

Following Oregon's Trail: Implementing Automatic Voter Registration to Provide for Improved Jury Representation in the United States

Julie A. Cascino

Repository Citation

Julie A. Cascino, *Following Oregon's Trail: Implementing Automatic Voter Registration to Provide for Improved Jury Representation in the United States*, 59 Wm. & Mary L. Rev. 2575 (2018), <http://scholarship.law.wm.edu/wmlr/vol59/iss6/6>

NOTES

FOLLOWING OREGON'S TRAIL: IMPLEMENTING AUTOMATIC VOTER REGISTRATION TO PROVIDE FOR IMPROVED JURY REPRESENTATION IN THE UNITED STATES

TABLE OF CONTENTS

INTRODUCTION	2577
I. THE NEED FOR VOTER REGISTRATION REFORM	2581
A. <i>Historical Background</i>	2582
1. <i>The U.S. Jury Tradition</i>	2582
2. <i>Voter Discrimination in the United States</i>	2584
B. <i>The Importance of Representative Juries</i>	2588
C. <i>Judicial Intervention in Jury Selection</i>	2589
II. CONTEMPORARY ISSUES WITH STATE VOTER REGISTRATION	2591
A. <i>Contemporary State Voter Laws</i>	2592
B. <i>Legal Challenges to State Voter Laws</i>	2594
III. OREGON'S AUTOMATIC VOTER REGISTRATION MODEL: THE MOTOR VOTER ACT.	2595
A. <i>Oregon as an Electoral Reform Pioneer</i>	2596
B. <i>The Structure of Oregon's Automatic Voter Registration Statute</i>	2597
C. <i>Early Statistics and Commentary on the Oregon Statute</i>	2598
1. <i>Early Voter Registration Statistics</i>	2598
2. <i>Positive Commentary on Oregon's Model</i>	2600
IV. APPLYING AN EXPANDED VERSION OF OREGON'S MODEL IN OTHER STATES	2601
A. <i>The Need for an Expanded Version of the Oregon Model</i>	2602

1. <i>Conserving Resources</i>	2604
2. <i>Preventing Voter Fraud</i>	2606
B. <i>Using Registered Voters' Names for Jury Pool Lists</i>	2608
1. <i>Increasing Access to the Franchise</i>	2608
2. <i>Increasing Jury Representation</i>	2609
V. COMMON CONCERNS WITH THE USE OF AUTOMATIC VOTER REGISTRATION	2610
A. <i>Criticism of the Oregon Model</i>	2610
B. <i>Automatic Registration Effectiveness</i>	2611
C. <i>Peremptory Challenges</i>	2612
D. <i>Jury Service Avoidance</i>	2613
E. <i>Voter Privacy Concerns</i>	2614
CONCLUSION	2615

INTRODUCTION

In 2012, economists Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson cowrote a study that was “the first of its kind—ever,”¹ a study examining the effect that all-white jury pools had on Florida trials over a ten-year period.² The study found that when Black persons were absent from Florida jury pools, Black defendants were convicted at an 81 percent rate while white defendants were convicted at only a 66 percent rate.³ In contrast, when the jury pool included at least one potential Black juror, the conviction rates between Black defendants and white defendants were almost identical, at 71 percent for Black defendants and 73 percent for white defendants.⁴ The study also found that adding Black potential jurors to the pool altered trial outcomes “even when [those] jurors [were] not ultimately seated on the jury.”⁵

The results of this study suggest that the diversity of a potential pool of jurors plays a significant role in providing defendants—and especially defendants of color—with fair trials, perhaps even more so than attorneys’ inability to use peremptory strikes to remove jurors of color.⁶ Moreover, although there is no promise juries will be perfect microcosms of the local community, the U.S. Constitution guarantees criminal defendants at least “an impartial jury.”⁷

1. Janell Ross, *How Big of a Difference Does an All-White Jury Make? A Leading Expert Explains*, WASH. POST (May 30, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/30/how-big-a-difference-does-an-all-white-jury-make-a-leading-expert-explains/?utm_term=.7e2e6742e830 [<https://perma.cc/2BU6-FDQM>].

2. See Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECONOMICS 1017, 1019 (2012) (“[W]e examine how conviction rates for white and black defendants vary with the composition of the jury pool rather than the seated jury.”).

3. *Id.*

4. *Id.*

5. *Id.* at 1020.

6. See *Batson v. Kentucky*, 476 U.S. 79, 89, 97 (1986) (holding that prosecutors cannot use peremptory strikes to challenge potential jurors solely because of their race); Anwar et al., *supra* note 2, at 1020 (“[W]henever attorneys use peremptory challenges to strike black members of the pool ... they forgo the possibility of excluding another potential juror with a similar ... probability of convicting. This pulls the likelihood of conviction for the seated jurors toward that excluded person’s position even though he or she does not wind up serving on the jury.”).

7. U.S. CONST. amend. VI.

Unfortunately, the likelihood that a specific locality's jury source pool includes a diverse array of individuals is low because states often use voter registration data as a major source of names for jury pools,⁸ and the U.S. electoral system suffers from widespread voter disenfranchisement.⁹ For example, in 2008, millions of Americans did not vote, either because they missed registration deadlines or did not know how to register in the first place.¹⁰

The voter turnout problems in the 2008 election were not anomalous compared to prior trends. In the past half-century, turnout in national elections has generally been low, especially when compared to voter participation in other democracies.¹¹ As part of this trend, younger people, people of lower socioeconomic status, and people of color have turned out to vote in lower numbers than other sectors of society, often due to strict state registration requirements that can make the registration process more difficult to complete.¹² For example, as recently as the 2014 midterm election year, persons under thirty years old constituted 34 percent of nonvoters; Hispanics, African Americans, and other racial and ethnic minorities constituted 43 percent of nonvoters; and persons with family incomes less than \$30,000 per year constituted 46 percent of nonvoters.¹³ Due to the low registration rates of these groups, voter rolls often do

8. See, e.g., Kurt M. Saunders, *Race and Representation in Jury Service Selection*, 36 DUQ. L. REV. 49, 58 (1997). The federal government must supplement jury pools if the voter registration list does not represent a fair cross-section of the community. 28 U.S.C. § 1863(b)(2) (2012). However, section 1863 governs only federal juries, leaving discretion to state legislatures regarding jury source pools. See *id.* § 1863(a).

9. See Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 15, 2017), <http://pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/> [<https://perma.cc/26NA-ADJA>] (comparing low U.S. voter turnout to international standards).

10. See *About National Voter Registration Day*, NAT'L VOTER REGISTRATION DAY, <http://nationalvoterregistrationday.org/about/> [<https://perma.cc/A9ZV-Z7H9>].

11. See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 467 (2008) (discussing electoral participation in the United States before the passage of the National Voter Registration Act); Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 618 (1990) (noting that electoral participation in the United States is far below other democracies).

