# *CAMPBELL V. LOUISIANA* — HAS THE SUPREME COURT EXPANDED THE DOCTRINE OF THIRD-PARTY STANDING TOO FAR?

The jurisdiction of a federal court is confined to "cases and controversies"[1] pursuant to Article III, section 2,[2] of the Constitution.[3] Perhaps one of the most important doctrines emanating from Article

[1] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12, at 54 n.1 (5th ed. 1995). "There is really no difference between 'case' or 'controversy' except that the latter may be narrower in meaning, including only civil cases." *Id.* (citing Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 239 (1937)).

[2] *See* U.S. CONST. art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*; *see also* THE FEDERALIST NO. 80, at 479-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the cases and controversies over which the federal judicial power extends).

[3] *See* NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 54. A "case or controversy" has been defined as "'the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.'" Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 81 (1994) (quoting Muskrat v. United States, 219 U.S. 346, 357 (1911)). "Case or controversy" implies "'the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.'" *Id.* (quoting *Muskrat*, 219 U.S. at 357). The Article III "cases and controversies" language ensures that the federal courts will not turn into "judicial versions of college debating forums." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982). A federal court's constitutional power must be defined with reference to the need for adjudicating litigants' legal rights in actual controversies. *See id.* at 471. A party who has simply asked a federal court to state its legal rights while seeking relief traditionally linked to the courts of law has not satisfied Article III's requirements. *See id.*

III is that a litigant must have standing[4] in order to invoke a federal court's power.[5]

The constitutional doctrine of standing incorporates concepts that evade precise definition.[6] In order to have standing, it is necessary for a plaintiff to satisfy three criteria.[7] First, the plaintiff must suffer an "injury in fact."[8] Second, there must be a causal connection

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[4] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 107 (2d ed. 1988). The question of standing is whether "'a party has a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 731 (1972)). The standing issue's primary focus is on the party who seeks to have his complaint entertained by a federal court and only secondarily "'on the issues he wishes to have adjudicated.'" *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)) (emphasis omitted). "Asking whether a plaintiff has standing is like asking whether the plaintiff is an intended beneficiary of the right being asserted." David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases — Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1137 (1997); *see also* BLACK'S LAW DICTIONARY 1405 (6th ed. 1990). Standing is a concept used to see if a party is "sufficiently affected so as to insure that a justiciable controversy is presented to the court . . . ." *Id.*

[5] *See* Allen v. Wright, 468 U.S. 737, 750 (1984). Related doctrines that also stem from Article III include mootness, ripeness, and the political question doctrine. *See id.*

[6] *See id.* at 751. "'Generalizations about standing to sue are largely worthless as such . . . .'" NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 71 (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970)). The problem of standing is "'among the most amorphous in the entire domain of public law.'" *Id.* (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong. 498 (1966)). "It is difficult to conceive of a constitutional doctrine more riddled with confusion, more unanimously savaged by commentator and court, more important and yet more neglected" than the doctrines that revolve around standing. Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863 (1996).

[7] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The first important case in the line of standing decisions was Massachusetts v. Mellon, 262 U.S. 447 (1923). *See* NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 71. In that case, the plaintiff complained that a congressional appropriations act deprived her of her property without due process of law. *See Mellon*, 262 U.S. at 480. Such an alleged injury was not persuasive to the Supreme Court, and it distinguished cases where municipal taxpayers had standing to complain of the misuse of local money, claiming such an injury is "direct and immediate." *See id.* at 486. A federal taxpayer's interest, on the other hand, is very small and indeterminable. *See id.* at 487. *But see* Flast v. Cohen, 392 U.S. 83, 102-06 (1968) (explaining that a federal taxpayer has standing to challenge congressional action pursuant to the Taxing and Spending Clause of Article I, § 8 on the grounds that such congressional action violates the First Amendment's Establishment and Free Exercise Clauses).

[8] *See Lujan*, 504 U.S. at 560. In *Lujan*, the Court held that there is no injury in fact when environmental groups interested in overseas endangered species challenge a government act withdrawing government protection of such species absent concrete plans to go abroad and observe the animals personally. *See id.* at 563-64. In its analysis, the Court stated that an "injury in fact" is the "invasion of a legally protected interest . . . ." *Id.* That invasion must be "concrete and particularized." *Id.* Particularized means that the injury suffered by the plaintiff must affect him in an

between the plaintiff's injury and the conduct of which he complains.[9] Third, it must be likely, and not speculative, that a favorable decision will redress the injury.[10] The burden of establishing these elements rests with the party who seeks to invoke federal jurisdiction.[11]

Generally, the Supreme Court is more likely to confer standing on a plaintiff who is shielded by a federal statute.[12] In those situations in which Congress has defined injury in fact for standing purposes, the Court has been very deferential to that definition.[13] Absent congressional action, however, the Court is reluctant to find standing when a plaintiff claims a generalized constitutional injury.[14] Moreo-

individual and personal way. *See id.* at 561 n.1. The invasion must also be "'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). The plaintiff must claim an injury that is "distinct and palpable." *See* Warth v. Seldin, 422 U.S. 490, 501 (1975). Alleging the possibility of future injury fails to satisfy Article III requirements. *See Whitmore*, 495 U.S. at 158.

[9] *See Lujan*, 504 U.S. at 560. Federal courts can only act "to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). The requirement that a plaintiff demonstrate that any challenged government action caused his injury is seen as a corollary to the injury-in-fact requirement. *See* TRIBE, *supra* note 4, § 3-18, at 129; *see also Allen*, 468 U.S. at 759 (explaining that the causation link between challenged government conduct that permitted the tax-exempt status of racially discriminatory private schools to persist and alleged an injury sustained by black parents claiming their children were being denied a racially integrated education was too weak to maintain standing).

[10] *See Lujan*, 504 U.S. at 561. The *Allen* Court noted that a change in the tax-exempt status of a racially discriminatory school would not necessarily lead the school to change its discriminatory policies. *See Allen*, 468 U.S. at 758.

[11] *See* Lujan, 504 U.S. at 561.

[12] *See* NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 77. Even when Congress has spoken, the requirements of Article III remain and the "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.* (quoting *Simon*, 426 U.S. at 41 n.22). *But see* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 253 (1988) (observing that the Court, in deciding cases that involve statutory rights, has never demanded any injury beyond what the statute itself requires). "Congress may enact . . . statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 59 (1984) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)). The Court recognizes Congress's ability to delve into social problems to determine particular facts that amount to a cognizable injury. *See id.* at 61-62.

[13] *See* NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 77.

[14] *See id.* Little effort has been made by the Court to explain why there is different treatment of standing in cases involving constitutional claims and cases involving plaintiffs shielded by a federal statute. *See* Logan, *supra* note 12, at 49. A significant barrier for plaintiffs who assert rights that arise under the Constitution is the injury-in-fact requirement. *See id.* The Court often denies a plaintiff standing because the alleged injury is too "abstract" or "generalized." *See id.* The Court will sometimes

ver, the Court will not ordinarily confer standing on a plaintiff who seeks to vindicate some third party's constitutional rights.[15] The reason for this refusal is that the Court prefers that only the most concerned and effective advocates litigate claims in Article III courts.[16] However, the Supreme Court has recognized exceptions to this rule.[17]

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stringently apply the injury-in-fact requirement and the limitation against hearing "generalized grievances" in order to prevent "abstract" claims from coming before the Court. *See id.* at 49-50.

[15] *See* Barrows v. Jackson, 346 U.S. 249, 255 (1953).

[16] *See* NOWAK & ROTUNDA, *supra* note 1, § 2.12, at 84. It is a rule that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). The term "third-party standing" is synonymous with *jus tertii* standing. *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.6 (1984).

Early case law shows no hint that the rule limiting a litigant to raising only his own rights was simply a matter of a court's discretion. *See id.* at 286. Monaghan reminded:

> The prime object of all litigation is to establish a right asserted by the plaintiff . . . . Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.

*Id.* at 287 (quoting Tyler v. Judges of the Court of Registration, 179 U.S. 405, 406 (1900)).

A coherent theory explaining the cases dealing with third-party standing is hard to devise. *See* TRIBE, *supra* note 4, § 3-19, at 135-36. Some reasons, however, have been offered to support the rule against third-party standing:

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not . . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis.

Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

There are two categories of cases that give rise to the assertion of third-party standing. *See* Robert Allen Sedler, *The Assertion of Constitutional* Jus Tertii*: A Substantive Approach*, 70 CAL. L. REV. 1308, 1310 (1982). The first type is when a plaintiff claims that a law, although applied constitutionally as to him, would be applied unconstitutionally to a third party. *See id.* The second type of case, which is more common, is when a litigant maintains that a denial of either a claim or a defense will violate the rights of third parties. *See id.*

[17] *See* TRIBE, *supra* note 4, § 3-19, at 136. The rule against third-party standing is often relaxed in cases "'[w]here practical obstacles prevent a party from asserting rights on behalf of itself' and where the litigant 'can reasonably be expected prop-

Recently, in *Campbell v. Louisiana*,[18] the Supreme Court addressed whether a white criminal defendant has standing to object to discrimination against blacks in the selection of grand jury members.[19] The Court held that a white defendant can meet the requisites of standing to assert an equal protection challenge to such discrimination against blacks.[20] The Court further held that he has standing to litigate the issue of whether he was convicted in violation of his due process rights.[21]

In Evangeline Parish, Louisiana, a grand jury indicted Terry Campbell of second-degree murder.[22] Campbell moved to quash the indictment claiming that the grand jury's composition contravened his equal protection and due process rights under the Fourteenth Amendment[23] and the fair cross-section requirement[24] of the Sixth

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erly to frame the issues and present them with the necessary adversary zeal . . . .'" *Id.* (quoting Secretary of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984)).

18 118 S. Ct. 1419 (1998).

19 *See id.* at 1421.

20 *See id.* at 1424.

21 *See id.* at 1424-25.

22 *See id.* at 1421; *see also* Brief for Respondent at 1, Campbell v. Louisiana, 118 S. Ct. 1419 (1998 No. 96-1584) (explaining that Campbell, a white male, was indicted on February 4, 1992, for the shooting death of a white male).

23 *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Fourteenth Amendment binds the states. *See* TRIBE, *supra* note 4, § 10-7, at 663.

Due Process has several meanings, which include "substantive" and "procedural." NOWAK & ROTUNDA, *supra* note 1, § 13.1, at 510. Substantive due process may shield certain fundamental rights or it may void arbitrary limitations of an individual's freedom of action. *See id.* Substantive due process is "[t]he analysis of constitutional limits on the *content* of legislative action . . . ." TRIBE, *supra* note 4, § 10-7, at 664 n.4.

