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Grand Jury Discrimination

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GRAND JURY DISCRIMINATION

Castaneda v. Partida, 97 S. Ct. 1272 (1977).

In *Castaneda v. Partida*,[1] the Supreme Court held that a criminal defendant of Mexican-American descent, indicted in a county in which Mexican-Americans comprise 79% of the total population, has made out a prima facie case of discrimination in the selection of the grand jury by showing that for the preceeding eleven years the average percentage of Mexican-American grand jurors in that county was approximately 39%. The Court further held that such a prima facie showing is not rebutted by the facts that the list of prospective grand jurors was 50% Mexican-American, and that the majority of government officials in the county,[2] a majority of the commissioners who selected the grand jurors, and the foreman of the grand jury which indicted the defendant were also Mexican-American.

I

In March, 1972, Rodrigo Partida was indicted by an Hidalgo County, Texas grand jury for the crime of burglary of a private residence at night with intent to rape.[3] A petit jury convicted Partida, and he received an eight year prison sentence.[4]

Partida moved for a new trial, alleging discrimination in the selection of the grand jury. By comparing statistics from the 1970 census with Hidalgo County grand jury records, he demonstrated that, although 79.1% of the county's 181,535 residents were Spanish-surnamed, from 1962 through 1972 the average percentage of Mexican-American grand jurors was only 39%.[5] He also demonstrated that during the two and one-half year period in which the judge who impanelled his grand jury had been sitting, the average had risen only marginally to 45.5%.[6] Finally, Partida noted that the panel from which his grand jury was drawn was only 50% Mexican-American.[7] Partida charged that these figures made out a prima facie case of discrimination in the selection of the grand jury. This, he alleged, was a violation of the equal protection clause.[8]

Partida's motion was denied, and he appealed.[9] On appeal, the state court affirmed his conviction, saying he had failed to make out a prima facie case of discrimination because he had not shown:

> [T]hat the females who served on grand juries were not of Mexican-American descent but married to husbands with Anglo-American surnames. He did not show how many persons with Mexican-American surnames or of Mexican-American descent were summoned for grand jury duty and were excused for age, health or other legal reasons.[10]

The court noted other lapses in the evidence saying that it did not know how many of the 79% were "wet-backs," non-resident migrant workers, illiterate or otherwise ineligible for grand jury service.[11]

Following his defeat in the Texas courts, Partida petitioned the United States District Court for a writ of habeas corpus, challenging the constitutionality of his conviction on fourteenth amendment and due process grounds.[12] The district court denied the petition.[13] In doing

[1] 97 S. Ct. 1272 (1977).

[2] One of these officials was the judge who appointed the grand jury commissioners who made the initial selection of the grand jurors. *Id.* at 1292.

[3] *Id.* at 1275.

[4] *Id.*

[5] *Id.* at 1275-76.

[6] *Id.* This figure is relevant insofar as it indicates relatively little impact on the alleged discriminatory situation due to the election of a Mexican-American to the bench.

[7] *Id.* The relevant census data was labeled "Spanish-surnamed." Nevertheless, Mexican-American was considered to be synonymous with Spanish-surnamed.

[8] U.S. CONST. amend. XIV, § 1.

[9] Partida v. State, 506 S.W.2d 209 (Tex. Crim. App. 1974).

[10] *Id.* at 210.

[11] *Id.* at 211. The court also focused on the composition of the particular grand jury which indicted Partida. It stated that 50% Mexican-American representation did not support his argument.

[12] Partida v. Castaneda, 384 F. Supp. 79 (S.D. Tex. 1974).

[13] *Id.* at 91.

so, however, it engaged in a lengthy discussion of the facts which it considered necessary to establish a prima facie case of discriminatory grand jury selection.[14] The court conceded that Partida had made out "a *bare prima facie* case" of invidious discrimination with his evidence of "a long continued disproportion in the composition of the grand juries in Hidalgo County."[15] Nevertheless, the court rested its denial of the writ on the fact that a majority of the judges and grand jury commissioners, a significant percentage of each grand jury list for the prior ten years, the judge that appointed the grand jury commissioners and three of the five commissioners themselves were all Mexican-American.[16]

