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# The Unrecognized Right: How Wealth Discrimination Unconstitutionally Bars Indigent Citizens from the Jury Box

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NOTE

THE UNRECOGNIZED RIGHT: HOW WEALTH  
DISCRIMINATION UNCONSTITUTIONALLY  
BARS INDIGENT CITIZENS FROM  
THE JURY BOX

*Kevin J. Quilty\**

*In state jury trials, the amount of compensation paid to jurors is determined on a county level. This has produced a wide disparity in juror pay—from as high as around \$50.00 per day in some states to as low as around \$2.00 per day in others. For many people, especially non-salaried workers, such low amounts effectively bar participation as a juror. The traditional way in which courts have handled such a situation is to allow the indigent person to claim “hardship” and excuse him or her from jury service.*

*This Note suggests that such an approach may be backwards. Instead, this Note argues, courts should find that there is a fundamental right to serve on a jury and hold that de minimis juror pay unconstitutionally discriminates against indigent persons on the basis of wealth. Supporting this claim are writings and practices of the Founding generation regarding the importance of jury service, Supreme Court precedent regarding other fundamental rights—such as the right to vote—and empirical evidence demonstrating that low juror pay keeps many indigent individuals from being able to serve in the jury box.*

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\* J.D. Candidate, Cornell University Law School, 2015; I would like to thank the editorial staff of the Cornell Journal of Law and Public Policy for their suggestions and assistance during the preparation of this Note, Professor Valerie Hans for her assistance in forming and crafting this Note since its inception, and Zoe Jones for her steadfast support throughout the writing and editing process.

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#### INTRODUCTION

Imagine a man—we'll call him Mr. Vandelay. Mr. Vandelay is an intelligent, thoughtful, and judicious person. But the 2008 financial crash hit Mr. Vandelay hard, and he lost his once well-paying job. Mr. Vandelay now works at a restaurant making minimum wage in order to support his family. One day, Mr. Vandelay received a summons for jury duty. Mr. Vandelay views jury duty as one of the greatest aspects of the American governmental system. Mr. Vandelay sincerely believes that every person should be guaranteed the right to have a diverse group of his peers—not the government that is prosecuting him—decide his or her fate. Mr. Vandelay, however, is prevented from serving on the jury. He lives paycheck to paycheck, dollar to dollar. His employer will not pay him for the time he would serve on the jury, and the \$2.00 per day that the court would pay him would force his family to skip meals for the next week. He must claim financial hardship and be denied the opportunity to serve on the jury.

On the other side of town, Dr. Van Nostrand has also received a jury summons. Dr. Van Nostrand feels the same way about jury duty as Mr. Vandelay. Dr. Van Nostrand promptly asked his secretary to put the jury date on his calendar. Dr. Van Nostrand's employer will similarly not pay for time served on a jury. But this is no matter. Dr. Van Nostrand belongs to the middle class. Dr. Van Nostrand is selected to be on a jury. While serving, he votes to acquit an innocent man.

Mr. Vandelay and Dr. Van Nostrand are the same age, same gender, same race, and have the same IQ. Yet because of Mr. Vandelay's indigent status, he was denied the fundamental right to serve on a jury.

Perhaps I am getting ahead of myself. Is there even a "right" to serve on a jury? And if so, does discriminating against the indigent class

violate that right? These are the questions that this Note seeks to address.

As way of introduction, in the United States federal court system, jurors are guaranteed \$40 per day, plus costs associated with travel to and from the court.<sup>1</sup> State courts, however, do not conform to the federal system, and counties in each state set their own amount of pay.<sup>2</sup> Thus, the amount of pay for jurors in state courts varies widely. One scholar found juror pay in counties across the nation to be as high as \$50.00 per day and as low as \$2.00 per day.<sup>3</sup> This Note explores whether such de minimis juror pay may unconstitutionally exclude indigent citizens from serving on the jury. Admittedly, there are no laws explicitly banning indigent persons from serving on a jury. But with juror pay set as low as \$2.00 per day, there is no need, for such persons will self-select out.

By concentrating on founding-era practices, Supreme Court jurisprudence, and empirical evidence, I conclude that there is a fundamental right to serve on a jury, and that discriminating against the indigent class, via de minimis juror pay, violates that right under the Equal Protection Clause of the Fourteenth Amendment.

## I. SUPREME COURT PRECEDENT REGARDING JURIES AND EQUAL PROTECTION

The Supreme Court has not held that denying a member of the indigent class the opportunity to serve on a jury violates the Fourteenth Amendment's equal protection guarantee. However, that in no way bars the Court from so holding in the future. Indeed, the Supreme Court has been notoriously sluggish in extending juror rights to minority groups. Analyzing Supreme Court rulings in jury selection cases pertaining to race or gender suggests that the Court could uphold an equal protection challenge for a member of the indigent class in the future. While tremendous progress has been made in advancing the right of equal protection for jurors in groups traditionally discriminated against, such as women<sup>4</sup>

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<sup>1</sup> 28 U.S.C. § 1871(b)(1) (2012) ("A juror shall be paid an attendance fee of \$40 per day for actual attendance at the place of trial or hearing. A juror shall also be paid the attendance fee for the time necessarily occupied in going to and returning from such place at the beginning and end of such service or at any time during such service.").

<sup>2</sup> See Evan R. Seamone, *A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 298 (2002).

<sup>3</sup> For example, the average jury compensation is \$50.00 per day in South Dakota, while states that compensate jurors according to county-based fees may be as low as \$2.00 per day in some South Carolina communities. See *id.* at 339. See also *Jury Management State Links*, NAT'L CENTER FOR ST. CTS., <http://www.ncsc.org/Topics/Jury/Jury-Management/State-Links.aspx?cat=Juror%20Pay> (last visited Mar. 1, 2015) (finding that Nevada does not pay a juror for the first two days of jury service).

<sup>4</sup> See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975) (holding that a jury system that forced women to "opt in" to jury service selection was unconstitutional).

and African-Americans,<sup>5</sup> that progress took years of slow, stilted developments. A brief recap of jury service jurisprudence in the realm of race and gender will help to illuminate the argument regarding indigent persons and equal protection.

### A. *Race, Gender, and Jury Selection in the Supreme Court*

Beginning before the founding of the country and lasting until at least the Civil War, jury service in the United States was reserved overwhelmingly for white males. Both women<sup>6</sup> and African-Americans<sup>7</sup> were specifically prohibited. After the Civil War, organic transformations in the states began to allow for both women and blacks to serve on juries.<sup>8</sup> This was, however, still the exception rather than the rule.<sup>9</sup>

Meaningful change began with the passage of the Civil Rights Act of 1875,<sup>10</sup> which made it a criminal offense to disqualify African-Americans from jury service on account of their race.<sup>11</sup> It was this statute that also provided the first Supreme Court intervention into jury selection. Five years after the enactment of the Civil Rights Act of 1875, the Supreme Court decided a “trilogy”<sup>12</sup> of cases that “confirmed the validity of the [1875] statute, as well as the broader constitutional imperative of race neutrality in jury selection.”<sup>13</sup> During the post-war Reconstruction effort, African-Americans in the South served in large numbers on juries, especially in communities with large black populations.<sup>14</sup>

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<sup>5</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986) (holding that racially motivated peremptory challenges were unconstitutional).

