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## ***Campbell v. Louisiana: Rethinking Access and Remedy for Claims of Discrimination in Jury Selection***

The United States Supreme Court has attempted to force state courts to follow the mandates of the Fourteenth Amendment to the Constitution since its ratification on July 9, 1868.<sup>1</sup> Time and again, the Court has demonstrated the importance of eliminating racial discrimination within the court system for the purpose of fulfilling these mandates.<sup>2</sup> The Court has shown a heightened sensitivity

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1. See U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.”); see also *Rose v. Mitchell*, 443 U.S. 545, 554-55 (1979) (discussing the primary purposes of the Fourteenth Amendment and the Court’s efforts to enforce those purposes); *Smith v. Texas*, 311 U.S. 128, 132 (1940) (reversing the defendant’s conviction because of the exclusion of African-Americans from the grand jury and finding the jury commissioners’ lack of intent to discriminate irrelevant); Brief on the Merits for Petitioner at 29, *Campbell v. Louisiana*, 118 S. Ct. 1419 (1998) (No. 96-1584) (“More than twenty times in the last century, the United States Supreme Court has sent a message to state court systems: The Fourteenth Amendment requires that states use racially neutral methods of selecting grand jurors.”).

Congress also has passed legislation for the purpose of enforcing the Fourteenth Amendment. See 18 U.S.C. § 243 (1994) (“No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race [or] color . . . .”); see also U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *Cassell v. Texas*, 339 U.S. 282, 287 (1950) (discussing 18 U.S.C. § 243 and holding that it provides rights not only for the excluded juror, but also for the accused, who has a right to have his charges heard before a jury free from racial discrimination).

2. See *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (allowing third-party standing for a white litigant asserting the rights of an excluded African-American petit juror); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (extending *Powers* to civil cases); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (noting that *Strauder v. West Virginia*, 100 U.S. 303 (1880), “laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn”); *Mitchell*, 443 U.S. at 554-55 (stating that the Equal Protection Clause was designed to eradicate racial discrimination); *Hill v. Texas*, 316 U.S. 400, 406 (1942) (stating that the Equal Protection Clause guarantees jury selection free from racial discrimination); *Neal v. Delaware*, 103 U.S. 370, 394 (1880) (stating that a defendant has a constitutional right to be indicted by a jury free from racial discrimination); *Strauder*, 100 U.S. at 308-09 (stating that the Equal Protection Clause forbids exclusion from jury service based on race); Catherine Beckley, Note, *Batson v. Kentucky: Challenging the Use of the Peremptory Challenge*, 15 AM. J. CRIM. L. 263, 266-69 (1988) (detailing the Court’s use of the Fourteenth Amendment to combat racial discrimination in jury selection). But see *Edmonson*, 500 U.S. at 632 (O’Connor, J., dissenting) (“As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the

toward such racial discrimination when evidenced during the selection of jurors.<sup>3</sup> Within this context, the Court has been willing to bend procedural rules to ensure that it can hear claims regarding this type of discrimination.<sup>4</sup> The latest example of the Court's bending of the rules occurred in *Campbell v. Louisiana*,<sup>5</sup> in which the Court addressed a claim of discrimination brought by a white defendant

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Constitution does not sweep that broadly.").

3. See, e.g., *Edmonson*, 500 U.S. at 628 ("[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."); *Powers*, 499 U.S. at 402 ("[O]ur Court confirmed the validity of the . . . broader constitutional imperative of race neutrality in jury selection."); *Batson*, 476 U.S. at 87-88 ("Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [African-American citizens] that equal justice which the law aims to secure to all others.'" (quoting *Strauder*, 100 U.S. at 308)); *Hobby v. United States*, 468 U.S. 339, 342 (1983) ("It is well settled, of course, that purposeful discrimination against [African-Americans] or women in the selection of federal grand jury foremen is forbidden by the Fifth Amendment to the Constitution."); *Mitchell*, 443 U.S. at 555-56 ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Louisiana v. United States*, 380 U.S. 145, 155-56 (1965) (affirming a broad decree by a federal district court in Louisiana ordering that reports be made to it every month by the State of Louisiana regarding the registration of voters in each of Louisiana's twenty-one parishes in order to "eliminate the discriminatory effects of the past as well as bar like discrimination [in jury selection] in the future"); *Smith*, 311 U.S. at 130 ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."); Audrey M. Fried, Comment, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1314-19 (1997) (discussing the Supreme Court's emphasis on combating discrimination within jury selection). See generally Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992) (discussing the Supreme Court's agenda of ending race discrimination in jury selection).

The Court's sympathetic treatment of claims of racial discrimination in jury selection is illustrated by the traditional remedy for this grievance: automatic reversal of the defendant's conviction or an order that the indictment be quashed. See *Mitchell*, 443 U.S. at 556 (explaining that automatic reversal applies regardless of whether the defendant was prejudiced by the discrimination because of the harm to the court system). For further explanation of the automatic reversal rule, see *infra* notes 251-56 and accompanying text.

4. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 55-56 (1992) (holding that the State has third-party standing to challenge on equal protection grounds a white defendant's use of peremptory strikes against African-Americans); *Powers*, 499 U.S. at 415 (extending third-party standing principles to allow defendants to assert the rights of excluded jurors). In *Rose v. Mitchell*, 443 U.S. 545 (1979), the Court declined to extend the rationale of *Stone v. Powell*, 428 U.S. 465 (1976), which limited federal habeas corpus relief to the context of claims of discrimination in the selection of the grand jury. See *id.* at 559-65. In granting federal habeas corpus relief, the Court in *Mitchell* rejected Justice Powell's observation that "a strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell*." *Id.* at 559 (quoting *Castaneda v. Partida*, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting)).

5. 118 S. Ct. 1419 (1998).

regarding the exclusion of African-Americans from his grand jury.<sup>6</sup> In *Campbell*, the Court held that a white criminal defendant has third-party standing to raise equal protection and due process objections to discrimination against potential African-American jurors in the selection of his grand jury.<sup>7</sup>

This Note discusses the facts of *Campbell*, its history in the lower courts, and the Supreme Court's resolution of the issues presented.<sup>8</sup> The Note then reviews four important areas of background law which the case implicates: standing,<sup>9</sup> third-party standing,<sup>10</sup> racial discrimination within the court system,<sup>11</sup> and the automatic reversal rule in the context of racially discriminatory jury selection.<sup>12</sup> Next, the Note discusses *Campbell's* impact on the third-party standing doctrine<sup>13</sup> and the motivations behind the Court's extension of third-party standing principles.<sup>14</sup> It then examines the *Campbell* Court's failure to apply the traditional automatic reversal remedy.<sup>15</sup> Finally, the Note discusses the potential effects of the Court's holding.<sup>16</sup>

In 1994, Terry Campbell, a thirty-one-year-old white male,<sup>17</sup> was convicted of second-degree murder and sentenced to life in prison without the possibility of parole by a district court in Evangeline Parish, Louisiana.<sup>18</sup> Before his trial began, however, Campbell moved to quash his grand jury indictment, alleging that the grand jury had been selected in an unconstitutional manner.<sup>19</sup> At the hearing on this motion, Campbell introduced evidence establishing the percentages of African-American residents in Evangeline Parish

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6. See *id.* at 1421.

7. See *id.* at 1422-26.

8. See *infra* notes 17-67 and accompanying text.

9. See *infra* notes 68-74 and accompanying text.

10. See *infra* notes 75-115 and accompanying text.

11. See *infra* notes 116-28 and accompanying text.

12. See *infra* notes 129-84 and accompanying text.

13. See *infra* notes 185-245 and accompanying text.

14. See *infra* notes 246-48 and accompanying text.

15. See *infra* notes 249-71 and accompanying text.

16. See *infra* notes 272-82 and accompanying text.

17. See Respondent's Brief at 3, *Campbell* (No. 96-1584).

18. See *Campbell*, 118 S. Ct. at 1421. The defendant and his wife, Susan Campbell, had been separated before the murder. See *State v. Campbell*, 673 So. 2d 1061, 1063-64 (La. Ct. App. 1996), *rev'd*, 118 S. Ct. 1419 (1998). On January 11, 1992, after James Sharp dropped Mrs. Campbell off at her house, the defendant shot Mr. Sharp through the window of Mr. Sharp's van. See *id.* Mr. Sharp tried to drive away from the scene, but he wrecked his vehicle in a neighbor's yard, where he died. See *id.* at 1064. Campbell was subsequently arrested and charged with second-degree murder. See *id.*

19. See Brief on the Merits for Petitioner at 7, *Campbell* (No. 96-1584).

during the prior sixteen and one-half years.<sup>20</sup> Campbell showed that although African-Americans constituted more than twenty percent of registered voters in the parish,<sup>21</sup> no African-American had served as a grand jury foreperson in that parish between January 1976 and August 1993.<sup>22</sup> The State failed to present any evidence to rebut the inference of discrimination.<sup>23</sup> The trial court, however, held that Campbell did not have standing to raise race-based constitutional challenges because he was white, and thus it denied the motion to quash the grand jury indictment.<sup>24</sup>

Campbell appealed to the Louisiana Court of Appeal, which held that the trial court erred in ruling that Campbell had no standing to raise race-based constitutional claims because he was white.<sup>25</sup> The appellate court remanded the case to the trial court for an evidentiary hearing on whether Campbell's grand jury foreperson was selected in a racially discriminatory fashion.<sup>26</sup> The Supreme Court of Louisiana, however, reversed the decision of the court of appeal and held that a white defendant had no standing to raise race-based constitutional claims.<sup>27</sup> Because of a split among courts on the issue of whether a white defendant has standing to raise equal protection and due process objections regarding discrimination against African-Americans in jury selection,<sup>28</sup> the U.S. Supreme

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20. See *id.* at 18 (summarizing Campbell's evidence).

21. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*23 (Jan. 20, 1998). The State stipulated to this evidence. See *id.*

22. See *id.*; Brief on the Merits for Petitioner at 19, *Campbell* (No. 96-1584).

23. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*14-\*15 (Jan. 20, 1998). The State explained its failure to rebut the evidence of discrimination by pointing to the failure of the trial court to rule formally that Campbell's evidence established a *prima facie* case of discrimination. See Respondent's Brief at 4-5, *Campbell* (No. 96-1584).

24. See Brief on the Merits for Petitioner at 7-8, *Campbell* (No. 96-1584).

25. See *State v. Campbell*, 651 So. 2d 412, 413-14 (La. Ct. App.), *rev'd*, 661 So. 2d 1321 (La. 1995), *rev'd*, 118 S. Ct. 1419 (1998).

26. See *id.*

27. See *State v. Campbell*, 661 So. 2d 1321, 1324 (La. 1995), *rev'd*, 118 S. Ct. 1419 (1998).

28. Several courts have granted third-party standing in such an instance. See *United States v. Tucker*, 90 F.3d 1135, 1142 (6th Cir. 1996) (stating that a challenge on due process grounds need not be brought by a member of the excluded group); *United States v. Sneed*, 729 F.2d 1333, 1334 (11th Cir. 1984) (holding that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to bring a claim of denial of equal protection when that group is excluded from serving as grand jury forepersons); *United States v. Test*, 550 F.2d 577, 581 n.3 (10th Cir. 1976) (stating that the fact that the defendants were not members of the underrepresented classes did not bar standing to bring their claims); *United States v. Butera*, 420 F.2d 564, 567 n.2 (1st Cir. 1970) (stating that a challenge on equal protection grounds to a jury selection system need not be brought by a member of the allegedly excluded group), *overruled on other grounds*

Court granted certiorari.<sup>29</sup>

Campbell argued before the Supreme Court that discrimination in the selection of the jury foreperson violated his equal protection and due process rights under the Fifth and Fourteenth Amendments.<sup>30</sup> Campbell framed the issue facing the Court as one involving discrimination in selecting only the grand jury foreperson.<sup>31</sup> After granting certiorari, however, the Court modified the issue to encompass discrimination in the selection of grand jurors generally because of the manner in which grand jury forepersons are selected in Louisiana.<sup>32</sup> In Louisiana, the judge selects the foreperson from the grand jury venire before the remaining members of the grand jury

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by *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (en banc); *State v. Parro*, 385 A.2d 1258, 1260 (N.J. Super. Ct. App. Div. 1978) (stating that a defendant has standing to raise equal protection claims of discrimination within jury selection regardless of whether he is a member of the excluded group); *Aldrich v. Texas*, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996) (same).

Other courts, however, have denied standing. See *Haley v. Armontrout*, 924 F.2d 735, 739 (8th Cir. 1991) (allowing standing for Sixth Amendment claims but denying it for equal protection claims when the defendant is not a member of the excluded class); *United States v. Cronn*, 717 F.2d 164, 169-70 (5th Cir. 1983) (holding that the defendant must be a member of the excluded group to raise an equal protection claim); *United States v. Musto*, 540 F. Supp. 346, 350-51 (D.N.J. 1982) (allowing a standing claim under the Sixth Amendment, but denying it for equal protection and due process claims when the defendant is not a member of the excluded class), *aff'd sub nom.* *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983); *United States v. Leonetti*, 291 F. Supp. 461, 473 (S.D.N.Y. 1968) (ruling that the defendant must be a member of the excluded group to raise equal protection objections); *Heaton v. State*, 350 S.E.2d 480, 482 (Ga. Ct. App. 1986) (holding the same); *Simon v. State*, 679 So. 2d 617, 621 (Miss. 1996) (holding the same); *People v. Wells*, 454 N.Y.S.2d 849, 851 (App. Div. 1982) (allowing standing for a Sixth Amendment fair cross-section claim but denying it for an equal protection claim).