Procedural due process, on the other hand, is a guarantee that when a person suffers a deprivation of his life, liberty, or property that person shall enjoy a certain "process." *See* NOWAK & ROTUNDA, *supra* note 1, § 13.1, at 510. If a person will suffer a loss of life, liberty, or property he must be accorded a fair procedure. *See id.* at 510. A neutral decision-maker is an element of a fair and impartial process. *See id.* at 551. "A fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchison, 349 U.S. 133, 136 (1955).

The equal protection guarantee of the Fourteenth Amendment requires that similar individuals be treated in a similar way by the government. *See* NOWAK & ROTUNDA, *supra* note 1, § 14.2, at 597. Originally, the Equal Protection Clause was seen as only providing relief from discrimination against newly freed black slaves after the Civil War. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873). Since then, the Court has used the Equal Protection Clause to strike down racial discrimination in a variety of contexts. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding as a violation of equal protection a state statute forbidding interracial marriage); Anderson v. Martin, 375 U.S. 399, 401-02 (1964) (holding that the Equal Protection Clause is violated when a state requires that election ballots designate the

Amendment.[25] Campbell maintained that Evangeline Parish had a long-established practice of discriminating on the basis of race when selecting grand jury foremen.[26] However, the trial court refused to quash the indictment.[27] Campbell's first trial resulted in a mistrial,

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race of a particular candidate); Brown v. Board of Educ. of Topeka, 347 U.S. 483, 495 (1954) (holding that segregation of children on account of race in public schools violates the Equal Protection Clause).

[24] The Supreme Court has said that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). The cases interpreting the fair cross-section requirements that are provided for by statute "have generally followed the decisions interpreting the Sixth Amendment requirement that *trial* juries be drawn from a representative cross section of the community, although they also show the influence of equal protection cases." 1 BEALE ET AL., GRAND JURY LAW AND PRACTICE § 3:11, at 42-43 (2d ed. 1997). "The federal Jury Service and Selection Act and statutes in more than one-third of the states require grand as well as petit juries to be drawn from a fair cross section of the community." *Id.* at 42. Louisiana is one of the states that has codified the fair cross-section requirement. *See* LA. SUPREME COURT RULE 25 (1) ("It is the policy of this court that all litigants in Louisiana courts entitled to trial by jury shall have the right to grand, petit and civil juries selected at random from a fair cross-section of the parish wherein the district court convenes . . . .").

[25] *See Campbell*, 118 S. Ct. at 1421.

[26] *See id.* The only evidence Campbell had to support this assertion was that from January 1976 to August 1993, no blacks had ever served as foremen of a grand jury in the parish, despite the fact that more than 20 percent of registered voters were black. *See id.*; *see also* Brief for Petitioner at 14, Campbell v. Louisiana, 118 S. Ct. 1419-20 (No. 96-1584) (noting that during this period of 16.5 years in the Evangeline Parish, 35 foremen had been selected for grand juries, all of whom were white). This evidence was not disputed by the state of Louisiana. *See Campbell*, 118 S. Ct. at 1421.

In Louisiana, the judge selects a person from the grand jury venire to serve as the foreman before the remaining grand jurors are selected by lot. *See id.* at 1422. LA. CODE CRIM. PROC. ANN. art. 413(B) (West 1997) provides in part:

> In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names on the grand jury venire a sufficient number of names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies . . . .

*Id.* A foreman on a Louisiana grand jury enjoys the same voting rights as his fellow grand jury members. *See Campbell*, 118 S. Ct. at 1422. The venire is the "group of citizens from whom a jury is chosen in a given case." BLACK'S LAW DICTIONARY 1556 (6th ed. 1990).

[27] *See Campbell*, 118 S. Ct. at 1421. The trial judge held that there was no discrimination in the parish's grand jury selection process and that Campbell,

> being a white man accused of killing another white man . . . was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, defendant Campbell has no standing to raise that issue.

State v. Campbell, 651 So. 2d 412, 412 (La. Ct. App. 1995).

but he was convicted of second-degree murder at retrial.[28] Campbell moved for a new trial following his conviction, but his motion was denied.[29]

The Louisiana Court of Appeal, relying on *Powers v. Ohio*,[30] reversed and concluded that Campbell, although white, had standing to challenge the alleged discrimination.[31] Since the court of appeal considered Campbell's evidence of discrimination insufficient, it remanded the case to permit an evidentiary hearing.[32]

The Louisiana Supreme Court reversed the appellate court. In so doing, the court distinguished *Powers* as focusing on the significant effect that a prosecutor's discriminatory exercise of peremptory challenges has on the defendant's trial.[33] The court also found that, pursuant to *Hobby v. United States*,[34] Campbell did not even have standing to assert a due process objection.[35]

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[28] *See Campbell*, 118 S. Ct. at 1421. Campbell's sentence was life imprisonment with no possibility of parole. *See id.*

[29] *See id.* at 1421-22.

[30] 499 U.S. 400 (1991).

[31] *See Campbell*, 651 So. 2d at 413. The Supreme Court in *Powers* held that it is permissible for a criminal defendant to object to exclusions of jurors through peremptory challenges based on race even if the excluded juror and defendant are not of the same race. *See Powers*, 499 U.S. at 402. For an in-depth discussion of *Powers*, see *infra* notes 78-86 and accompanying text.

[32] *See Campbell*, 651 So. 2d at 413. The court of appeal noted that even though the grand jury foreman's role may be ministerial in nature, there should have been a full evidentiary hearing on the defendant's claims of equal protection and due process violations. *See id.* In order to establish a prima facie case of discrimination, the court said that the defendant "'must show that the percentage of minority persons in the general population who are qualified to serve as grand jurors is disproportionate to the actual number of minority grand jury forepersons over a significant period of time . . . .'" *Id.* (quoting State v. Young, 569 So. 2d 570, 575 (La. Ct. App. 1990)). In remanding the case, the court of appeal instructed that, should the trial court find that Campbell's constitutional rights had been violated by the grand jury selection procedure, the trial court must quash the indictment. *See id.*

[33] *See* State v. Campbell, 661 So .2d 1321, 1324 (La. 1995). The court observed that *Powers* was based

> on the considerable and substantial impact that such obvious discrimination by the prosecutor during voir dire would have on the defendant's trial as well as on the integrity of the judicial system as a whole. The same cannot be said for discrimination in the selection of a grand jury foreman . . . .

*Id.* at 1324.

[34] 468 U.S. 339 (1984).

[35] *See Campbell*, 661 So. 2d at 1322-24. The *Hobby* Court denied a defendant's due process claim while observing that the federal grand jury foreman's responsibilities "are essentially clerical in nature" and the position carries with it "no special powers or duties that meaningfully affect the rights of persons that the grand jury charges with a crime . . . ." *Hobby*, 468 U.S. at 344-45, 350. The Louisiana Supreme Court observed that "[t]he role of the grand jury foreman in Louisiana appears to be simi-

The United States Supreme Court granted certiorari[36] to consider the narrow issue of whether Campbell had standing to assert equal protection, due process and fair cross-section claims.[37] Applying *Powers*, the Court reversed the Louisiana Supreme Court, and held that Campbell had standing to challenge, on equal protection grounds, discrimination against blacks excluded from his grand jury.[38] In addition, the Court stated that the Louisiana Supreme Court erred in its interpretation of *Hobby* and held that Campbell had standing to assert a due process claim.[39]

Pursuant to the Sixth Amendment of the United States Constitution, a person accused of a crime enjoys the right to a trial by an impartial jury.[40] In addition, the Constitution recognizes the right to be indicted by a grand jury.[41] For more than one hundred years, the

larly ministerial." *Campbell*, 661 So. 2d at 1324. For an in-depth discussion of *Hobby*, see *infra* notes 66-72 and accompanying text.

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

[37] *See* Cambell v. Louisiana, 118 S. Ct. 1419, 1422 (1998). The Court noted that Campbell was not merely complaining of discrimination in choosing the grand jury foreman, but discrimination in composing the actual grand jury. *See id.*; *see supra* note 26 (explaining the selection process for the grand jury foremen in Louisiana and indicating that the foreman has the same voting powers as the other grand jurors). Due to the fact that the judge, when choosing the foreman, is also choosing a member of the grand jury, the Court concluded that it was necessary to approach Campbell's case as one that alleged discrimination in the selection of grand jurors. *See Campbell*, 118 S. Ct. at 1422.

[38] *See Campbell*, 118 S. Ct. at 1424, 1425. The Court noted that prior case law had not decided whether the equal protection rights of a white defendant are violated when there exists racial discrimination against blacks in the make-up of the defendant's grand jury. *See id.* at 1423. The Court explained that such an issue did not have to be decided because Campbell was seeking to raise equal protection rights of the *black* jurors discriminatorily excluded. *See id.*

[39] *See id.* at 1424-25. The Court refused to address the fair cross-section issue because the Louisiana court of appeal and the Louisiana Supreme Court did not address it. *See id.* at 1425.

[40] *See* U.S. CONST. amend. VI. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . . ." *Id.* The Sixth Amendment's guarantee to a trial by jury in all criminal cases extends to the states by way of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968). A jury has been defined as "a certain number of citizens selected by chance and temporarily invested with the right to judge." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272 (J. P. Mayer ed., Harper Perennial 1988).

[41] *See* U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." *Id.*

A grand jury has been defined as "an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be

Supreme Court has struggled with the constitutional requirements imposed on the jury selection process.[42] The Supreme Court first addressed the issue of discriminatory jury selection in *Strauder v. West Virginia*.[43] In *Strauder*, a black man who had been indicted for murder complained that the state laws did not permit blacks to be eligible for service on either grand or petit juries.[44] The Court held that such discriminatory laws deny a black defendant equal protection.[45] How-

instituted against any person." United States v. Calandra, 414 U.S. 338, 343-44 (1974). The Supreme Court has concluded that the absence of a grand jury review does not violate due process. *See* Hurtado v. California, 110 U.S. 516, 538 (1884). Today, an indictment by a grand jury to initiate charges for serious crimes is required in 18 states. *See* 1 BEALE ET AL., *supra* note 24, at § 1:2, 3. For charges that could ultimately result in life imprisonment or a capital sentence, four additional states, including Louisiana, demand an indictment to initiate those charges. *See id* at § 1:2, 3 & n.8. Once a state chooses to provide a grand jury, the state must still respect the federal constitutional demand that there be no racial discrimination in choosing jurors. *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330 (1970). In all jurisdictions, challenges to the composition of the grand jury panel can be brought on federal constitutional grounds. *See* 1 BEALE ET AL., *supra* note 24, § 3:9, 33. The general rule is that defendants have standing to challenge both the make-up and selection process of their indicting grand jury. *See id.* § 3:25, 115.