12. See, e.g., Tokaji, *supra* note 11, at 496-97.

13. See Sam Fulwood III, *Why Young, Minority, and Low-Income Citizens Don't Vote*, CTR. FOR AM. PROGRESS (Nov. 6, 2014, 10:37 AM), <https://www.americanprogress.org/issues/race/news/2014/11/06/100627/why-young-minority-and-low-income-citizens-dont-vote/> [<https://perma.cc/U98X-RA2J>].

not accurately represent the proportion of eligible minority, low-income, or young voters in a specific community.¹⁴ Accordingly, jury pools are less representative of that community as well.¹⁵

Notably, many states supplement jury source lists with names from other sources, including tax rolls and the names of licensed drivers.¹⁶ Nevertheless, these sources often lack diversity as well, making it less likely that including those names will have a significant effect on jury pool representation.¹⁷ And when the pool of potential jurors lacks diversity, a person's chance of securing an impartial jury is compromised.¹⁸ In a country that prides itself on its democratic ideals, the chronic problem of underrepresentative juries threatens a crisis of injustice by preventing the justice system from living up to its constitutional mandate.¹⁹

Hope is not lost, however. The State of Oregon may have fashioned a partial solution to jury representation problems through the passage of the Oregon Motor Voter Act.²⁰ The 2015 law calls for the state to automatically register to vote those persons who apply for a driver's license or other qualifying document from the Department of Transportation.²¹ Preliminary results suggest the law has been

14. See Saunders, *supra* note 8, at 61.

15. See *id.*

16. See GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13-14 (2007).

17. See, e.g., Bershatsky v. Levin, 99 F.3d 555, 557 (2d Cir. 1996) (per curiam) ("Although alternative lists, such as lists of licensed drivers and of individuals who have filed tax returns, can be and have been used as an additional source, they are ... underinclusive, as they likely will not include citizens whose income levels do not require the filing of tax returns and who do not drive.").

18. See Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80, 81 (1973) (arguing "the fact-finding process is hampered" when juries are biased against a population group).

19. See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (claiming the protective function of the jury is undermined when "large, distinctive groups are excluded from the pool"); see also Williams, *supra* note 11, at 626 ("[B]lack, Hispanics, Native Americans, and low-income persons—are substantially underrepresented in jury pools as a result of their systematic exclusion from voter registration lists.").

20. See OR. REV. STAT. § 247.017 (2017); see also *Automatic Voter Registration*, BRENNAN CTR. FOR JUST. (Aug. 28, 2017), <https://www.brennancenter.org/analysis/automatic-voter-registration> [<https://perma.cc/2BG3-3Q9K>] (describing automatic registration systems in Oregon and several other states).

21. See OR. REV. STAT. § 247.017. Notably, Alaska, California, Connecticut, Vermont, and West Virginia have automatic registration statutes, and twenty-seven other states considered

effective in its aim to promote the convenience, security, and simplicity of voter registration and to expand ballot access to all potential voters.²² In the months before the November 2016 presidential election, Oregon automatically registered 272,702 individuals.²³ Insofar as Oregon jurisdictions draw jury pools from the lists of registered voters,²⁴ this surge in registered voters increases the likelihood that those pools will reflect the diversity present within local communities.

This Note will discuss how implementing automatic voter registration can increase registration numbers, and, by extension, jury diversity in other states. Part I will discuss the history of both the jury system and voter discrimination in the United States, and will argue that neither the federal government nor the judiciary's intervention in jury selection practices has ensured that juries are truly representative.

Noting that historical issues with voter discrimination have become contemporary problems as well, Part II will explain why voter registration reform is needed to increase the diversity of juries and to protect the constitutional rights of criminal defendants, even in states that supplement their jury source lists with data from other sources. Part III will then examine Oregon's Motor Voter statute, detail some history behind the law and early registration statistics following its passage, and discuss some commentary on its early effects.

Recognizing that many states already pull jurors from supplemental sources, Part IV will then argue that states should develop

automatic registration legislation in 2016. See BRENNAN CTR. FOR JUST., *supra* note 20. Nonetheless, automatic registration would benefit all U.S. citizens and should be considered on an even broader scale.

22. See *infra* Parts III.C.1-2.

23. Rob Griffin et al., *Who Votes with Automatic Voter Registration?*, CTR. FOR AM. PROGRESS (June 7, 2017, 8:56 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/> [<https://perma.cc/FVY5-2XKE>].

24. OR. REV. STAT. § 10.215 (2017). The statute directs Oregon localities to pull names from voter registration lists, Department of Transportation records, and any other sources the Chief Justice of the Oregon Supreme Court approves. See *id.* Nonetheless, Oregon does not mandate that the Department of Transportation furnish the information of expired licenses, *id.* § 802.260, and prior case law suggests the use of Department lists may be discretionary, see *State ex rel. Schrunck v. Walker*, 780 P.2d 731, 734 (Or. 1989) (per curiam).

an expanded version of Oregon's program by automatically registering residents who interact with either state motor vehicle offices, state public assistance offices, or offices providing state-funded services to persons with disabilities. Part IV will further explain why implementing automatic registration systems will not only increase access to the franchise, but also will lower resource costs, increase voter security, and prevent voter fraud. Part IV will conclude by arguing that states should require their localities to add the names of automatically registered voters to jury source lists to ensure that automatic registration systems effectively increase jury source pool diversity.

Finally, Part V will describe some common concerns with the use of automatic voter registration, and will provide responses and potential remedies to address those concerns. Overall, this Note shows that in providing for increased jury diversity, expanding access to the vote, and preventing problems with fraud and voter security, automatic voter registration will help to ensure the U.S. justice system lives up to its democratic ideals, without threatening the safety or integrity of its people.

I. THE NEED FOR VOTER REGISTRATION REFORM

To understand why implementing automatic voter registration is needed to improve the jury selection process, it is helpful to understand both why representative juries are so important in the United States and how voter discrimination affects the jury system. To provide some context behind the voter registration problem, this Part offers a brief historical background of the development of the U.S. jury system and points to the nation's history of voter discrimination, arguing that federal intervention in the electoral system has failed to resolve issues with discrimination. Then, this Part explains why representative juries are a cornerstone of democracy in the United States. Lastly, this Part asserts that judicial intervention in discriminatory jury selection processes has failed to ensure all parties face a truly diverse, impartial jury.

A. *Historical Background*

To provide some context regarding the use of the jury in U.S. society, this Section details the basic history of the U.S. jury and describes traditional state juror selection procedures, such as the use of voter registration rolls as juror source lists. Then, to show how voter registration reform can affect the jury process, this Section details the history of voter discrimination in the United States, as well as Congress's failed attempts to mitigate the effects of discrimination in the electoral process.

1. *The U.S. Jury Tradition*

U.S. courts began using juries as early as the establishment of the English colonies.²⁵ Following the English common law tradition, colonial governments provided for jury trials in their jurisdictions.²⁶ Then, after achieving independence in the Revolutionary War, the fledgling U.S. government maintained the English tradition, constitutionalizing the right to trial by jury through the establishment of three separate constitutional provisions.²⁷

The state legislatures' ratification of all three constitutional provisions²⁸—which preserve the right to a jury trial in civil and criminal cases—had serious implications for the administration of justice in the United States. The Sixth Amendment was particularly important for criminally accused persons, as it guaranteed their right to be tried before “an impartial jury,” composed of members of the community where their alleged crime occurred.²⁹

25. See Saunders, *supra* note 8, at 52 (noting the English exported “[t]he institution of jury trials” to the American colonies).