> [T]his court refuses to believe that Claudio Castaneda, the elected Mexican-American sheriff of a county where the majority of the voters are Mexican-American, would purposefully refuse to serve four of the Mexican-American members of the jury panel with the intention of causing a disproportion on the grand jury that indicted the Petitioner. Here, the Mexican-Americans are a *governing* majority, and it cannot be presumed they would purposefully and intentionally discriminate against themselves.[17]

On appeal, the Fifth Circuit reversed.[18] It agreed with the district court that a prima facie case was established,[19] but also held that the fact that Mexican-Americans were a governing majority in Hidalgo County was insufficient to rebut Partida's prima facie case. Without more, the court held, the mere fact of a governing majority did not disprove the presumption of discriminatory intent which had been raised by the statistical disparity.[20] The Supreme Court granted certiorari[21] to decide whether or not the "governing majority" theory was an adequate rebuttal to a prima facie case of invidious discrimination in grand jury selection, and, if not, whether the State had otherwise rebutted Partida's allegations.[22]

Essentially, the Court reiterated the statement of significant statistical disparities and reaffirmed the fact that this established a prima facie case. Then, addressing the "governing majority" theory, the Court affirmed the holding of the Fifth Circuit, namely that the fact that Mexican-Americans held many influential and powerful positions in Hidalgo County could not explain away the evidence of the numbers.

Writing for a five-Justice majority,[23] Justice Blackmun devoted a substantial portion of the opinion to an analysis of the statistics presented by Partida.[24] At issue was which population figures should be compared with the grand jury statistics.

The State had argued that although Mexican-Americans comprised approximately 79% of the general population of Hidalgo County, that was an irrelevant figure. The State asserted that the percentage of Mexican-Americans in the population of *eligible* grand jurors was the appropriate figure to compare with the grand jury statistics. It said that the relatively high number of Mexican-Americans who failed to meet the statutory literacy requirements,[25] coupled with the number of Mexican-Americans in the population who were ineligible as nonresidents, unnaturally inflated the general population figure used by Partida.

[14] The court held that the party attempting to establish a prima facie case of discrimination must first show "a discriminatory result by proving a marked disparity between the percentage which the 'distinct group' constitutes among the potentially eligible jurors and the percentage which the 'distinct group' constitutes among the jury list actually compiled by the jury commissioners." *Id.* at 86. This "marked disparity" must be accompanied by a "jury selection system containing a significant danger of abuse; or by proving that the discriminatory result was representative of the results obtained in a history of cases in the particular jurisdiction . . . this being strong circumstantial evidence of discriminatory jury selection." *Id.* at 87.

[15] *Id.* at 90 (emphasis in original).

[16] *Id.* at 91.

[17] *Id.* (emphasis in original).

[18] Partida v. Castaneda, 524 F.2d 481 (5th Cir. 1975).

[19] The court noted the applicability of the "rule of exclusion" which facilitates the establishment of a prima facie case of discrimination, "by showing a disparity between (1) the percentage which the ethnic or racial group constitutes of the persons from whom a jury list is drawn and (2) the percentage which that group constitutes of the jury list compiled." *Id.* at 483.

[20] *Id.* at 484.

[21] 426 U.S. 934 (1976).

[22] 97 S. Ct. at 1279.

[23] The majority included Brennan, White, Marshall and Stevens, J.J.

[24] One may wonder why, if both lower federal courts had accepted the fact of a prima facie case, Justice Blackmun was so concerned with the statistics at this late stage. This is especially true in view of the basis for the writ of certiorari. Justice Blackmun's approach is discussed in Part III *infra*.

[25] TEX. CODE CRIM. PROC. ANN. art. 19.08 (Vernon 1966).

Responding to the argument that the generally substandard educational background of Mexican-Americans in Hidalgo County could help to explain the disparity, the Court found that it was unnecessary to decide the question because, theoretically, there was no way to know whether a particular grand jury candidate was literate until he was in court to be tested by a judge. "Prior to that time, assuming an unbiased selection procedure, persons of all educational characteristics should appear on the list."[26] Furthermore, the Court noted that educational characteristics were not reported for individuals under twenty-five years old. Believing that educational opportunities were more readily available to younger persons, the Court indulged in the assumption that this fact would favor Partida. The Court reasoned that a large segment of the eighteen to twenty-five year old group would be literate and thus eligible.[27]