The Fourteenth Amendment's Equal Protection Clause and Due Process Clause exclusively govern cases that deal with state grand jury selection. *See id.* § 3:12, 53. In such cases, a discriminatory purpose is required to prove an equal protection violation. *See id.* Direct evidence is not necessary, however, and statistical evidence will suffice. *See id.*

[42] *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 203 (1995).

[43] 100 U.S. 303 (1879); *see also* Amar, *supra* note 42, at 208.

[44] *See Strauder*, 100 U.S. at 304. The Court framed the issue as whether "by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color . . . ." *Id.* at 305. Additionally, the Court addressed whether, if such a right exists and a State violates it, the individual can seek redress in the federal courts. *See id.* The Court stressed the importance of these issues because they required interpretation of newly enacted constitutional amendments and focused its inquiry on the Fourteenth Amendment. *See id* at 305-06.

[45] *See id.* at 310. In reaching this holding, the Court echoed the theme of the *Slaughter-House Cases* and explained that the Fourteenth Amendment was enacted to assist blacks who were emancipated from slavery, to secure for them the same rights as white people, and to ensure that they were not targeted by hostility. *See id.* at 306-08. The Court opined that the state laws involved in *Strauder* were undoubtedly discriminatory. *See id.* at 308. The Court further observed that the fact that blacks were excluded from jury service because of their race was "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.* However, the Court noted that states may discriminate in proscribing qualifications for jurors and believed that the Fourteenth Amendment was not intended to prohibit jury service criteria such as education, age, citizenship, and that the jury be confined to males only. *See id.* at 310; *see also* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory*

ever, the Court emphasized that the case did not involve an individual's right to have members of his own race serve on his grand or petit jury.[46]

Nearly a century later, the Court, in *Carter v. Jury Commission of Greene County*,[47] addressed an attack on racial discrimination in jury selection.[48] The challenge was leveled by a group of plaintiffs seeking affirmative relief rather than by a criminal defendant contesting his conviction.[49] Black citizens in Alabama alleged that the jury selection laws unconstitutionally excluded blacks from service on grand and petit juries on the basis of race.[50] The Court noted that the plaintiffs in the case were not barred from bringing such a suit, even though they were not criminal defendants.[51] The Court concluded that the challenged provisions were constitutional because the provisions did

*Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 83 (1993) (asserting that there was no great sympathy on the part of the *Strauder* Court toward the struggle of the newly freed blacks); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1421 (1983) (noting that one of the limits of *Strauder* is that it does not provide "an affirmative right of presence" for blacks to be on a jury).

[46] *See Strauder*, 100 U.S. at 305. In fact, the Supreme Court has said that the right to have members of your own race on a jury hearing your case is not a guarantee of the Fourteenth Amendment. *See* Virginia v. Rives, 100 U.S. 313, 323 (1879).

[47] 396 U.S. 320 (1970).

[48] *See id.* at 329.

[49] *See id.* *Carter* was the first case of this nature to reach the Court. *See id.*

[50] *See id.* at 321-22. The black citizens (appellants) sought a declaration that qualified blacks had been systematically excluded from service on the county's grand and petit juries, a permanent injunction disallowing the systematic exclusion of blacks, and an order which would vacate the appointments of the county jury commissioners and force the Governor to choose new members in a nondiscriminatory manner. *See id.* at 322. The appellants complained that a provision of the state law empowering the jury commission to call people to jury service who were reputed to be intelligent and honest, enabled the commission to act on its belief that blacks were unfit for service. *See id.* at 323, 331. The District Court found an unconstitutional exclusion of blacks based on race, enjoined the further exclusion of blacks from the jury role, and directed the commission to devise a jury list in accordance with constitutional principles. *See id.* at 328. However, the District Court neither enjoined the enforcement of the challenged state provisions nor directed the Governor to appoint blacks to the jury commission. *See id.* The appellants directly appealed to the Supreme Court, and the Court noted probable jurisdiction. *See id.*

[51] *See id.* at 329. The Court recognized that criminal defendants are not the only ones who have a cognizable legal interest in a nondiscriminatory jury selection process. *See id.* Those individuals excluded from juries on the basis of race, the Court said, are injured as much as those who are indicted and tried by juries from which people have been racially excluded. *See id.* The Court posited, "Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here." *Id.* at 330.

not mention race nor were they meant to promote racial discrimination.[52]

Two years later, the Supreme Court, in *Peters v. Kiff*,[53] considered for the first time a white defendant's allegation that blacks were excluded from jury service.[54] Refraining from deciding the case on equal protection grounds,[55] the Court held that a defendant is denied due process of law when members of any race are arbitrarily excluded from his grand or petit jury.[56] Furthermore, the Court concluded that a defendant has standing to make this due process claim irrespective of his race.[57] In reaching this decision, the Court ex-

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[52] *See id.* at 336. The Court reached this conclusion even though the evidence demonstrated that both the clerk and the commissioners in charge of drawing up jury service lists, all of whom were white, did not make enough efforts to obtain the names of black citizens eligible for service. *See id.* at 324-26. The Court said that the federal courts could come up with effective injunctive relief to remedy any discrimination in the application of the law. *See id.* at 336-37.

[53] 407 U.S. 493 (1972).

[54] *See id.* at 496. The petitioner contended that there was a systematic exclusion of blacks from both his grand and petit juries. *See id.* at 494. He asserted that such exclusion rendered his conviction invalid under the Fourteenth Amendment's Equal Protection and Due Process Clauses. *See id.* He further contended that the impact resulting from the manner in which his juries were composed was unascertainable. *See id.* at 497. The Court observed that the grand and petit jury selection processes were the same and that the exclusion issue would be decided the same way for both juries. *See id.* at 496. The respondent maintained that because the petitioner was not black he suffered no unconstitutional discrimination. *See id.* at 494. In fact, at this time, some lower federal courts and state courts held that excluding a class from service on the jury could only be challenged by someone who was a member of the class excluded. *See id.* at 496 n.4. The court of appeals accepted the respondent's claim that, because petitioner was black, no unconstitutional discrimination occurred. *See id.* at 494. The Supreme Court subsequently granted certiorari. *See id.*

[55] *See id.* at 497 n.5.

[56] *See id.* at 502. The respondent argued that even if the juries were impermissibly chosen, the petitioner still should not be entitled to relief because he did not demonstrate that he was harmed. *See id.* at 498. The Court criticized this view and said that excluding blacks from jury service not only harms the defendants, but also harms members of the excluded class by denying them "'the privilege of participating equally . . . in the administration of justice . . . .'" *Id.* at 499 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)). The Court stated, "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well." *Id.* at 502-03. The Court went on to assert, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Id.* at 503.

[57] *See id.* at 504. The Court recognized that exclusion of a class from a jury not only offends the excluded members, but other defendants as well for it compromises the chance that "the jury will reflect a representative cross section of the commu-

plained that such discriminatory practices regarding grand and petit juries are prohibited under the Constitution, regardless of whether the defendant is white or black.[58]

The Supreme Court revisited the issue of grand jury discrimination in *Rose v. Mitchell*.[59] The sole issue in *Rose* was the selection of a state grand jury foreman.[60] In *Rose*, two black criminal defendants were indicted by a Tennessee grand jury for first degree murder.[61] They alleged racial discrimination in the selection of the grand jury foreman.[62] The Court noted the importance of the foreman in the

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nity." *Id.* at 500; *see also* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (stating that a male criminal defendant, similar to the defendant in *Peters*, is entitled to bring and have adjudicated a claim asserting that he was deprived of a constitutional jury because of the exclusion of women from the jury). The *Peters* case has been seen as an example of judicial activism by expanding doctrines, such as standing, to make sure that a case is before them in a proper manner. *See* Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1369 (1996).

[58] *See Peters*, 407 U.S. at 498. If a public official discriminates in this context, it is a crime. *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, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

*Id.*; *see also* Ex Parte Virginia, 100 U.S. 339, 349 (1879) (holding this statute constitutional).

[59] 443 U.S. 545 (1979).

[60] *See id.* at 547. The Court explained that in Tennessee the grand jury was composed of 12 persons and a foreman who "'shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof.'" *Id.* at 548 n.2 (quoting TENN. CODE. ANN. § 40-1506 (Supp. 1978)). The foreman would serve a term of two years and is appointed by the judge. *See id.* The foreman may also cast one of the twelve necessary votes for indictment. *See id.* The Court elaborated on the foreman's role:

> [The foreperson] acts as chairman or "presiding officer." He or she is charged with the duty of assisting the district attorney in investigating crime, may order the issuance of subpoenas for witnesses before the grand jury, may administer oaths to grand jury witnesses, must endorse every bill returned by the grand jury, and must present any indictment to the court in the presence of the grand jury. The absence of the foreman's endorsement makes an indictment "fatally defective."

*Id.* (citations omitted).

[61] *See id.* at 547, 548.

[62] *See id.* The respondents claimed that discrimination in the grand jury selection violated the Fourteenth Amendment's Equal Protection Clause. *See id.* at 547. The court denied the claim after an evidentiary hearing and the respondents were tried and convicted. *See id.* at 549. The Tennessee Court of Criminal Appeals affirmed the convictions and the Tennessee Supreme Court denied certiorari. *See id.* The respondents filed a petition for a writ of habeas corpus in the United States Dis-

grand jury.[63] Although the Court found that the defendants had not presented a prima facie case of discrimination in the selection of the foreman,[64] the Court maintained that a criminal conviction could be set aside when there is discrimination in the grand jury selection process.[65]

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trict Court, which referred the matter to a magistrate. *See id.* The magistrate suggested that an evidentiary hearing be held regarding the selection issue of the grand jury and the foreman, and further concluded that the respondents "had presented an unrebutted prima facie case with respect to the selection of the foreman." *Id.* at 549-50. The district court disagreed with the magistrate regarding the grand jury and accepted the state judge's conclusion, but agreed with the magistrate on the foreman question and asked the State to respond. *See id.* at 550. After the State presented affidavits from the presiding foreman of the indicting grand jury and the judge who appointed him, the petitions were dismissed. *See id.* Respondents appealed to the Sixth Circuit Court of Appeals, which reversed. *See id.* The Supreme Court granted certiorari to address the foreman question. *See id.*

[63] *See id.* at 548 n.2.

