun v. Cook, 332 F. Supp. 804 (N.D. Ga. 1971), provided a bleak answer:

The cause of such frustrating results lies in factors completely beyond the control of school authorities. Segregated housing, whether impelled by school changes or not, remains the unconquerable foe of the racial ideal of integrated public schools in the cities. The white flight to the suburbs and private schools continues... The problem is no longer how to achieve integration, but how to prevent re-segregation.

Id. at 806. The problems inherent in demographic shifts provide a good case for the elimination of the de jure-de facto distinction. Such shifts in the racial makeup of urban areas are more significant causes of racial imbalance than were prior state laws and policies which encouraged segregation. See Comment, Conflict Between the Judiciary and the Legislature in School Desegregation, 44 FORDHAM L. REV. 1206, 1221-22 (1976).
24. See 100 S. Ct. at 367-68.
25. 584 F.2d at 588.
make any school board that either intentionally discriminates or unintentionally maintains unjustified disparity in teacher assignments ineligible for ESAA funding.  

III. STATUTORY INTERPRETATION: INTENT OR IMPACT?

Section 706(d)(1)(B) operates, in part, to make a school district ineligible for special funding where racial "discrimination" in teacher assignments is shown. The issue in Harris can be simply stated as the question of what did Congress mean by the phrase "or otherwise engaged in discrimination"? In interpreting this phrase, the Court decided that the whole of section 706(d)(1)(B) is governed by a disparate impact standard. In other words, discriminatory intent, in the constitutional sense, is not required. The Court arrived at this decision by use of various methods of statutory interpretation.

A. Textual Reading

The Court first examined the text of section 706(d)(1)(B) and found the section ailing from "imprecision of expression and less-than-careful draftsmanship." The majority acknowledged that the second clause ("or otherwise engages in discrimination") could be read to imply intentional or purposeful conduct, even though the first clause ("results in the disproportionate demotion or dismissal") speaks only of impact or results. However, it concluded that without a clear justification for such a distinction, there is no reason to divide the statute.

The majority's conclusion was pragmatic and supplied a convenient rationale for reaching the desired result. However, the rationale may have been unnecessarily superficial since it did not encompass the favorable implications of one tool of statutory con-

26. Id.
28. See 100 S. Ct. at 368.
29. Id. at 376 (Stewart, J., dissenting).
30. 100 S. Ct. at 369-70.
32. 100 S. Ct. at 368. The dissenting opinion also characterized the section as "ambiguous." Id. at 376 (Stewart, J., dissenting).
33. Id. at 368-69.
34. Id. at 371.
struction, the doctrine of *ejusdem generis*. This doctrine of statutory construction states that where "general" legal words follow "specific" legal words, the general words are construed to include only items similar to those defined by the foregoing specific words. *Ejusdem generis* presumes that the legislature has assigned a natural meaning to words in a statute. Under this doctrine, the general word "discrimination" would refer to the specific words "results in" for its assigned meaning.

The dissent considered, but discounted, the applicability of *ejusdem generis* to section 706(d)(1)(B) since the intervening word "otherwise" can be construed to indicate either similarity or, in the reverse, diversity. Because of such confusion, both the majority and the dissent considered it necessary to look beyond the words of the statute to arrive at the intended meaning.

B. The District Court Decisions

The Court distinguished the three cases tending to support the Board's interpretation that a *de jure* segregated school district must desegregate to receive ESAA funds although a *de facto* segregated district need not. In *Robinson v. Vollert*, HEW attempted to place a higher standard on receipt of ESAA funds than that imposed by a court ordering school desegregation. However, the *Vollert* court wanted to apply the same discriminatory intent standard to both ESAA and court-ordered plans. In distinguishing *Vollert*, the *Harris* Court maintained a position that Title VI of the Civil Rights Act of 1964 (upon which court orders such as those mentioned in *Vollert* are based) and the ESAA each may require different standards of eligibility, although each may define what constitutes proper integration similarly. However, the ESAA was a legislative attempt to remedy all species of minority isola-


37. *Id.*

38. *See* *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), where the term "otherwise qualified handicapped person" was held to indicate persons who are similarly qualified in spite of the handicap, rather than persons who are qualified except as their handicap limits qualification. *Id.* at 406.