<sup>6</sup> Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 934 (2011) (quoting Blackstone’s pronouncement that women had *propter defectum sexus*, a “defect of sex,” which rendered them ineligible for jury service).

<sup>7</sup> See *id.* at 934–35 (explaining that in the antebellum period, African-Americans were “excluded from jury service in all southern and most northern states”).

<sup>8</sup> See *id.* at 935–36 (noting the first and increasing opportunities after the Civil War for women and African Americans to serve on juries).

<sup>9</sup> See *id.* at 936–37 (noting that women were still subject to the systematic exclusion from juries, while the ensuing disfranchisement of African Americans in the South facilitated the exclusion of blacks from juries).

<sup>10</sup> Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* *United States v. Stanley* (The Civil Rights Cases), 109 U.S. 3 (1883).

<sup>11</sup> *Id.* (“That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a 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 . . .”), *quoted in* Chhablani, *supra* note 6, at 936 n.18.

<sup>12</sup> See *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (labeling the “trilogy” as *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); and *Ex parte Virginia*, 100 U.S. 339 (1880)).

<sup>13</sup> *Id.*

<sup>14</sup> Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 371.

But as Reconstruction came to an end, the number of African-Americans serving on juries dwindled almost to a vanishing point.<sup>15</sup> Although the Supreme Court had struck a victory for equality in the jury box with its trilogy of cases interpreting the Civil Rights Act of 1875, the effect of these rulings was severely watered down by later Supreme Court holdings. Indeed, the Supreme Court subsequently imposed “stringent standards of proof on defendants alleging race discrimination in jury selection and announc[ed] a broad rule of deference to state court findings on the question of discrimination.”<sup>16</sup>

Women were likewise excluded from general jury service for most of the nation’s history.<sup>17</sup> However, prior to 1921, some women were allowed to serve on special juries regarding “cases involving pregnancy or children’s welfare.”<sup>18</sup> Although women did gain some traction in the opportunity to participate in jury service after the passage and ratification of the Nineteenth Amendment, most states still excluded women from serving on the jury.<sup>19</sup> As late as the 1960s, the Supreme Court was still hesitant to give full equal protection to women. Exemplary is the 1961 decision in *Hoyt v. Florida*.<sup>20</sup> In that case, the Supreme Court upheld a Florida statute that excluded women from jury service unless they proactively registered with the clerk of the court and voiced their desire to be placed on the jury list.<sup>21</sup>

### B. *The Modern Era of the Supreme Court’s Race and Gender Jurisprudence*

The Supreme Court began its modern approach to jury composition in the 1940s. The truly “landmark case in the advancement of the fair cross-section requirement”<sup>22</sup> was *Smith v. Texas*.<sup>23</sup> There, the Supreme Court held that Texas’s jury scheme, while facially neutral, was being carried out in a way that systematically excluded African-Americans from jury service.<sup>24</sup> The Fourteenth Amendment’s guarantee of equal protection, the Court stated, must actually be put into action, not merely

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<sup>15</sup> See *id.* (“[B]lacks became noticeably less present on southern juries by the late 1880s and generally disappeared in the 1890s. Through the first three decades of the twentieth century, essentially no blacks sat on southern juries.”).

<sup>16</sup> *Id.* at 304.

<sup>17</sup> See Chhablani, *supra* note 6, at 937.

<sup>18</sup> NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 73 (2007).

<sup>19</sup> See *id.*

<sup>20</sup> *Hoyt v. Florida*, 368 U.S. 57 (1961).

<sup>21</sup> See *id.* at 58.

<sup>22</sup> See Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 335 (2005).

<sup>23</sup> *Smith v. Texas*, 311 U.S. 128 (1940).

<sup>24</sup> See *id.* at 130–31.

promised.<sup>25</sup> Two years later, the Supreme Court in *Glasser v. United States*<sup>26</sup> reaffirmed *Smith v. Texas* and made explicit its view that a proper “cross-section of the community” was required for selecting prospective jurors so that a jury is a true representation of society.<sup>27</sup>

The Supreme Court continued this line of rulings into the late 20th century. The Court again extolled the virtues of a “cross section” of the community in the 1975 case, *Taylor v. Louisiana*.<sup>28</sup> In *Taylor*, the Court explicitly overturned its holding in *Hoyt* and ruled that the systematic exclusion of women from jury selection via an “opt-in” process was unconstitutional.<sup>29</sup> Eleven years after *Taylor*, the Court made another strong statement in *Batson v. Kentucky*.<sup>30</sup> The Court in *Batson* held that the Equal Protection Clause shielded prospective members of a jury from being stricken via peremptory challenge on account of their race.<sup>31</sup>

Yet even *Batson*, an opinion written over one hundred years after the 1880 trilogy, is still widely criticized as not going far enough to end discrimination in the jury box.<sup>32</sup> Thus, although the Supreme Court has shown an ability to evolve on the issue of equality in the jury box, it moves at a glacial pace. The Court has taken the tentative first steps in recognizing and protecting indigent citizens’ right to serve on the jury.<sup>33</sup> But it has not yet afforded indigent citizens the same constitutional protections that it has for African-Americans and women. Before that can be done, however, it must be demonstrated that indigent citizens have actually been prevented from serving on juries because of de minimis juror pay.

## II. EMPIRICAL EVIDENCE

Juror pay in some counties is prohibitively low for indigent citizens. As mentioned above, the federal government has mandated minimum payment of \$40.00 per day for jurors.<sup>34</sup> This, however, has not been

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<sup>25</sup> See *id.* at 130 (“The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.”).

<sup>26</sup> *Glasser v. United States*, 315 U.S. 60 (1942).

<sup>27</sup> See *id.* at 86 (stating that the proper functioning of the jury system requires the jury body to truly represent the community and that officials charged with choosing jurors should make selections that comport with the concept of the jury as being a cross-section of the community).

<sup>28</sup> *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>29</sup> *Id.* at 537 (“[W]e think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex . . . . To this extent we cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida*.”).

<sup>30</sup> 476 U.S. 79 (1986).

<sup>31</sup> *Id.* at 89.

<sup>32</sup> Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1588–91 (2012) (enumerating the ways *Batson* has been ineffective).

<sup>33</sup> See *infra* Part IV.