[64] *See id.* at 574. The Court said that in order to show an equal protection violation regarding grand jury foreman selection, the defendant had to demonstrate that there was a "'substantial underrepresentation of his race or of the identifiable group to which he belongs.'" *Id.* at 565 (quoting Castenda v. Partida, 430 U.S. 482, 494 (1977)). The Court outlined what was necessary to establish a prima facie case:

> "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 [foreperson], over a significant period of time .... Finally ... a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing."

*Id.* (alteration in original) (quoting *Castenda*, 430 U.S. at 494). Once the prima facie case is established, the State has the burden to rebut it. *See id.* The Court explained that all the respondents had in proof of their prima facie case was the evidence offered from two former grand jury foremen and a current foreman that they did not know of a black person having served as foreman. *See id.* at 573. The Court criticized the offered evidence as inadequate and, accordingly, found no equal protection violation. *See id.* at 573, 574.

[65] *See Rose*, 443 U.S. at 559; *see also* Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (reaffirming the Court's commitment to mandatory reversal of convictions when there is racial discrimination in choosing the grand jury). The *Rose* Court assumed, without deciding, that "discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Rose*, 443 U.S. at 551 n.4. It has been suggested, however, that to reverse a black defendant's conviction because blacks had been discriminated against in his grand jury selection conflicts with the principle that "no conviction should be set aside for errors not affecting substantial rights of the accused." Cassell v. Texas, 339 U.S. 282, 299 (1950) (Jackson, J., dissenting). Justice Jackson observed that a grand jury is quite distinctive from the trial jury because "[i]ts power is only to accuse, not to convict." *Id.* at 302 (Jackson, J., dissenting). Justice Jackson also explained that there exist criminal, civil, and equitable remedies for blacks excluded from jury service, but that blacks had neglected such remedies. *See id.* at 303-04 (Jackson, J., dissenting).

In *Rose*, Justice Stewart, with whom Justice Rehnquist joined, concurred in the

Five years later, in *Hobby v. United States*,[66] the Court examined discrimination in the selection of a federal grand jury foreman.[67] Wilbur Hobby, indicted on various counts of fraud, sought the dismissal of his indictment.[68] He alleged that the grand jurors were improperly selected because there were no black or female forepersons in the past seven years.[69] The Court held that a white male bringing a due process claim could have neither his indictment dismissed nor his conviction reversed if such discrimination occurred.[70] The Court

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judgment and concluded that "[a]ny possible prejudice to the defendant resulting from an indictment returned by an invalid grand jury . . . disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt." *Rose*, 443 U.S. at 575 (Stewart, J., concurring). The majority, however, rejected this argument. *See id.* at 554. Race discrimination, the Court said, is "especially pernicious in the administration of justice." *Id.* at 555. The Court observed that to discriminate along racial lines in grand jury selection shatters the appearance of justice, thereby casting doubt on the judicial process' integrity. *See id.* at 555-56. The defendant is not the only one injured by a jury from which people have been excluded on the basis of race, the Court reasoned, for the injury extends "'to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Id.* at 556 (quoting Ballard v. United States, 329 U.S. 187, 195 (1946)); *see also* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 258 (1988) (taking note of *Rose*'s conclusion that discrimination casts doubt on the judicial process, but also observing that it is plausible to argue that "almost any constitutional violation taints the judicial process").

The Court pointed out that civil actions are expensive. *See Rose*, 443 U.S. at 558. The Court did observe that even if a reversal occurs, if a defendant is in fact guilty he may be indicted and tried again by the State as long as the procedures are constitutional. *See id.*

[66] 468 U.S. 339 (1984).

[67] *See id.* at 340.

[68] *See id.*

[69] *See* United States v. Hobby, 702 F.2d 466, 470 (4th Cir. 1983). Hobby, the petitioner, specifically claimed that the selection plan, which excluded citizens from jury service on the basis of race, violated the Fifth and Sixth Amendments of the United States Constitution. *See id.* at 341. The District Court would not dismiss Hobby's indictment, despite Hobby's attempts to prove discrimination, and Hobby was later convicted. *See id.* The Fourth Circuit affirmed, maintaining that the federal foreman's role is strictly ministerial and has a minimal impact on the justice system and on a criminal defendant's rights. *See id.* The Court of Appeals also said that the likelihood that being chosen foreman may enable the foreman to influence the other grand jurors as "too vague and speculative to warrant dismissals of indictments and reversals of convictions." *Id.* *But see* United States v. Cross, 708 F.2d 631, 637 (11th Cir. 1983) ("[S]election by the district judge [of the foreperson] might appear to the other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers.").

The Supreme Court granted certiorari to settle the conflict among the other circuits on this issue. *See Hobby*, 468 U.S. at 342 & n.1 (enumerating lower court decisions illustrating the conflict on the grand jury discrimination issue).

[70] *See Hobby*, 468 U.S. at 350. The Court declared that it is "well settled" that the Fifth Amendment prohibits purposeful discrimination against blacks or women in

ruled that discrimination in choosing the grand jury foreman does not threaten any of the defendant's interests that are safeguarded by the Due Process Clause.[71] The Court distinguished *Rose v. Mitchell*, explaining that while the state foreman's role is investigative and administrative, the federal foreman's role is more ministerial and clerical.[72]

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choosing a foreman for the federal grand jury. *See id.* at 342. The Court assumed that discrimination in choosing the foreman did take place. *See id.* at 343.

[71] *See id.* at 344. Because of the ministerial nature of the foreman's office, the Court concluded that "discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness." *Id.* at 345. The Court asserted that "as long as the composition of the federal grand jury as a whole serves the representational due process values expressed in *Peters*," discrimination in choosing the foreman does not clash with those interests. *Id.* at 346. The Court said that the petitioner's reliance on *Rose* was misplaced. *See id.* at 347. The *Rose* defendants, the Court explained, were black and brought an equal protection claim maintaining that discriminatory exclusion of blacks in their grand jury resulted in the stigmatization that runs with racial prejudice. *See id.* The petitioner in *Hobby*, however, only claimed that discrimination against blacks and women violated his due process right to fundamental fairness. *See id.* Additionally, the Court highlighted the differences in the process used to select the foreman in *Rose*. *See id.* at 347-48; *see also supra* note 60. The Court contrasted the federal system, explaining that the foreman is chosen from members of an already empaneled grand jury, and, therefore, the *Hobby* foreman, unlike the *Rose* foreman, cannot be seen as a "surrogate of the judge." *See Hobby*, 468 U.S. at 348.

[72] *See id.* The *Hobby* Court contrasted the discriminatory selection in the whole grand jury against discriminatory selection of the foreman. *See id.* at 344. The grand jury foreman, the Court said, is not a "creature of the Constitution" but rather an office created by statute for the court's convenience. *See id.* Federal Rule of Criminal Procedure 6(c) grants the authority for appointing the grand jury foreman and it provides:

> The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

FED. R. CRIM. P. 6(C). The foreman, the Court explained, does not have any additional authority separate from that of the whole grand jury. *See Hobby*, 468 U.S. at 345.

In dissent, Justice Marshall, joined by Justices Brennan and Stevens, explained that the position of foreman is not as insignificant as the Court suggested. *See id.* at 356-58. Justice Marshall explained that the foreman of the grand jury has the power to excuse a grand juror's absence and also "initiates the juror's questioning of witnesses, . . . determines whether an interpreter is required, . . . initiates deliberations, [and] tallies the votes and reports the grand jury's conclusions to the court." *Id.* at 356-57. Justice Marshall also observed that district court judges put much effort and time in choosing a foreman and look for a person with good education, manage-

Two years later, in *Batson v. Kentucky*,[73] the Supreme Court focused on the discriminatory use of peremptory challenges on members of the petit jury.[74] In *Batson*, the criminal defendant claimed that the State denied him equal protection by using peremptory challenges[75] to exclude members of his racial group from the petit jury.[76] In the case of an equal protection violation in petit jury selection, the Court noted that it can focus on the State's use of peremptory challenges at the defendant's trial rather than examining the State's use of peremptory challenges in prior cases.[77]

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ment skills, and personal leadership qualities. *See id.* at 357-58.

[73] 476 U.S. 79 (1986).

[74] *See id.* at 79. A petit jury is the "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).

[75] A peremptory challenge is the "right to challenge a juror, without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). The peremptory challenge is "often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' . . . ." Swain v. Alabama, 380 U.S. 202, 220 (1965) (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)).

[76] *See Batson*, 476 U.S. at 82. This issue was also considered in *Swain v. Alabama*, 380 U.S. 202 (1965). *See Batson*, 476 U.S. at 82. In *Swain*, a prosecutor used peremptory challenges to strike six blacks from a black defendant's petit jury venire. *See Swain*, 380 U.S. at 210. The Court concluded that the Constitution does not require that a prosecutor's exercise of peremptory challenges be examined in any given case. *See id.* at 222. The Court explained the presumption to be that the peremptories by the prosecutor in a particular case are being exercised so that an impartial and fair jury can try the case. *See id.* However, the *Swain* Court observed that the Equal Protection Clause places limits on the State's use of peremptory challenges. *See Batson*, 476 U.S. at 91. The presumption protecting the prosecutor might be overcome, the Court suggested, if it is shown that the State has not found it possible to place a black person on any jury hearing a criminal case. *See Swain*, 380 U.S. at 224.

In *Batson*, a black defendant, the petitioner, was indicted for second-degree burglary and the prosecutor, using his peremptory challenges, had four black individuals on the jury venire stricken resulting in an all-white jury. *See Batson*, 476 U.S. at 82-83. Defense counsel moved to have the jury discharged, claiming violations of the Sixth and Fourteenth Amendments. *See id.* at 83. The trial judge denied the motion. *See id.* Petitioner was convicted and he appealed to the Supreme Court of Kentucky, which said that in order to show there is no fair cross-section of the community, it was necessary to show a "systematic exclusion of a group of jurors from the venire." *Id.* at 83, 84. The Supreme Court granted certiorari. *See id.* at 84. (citation omitted). The Court observed that the case hinged on equal protection principles and did not address the Sixth Amendment argument. *See id.* n.4.