The Court similarly rejected the State's second argument that the presence of illegal aliens inflated the Mexican-American population figures. Analyzing the sub-groupings within the census data, the Court demonstrated that by construing the data most favorably to the State, the legitimate Mexican-American percentage of the total Hidalgo County population would be reduced only negligibly.[28]

Even eliminating all conceivably ineligible Mexican-Americans from the 79% gross population figure, the Court concluded that Mexican-Americans would nevertheless constitute approximately 65% of the population of potential grand jurors. This was still "a significant disparity when compared with the 39% representation on grand juries shown over the 11-year period."[29] Continuing in this vein, the Court found: "If one assumes that Mexican-Americans constitute only 65% of the jury pool, then a detailed calculation reveals that the likelihood that so substantial a discrepancy would occur by chance is less than 1 in 10^{50}."[30]

These data, however, were not accepted unanimously by the other members of the Court. Chief Justice Burger, in dissent, seemed to be particularly swayed by the alleged over-inclusiveness of Partida's figures.[31] Because the statistics were arguably unreliable, Justice Blackmun chose to base the conclusion that a prima facie case had been established on the fact that these data should not have been relevant until *after* the grand jurors had been summoned into court to be tested according to Texas statute.[32] It seems apparent that Justice Blackmun was intentionally obfuscating the question of whether the case involved the establishment of a prima facie case by the statistical disparity, or by the selection process. Actually, it was an amalgam of the two which led to the Court's decision.

[26] 97 S. Ct. at 1276 n.8.

[27] Apparently the Court reasoned that a significant portion of potential grand jurors would be between the ages of 18 and 25. Since the statutory age requirement for grand jurors in Texas is 18, the Court believed that these relatively younger people would be more likely than not to have had some schooling.

[28] The census data divided the population into three groups: (1) Native born of native parentage; (2) native born of foreign parentage; and (3) foreign born of foreign parentage. Since illegal aliens by definition could only come from the third group, the Court assumed, *arguendo*, that every person in that category was both Spanish-surnamed and a non-citizen. The Mexican-American population of Hidalgo County would still comprise 76.1% of the total. 97 S. Ct. at 1276. n.6.

[29] *Id.* at 1276–77 n.8.

[30] *Id.*

[31] *Id.* at 1286 (Burger, C.J., dissenting). Furthermore, Burger believed that the comparison of 1962 grand jury statistics with 1970 census figures was erroneous. He said:

> The Court's reliance on respondent's overbroad statistics is not the sole defect. As previously noted, one-half of the members of respondent's grand jury list bore Mexican-American surnames. Other grand jury lists at about the same time as respondent's indictment in March 1972 were *predominantly Mexican-American*. . . . Since respondent was indicted in 1972, by what appears to have been a truly representative grand jury, the mechanical use of Hidalgo County's practices some 10 years earlier seems to me entirely indefensible. We do not know, and on this record we cannot know, whether respondent's 1970 gross population figures, which served as the basis for establishing the "disparity" complained of in this case, had any applicability at all to the period prior to 1970.

Id. at 1286 (emphasis in original).

[32] We prefer not to rely on the 65% to 39% disparity, however, since there are so many implicit assumptions in this analysis. . . . We rest, instead, on the fact that the record does not show any way by which the educational characteristics are taken into account in the compilation of the grand jury lists, since the procedure established by the State provides that literacy is tested only after the group of 20 are summoned.

Id. at 1277 n.8.

The Texas system of grand jury selection, the "key man" system, has been the subject of repeated critical examination by the Supreme Court.[33] Under this system, a state district judge appoints jury commissioners who select prospective jurors from different portions of the county. Then, in court, the qualifications of these potential jurors are examined. Because of the subjectivity involved in the process, it is susceptible to abuse. It has not, however, been held unconstitutional.

Faced with the same selection process in *Partida*, the Court held that, for the statistical disparity to rise to the level of a rebuttable presumption of discrimination, a showing of substantial under-representation on grand juries "over a significant period of time" coupled with a selection process "susceptible to abuse or not racially neutral" must be made.[34] Additionally, the allegedly under-represented group must be established as an identifiable minority.

The Court had no difficulty finding that Mexican-Americans are an "identifiable minority"[35] and that the "key man" system of grand jury selection is susceptible to abuse.[36] The crucial issue was whether the statistics which have been discussed above indicated substantial under-representation over a long period of time. Using sophisticated probability theory, the Court found that the disparity between Mexican-Americans' represenation in the general population of Hidalgo County and their representation on grand juries over the eleven-year period from 1962–1972 had a likelihood of occurring by chance of less than one in 10^{140}.[37]

The Court found this to satisfy the under-representation requirement.