26. See *id.*

27. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); *id.* amend. VI (“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, which district shall have been previously ascertained by law.”); *id.* amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”).

28. See, e.g., *Primary Documents in American History: The Bill of Rights*, LIBR. CONGRESS (Apr. 25, 2017), <https://www.loc.gov/r/r/program/bib/ourdocs/billofrights.html> [<https://perma.cc/DW86-HW3J>].

29. See U.S. CONST. amend. VI.

The Supreme Court later determined that an impartial jury is one composed of “a representative cross-section of the community.”³⁰ Throughout U.S. history and until the late twentieth century, however, states and other localities consistently chose to pool jurors from under-representative sources.³¹ For example, until the mid-twentieth century, “most federal and state courts chose jurors through the ‘key-man’ system, under which jury commissioners or court clerks asked *prominent members of the community* to supply names of potential jurors.”³² After the passage of the Jury Selection and Service Act of 1968, most states followed the federal courts’ lead and began to pull juror names from voter registration lists,³³ lists that consistently lacked representation of racial minorities and the poor.³⁴

As discussed in Part I.C, numerous defendants challenged the constitutionality of these practices,³⁵ but to no avail.³⁶ State and federal courts continuously upheld the constitutionality of the use of voter registration lists for jury source pools, despite indications that certain sectors of society were systematically absent from voter rolls.³⁷ States may legally continue to use voter registration lists for jury source pools even today.³⁸

30. See *Taylor v. Louisiana*, 419 U.S. 522, 527-28 (1975) (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)); see also *Williams*, *supra* note 11, at 590 (discussing the importance of the fair cross-section requirement in ensuring public justice).

31. See Stephen Knack, *The Voter Participation Effects of Selecting Jurors from Registration Lists*, 36 J.L. & ECON. 99, 99-100 (1993).

32. *Id.* (emphasis added).

33. See, e.g., *id.* at 100; see also MIZE ET AL., *supra* note 16, at 13-14.

34. See *Saunders*, *supra* note 8, at 61 (discussing the low voter registration rates of persons of color and low-income persons and noting persons of color have been underrepresented on juries partly due to systematic discouragement of Black voting).

35. See, e.g., *United States v. Ireland*, 62 F.3d 227, 231 (8th Cir. 1995) (describing appellants’ complaint that the district court’s grand jury selection procedure violated the Sixth Amendment).

36. See *Williams*, *supra* note 11, at 601-02 (noting that no judicial challenges to the use of voter registration lists as jury source lists have succeeded). For further examples of constitutional challenges to the use of voter registration lists in jury source pools, see *infra* Part I.C.

37. See, e.g., *Ireland*, 62 F.3d at 231 (“[N]umerical disparities resulting from the use of voter-registration lists do not violate a defendant’s Sixth Amendment rights.” (citing *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993))). For further examples of courts upholding the use of voter registration lists in jury source pools, see *infra* Part I.C.

38. See, e.g., *Bershatsky v. Levin*, 99 F.3d 555, 557 (2d Cir. 1996) (per curiam); *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988) (en banc).

2. Voter Discrimination in the United States

As discussed in Part I.A.1, voter registration rolls long served as the main, and often sole, source of names for jury pools in many jurisdictions.³⁹ Although many states permit or require jurisdictions to supplement their jury pool lists today,⁴⁰ these supplemental sources do not add much, if anything, to the diversity of voter rolls.⁴¹ For example, the same groups that struggle to access the franchise often lack the resources needed to obtain drivers licenses or appear on tax rolls.⁴² As a result, state restrictions on voter registration still have the potential to affect jury impartiality in criminal cases. If jurisdictions systematically exclude certain members of society from voter rolls, those persons will not likely appear in jury pools.⁴³ More specifically, if jurisdictions pull jurors from voters rolls or licensed drivers lists that lack the names of persons of color, and do not supplement their jury lists with names from other, more diverse lists, there is little likelihood that localities will select persons of color for jury duty, regardless of how fair each jurisdiction's selection process appears to be.⁴⁴ To help further explain how changes in voter laws will affect jury pools, this Subsection describes the history of voter discrimination in the United States and notes that the federal government's response to incidents of voter discrimination has failed to fully resolve the problem.

39. Today, many states permit or require localities to supplement registration rolls through other sources. *See, e.g.*, COLO. REV. STAT. § 13-71-107 (2017); S.D. CODIFIED LAWS § 16-13-4.1 (2017); *see also* Knack, *supra* note 31, at 100 (listing states that supplemented jury source lists in the 1980s). However, jurisdictions often have discretion over whether to use supplemental methods. *United States v. Brady*, 579 F.2d 1121, 1131 (9th Cir. 1978). Also, certain supplemental sources, such as tax assessment rolls, do not reflect low-income persons, many of whom are minorities. *See Saunders*, *supra* note 8, at 70 (claiming that using tax rolls “may have an even more disproportionate impact on economically-disadvantaged groups”). Even with supplementation, juries in these jurisdictions may lack diversity. *See id.*

40. *See MIZE ET AL.*, *supra* note 16, at 14.

41. *See, e.g., Bershatsky*, 99 F.3d at 557 (noting that supplemental sources “are ... under-inclusive, as they likely will not include citizens whose income levels do not require the filing of tax returns and who do not drive”).

42. *See id.*

43. *See supra* Part I.A.1.

44. *See Saunders*, *supra* note 8, at 70 (“[T]he voter registration list is an imperfect source list, that can be inherently unrepresentative of the community.”).

Voter discrimination has been problematic throughout U.S. history.⁴⁵ Over the past few centuries, various political groups have aimed to maintain power by preventing their opponent's constituents from voting.⁴⁶ Claiming that states needed to regulate voters to prevent fraud, these groups advocated for voter registration restrictions that had the practical effect of depressing registration on the part of low-income voters and minority groups.⁴⁷ For example, during the Reconstruction Era, southern states passed constitutional amendments implementing literacy tests as part of the voter registration process.⁴⁸ These tests served to systematically prevent persons of color and the poor from accessing the franchise.⁴⁹ Similar restrictions remained legal in southern states through the Jim Crow era; poll taxes, grandfather clauses, and literacy tests all stood in the way of potentially eligible voters.⁵⁰

The U.S. Congress attempted to address voter discrimination through major legislation three separate times.⁵¹ First, Congress passed the Voting Rights Act (VRA) of 1965,⁵² which "prohibited states or other political subdivisions from adopting qualifications or practices that denied the right to vote on the basis of race."⁵³ Congress aimed to eliminate registration barriers⁵⁴ by (1) authorizing special federal examiners to travel to certain jurisdictions and ensure that minorities could register to vote; and (2) requiring covered jurisdictions to obtain preclearance from either the District Court in Washington, D.C., or the Department of Justice before

45. See Tokaji, *supra* note 11, at 456 (claiming voter registration lists "have ... served [a] less worthy end of allowing those in control of the administration of elections to impede their political opponents' supporters from participating").