[77] *See Batson*, 476 U.S. at 95. The Court said that the burden of proof in *Swain* (see *supra* note 76) was too crippling for a defendant and left prosecutors' use of peremptories largely free of close constitutional review. *See id.* at 92-93. Practically speaking, the initial burden of production to prove discrimination rests with the defendant. *See* Lawrence Elmen, Jr., Note, *Peremptory Challenges After* Batson v. Kentucky: *Equal Protection Under the Law or an Unequal Application of the Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 481, 496 (1994). Once a defendant proves dis-

In 1991, in *Powers v. Ohio*,[78] allegations of discrimination in the prosecutor's exercise of peremptory challenges resurfaced.[79] The criminal defendant in *Powers*, a white male, objected to the State's use of peremptory challenges excluding blacks from his petit jury.[80] The Court reaffirmed that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to exclude individuals from petit jury service because of their race.[81] Furthermore, the Court held that a defendant may object to exclusions regardless of whether

crimination, the Court said, the State must offer a neutral explanation as to why the black jurors were challenged. *See Batson*, 476 U.S. at 97. The Supreme Court has held that, in a civil suit, a private litigant may not exercise his peremptory challenges to exclude jurors on the basis of race. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991); *see also* Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 961 (1998) (standing for the proposition that, as a result of *Batson* and its progeny, the peremptory challenge has basically ceased to exist).

[78] 499 U.S. 400 (1991).

[79] *See id.* at 402.

[80] *See id.* at 402-03. Larry Joe Powers was convicted of the crimes for which he was indicted, and he appealed to the Ohio Court of Appeals. *See id.* at 403. Powers contended that the prosecutor's discriminatory exercise of peremptory challenges was a violation of the Sixth Amendment's fair cross-section requirement, the Equal Protection Clause of the Fourteenth Amendment, and various provisions of the Ohio Constitution. *See id.* His conviction was affirmed by the Ohio Court of Appeals, and his appeal was subsequently dismissed by the Ohio Supreme Court because no substantial constitutional question was presented. *See id.*

Powers sought review by the United States Supreme Court, and while his appeal was pending, the Court decided *Holland v. Illinois*, 493 U.S. 474 (1990). *See Powers*, 499 U.S. at 403. In *Holland*, the defendant alleged that the prosecutor used peremptories to exclude people from the defendant's jury who were not of the same race as the defendant. *See Holland*, 493 U.S. at 476. The Court held that exclusion of members of a racial group during the peremptory challenges is not restricted by the Sixth Amendment. *See id.* at 478. Three separate opinions in *Holland*, however, suggested that the claim might be possible on equal protection grounds. *See id.* at 488 (Kennedy, J., concurring); *see id.* at 490-92 (Marshall, J., dissenting); *see id.* at 506-07 (Stevens, J., dissenting).

After *Holland*, the Court granted Powers's petition for certiorari confined to the issue of whether, "[B]ased on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons." *See Powers*, 499 U.S. at 404 (citation omitted).

[81] *See Powers*, 499 U.S. at 409. The Court noted *Batson's* recognition that discrimination in the use of the peremptory challenges "harms the excluded jurors and the community at large." *Id.* at 406 (citing *Batson*, 476 U.S. at 87). According to the *Powers* Court, jury duty, aside from voting, is the "most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407; *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1186, 1187 (1991) (explaining that jurors were intended to be educated by judges in political and legal values, and that ordinary citizens, who had small odds of becoming members of the Congress, could still play a role in applying the national law through jury participation). *Powers* suggested that victims of jury discrimination would feel a "stigma or dishonor" if their skin color were used to determine their qualifications. *See Powers*, 499 U.S. at 410.

an excluded juror and a criminal defendant are of the same race.[82] In the majority opinion, Justice Kennedy observed that litigants have standing to bring actions for third parties provided certain criteria are met: (1) There must be an "injury in fact" to the litigant,[83] (2) The litigant and the third party must have a close relation to one another,[84] and (3) There must be some hindrance to the ability of the

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[82] *See Powers*, 499 U.S. at 402.

[83] *See id.* at 411. The Court said that an "injury in fact" would give the litigant a "sufficiently concrete interest" in the dispute's outcome. *See id.* (citing Singleton v. Wulff, 428 U.S. 106, 112 (1976)). According to the Court, a prosecution's discriminatory exercise of peremptory challenges "causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice." *Id.* This injury occurs, the Court said, because excluding jurors on the basis of race in full view of the open court places doubt on the fairness of the criminal proceeding and on "'the integrity of the judicial process.'" *Id.* at 411, 412 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). In the Court's view, if the defendant cannot object to the improper exclusion of jurors, "[T]here arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow." *Id.* at 412-13; *see* 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, 708 (1992) (observing that the *Powers* Court expanded the traditional idea of injury in fact in the context of third-party standing).

In dissent, Justice Scalia, joined by Chief Justice Rehnquist, said that the majority did not establish the injury-in-fact requirement for third-party standing. *See Powers*, 499 U.S. at 426 (Scalia, J., dissenting). Justice Scalia explained that, since exclusion of jurors does not generate an unfair injury, it was necessary for the Court to couch its opinion in terms of a "perception of fairness rather than its reality . . . ." *Id.* The Justice asserted that perceptions of unfairness do not establish an injury in fact to the defendant. *See id.* at 427 (Scalia, J., dissenting). According to Justice Scalia: "Injury in perception" would seem to be the very antithesis of "injury in fact." *Id.* Justice Scalia emphasized that an injury in fact must be "'distinct and palpable,' 'particular [and] concrete,' 'specific [and] objective." *Id.* (alterations in original) (citations omitted).

[84] *See Powers*, 499 U.S. at 411 (citing *Singleton*, 428 U.S. at 113-14). "'[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.'" *Id.* at 413 (quoting *Singleton*, 428 U.S. at 115). The Court said that in *Powers*, the "relation between the petitioner and the excluded juror is as close as, if not closer than" the relations recognized in prior third-party standing cases. *Id.* *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (explaining that the physician and the director of a family-planning league, convicted for giving information on contraceptive use, have third-party standing to assert constitutional rights of married persons with whom they have a professional relationship).

The Court addressed the importance of the voir dire portion of the court proceedings. *See Powers*, 499 U.S. at 413. According to the majority, voir dire allows a party "to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to the sentencing as well." *Id.*

The Court further observed that there is a "common interest" between the excluded juror and the defendant in eradicating race discrimination from court pro-

third party to safeguard his interests.[85] In dissent, Justice Scalia observed that criminal defendants are not permitted to assert the rights of third parties whose Fourth Amendment rights are violated.[86]

Against this background of precedent, the United States Supreme Court in *Campbell v. Louisiana*[87] concluded that a white defendant has standing to assert an equal protection claim to challenge discrimination leveled against black individuals in the selection process for his grand jury.[88] In addition, the Court held that a defendant has standing to litigate whether his conviction complies with due process mandates.[89]

Justice Kennedy, writing for the Court,[90] initially noted that Campbell's complaint went beyond discrimination in choosing the foreman of his grand jury, and that it alleged that discrimination

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ceedings. *See id.* In the Court's view, the excluded venireperson's injury consists of great personal humiliation, and the venireperson's confidence in verdicts and the court may evaporate. *See id.* at 413-14. Because discrimination in choosing the jury may lead to reversing a defendant's conviction, the Court said this fact would enable a defendant to be a "motivated [and] effective advocate" for those excluded veniremen. *Id.* at 414. *But see* Kirk, *supra* note 83, at 709. Kirk contends that the *Powers* Court did not directly deal with the defendant-venireman relationship, but rather, focused on the common interest they shared. *See id.* He argues that the shared interest in the fairness of a court proceeding does not rise to the level of a precedentially recognized close relationship. *See id.* Additionally, Kirk maintains that the vagueness of the term "common interest" might provide the basis for a greater enlargement of third-party standing in the future. *See id.* at 710.

85 *See Powers*, 499 U.S. at 411 (citing *Singleton*, 428 U.S. at 115-16). The Court noted that it is rare to see challenges brought by individuals excluded from juries because of their race. *See id.* at 414. The Court explained that there are significant barriers in bringing a suit such as the cost of litigation and the limited financial stake in the outcome. *See id.* at 415. Moreover, the Court pointed out that potential jurors do not have an opportunity to be heard if they are excluded, and it is difficult for them to obtain injunctive or declaratory relief. *See id.* at 414. The reality of the situation, according to the Court, is that "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.* at 415.

86 *See id.* at 428 (Scalia, J., dissenting). The Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

87 118 S. Ct. 1419 (1998).

88 *See id.* at 1424.

89 *See id.* at 1424-25.

90 *See id.* at 1421. The opinion was unanimous with respect to Campbell's due process and fair cross-section claims, but Justices Thomas and Scalia did not join the Court's opinion regarding standing to raise the equal protection issue. *See id.* at 1426 (Thomas, J., concurring in part and dissenting in part).

shaped the make-up of the grand jury as a whole.[91] The Justice explained that in the federal courts, and most state courts that utilize grand juries, the foreman is chosen from among persons already empaneled as grand jurors.[92] However, the Court pointed out that in Louisiana the judge chooses the foreman from the venire before the other grand jurors are randomly selected.[93] The foreman, the Court explained, enjoys the same voting powers as his fellow grand jurors, in addition to his other responsibilities.[94] Therefore, the Court concluded, in choosing the foreman, the Louisiana judge was also choosing a grand juror.[95] Accordingly, the Court reasoned that it was necessary to approach Campbell's case as one involving discrimination in the selection of grand jurors.[96]

The Court then proceeded to discuss Campbell's standing to raise an equal protection claim on behalf of the excluded grand jurors.[97] The Court noted that prior case law had never decided whether the equal protection rights of a white defendant are violated when there exists racial discrimination against blacks in the make-up of the defendant's grand jury.[98] The Court explained that such an issue did not have to be decided because Campbell was seeking to raise equal protection rights of the *black* jurors discriminatorily excluded.[99] Justice Kennedy conceded that while determining standing is difficult and often hinges on hazy distinctions, established precedent may help guide the inquiry.[100]

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[91] *See id.* at 1422.

[92] *See id.*

[93] *See Campbell*, 118 S. Ct. at 1422 (citing LA. CODE CRIM. PROC. ANN. art. 413(B) (West 1997)); *see also supra* note 26 (quoting the Louisiana law which provides for the selection of the grand jury foreman); 1 BEALE ET AL., *supra* note 24, at 22 n.11 (noting that Ohio, Oklahoma, Tennessee, and Virginia employ a foreman selection procedure similar to Louisiana's).

[94] *See Campbell*, 118 S. Ct. at 1422.