The Supreme Court has held that the defendant does not have to be a member of the excluded class to challenge discrimination when that challenge is based on the Sixth Amendment's guarantee to a trial by a fair cross-section of the community. See U.S. CONST. amend. VI; see also *Taylor v. Louisiana*, 419 U.S. 522, 525-26 (1976) (allowing a male defendant to challenge the exclusion of women from his petit jury in a state criminal trial); *Haley*, 924 F.2d at 739 (allowing standing on Sixth Amendment grounds); *United States v. Abell*, 552 F. Supp. 316, 318-19 (D. Me. 1982) (same). Campbell raised a Sixth Amendment challenge on certiorari to the Supreme Court, but the Court would not entertain the challenge because it had not been addressed by the Louisiana Supreme Court or the Louisiana Court of Appeal. See *Campbell*, 118 S. Ct. at 1425. Thus, the Court had to address Campbell's standing based on his equal protection and due process claims rather than on his fair cross-section claim. See *id.*

29. See *Campbell v. Louisiana*, 118 S. Ct. 29 (1997).

30. See *id.* at 1421. Campbell also asserted a violation of the Sixth Amendment's fair cross-section requirement, but the Court dismissed this claim as not being properly preserved on appeal. See *id.* at 1425; see also *supra* note 28 (discussing the fair cross-section requirement).

31. See Brief on the Merits for Petitioner at 14, *Campbell* (No. 96-1584).

32. See *Campbell*, 118 S. Ct. at 1422.

have been chosen.<sup>33</sup> Thus, if discrimination plays a role in the selection of the foreperson, discrimination necessarily will taint the composition of the grand jury itself.<sup>34</sup> In other jurisdictions, by contrast, the foreperson is selected from the ranks of the already seated grand jurors.<sup>35</sup> In theory, using this method of selection, the grand jury could be selected constitutionally, with discrimination affecting only the choice of the foreperson.<sup>36</sup>

In an opinion written by Justice Kennedy,<sup>37</sup> the Court held that

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33. See LA. CODE CRIM. PROC. ANN. art. 413(B) (West 1991); see also 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:6, at 4-22 n.11 (2d ed. 1997) (stating that Ohio, Oklahoma, Tennessee, and Virginia use procedures similar to that of Louisiana).

34. See *Campbell*, 118 S. Ct. at 1422. This fact is true because a member of the grand jury has been selected to sit on the grand jury based on unconstitutional discrimination. By selecting the foreperson from the venire rather than from the grand jury after all of its members have been selected, the judge is including a member in the grand jury who might not have been selected but for the discrimination. Also, the judge is excluding African-Americans in the venire from an equal chance of receiving one of the 12 positions on the grand jury. By selecting one person unconstitutionally, the judge allows African-Americans only the chance to fill 11 of the seats in the grand jury rather than the 12 seats the whites in the venire have the chance to fill. See *id.*; see also Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*30-\*33 (Jan. 20, 1998) (questioning how discrimination against African-Americans by excluding them from one-twelfth of all grand jury positions is any different than other types of systematic discrimination). In states that do not randomly select the remainder of the grand jury, an additional argument could be made that if discrimination tainted the selection of the foreperson, it easily could have affected the selection of other jurors as well. This argument is not a viable one in *Campbell*, however, because the grand jury is randomly selected after the foreperson is chosen.

35. See 1 BEALE ET AL., *supra* note 33, at 4-20 to 4-21. The foreperson in Louisiana is not only selected differently than in other jurisdictions, but she also is given more powers than forepersons in some other jurisdictions. Compare LA. CODE CRIM. PROC. ANN. arts. 435, 444 (West 1991), and Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*22, \*25 (Jan. 20, 1998), with FED. R. CRIM. P. 6(c) (granting only ministerial, or clerical, powers to the foreperson in federal cases), and OHIO R. CRIM. P. 6(c) (granting ministerial powers, such as signing the indictment and administering the oath, to the foreperson). In Louisiana, the foreperson has full voting powers equal to all the other members of the grand jury. See *Campbell*, 118 S. Ct. at 1422. In addition to his voting power, the foreperson in Louisiana also has various ministerial duties. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*22 (Jan. 20, 1998).

36. See *Campbell*, 118 S. Ct. at 1422. In other words, everyone in the venire had an equal opportunity to be placed on the grand jury. The discrimination affected solely the choice of who would serve as foreperson.

37. See *Campbell*, 118 S. Ct. at 1421. Justice Kennedy was joined by Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsburg, and Breyer. See *id.* Justice Thomas, who was joined by Justice Scalia, dissented as to Part III of the Court's opinion, which concerned *Campbell*'s third-party standing. See *id.* at 1426 (Thomas, J., concurring in part and dissenting in part); *id.* at 1422. Justice Kennedy also wrote the majority opinions for *Powers v. Ohio*, 499 U.S. 400 (1991), which granted third-party standing to a white defendant to challenge peremptory strikes of African-American jurors, and *Edmonson v.*

Campbell had standing to object on both equal protection and due process grounds to the exclusion of African-Americans from his grand jury, even though he was not a member of the excluded group.<sup>38</sup> Thus, the Court recognized Campbell's third-party standing to raise equal protection claims based on the rights of the excluded jurors.<sup>39</sup> The Court also held that Campbell had standing to raise his *own* due process objections to racial discrimination on his grand jury.<sup>40</sup> The Court did not define the nature or extent of Campbell's due process protections;<sup>41</sup> rather, it merely held that he had such standing under the Fifth Amendment.<sup>42</sup>

In its analysis, the *Campbell* Court relied on *Powers v. Ohio*,<sup>43</sup> a case decided seven years before *Campbell*, in which the Court had synthesized prior case law and developed a three-prong test to determine whether third-party standing should be granted. According to *Powers*, a defendant claiming discrimination in the selection of his petit jury<sup>44</sup> must show: (1) injury-in-fact; (2) a close relationship between himself and the excluded juror(s); and (3) an obstacle to the third person in bringing the claim herself.<sup>45</sup> The *Campbell* Court extended this three-prong test to the context of

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*Leesville Concrete Co.*, 500 U.S. 614 (1991), which extended the rule of *Powers* to civil litigants. For a discussion of Justice Kennedy's views on jury service, see Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 523-25 (1997).

38. See *Campbell*, 118 S. Ct. at 1421.

39. See *id.* The traditional equal protection argument with respect to jury selection is that a defendant has the right for members of his race not to be excluded from service. See *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (stating that if a white man has the right to be tried by a jury free from racial discrimination against those of his race, then equal protection requires the same right for an African-American defendant). In cases like *Campbell*, the Court must grapple with the conceptual difficulty of whether a defendant can claim that his right to equal protection under the law has been violated when members of a different race are excluded from his jury. See *supra* note 28 (demonstrating the difficulty lower courts have had in addressing this issue). In such a situation, the defendant suffers no discrimination or classification based on his race. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 497 n.4 (1972) (plurality opinion) (discussing the "same class" rule). To get around this difficulty, the *Campbell* Court granted the defendant third-party standing so that he could assert the excluded jurors' rights to equal protection under the law—that is, the right not to be excluded from jury service due to race. See *Campbell*, 118 S. Ct. at 1421.

40. See *Campbell*, 118 S. Ct. at 1424-25.

41. See *id.* at 1424.

42. See *id.* at 1424-25.

43. 499 U.S. 400 (1991).

44. A petit jury is "[t]he ordinary jury for the trial of a civil or criminal action; so called to distinguish it from the grand jury." BLACK'S LAW DICTIONARY 856 (6th ed. 1990).

45. See *id.* at 411; see also *infra* notes 107-15 and accompanying text (discussing the *Powers* test).



grand juror discrimination.<sup>46</sup> As in *Powers*, the *Campbell* Court was concerned that discrimination has the potential to undermine every facet of the judicial system.<sup>47</sup> In applying each stage of the test,<sup>48</sup> the Court noted the harm that will come to the judicial system if discrimination infects any of the processes within it.<sup>49</sup>

In applying the *Powers* test to the selection of grand jurors, the *Campbell* Court focused on the central role of the grand jury in the criminal justice system.<sup>50</sup> "The grand jury, like the petit jury 'acts as a vital check against the wrongful exercise of power by the State and its prosecutors.'"<sup>51</sup> The grand jury also makes significant decisions about whether to indict, how many charges to bring against a defendant, and which charges to bring against a defendant.<sup>52</sup> The *Campbell* Court held that injury-in-fact had been established because the fairness of all of these decisions is called into question any time discrimination taints the selection process.<sup>53</sup> It held that the closeness requirement enunciated in *Powers* was met in *Campbell* due to the excluded grand jurors' and the defendant's "common interest in eradicating discrimination from the grand jury selection process."<sup>54</sup> Finally, the third prong of the *Powers* test was satisfied in *Campbell* because "excluded grand jurors have the same economic disincentives to assert their own rights as do excluded petit jurors."<sup>55</sup>

After establishing the applicability of the *Powers* test to the grand jury context, and thus allowing Campbell third-party standing to assert his claim of discrimination, the Court reversed the Louisiana Supreme Court's decision to deny Campbell standing to assert his claim of discrimination.<sup>56</sup> It did not reverse Campbell's conviction.<sup>57</sup> Instead, it remanded the case to determine if any discrimination actually occurred.<sup>58</sup>

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46. See *Campbell*, 118 S. Ct. at 1423.

47. See *id.* ("If [the grand jury selection process] is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions."); *Powers*, 499 U.S. at 411-12.

48. See *Campbell*, 118 S. Ct. at 1423-24; *Powers*, 499 U.S. at 412-14.

49. Particular concerns included the excluded jurors' perceptions of the system; the public's perception of the integrity of the system; the convicted defendant's perception of the fairness of the system; and the perception of integrity and fairness on the part of those selected to serve as jurors. See *Campbell*, 118 S. Ct. at 1423; *Powers*, 499 U.S. at 412-14.

50. See *Campbell*, 118 S. Ct. at 1423.

51. *Id.* (quoting *Powers*, 499 U.S. at 411).

52. See *id.*

53. See *id.*

54. See *id.* at 1424.

55. *Id.*

56. See *id.* at 1425.

57. See *id.* at 1425-26.

58. See *id.*; see also Transcript of Oral Argument, *Campbell* (No. 96-1584), available

Justice Thomas, joined by Justice Scalia, concurred in the judgment, but dissented as to the Court's application of third-party standing in this context.<sup>59</sup> As an initial matter, he noted that *Powers* should be overruled because it "distorted standing principles and equal protection law."<sup>60</sup> Even accepting the principles of *Powers*, Justice Thomas argued that the *Powers* test on its own terms could not be satisfied in Campbell's situation and was not appropriately applied by the majority.<sup>61</sup> One of his primary concerns in regard to the majority's application of the *Powers* test was the treatment of injury-in-fact.<sup>62</sup> While Justice Thomas would require injury-in-fact to be suffered by the *defendant*,<sup>63</sup> the majority believed that the injury was the *harm to the judicial system*.<sup>64</sup> This disagreement demonstrates the reach of the majority opinion. Justice Thomas disapproved of the majority's expanding view of injury-in-fact and would instead conduct a particularized analysis of third-party standing based on the facts of each case, analyzing the harm to each defendant.<sup>65</sup> For Justice Thomas, the majority's emphasis on the harm to the judicial system provides a broad test that *any* defendant could satisfy.<sup>66</sup>

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in 1998 WL 27944 at \*21-\*22 (Jan. 20, 1998) (indicating that the Court was only deciding the standing issue, and it was up to the Louisiana state courts to determine if discrimination had in fact occurred).

59. See *Campbell*, 118 S. Ct. at 1426 (Thomas, J., concurring in part and dissenting in part).

60. *Id.* (Thomas, J., concurring in part and dissenting in part).

61. See *id.* at 1427 (Thomas, J., concurring in part and dissenting in part) ("Even if the *Powers* justifications were persuasive, they would still be wholly inapplicable to this case . . .").

62. See *id.* (Thomas, J., concurring in part and dissenting in part). Injury-in-fact refers to the litigant's ability to show "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.2, at 58-72 (2d ed. 1994) (discussing in depth the nature of the injury as required by the Court). In *Lujan*, the Court referred to the injury requirement as an "irreducible constitutional minimum." *Lujan*, 504 U.S. at 560. For an argument that injury-in-fact was judicially constructed and is not constitutionally required, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170-79 (1992). For a further discussion of the injury requirement, see *infra* notes 152, 191-219 and accompanying text.

63. See *Campbell*, 118 S. Ct. at 1427-28 (Thomas, J., concurring in part and dissenting in part).

64. See *id.* at 1423-24.

65. See *id.* at 1427-28 (Thomas, J., concurring in part and dissenting in part).

66. See *id.* (Thomas, J., concurring in part and dissenting in part); see also *id.* at 1423-24 (discussing the harm to the judicial system that results from racial discrimination in jury selection).