39. The word "otherwise" is defined in *Black's Law Dictionary* 1253 (rev. 4th ed. 1968) as meaning: "In a different manner, in another way, or in other ways."

40. 100 S. Ct. at 369.

41. *Id.* at 376 (Stewart, J., dissenting).

42. *Id.* at 374 & n.13.


44. 411 F. Supp. at 472-75.

tion, while Title VI may have been intended to remedy only intentional discrimination.46

In Board of Education v. HEW,47 the district court said that discriminatory acts under the ESAA "are those which violate the Constitution, and discrimination is another way of referring to de jure segregation."48 The court provided little analysis for this pronouncement other than a vague reference to the case of Swann v. Charlotte-Mecklenburg Board of Education.49 In Swann, the Supreme Court spoke generally of a state’s constitutional duty not to discriminate against school children because of race.50

In Bradley v. Miliken,51 another federal district court found that the defendant school board had never been found guilty of de jure acts of teacher segregation, and then decided that the ESAA standard of eligibility was not higher than that in Title VI of the Civil Rights Act of 1964.52 The court supported its conclusion with a passing reference to the doctrine of constitutional separation of powers, and to Vollert. However, the Harris Court stated that it simply was not persuaded by the decisions in Board of Education v. HEW and Miliken.53 Apparently, the Court rejected analogies to the standard used under Title VI as a tool of statutory interpretation for later congressional enactments.

C. Structure and Context of the ESAA

The Supreme Court then examined the composition of the ESAA generally and found a congressional intent to use financial incentive as a means to eradicate de facto as well as de jure racial segregation in schools.54 In section 702 of the ESAA,55 Congress clearly stated its desire to promote the voluntary elimination or prevention of minority group isolation and to improve the standard of education for all students. A desire to remove “minority group isolation” is naturally result-oriented. Had Congress been satisfied with the scope of the existing law, which was thought to treat only de jure segregation,56 the ESAA would not have been enacted.

46. 100 S. Ct. at 374 n.13.
47. 396 F. Supp. 203 (S.D. Ohio 1975), aff’d in part and rev’d in part on other grounds, 532 F.2d 1070 (6th Cir. 1976).
48. Id. at 225.
50. Id. at 13.
52. Id. at 886-87.
53. 100 S. Ct. at 374.
54. See note 14 supra.
56. For example, the 1971 Senate debates on S. 1557, which became the ESAA, produced the following statement:
   Just the other day the U.S. Supreme Court, in the Charlotte-
Apparently Congress wanted a device to remedy *de facto* segregation and thus, it adopted the financial incentive approach.\(^{57}\) The Court reasoned in *Harris* that "it would make no sense to allow a grant to a school district that, although not violating the Constitution, was maintaining a *de facto* segregated system."\(^{58}\)

According to the Court, section 703(a) of the ESAA\(^{59}\) presents, as federal policy, the idea that guidelines and criteria formed under the ESAA should be applied uniformly throughout the United States. These "guidelines and criteria" are to be applied "without regard to the origin or cause" of any racial segregation in schools. The Court interpreted this language as looking to impact, and not to intent.\(^{60}\)

Furthermore, other ineligibility provisions of section 706 operate to accomplish the goal of defeating both *de jure* and *de facto* segregation.

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\(^{57}\) Recently, alternative incentives for desegregation have been suggested. These include: (1) allowing voluntary interdistrict transfers of students, so long as any racial imbalance in the receiving school does not increase; (2) providing each student with a voucher or entitlement to be used in any accredited school but which has greater worth in an integrated school; and (3) rewarding students for attendance at an integrated school with post-secondary tuition. See Coleman, *New Incentives for Desegregation*, 7 HUMAN RIGHTS 10, 48-49 (Fall, 1978).

\(^{58}\) 100 S. Ct. at 370 (emphasis by the Court).