[95] *See id.*

[96] *See id.*; *see also* Brief for Petitioner at 23, Campbell v. Louisiana, 118 S. Ct. 1419 (1998) (No. 96-1584) (noting that the trial court in Louisiana chooses the foreman who has a vote on the grand jury, and explaining that discrimination in foreman selection "distorts the composition of the resulting grand jury thereby tainting the whole").

[97] *See Campbell*, 118 S. Ct. at 1422.

[98] *See id.* at 1423.

[99] *See id.*

[100] *See id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)) (setting forth the criteria necessary for a litigant to establish standing). For an in-depth discussion of standing, see *supra* notes 5-13 and accompanying text.

After noting that Campbell's equal protection claim was easy to ascertain, the Court then turned to *Powers*.[101] Justice Kennedy noted that *Powers* conferred standing on a white defendant to bring an equal protection claim challenging discrimination against blacks in petit jury selection.[102] The Court concluded that the *Powers* rationale applied to Campbell's case, even though Campbell challenged discrimination in the context of grand juror selection.[103] Furthermore, Justice Kennedy asserted that Campbell satisfied the necessary prerequisites for third-party standing set forth in *Powers*.[104]

The Court declared that when racial discrimination touches the grand jury, an injury in fact is inflicted on the accused regardless of his skin color.[105] After explaining the grand jury's importance in the criminal justice process,[106] the Court asserted that doubt hangs over

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

102 *See id.* at 1422-23; *see also supra* notes 81-83 (explaining how the three requirements of third-party standing were satisfied in *Powers*).

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

104 *See id.*

105 *See id.* The Court characterized the injury in fact as "significant." *See id.* Justice Kennedy explained that because the grand jury is an important part of the criminal justice system, racial discrimination in choosing grand jurors "'strikes at the fundamental values of our judicial system.'" *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)). For a discussion of *Rose*, see *supra* notes 59-65 and accompanying text. The Court also noted *Powers's* emphasis on the harm done when a prosecutor strikes jurors on the basis of race in open court and its concern that such a maneuver "might encourage the jury to be lawless in its own actions." *Id.* at 1423-24. (citing Powers v. Ohio, 499 U.S. 400, 412-13 (1991)). Justice Kennedy conveyed the State's suggestion that, when one grand juror is chosen based on racial discrimination, that type of harm is not imposed because such discrimination is not visible to other empaneled grand jurors. *See id.* at 1424. The Justice said that according to the State, the harm only becomes visible when there is an evolving pattern over a number of years. *See id.* The Court maintained that this argument underestimated the gravity of Campbell's allegations. *See id.* If the prosecutor in *Powers*, the Court asserted, acted because of racial bias, there was no actual bias demonstrated by the judge and jury. *See id.* On the other hand, the Court professed that if the allegations in Campbell's case are true, "the impartiality and discretion of the judge himself would be called into question." *Id.*

106 *See id.* at 1423. The Court said the grand jury is similar to the petit jury in that it "'acts as a vital check against the wrongful exercise of power by the State and its prosecutors.'" *Id.* at 1423 (quoting *Powers*, 499 U.S. at 411). The grand jury, the Court articulated, "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a lesser or greater offense, including the important decision to charge a capital crime." *Id.* The integrity of grand jury decisions, the Court said, is contingent on the integrity of the grand juror selection process. *See id.* *But see* Cassell v. Texas, 339 U.S. 282, 302 (1950) (Jackson, J., dissenting) (downplaying the role of grand jury indictments); *see also supra* note 65 (discussing racial discrimination in grand juror selection).

The Court drew attention to the constitutional guarantee of the Fifth Amendment that a grand jury be used in order for the federal government to initiate

the fairness of grand jury decisions once racial discrimination taints the selection process.[107]

Next, the Court addressed the requirement that a close relationship exist between the defendant and the excluded jurors.[108] The Court did not treat a white defendant's ability to advocate effectively for excluded grand jurors any differently than his ability to advocate effectively for excluded petit jurors as held in *Powers*.[109] Justice Kennedy noted that the interest in abolishing discrimination in the grand jury selection process is one shared by both the excluded grand juror and the defendant.[110] Moreover, the Justice drew attention to the defendant's vital interest in promoting the rights of the excluded juror because a finding of discrimination may lead to a reversal of his conviction.[111]

Finally, the Court addressed the third requirement: that excluded grand jurors are hindered from asserting their rights.[112] The Court concluded that the economic disincentives that exist for the

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prosecutions. *See id.*; *see also supra* note 41 (quoting the Fifth Amendment, discussing the grand jury, and noting the nature of the crimes whereby states will allow for a grand jury). Additionally, the Court noted that the grand jury requirement of the Fifth Amendment does not bind the states. *See Campbell*, 118 S. Ct. at 1423 (citing Hurtado v. California, 110 U.S. 516 (1884)). *But see Hurtado*, 110 U.S. at 539 (Harlan, J., dissenting) (standing for the proposition that due process of law requires the use of a grand jury when a person will be made to answer for a capital crime).

[107] *See Campbell*, 118 S. Ct. at 1423 (citing *Rose*, 443 U.S. at 555-56); *see also supra* note 65 (discussing the effects of discrimination on the justice system).

[108] *See Campbell*, 118 S. Ct. at 1424.

[109] *See id.* (citing *Powers*, 499 U.S. at 413-14).

[110] *See id.* Justice Kennedy referred to the State's argument that Campbell's relationship to those jurors excluded for the past 16.5 years is "'tenuous, at best.'" *Id.* (quoting Brief for Respondent at 22, Campbell v. Louisiana, 118 S. Ct. 1419 (1998) (No. 96-1584). *See supra* note 26 (noting Campbell's evidence that from January 1976 to August 1993, a period of 16.5 years, no black individual served as a grand jury foreman in Louisiana). The Court stated, however, that it is not necessary for Campbell to prove that a close relationship existed with the jurors excluded for the past 16.5 years. *See Campbell*, 118 S. Ct. at 1424. The shared interest in abolishing discrimination, the Court explained, sufficiently satisfies the requirement of a close relationship. *See id.* The Justice articulated that Campbell's evidence "based on past treatment of similarly situated venirepersons . . . ." merely seeks to prove intentional discrimination. *Id.* (citations omitted).

[111] *See Campbell*, 118 S. Ct. at 1424; *see also Rose*, 443 U.S. at 558 (pointing out that if a conviction is reversed due to discrimination in the selection of a grand jury, a defendant who is in fact guilty can be indicted and tried again pursuant to constitutional procedures); Cassell v. Texas, 339 U.S. 282, 290 (1950) (reversing a criminal conviction because of discrimination in choosing grand jurors).

[112] *See Campbell*, 118 S. Ct. at 1424.

excluded petit jurors in *Powers*, likewise exist for excluded grand jurors.[113]

Having concluded that Campbell satisfied the third-party standing requirements, the Court turned to Campbell's due process claim.[114] Justice Kennedy asserted that it is "axiomatic" that an individual has standing to litigate his own due process rights,[115] and thus the Court held that Campbell had standing.[116] The Court said that the Louisiana Supreme Court's reading of *Hobby* not to allow Campbell standing to assert a due process challenge was erroneous.[117] The *Hobby* decision, the Court noted, rejected a defendant's due process claim because the Court found that discrimination in the choice of the federal foreman did not violate principles of fundamental fairness owing to the "ministerial" nature of the foreman's duties.[118] Jus-

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[113] *See id.* (citing *Powers*, 499 U.S. at 415) (observing that a juror dismissed on racial grounds would have little incentive to initiate the long, difficult process to assert his rights); *see also supra* note 85 (discussing the impediments excluded jurors face in asserting their rights).

[114] *See Campbell*, 118 S. Ct. at 1424.

[115] *See id.*; *see also* 1 BEALE ET AL., *supra* note 24, § 3:25, at 115 (observing that "[a]s a general matter . . . a defendant has standing to challenge the composition and selection of the grand jury that indicts him . . . .")

[116] *See Campbell*, 118 S. Ct. at 1424-25. The Court confined its holding to the standing question. *See id.* at 1424. Justice Kennedy explained that it was not necessary to delve into the nature and extent of the due process rights a defendant has when he alleges discrimination in choosing grand jurors. *See id.* Justice Kennedy indicated that, in the framework of grand jury selection, it is not necessary to address the nature and extent of due process protection, and it should be determined on the merits. *See id.* at 1424. The Justice intimated that such an issue may not even have to be addressed by a court since it would be looking at the equal protection claim as well. *See id.* The Justice said that the due process question was addressed in *Peters*, but there was no agreement among a majority of the Justices in *Peters* on a comprehensive articulation of the due process rule or what an appropriate remedy would be for a violation. *See id.* (citing Peters v. Kiff, 407 U.S. 493, 493 (1972)). Justice Marshall stated that "[W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand . . . jury on the ground that it arbitrarily excludes . . . members of any race, and thereby denies him due process of law." *Peters*, 407 U.S. at 504; *see also supra* notes 53-58 and accompanying text (discussing *Peters*).

[117] *See Campbell*, 118 S. Ct. at 1425.

[118] *See id.* The Court said that the Louisiana Supreme Court was wrong when it "decided a Louisiana grand jury foreperson's duties were ministerial too, but then couched its decision in terms of Campbell's lack of standing to litigate a due process claim." *Id.* Justice Kennedy maintained that the Louisiana Supreme Court's reading of *Hobby* was incompatible with what the Court articulated in *Hobby*. *See id.* Justice Kennedy explained that in *Hobby* the foreman was chosen from already selected grand jurors, so arguably the choice to pick one juror over another could affect the defendant only if that foreman were given duties not enjoyed by the other grand jurors. *See id.* In light of this circumstance, Justice Kennedy said the *Hobby* Court concluded that the ministerial nature of the federal foreman "'is not such a vital one

tice Kennedy recognized that Campbell's claim was wholly different from the one asserted in *Hobby*.[119] What concerned Campbell, the Court noted, was not the foreman's presiding capacity, but, rather the foreman's voting capacity as a member of the grand jury.[120]

The Court then briefly touched upon Campbell's standing to bring a fair cross-section claim.[121] Noting that this issue was not discussed by either the Louisiana Supreme Court or the Louisiana Court of Appeal, Justice Kennedy did not address the issue.[122]

Taking into account the harm that discrimination in the grand jury selection process inflicts upon the justice system, the Court stressed that both defendants and excluded grand jurors have an interest in removing that discrimination.[123] Reiterating the *Powers* criteria for third-party standing, the Court concluded that a white defendant has standing to assert the equal protection rights of those black veniremen excluded from the grand jury on the basis of race.[124] The Court distinguished a federal grand jury foreman from a state grand jury foreman in Louisiana, and declared that a defendant's standing to raise his own due process rights is indisputable.[125] Accordingly, the Court reversed the Louisiana Supreme Court and remanded the case for further proceedings.[126]

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that discrimination in the appointment of an individual to that post significantly invades' due process." *Id.* (quoting *Hobby*, 468 U.S. at 346); *see also supra* notes 66-72 and accompanying text (discussing *Hobby*).