Third-party standing—the issue in *Campbell*—is a prudential limitation<sup>67</sup> within the general justiciability doctrine<sup>68</sup> of standing. The doctrine of standing is concerned with whether a litigant is the proper person to bring an issue before the court and, thus, whether the court has the power to adjudicate the particular dispute.<sup>69</sup> To obtain standing, a litigant must satisfy the constitutional requirements of Article III, which defines the scope of the federal judiciary's power to hear disputes.<sup>70</sup> The Supreme Court has interpreted these constitutional prerequisites to require proof of three elements:<sup>71</sup> injury-in-fact,<sup>72</sup> causation,<sup>73</sup> and redressability.<sup>74</sup>

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67. "Prudential" refers to judicial self-restraint, or judicial self-governance, as opposed to jurisdictional limitations on the Court. See *Warth v. Seldin*, 422 U.S. 490, 509 (1975); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). One commentator explains the concept of prudential limitations as follows: "[A]lthough the Constitution permits federal court adjudication, the Court has decided that in certain instances wise policy militates against judicial review. These justiciability doctrines are termed 'prudential.'" CHEMERINSKY, *supra* note 62, § 2.1, at 38.

68. The justiciability doctrines include prohibitions against issuing advisory opinions and deciding political questions, as well as standing, ripeness, and mootness considerations. See CHEMERINSKY, *supra* note 62, § 2.1, at 42 ("The justiciability doctrines determine which matters federal courts can hear and decide and which must be dismissed.").

69. See *Warth*, 422 U.S. at 498; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) (stating that the "gist of standing" is whether the litigants have a sufficiently personal stake in the outcome of the dispute); CHEMERINSKY, *supra* note 62, § 2.3.1 at 53-54 (defining standing).

70. See U.S. CONST. art. III, § 2; *Baker*, 369 U.S. at 204 (stating the constitutional requirement that federal courts hear only actual controversies).

71. See *Northeastern Fla. Contractors v. Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

72. The injury must be "particularized" or "demonstrable" through "specific, concrete facts." *Warth*, 422 U.S. at 508; see also *United States v. Richardson*, 418 U.S. 166, 177 (1974) (stating that the injury must be "particular and concrete"); *Laird v. Tatum*, 408 U.S. 1, 14 (1972) (stating that the injury must be "specific and objective").

Article III defines the constitutional scope of the federal judiciary's power to hear disputes, limiting it to cases or controversies. See U.S. CONST. art. III, § 2; *Baker*, 369 U.S. at 204 (stating the constitutional requirement that federal courts hear only actual controversies). The result of the case or controversy requirement is that federal courts hear only those cases in which there has been or will be an injury. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (requiring some actual or threatened injury to satisfy the Article III standing requirement).

The injury can be direct or indirect, but it is more difficult for an indirect injury to satisfy this Article III test. See *Warth*, 422 U.S. at 505 (citing *Roe v. Wade*, 410 U.S. 113, 124 (1973)). In *Warth*, plaintiffs alleged that a town's zoning laws prevented developers from building housing for low and moderate income people. Without such housing, low and moderate income people such as the plaintiffs were effectively prohibited from moving to the town. See *id.* at 493-95. The Court denied standing in *Warth*, however, explaining that the plaintiffs had failed to "allege facts from which it reasonably could be inferred that, absent [the town's] restrictive zoning practices, there [was] a substantial

After a litigant satisfies the constitutional prerequisites of Article III, the litigant may still face prudential limitations that have been articulated by the Court.<sup>75</sup> One of these limitations is the general rule against a litigant's invoking the constitutional rights or immunities of third persons.<sup>76</sup> Such a limitation is designed to restrict access to federal courts because of concerns regarding separation of powers,<sup>77</sup> scarce judicial resources,<sup>78</sup> and unnecessary constitutional

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probability that they would have been able to purchase or lease" in the town. *Id.* at 504. Moreover, the plaintiffs did not show how striking down the zoning laws, which applied to developers, would provide them with relief. *See id.* The Court contrasted the plaintiffs in *Warth* with other plaintiffs who had successfully obtained standing, explaining that the successful "plaintiffs challenged zoning restrictions as applied to *particular projects* that would supply housing within their means, and of which they were *intended residents*." *Id.* at 507 (emphasis added).

*Roe v. Wade*, 410 U.S. 113 (1973), provides an example of an indirect injury that was sufficient. *Roe* challenged a Texas statute criminalizing the behavior of doctors who administered abortions on the ground that the statute had an impact on her ability to obtain an abortion. *See id.* at 117-18. Her injury was sufficient for Article III purposes, even though the statute did not threaten to criminalize her actions. *See id.* at 124.

73. Causation requires a determination of whether the defendant's actions caused the asserted injury. *See Allen*, 468 U.S. at 750; *Warth*, 422 U.S. at 505; *see also* CHEMERINSKY, *supra* note 62, § 2.3.3, at 72-73 (discussing causation).

74. Redressability refers to whether the relief sought will remedy the harm. *See Allen*, 468 U.S. at 750; *Warth*, 422 U.S. at 505; *see also* CHEMERINSKY, *supra* note 62, § 2.3.3, at 72-73 (discussing redressability). Earlier cases held that redressability and causation were a single requirement for standing purposes. *See* *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 (1978); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 13, at 68 n.43 (4th ed. 1983). In *Allen*, the Court made it clear that these were distinct and independent prerequisites for standing. *See Allen*, 468 U.S. at 753 n.19.

75. *See Warth*, 422 U.S. at 499-500 (distinguishing these matters of "judicial self governance" from the constitutional mandates of Article III); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (describing the limits to third-party standing as a "rule of practice," as opposed to a constitutional requirement).

76. *See, e.g., Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (denying a physician the right to assert the claims of his patients when the physician claimed that a statute forbidding him from giving them advice regarding conception would endanger their lives). *But see Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (discussing this general rule and the policy reasons underlying it); *Barrows*, 346 U.S. at 255 (granting third-party standing to a realtor to assert the unconstitutionality of a restrictive covenant that adversely affected the equal protection rights of non-Caucasian purchasers of land); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (granting standing to private schools to assert the rights of parents and guardians to decide where to send their children to school).

77. *See Warth*, 422 U.S. at 500; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *see also* CHEMERINSKY, *supra* note 62, § 2.3, at 55 (discussing the values served by limiting standing); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890-99 (1983) (discussing the value of limiting standing to preserve the separation of powers).

78. *See* CHEMERINSKY, *supra* note 62, § 2.3, at 55-56 (discussing the value of preventing a flood of lawsuits and conserving political capital by limiting standing).

adjudications.<sup>79</sup> Also, the Court has noted that courts "should prefer to construe legal rights only when the most effective advocates of those rights are before them."<sup>80</sup> Generally, an assumption exists that the person suffering the harm at issue will be the best proponent of his own legal rights.<sup>81</sup>

Because standing is a prudential limitation rather than a constitutional one, however, the Court may make exceptions to its own rule. When countervailing policy considerations outweigh the Court's reluctance to hear claims asserted by a proponent of a third party's rights, the Court may grant what is known as "third-party standing."<sup>82</sup> Yet even if policy considerations allow a litigant to assert the rights of a third party, the litigant before the Court still has the burden of showing a "distinct and palpable injury" to herself.<sup>83</sup> In other words, the litigant must still meet the requirements for Article III standing.

A review of prior third-party standing decisions leading up to *Campbell* helps clarify the Court's prudential standing requirements. In *Singleton v. Wulff*,<sup>84</sup> two Missouri-licensed physicians challenged the constitutionality of a Missouri statute excluding Medicaid

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79. See *Wulff*, 428 U.S. at 113-14; *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); see also *CHEMERINSKY*, *supra* note 62, § 2.3, at 53-56 (discussing the policies underlying standing regarding judicial efficiency and the conservation of political capital). This desire not to engage in unnecessary constitutional adjudications stems from concerns regarding judicial efficiency and separation of powers. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) (discussing the central role of standing questions in the preservation of separation of powers); *CHEMERINSKY*, *supra* note 62, § 2.3, at 55 (discussing the values served by limiting standing).

80. *Wulff*, 428 U.S. at 114.

81. See *id.*

82. See *Warth*, 422 U.S. at 500-01 ("In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties."); *Raines*, 362 U.S. at 22-24 (discussing various policy considerations that lead the Court to apply the third-party standing doctrine, such as when application of traditional standing rules would inhibit freedom of speech); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) ("Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied . . .").

83. *Warth*, 422 U.S. at 501; see also *Craig v. Boren*, 429 U.S. 190, 194-95 (1976) (stating that the Article III constitutional prerequisites must still be satisfied for third-party standing); *Wulff*, 428 U.S. at 113-14 (same); *CHEMERINSKY*, *supra* note 62, § 2.3.4, at 81-82 (stating that the person asserting the rights of third parties must meet the constitutional standing requirements in addition to satisfying prudential third-party standing concerns).

84. 428 U.S. 106 (1976).

benefits for abortions that were not medically required.<sup>85</sup> The doctors sought to assert their own rights to perform abortions, as well as those of their patients to receive proper medical advice and treatment.<sup>86</sup> The Supreme Court allowed the physicians to assert the rights of their patients "as against governmental interference with the abortion decision."<sup>87</sup>

The Court in *Wulff* noted that if injury-in-fact can be shown for jurisdictional (that is, constitutional) purposes, two elements determine whether the general rule prohibiting litigants from asserting the claims of third parties should apply.<sup>88</sup> The first element is whether the litigant has a sufficiently close relationship to the person whose rights he seeks to assert.<sup>89</sup> This element ensures that the adjudication of the issue is necessary, in that the third party will be able to benefit from the outcome of the suit.<sup>90</sup> A sufficiently close relationship also ensures effective advocacy from the third-party litigant.<sup>91</sup>

The second element is whether the third party is able to assert his own rights.<sup>92</sup> In support of this element, the Court noted that there are reasons to require a person to assert his own rights, even if the element of closeness is met in a particular case.<sup>93</sup> If that person is unable to assert his own rights, however, some of the rationales behind the prohibition of third-party standing, such as concerns regarding unwanted intervention or effective advocacy, begin to lose their force.<sup>94</sup> The Justices have differed as to what constitutes a

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85. *See id.* at 109-10.

86. *See id.* at 110.

87. *Id.* at 118.

88. *See id.* at 113-14.

89. *See id.* at 114-15.

90. *See id.*

91. *See id.* at 115; *see also* *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973) (holding that the nature of the doctor-patient relationship is sufficient to allow doctors to assert the rights of their patients); *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972) (stressing the "advocate" relationship and the "impact of the litigation on the third-party interests"); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (holding that the confidential nature of the relationship between the litigants and the third persons ensured effective advocacy and preservation of the third persons' rights).

92. *See Wulff*, 428 U.S. at 115-16.

93. *See id.* at 116 ("Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply."); *see also* *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (stating the test as requiring all three elements: closeness, obstacle, and injury). *But see* *CHEMERINSKY*, *supra* note 62, § 2.3.4, at 82-88 (discussing closeness and obstacles faced by a third party in asserting his own claim as independent exceptions to the rule against allowing third-party standing).

94. *See Wulff*, 428 U.S. at 116 ("If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly

sufficient obstacle to satisfy this element, however.<sup>95</sup>

The Court's refusal to grant third-party standing when no obstacle exists for the third person to assert his own claims was illustrated in *McGowan v. Maryland*.<sup>96</sup> In *McGowan*, the appellants were indicted for selling various products on Sunday,<sup>97</sup> subjecting them to criminal penalties under Maryland's Sunday closing laws.<sup>98</sup> The appellants argued that the Sunday closing laws violated constitutional guarantees to freedom of religion for certain other parties and that the appellants, as affected third parties, suffered resulting economic harm.<sup>99</sup> The Court denied third-party standing on this issue,<sup>100</sup> holding that the appellants did not allege sufficient countervailing policy considerations to justify abandonment of the

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important to him, and the party who is in court becomes by default the right's best available proponent.").

95. See *id.* at 126 (Powell, J., concurring in part and dissenting in part) ("[S]uch an assertion is proper, not when there is merely some 'obstacle' to the rightholder's own litigation, but when such litigation is in all practicable terms impossible."); see also Henry P. Monaghan, *Third-Party Standing*, 84 COLUM. L. REV. 277, 288 (1984) (describing how what constitutes an obstacle has changed over time, with the Court now focusing less on the actual ability of the third party to assert his claim).

96. 366 U.S. 420 (1961).

97. The products they sold were a three-ring loose-leaf binder, a can of floor wax, a stapler, staples, and a toy submarine. See *id.* at 422.

98. These "blue laws" have since been repealed. See MD. ANN. CODE, art. 27 § 492 (1957) (prohibiting work on Sundays) (repealed 1992); *id.* § 509 (forbidding the operation of various recreational activities on Sundays) (repealed 1980); *id.* § 521 (forbidding the sale of various merchandise on Sundays) (repealed 1992); *id.* § 522 (prohibiting the opening of barber shops and bowling alleys, among other things, on Sundays) (repealed 1992). They were each fined five dollars plus court costs for selling merchandise in violation of state law. See *McGowan*, 366 U.S. at 422, 424.