Having concluded that Partida had established a prima facie case of discrimination in the selection of the grand jury, the Court finally turned its attention to whether the "governing majority" theory, as formulated in the district court, rebutted Partida's prima facie case. Although this issue was the basis for the Court's acceptance of the case, Justice Blackmun was remarkably sparse in his treatment of it. Calling the record "barren"[38] and refusing to presume as a matter of law that members of hitherto discriminated against minorities would not discriminate against other members of this group,[39] Blackmun held the "governing majority" theory was inadequate to rebut Partida's case.

In an interesting dictum, however, the Court appeared to leave open the possibility of using this theory in the future. In fact, Justice Blackmun drew a virtual blueprint for its future use. He observed:

> Among the evidentiary deficiencies are the lack of any indication of how long the Mexican-Americans have enjoyed "governing majority" status, the absence of information about the relative power inherent in the elective offices held by Mexican-Americans, and the uncertain relevance of the general political power to the specific issue in this case.[40]

Finally, although there was testimony by the

[33] *See, e.g.*, Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940).

[34] 97 S. Ct. at 1280.

[35] Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans were under-represented in grand jury selection process).

[36] See note 33 *supra* and accompanying text.

[37] *See* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966). The Court found that in the 11-year period from 1962 through 1972 a random sampling of the whole population of Hidalgo County should produce 688 Mexican-Americans out of the 870 chosen for grand jury service. The actual number, however, was 339. The difference was substantial enough for the Court to find the prima facie case.

> The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case, the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial departure from the expected value would occur by chance is less than 1 in 10^{140}.

97 S. Ct. at 1281 n.17. *See also* P. HOEL, INTRODUCTION TO MATHEMATICAL STATISTICS (4th ed. 1971); F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS (2d ed. 1970).

[38] 97 S. Ct. at 1282.

[39] *Id.* at 1283.

[40] *Id.*

state district judge[41] denying any discrimination, the Court held that such testimony, standing alone, was insufficient to rebut the allegations.[42]

In a powerful dissent, Justice Powell took issue with the majority's failure to utilize the "governing majority" theory in this case.[43] He experienced what he termed "a sense of unreality" that the Supreme Court should infer from mere numbers a prima facie case of discrimination, while those on the scene—the judge who appointed the jury commissioners and who presided at the trial at which Partida was convicted and the United States District Judge—"perceived no basis for respondent's claim of invidious discrimination."[44] Moreover, Powell asserted, the Court's recent decisions in *Washington v. Davis*[45] and *Arlington Heights v. Metropolitan Housing Corp.*[46] weighed heavily in favor of adopting the "governing majority" theory. Those cases required proof of discriminatory intent to support allegations of equal protection violations. Said Powell:

> That individuals are more likely to discriminate in favor of, than against, those who share their own identifiable attributes is the premise that underlies the cases recognizing that the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his own class excluded from jury service.[47]

Powell believed that the existence of a governing majority of a particular group or race should itself be prima facie evidence of *no* discriminatory intent against members of that group or race. Substantial under-representation in the face of such a governing majority, as was present here, would have to be explained on other grounds. Following *Davis* and *Arlington Heights*, those grounds would be immaterial for fourteenth amendment purposes.[48]

Responding to Powell's analysis, Justice Marshall concurred in the opinion of the Court "to express my profound disagreement with the views expressed by Mr. Justice Powell in his dissent."[49] Whereas Powell was virtually willing to ignore the hard statistical evidence of discrimination, in favor of what his commonsense told him about how members of minority groups behave toward one another, Marshall rested his opinion on more solid foundations. Relying extensively on sociological studies,[50] Marshall emphatically concluded:

> Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.[51]

Justice Marshall seemed almost to be saying that the existence of a governing majority should, perhaps, be considered in *favor* of the establishment of a prima facie case of discrimination, rather than as rebuttal evidence. Nevertheless, Marshall ultimately agreed with the majority in deciding the case on other grounds.