119 *See Campbell*, 118 S. Ct. at 1425. The difference, the Court said, rested with the fact that Campbell's challenge "implicate[d] the impermissible appointment of a member of the grand jury." *Id.*

120 *See id.* The Court observed that *Hobby* noted this distinction in its discussion of *Rose v. Mitchell*. *See id.* (citing Rose v. Mitchell, 443 U.S. 545 (1979)). Justice Kennedy relayed the *Rose* Court's assumption that relief could be afforded for a constitutional challenge asserted against discrimination in choosing the foreman of a state grand jury. *See id.* (citing *Rose*, 443 U.S. at 556). The Justice proceeded to discuss how *Hobby* distinguished *Rose* by calling attention to the different foreman selection procedure used in Tennessee. *See id.* (citing *Hobby*, 468 U.S. at 347). The Court reiterated *Hobby's* view that discrimination in state court was more serious than in federal court. *See id.* (citing *Hobby*, 468 U.S. at 348).

121 *See id.*

122 *See id.* The Justice stated that it is very rare for the Court "'to consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.'" *Id.* (quoting Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997) (per curiam)). The Court noted that Campbell had not endeavored to meet the burden he had of showing that the fair cross-section issue was properly put forward to the lower appellate courts; Campbell devoted little attention to the fair cross-section issue in his brief. *See id.*

123 *See Campbell*, 118 S. Ct. at 1424.

124 *See id.* at 1423-24.

125 *See id.* at 1424-25.

126 *See id.* at 1425-26.

Justice Thomas, joined by Justice Scalia, wrote a separate opinion concurring in part and dissenting in part.[127] Justice Thomas concurred with the majority that Campbell has standing to raise a due process claim.[128] The Justice, however, dissented from the Court's holding regarding Campbell's standing to raise third-party equal protection claims.[129]

Justice Thomas initially expressed confusion as to how releasing a white murderer would vindicate the rights of black individuals excluded from jury service.[130] According to the Justice, the Court applied *Powers's* third-party standing doctrine to an improper context.[131] Furthermore, Justice Thomas asserted that *Powers* should be overruled.[132]

[127] *See id.* at 1426. (Thomas, J., concurring in part and dissenting in part).

[128] *See id.* Justice Thomas maintained that he joined the Court's opinion regarding standing to raise the due process claim because the opinion only addressed standing and not the "nature and extent" of the due process right. *See id.* at 1427 n.3 (Thomas, J., concurring in part and dissenting in part).

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

[130] *See id.* Justice Thomas reiterated the holding of *Powers* that a white defendant could challenge his conviction due to equal protection violations against excluded black prospective jurors. *See id.*

[131] *See id.* Justice Thomas characterized the doctrine as "misguided." *Id.* The Justice explained that he dissented from the Court's opinion dealing with the equal protection claim because he believed *Powers* to be incorrect and "inapposite to the case at hand." *Id.* Observing that Campbell's case did not involve peremptory strikes or discrimination in choosing petit jurors, Justice Thomas argued that, even if the justifications of *Powers* were persuasive, they were "wholly inapplicable" to the present case. *See id.* (Thomas, J., concurring in part and dissenting in part).

[132] *See id.* at 1426 (Thomas, J., concurring in part and dissenting in part). The Justice maintained that equal protection law and the principles of standing were distorted by *Powers*. *See id.* Justice Thomas noted that the *Batson* line of cases including *Powers* "is a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges." *Id.* n.1 (Thomas, J., concurring in part and dissenting in part). *See supra* notes 73-77 and accompanying text (discussing *Batson*).

Justice Thomas observed that the *Powers* holding "broke new ground." *See id.* at 1426 (Thomas, J., concurring in part and dissenting in part). Justice Thomas focused on Justice Scalia's observations in *Powers* that the defendant did not even establish the needed injury in fact, i.e., that the discriminatory use of the peremptory challenge against the excluded jurors exerted any effect on the outcome of his trial. *See id.* (citing Powers v. Ohio, 499 U.S. 400, 426-29 (1991) (Scalia, J., dissenting)).

Justice Thomas also expressed his disagreement over *Powers*'s conclusion that there was a close relationship between the defendant and the venireman. *See id.* at 1427 (Thomas, J., concurring in part and dissenting in part). The Justice stated, "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." *Id.* The Justice opined that a black venireman would surely "be dismayed to learn that a white defendant used the venireman's constitutional rights as a means to over-

Turning to the first requirement for third-party standing, Justice Thomas maintained that there was no injury in fact.[133] The Justice reasoned that even if a judge discriminatorily chose the grand jury foreman from the venire while the remaining grand jurors were chosen at random, this would not amount to an "overt" wrong that would influence the grand jury's proceedings or the subsequent trial.[134] Moreover, Justice Thomas asserted that Campbell's injury-in-fact allegation was foreclosed, noting that there was no allegation that Campbell's trial jury was tainted with discrimination.[135] Remarking that Campbell himself had used five peremptory strikes at the petit jury stage, Justice Thomas said this fact belied Campbell's own alleged injury caused by discrimination at the grand jury phase.[136] Continuing, Justice Thomas explained that precedent concerning discrimination in the grand jury selection process had only pertained to defendants raising their own rights, not to defendants raising third-party claims.[137]

Justice Thomas criticized the Court's finding that a close relationship existed between Campbell and the excluded black veniremen, and called attention to the Court's failure to identify precisely whose rights Campbell was seeking to vindicate.[138]

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turn the defendant's conviction." *Id.* A similar dismay would occur, the Justice suggested, "[I]f the defendant and the excluded venireman were of the same race." *Id.* n.2.

Finally, Justice Thomas said that the obstacles that the excluded veniremen face in bringing suit are not sufficient to allow third-party standing. *See id.* at 1427; *see also supra* note 85 (explaining the challenges excluded jurors would face).

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

[134] *See id.* Justice Thomas explained *Powers*'s reasoning that continual use of peremptory strikes against individuals of one race "constituted an 'overt wrong, often apparent to the entire jury panel,' that threatened to 'cas[t] doubt over the obligation of the parties, the jury, and indeed the court throughout the trial of the cause.'" *Id.* (quoting *Powers*, 499 U.S. at 412) (alteration in original). Because the visibility of the discrimination in *Campbell* was significantly less than in *Powers*, Justice Thomas said that the *Campbell* Court resorted 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." *Id.*

[135] *See id.* Justice Thomas reported that the allegation was only discrimination in the choice of one grand jury member. *See id.* The Justice contended that the "properly constituted petit jury's verdict of guilt beyond a reasonable doubt was in no way affected by the composition of the grand jury." *Id.* Such a verdict, the Justice asserted, "conclusively establishes that no reasonable grand jury could have failed to indict [Campbell]." *Id.*

[136] *See id.*

[137] *See id.*

[138] *See id.* at 1428 (Thomas, J., concurring in part and dissenting in part). Justice Thomas failed to see how such a relationship could even develop. *See id.* Regarding whose rights Campbell was going to vindicate, the Justice asked: "Is it all veniremen

Finally, Justice Thomas noted that alleged systematic discrimination in the grand jury selection process provides a significant number of potential plaintiffs who could assert equal protection claims.[139] Thus, the Justice suggested that, in a case of racially discriminatory jury selection, many opportunities exist for excluded jurors to raise discrimination claims, so it is not necessary for a defendant of a different race to do so on their behalf.[140]

The *Campbell* decision received attention in newspapers nationwide.[141] This fact is hardly surprising given the preeminence of racial issues in the nation's consciousness. Race discrimination in choosing jurors has concerned the Supreme Court since *Strauder v. West Virginia*[142] was decided 120 years ago. However, questions arise as to why the Court has prohibited race-based discrimination in jury selection.[143]

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who were not chosen as foreman? Is it all non-white veniremen? All black veniremen? Or just the black veniremen who were not ultimately chosen for the grand jury?" *Id.* Additionally, Justice Thomas's opinion maintained:

> Even if a "bond" could develop between veniremen and defendants during voir dire, such a bond could not develop in the context of a judge's selection of a grand jury foreman — a context in which the defendant plays no role. Nor can any "common interest," between a defendant and excluded veniremen arise based upon a public humiliation suffered by the latter, because unlike the exercise of peremptory strikes, Evangeline Parish's process of selecting foremen does not constitute "overt" action against particular veniremen. Rather, those veniremen not chosen (all but one) are simply left to take their chances at being randomly selected for the remaining seats on the grand jury.

*Id.* (citation omitted).

[139] *See Campbell*, 118 S. Ct. at 1428. The Justice distinguished the *Batson*-context cases in which one may allege discrimination based solely on the case at bar, rather than examining past history of discrimination. *See id.*

[140] *See id.*

[141] *See* Laurie Asseo, *Anti-Black Bias Can Harm Whites, High Court Says*, THE RECORD (OF HACKENSACK), Apr. 22, 1998, at A12; *Bias Challenge in Selection of La. Grand Jury Is Upheld*, BOSTON GLOBE, Apr. 22, 1998; at A11; Tony Mauro, *Court: Whites Harmed by Anti-Black Bias*, USA TODAY, Apr. 22, 1998, at 1A; Frank J. Murray, *Killer's Cross-Race Bias Claim Is Upheld*, WASH. TIMES (D.C.), Apr. 22, 1988, at A6.

[142] *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 725 (1992); *see also supra* notes 43-46 and accompanying text (discussing *Strauder*).

[143] *See* Underwood, *supra* note 142, at 725. The author poses the following questions: "Does the Constitution prohibit race-based jury selection on the theory that it results in biased juries, whose verdicts thereby harm the disfavored litigants? Or does the constitutionally significant harm of race-based jury selection lie . . . in the injury to the excluded jurors or the group stigmatized by exclusion?" *Id.* The *Campbell* Court recognized the harm inflicted on the defendant. *See Campbell*, 118 S. Ct. at 1423 ("Regardless of his or her skin color, the accused suffers a significant injury in fact when the composition of the grand jury is tainted by racial discrimination."). It is interesting that the *Campbell* Court did not discuss the nature of the injury inflicted on excluded grand jurors. However, in *Powers*, the Court noted the stigma or

The *Campbell* decision has left some questions unanswered. Though the Court conclusively held that Campbell had standing, the Court did not address whether a white defendant's own equal protection rights are violated when there is discrimination against blacks in grand jury selection.[144] Avoiding this issue and simply focusing on a defendant's due process rights is easier for the Court because it can rely on the holding in *Peters v. Kiff*[145] that due process rights are violated when there is race-based discrimination in grand or petit jury selection.[146] Although it is more convenient for the Court to focus solely on the due process issue, the *Campbell* decision did not delve into the nature and extent of a white defendant's due process rights in this context.[147] However, given the general recognition that standing is appropriate when a defendant seeks to challenge the composition and selection procedure of his indicting grand jury, the Court was correct to grant Campbell standing to litigate his due process claim.