99. See *McGowan*, 366 U.S. at 429.

100. In analyzing the appellants' claim that the laws violated the constitutional guarantee of freedom of religion, the Court had to look to third-party standing principles because the appellants alleged that they suffered only economic harm, rather than any impairment of their own religious practices. See *id.* The Court apparently ignored the fact that the appellants themselves were subject to criminal penalties. See *id.* at 424. The Court has denied third-party standing in other cases in which the state has criminalized the litigant's conduct, thus arguably causing a direct injury to the litigant. This type of denial often occurs in cases in which a defendant seeks third-party standing to exclude evidence obtained in the illegal search of some third party. The Supreme Court justifies this rule on the principle that Fourth Amendment rights are personal rights, and thus can not be asserted by a third party. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980); *United States v. Payner*, 447 U.S. 727, 731-32 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *Brown v. United States*, 411 U.S. 223, 230 (1973); *Alderman v. United States*, 394 U.S. 165, 171-72 (1969); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Wong Sun v. United States*, 371 U.S. 471, 492 (1963). In *McGowan*, however, the appellants were asserting the First Amendment, rather than Fourth Amendment, rights of third parties. See *McGowan*, 366 U.S. at 429.

general rule that litigants cannot assert claims of a third party.<sup>101</sup> The Court noted that if a person's religious freedom had been impaired because of the Sunday closing statutes, no obstacle existed to prevent that person from bringing his own claim.<sup>102</sup>

In deciding *Campbell*, the Court relied most heavily on its decision in *Powers v. Ohio*<sup>103</sup> due to the similarity of the facts in the two cases. In *Powers*, a white defendant challenged the exclusion of African-American jurors from his petit jury through the use of peremptory strikes.<sup>104</sup> The defendant's claim rested on the third-party equal protection claims of the jurors excluded by the prosecution because of race.<sup>105</sup> The Court held that a defendant could challenge race-based exclusion of jurors through peremptory strikes, regardless of whether the defendant and the excluded jurors share the same race.<sup>106</sup>

In *Powers*, the Court consolidated the principles of prior third-party standing cases and formulated a three-prong test.<sup>107</sup> Once the litigant meets the three-prong test, he fits into the limited exception to the general rule forbidding a litigant from asserting a third-party claim.<sup>108</sup> The three-prong test requires the litigant to show: a distinct perceptible injury to himself; a close relationship to the third party; and some obstacle to the third party's ability to bring a claim for

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101. See *McGowan*, 366 U.S. at 430.

102. See *id.*

103. 499 U.S. 400 (1991).

104. Powers was on trial for murder. See *id.* at 402. During the selection of his jury, Powers objected when the prosecutor exercised his first peremptory challenge to remove an African-American and requested the trial court to compel the prosecutor to explain, on the record, his reasons for excluding the African-American. See *id.* at 403. The trial court denied the request and excused the juror. See *id.* Out of the nine subsequent preemptory challenges used by the State, it used six to exclude African-Americans. See *id.* Each time the prosecution challenged an African-American prospective juror, Powers renewed his objections. See *id.*

105. See *id.* at 416.

106. See *id.* at 415. Compare this holding with the holding in *Holland v. United States*, 493 U.S. 474 (1990), which was decided while the petition for certiorari for *Powers* was pending. See *Powers*, 499 U.S. at 403. In *Holland*, the Court held that a white defendant had standing under the Sixth Amendment fair cross-section requirement to challenge the exclusion of African-Americans from his jury. See *Holland*, 493 U.S. at 476. The Court held, however, that the exclusion of a racial group through peremptory strikes does not violate the Sixth Amendment. See *id.* at 487. Five Justices (Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy) agreed that this type of exclusion would violate the Fourteenth Amendment's Equal Protection Clause, but the question of standing under the Fourteenth Amendment was still left open by the Court. See *id.* at 488 (Kennedy, J., concurring); *id.* at 490 (Marshall, Brennan & Blackmun, JJ., dissenting); *id.* at 504 (Stevens, J., dissenting).

107. See *Powers*, 499 U.S. at 410-11.

108. See WRIGHT, *supra*, note 74, § at 68.



himself.<sup>109</sup>

To establish injury-in-fact, the Court in *Powers* focused on the "overt wrong, often apparent to the entire jury panel," of allowing a prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge.<sup>110</sup> The Court distinguished this constitutional violation, which occurs during the trial itself, from constitutional violations that occur before trial when discussing the harm to the defendant.<sup>111</sup> This constitutional violation, by occurring in open court, "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial."<sup>112</sup> Thus, the defendant may receive an unfair trial because the trier of fact now has a diminished respect for the law.<sup>113</sup>

The *Powers* Court held that the second requirement—closeness—also was satisfied because of the nature of voir dire, which "permits a party to establish a relation, if not a bond of trust, with the jurors . . . [that] continues throughout the entire trial and may in some cases extend to the sentencing as well."<sup>114</sup> Finally, the third prong of the test was satisfied because of the many difficulties that individual excluded jurors would have in bringing their own claims.<sup>115</sup>

*Powers* highlights a trend in the Court's extension of third-party standing principles, but it also demonstrates the Court's sensitivity to

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109. *Id.*

110. *Powers*, 499 U.S. at 412. The Court focused on the injury to the defendant, the excluded jurors, and the public's perception of the jury system. *See id.* at 412-13; *see also* Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1182-86 (1994) (discussing the impact of a representative jury on the community's and the jurors' perceptions of fairness in the court system); Bradley R. Kirk, Note, *Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in Powers v. Ohio and Edmonson v. Leesville Concrete Co.*, 19 PEPP. L. REV. 691, 706-08 (1992) (discussing the *Powers* Court's treatment of the injury-in-fact requirement).

111. *See Powers*, 499 U.S. at 412. For examples of constitutional violations that occur before trial, *see supra* note 100.

112. *Powers*, 499 U.S. at 412.

113. *See id.* at 412-13.

114. *Id.* at 413; *see also* Kirk, *supra* note 110, at 708-10 (noting that the Court focused on the closeness of the remaining jurors to the defendant, rather than the relationship of the excluded jurors to the defendant).

115. The Court noted that potential jurors cannot object at the time of their exclusion, and that it would be difficult to get prospective relief because of an inability to show a likelihood of future personal discrimination. *See Powers*, 499 U.S. at 414-15. In addition, the Court noted that the "small financial stake involved and the economic burdens of litigation" are additional hurdles. *Id.* at 1415; *see also* Hon. Thomas A. Hett, *Batson v. Kentucky: Present Extensions and Future Applications*, 24 LOY. U. CHI. L.J. 413, 424-25 (1993) (discussing the Court's application of the *Powers* three-prong test in *Georgia v. McCollum*).

racial discrimination in the court system.<sup>116</sup> *Powers* was actually an extension of *Batson v. Kentucky*,<sup>117</sup> a case decided five years earlier, in which the Supreme Court held that the Equal Protection Clause gives an African-American defendant the right to challenge peremptory strikes used to exclude African-Americans from the defendant's petit jury.<sup>118</sup> The Court in *Batson* acknowledged the harm to the community that comes when discrimination occurs within the judicial system.<sup>119</sup> This harm, the Court believed, outweighed the benefits that come from allowing the prosecutor unbridled discretion in exercising peremptory challenges.<sup>120</sup>

The Supreme Court's concern about racial discrimination within the court system is a longstanding one, dating from its 1880 decision in *Strauder v. West Virginia*.<sup>121</sup> In *Strauder*, the Court reversed a defendant's state court conviction because African-Americans were excluded from the grand jury that returned an indictment against that defendant.<sup>122</sup> The Court stated that this kind of exclusion from either a grand or petit jury violates the Equal Protection Clause of the Fourteenth Amendment.<sup>123</sup> The rationale behind granting African-Americans an equal protection claim in this context was that whites receive trials by juries selected from persons of their own race, so African-Americans should be allowed the same opportunity.<sup>124</sup> Over the next several years, the Court repeatedly held that an African-American has the right to be indicted by a grand jury free from racial discrimination.<sup>125</sup>

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116. The importance of *Powers* was enhanced by *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), which extended the rule of *Powers* to civil litigants. See *id.* at 630.

117. 476 U.S. 79 (1986).

118. See *id.* at 89.

119. See *id.* at 85-88.

120. See *id.* at 98-99. For a thorough discussion of *Batson*, see Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 967-68 (1998); Justice Hugh Maddox, *Batson: From an Appellate Judge's Viewpoint*, 54 ALA. LAW. 316 (1993); Beckley, *supra* note 2, at 285-302; Fried, *supra* note 3, at 1313-19.

121. 100 U.S. 303 (1880).

122. See *id.* at 310, 312.

123. See *id.* at 309-10.

124. See *id.* at 309. The Court enunciated the argument as follows: Deliberate exclusion of African-Americans "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* at 308.

125. See *Rogers v. Alabama*, 192 U.S. 226, 259 (1904) (reversing and remanding a murder conviction because the defendant was not given the opportunity to challenge the exclusion of African-Americans from his grand jury); *Carter v. Texas*, 117 U.S. 442, 447-49 (1900) (holding unconstitutional the indictment of a defendant who was denied the opportunity to challenge the racial composition of the grand jury); *Bush v. Kentucky*, 107

In *Pierre v. Louisiana*,<sup>126</sup> the Supreme Court for the first time analyzed a Louisiana parish's practice of selecting a grand jury. In *Pierre*, the African-American defendant presented evidence that, despite the fact that one-third of the population of the parish where he was charged was African-American, his grand jury venire contained the names of no African-American citizens.<sup>127</sup> The Court held that this evidence was sufficient to demonstrate racial discrimination in the selection of both the grand jury and the petit jury.<sup>128</sup>

In *Patton v. Mississippi*,<sup>129</sup> the Court observed that evidence of the long, continued, unexplained absence of African-Americans from jury panels is proof of discrimination. In *Patton*, an all-white jury convicted the African-American defendant and sentenced him to death.<sup>130</sup> He produced evidence that no African-Americans had served on a grand or petit jury in Lauderdale County, Mississippi, in at least thirty years.<sup>131</sup> Though the Mississippi Supreme Court ruled that the lack of an African-American in the county's grand juries for more than thirty years was irrelevant in determining whether systematic racial discrimination had occurred,<sup>132</sup> the U.S. Supreme Court disagreed and reversed the conviction.<sup>133</sup> The Court noted that "[w]hen a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of [African-Americans], or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."<sup>134</sup>

In later decisions, the Court held that once a defendant has made a prima facie case of racial discrimination, the burden shifts to the State to rebut the inference.<sup>135</sup> The Court reiterated this approach in

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U.S. 110, 121-23 (1883) (reversing and remanding a murder conviction due to the exclusion of African-Americans from the grand jury).

126. 306 U.S. 354 (1939).

127. *See id.* at 355. This evidence was not rebutted by the State. *See id.*

128. *See id.* at 361-62.

129. 332 U.S. 463 (1947). The unanimous opinion was authored by Justice Black. *See id.* at 464. Future-Justice Thurgood Marshall argued for Patton. *See id.*

130. *See id.* at 464. The defendant had been indicted by an all-white grand jury. *See id.*

131. *See id.*

132. *See id.* at 467; *Patton v. State*, 29 So. 2d 96, 98-99 (Miss. 1947).

133. *See Patton*, 332 U.S. at 466.

134. *Id.* at 469.

135. *See, e.g., Jones v. Georgia*, 389 U.S. 24, 24-25 (1969) (reversing the defendant's murder conviction because the Georgia Supreme Court improperly relied on the presumption that the jury commissioners properly executed their duties in eliminating possible jurors); *Whitus v. Georgia*, 385 U.S. 545, 551 (1967) (reversing the convictions of defendants when the State did not sufficiently rebut the inference of discrimination);

*Castaneda v. Partida*,<sup>136</sup> in which a Texas prisoner alleged discrimination against Mexican-Americans in the selection of the grand jury that had indicted him.<sup>137</sup> The defendant introduced evidence that from 1962 to 1972, the average percentage of the county's population was 79.1% Mexican-American, while the average percentage of Mexican-American grand jurors was 39%.<sup>138</sup> The Court established this method for proving racial discrimination as " 'the rule of exclusion.' "<sup>139</sup> The defendant must show that he is part of a distinct class, and he must show that this particular class has been substantially underrepresented over a period of time.<sup>140</sup> The defendant's statistics in *Partida* were sufficient evidence to establish a prima facie case of discrimination.<sup>141</sup> The Court held that the State did not sufficiently rebut the inference of discrimination established by the defendant's evidence, and therefore upheld the lower court's decision that the defendant had been denied equal protection in the selection of his grand jury.<sup>142</sup>

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Arnold v. North Carolina, 376 U.S. 773, 774 (1964) (per curiam) (holding that the testimony concerning a discrepancy between the number of African-Americans in the county as compared with the number called for jury service established a prima facie case of discrimination).

136. 430 U.S. 482 (1977).

137. See *id.* at 483-84.

138. See *id.* at 486-87.

139. *Id.* at 494 (quoting *Hernandez v. Texas*, 347 U.S. 475, 480 (1954)). The Court explained the rule of exclusion by stating, "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Id.* at 494 n.13 (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977)); see also *Washington v. Davis*, 426 U.S. 229, 241 (1976) (stating that a prima facie case of discrimination may be established by demonstrating the absence of African-Americans in jury pools); *Eubanks v. Louisiana*, 356 U.S. 584, 587 (1958) (holding that the "uniform and long-continued exclusion" of African-Americans from grand juries in the county was sufficient evidence of discrimination); *Smith v. Texas*, 311 U.S. 128, 131 (1940) ("Chance and accident alone could hardly have brought about the listing for grand jury service of so few [African-Americans] from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.").

140. The Court stated the test as follows:

The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.

*Partida*, 430 U.S. at 494 (citing *Hernandez*, 347 U.S. at 478-80; *Norris v. Alabama*, 294 U.S. 587, 591 (1935)).