46. *Id.*; see Williams, *supra* note 11, at 620.

47. See, e.g., Tokaji, *supra* note 11, at 457 (noting political groups claimed "stronger registration requirements [were needed] to combat fraud and corruption at the polls").

48. See Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 27-28 (2006).

49. See Williams, *supra* note 11, at 620 (discussing the negative impact of registration restrictions on the registration of both "blacks ... [and] poor, illiterate whites").

50. See *id.*

51. Congress attempted to address voting issues a number of other times but with less effective or less comprehensive provisions. See Tokaji, *supra* note 11, at 462-63 (discussing the Civil Rights Acts passed in 1957, 1960, and 1964).

52. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 52 U.S.C. §§ 10301-10314, 10501-10508, 10701-10702 (Supp. III 2016)).

53. Moke & Saphire, *supra* note 48, at 17.

54. See *id.*

implementing changes to voter registration.⁵⁵ The VRA experienced early success; African American voter registration numbers increased by 22.8 percent in the two years after the VRA's passage.⁵⁶

Second, Congress passed the National Voter Registration Act (NVRA) of 1993⁵⁷ in response to a trend of low voter turnout in prior elections.⁵⁸ The NVRA, nicknamed "Motor Voter," requires states to make voter registration possible at state motor vehicle agencies.⁵⁹ The statute also requires states to provide registration opportunities at public assistance offices and offices that provide state services to persons with disabilities.⁶⁰ Although an overall increase in turnout did not occur after the NVRA's passage, voter registration rose by almost 4 percent nationally in the four years following the Act's passage.⁶¹

Third, after post election reports found that registration mix-ups likely accounted for between 1.5 and 3 million lost votes in the 2000 election,⁶² Congress passed the Help America Vote Act (HAVA) of 2002.⁶³ In passing the Act, Congress aimed to provide easier access to the franchise, while simultaneously reducing the incidence of voter fraud.⁶⁴ The HAVA mandates that states establish computerized voter registration lists; provides for the use of provisional ballots; and requires only a small subset of voters to provide identification when they attempt to register or vote.⁶⁵ Unlike the VRA and the NVRA, however, the HAVA did not appear successful soon after

55. See Tokaji, *supra* note 11, at 463-64.

56. See *id.* at 464-65.

57. Pub. L. No. 103-31, § 2, 107 Stat. 77 (codified at 52 U.S.C. §§ 20501-20511 (Supp. III 2016)).

58. See Tokaji, *supra* note 11, at 467.

59. National Voter Registration Act § 5; see also Tokaji, *supra* note 11, at 468 (noting that the NVRA requires states to attach voter registration applications to driver's license applications).

60. National Voter Registration Act § 7; see also Tokaji, *supra* note 11, at 468.

61. See Tokaji, *supra* note 11, at 469-70.

62. *Id.* at 470-71.

63. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 52 U.S.C.); see also Tokaji, *supra* note 11, at 470-71.

64. See Tokaji, *supra* note 11, at 470 (noting Congress aimed "to make it 'easier to vote' and 'harder to cheat'" (quoting David Nather, *Election Overhaul May Have to Wait in Line Behind Other 'Crisis' Issues*, CQ WKLY., July 27, 2002, at 2034)).

65. See Help America Vote Act § 303; see also Tokaji, *supra* note 11, at 471-73.

its passage.⁶⁶ During the HAVA's implementation period, numerous states required extended timelines to establish electronic systems.⁶⁷ At the same time, some states experienced problems matching voter names to motor vehicle registration information, a problem that threatened to result in the names of eligible voters being erroneously left off state registration lists.⁶⁸ Also, during the period following the HAVA's passage, the Department of Justice contravened Congress's goals by expending greater enforcement efforts on removing ineligible persons from voter rolls than on helping persons maintain their voter status.⁶⁹

Despite the early success of the VRA and the NVRA, moreover, issues have arisen with regard to compliance and the effectiveness of those statutes as well.⁷⁰ Specifically, critics have questioned the level of state compliance with the NVRA, as registrations from public assistance offices declined by 79 percent during the early period following the Act's passage.⁷¹ More generally, overall voter registration numbers declined from 2004 to 2006, a period in which all three voter registration acts were in effect.⁷² Furthermore, during this period, the burden to register remained on the citizen in most states, a requirement that served as a significant barrier for many persons.⁷³ These persistent problems with voter registration show that further change remains necessary to ensure the greatest number of eligible Americans can register to vote and, in turn, appear in jury pools.

66. See Tokaji, *supra* note 11, at 471-72 (describing early problems with HAVA compliance).

67. See *id.*

68. See *id.* at 472.

69. See *id.* at 480 (claiming the DOJ "has been much less active in protecting eligible voters from wrongful purges" than in forcing states to adopt practices aimed at removing ineligible voters). For a list of cases the DOJ has raised under the HAVA, see *Cases Raising Claims Under the Help America Vote Act*, U.S. DEP'T JUSTICE, <https://www.justice.gov/crt/cases-raising-claims-under-help-america-vote-act> [<https://perma.cc/ME3L-9EHJ>].

70. See generally Tokaji, *supra* note 11, at 474-76 (discussing persistent problems with the national voting acts).

71. See *id.* at 475 ("[R]egistration opportunities were not being offered as required by federal law.").

72. See *id.* at 474-75.

73. See Williams, *supra* note 11, at 623 (discussing the impediments people face when states place the burden to register upon individuals).

B. The Importance of Representative Juries

Beyond the fact that the Sixth Amendment mandates impartial jury trials for criminal prosecutions,⁷⁴ the U.S. justice system must provide for representative juries because doing so helps the country live up to its democratic ideals.⁷⁵ When juries lack diversity, the justice system loses some of the democratic fervor that drives it.⁷⁶ The Supreme Court has recognized this risk, noting that “[w]hen 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.”⁷⁷

Moreover, the integrity of the judicial process is threatened when juries lack diversity.⁷⁸ Specifically, some scholars note that white persons have historically “harbor[ed] prejudicial attitudes toward Blacks.”⁷⁹ If these historical attitudes persist in the present, all-white juries may be biased against defendants of color.⁸⁰ Even those white jurors who believe themselves impartial may lack the ability to separate their implicit biases from their civic duty.⁸¹ Erroneous outcomes can result when such biases affect jurors’ views on the guilt or innocence of defendants of color.⁸² In a country where capital punishment remains in use,⁸³ the chance of erroneous outcomes

74. See U.S. CONST. amend. VI.

75. See Williams, *supra* note 11, at 590 (“[T]he jury must be truly representative of the community to be an instrument of public justice.”).

76. See Saunders, *supra* note 8, at 54.

77. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (3-3-3 decision) (plurality opinion).

78. See Williams, *supra* note 11, at 596 (noting that the use of “unconstitutional procedures for jury source list development threaten[s] ... the integrity of the entire judicial process”).