<sup>34</sup> 28 U.S.C. § 1871(b)(1) (2009).

applied to the states. While some states have statutorily mandated employer compensation for jury duty, even those statutes have serious limitations.<sup>35</sup> Some states, for example, only cover full-time, salaried employees.<sup>36</sup> Other states qualify their reimbursement scheme with factors such as requiring that the individual who was called for jury duty to have young children.<sup>37</sup> Furthermore, courts have dealt with financial issues preventing people from serving on a jury in a backwards manner. Instead of raising the pay for jurors, they have excused jurors who cannot participate because of “financial hardship.”<sup>38</sup>

Would increased juror pay lead to higher juror participation, and thus a more representative cross-section of society in the jury box? Anecdotal, this certainly seems to be the case.<sup>39</sup> The empirical evidence also suggests it would. For example, in 1993, Arizona began a major review of jury service in the state. Arizona assigned a committee the task of leading the review and reporting its findings.<sup>40</sup> To gather evidence, the committee established over fifteen subcommittees, each of which examined particular issues pertaining to jury service and then reported back to the full committee.<sup>41</sup> The juror pay in 1993 in Arizona was \$12 per day, plus travel mileage reimbursement.<sup>42</sup> The committee stated in its report that it believed such a low per diem discouraged potential jurors from serving for financial reasons.<sup>43</sup> Specifically, the report concluded: “At present, juror pay is so low as to be unfair. It is especially unfair to jurors who have no or only modest incomes. Low juror pay also contributes to jury underrepresentativeness by discouraging low income persons from serving.”<sup>44</sup> After studying other states with a higher per diem, the committee urged that jury pay be increased to \$50 per day.<sup>45</sup> To offset the costs to the state, the committee recommended

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<sup>35</sup> See generally Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1 (2012).

<sup>36</sup> See, e.g., N.H. REV. STAT. ANN. § 275:43-b (2010) (protecting only salaried employees, not all employees), cited in Preller, *supra* note 35, at 12.

<sup>37</sup> See, e.g., TEX. GOV'T CODE ANN. § 62.106(a)(2) (West 2013) (covering only parents with children age twelve and under), cited in Preller, *supra* note 35, at 12.

<sup>38</sup> See, e.g., *United States v. Edouard*, 200 F. App'x 970, 971 (11th Cir. 2006) (“A juror can be excused from jury duty because of severe financial hardship.”).

<sup>39</sup> See, e.g., Andrew Sullivan, *Why Does Everyone Hate Jury Duty?* Ctd, THE DISH (Feb. 29, 2012, 10:19 AM), <http://dish.andrewsullivan.com/2012/02/29/why-does-everyone-hate-jury-duty-ctd-2/> (publishing complaints, among other things, about low juror pay).

<sup>40</sup> See B. Michael Dunn & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996).

<sup>41</sup> See ARIZ. SUPREME COURT COMM., JURORS: THE POWER OF 12—REPORT OF THE ARIZONA SUPREME COURT COMMITTEE ON MORE EFFICIENT USE OF JURIES (1994) [hereinafter THE POWER OF 12].

<sup>42</sup> Dunn & Logan III, *supra* note 40, at 283.

<sup>43</sup> *Id.*

<sup>44</sup> See THE POWER OF 12, *supra* note 41, at 56.

<sup>45</sup> Dunn & Logan III, *supra* note 40, at 284.



two steps: first, that employers pay the first three days; and second, that the state eliminate the mile reimbursement for jurors who travel less than fifty miles round trip.<sup>46</sup> The committee came to the conclusion that such a scheme was feasible after studying empirical data on juror length of service in Arizona counties.<sup>47</sup> The business community, however, apparently had no interest in paying its employees while they were on jury duty and thus effectively halted this proposal in the legislature.<sup>48</sup>

Further empirical evidence buttresses the Arizona study's conclusions in different areas of juror pay. Employer reimbursement, for example, as it is currently constituted does not make up for the low amount of money that the court system pays. A study by Robert Boatright<sup>49</sup> showed that employer compensation can actually further the economic skew in the jury box. In Boatright's study, potential jurors were questioned about employer reimbursement. The responses showed that, based on employee belief, employer reimbursement actually increases as incomes rise.<sup>50</sup> A majority (72%) of those at the higher end of the income spectrum (\$80,000 or above) believed that they would be reimbursed by their employers; however, fewer than half (47%) of those making less than \$20,000 believed that their employers would reimburse them.<sup>51</sup> Empirical research has confirmed these beliefs.<sup>52</sup> Those who earn more income are more likely to be reimbursed by their employers for time spent in the jury box.<sup>53</sup> Thus, indigent individuals, who have a greater need to be reimbursed, are disincentivized from serving on the jury because of the low juror pay, while those with high incomes do not feel this effect. This, of course, leads to juries that are skewed towards wealthy individuals, throwing off the "cross section" requirement that the Supreme Court has insisted upon.

Furthermore, a study done by Professor Fukurai<sup>54</sup> underscores the immense importance of social status when determining who serves on a jury. Fukurai examined the effects of race and social class in jury selection. Social class, for Fukurai, was composed of "work related authority,

<sup>46</sup> *Id.*

<sup>47</sup> See THE POWER OF 12, *supra* note 41, at 57.

<sup>48</sup> See Dunn & Logan III, *supra* note 40, at 284 (citing the case of Arizona where the jury fee proposal was firmly rebuffed by the business community and the court was forced to withhold its legislative proposal).

<sup>49</sup> Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It*, 82 JUDICATURE 156 (1999).

<sup>50</sup> See *id.* at 163 tbl.6.

<sup>51</sup> See *id.*

<sup>52</sup> See PAULA L. HANNAFORD-AGOR, NAT'L CTR. FOR STATE COURTS, INCREASING THE JURY POOL: IMPACT OF THE EMPLOYER TAX CREDIT 5-6 (2004).

<sup>53</sup> *Id.*

<sup>54</sup> Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST. 77 (1996).

occupational standing, annual income, and perhaps ownership status.”<sup>55</sup> The data Fukurai collected led him to believe that a potential juror’s social class is more important than racial or ethnic backgrounds in determining jury participation.<sup>56</sup> Fukurai found that being a part of a low social class is a major impediment to serving on a jury.<sup>57</sup> Indeed, he asserted that “[b]lue-collar workers in insecure job positions also may face job loss if called for jury service.”<sup>58</sup> Although many states have provisions in their codes that prohibit firing employees for reporting for jury duty, some employees and supervisors are unaware of this.<sup>59</sup> Thus, despite these provisions, some workers may still be concerned—and rightly so—about their employment security.<sup>60</sup> Even if job loss does not occur, Fukurai nevertheless contends that prospective jurors making minimum wage “cannot afford a sudden and involuntary pay cut.”<sup>61</sup> Thus, a class of individuals, based on its lower social status, faces perhaps the greatest roadblocks to serving on a jury.

One study from Washington, on the surface, may appear to cut against this trend. A 2008 report to the Washington State Legislature chronicled the results of a study that argued that higher juror pay would not increase juror participation.<sup>62</sup> The report cited research from across the country which found that residents of low-income neighborhoods were less likely to appear for jury duty than residents of white middle-class neighborhoods.<sup>63</sup> The purpose of the study was to determine whether raising juror pay (which was set at \$10 in Washington State at the time of the study) would increase citizen participation.<sup>64</sup> For purposes of the study, juror pay was raised to \$60 dollars in three Washington counties.<sup>65</sup> One of the study’s conclusions was that “[t]here [wa]s no evidence that increased pay increase[d] juror representativeness.”<sup>66</sup> In one county after the pay increase, participation increased moderately; in

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<sup>55</sup> *Id.* at 83.

<sup>56</sup> *Id.* at 85.