141. See *id.* at 496. For a discussion of the use of statistics in death penalty cases, see *infra* note 250.

142. See *Partida*, 430 U.S. at 501.

The Court first addressed a white defendant's challenge to the exclusion of African-Americans from jury service in *Peters v. Kiff*.<sup>143</sup> In *Peters*, the defendant claimed that African-Americans "were systematically excluded" from both the grand and petit juries.<sup>144</sup> The Court held that the defendant's conviction could not stand if his claims of discrimination were valid.<sup>145</sup> The Justices could not resolve, however, the issue of the grounds on which the defendant could bring the claim.<sup>146</sup> The fact that a white defendant complained of discrimination against African-Americans in jury selection led three Justices to argue that the harmless-error<sup>147</sup> analysis should apply.<sup>148</sup> In the lower courts, *Peters* had been "precluded from proving the facts alleged in support of his claim" of discrimination.<sup>149</sup> Thus, the Court remanded to allow him to do so.<sup>150</sup> It explicitly stated that if his allegations were proven true, his conviction could not stand.<sup>151</sup> If a majority of the *Peters* Court had adopted the harmless error argument,<sup>152</sup> this would mean that the defendant's conviction would

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143. 407 U.S. 493 (1972). *Peters* was convicted of burglary by a jury in Muscogee County, Georgia. See *id.* at 494 (plurality opinion). His first conviction was reversed on Fourth Amendment grounds. See *Peters v. State*, 152 S.E.2d 647, 648 (Ga. Ct. App. 1966). He alleged discrimination in jury selection after his second conviction. See *Peters*, 407 U.S. at 494 n.1 (plurality opinion).

144. *Peters*, 407 U.S. at 497 (plurality opinion).

145. See *id.* at 505-07 (White, J., concurring in the judgment).

146. Compare *id.* at 502 (plurality opinion) (stating that a white defendant can establish a claim on due process grounds), with *id.* at 505-07 (White, J., concurring in the judgment) (stating that a white defendant has a claim on statutory grounds, rather than due process grounds). None of the Justices accepted *Peters*'s equal protection argument, however. See *id.* at 494 (plurality opinion) (stating that *Peters* raised a Fourteenth Amendment Equal Protection objection); *Powers v. Ohio*, 499 U.S. at 421 (Scalia, J., dissenting) ("The case [*Peters v. Kiff*] produced no majority opinion, but it is significant that no Justice relied upon the petitioner's equal protection argument.").

147. Harmless error refers to the idea that an appellate court should only reverse a trial court if the trial court's mistake affected a substantial right of the defendant's. See David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1403-07 (1997) (discussing the meaning and history of harmless error).

148. See *Peters*, 407 U.S. at 508 (Burger, C.J., dissenting). Justice Blackmun, who joined Chief Justice Burger's dissenting view in *Peters* that the harmless-error analysis should apply, see *id.* at 507 (Burger, C.J., dissenting), changed his position in *Vasquez v. Hillery*, 474 U.S. 254 (1986), joining the majority in upholding the automatic reversal rule, see *Vasquez*, 474 U.S. at 263. The difference between these two cases is that in *Peters*, a white defendant alleged discrimination against African-American jurors, whereas in *Hillery*, an African-American defendant alleged discrimination against African-American jurors.

149. *Peters*, 407 U.S. at 505.

150. See *id.*

151. See *id.*

152. The argument specifically was that even if the grand and petit juries were selected in a discriminatory fashion, *Peters* was not harmed by this error; therefore, his conviction

not have been overturned.<sup>153</sup> Application of the harmless error rule thus would negate the imposition of the automatic reversal rule.<sup>154</sup>

The traditional remedy for discrimination in the selection of grand jurors has been automatic reversal.<sup>155</sup> For years, the Court has uniformly held that sufficient proof of discrimination in the selection of jurors mandates that the conviction be set aside and that the indictment returned by the unconstitutionally composed grand jury be quashed.<sup>156</sup> The question of whether the harmless-error standard, instead of automatic reversal, should apply when discrimination has been proved in the context of a grand jury was first discussed in a dissent by Justice Jackson in *Cassell v. Texas*.<sup>157</sup> The majority in *Cassell* reversed Cassell's murder conviction based on the exclusion of African-Americans from his grand jury.<sup>158</sup> Justice Jackson enunciated the argument for harmless-error review in the context of grand juries by pointing to the lack of prejudice the defendant suffered.<sup>159</sup> He noted that the harm a defendant suffers in the context of petit jury selection is very different from the harm suffered in grand jury selection.<sup>160</sup> The petit jury is the ultimate trier of fact, and discrimination in this context can affect the fairness of the

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should not be overturned. See *Peters*, 407 U.S. at 498 (plurality opinion). The argument for harmless error follows from the Court's prior characterizations of the injury suffered when the selection of jurors is tainted by discrimination. The argument up to the time of *Peters* was that the defendant suffered an injury because the jury, which excluded members of the defendant's own group, would be prejudiced against him. See *id.* Because *Peters* was not a member of the excluded group, the argument was put forth that he did not suffer any prejudice, and therefore did not suffer any harm from the discrimination. See *id.*

153. See Rebecca Horton, Note, *South Carolina Adopts a Harmless Error Rule for Cases Involving Government Intimidation of Witnesses*, 49 S.C. L. REV. 1143, 1145 (1998).

154. See *id.* at 1144-47 (discussing differences between harmless error analysis and per se rules of reversal).

155. See *Hillery*, 474 U.S. at 266 (O'Connor, J., concurring in the judgment); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Cassell v. Texas*, 339 U.S. 282, 290 (1950) (Frankfurter, J., concurring in the judgment); *Hill v. Texas*, 316 U.S. 400, 406 (1942).

156. See, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 628, 633-34 (1972); *Arnold v. North Carolina*, 376 U.S. 773, 774 (1964); *Eubanks v. Louisiana*, 356 U.S. 584, 589 (1958); *Reece v. Georgia*, 350 U.S. 85, 88-90 (1955); *Cassell*, 339 U.S. at 240; *Smith v. Texas*, 311 U.S. 128, 132 (1940); *Pierre v. Louisiana*, 306 U.S. 354, 362 (1939); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); *Carter v. Texas*, 177 U.S. 442, 447-49 (1900); *Bush v. Kentucky*, 107 U.S. 110, 121-23 (1883); *Neal v. Delaware*, 103 U.S. 370, 398 (1881); cf. *Gibson v. Mississippi*, 162 U.S. 565, 584 (1896) (reaffirming the notion that a conviction by an unconstitutionally constituted jury should be set aside, but determining that there was no constitutional violation in the case at bar).

157. 339 U.S. 282, 299 (1950) (Jackson, J., dissenting).

158. See *id.* at 290.

159. See *id.* at 301-02 (Jackson, J., dissenting).

160. See *id.* (Jackson, J., dissenting).

defendant's trial in multiple ways.<sup>161</sup> The grand jury, on the other hand, does not have the same ability to affect the defendant's right to a fair trial.<sup>162</sup> Moreover, once a defendant has been convicted beyond a reasonable doubt at a trial free from constitutional error, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."<sup>163</sup>

Despite Justice Jackson's strong dissent in *Cassell*, in *Rose v. Mitchell*<sup>164</sup> the Court reiterated its preference for the automatic reversal rule in the context of grand jury foreperson selection. *Mitchell* involved a federal habeas corpus claim of racial discrimination in the selection of a grand jury foreman.<sup>165</sup> Although the defendant failed to establish a prima facie case of discrimination in *Mitchell*,<sup>166</sup> the Court noted that discrimination in the selection of the grand jury requires reversal of a state conviction.<sup>167</sup> It observed, however, that Justice Jackson's dissent in *Cassell* had for the first time gained a following in the Court<sup>168</sup> in the concurring opinion of

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161. See *id.* (Jackson, J., dissenting). Justice Jackson explained the risk of prejudice inherent in petit juries:

The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is [an African-American] and the alleged victim is not.

*Id.* (Jackson, J., dissenting).

162. See *id.* at 302 (Jackson, J., dissenting). Justice Jackson pointed to various differences between the grand jury and the petit jury, focusing mainly on the different powers between the two institutions. See *id.* (Jackson, J., dissenting). The grand jury has the power only to accuse, while the petit jury has the power to convict. See *id.* (Jackson, J., dissenting). Also, because the grand jury need not be unanimous, it is unclear that one juror could affect the indictment decision in the same manner as on a petit jury. See *id.* (Jackson, J., dissenting). Justice Jackson further noted that "[t]he difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried." *Id.* (Jackson, J., dissenting).

163. *Id.* (Jackson, J., dissenting).

164. 443 U.S. 545 (1979).

165. See *id.* at 547.

166. See *id.* at 558-59. No evidence was presented regarding the method of selecting a foreman or the race of any of the past foremen in that county. See *id.* at 566-67. The defendants only presented evidence regarding the selection of the grand jury venire. See *id.* They did this by calling three of the jury commissioners to testify along with 11 of the 12 grand jurors who indicted the defendants. See *id.*

167. See *id.* at 559.

168. See *id.* at 552 ("Until today, only one Justice among those who have served on this Court in the 100 years since *Strauder v. West Virginia* has departed from this line of

Justice Stewart, who was joined by then-Justice Rehnquist.<sup>169</sup>

Justice Jackson's view finally prevailed in *Hobby v. United States*,<sup>170</sup> some thirty-four years after *Cassell* was decided. In *Hobby*, the Court addressed a white defendant's claim of discriminatory selection of the grand jury foreperson in the Eastern District of North Carolina.<sup>171</sup> The Court proceeded on the assumption that discrimination had occurred in the selection of the grand jury foreperson and acknowledged that the Fifth Amendment forbids this type of discrimination.<sup>172</sup> The only issue before the Court was "the narrow one of the appropriate remedy for such a violation."<sup>173</sup> The Court held for the first time that discrimination in the selection of a juror did not warrant reversal of the conviction.<sup>174</sup> The Court distinguished *Mitchell* by stating that *Mitchell* dealt with an equal protection claim, while *Hobby* dealt with a due process claim.<sup>175</sup> The harm that came to *Hobby* because of discrimination in the selection of his grand jury foreperson was not enough, in the Court's eyes, to warrant reversal of his conviction.<sup>176</sup>

In *Vasquez v. Hillery*,<sup>177</sup> decided just two years after *Hobby*, the dissenters from *Hobby*<sup>178</sup> formed a narrow majority and applied the

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decisions." (citation omitted)).

169. See *id.* at 574-79 (Stewart, J., concurring in the judgment).

170. 468 U.S. 339 (1984). *Hobby*'s claim was brought under the Fifth Amendment's Due Process Clause because he was indicted by a federal grand jury, see *id.* at 343, whereas *Cassell*'s claim was based on the Fourteenth Amendment's Equal Protection Clause, see *Cassell v. Texas*, 339 U.S. 282, 283 (1950).

171. See *Hobby*, 468 U.S. at 341 ("In particular, he alleged that the grand jury selection plan 'exclude[d] citizens from service . . . on account of race, color, economic status and occupation, in violation of . . . the Fifth and Sixth Amendments of the United States Constitution.' " (quoting Brief for Appellant at 33, *Hobby* (No. 82-2140))).

172. See *id.* at 342-43.

173. *Id.* at 342.

174. See *id.* at 346.

175. See *id.* at 347. While the Court did not explain the significance of this distinction, it should be noted that in *Mitchell*, the defendants were members of the excluded class, while in *Hobby*, the defendant was not. See *id.* The *Hobby* Court discussed the fact that in *Mitchell*, the defendants "suffered the injuries of stigmatization and prejudice associated with racial discrimination" because they were members of the excluded class. *Id.* In *Hobby*, the petitioner did not claim that discrimination had occurred against any class of which he was a member. See *id.* The Court's disdainful treatment of *Hobby*'s "alleged injury" in this regard is difficult to square with its outcome in *Peters v. Kiff*, 407 U.S. 493 (1972), in which the Court overturned the conviction of a defendant who was not a member of any group against which discrimination was directed. *Id.* For a discussion of *Peters*, see *supra* notes 143-52 and accompanying text.

176. See *Hobby*, 468 U.S. at 346, 349.

177. 474 U.S. 254 (1986).

178. In *Hobby*, Justices Marshall, Brennan, and Stevens dissented. See *Hobby*, 468 U.S. at 350 (Marshall, J., dissenting).



automatic reversal rule in the case of grand jury discrimination.<sup>179</sup> In *Hillery*, the defendant claimed discrimination in the selection of the grand jury of Kings County, California, that indicted him for murder.<sup>180</sup> The Court stated that reversal was the only effective remedy for this type of violation.<sup>181</sup> It also stated that the remedy was appropriate because the grand jury has a multitude of important functions, including power over the degree of the charge, the number of counts charged, and whether to charge a capital or noncapital offense.<sup>182</sup> "Moreover," the Court emphasized, "'the grand jury is not bound to indict in every case where a conviction can be obtained.'"<sup>183</sup> When discussing the harsh remedy of reversing the conviction, the Court pointed out that once discrimination in jury selection is eliminated, convictions no longer will have to be reversed because of it.<sup>184</sup>

The issues of third-party standing, racial discrimination in the

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179. See *Hillery*, 474 U.S. at 255. Justices Brennan, Marshall, Blackmun, and Stevens agreed that the harmless-error standard should not be adopted in cases of grand jury discrimination. See *id.* at 255, 263-64. Justice White joined in this analysis, but did not join in the sixth paragraph of Part III, see *id.* at 255, in which the Court stated, "[l]ike these fundamental flaws, which never have been thought harmless, discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review," *id.* at 263-64. Justice O'Connor concurred in the judgment, but expressed some hesitation about the automatic reversal rule "[b]ecause [she was] not convinced that a sufficiently compelling case ha[d] been made for reversing this Court's precedents with respect to the remedy applicable to properly cognizable claims of discriminatory exclusion of grand jurors." *Id.* at 267 (O'Connor, J., concurring in the judgment). Justice Powell, with whom Chief Justice Burger and then-Justice Rehnquist joined, dissented on the grounds that the harmless-error standard should apply in this context. See *id.* at 267-73 (Powell, J., dissenting).