79. Potash, *supra* note 18, at 81.

80. See *id.* (“While not *all* non-minority jurors are prejudiced against minority defendants, the courts and legislatures should operate on the assumption that prejudice, rather than impartiality, exists in the ‘all white’ jury.”).

81. See *id.* at 82 (“[T]he ‘all white’ jury, no matter how educated, cannot effectively screen out racism.”).

82. See *id.* at 81 (noting that community norms can “affect both the individual’s decision and the process through which the jury comes to its collective verdict”).

83. As of February 2017, thirty-one states, the federal government, and the U.S. military authorize the death penalty. *States and Capital Punishment*, NAT’L CONF. ST. LEGISLATURES (Feb. 2, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> [<https://perma.cc/6KV9-CEXG>].

must be minimized to prevent the state-mandated imprisonment and death of innocent persons.

C. Judicial Intervention in Jury Selection

Likely recognizing the importance of facing an impartial jury to the maintenance of their freedoms, numerous criminal defendants have challenged verdicts that allegedly “under-representative” juries handed down.⁸⁴ However, the judiciary’s response to such challenges has failed to ensure defendants face truly representative juries.

In addressing early challenges to juror selection procedures, the Supreme Court found the Sixth Amendment requires juries to be composed of fair cross-sections of the community.⁸⁵ In *Peters v. Kiff*, the Supreme Court applied the fair cross-section standard when examining the state indictment and conviction of a white man.⁸⁶ The Court subsequently overturned the defendant’s conviction because African Americans had been arbitrarily excluded from the grand jury that indicted him.⁸⁷ In its decision, the Court noted that while other forms of exclusion may be justified by law, the systematic exclusion of African Americans from juries is patently unconstitutional.⁸⁸

Despite the fair cross-section requirement, however, federal courts, including the Supreme Court, have repeatedly upheld the

84. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 524-25 (1975) (describing the issue of whether excluding women from the jury violated the defendant’s Sixth Amendment rights); *Hernandez v. Texas*, 347 U.S. 475, 476-77 (1954) (describing petitioner’s argument that the exclusion of persons of Mexican descent from the jury denied him equal protection of the law); *United States v. Bryant*, 523 F.3d 349, 351 (D.C. Cir. 2008) (noting appellant’s request for “a hearing to determine whether his jury venire violated the Jury Selection and Service Act”).

85. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (“Trial by jury presupposes a jury drawn from a pool broadly representative of the community.”); see also *Taylor*, 419 U.S. at 530 (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment.”). Congress codified the fair cross-section requirement through the passage of the Jury Selection and Service Act of 1968. See Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1821, 1861-1869, 1871 (2012)). The associated statutes mandate that federal juries be fair cross-sections of the community and prohibit racial discrimination in jury selection. 28 U.S.C. §§ 1861-1862 (2012).

86. 407 U.S. 493, 494, 500 (1972) (3-3-3 decision) (plurality opinion).

87. See *id.* at 505.

88. See *id.*

constitutionality of questionable jury selection practices.⁸⁹ For example, courts have maintained the constitutionality of selection practices even in cases in which the challengers claimed the jury underrepresented significant portions of the community.⁹⁰ In doing so, these courts asserted that juries need not be perfect microcosms of the local population to be fair cross-sections of the community.⁹¹

As discussed above, courts have also consistently upheld the use of voter registration rolls as jury source lists, despite evidence that these lists may not be perfectly representative of the community.⁹² The Fourth Circuit's decision in *United States v. Cecil* highlights the extent to which juries may lack diverse representation but remain constitutionally sufficient.⁹³ In *Cecil*, the court noted that "the Constitution does not require that the juror selection process be a statistical mirror of the community," so long as the jurors are "gathered without active discrimination."⁹⁴ The court further noted that the use of voter lists as jury selection sources "will not be invalidated because a group chooses not to avail itself of the right to register."⁹⁵ Under this reasoning, the court upheld Maryland's use of "the Voter Registration List ... as the sole source" for jury selection, even when the juror selection list underrepresented certain groups, such as Hispanics.⁹⁶ The court's decision in *Cecil* reveals that so long as

89. See, e.g., *United States v. Torres-Hernandez*, 447 F.3d 699, 705-06 (9th Cir. 2006) ("[The] 2.0 percentage point[] ... disparity between the percentage of jury-eligible Hispanics and the percentage of Hispanics on [the] grand jury venire was constitutionally insignificant."); *United States v. Smith*, 463 F. Supp. 680, 683 (E.D. Wis. 1979) (finding the Constitution does not require supplementation of "voter lists simply because an identifiable group votes in a proportion lower than the rest of the population"). But see *State v. Machia*, 449 A.2d 1043, 1047 (Conn. Super. Ct. 1979) ("[M]ales and females are not fungible as jurors, because women bring a certain 'flavor' to the adjudicative process of which no person accused of a crime may be lawfully deprived." (citing *Ballard v. United States*, 329 U.S. 187, 193-94 (1946))).

90. See, e.g., *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988) (en banc).

91. See, e.g., *id.* ("[T]he Constitution does not require that the juror selection process be a statistical mirror of the community; it is sufficient that the selection be 'in terms of a "fair cross-section" gathered without active discrimination.'" (quoting *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc))).

92. See, e.g., *Smith*, 463 F. Supp. at 683 (finding the Constitution does not require the supplementation of names outside of voter registration lists when the "group votes in a proportion lower than the rest of the population").

93. See 836 F.2d at 1445.

94. *Id.*

95. *Id.* at 1448.

96. See *id.* at 1447, 1456.

the jury's structure remains constitutionally sufficient, the federal courts will not likely act to mandate perfect diversity.⁹⁷

Recently, in *Peña-Rodriguez v. Colorado*, the Supreme Court held “that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant ... the trial court [may] consider the evidence of the juror’s statement” to determine if the defendant received a fair trial under the Sixth Amendment.⁹⁸ Although this decision may permit ex post review of questionable jury practices, the Court’s decision does not prevent more subtle prejudices from influencing trial outcomes.⁹⁹ Even when no jurors express specific antipathy toward a defendant, the jury may lack the diversity needed to achieve a truly impartial structure.¹⁰⁰ Accordingly, jury selection reform remains needed to ensure the judicial process occurs within a truly just system.

II. CONTEMPORARY ISSUES WITH STATE VOTER REGISTRATION

As discussed in Part I, judicial and congressional attempts to address voter registration issues have been, at best, only marginally effective.¹⁰¹ In fact, historical problems with voter registration have become contemporary problems as well, especially within the last two decades.¹⁰²

In the first two decades of the new millennium, a number of states have passed increasingly restrictive voter laws that make it difficult, if not impossible, for large sectors of society to gain access to the franchise.¹⁰³ Such restrictions include voter identification (voter ID) requirements, early voting limits, ex-felon voting restrictions, and voter roll purges.¹⁰⁴ Conservative politicians often back those

97. *See id.* at 1448.

98. 137 S. Ct. 855, 869 (2017).

99. *See supra* notes 81-82 and accompanying text.

100. *See supra* note 82 and accompanying text.

101. *See supra* Parts I.A.2, I.C.