<sup>57</sup> *Id.* at 82.

<sup>58</sup> *Id.* at 83.

<sup>59</sup> Susan Carol Losh et al., “Reluctant Jurors”: What Summons Responses Reveal About Jury Duty Attitudes, 83 JUDICATURE 304, 309 (2000).

<sup>60</sup> *Id.* (finding that when a notice was attached to a jury summons informing employers that it was illegal to fire employees for attending jury service, request for an excuse citing “job security” fell to near zero).

<sup>61</sup> Fukurai, *supra* note 54, at 83.

<sup>62</sup> WASH. STATE CTR. FOR COURT RESEARCH, ADMIN. OFFICE OF THE COURTS, JUROR RESEARCH PROJECT—REPORT TO THE WASHINGTON STATE LEGISLATURE (2008).

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 13.

another county, the rate remained constant; and in the third, juror participation actually declined.<sup>67</sup>

However, as the report itself acknowledges, there were multiple limitations on this study. Foremost among the limitations were time and publicity. The study was run for a year. A year, however, was apparently not enough time to spread the word that juror pay had been raised. Indeed, a post-study survey showed that only 8% of those who received summonses but did not participate in juror selection had been aware that the juror pay had increased.<sup>68</sup> Eight percent of the survey population is, of course, a small sample size from which to draw a conclusion on whether a pay increase for potential jurors would increase juror participation. Finally, the study acknowledged that two studies outside Washington State showed an increase in juror participation rates after the jury pay was increased,<sup>69</sup> leaving Washington State's study as the outlier.<sup>70</sup>

The empirical evidence thus suggests that indigent citizens are precluded from serving on juries because of financial restraints. The result of this research is unsurprising. Indeed, in the better-studied realm of race and jury service, scholars have floated the idea that increasing juror pay could increase the number of minorities reporting for jury service.<sup>71</sup> The second issue that needs to be addressed, then, is whether there is a fundamental right for all people—regardless of wealth status—to have the opportunity to serve on a jury.

### III. THE RIGHT TO SERVE ON A JURY

The “right to serve on a jury” must be viewed on equal ground with the “right to vote.” Both the views and practices of the Founders as well as Supreme Court precedent support such an argument. The Founders placed a tremendous amount of importance on a representative democracy facilitated by citizen voting. But the Founders also understood jury service as among the most important features of majoritarian self-governance.<sup>72</sup> Similar to voting, the Founders viewed the role of the jury as

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<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 5.

<sup>70</sup> The Washington study neglects to cite the two studies that show increased response rates following an increase in jury pay. Nevertheless, Walters & Curriden cite to El Paso, Texas, and New York State as evidence of an increase in juror pay leading to an increase in juror participation. See Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venires*, 43 JUDGES' J., Fall 2004, at 20 (citing a juror participation jump from 22% to 46% in two years, and 12% to 39% in three years in El Paso, Texas and New York State, respectively, after an increase in juror pay to \$40 per day).

<sup>71</sup> Valerie P. Hans, *Jury Representativeness: It's No Joke in the State of New York*, CORNELL J.L. & PUB. POL'Y BLOG (Jan. 20, 2012), <http://jlpp.org/blogzine/?p=652>.

<sup>72</sup> Vikram David Amar, *Jury Service As Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995).

a crucial bulwark to unopposed governmental power.<sup>73</sup> Indeed, jury service, when brought to its final act, *is* voting. The jurors retire after hearing all evidence and arguments presented and vote on a particular outcome.

A host of statements and practices surrounding the Founding era, and shortly afterwards, emphasize the importance of universal jury service. The influential “federal farmer” wrote: “It is essential in every free country, that common people should have a part and share of influence, in the *judicial* as well as in the legislative department.”<sup>74</sup> Accordingly, the first Congress actually set a jury pay rate at fifty cents per day.<sup>75</sup> This was the average amount of money a laborer would make in a day in 1789.<sup>76</sup> An early commentator on the American government, Alexis de Tocqueville, commented extensively on the American jury. And indeed, he directly linked voting and jury service, stating: “‘Every American citizen can vote or be voted for and may be a juror.’”<sup>77</sup>

This importance of an individual to be able to serve on a jury without regard to financial situation has extended to the modern era. Indeed, the United States federal government has gone so far as to codify one’s right to serve on a jury regardless of economic class. Section 1862 of the United States Code reads: “No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or *economic status*.”<sup>78</sup>

Furthermore, the Supreme Court has on multiple occasions equated the right to serve on a jury with the right to vote. For example, the Court in *Bush v. Vera*<sup>79</sup> called jury service and voting the two “basic forms of political participation.”<sup>80</sup> The Court in *Powers v. Ohio* called voting and jury service the two “most significant opportunit[ies] to participate in the democratic process.”<sup>81</sup> It singled out jury service as a “duty, honor, and privilege.”<sup>82</sup> And writing in dissent in *Powers*, Justice Scalia termed

<sup>73</sup> See Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (“[T]he key role of the jury was to protect ordinary individuals against governmental overreaching. . . . [T]he jury could thwart overreaching by powerful and ambitious government officials.”).

<sup>74</sup> Letters from the Federal Farmer (IV), *reprinted in* THE COMPLETE ANTI-FEDERALIST 249–50 (Herbert Storing ed., 1981), *cited in* Amar, *supra*, note 72, at 220 (emphasis added).

<sup>75</sup> See Seamone, *supra* note 2, at 343 (citing the Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 217).

<sup>76</sup> See *id.* at 352–53.

<sup>77</sup> See Amer, *supra* note 72, at 221 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* APP. I at 702 (J. P. Mayer & Max Lerner eds., George Lawrence trans., 1966)).

<sup>78</sup> 28 U.S.C. § 1862 (2012) (emphasis added).

<sup>79</sup> 517 U.S. 952 (1996).

<sup>80</sup> *Id.* at 968–69.

<sup>81</sup> *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

<sup>82</sup> *Id.* at 415.

jury service a “civic right.”<sup>83</sup> The Court in *Thiel v. Southern Pacific Co.*<sup>84</sup> stated that jury service was a “duty as well as a privilege.”<sup>85</sup> Indeed, modern commentators have explicitly read the Court’s statements as establishing the “rights of individuals to serve as jurors.”<sup>86</sup>

Thus, the Founders’ statements and actions as well as Supreme Court jurisprudence demonstrate that to serve on a jury is a fundamental civic right.

#### IV. THE SUPREME COURT AND ECONOMIC STATUS OF POTENTIAL JURORS

Although the struggles of African-Americans and women have been on the forefront of obtaining the right to serve on a jury, the Court has broadened its scope enough at times to suggest that other groups should similarly not be denied the right to serve on a jury.