180. See *id.* at 255-56.

181. See *id.* at 262. The excluded juror also could pursue a claim under 18 U.S.C. § 243 (1994), the federal criminal prohibition against discrimination in the selection of grand and petit jurors. See *id.* at 262 n.5; see also 18 U.S.C. § 243 (1994) (providing the current version of the statute cited in *Hillery*). Pointing to the statute's ineffectiveness, however, the Court has noted that "according to statistics compiled by the Administrative Office of the United States Courts, that section has not been the basis for a single prosecution in the past nine years." *Hillery*, 474 U.S. at 262 n.5. The only other remedy that has been explored is under 42 U.S.C. § 1983 (1994), and the Court has stated that these § 1983 suits are also extremely rare. See *id.* (citing *Carter v. Jury Comm'n*, 396 U.S. 320 (1970)). In *Carter*, the Court held that African-Americans who have been excluded from grand jury service are allowed relief under 42 U.S.C. § 1983. See *Carter*, 396 U.S. at 329-30 & n.17. For discussions of § 1983, see Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361 (1951).

182. See *Hillery*, 474 U.S. at 263.

183. *Id.* (quoting *United States v. Ciambone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

184. See *id.* at 262.

selection of the grand jury, and harmless error came together in *Campbell*, implicating a number of other issues. First, the Court appears to have significantly altered its third-party standing analysis, both expanding the definition of injury-in-fact<sup>185</sup> and deviating from the closeness and obstacle requirements presented in *Powers*.<sup>186</sup> The decision may signal a general relaxation of third-party standing requirements, or it may just demonstrate the Court's commitment to eliminating racial discrimination within the court system.<sup>187</sup> Finally, the Court's failure to apply automatic reversal in *Campbell* hints at a disagreement over the blanket applicability of such a rule.<sup>188</sup>

Since *Singleton v. Wulff*,<sup>189</sup> the Court has been expanding third-party standing principles.<sup>190</sup> *Campbell* continues this trend, as demonstrated primarily in the treatment of the injury-in-fact requirement. Traditionally, injury-in-fact has been considered a jurisdictional—that is, constitutional—requirement, rather than part of the Court's discretionary considerations.<sup>191</sup> The *Powers* Court consolidated the discretionary and jurisdictional requirements into a single three-prong test.<sup>192</sup> The injury-in-fact requirement is merely one factor in the test and was not explicitly given more weight than the other factors. One could argue, however, that the fact that it is a jurisdictional (constitutional) prerequisite requires the Court to give it more weight than the other factors.<sup>193</sup> The *Powers* Court, however,

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185. See *infra* notes 191-214 and accompanying text.

186. See *infra* notes 220-45 and accompanying text.

187. See *infra* notes 246-48, 272-79 and accompanying text.

188. See *infra* notes 249-71 and accompanying text.

189. 428 U.S. 106 (1976); see *supra* notes 84-95 (discussing *Wulff*).

190. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991) (allowing third-party standing for civil litigants); *Craig v. Boren*, 429 U.S. 190, 193 (1976) (allowing, for the first time, third-party standing based on a commercial relationship between the litigant and the third parties); *Kirk*, *supra* note 110, at 708-09 (discussing the Court's departure from precedent to allow third-party standing in *Powers*); see also *Wulff*, 428 U.S. at 128-31 nn.5-7 (Powell, J., concurring in part and dissenting in part) (stressing the departure of the case from previous third-party standing analyses).

191. See *supra* notes 70-72 and accompanying text; see also Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1897 (1996) (discussing the need for a concrete injury to satisfy Article III requirements and arguing that only a generalized injury was present in *Powers*).

192. Compare *Wulff*, 428 U.S. at 112-14 (discussing the two different dimensions—jurisdictional and discretionary—to the third-party standing analysis), with *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (collapsing the requirements from the two different dimensions into a single three-prong test).

193. See *Campbell*, 118 S. Ct. at 1428 (Thomas, J., dissenting) (“[E]ven the *Powers* majority acknowledged that such a showing is the foremost requirement of third-party standing, as evidenced by the lengths to which it went in an attempt to justify its finding of

failed to address the other two jurisdictional requirements of standing: causation and redressability.

In *Powers*, the Court went to great lengths to establish injury-in-fact,<sup>194</sup> presumably for the reason that this element was originally considered a constitutional requirement. Prior to *Batson*, when discussing the harm to a defendant that comes from exclusion of members of his own race from the jury, the Court had focused on the bias that could result to the defendant from being tried by a jury of a different race.<sup>195</sup> In *Batson*, the Court moved away from the perspective that the race of the jurors would have bearing on their bias towards the defendant.<sup>196</sup> In *Edmonson v. Leesville Concrete Co.*,<sup>197</sup> the Court stated that classifications based on race are purely irrational because a person's race has no relationship to her ability to serve as a juror.<sup>198</sup> Thus, the Court had to construct a new conception of injury. Some commentators have noted that the way the Court defines the injury determines whether standing will be granted.<sup>199</sup>

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injury-in-fact."); see also *Wulff*, 428 U.S. at 112-14 (discussing the injury-in-fact requirement as a prerequisite to standing and the other considerations as discretionary factors); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitations of federal-court jurisdiction to actual cases or controversies."); *CHEMERINSKY*, *supra* note 62, § 2.3.1, at 57 (differentiating between injury-in-fact, which is a constitutional requirement, and the Court's "prudential limitations"); *Guilds*, *supra* note 191, at 1866 (discussing the importance of Article III requirements in standing analysis).

194. See *Powers*, 499 U.S. at 411-13; see also *supra* notes 110-13 (discussing the *Powers* Court's view of injury-in-fact).

195. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 210 (1995); Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 97-131 (1996); Clem Turner, Note, *What's the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 301-04 (1996).

196. See *supra* notes 117-20 and accompanying text (discussing *Batson*).

197. 500 U.S. 614 (1991).

198. See *id.* at 631 (contrasting rationality with race-based prejudices); cf. *J.E.B. v. Alabama*, 511 U.S. 127, 138 n.9 (1994) (noting that "[t]he majority of studies suggest that gender plays no identifiable role in jurors' attitudes"). One commentator has noted that the Court's philosophy embraces the idea that "group affiliation predicts nothing about juror perspective." Muller, *supra* note 195, at 104.

199. See Sunstein, *supra* note 62, at 203-04. Professor Sunstein argues that the Court's decision in *Regents of the University v. Bakke*, 438 U.S. 265 (1978), is a prime example of the Court's willingness to recharacterize the injury so as to afford a remedy:

Bakke himself could not show that without the affirmative action program he challenged, he would have been admitted to the medical school of the University of California at Davis. It was therefore argued that he could not meet the Article III requirement of injury-in-fact. The Court responded in a way that has potentially major implications:

[E]ven if Bakke had been unable to prove that he would have been admitted

One could argue that in *Campbell* and in *Powers*, if the injury were still a concern regarding bias, the Court could not have recognized injury in the context of a white defendant complaining of the exclusion of African-American jurors.

Within this redefined concept of injury, the *Powers* Court considered the effect racial discrimination has on public perception of the court system. It relied on other factors as well, including the particularized harm the defendant suffers when tried by those who have lost respect for the processes of the court system.<sup>200</sup> In *Campbell*, the Court modified the concept of injury-in-fact even further than in *Powers* by exclusively focusing on the injury to the perception of the court system.<sup>201</sup> When discussing whether injury-in-fact had been established, the Court made general references to the necessity to preserve the appearance of integrity in the judicial system and the central role the grand jury system plays in the criminal justice process.<sup>202</sup> Although the Court made a passing reference to actual harm that the defendant might suffer if tried by a biased judge,<sup>203</sup> the emphasis was on the harm to the judicial system that results from discrimination.<sup>204</sup>

The Court's treatment of injury-in-fact in *Campbell* is arguably a significant departure from prior case law. Previously, the Court had required that the injury be "distinct and palpable,"<sup>205</sup> "particular [and] concrete,"<sup>206</sup> or "specific [and] objective."<sup>207</sup> The *Campbell*

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in the absence of the special program, it would not follow that he lacked standing. . . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.

What happened here was that the Bakke Court found injury, causation, and redressability by the simple doctrinal device of recharacterizing the injury.

Sunstein, *supra* note 62, at 203 (quoting *Bakke*, 438 U.S. at 281 n.14); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 121 (3rd ed. 1996) (noting the tension between the Court's denial of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and its grant of standing in *Northeastern Florida Chapter of Associated General Contractors*, 508 U.S. 656 (1993), and arguing that the only difference between the two cases was the Court's characterization of the relevant injury).

200. See *supra* note 110 and accompanying text.

201. See *Powers v. Ohio*, 499 U.S. 400, 427 (1991) (Scalia, J., dissenting) (" 'Injury in perception' would seem to be the very antithesis of 'injury in fact.' ").

202. See *Campbell*, 118 S. Ct. at 1423 ("The integrity of these decisions depends on the integrity of the process used to select the grand jurors.").

203. See *id.* at 1424 ("If, by contrast, the allegations here are true, the impartiality and discretion of the judge himself would be called into question.").

204. See *id.* at 1423-24.

205. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

206. *United States v. Richardson*, 418 U.S. 166, 177 (1974).

207. *Laird v. Tatum*, 408 U.S. 1, 14 (1972).

Court, however, did not attempt to recognize this type of harm to the defendant.<sup>208</sup> Moreover, the concern, highlighted in *Powers*, that the "overt" act in open court might infect the jurors' disposition throughout the trial was not present in the grand jury context of *Campbell*.<sup>209</sup> The *Powers* Court emphasized that the primary constitutional violation occurred at trial,<sup>210</sup> whereas in *Campbell*, the constitutional violation occurred before trial.<sup>211</sup> Nonetheless, the *Campbell* Court held that injury-in-fact had been established.<sup>212</sup> Furthermore, a substantial majority<sup>213</sup> held that injury-in-fact had been established "with relative ease."<sup>214</sup>

The other jurisdictional requirements of third-party standing, redressability and causation, were not mentioned in *Campbell*.<sup>215</sup> The *Powers* test seems to drop the two requirements from the third-party standing analysis.<sup>216</sup> One could argue that in *Campbell*, these two

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208. See *Campbell*, 118 S. Ct. at 1423-24 (focusing on the harm to the court system, rather than the harm to the defendant, when discussing injury); Guilds, *supra* note 191, at 1897 ("It is difficult to find a more speculative or generalized injury than a concern about the 'integrity of the judicial process.'" (citations omitted)).

209. Justice Thomas asserted that

the judge's selection (rather than exclusion) of a single member of the grand jury could hardly constitute an "overt" wrong that would affect the remainder of the grand jury proceedings, much less the subsequent trial. The Court therefore resorts to emphasizing the seriousness of the allegation of racial discrimination (as though repetition conveys some talismanic power), but that, of course, cannot substitute for injury-in-fact.

*Campbell*, 118 S. Ct. at 1427 (Thomas, J., concurring in part and dissenting in part).

210. See *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

211. See *Campbell*, 118 S. Ct. at 1427 (Thomas, J., concurring in part and dissenting in part) (noting that the alleged harm did not occur in open court and, since it allegedly occurred at the grand jury stage, it was before trial).

212. See *id.* at 1423-24.

213. The Court's decision in *Campbell* was unanimous with respect to Parts I, II, IV, and V. Part III extended third-party standing to *Campbell* to assert his claim of discrimination. See *id.* at 1422-24. Only six Justices, however, joined Justice Kennedy in Part III of the opinion: Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. See *id.* at 1421. Justices Thomas and Scalia dissented from this portion of the Court's opinion because both Justices believed that *Powers* should have been overruled, and that, even accepted on its own terms, *Powers* should not have been applied in the context of *Campbell*'s claims of discrimination. See *id.* at 1426-27 (Thomas, J., concurring in part and dissenting in part).

214. *Id.* at 1422 ("On occasion, however, we can ascertain standing with relative ease by applying rules established in prior cases. *Campbell*'s equal protection claim is such an instance." (citation omitted)).

215. See *id.* at 1422-24 (applying the *Powers* test for third-party standing).

216. See *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (discussing three criteria that must be satisfied for third-party standing to apply). But see *Campbell*, 118 S. Ct. at 1428 (Thomas, J., concurring in part and dissenting in part) (implying that the *Powers* Court meant to retain the "cause-and-effect" requirements of standing within its injury-in-fact analysis).

requirements cannot be met.<sup>217</sup> As compared to the petit jury, the grand jury is further removed from the ultimate harm: the conviction.<sup>218</sup> It is difficult to show that discrimination in the selection of the grand jury had any causal connection whatsoever with the ultimate conviction handed down by the petit jury.<sup>219</sup> Thus, with respect to claims of racial discrimination in the selection of grand and petit juries, *Campbell* and *Powers* read together indicate that the Court will presume all of the traditional jurisdictional requirements for standing: injury, causation, and redressability.