102. *See* Denise Lieberman, *Barriers to the Ballot Box: New Restrictions Underscore the Need for Voting Laws Enforcement*, 39 HUM. RTS., Aug. 2012, at 2, 2 (“[L]egislative activity ... since the 2010 midterm elections marks a sharp departure from the trend of expanding access, with more than 180 restrictive voting bills introduced in forty-one states since last year.”).

103. *See id.*

104. *See id.* at 3-4.

measures, claiming that restrictions are “necessary to prevent voter fraud.”¹⁰⁵ Conversely, state implementation of such laws has also incited backlash, with the Advancement Project calling the trend “the most significant rollback of voting rights in a century.”¹⁰⁶ Individuals have also brought suit to challenge the laws,¹⁰⁷ which have been said to be “functionally indistinguishable” from past Jim Crow restrictions.¹⁰⁸

To show why registration reform is needed to preserve access to the franchise, and to address lawmaker concerns with fraud and voter security, this Part examines the restrictive voter laws passed in a number of different states in the past fifteen years and discusses the results of legal challenges to those laws.

A. Contemporary State Voter Laws

In the years following the 2000 presidential election, a number of states passed restrictive voter laws, often backed by politicians who claimed states needed to pass such measures to prevent voter fraud.¹⁰⁹ As with historic restrictions, many of these laws had disproportionate effects on people of color, the elderly, young people, and people with disabilities.¹¹⁰ Laws restricting the forms of acceptable identification had a particularly disproportionate impact on potential voters, as approximately twenty-one million Americans—including about one-in-four African Americans—lacked non-expired forms of identification at that time.¹¹¹ State limits on early voting in Florida, Georgia, Ohio, Tennessee, West Virginia, and Wisconsin likely had similar disproportionate effects.¹¹² In past elections, African Americans participated in early voting in much greater numbers than white persons.¹¹³

105. *Id.* at 3.

106. *Id.* at 2.

107. *See infra* Part II.B.

108. *See* Lieberman, *supra* note 102, at 5.

109. *See id.* at 2-3.

110. *See id.* at 3 (noting that African Americans, Latinos, young people, people with disabilities, and the elderly are disproportionately unlikely to possess identification).

111. *See id.*

112. *See id.* at 4.

113. *See id.* (noting that African Americans were “twice as likely” as white persons to cast early ballots in 2008).

Numerous states passed laws specifically aimed at voter registration as well.¹¹⁴ For example, a number of states implemented voter ID matching procedures that required the deletion of voters from registration databases if their names did not sufficiently match with information on other documents.¹¹⁵

The states of Texas and Florida also limited the effectiveness of voter registration drives by compelling workers to adhere to difficult procedural requirements, such as submitting registration forms within forty-eight hours.¹¹⁶ The State of Ohio placed even further barriers on registration drives when it implemented a statute requiring workers to comply with the following procedures:

- (1) all “compensated” registration workers [must] pre-register and receive online training from the Secretary of State’s Office, and then sign an affirmation attesting to their completion of this requirement with each registration form; (2) all voter registration workers [must] *personally* return the registration forms they collect to election authorities ...; and (3) all compensated election workers who help voters in completing registrations [must] disclose their identity and employer on the forms.¹¹⁷

These requirements acted as a barrier against the participation of nongovernmental entities in voter registration drives, including many volunteers who had sought to assist low-income or minority populations.¹¹⁸

Prior to the passage of the state statute, the Ohio Secretary of State even issued a directive requiring registration forms to be on

114. See, e.g., Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (June 5, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Details> [<https://perma.cc/WV4A-KHYY>].

115. Tokaji, *supra* note 11, at 481. A Brennan Center study found that ID “matching failed between 20 and 30% of the time” in some areas. *Id.* (citing JUSTIN LEVITT ET AL., MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION (2006)). Specifically, the study found that Iowa, Washington, South Dakota, and Texas had “overly stringent matching procedures” at that time. See *id.* Although some of these states have less stringent voter identification laws today, others have implemented stricter laws since that period. See *supra* note 114 (discussing voter ID requirements in effect in 2017).

116. See Lieberman, *supra* note 102, at 4.

117. Tokaji, *supra* note 11, at 487; see also *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006).

118. See Tokaji, *supra* note 11, at 487 (noting that groups hosting voter registration drives targeting minority and low-income communities brought suit to challenge the law).

“heavy-stock, 80 lb. paper weight” or be rejected.¹¹⁹ Such a requirement would have disproportionately affected the poor, who likely lack the resources to comply with specific paper weight requirements. Under the threat of litigation, the Secretary’s office later chose not to enforce the directive.¹²⁰ Altogether, these restrictive state laws could negatively impact millions of potential voters.

B. Legal Challenges to State Voter Laws

A number of groups successfully challenged restrictive voter laws in their respective states. For example, in *Project Vote v. Blackwell*, the United States District Court for the Northern District of Ohio found Ohio’s application of restrictions on “compensated” registration drive workers was discriminatory and violated the NVRA.¹²¹ Additionally, in summer 2016, federal courts overturned all or part of the voter registration or voter identification laws in North Carolina,¹²² Texas,¹²³ Wisconsin,¹²⁴ and Ohio,¹²⁵ following constitutional challenges.

Nevertheless, these constitutional bars may be only short-term solutions.¹²⁶ States may find other ways to implement registration restrictions while avoiding constitutional scrutiny. For example, in *Feldman v. Arizona Secretary of State’s Office*, the United States District Court for the District of Arizona declined to follow the

119. *Id.* at 477.

120. *See id.*

121. 455 F. Supp. 2d at 703.

122. *See* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214, 241 (4th Cir. 2016) (enjoining provisions of the electoral reform law, including the voter ID provision, challenged as violative of the Fourteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act), *cert. denied*, 137 S. Ct. 1399 (2017).

123. *See* Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (determining the district court did not err in finding a Texas voter ID bill “has a discriminatory effect on minorities’ voting rights in violation of Section 2 of the Voting Rights Act”), *cert. denied*, 137 S. Ct. 612 (2017).

124. *See* One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016) (finding various portions of the Wisconsin voter law unconstitutional), *appeal docketed*, No. 16-03083 (7th Cir. Aug. 2, 2016).

125. *See* N.E. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 632 (6th Cir. 2016) (finding the requirement “mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope” unjustified by the government interest), *cert. denied*, 137 S. Ct. 2265 (2017).

126. The defendants in the *Thomsen* case filed for appeal in 2016. *See* Plaintiffs’ Notice of Appeal, One Wis. Inst., Inc. v. Thomsen, No. 16-03083 (7th Cir. Aug. 2, 2016).