II

Historically, the Court's discussion of statistical disparities is on solid ground. Beginning in 1880 when the Court decided *Strauder v. West Virginia*[52] and *Neal v. Delaware*,[53] it has consist-

[41] The judge was himself Mexican-American.

[42] 97 S. Ct. at 1283.

[43] *Id.* at 1292 (Powell, J., dissenting). Indeed, Justice Powell questioned the propriety of hearing this type of case at all. Citing Stone v. Powell, 428 U.S. 465 (1976), he argued that the "incremental benefits" of allowing habeas review of allegedly unconstitutional grand jury selection procedures are outweighed by the costs. This would be especially so when, as in the instant case, the issue was essentially mooted by a conviction at a trial where no challenges were raised. *Id.* at 1287 n.1.

[44] In a very brief dissent, Justice Stewart expressed similar sentiment. He simply found that the district court's failure to find a constitutional violation was not "clearly erroneous." *Id.* at 1286 (Stewart, J., dissenting).

[45] 426 U.S. 229 (1976) (verbal skills testing of police recruits not discriminatory).

[46] 429 U.S. 252 (1977) (denial of zoning change to accomodate low-income, integrated housing project not discriminatory).

[47] 97 S. Ct. at 1291.

[48] Powell did not elaborate as to what those other grounds may be. After *Davis* and *Arlington Heights*, however, if the Court finds no discriminatory intent, it need go no further.

[49] 97 S. Ct. at 1283 (Marshall, J., concurring).

[50] *See, e.g.*, G. ALLPORT, THE NATURE OF PREJUDICE (1953); A. ROSE, THE NEGRO'S MORALE (1949); Bettleheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOCIAL PSYCH. 417 (1943).

[51] 97 S. Ct. at 1284–85.

[52] 100 U.S. 303 (1879).

[53] 103 U.S. 370 (1880).

ently been held that a procedure which effectively discriminates against the inclusion of a particular group in grand jury venires is violative of the equal protection clause.

In *Strauder*, the Court for the first time held that a state statute which excluded blacks from grand jury service conflicted with the fourteenth amendment.[54] In *Neal*, on the other hand, there was no showing of statutory exclusion.[55] There was, however, a showing that no blacks had ever been summoned for grand jury service in the county, despite the fact that blacks comprised approximately one-fifth of the general population. This fact was sufficient to establish a prima facie case of discrimination.[56] The State conceded the fact of exclusion, but argued that it was by chance, rather than design. Declaring that argument "a violent presumption [in] which the State court indulged,"[57] the Court held that a defendant did *not* have a right to have members of his race represented on a jury. However, the Court continued: "[I]t *is* a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'"[58] These cases laid the foundation for the decision in *Partida*. Therefore, the question is not one of representation on grand juries, but of selection procedures. *Strauder* was not decided on any right of minorities to be represented on grand juries, but on the fact that a statute would not permit such representation. The reason that proof of exclusion or significant under-representation is material is that it is often the best evidence of intentionally discriminatory selection procedures. This was true in *Neal*.

This reasoning was applied in several subsequent cases in which blacks had been excluded from grand and petit jury service, despite their representation in large numbers in the general population.[59] In each of these cases, the defendant alleged, and the Court agreed, that the discrimination evidenced by statistical disparities was intentional and purposeful.

One of these cases was *Norris v. Alabama*.[60] There, the Court examined 1930 census data from Jackson County, Alabama[61] and found that that information, coupled with testimony that blacks had not served on a grand jury within anyone's memory, established a prima facie case of invidious discrimination. The Court held: "We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service . . . established the discrimination which the Constitution forbids."[62] In *Norris*, however, there was affirmitive testimony and sworn affidavits from jury commissioners that there had been no consideration of race in their selections of potential grand jurors. The Court's response has particular relevence in the context of the *Partida* rejection of the "governing majority" theory. The *Norris* Court stated: "The mere general assertions by officials of their performance of duty" was insufficient to rebut the prima facie case made out by the defendant.[63]

Shortly after *Norris*, the Court decided *Pierre v. Louisiana*.[64] In *Pierre*, it was held that the forty-year absence of blacks from jury service in a parish with a population in excess of 14,000, which was approximately 49% black, was an important element in the creation of a prima facie case of discrimination. The Court went further, however, and coupled the statistical disparity with the fact that the selection

[54] One of the unstated premises which compelled the decision was that blacks on juries would discriminate, if at all, in favor of black defendants. In this sense, the reasoning of the *Strauder* Court supports Justice Powell's dissent in *Partida*.