Indeed, the Supreme Court has directly examined economic status in relation to jury service. In *Thiel v. Southern Pacific Co.*, a passenger, Thiel, jumped out of the window of a moving train run by Southern Pacific Company.<sup>87</sup> Thiel then sued Southern Pacific, alleging that the company knew he was “out of his normal mind” and should have either rejected him as a passenger or else kept him under guard.<sup>88</sup> After the jury was selected, Thiel made a motion to strike the jury as paneled. He claimed that the jurors selected were “mostly business executives” that “[g]ave] a majority representation to one class” and “discriminat[ed] against other occupations and classes, particularly the employees and those in the poorer classes.”<sup>89</sup> The district denied Thiel’s claim, and the Ninth Circuit affirmed.<sup>90</sup>

In reversing the lower courts’ decisions, the Supreme Court stated in strong terms the need for all economic classes to be represented on the jury and warned of the “evil” in the exclusion of a whole class of people.<sup>91</sup> The Court stated that juror competency is a decision to be made on an individual, rather than a class, basis. If competency were decided on a class basis, the Court stated, it would “open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of

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<sup>83</sup> *Id.* at 424 (Scalia, J., dissenting) (“All qualified citizens have a civic right, of course, to serve as jurors . . .”).

<sup>84</sup> 328 U.S. 217 (1946).

<sup>85</sup> *Id.* at 224 (“Jury service is a duty as well as a privilege of citizenship . . .”).

<sup>86</sup> JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 5 (2010).

<sup>87</sup> *Thiel*, 328 U.S. at 218–19.

<sup>88</sup> *Id.* at 219.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 219–20.

<sup>91</sup> *Id.* at 220–25.

trial by jury.”<sup>92</sup> Specifically in *Thiel*, the clerk of the court and the jury commissioner testified that they “deliberately and intentionally” excluded any potential jurors who worked for a daily wage.<sup>93</sup> The Court rebuked such an action. “[A potential juror] who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month.”<sup>94</sup> The Court went on to say that that daily wage earners made up a substantial portion of the community, and they could not be “intentionally and systematically” excluded.<sup>95</sup>

While this case may seem to squarely support the notion that the Court is directly prohibiting actions that have the effect of excluding indigent jurors, the Court stopped short of providing a specific constitutional rationale that lower courts could follow and expand upon. Additionally, the Court stated that a judge could excuse a daily wage earner that would endure undue “financial hardship” by serving on the jury.<sup>96</sup> Financial hardship was defined in *Thiel*, and lower courts have carried its standard into the 21st century.<sup>97</sup> The Court in *Thiel* held that “[o]nly when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear.”<sup>98</sup> This reading has given state courts an excuse to dismiss indigent workers from jury duty instead of adequately paying them.

Thus, unlike the tectonic movements in the rights for women and African-Americans to serve on the jury, there has not been an equal push to continue expanding *Thiel*. Supreme Court rulings have reflected this. Only twenty-four Supreme Court cases have cited *Thiel* since it was decided in 1946.<sup>99</sup> And in the majority of those cases, *Thiel* is referenced in situations dealing with race or gender. Indeed, only two cases use *Thiel* in the context of economic discrimination.<sup>100</sup> And even then, the citations are relegated to a footnote and a dissent.

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<sup>92</sup> *Id.* at 220.

<sup>93</sup> *Id.* at 221.

<sup>94</sup> *Id.* at 223.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 224.

<sup>97</sup> *See, e.g.*, *United States v. Edouard*, 200 F. App'x 970, 971 (11th Cir. 2006) (“A juror can be excused from jury duty because of severe financial hardship.” (citing *Thiel*, 328 U.S. at 224)).

<sup>98</sup> *Thiel*, 328 U.S. at 224.

<sup>99</sup> Although, as one would expect, federal appellate courts and state courts have cited to *Thiel* more than the Supreme Court has (125 times and 294 times, respectively), these numbers are still relatively low. For example, *Glasser v. United States*, 315 U.S. 60 (1942), written four years before *Thiel*, has been cited by federal appellate courts 6,018 times and by state courts 1,497 times.

<sup>100</sup> *Castaneda v. Partida*, 430 U.S. 482 (1977); *Frazier v. United States*, 335 U.S. 497 (1948).

In *Castaneda v. Partida*,<sup>101</sup> for example, the case centered on whether Mexican-Americans were discriminated against during jury selection. The Supreme Court acknowledged the lower court's suspicion that the real discrimination at work might have been *economic*, not racial in nature.<sup>102</sup> Because the respondent did not advance an economic discrimination argument, however, the Supreme Court punted the question of whether clandestine economic discrimination was sufficient to make a *prima facie* case of intentional discrimination.<sup>103</sup>

In *Frazier v. United States*,<sup>104</sup> the petitioner, Frazier, was indicted for violating the Harrison Narcotics Act, a federal statute.<sup>105</sup> Frazier's jury was made up entirely of federal government employees.<sup>106</sup> Frazier advanced a Sixth Amendment challenge as to the jury composition. The majority ruled that because the jury pool was made up of both private and public employees (nine private employees and thirteen public employees) and the petitioner struck all nine of the private employees with his not-for-cause peremptory strikes, there was no Sixth Amendment violation. Justice Jackson and three other Justices dissented, however, and would have held that the low per diem provided by the court violated the Constitution. They stated:

The nongovernment juror receives \$4 per day, which under present conditions is inadequate to be compensatory to nearly every gainfully employed juror. But the government employee is not paid specially; instead, he is given leave from his government work with full pay while serving on the jury. The latter class are thus induced to jury service by protection against any financial loss, while the former are subjected to considerable disadvantage.

This condition makes it obvious that, if jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option, the panel will become loaded with government employees. If this undue concentration of such jurors were accomplished by any device which excluded nongovernment jurors, it unquestionably would be condemned not only by reason of but even without resort to

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<sup>101</sup> 430 U.S. 482 (1977).

<sup>102</sup> *Id.* at 492 n.11.

<sup>103</sup> *Id.* ("We find it unnecessary to decide whether a showing of simple economic discrimination would be enough to make out a *prima facie* case in the absence of other evidence, since that case is not before us.")

<sup>104</sup> 335 U.S. 497 (1948).

<sup>105</sup> *Id.* at 498.

<sup>106</sup> *Id.*

the doctrine that prevailed in [*Ballard, Thiel, and Glasser*].<sup>107</sup>

From this language, it appears that the Court in 1948 was one vote shy of declaring a low per diem as unconstitutionally disadvantaging an entire class. The language appears to use an equal protection rationale, but again stops short of any direct citation to the Constitution. Given that the Supreme Court, even when taking economic discrimination cases, has not yet suggested a constitutional line of attack for wealth discrimination cases in the jury, it is appropriate to review other avenues of attack.

## V. ATTACKS ON THE LACK OF PAY FOR A JUROR

As noted above, when the Supreme Court examined economic discrimination in the jury box, it was sympathetic to the citizens who were left off the jury because of such discrimination. But it did not take the necessary next step in naming the particular constitutional guarantee which protects the indigent class's right to serve on a jury. Commentators have explored other avenues for securing higher juror pay under statutory or constitutional grounds. In particular, Evan Seamone has scrutinized and dismissed the Fair Labor Standards Act, the Fifth Amendment, and the Thirteenth Amendment, among other grounds, as avenues of increasing juror pay.<sup>108</sup>

### A. *The Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA) is a federal statute that defines minimum wage and overtime rates in employee/employer relationships.<sup>109</sup> Seamone has noted that in many respects, this seems like an ideal way to ensure adequate wages for jurors.<sup>110</sup> The argument that jurors are employees under the FLSA's ambit, however, has failed in the courts. For example, in an 11th Circuit case, *Brouwer v. Metropolitan Dade County*,<sup>111</sup> the plaintiff, Brouwer, brought a lawsuit against Dade County, claiming that under the FLSA's standards, she was entitled to minimum wage while serving on the jury.<sup>112</sup> Brouwer argued that the FLSA definition of employee was broad enough to include jurors.<sup>113</sup>

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<sup>107</sup> *Id.* at 516–17 (Jackson, J., dissenting) (footnotes omitted).