Supreme Court's decision in *Project Vote v. Blackwell*, claiming that Arizona's similar voter law had minimal effects on minorities and served legitimate fraud prevention purposes.¹²⁷ The Ninth Circuit then affirmed that decision.¹²⁸ Under similar reasoning, courts may uphold restrictive voter laws in other states as well. Accordingly, implementing automatic voter registration remains important as a means to reduce the likelihood of voter discrimination, while simultaneously addressing politicians' concerns with voter fraud, voter privacy, and increased electoral costs.¹²⁹

III. OREGON'S AUTOMATIC VOTER REGISTRATION MODEL: THE MOTOR VOTER ACT

As neither the courts nor the federal government have definitively resolved problems with either voter discrimination or jury selection, this Note turns to voter registration reform as a means to reform the jury selection process. Although this Note does not intend to suggest voter registration reform can solve all of the problems within the jury system, it aims to show how automatic registration can help take a step in the right direction by diversifying the pool of potential jurors from which localities select before trial. Specifically, this Note examines Oregon's now-codified Motor Voter Act, which mandates a form of automatic voter registration.¹³⁰ Viewing Oregon's Act as a model for state reform, the rest of this Note argues that states should implement an expanded version of Oregon's automatic voter registration program in their own jurisdictions to increase the diversity of their jury selection pools.

This Part provides some background behind Oregon's passage of its automatic registration statute, describes the statute in detail, and argues that early statistics as well as preliminary commentary on the statute show that Oregon has increased registration numbers

127. See *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1088, 1090-91 (D. Ariz. 2016), *aff'd*, 840 F.3d 1057 (9th Cir. 2016), *reh'g granted*, 841 F.3d 791, 791 (9th Cir. 2016).

128. See *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1085-86 (9th Cir. 2016), *reh'g granted*, 841 F.3d 791, 791 (9th Cir. 2016).

129. See *infra* Parts IV.A.

130. OR. REV. STAT. § 247.017 (2017).

and lowered electoral costs, while preventing fraud and securing voter privacy.

A. Oregon as an Electoral Reform Pioneer

Over the past twenty years, the State of Oregon has been at the forefront of electoral reform. In 1998, Oregon became the first state to introduce a statewide vote-by-mail system, which is credited with increasing turnout and election security, while reducing electoral costs.¹³¹ Then, in 2008, Oregon implemented legislation permitting seventeen-year-olds to preregister to vote before their eighteenth birthdays.¹³² Finally, in 2009, Oregon passed online voter registration legislation, becoming one of the first ten states to permit online registration.¹³³

Given Oregon's precedent of electoral reform, it is perhaps unsurprising that the Oregon legislature was the first to pass an automatic registration bill.¹³⁴ Despite the state's track record of reform, however, not all of Oregon's politicians favored the bill.¹³⁵ Republicans opposed the measure for several reasons, claiming the law would risk data security, threaten the safety and privacy of citizens, and raise county clerk costs.¹³⁶

Nonetheless, Democrats' assertions that automatic registration would empower democracy by "bucking th[e] trend" of state registra-

131. See *id.* § 254.470; see also Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 424, 426 (2008); Alex G. Tischenko, Note, *Online Voter Registration in Oregon: Towards an Election Administration Triple Bottom Line*, 21 STAN. L. & POL'Y REV. 165, 168 (2010).

132. 2007 Or. Legis. Serv. 555 (West) (codified as amended at OR. REV. STAT. § 247.016 (2017)).

133. 2009 Or. Legis. Serv. 914 (West) (codified at OR. REV. STAT. § 247.019 (2017)).

134. See Ari Berman, *Automatic Voter Registration in Oregon is Revolutionizing American Democracy*, NATION (May 16, 2016), <https://www.thenation.com/article/automatic-voter-registration-in-oregon-is-revolutionizing-american-democracy/> [<https://perma.cc/H4HC-T4E8>].

135. See Press Release, House Republican Office, House Republicans Protect Privacy & Individual Freedoms of Oregonians in Unanimous Opposition to HB 2177 (Feb. 20, 2015), <https://www.oregonlegislature.gov/houserepublicans/Documents/House%20Republicans%20Protect%20Privacy%20And%20Individual%20Freedoms%20Of%20Oregonians%20In%20Unanimous%20Opposition%20To%20HB%202177.pdf> [<https://perma.cc/R6MB-QZGT>].

136. *Id.* For further discussion on criticisms of Oregon's voter registration statute, see *infra* Part V.A.

tion limitations carried the day.¹³⁷ Despite Republican dissension, the Oregon legislature passed the Motor Voter Act and codified automatic voter registration in March 2015.¹³⁸ The law went into effect in January 2016—ten months before the 2016 presidential election—and preserved Oregon's status as a pioneer in electoral reform.¹³⁹

B. The Structure of Oregon's Automatic Voter Registration Statute

Oregon's automatic registration statute requires the Department of Transportation to provide electronic records of persons who have a qualifying interaction with the Department of Motor Vehicles (DMV) to the Secretary of State.¹⁴⁰ The Secretary then must provide the information to the clerk of the county where that person may be registered to vote.¹⁴¹ Next, the Secretary or county clerk must notify the qualifying person of his or her choice whether to (1) decline to be registered, or (2) adopt a political party affiliation.¹⁴² If the person does not respond and opt out of registration within twenty-one calendar days, the person's electronic record then constitutes a voter registration card.¹⁴³ Then, if the person has not previously been registered and meets the qualification requirements under the Oregon Constitution, the clerk registers the person as an elector.¹⁴⁴

Per section 247.017, the Oregon Secretary of State must also adopt the rules required to implement the statute, including the determination of which interactions with the DMV qualify under the statute.¹⁴⁵ The Secretary has determined that qualifying interactions with the DMV include applying for, renewing, or replacing a

137. News Release, Senate Majority Office, Motor Voter Legislation Passes Senate, on the Way to Governor Brown (Mar. 5, 2015), https://www.oregonlegislature.gov/senatedemocrats/Documents/SMO%20PR_HB%202177%20Motor%20Voter_03%2005%202015.pdf [<https://perma.cc/4G72-APPT>].

138. See OR. REV. STAT. § 247.017 (2017).

139. See *Oregon Motor Voter Act FAQ*, OR. SECRETARY ST., <http://sos.oregon.gov/voting/Pages/motor-voter-faq.aspx> [<https://perma.cc/EZ9N-F7Q4>].

140. See OR. REV. STAT. § 247.017(1).

141. See *id.* § 247.017(2).

142. See *id.*

143. See *id.* § 247.017(3).

144. See *id.*

145. See *id.* § 247.017(1), (5).

license, ID card, or permit.¹⁴⁶ In carrying out the statutory mandate, the Secretary further provided for the automatic registration of persons who interacted with the DMV in 2014 and 2015—before the implementation of the Act—so long as those persons did not choose to opt out.¹⁴⁷

In other words, after any person over the age of seventeen interacts with the Oregon DMV going forward, the DMV will send that person's information to the Secretary of State to begin the process of registering him or her to vote.¹⁴⁸ So long as that person is not already registered and qualifies as an elector, he or she will then become a registered voter.¹⁴⁹ Through the passage of the Motor Voter Act, the registration burden has thus shifted from the citizen to the State of Oregon. This burden shift differentiates Oregonian residents from those in many other states, who must continue to bear the burden of registration if they wish to vote.¹⁵⁰

C. Early Statistics and Commentary on the Oregon Statute

Oregon's automatic voter registration statute went into effect in early 2016.¹⁵¹ Since Oregon's implementation of section 247.017, both early statistics and commentary suggest the law has been successful in increasing voter registration, while reducing electoral administration costs.