[55] The petitioner had complained, in part, that Delaware's 1831 constitution limited suffrage to free white males over the age of 22, and that the 1848 statute setting forth the qualifications for grand jurors restricted eligibility to qualified voters. The State responded that although it had not formally changed its constitution, the fifteenth amendment had superseded its constitutional voting provisions, and hence, the provision in the statute making reference to it was also modified by implciation to include blacks who were otherwise qualified. On this point, the Court agreed, saying, "the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from her Constitution and laws." 103 U.S. at 389.

[56] *Id.* at 397.

[57] *Id.*

[58] *Id.* at 394.

[59] *See, e.g.*, Carter v. Texas, 177 U.S. 442 (1900).

[60] 294 U.S. 587 (1935).

[61] The Court found that in 1930, Jackson County had a population of 36,881, of which 2,688 were black. Blacks also comprised 666 of the 8,801 persons eligible for grand jury service.

[62] 294 U.S. at 596.

[63] *Id.* at 598.

[64] 306 U.S. 354 (1939).

procedure provided the *opportunity* for discrimination. Together, these "created a strong *prima facie* showing that negroes had been systematically excluded—because of race—from the Grand Jury and the venire from which it was selected."[65] Thus, the Court was closely adhering to the doctrine, enunciated in *Neal* and *Strauder*, that numbers alone are meaningless. It is the selection *process* which cannot be discriminatory. When total exclusion is accompanied by a procedure providing the opportunity to discriminate, it takes but a short step of logic to conclude that the exclusion was the intentional result of the process.

Subsequently, the Court extended this doctrine to situations in which the grand juries under attack did not completely exclude minority members, but included them in minimal numbers. It was in this context that the Court, in 1940, began a series of decisions involving the Texas system of grand jury selection. Focusing on the "key man" selection system[66] in *Smith v. Texas*,[67] the Court refused to hold it facially unconstitutional. However, the Court held that when the "key man" system was coupled with a continuing wide disparity between the proportion of blacks in the population and their representation on grand juries, "the conclusion is inescapable" that invidious discrimination was being practiced.[68]

Smith is important for several reasons. First, it clearly held that the "key man" system was permissible, but highly suspect.[69] Secondly, the Court said that even though blacks were not excluded from jury service, their extreme under-representation gave rise to an inference of discriminatory selection. Lastly, the Court found that if the "key man" system is coupled with significant under-representation, the fact of intentional invidious discrimination is all but proven.

In the ten years following *Smith*, the Court held that in any Texas county in which blacks comprise a part of the population of potentially eligible grand jurors, a showing of exclusion,[70] or intentional limitation to proportional representation[71] when coupled with the "key man" selection system was prima facie evidence of purposeful discrimination. In the later case of *Hernandez v. Texas*,[72] the Court for the first time extended these equal protection rights to Mexican-Americans. There, the petitioner had alleged that Mexican-Americans had been systematically excluded from grand jury duty in Jackson County, Texas.[73] The Court had no trouble concluding both that Mexican-Americans were an identifiable minority and that there was a prima facie case of discrimination. It is important to realize that in all these cases, the Court is attempting to steer clear of the appearance that statistical disparities alone are sufficient to find equal protection violations. There must be a showing of intentional discrimination which results in the disparity. With the Texas scheme of grand jury selection, however, this was not difficult.[74]

There were, in this period, two cases almost directly on point for the *Partida* Court. In *Whitus v. Georgia*[75] and *Alexander v. Louisiana*,[76] the Court was confronted with situations in which statistical disparities were coupled not only with selection procedures which afforded opportunities for discrimination, but seemed

[65] *Id.* at 361 (emphasis in original).

[66] See note 33 *supra* and accompanying text.

[67] 311 U.S. 128 (1940).

[68] *Id.* at 131. The population of Harris County, Texas was over 20% black, one-half of whom were presumptively eligible as grand jurors. From 1931 to 1938, 18 of the 512 individuals summoned for service were black. Only five of the 384 who actually served were black.

[69] The system then in effect was similar in its essential elements to that in effect in *Partida*. Reluctantly approving this system, the Court held:

> [I]t is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County.

Id. at 130–31.