<sup>108</sup> See generally Seamone, *supra* note 2, at 301–08 (discussing extensively the attacks on de minimis juror pay stemming from the FLSA, the Fifth Amendment, and the Thirteenth Amendment).

<sup>109</sup> 29 U.S.C. § 201 *et seq.* (2012).

<sup>110</sup> Seamone, *supra* note 2, at 307.

<sup>111</sup> 139 F.3d 817 (11th Cir. 1998), *cited in* Seamone, *supra* note 2, at 306–08.

<sup>112</sup> *Id.* at 818.

<sup>113</sup> *Id.* at 818–19.



The circuit court, however, held that jurors have a completely different relationship with the county than do employees with their employers.<sup>114</sup> In its opinion, the court enumerated a laundry list of differences in the two relationships and rejected her argument.<sup>115</sup>

### B. *The Fifth Amendment*

The Fifth Amendment, in relevant part, reads, “nor shall private property be taken for public use, without just compensation.”<sup>116</sup> The Supreme Court has expanded “private property” to include the monetary value of someone’s time.<sup>117</sup> Thus, one could advance the argument that the time a juror spends only being paid de minimis compensation amounts to a “taking” under the Fifth Amendment. However, such a challenge would probably fail.<sup>118</sup> There is Supreme Court precedent stating that the government does not need to pay for “public duties.” For example, in *Hurtado v. United States*,<sup>119</sup> the Petitioner, Hurtado, was a Mexican citizen who had been illegally smuggled across the border and into the United States.<sup>120</sup> Hurtado was jailed in order to ensure that he was available to serve as a witness against the smugglers.<sup>121</sup> While awaiting the trial, Hurtado was compensated \$1 per day.<sup>122</sup> Hurtado argued that by incarcerating him, the government had “taken” his property, and that \$1 per day was insufficient just compensation under the Fifth Amendment.<sup>123</sup>

The Supreme Court rejected this argument.<sup>124</sup> Although its holding was limited to incarcerated witnesses, the language that was used could

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<sup>114</sup> *Id.* at 819 (“Jurors are completely different from state [or county] employees. Jurors do not apply for employment, but are randomly selected from voter registration lists. Jurors are not interviewed to determine who is better qualified for a position; the State summons all available persons who meet the basic requirements . . . . Jurors do not voluntarily tender their labor to the state, but are compelled to serve. Jurors are not paid a salary, rather they receive a statutorily mandated sum regardless of the number of hours worked. Jurors are not eligible for employment benefits, do not accrue vacation time, annual or sick leave and do not qualify for health or life insurance. The state does not have the power to fire jurors for poor performance, but must accept their verdict. In short, there is no indicia of an employment relationship between state court jurors and Dade County.”).

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CONST. amend. V.

<sup>117</sup> See Seamone, *supra* note 2, at 302 (citing Daniel E. Witte, Comment, *Getting a Grip on National Service: Key Organizational Features and Strategic Characteristics of the National Service Corps (AmeriCorps)*, 1998 BYU L. Rev. 741, 786).

<sup>118</sup> See Seamone, *supra* note 2, at 303 (“Prior court decisions at least appear to indicate that the hardships jurors face do not rise to the level of a prohibited taking.”).

<sup>119</sup> 410 U.S. 578 (1973), *noted in* Seamone, *supra* note 2, at 304.

<sup>120</sup> *Id.* at 579.

<sup>121</sup> *Id.*

<sup>122</sup> See *id.* at 581.

<sup>123</sup> *Id.* at 588.

<sup>124</sup> *Id.* at 588–89.

easily be extended to jurors. The Fifth Amendment, the Court held, “does not require that the Government pay for the performance of a public duty it is already owed.”<sup>125</sup> If there is to be payment, it is controlled by statute.<sup>126</sup> Even if that price is low, “personal sacrifice” is part of the obligation of the individual to the public welfare.<sup>127</sup> Thus, under *Hurtado*, a court could easily find that jury service is a “public duty,” and that government is only required to pay what is demanded by the statute.<sup>128</sup>

### C. *The Thirteenth Amendment*

Finally, Seamone cites commentators who have argued that the Thirteenth Amendment may be applicable to jurors.<sup>129</sup> The Thirteenth Amendment, in relevant part, proscribes involuntary servitude.<sup>130</sup> Thus, one could advance the argument that forcing jurors to serve for only de minimis pay subjects them to involuntary servitude. However, a brief review of Supreme Court jurisprudence discounts the merits of this argument.<sup>131</sup> Stretching back to 1916, the Supreme Court held in *Butler v. Perry*<sup>132</sup> that a Florida law requiring adult males to spend six days out of the year working on public roads was not a Thirteenth Amendment violation.<sup>133</sup> In its holding, the Court called working on public roads a duty “which individuals owe to the State, such as services in the army, militia, on the jury, etc.”<sup>134</sup> Thus, there is direct language (albeit in dicta) suggesting that serving on the jury is a duty that individuals owe to the state. Furthermore, the Court later clarified in *United States v. Kozminski*<sup>135</sup> that the primary purpose of the Thirteenth Amendment was to abolish African slavery, and that “involuntary servitude” meant compulsory labor “akin to African slavery.”<sup>136</sup> Although it may be inconvenient for some to serve on a jury, a few days on the jury does not begin to ap-

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<sup>125</sup> *Id.* at 588.

<sup>126</sup> *See id.* at 590.

<sup>127</sup> *Id.* at 589.

<sup>128</sup> *See* Seamone, *supra* note 2, at 304.

<sup>129</sup> *See* Dominick T. Armentano, *Use Market to Select Jurors*, PRESS J., NOV. 11, 1999, available at <http://www.cato.org/publications/commentary/use-market-select-jurors> (“Indeed, forcing individuals to appear for jury duty against their will flies in the face of the spirit of other constitutional guarantees, such as the prohibition on involuntary servitude.”), *cited in* Seamone, *supra* note 2, at 305.

<sup>130</sup> U.S. CONST. amend. XIII.

<sup>131</sup> *See* Seamone, *supra* note 2, at 305 (mentioning *Kozminski v. United States*, 487 U.S. 931 (1988), and earlier opinions that support it).

<sup>132</sup> 240 U.S. 328 (1916).

<sup>133</sup> *Id.* at 333.

<sup>134</sup> *Id.* (emphasis added).

<sup>135</sup> 487 U.S. 931 (1988), *cited in* Seamone, *supra* note 2, at 305.