\(^{60}\) 100 S. Ct. at 370.
segregation. For instance, a school system is ineligible for ESAA funds under section 706(d)(1)(A)\textsuperscript{61} if the school board provides property or services to a private school institution without first determining that the institution does not practice discrimination. The Court considered this an "impact" provision, since ineligibility occurs even where the applicant school board negligently fails to determine the nature of the private school's practices.\textsuperscript{62} Likewise, section 706(d)(1)(C)\textsuperscript{63} disqualifies a school board that separates minority from non-minority school children by classroom assignments within a particular school for a large part of the school day.\textsuperscript{64} The Court characterized this as an "impact" provision as well.\textsuperscript{65}

This pattern is interrupted by section 706(d)(1)(D),\textsuperscript{66} which addresses conduct that limits student activities (curricular or extracurricular) so as to discriminate against minority school children who would take part in such activities. The Court acknowledged,\textsuperscript{67} and HEW conceded,\textsuperscript{68} that the context of this provision was one of "intent" and not "impact." The Court dealt with this anomaly by suggesting that an impact standard, if used in this situation, would put in question any school board decision not to offer any course or program, no matter what the purpose or budgetary constraints.\textsuperscript{69} Thus, the Court apparently concluded that Congress intended the ESAA to encourage elimination of \textit{de facto} segregation by providing financial incentives.

The dissent in \textit{Harris} disagreed with the majority's reliance upon the overall scheme of the ESAA.\textsuperscript{70} Justice Stewart conceded that one purpose of Congress was to eradicate minority isolation no matter what the cause. But the Court also should have considered other purposes of the ESAA, such as that found in section 708(c),\textsuperscript{71} which provided earmarked funds for minority school children who live in areas where the predominant language is not English.\textsuperscript{72} Apparently, Justice Stewart did not believe that the majority's disparate impact standard should blanket section


\textsuperscript{62} 100 S. Ct. at 370.


\textsuperscript{64} An exception is provided only for good faith ability grouping. \textit{Id}.

\textsuperscript{65} 100 S. Ct. at 370.


\textsuperscript{67} 100 S. Ct. at 370 n.5.

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{Id} at 377 n.3 (Stewart, J., dissenting).


\textsuperscript{72} 100 S. Ct. at 377. \textit{See also} S. REP. No. 92-61, 92d Cong., 1st Sess. 22-24 (1971).
706(d)(1)(B) and all other sections of the ESAA absent a clear single objective. It should be noted that the majority opinion did recognize anomalies in the ESAA's thrust. However, it also maintained that there could be no disagreement respecting the "underlying philosophy of the Act." 

D. Legislative History

The majority opinion also used the legislative history of the ESAA to support its view that the disparate impact standard governs teacher assignments in section 706(d)(1)(B). The report by the Senate Committee on Labor and Public Welfare, which dealt with one of the proposed ESAA bills, the Emergency School Aid and Quality Integrated Education Act of 1971, was considered first. One passage of the report, quoted by the Court, stated that the clause which later became section 706(d)(1)(B) would make a school board ineligible if it discriminated in its employment conduct. The report also stated that the clause "presumes one practice to be discriminatory: the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregating its schools or establishing integrated schools." In its argument, the Board emphasized the report term "presumes one practice" as showing intent to make a clear distinction between language in section 706(d)(1)(B) referring to "demotion or dismissal" and that referring to "hiring, promotion or assignment." Although the Court was persuaded that some distinction between the two clauses of section 706(d)(1)(B) was intended, the distinction it found was consistent with the overall impact scheme. The Court found a strict irrebuttable impact test in the first clause which prohibits conduct resulting in disproportionate demotion or dismissal of teachers. Under this test, a school board would be ineligible for funds under the ESAA if its faculty was racially disproportionate due to demotions or terminations in employment. There would be no need to prove intent and the school board would not have an opportunity to justify the disparity. In the second clause, which prohibits racial discrimination in the hiring, promotion or assignment of teachers, the Court found a rebuttable impact test. This test would make a school board ineligible for funds if faculty disparity occurs because of hiring, promo-

73. See notes 66-69 & accompanying text supra.
74. 100 S. Ct. at 370.
78. Brief for Petitioners at 26, Board of Educ. v. Harris, 100 S. Ct. 363 (1979); 100 S. Ct. at 377.
79. 100 S. Ct. at 371.
tion or assignment in employment. Again, there would be no need to prove intent, but the school board could attempt to justify the disparity.

For its irrebuttable-rebuttable impact distinction, the Court relied on another passage of the Senate committee report which indicated that disproportionate demotion or dismissal of teachers would constitute a *per se* violation when the disparity arises with desegregation activity. From this *per se* qualification of the first clause of section 706(d)(1)(B), the majority deduced that the second clause, for which there was no *per se* qualification, is governed by an impact test wherein the school board has an opportunity to rebut any disparity in assignments.