[70] Hill v. Texas, 316 U.S. 400 (1942).

[71] Cassell v. Texas, 339 U.S. 282 (1950).

[72] 347 U.S. 475 (1954)

[73] Approximately 11% of the county population were Mexican-Americans eligible for grand jury service. None had served for at least 25 years. *Id.* at 480–81.

[74] There followed a series of cases dealing primarily with this question, that is, whether the defendant was able to make out a prima facie case of invidious discrimination. These cases were notable primarily for expressly holding that if such a case is made out, the burden of proof shifts to the State to show the absence of intentional discrimination. *See* Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955).

[75] 385 U.S. 545 (1967).

[76] 405 U.S. 625 (1972).

designed to foster it. In *Whitus,* prospective grand jurors were largely selected from the tax digests. Blacks had a "c" after their names to designate them as "colored." Similarly, in *Alexander,* prospective jurors were selected largely on the basis of questionnaires designed to elicit information about individuals' eligibility for service. One of the items of information to be included by the respondent was race. In neither of these cases did the Court quite reach the process itself. It merely said that the defendent had made out his prima facie case. The reason these cases are so relevant to the instant case is that Mexican-Americans are as easily identifiable by being Spanish-surnamed[77] as were the blacks in *Whitus* and *Alexander.*

Throughout the development of law in this area, one question was left largely unanswered: How great must the statistical disparity be to be termed significant? Although it is by no means clear that it would control today, *Swain v. Alabama*[78] does give some guidance on the question. There, the Court held that a 10% disparity between blacks' representation in the general population and their representation on grand juries failed to make out a prima facie case of discrimination. The Court simply stated: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%."[79]

The *Swain* Court's apparent intention to limit the ease with which prima facie cases of discrimination could be proven has received clear support in the 1976 and 1977 cases of *Washington v. Davis*[80] and *Arlington Heights v. Metropolitan Housing Corp.*[81] Essentially, these cases held that a party charging discrimination must show *intent* to discriminate. Disproportionate representation, standing alone, was held to be insufficient. Although these two cases bear directly on all equal protection cases, their impact on grand jury cases should be slight. First, neither case involved grand jury discrimination.[82] Moreover, in *Arlington Heights,* the Court said: "Because of the nature of the jury selection task . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion.*"[83] Ever since *Strauder* and *Neal,* the Court has emphasized and reemphasized that it is concerned with the discriminatory selection process, *not* with numbers alone. Statistical disparities have relevance only when there is some reason to believe that they reflect purposeful discrimination, such as the presence of a "key man" system, or a system like that used in *Whitus* or *Alexander.* Thus, *Davis* and *Arlington Heights* should not alter the course of the law in this area. The *Partida* decision supports this conclusion.

III

Partida is intriguing solely because of the Court's treatment of the "governing majority" theory. As noted earlier, the Supreme Court granted certiorari only to examine the adequacy of this theory as a rebuttal to Partida's prima facie case of discrimination. It is extremely curious, therefore, that Justice Blackmun virtually ignored the theory, instead devoting the more substantial portion of his opinion to an analysis of the statistical evidence. While it is true that he very skillfully demonstrated that Partida had in fact made out a prima facie case, this had already been accepted by both the district court and the court of appeals. When he did address the governing majority question on which certiorari was granted, he did so unconvincingly.

Calling the record "barren"[84] as it related to the facts concerning the governing majority, Blackmun outlined what he considered to be the "evidentiary deficiencies" which precluded acceptance of the theory in this case.[85] The first such "deficiency" was that there was "a lack of any indication of how long the Mexican-Americans have enjoyed 'governing majority'

[77] See note 7 *supra.*
[78] 380 U.S. 202 (1965).
[79] *Id.* at 208-09.
[80] 426 U.S. 229 (1976).
[81] 429 U.S. 252 (1977).
[82] *Davis* involved allegations of discrimination against black police recruits by the use of a verbal skills test. *Arlington Heights,* on the other hand, involved a decision by a village board of trustees not to allow the construction of low-cost housing which would have been of particular benefit to Chicago-area blacks.
[83] 429 U.S. at 266 n.13.
[84] 97 S. Ct. at 1282.
[85] *Id.* at 1283.

status."[86] Blackmun never explained, however, why such information would have been significant. Even if he had, the record was not devoid of evidence. It *was* known that the Mexican-American judge who appointed Partida's grand jury had been sitting for two and one-half years. Second, it would seem that the relevant time frame would be that in which Partida's grand jury was chosen. It is immaterial whether Mexican-Americans enjoyed governing majority status prior to that time.