<sup>136</sup> *Id.* at 942.

proach the loss of personal autonomy similar to that imposed on slaves in the American South.

Nevertheless, at least one individual has tried to make the argument in federal court that compulsory jury service violates the Thirteenth Amendment. The plaintiff in *Neil v. Weinstein*<sup>137</sup> argued that because he was self-employed as a software developer, any time he was forced to spend on jury duty would prevent him from earning a living.<sup>138</sup> The district court quickly dismissed Neil's lawsuit, citing the *Kozminski* Court's reasoning that the Thirteenth Amendment was meant to prevent African slavery, and the Thirteenth Amendment did not prohibit all types of labor that a citizen may be compelled to perform for the benefit of society.<sup>139</sup>

Thus, three seemingly viable avenues of attack—that a juror is an “employee” under the broad FLSA definition, that paying a juror a de minimis amount to serve on a jury amounts to a Fifth Amendment taking without just compensation, and that forcing an individual to serve on a jury without adequate pay is akin to involuntary servitude—each have fatal weaknesses. If there is a constitutional argument to be made for the protection of a citizen's right to serve on a jury, regardless of his or her economic status, it must be made elsewhere.

## VI. EQUAL PROTECTION

An avenue that has not been thoroughly explored, however, is that de minimis juror pay discriminates on the basis of wealth, and thus violates the Fourteenth Amendment's equal protection guarantee. At first blush, however, it may seem that the equal protection guarantee is poor grounds to mount such an attack.

### A. *The Supreme Court and Wealth Discrimination*

Since the 1970s, the Supreme Court has been reluctant to apply any form of heightened scrutiny to wealth discrimination cases.<sup>140</sup> For example, in *Dandridge v. Williams*,<sup>141</sup> the Court upheld a law that capped welfare benefits for families upon reaching a certain number of dependents.<sup>142</sup> Because the statute was in the “area of economics and social

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<sup>137</sup> See *Neil v. Weinstein*, No. 01-CV-2333, 2001 WL 34036322 (D. Md. Nov. 14, 2001).

<sup>138</sup> *Id.* at \*1.

<sup>139</sup> *Id.* at \*3–4.

<sup>140</sup> See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.7.3, at 785–86 (3d ed. 2006).

<sup>141</sup> 397 U.S. 471 (1970).

<sup>142</sup> *Id.* at 472–73, 487.

welfare,” the Court stated that it needed to only scrutinize the legislation for some “reasonable basis.”<sup>143</sup>

The Supreme Court extended this line of reasoning in *San Antonio Independent School District v. Rodriguez*.<sup>144</sup> There, Mexican-American parents brought a lawsuit on behalf of school children across the state, “attacking the Texas system of financing public education.”<sup>145</sup> The system, the plaintiffs argued, resulted in a taxing and funding scheme that discriminated against indigents.<sup>146</sup> The majority refused to admit that the system even targeted indigent persons as a class, but said that such an alleged “class” would not have the “traditional indicia of suspectness,”<sup>147</sup> and thus only merited rational basis review. From such statements, it would seem that wealth discrimination is not a practicable avenue to pursue an equal protection claim.

#### B. *Harper and the Fourteenth Amendment’s Equal Protection Guarantee*

There may, however, be an exception to the state-friendly rational-basis test the Court has employed in cases such as *Dandridge* and *Rodriguez*. As discussed earlier, jury duty should be viewed as a fundamental political right on par with voting.<sup>148</sup> If there is Supreme Court precedent stating that laws that discriminate on the basis of wealth in the realm of the right to vote are unconstitutional under the equal protection guarantee, then the same outcome should result for laws that discriminate on the basis of wealth in the realm of jury service. Enter *Harper v. Virginia State Board of Elections*.<sup>149</sup>

In *Harper*, the Supreme Court consolidated three lawsuits by Virginia residents arguing that Virginia’s poll tax was unconstitutional.<sup>150</sup> It is important first to note which provisions of the Constitution the plaintiffs did *not* sue under. They did not sue under the Twenty-fourth Amendment, which forbids poll taxes only in *federal* elections.<sup>151</sup> Similarly—and more importantly—they did not sue under the Fifteenth

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<sup>143</sup> *Id.* at 485.

<sup>144</sup> 411 U.S. 1, 28–29 (1973).

<sup>145</sup> *Id.* at 4–5.

<sup>146</sup> *Id.* at 11–17.

<sup>147</sup> *Id.* at 28 (listing as the traditional indicia of suspectness, “the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

<sup>148</sup> See discussion *supra* Part III.

<sup>149</sup> 383 U.S. 663 (1966).

<sup>150</sup> *Id.* at 664–65.

<sup>151</sup> U.S. CONST. amend. XXIV. The language of the Twenty-fourth Amendment pertains specifically to federal elections, for example, for the president of the United States, and thus could not be incorporated against the states as other amendments have been.

Amendment, which prohibits denying any citizens the right to vote based on, among other things, race.<sup>152</sup> The Court decided *Harper* on the basis of the Equal Protection Clause of the Fourteenth Amendment.<sup>153</sup> The violation at issue in *Harper* was clearly one of wealth discrimination. The Court unequivocally held that to vote was “a fundamental political right,”<sup>154</sup> and thus a state could not, under the Fourteenth Amendment, discriminate on the basis of wealth in this context.<sup>155</sup>

In Part III, I argued that voting and jury service should be viewed in the same constitutional vein. Assuming that to be the case, by the Court’s logic in *Harper*, states should not be able to discriminate on the basis of wealth against those who are allowed to enjoy the fundamental right to serve on a jury. Indeed, replacing “voting”-related terms in the *Harper* opinion with “jury service” related terms demonstrates the natural parallelism: “[Juror] qualifications have no relation to wealth . . . .”<sup>156</sup> “The Equal Protection Clause demands no less than substantially equal state [judicial] representation for all citizens . . . . We say the same whether the citizen, otherwise qualified to [serve as a juror], has \$1.50 in his pocket or nothing at all . . . .”<sup>157</sup> “Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the [judicial] process.”<sup>158</sup> “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. *The degree of the discrimination is irrelevant.*”<sup>159</sup> Finally, the Court concluded by stating, “For to repeat, wealth or fee paying has, in our view, no relation to [juror] qualifications; the right to [serve on a jury] is too precious, too fundamental to be so burdened or conditioned.”<sup>160</sup>

I am not alone in substituting the Supreme Court’s language regarding voting for language pertaining to jury service. Indeed, the Supreme Court itself has done it. In *Dean v. Gadsden Times Publishing Corp.*,<sup>161</sup> an employee sued his employer for money lost while serving on a jury under an Alabama statute that guaranteed employees the “usual compensation” while serving on a jury.<sup>162</sup> In a brief, per curiam opinion, the

<sup>152</sup> U.S. CONST. amend. XV.

<sup>153</sup> *Harper*, 383 U.S. at 670.

<sup>154</sup> *Id.* at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)) (internal quotation marks omitted).

<sup>155</sup> *Id.* at 670.

<sup>156</sup> *Id.* at 666.