The dissent felt that the majority was inconsistent in its subtle distinction between the two clauses. It recognized a conflict between the irrebuttable-rebuttable distinction and the prior reasoning that "[u]nless a solid reason for a distinction exists" between closely related statutory phrases, none should be implied. However, the Court's prior reasoning is still consistent since the Senate committee report provided a valid reason for an irrebuttable-rebuttable distinction, but none for an impact-intent distinction.

The dissent also found language in the Senate committee report which stated that the first clause "is not modified or in any way diminished" by the second clause. On the basis of this admitted distinction, along with some historical statistics, the dissent concluded that the Committee on Labor and Public Welfare intended the first clause to be more burdensome to the applicant than the second clause. Yet, the majority did recognize that intent by making its limited distinction: an irrebuttable impact test is more burdensome to the applicant than a rebuttable impact test.

The majority found a second major item in the legislative history to support its "impact" interpretation in the Senate debates on the Stennis Amendment to the proposed Emergency School Aid and Quality Integrated Education Act of 1971 (ESAQIEA). Since the ESAA of 1972 was essentially the same act as the proposed ESAQIEA, the legislative history is pertinent. In addition,
the Stennis Amendment eventually became the federal policy pronouncement of section 703(a) of the ESAA, which requires uniform standards of enforcement nationwide. 88 Those senators in favor of uniform application of the ESAQIEA argued that the Stennis Amendment would help eliminate the constitutional double standard whereby integration policies were strictly applied in the southern states (where de jure segregation was once prevalent), but leniently applied in the northern states (where any segregation was traditionally de facto). 89 Although there was no apparent reason for concern, opponents of the Stennis Amendment worried that uniform application of the ESAQIEA "could be construed as an endorsement of weakened enforcement throughout this Nation." 90 The amendment was included in the ESAA when it was enacted in 1972. Thus, the legislative history 91 of the uniform application pronouncement of section 703(a) gave the Harris Court another suggestion that the ineligibility rules of section 706 "focus on actualities, not on history, on consequences, not on intent." 92

The dissenting justices were reluctant to accept the Court's reading of the Stennis Amendment. 93 Since the amendment applies not just to the ESAA, but also to Title VI of the Civil Rights Act of 1964, 94 it may have been construed to incorporate a discriminatory intent standard rather than a disparate impact standard. 95

88. See notes 59-60 & accompanying text supra.
89. One senator vividly described the essence of the perceived double standard:

I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and see nothing but black faces in his classroom and say to himself: "This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidently developed."

91. In final debate, the Stennis Amendment was summarized as follows: "[W]e will have a uniform national policy in school desegregation matters, North, South, East, and West applied uniformly without regard to the origin or cause of such segregation. That is the Stennis amendment, pure and simple." 118 CONG. REC. 18844 (1972) (remarks of Sen. Stennis), quoted in Board of Educ. v. Harris, 100 S. Ct. 363, 372 n.9 (1979).
92. 100 S. Ct. at 373.
93. Id. at 379 (Stewart, J., dissenting).
95. See University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), where five justices concluded that Title VI prohibits only purposeful discrimination in federally financed programs, that is, discrimination in violation of the fifth amendment and the fourteenth amendment equal protection clause. Id. at
Does that mean the uniform national standard would be a discriminatory intent standard? For the majority, Justice Blackmun answered that it is not incongruous to find the Stennis Amendment defining ESAA discrimination as meaning disparate impact when Title VI might incorporate a discriminatory intent definition, since section 703(a) refers to ESAA, while section 703(b) refers to Title VI. The majority felt it did not have to address the issue of whether Title VI of the Civil Rights Act of 1964 embraces the constitutional standard since there was no indication that Title VI and the ESAA were meant to be coextensive.

The ineligibility provisions of section 706 may well impose a stricter standard on the school board than Title VI would. Under Title VI, all federal funds to a public school would be terminated for civil rights violations. Congress probably does not wish to impose a strict impact standard on Title VI provisions since it could easily result in the loss of federal funds for essential programs in many schools, and hence for many innocent school children. On the other hand, only ESAA funds would be unavailable when an ESAA impact violation is determined. Since ESAA funds operate as incentives to eradicate de facto segregation, and since there exists fierce competition for the funds, their unavailability to a school district where segregated teaching staffs are maintained appears justifiable.