The second evidentiary deficiency cited by Blackmun was the "absence of information about the relative power inherent in the elective offices held by Mexican-Americans."[87] Here too, it was known that the state district judge and the county sheriff were Mexican-American. Furthermore, the Court had long been aware of the powers of appointed grand jury commissioners and it knew that three of the five commissioners who selected Partida's grand jury were Mexican-American. Even Blackmun appeared confused on this point, making reference to the "uncertain relevance of the general political power to the specific issue in this case."[88] The fact is that Blackmun's evidentiary requirements for future cases involving the "governing majority" theory were, in reality, met in this case. Justice Blackmun, speaking for the Court, did not directly decide the question presented by the case.

It is not clear why Blackmun avoided a direct decision on the "governing majority" theory. Part of the reason, one suspects, was that writing for the majority of the Court, he preferred to be prudent and not decide the case on such controversial grounds. Furthermore, Blackmun was assured that the issue would be discussed, and so left Justices Marshall and Powell to debate the relative merits of the "governing majority" theory in concurring and dissenting opinions. They did so with relish.

Justice Powell made the obvious argument. He looked at all of the facts concerning the positions of Mexican-Americans in Hidalgo County, noting that it is their community which "controls the levers of power."[89] He asserted that reason compels the conclusion that in Hidalgo County, Texas, any under-representation of Mexican-Americans could not have been the result of invidious discrimination. Furthermore, he stated:

> That individuals are more likely to discriminate in favor of, than against, those who share their own identifiable attributes is the premise that underlies the cases recognizing that the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his own class excluded from jury service.[90]

Powell relied on *Strauder* and is correct to the extent that *Strauder* supports this position. But with the complexity of inter- and intraracial problems in today's society, one is compelled to question the propriety of a Supreme Court justice premising his opinions on attitudes prevailing a century ago.

Justice Marshall clearly believes that social science has taken us far from the comparatively simplistic notions underlying *Strauder* and Powell's dissent. Marshall's thesis, that a governing majority may evince discrimination rather than rebut it, however, is also flawed.[91] Carried to its conclusion, Marshall's argument that minority members who have achieved some measure of success carry subliminal hostilities towards the unsuccessful members of their minority group becomes untenable. It might even *require* the purposeful exclusion of, wealthy and prominent Mexican-Americans from sitting on the jury trying a poor, disenfranchised Mexican-American. The real point, one suspects, is that in a society of disparate economic classes, the impoverished will not be favorably countenanced by the affluent, irrespective of racial considerations.

Ultimately, Blackmun probably relegated the "governing majority" theory to a relatively trivial position in his opinion because he never had any real intention of reaching that issue. The message of this case is that anytime a significant disparity between an identifiable minority's representation in the general population and its representation on juries is coupled with a selection process like the "key man" system, the presumption of discrimination will be virtually impossible to rebut. Read in light

[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1292 (Powell, J., dissenting).
[90] *Id.* at 1291.
[91] See text accompanying notes 49–51 *supra*.

of the Court's earlier decisions, this conclusion is compelled. A necessary corollary is that in any given case, the merits of the "governing majority" theory will never be reached. For instance, if a criminal defendant was able to show a significant statistical disparity, but was unable to show a selection process which lent itself to abuse, the Court would have to find that the disparity resulted from chance. On the other hand, in the absence of a statistical disparity, there is no case. In any event, the issue of purposeful discrimination would be decided on those grounds, without having to explore the terrain of the "governing majority" theory.

This dual conclusion, that a statistical disparity coupled with a "key man" selection system effectively proves discriminatory intent, and that the Court will never have to reach the merits of the "governing majority" theory, is premised on one assumption. That is, despite Justice Blackmun's apparent willingness to consider the theory in the future and his criticism of the incompleteness of the record in this case notwithstanding, the Court simply will not get a better factual situation against which to test the merits of the theory. The validity of this assumption will be determined in future cases in which lawyers will debate the "governing majority" theory. As demographics continue to change so that more and more areas are, like Hidalgo County, predominantly populated by minorities, the fact that such cases will arise is undoubted.