<sup>157</sup> *Id.* at 667–68. Also note here the similar phrasing and logic of the opinion in *Thiel*. See *Thiel*, 328 U.S. 217, 223 (1946) (“[A potential juror] who is paid \$ 3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month.”).

<sup>158</sup> *Harper*, 383 U.S. at 668.

<sup>159</sup> *Id.* (emphasis added).

<sup>160</sup> *Id.* at 670.

<sup>161</sup> 412 U.S. 543 (1973).

<sup>162</sup> *Id.* at 543.

Court upheld the statute. In lieu of independent reasoning specific to jury service, the Court simply cited to another case, *Day-Brite Lighting, Inc. v. Missouri*,<sup>163</sup> where the Court had upheld a state statute that made it a misdemeanor for an employer to deduct the wages of an employee when he left his job to vote.<sup>164</sup> The opinion in *Dean*, quoting in long-form from *Day-Bright Lighting*, called the money expended to reimburse those leaving to serve on a jury as “part of the costs of our civilization.”<sup>165</sup> After concluding its long-form quote, the Court concluded by simply stating: “The Alabama statute stands on no less sturdy a footing.”<sup>166</sup> The Court had decided there was no substantive difference between the importance of the right to vote and the importance of the right to serve on a jury.

### C. *Wealth Discrimination and Fundamental Rights*

*Harper* takes the crucial step that *Thiel* stumbled on. It applied a constitutional basis—the Fourteenth Amendment’s equal protection guarantee—to wealth discrimination. It should be noted that the Supreme Court in *Harper* used broad language when reaching its decision. The Court did not just focus on the poll tax, but how the state used wealth in general as a barrier to exercising a fundamental right. Indeed, the Court stated, “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”<sup>167</sup> *Harper* is still good law despite the Court’s subsequent holdings which analyzed wealth discrimination with a lower form of scrutiny. This makes sense. Although the Court did not explicitly distinguish *Harper* from cases like *Dandridge* or *Rodriguez*, it easily could have. In *Harper*, the equal protection claim deserved more than rational basis review because it dealt with a fundamental right. However, in the cases cited above, *Dandridge* and *Rodriguez*, no fundamental rights were at issue. In *Dandridge*, instead of characterizing the issue in terms of a fundamental right, the Court defined the subject matter as an “area of economics and social welfare.”<sup>168</sup> The Court has traditionally deferred to the legislative branch in the area of economics.<sup>169</sup> Similarly, in *Rodriguez*, the Court explicitly stated that the “right” at issue (education) was *not* a fundamental right.<sup>170</sup> But, as shown above, that is not the case with jury service. Jury service is on par with voting as a fundamental right. Thus,

<sup>163</sup> 342 U.S. 421 (1952).

<sup>164</sup> *Dean*, 412 U.S. at 544.

<sup>165</sup> *Id.* (quoting *Day-Bright Lighting*, 342 U.S. at 424).

<sup>166</sup> *Id.* at 545.

<sup>167</sup> *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966).

<sup>168</sup> *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

<sup>169</sup> *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

<sup>170</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

if we take the analysis from *Thiel* plus the equal protection application from *Harper*, we see that the Court should view the wealth discrimination stemming from de minimis juror pay as unconstitutional under the Fourteenth Amendment.

## VII. CHALLENGES TO AN EQUAL PROTECTION APPROACH

This Note attempts to provide a legal basis for an attack on a state's de minimis juror pay via the Equal Protection Clause of the Fourteenth Amendment. This argument, however, is not unassailable. The Supreme Court has never explicitly held that there is a fundamental right to serve on a jury. Lower courts that have addressed the question have split in their decisions.<sup>171</sup> But it is an avenue of attack that has not been adequately advanced. Indeed, the Second Circuit in *United States v. Jackman*<sup>172</sup> raised, *sua sponte*, an equal protection argument in an opinion regarding a jury selection case, stating, "the right to serve on juries at all is a fundamental right akin to the right to vote."<sup>173</sup> In the same breath, however, the court couched its language, stating that the defendant had not raised that argument and thus the court did not mean to imply that the court would recognize the right to serve on the jury as a fundamental right if the defendant had raised it.<sup>174</sup>

Even if a court finds that the opportunity to serve on a jury is a fundamental political right, there are still challenges. Differences exist, for example, between jurors self-selecting out of jury selection because they do not think they can afford it and a state affirmatively forcing a citizen to pay in order to exercise their fundamental right (such as when a state mandates a poll tax in order to vote). Indeed, even in counties that only compensate jurors with de minimis amounts, jurors are still being paid for their services—and they are certainly not being forced to pay to be able to serve on a jury.

Thus, a couple of developments in the Supreme Court's jurisprudence would strengthen the case that indigent persons are being deprived of a constitutional right because of de minimis juror pay. First, the Court should recognize that there is a fundamental right to serve on a jury. As discussed earlier, there is strong support for this idea in Founding-era

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<sup>171</sup> Compare *Adams v. Superior Court*, 524 P.2d 375, 380 (Cal. 1974) ("[A]n individual's interest in serving on a jury cannot be held a fundamental right."), with *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("After all, felons lose out on fundamental rights such as voting and serving on juries . . . ."), and *Bradley v. Judges of the Superior Court*, 372 F. Supp. 26, 30 (C.D. Cal. 1974) ("It is well established that action by a state in arbitrarily depriving a person of the opportunity to serve on a jury is a violation of a right secured by the United States Constitution . . . .").

<sup>172</sup> 46 F.3d 1240 (2d Cir. 1995).

<sup>173</sup> *Id.* at 1255.

<sup>174</sup> *Id.*

sources. Second, the Supreme Court should revisit its holdings on wealth discrimination and explicitly distinguish cases where there is a wealth discrimination challenge based on fundamental rights (such as in *Harper*) from those that do not contain such a challenge (such as in *Rodriguez*). These clarifications would pave a clear road for an indigent to challenge a state or county decision to provide only de minimis pay for serving on a jury.

#### CONCLUSION

The ability to serve on a jury is a fundamental political right on par with voting. This can be seen through the Founders' statements and actions when they defined our nation. Furthermore, the Supreme Court has, on several occasions, suggested that jury service is a right. And indeed, the Court has explicitly equated the importance of jury service with the importance of the right to vote. Merely because the Court has not yet recognized such a right does not mean that the Court will not in the future. A review of the Court's jurisprudence in the areas of race, gender, and jury service demonstrates that the Court is nothing if not sluggish in protecting the right to serve on a jury. The Supreme Court in *Thiel* recognized that states cannot discriminate against potential jurors for economic reasons. The Court failed, however, to ground its holding on a specific constitutional provision. This has allowed states to circumvent the narrow holding of *Thiel* and continue to offer jurors only de minimis pay. Previous attacks on de minimis juror pay, such as via statutes or other constitutional provisions, have failed. However, imputing the logic of the Supreme Court's holding in *Harper* regarding voting and wealth discrimination, it becomes apparent that a Fourteenth Amendment equal protection argument should eliminate state programs that offer only de minimis jury pay and thereby prevent the indigent class from exercising its right to serve on a jury.