Finally, the majority found it significant that Congress was aware of an existing HEW regulation when the ESAA was reenacted in 1978. Section 185.43(b) (2) provides in part that a school is ineligible for ESAA assistance if it effectuates any "practice, pol-

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287 (Powell, J.); id. at 328 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). See also note 31 supra.

96. 100 S. Ct. at 372 n.10.
97. See note 31 supra.
98. 100 S. Ct. at 374.
99. Id.
100. 45 C.F.R. § 185.43(b) (2) (1979) provides, in part, that:

No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees . . ., including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

Section 185.43(b) (2) only prohibits teacher assignments that racially identify schools—it does not require faculties to be perfectly balanced. 100 S. Ct. at 373. Indeed, the ESAA's sponsor in the House stated that perfect racial balance was not required for aid under the Act. See 117 Cong. Rec. 39332 (1971) (remarks of Reps. Pucinski and Esch), quoted in Board of Educ. v. Harris, 100 S. Ct. at 373.

101. 100 S. Ct. at 365 n.1.
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ICy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees.”102 Section 185.43(b) (2) further prohibits only teacher assignments which identify schools racially—it does not require faculties to be perfectly balanced.103 The regulation’s narrower second requirement might be seen as limiting HEW’s capacity to completely eliminate de facto segregation, but the Court found no indication that Congress intended to weaken the eligibility provisions.104 In 1978, the House included a special waiver-of-ineligibility provision to address complaints about the regulation’s applicability to situations in Los Angeles and New York City.105 However, the provision was deleted in the report of the conference committee.106 The Court also noted that the President of the American Federation of Teachers urged the Senate to reform the ESAA “to require a finding of discrimination, not simply a numerical imbalance, before ESAA funds can be cut off.”107 No reformation was made, however, which implies that Congress agreed with HEW’s interpretation of the statute.108

IV. CONCLUSION

Over a quarter century after Brown v. Board of Education,109 racial isolation still remains a problem in New York public schools, just as it remains a problem in other major urban areas.110 Within that time, the Supreme Court has shown its desire to reallocate teachers in each segregated school district so that each school’s staff approximates the composition of the entire district.111 Certainly policy considerations outside the constitutional realm favor this result. Fair racial representation on school faculties demon-

103. Id.
104. 100 S. Ct. at 373.
109. 347 U.S. 483 (1954). In Brown, the Supreme Court found the use of race as a classification unconstitutional for assignment of students to public schools which they were required to attend.
strates that the school system and the community believe that racial equity is an important priority. Also, an integrated faculty affords the opportunity to present to students and the community a role model of harmony, friendship and trust between the races. Furthermore, a broader educational experience for all students might result from the greater diversity in cultural, political and economic backgrounds to which they are exposed.

In *Harris*, the Supreme Court primarily relied upon legislative history to find congressional intent to pair section 706(d)(1)(B) of the ESAA with a disparate impact standard. From a legal process standpoint, reliance on legislative history is illusory at best. What chance is there that the several hundred members of Congress have identical situations in mind as being covered or not by the statutory language for which they vote? It is highly improbable that the members of Congress even consider all relevant contingencies when they cast their votes. More importantly, Congress does not enact committee reports and floor debates into law—it only enacts statutes.

Yet, it remains the duty of the Court to find legislative intent when a well-meaning act of Congress suffers from "less-than-careful draftsmanship." When faced with an ambiguous statute, the Court must clarify its meaning and thereby find the law. To find the law, the Court must make an honest use of the available tools of statutory construction. In *Harris*, the Court did that much, but it is also encouraging to note that the decision in all probability reflects the personal values of a majority of the Court.

Although the issue of statutory construction is narrow, the *Harris* Court's favorable response to such a vulnerable question is certainly welcome news to those who follow legal developments in civil rights. The decision indicates the viewpoint of a majority of the Court, a viewpoint which may be expressed again in later interpretations of the ESAA or Title VI. The Court shows some sensitivity to advancing the goal of breaking down the walls between the traditionally advantaged and the traditionally deprived. *Harris* suggests that desegregation within public schools remains one of the primary goals available for the long term advancement of humanity.

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114. 100 S. Ct. at 368.