The Court has required a close relationship between the litigant and the third party before exercising its discretion in favor of third-party standing.<sup>220</sup> In *Powers*, the Court noted that the relationship between the defendant and the excluded jurors was "as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases,"<sup>221</sup> and pointed to the juror-defendant bond that can develop during voir dire.<sup>222</sup> The "bond" argument was weak in *Powers*,<sup>223</sup> however, and is not applicable to *Campbell*. First, the *Powers* Court focused on the bond that develops and grows between the defendant and the jurors throughout trial and into sentencing.<sup>224</sup> This focus indicates that perhaps the Court concentrated more on the bond between the defendant and the remaining jurors than on the bond between the defendant and the excluded jurors, whose rights the defendant was asserting.<sup>225</sup> In *Campbell*, no bond could have formed between the defendant and the excluded jurors because the defendant did not participate in the

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217. See *Campbell*, 118 S. Ct. at 1428 (Thomas, J., concurring in part and dissenting in part).

218. See *id.* at 1427 ("It would be to no avail to suggest that the alleged discrimination in grand jury selection could have caused an indictment improperly to be rendered, because the petit jury's verdict conclusively establishes that no reasonable grand jury could have failed to indict petitioner.").

219. See *id.*; see also *Cassell v. Texas*, 339 U.S. 282, 301-03 (1950) (Jackson, J., dissenting) (discussing the differences between grand and petit juries).

220. See *supra* notes 89-91 and accompanying text.

221. *Powers*, 499 U.S. at 413 (citing *Department of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990)) (attorney/client relationship); *Craig v. Boren*, 429 U.S. 190, 192-93 (1976) (commercial relationship); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (doctor/patient relationship). But see *Kirk*, *supra* note 110, at 708-09 (arguing that the Court had normally required confidential or certain financial relationships to satisfy the closeness requirement).

222. See *Powers*, 499 U.S. at 413.

223. See *Kirk*, *supra* note 110, at 709 (describing the Court's analysis of the relationship as "scant" and "outside traditional precedential boundaries").

224. See *Powers*, 499 U.S. at 413.

225. See *Kirk*, *supra* note 110, at 710.

selection of the grand jurors.<sup>226</sup> Thus, it was impossible for him to form a "bond" with any of the excluded jurors.<sup>227</sup>

In its enunciation of the *Powers* rule, the *Campbell* Court noted that a defendant must show a "close relationship" to the excluded jurors,<sup>228</sup> but it did not use this language in the application of the test.<sup>229</sup> Traditionally, part of what the "close relationship" test attempted to discern was whether the litigant would be an effective advocate for the third party.<sup>230</sup> The query functioned, however, as a measure of whether it was necessary for the Court to hear the constitutional issue before it, as well as whether the third party would benefit from a determination of the right at issue.<sup>231</sup> The Court in *Campbell*, however, asked only if the defendant would be an "effective advocate" for the excluded juror.<sup>232</sup> By only focusing on the "effective advocacy" issue, the Court disregarded a major part of the analysis.

The *Powers* Court focused on "the congruence of interests" between the excluded juror and the defendant in eliminating discrimination.<sup>233</sup> The Court stated that "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard."<sup>234</sup> Like the *Powers* Court, the Court in *Campbell* noted a common interest between the defendant and the excluded juror only in "eradicating

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226. See *Campbell*, 118 S. Ct. at 1428 (Thomas, J., concurring in part and dissenting in part); see also *supra* note 34 (explaining that the members of a Louisiana grand jury are selected randomly after the judge chooses a foreperson).

227. See *Campbell*, 118 S. Ct. at 1428 (Thomas, J., concurring in part and dissenting in part).

228. *Id.* at 1423 (quoting *Powers*, 499 U.S. at 411 (citing *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976))).

229. See *id.* at 1424.

230. See *Wulff*, 428 U.S. at 115 ("[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter."); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (stating that the presentation of issues is sharper when the litigant has a personal stake in the litigation); CHEMERINSKY, *supra* note 62, § 2.3.1, at 56 (stating that a sufficient personal concern insures effective advocacy and thus improves judicial decision-making).

231. See *Wulff*, 428 U.S. at 113-15.

232. *Id.* at 1424 ("We find no reason why a white defendant would be any less effective as an advocate for excluded grand jurors than for excluded petit jurors.").

233. See *Powers*, 499 U.S. at 414.

234. *Id.* at 413-14; see *supra* notes 110-13 and accompanying text (discussing the need to preserve integrity in the judicial system and suggesting that a breakdown of such integrity may constitute injury-in-fact to a litigant).

discrimination from the grand jury selection process.”<sup>235</sup> A “common interest” standard for the relationship between the excluded juror and the litigant was a departure from third-party standing precedent,<sup>236</sup> which typically required a “close,”<sup>237</sup> “professional,”<sup>238</sup> “confidential,”<sup>239</sup> or at least “commercial”<sup>240</sup> relationship.<sup>241</sup>

An argument exists that the obstacle to excluded jurors asserting their own rights was not the same in *Campbell* as it was in *Powers*. In *Powers*, the Court noted the difficulty that each juror excluded by peremptory challenges faced in asserting her own right to be free from discrimination.<sup>242</sup> The *Powers* Court observed that an African-American does not face the same obstacles in bringing a claim alleging systematic exclusion as he does when alleging individual discrimination by an individual prosecutor.<sup>243</sup> In *Powers*, the defendant focused on discrimination against individuals by individual prosecutors.<sup>244</sup> In *Campbell*, however, the defendant alleged systematic exclusion of African-Americans from the position of grand jury foreperson by the parish judicial system as a whole.<sup>245</sup> Thus, a more liberal analysis of “obstacle” was conducted in *Campbell* than in *Powers*.

The holding in *Campbell* raises the issue of whether the standard for all third-party standing cases will be less stringent in the future, or

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235. *Campbell*, 118 S. Ct. at 1424; see also Kirk, *supra* note 110, at 709 (discussing the *Powers* Court’s focus on the common interest between the excluded juror and the defendant).

236. See Kirk, *supra* note 110, at 709.

237. *Wulff*, 428 U.S. at 117.

238. *Department of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990).

239. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

240. *Craig v. Boren*, 429 U.S. 190, 192-93 (1976).

241. In *Campbell*, the Court asserted that the “common interest” of the excluded juror and the defendant was in combating discrimination in the grand jury selection system. See *Campbell*, 118 S. Ct. at 1424. Justice Thomas’s opinion in *Campbell* articulates the argument that the ability to meet the “common interest” standard is dependent on how the Court characterizes the interest. See *id.* at 1427 (Thomas, J., concurring in part and dissenting in part). If the defendant’s interest is characterized as having his conviction overturned, the excluded juror and the defendant cannot meet even this diluted “common interest” standard. See *id.* (Thomas, J., concurring in part and dissenting in part) (“Regardless of whether black veniremen wish to serve on a particular jury, they do not share the white defendant’s interest in obtaining a reversal of his conviction.”).

242. See *Powers v. Ohio*, 499 U.S. 400, 414-15 (1991) (noting the difficulty in asserting claims against individual prosecutors versus asserting claims of systematic discrimination within the court system).

243. See *id.* at 414-15; see also *Carter v. Jury Comm’n*, 396 U.S. 320, 329 (1970) (providing an example of a claim brought by African-Americans excluded from jury service alleging systematic discrimination).

244. See *Powers*, 499 U.S. at 414.

245. See *Campbell*, 118 S. Ct. at 1421.



whether the *Campbell* Court's treatment is particularized to the context of discrimination within the court system. The Court in *Campbell* did not explicitly narrow its holding to this context, so one could argue that third-party standing requirements have become less stringent in light of *Campbell*. Thus, the Court's zealous desire to protect against discrimination may have an inadvertent impact on third-party standing analysis in other contexts. The Court's outcome in *Campbell*, however, follows a trend in third-party standing cases dealing with claims of racial discrimination.<sup>246</sup> *Campbell* certainly reiterates and reinforces the proposition that the Court will not back down in its effort to eliminate discrimination in state courts. The Court's willingness to stretch third-party standing principles shows a determination to provide redress for grievances concerning racial discrimination.<sup>247</sup> Perhaps, then, this type of liberal injury-in-fact analysis will not apply outside the context of racial discrimination in the courts.<sup>248</sup>

In addition to deviating from precedent in its granting of third-party standing, the Court in *Campbell* was not entirely consistent with precedent in its provision of a remedy.<sup>249</sup> The Court previously had held that long, unexplained absences of African-Americans from jury boxes could establish a *prima facie* case of discrimination.<sup>250</sup>

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246. See Guilds, *supra* note 191, at 1898 (arguing that the Court only applies this type of "generalized grievance analysis" when racial stigmatization is at issue); Kirk, *supra* note 110, at 691 (stating that the Court tends to "step outside of legal precedent in order to impose judge-made remedies designed to curb racial discrimination").

247. See *Georgia v. McCollum*, 505 U.S. 42, 55-56 (1992) (noting that a state has third-party standing to challenge a defendant's use of peremptory strikes against African-Americans on equal protection grounds). See generally Guilds, *supra* note 191, at 1896 (discussing the Court's special treatment of racial discrimination as a generalized injury).

248. See Guilds, *supra* note 191, at 1898 ("[T]rying to extend the Court's generalized grievance analysis beyond the limited confines of racial stigmatization is probably an unprofitable exercise.").

249. See *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986); see also *McCord*, *supra* note 147, at 1403-54 (discussing the history of the automatic reversal rule); *Muller*, *supra* note 195, at 97-131 (same); James Edward Wicht, III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 *BYU J. PUB. L.* 73, 75-86 (1997) (same).

250. See *Hillery*, 474 U.S. at 259 ("['C]hance or accident could hardly have accounted for the continuous omission of [African-Americans] from the grand jury lists for so long a period as sixteen years or more." (quoting *Hill v. Texas*, 316 U.S. 400, 404 (1942))); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (determining that the disparity between the county's Mexican-American population and the number called for jury service established a *prima facie* case of discrimination); *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (stating that the disparity between the county's African-American population and the number of African-Americans on the grand jury list was sufficient to establish a *prima facie* case of discrimination); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (holding that the disparity between the number of African-Americans in the county and those actually selected for

Generally, if the defendant proves such a *prima facie* case of discrimination in the selection of jurors, and the prosecution fails to rebut this claim, the defendant's conviction will be reversed by the Supreme Court.<sup>251</sup> The Court had held that no other remedy is appropriate for this type of grievance.<sup>252</sup> In *Campbell*, however, even though the defendant presented un rebutted evidence,<sup>253</sup> of a type which was held sufficient to constitute *prima facie* proof of discrimination in prior decisions, the Court did not reverse Campbell's conviction.<sup>254</sup> Instead, it limited its holding only to the

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grand jury service established a *prima facie* case of discrimination).

Compare this use of statistics with the use of statistics in death penalty sentencing, in which statistical evidence is not enough to establish a *prima facie* case of discrimination. See *McClesky v. Kemp*, 481 U.S. 279, 313 (1987). In *McClesky*, an African-American defendant was convicted of armed robbery and the murder of a white police officer and sentenced to death. See *id.* at 283. In seeking relief from his sentence, the defendant argued that capital punishment was administered in a racially discriminatory manner in violation of the Fourteenth Amendment. See *id.* at 286. To support this claim, the defendant offered statistical proof regarding the effect of race on the imposition of the death penalty. See *id.* at 286-87. The statistical evidence offered as proof of discrimination in *McClesky* was compiled in a study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth, and is known as the Baldus study. See *id.* at 286. The Baldus study examined over 2000 murder cases that occurred in Georgia during the 1970s. See *id.* Its results indicated a "disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* The Court held that this statistical evidence was not sufficient proof of purposeful discrimination. See *id.* at 299. The Court noted that this type of proof is sufficient in claims of discrimination within jury selection, but it distinguished statistical evidence in the context of capital punishment sentencing on three grounds: (1) difficulty in deducing a "state policy" from the various people examined in the Baldus study; (2) lack of opportunity for the state to rebut the charges of the Baldus study; and (3) the nature of what is being challenged. See *id.* at 294-97.

251. See, e.g., *Hillery*, 474 U.S. at 260-64; *Rose v. Mitchell*, 443 U.S. 545, 551 (1979); *Partida*, 430 U.S. at 492-501; *Alexander v. Louisiana*, 405 U.S. 625, 631-32 (1972); *Arnold v. North Carolina*, 376 U.S. 773, 774 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85, 87-88 (1955); *Cassell v. Texas*, 339 U.S. 282 (1950); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1880).

252. See *Hillery*, 474 U.S. at 262 & n.5 (discussing alternative remedies and concluding that reversal of the conviction is the only effective one); *Mitchell*, 443 U.S. at 558 (upholding automatic reversal as the appropriate remedy for discrimination in the selection of a grand jury foreperson).

253. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*13 (Jan. 20, 1998).