With its ruling in *Campbell*, the Court has expanded the third-party standing doctrine too far. The Court does not adequately explain how alleged discrimination in choosing one grand juror imposes harm on a defendant who has been convicted by a permissibly constituted petit jury. Even though the *Powers* Court found an injury in fact, *Powers* did not explicitly state that a white defendant is significantly harmed by discrimination against blacks in the petit jury context.[148] An injury to an excluded juror should not be synonymous with an injury to a defendant.[149]

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dishonor that might attach to an excluded petit juror. *See* Powers v. Ohio, 499 U.S. 400, 410 (1991).

[144] *See Campbell*, 118 S. Ct. at 1423.

[145] 407 U.S. 493, 502 (1972) ("[A] State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner . . . .").

[146] *See* Underwood, *supra* note 142, at 737. "A due process analysis avoids the various problems inherent in the effort to specify how the defendant is denied equality by race-based jury selection." *Id.* Under such a formulation, it is ironic that the Court avoids a white defendant's own equal protection claim. It would appear that the Court is being pulled in two directions. On the one hand, the Court is striving towards a jurisprudence where distinctions on racial lines should be avoided. On the other hand, the Court is being forced to differentiate between black and white defendants.

[147] *See Campbell*, 118 S. Ct. at 1424.

[148] *See Powers*, 499 U.S. at 427 (Scalia, J., dissenting). In *Powers*, Justice Scalia argued that the majority merely defined the defendant's injury as "cognizable." *See id.* This, the Justice remarked, did not meet the necessary threshold of injury in fact. *See id.* Furthermore, Justice Scalia observed that the majority claimed that the defendant had a concrete interest in challenging the discrimination. *See id.* The Justice retorted, however, that any possibility of overturning the defendant's conviction

Nor does the *Campbell* Court address, as it should have, why a defendant can have standing to raise the equal protection rights of third parties, but not the rights of third parties whose Fourth Amendment rights are violated.[150]

The Court's point that a defendant would be an effective advocate for excluded jurors is an obvious one, but the Court did not address the possibility that those jurors may not have wanted to assert their rights.[151] However, it can hardly be said that the defendant and the excluded jurors share the common interest of removing discrimination from the courtroom for the same reasons.[152] For the excluded jurors, the removal of discrimination may be a goal in itself, while for the white defendant it is merely a means to an end: the reversal of his conviction.[153]

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would give the defendant a concrete interest. *See id.* For example, the Justice observed that a defendant "would have a concrete interest in challenging a mispronunciation of one of the juror's names, if that would overturn his conviction." *Id.*; *see also* Nunn, *supra* note 45, at 99 (noting that, in regard to the injury-in-fact requirement, the *Powers* Court "focused on the *possibility* of injury to the defendant rather than *actual* injury.").

[149] *See Powers*, 499 U.S. at 426-27 (Scalia, J., dissenting). Justice Scalia pointed out in his *Powers* dissent that the Supreme Court had recently held that "the exclusion of members of a particular race from a jury does not produce an unfair jury, and suggested that in some circumstances it may increase fairness." *Id.* (citing Holland v. Illinois, 493 U.S. 474, 480-81 (1990)).

[150] *See Powers*, 499 U.S. at 428 (Scalia, J., dissenting); *see Campbell*, 118 S. Ct. at 1426 (Thomas, J., concurring in part and dissenting in part). Both Justices Scalia and Thomas noted that defendants cannot challenge their convictions based on Fourth Amendment violations of third parties. *See id.*; *see also supra* note 86 (quoting the Fourth Amendment). Of course, this difference may rest with the fact that a Fourth Amendment violation is more outrageous and hostile to an individual than is discrimination in court. The excluded juror may not know discrimination has occurred, or if he suspects something he will not get far if he objects. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 193-94 (1989). If a juror were to complain about being excluded, "The court would reply that a juror may not interrupt an ongoing criminal proceeding to demand a hearing simply because the juror's own rights may have been violated. In accordance with customary practice, jurors should speak only when spoken to." *Id.* at 194; *see also Powers*, 499 U.S. at 414 (noting the infrequency of challenges by excluded jurors).

[151] *See* Singleton v. Wulff, 428 U.S. 106, 113-14 (1976). In *Singleton*, the Court said that federal courts should not adjudicate unnecessarily the rights of third persons not before the court and "it may be that in fact the holders of those rights . . . do not wish to assert them . . . ." *Id.*

[152] *See* Nunn, *supra* note 45, at 101 (standing for the proposition that the defendant's stake in the outcome, the reversal of the conviction, means that he will be "motivated primarily by the desire to go free, not the desire to do racial justice or to vindicate the rights of the excluded jurors").

[153] *See id.* at 102. White defendants may rely on the equal protection rights of blacks but only when it is in their interest to do so. *See id.* Allowing the white defendant standing to represent the interests of the excluded blacks silences black voices

In Louisiana, the best way to avoid future implications of *Campbell* would be to enact legislation changing the method by which grand jury foremen are selected.[154] For future white criminal defendants, *Campbell* has now paved an avenue to challenge their convictions; however, it is unclear how significant a decision it is.[155] What is clear is that the Supreme Court is committed to the eradication of racial discrimination in our justice system. The Court's choice to expand third-party standing in the grand jury context helps to further this goal.[156] However, the expansion of standing may actually serve to

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and "allows white defendants to shape Equal Protection jurisprudence according to their needs." *Id.* The result of such an arrangement is that adequate litigation of black jurors' equal protection rights becomes less likely. *See id.*

[154] *See* Bill Walsh & Bruce Alpert, *Court Lets White Man Press Jury Bias Claim*, NEW ORLEANS TIMES-PICAYUNE, Apr. 22, 1998, at A1 (reporting that Richard Ieyoub, the Louisiana Attorney General, noted that legislation may be required to have the judges choose foremen from among the existing group of jurors).

[155] *See* Aaron Epstein, *Court Rules on Grand Jury Race Bias, Justices Say Whites Can Challenge Charges if Blacks Excluded*, AUSTIN AM.-STATESMAN, Apr. 22, 1998, at A3. The article quotes Neal Sonnet, a criminal defense lawyer, saying, "'I don't think [*Campbell*] is a groundbreaking opinion' . . . . 'It's not going to open the jailhouse doors, but it creates another way for defendants to attack their convictions.'" *Id.*; *see also White Killer Wins Appeal, Cites Racism*, SALT LAKE TRIB., Apr. 22, 1998, at A10. This article quotes Richard Ieyoub, the Attorney General of Louisiana, who said that, in order for Campbell to get his conviction reversed, he will still "'have to offer proof that there was in fact discrimination in the selection of [his] grand jury.'" *Id.*

It is also unclear how *Campbell* will play out in the state of Ohio, a state whose grand jury foreman selection process is similar to the one in Louisiana. *See* Campbell v. Louisiana, 118 S. Ct. 1419, 1422 (1998). Barbara P. Gorman, an Administrative Common Pleas Judge in Montgomery County, Ohio, said that the *Campbell* ruling would probably not affect the method by which grand juries are selected in her county. *See U.S. Supreme Court — Ruling Lets Whites Challenge Jury Picks*, DAYTON DAILY NEWS, Apr. 22, 1998, at 3A. The judge went on to say that "'I'm confident we have a system that hasn't excluded anybody' . . . . 'We'll read the case and decide if it affects us. I do know we have had minority forepersons in recent memory.'" *Id.*

[156] *See Still Grappling with Race Legacy*, BATON ROUGE ADVOC., Apr. 27, 1998, at 6BS. In asking why the Supreme Court has devoted such concern to grand juror selection, the article offered the explanation that the Court is still:

> cleaning up the theoretical residue of a very practical problem: The legacy of racism that once was common in the justice system.
>
> At one time courts took, bold, decisive steps necessary to attack bias against black citizens. Decades later, the Supreme Court still frequently considers race. But the big-picture race issues are settled. The court now considers more minute issues resulting from those bigger decisions.
>
> And the court must address those issues, not by considering just the bald facts of one murder in Evangeline Parish, but by theoretically applying the U.S. Constitution to the overall justice system.
>
> Last week, the court was reduced to deciding whether a white murderer has as much standing as a black murderer to defend rights of law-abiding citizens who might have been unfairly left off a jury.
>
> In effect, the court shrugged, and said, why not?

undermine the goal of increasing minority representation on juries.[157] One wonders if the Court has chosen the appropriate custodians to assert the claims of excluded black jurors.[158] Nevertheless, the Court took a pragmatic approach towards attaining a praiseworthy objective.

*Patrick McCormack*

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*Id.*

[157] *See* Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 709 (1993). King reports that an increasing number of courts and lawmakers are utilizing race-conscious measures to insure a *higher* percentage of minorities on juries. *See id.* at 709. Such means may actually be labeled as "racial quotas" to guarantee a certain minority presence in jury service. *See id.* King argues, however, that the Supreme Court's standing rulings have made it simpler for civil litigants and criminal defendants to challenge such race-conscious methods. *See id.*

[158] *See* Nunn, *supra* note 45, at 102. The author maintains that there is still pervasive racism directed at blacks from whites and criticizes the *Powers* decision as one that entrusted the well-being of black persons "in the hands of white criminal defendants and their attorneys, who, generally speaking, have little or no concern for the elimination of racial discrimination in the courthouse." *Id.* The *Campbell* decision, too, allows for this same situation. However, one need not accept the proposition that there exists rampant discrimination against blacks in our nation's justice system to imagine interesting examples of third-party standing. For example, under the formulation of *Powers* and *Campbell*, it is conceivable that the equal protection rights of excluded black jurors can be asserted not only by white murderers, but by white murderers who are admitted white supremacists — a remarkable scenario. If that ever occurred, it would seem that the Court has indeed "set foxes to guard the chicken coop." *Id.*