254. See *Campbell*, 118 S. Ct. at 1425-26 (reversing the Louisiana Supreme Court's decision to deny Campbell standing—but not reversing Campbell's conviction—and remanding the case to determine whether discrimination had taken place). But see *Mitchell*, 443 U.S. at 551 ("[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the

issue of standing,<sup>255</sup> remanding the case to the state court for a determination of whether discrimination had actually occurred.<sup>256</sup>

Although the Court stated that it was not able to decide the remedy issue because that issue was not properly presented in petitioner's brief,<sup>257</sup> generally, the Court can hear any issue "fairly subsumed" by the issues presented.<sup>258</sup> In *Peters v. Kiff*,<sup>259</sup> for example, the Court addressed an issue not properly stated in the issues presented but addressed in the petitioner's arguments.<sup>260</sup> In deciding to hear the claim of discrimination in the selection of the petit jury in *Peters*, the Court emphasized that the "State . . . had

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unconstitutionally constituted grand jury be quashed."). Compare *Partida*, 430 U.S. at 495-501 (noting that a prima facie case for discrimination is made by showing that an excluded juror is a member of a distinct and recognizable group that has been substantially underrepresented over a significant period of time), *Patton v. Mississippi*, 332 U.S. 463, 464-69 (1947) (noting that the lack of an African-American on the state's grand juries for more than 30 years was proof of discrimination), and *Hill v. Texas*, 316 U.S. 400, 404 (1942) (holding that the absence of African-Americans from grand jury lists for more than 16 years creates an inference of discrimination), with *Campbell*, 118 S. Ct. at 1425-26 (remanding the case for an evidentiary hearing on discrimination when the defendant produced uncontested evidence that no African-Americans had served as foreperson for over 16 years even though 20% of the registered voters in the parish were African-American).

In *Campbell*, even the State conceded that if the Court determined that there was unconstitutional discrimination in the selection of the grand jury, automatic reversal would be the appropriate remedy. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*19 (Jan. 20, 1998).

255. See *Campbell*, 118 S. Ct. at 1422; see also Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*11-\*16 (Jan. 20, 1998) (questioning the petitioner as to why the Court should decide remedy issues when the issues presented only concerned standing).

256. See *Campbell*, 118 S. Ct. at 1425-26.

257. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*13-\*14 (Jan. 20, 1998).

258. See *id.* at \*14; see also *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (stating that claims that are substantially connected to those presented are proper for the Court's review); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, § 3.20, at 1367 (7th ed. 1993) (stating that "the parties may enlarge upon the questions they do present as long as the enlargement may be deemed fairly included or comprised within the stated questions").

259. 407 U.S. 493 (1972).

260. See *id.* at 495. With regard to this issue, the Court stated:

The respondent argues that the challenge to the petit jury is not before us, because it fails to appear in the list of questions presented by the petition for certiorari. We do not regard that omission as controlling, however, in light of the fact that the two claims have been treated together at every stage of the proceedings below, they are treated together in the body of the petition for certiorari, and they are treated together in the brief filed by petitioner on the merits in this Court.

*Id.*

ample opportunity to respond to [the unenumerated] challenge.”<sup>261</sup>

Yet in *Campbell*, the Court would not address the issue of remedy, despite the fact that the State did have an opportunity to respond to the claims of discrimination.<sup>262</sup> The trial court judge held an evidentiary hearing on the allegations of discrimination, where the State was given an opportunity to rebut the inference of discrimination.<sup>263</sup> No rebuttal was offered, however.<sup>264</sup> Considering *Peters*, it is unlikely, then, that the *Campbell* Court was concerned only with the procedural issue of addressing the question of remedy when it was not included in the questions presented.<sup>265</sup> The reluctance of the Court to address the remedy may reflect the Court’s uneasiness with the rule of automatic reversal in the context of grand jury discrimination.

Throughout the nineteenth century, “American courts generally operated under the [principle] that any error in the trial court proceedings” mandated automatic reversal.<sup>266</sup> Commentators have noted, however, that the Court has gradually shifted its position to one in which it reverses only for errors that “seriously undermine the truthfinding function.”<sup>267</sup> These commentators argue that the Court has created a dichotomy of errors: trial versus structural errors.<sup>268</sup> Structural errors demand automatic reversal of the conviction, while trial errors do not.<sup>269</sup> Included in the list of structural errors is the exclusion of members of a defendant’s race from a grand jury.<sup>270</sup> Extension of this principle to exclusion of members of a different race from the grand jury apparently was too much of a stretch for the *Campbell* Court, however, perhaps because the rule is not based on a

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261. *Id.*

262. See Transcript of Oral Argument, *Campbell* (No. 96-1584), available in 1998 WL 27944, at \*13-\*15 (Jan. 20, 1998).

263. See *id.*

264. See *id.*

265. See *supra* notes 259-61 and accompanying text (discussing the Court’s willingness to address a question in *Peters* that was not properly presented).

266. McCord, *supra* note 147, at 1403; see also Muller, *supra* note 195, at 107 (discussing the history of the automatic reversal rule); Wicht, *supra* note 249, at 74 (same).

267. Muller, *supra* note 195, at 110; see also Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156-61 (1991) (discussing the change over the years in the Court’s position regarding the automatic reversal rule).

268. See McCord, *supra* note 147, at 1407-12 (discussing the dichotomy); Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 397 (1997) (same).

269. See McCord, *supra* note 147, at 1407-12.

270. See *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (opinion of Rehnquist, C.J.) (citing *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986)).

solid foundation.<sup>271</sup>

*Campbell* leaves many unanswered questions and foreshadows changes in two main areas: third-party standing and the remedy of automatic reversal in the context of grand jury discrimination. From *Batson* to *Powers* to *Campbell*, the Court has formulated a new equal protection analysis.<sup>272</sup> That analysis is premised on the importance of jury service and the harmfulness of discrimination against certain cognizable groups.<sup>273</sup> It is not clear whether the principles of *Campbell* and *Powers*—allowing third-party standing when racial discrimination is implicated—will extend to other types of discrimination. *Batson*'s ban against discriminatory peremptory strikes has been applied outside the context of racial discrimination to discrimination based on other group characteristics.<sup>274</sup> By analogy, the third-party standing analyses of *Powers* and *Campbell* could also

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271. See Muller, *supra* note 195, at 126 ("Whatever the conceptual validity of [*Hillery*] when it was decided, it is now a relic from a bygone era."); see also *supra* notes 155-84 and accompanying text (discussing the Court's changes in position regarding the automatic reversal rule in the context of grand jury discrimination in *Cassell*, *Mitchell*, *Hobby*, and *Hillery*). Professor Muller's article discusses the struggle of the Court to fit grand jury discrimination in with its other cases, in which the Court had held that automatic reversal should only apply when a trial error had a "concrete impact on the reliability of the conviction." Muller, *supra* note 195, at 125. He highlights the shift in the Court's rationale for automatic reversal between *Mitchell* and *Hillery*. See *id.* at 124. In *Mitchell*, the Court focused on the interest in deterring equal protection violations, but "[b]y 1986, it was only barely tenable for the Court to suggest that a conviction should be reversed to deter an equal protection violation that did not have concrete impact on the reliability of the conviction." *Id.* at 125. Thus, the focus by the Court in *Hillery* was "to show that discrimination in the selection of grand jurors actually has a concrete impact on the reliability of verdicts." *Id.* According to Professor Muller, "Justice Marshall labored mightily to produce a reason why grand jury discrimination might affect the accuracy of a subsequent conviction, but the strain is obvious." *Id.* at 126. Professor Muller also notes that the Court does not seem convinced by this position. See *id.* ("In fact, it is not even clear that Justice Marshall attracted five votes to the position that grand jury discrimination is automatically reversible in every case . . ."). The position in *Hobby* augments the argument that the Court is very hesitant to apply the automatic reversal rule in the context of "same class" discrimination in grand jury selection. See *Hobby v. United States*, 468 U.S. 339, 347 (1984) (focusing on the fact that the defendant in *Hobby* did not suffer the same degree of harm as the defendants in *Mitchell* because the defendant in *Hobby* was not a member of the excluded class). This uncertainty on the Court's part may explain its desire to avoid the question of the accuracy of the jury's conviction in *Campbell*.

272. See Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities*, 57 ALB. L. REV. 289, 320-34 (1993) (describing the differences between the equal protection analysis in *Batson* and its progeny and the traditional equal protection analysis).

273. See *id.* at 292.

274. See *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994) (extending *Batson* to gender-based discrimination); *Hernandez v. New York*, 500 U.S. 352, 360-61 (1991) (plurality opinion) (extending *Batson* to ethnicity-based discrimination).

extend to other types of discrimination.<sup>275</sup> Some cases suggest that *all* types of discrimination in jury selection—not just race-based discrimination—may be the Court's target.<sup>276</sup> If this suggestion is so, and the Court's concern extends to other types of discrimination, the question is what other types of discrimination claims are left to be addressed after *Campbell*. At least one commentator has argued that the *Batson* protection should extend to discrimination based on disabilities.<sup>277</sup> Other commentators have focused on the extension of protection to language-based discrimination.<sup>278</sup> Possibly, the Court will only vigorously protect those groups who are afforded heightened scrutiny in equal protection review.<sup>279</sup>

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275. See *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (plurality opinion) (declining to limit the language of the opinion to concerns only about racial discrimination, and instead expressing concern over the exclusion from jury service of "any large and identifiable segment of the community").

276. See, e.g., *J.E.B.*, 511 U.S. at 130-31 (extending *Batson* to gender-based discrimination); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991) (extending the holding of *Powers* to civil litigants); *Hernandez*, 500 U.S. at 360-61 (plurality opinion) (extending *Batson* to claims based on ethnicity brought by Latinos).

277. See Lynch, *supra* note 272, at 292.

278. See Justin B. Denton, Comment, *Protecting Both Ethnic Minorities and the Equal Protection Clause*, 1997 BYU L. REV. 101, 120 (questioning whether the Court will extend *Batson* and its progeny to protect ethnic groups from language-based discrimination). It is interesting to note that some states require the ability to "hear and understand the English language" as a prerequisite to eligibility for jury service. See, e.g., ALA. CODE § 12-16-60(a)(2) (1975) (requiring as a qualification for jury service that a juror be able to "read, speak, understand and follow instructions given by a judge in the English language"); CAL. PENAL CODE § 893 (a)(3) (West 1985) (requiring that grand jurors have "sufficient knowledge of the English language"); 705 ILL. COMP. STAT. 305/2, 305/9 (West 1992 & Supp. 1998) (stating that a prerequisite for jury service is the ability to speak and understand English); IND. CODE ANN. § 33-4-5-7 (b)(2) (Michie Repl. 1998) (disqualifying from jury service those prospective petit jurors who do not have "a degree of proficiency [in the English language] sufficient to fill out satisfactorily a juror qualification form"); LA. CODE CRIM. PROC. ANN. art. 401(3) (1991) (requiring that a prospective juror have the "ability to read, write and speak the English language and be possessed of sufficient knowledge of the English language"); N.C. GEN. STAT. § 9-3 (1996) (requiring the ability to "hear and understand the English language").

279. See Denton, *supra* note 278, at 119-20. Lower courts have declined to extend the *Batson* line of cases to prohibit discrimination based on classifications accorded rational basis review under the Equal Protection Clause. See, e.g., *United States v. Mitchell*, 886 F.2d 667, 673 (4th Cir. 1989) (allowing the striking of a young juror); *United States v. Moreno*, 878 F.2d 817, 820-21 (5th Cir. 1989) (holding that age, marital status, and unemployment are valid reasons for peremptory challenges); *United States v. Harrell*, 847 F.2d 138, 139 (4th Cir. 1988) (per curiam) (upholding under *Batson* a challenge to an unemployed juror lacking secondary education); *United States v. Clemons*, 843 F.2d 741, 748-49 (3d Cir. 1988) (determining that a challenge against a young, single juror did not violate *Batson*); *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (determining that a peremptory strike based on the juror's religion does not violate *Batson*). All of these classifications, with the possible exception of religion, are afforded rational basis review, the lowest level of equal protection scrutiny. See JOHN E. NOWAK & RONALD D.

The Court's future position on automatic reversal with respect to grand jury discrimination is more difficult to predict. *Hillery*, *Hobby*, and *Campbell* demonstrate that the Court is presently not certain about its position regarding automatic reversal. The harmless error argument is a compelling one when the complaint is one of discrimination in the context of grand jury selection and when the defendant is not a member of the excluded class. The argument becomes even more compelling if the defendant was convicted beyond a reasonable doubt by a petit jury free of racial discrimination. In such a situation, a court may find it difficult to justify applying the automatic reversal rule, especially when it considers the burden this places on the judicial system and society as a whole.<sup>280</sup>

The Fourteenth Amendment guarantees equal protection of the laws.<sup>281</sup> As it has done many times in the past, the Supreme Court in *Campbell* applied this provision of the Fourteenth Amendment to force state courts to eliminate discrimination within jury selection.<sup>282</sup> The Court has struck an interesting balance in *Campbell*, continuing to express its disdain for racial discrimination in the court system, but also moving toward more stringent standards for the automatic reversal rule.

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ROTUNDA, CONSTITUTIONAL LAW § 14-3, at 601-02 (5th ed. 1995); see also Karen L. Cipriani, Note, *The Numbers Don't Add Up: Challenging the Premise of J.E.B. v. Alabama Ex. Rel. T.B.*, 31 AM. CRIM. L. REV. 1253, 1262 (1994) (advancing the theory that the principles developed in *Batson* and *Powers* regarding equal protection rights should extend to gender because of the heightened level of scrutiny afforded gender discrimination in equal protection review). But see *Hoyt v. Florida*, 368 U.S. 57, 68 (1961) (distinguishing the Court's protection of racial discrimination from gender discrimination).

280. The burdens include wasting judicial resources re-trying a defendant who has already been convicted beyond a reasonable doubt and releasing convicted criminals from jail due to an inability to re-try them. See *Powers v. Ohio*, 499 U.S. 400, 430-31 (1990) (Scalia, J., dissenting).

281. See U.S. CONST. amend XIV, §1.

282. See *Campbell*, 118 S. Ct. at 1422-24; see also *supra* notes 1-2 (discussing the Court's use of the Fourteenth Amendment to eliminate racial discrimination within the court system).