1. Early Voter Registration Statistics

Although the Oregon statute remains relatively new in its application, early reports suggest the law has been effective in increasing voter registration and in diversifying the registration pool. In the

146. OR. SEC'Y OF STATE, ELECTIONS DIV., OREGON MOTOR VOTER REGISTRATION MANUAL (2017), <http://sos.oregon.gov/voting/Documents/oregon-motor-voter-registration-manual-final.pdf> [<https://perma.cc/3UZZ-HWLZ>].

147. See OR. SECRETARY ST., *supra* note 139.

148. See § 247.017; OR. SECRETARY ST., *supra* note 139.

149. See § 247.017.

150. See, e.g., FLA. STAT. ANN. § 97.053(2) (2017) (placing the burden on the individual to register prior to the date of book closing); KAN. STAT. ANN. § 25-2309(a) (2017) (requiring persons to mail or otherwise deliver their registration to election county officers); see also Williams, *supra* note 11, at 623 (noting the burden to register lies with the individual in most states).

151. See *supra* note 139 and accompanying text.

first four months of 2016, Oregon added 129,162 voters to the rolls, registering 51,558 of those individuals through the automatic process.¹⁵² In comparison, in 2008, another major election year, only 85,362 people registered to vote in the first four months of the year.¹⁵³ Additionally, through May 2016, an average of 12,889 Oregonians registered to vote per month, over 8,000 more people than at the same point before the 2012 presidential election.¹⁵⁴

Furthermore, during the implementation of the second phase of the Motor Voter Act rules in June 2016, the Secretary gave 145,000 people the opportunity to register to vote based upon qualifying interactions those people had with the DMV in 2014 and 2015.¹⁵⁵ Through the first seven months of the year, the Oregon Secretary of State estimated the state was on track to sign up more than 200,000 new voters.¹⁵⁶

After Oregon implemented the Act, registration numbers increased significantly at the local level as well.¹⁵⁷ Lane County voter registration, for example, topped 237,000 before the end of September 2016, several weeks before the registration deadline for the presidential election.¹⁵⁸ In comparison, Lane County registration totaled only 214,259 persons before the 2012 presidential election.¹⁵⁹

Ultimately, Oregon automatically registered 272,702 individuals before the November 2016 presidential election, 98,000 of whom vot-

152. See Berman, *supra* note 134; Liz Kennedy, *Oregon's Success Shows Way Forward for Automatic Voter Registration*, CTR. FOR AM. PROGRESS (May 16, 2016, 9:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2016/05/16/137492/oregons-success-shows-way-forward-for-automatic-voter-registration/> [https://perma.cc/5Z6S-QCUZ].

153. See Kennedy, *supra* note 152.

154. See Berman, *supra* note 134.

155. Press Release, Or. Sec'y of State, 145,000 Oregonians to Receive Automatic Voter Registration Letters Starting Friday (June 8, 2016), <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1609> [https://perma.cc/CH8V-WBQN].

156. Hillary Borrud, *Oregon Expects to Automatically Register More Than 200,000 New Voters Ahead of November Election*, OREGONIAN (July 8, 2016, 3:16 PM), http://www.oregonlive.com/politics/index.ssf/2016/07/oregon_secretary_of_state_expe.html [https://perma.cc/YX5T-QYYN].

157. See Christian Hill, *Motor Voter Law Stokes Registration*, REG.-GUARD (Sept. 29, 2016), <http://projects.registerguard.com/rg/news/local/34840508-75/motor-voter-law-presidential-race-stoke-record-lane-county-registration.html.csp> [https://perma.cc/TM7A-XQM6] (discussing voter registration statistics in Lane County, Oregon).

158. See *id.*

159. See *id.*

ed in the election.¹⁶⁰ Significantly, the Center for American Progress found that these automatically registered voters were “[n]oticeably younger[,] ... [m]ore likely to live in low- and middle-income areas[,] [m]ore likely to live in lower-education areas[,] and [m]ore likely to live in racially diverse areas” than that of traditional registrants.¹⁶¹ The increase in registrants across these areas shows that automatic registration helped to diversify Oregon’s voter rolls, and by extension, the lists of names available for jury selection.

These early statistics suggest that Oregon’s Motor Voter Act has successfully increased and diversified voter registration, perhaps even beyond early estimates. Accordingly, if states implement automatic registration, their registration rates will also likely increase.

2. *Positive Commentary on Oregon’s Model*

Early commentary on Oregon’s act suggests the statute has successfully increased registration numbers, while addressing many critics’ concerns with the passage of the act. First, Jonathan Brater, who focuses on voting rights and elections as counsel for the Brennan Center for Justice’s (Brennan Center) Democracy Program,¹⁶² claims Oregon’s law “increases the accuracy and security of our voter rolls, and curbs the potential for fraud.”¹⁶³ The Brennan Center also argues that automatic registration systems are more secure because they are more accurate and “less vulnerable to manipulation and abuse than their paper-based counterparts” and because “states can take steps to increase security, like limiting authorized [registration system] users, monitoring for anomalies, and designing systems to withstand potential breaches.”¹⁶⁴ Although there is no guarantee that persons will not hack voter systems,¹⁶⁵

160. Griffin et al., *supra* note 23.

161. *Id.*

162. See Jonathan Brater, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/expert/jonathan-brater> [<https://perma.cc/HD2S-ASFS>].

163. Jonathan Brater, *Automatic Voter Registration in Oregon a Huge Success*, BRENNAN CTR. FOR JUST. (Apr. 8, 2016), <https://www.brennancenter.org/blog/automatic-voter-registration-oregon-huge-success> [<https://perma.cc/P76T-TKCK>].

164. BRENNAN CTR. FOR JUSTICE, *THE CASE FOR AUTOMATIC VOTER REGISTRATION* (2016), <https://www.brennancenter.org/publication/case-automatic-voter-registration> [<https://perma.cc/HJC2-RL3B>].

165. Amber Phillips, *How to Argue About Automatic Voter Registration, as Oregon Gets the Ball Rolling*, WASH. POST (Feb. 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/>

these comments suggest that the Oregon Republicans' concerns regarding voter privacy and the potential for data breaches are likely unfounded.¹⁶⁶

Second, the Brennan Center notes that modernizing registration saves states money.¹⁶⁷ For example, in the first two years after the State of Washington implemented electronic voter registration, the Secretary of State's office saved over \$176,000.¹⁶⁸ To that end, the Brennan Center claims automatic registration systems will be cost-effective and save taxpayers "millions of dollars [each] year."¹⁶⁹ Moreover, Oregon's law "puts the responsibility for the program on elections officials at the state and county level, not on front line agency employees," which means DMV employees neither face increased responsibilities beyond their regular workload nor require further resources to carry out automatic registration.¹⁷⁰ These early comments on Oregon's law suggest automatic voter registration can serve as an effective model for electoral reform in the jury source context.¹⁷¹

IV. APPLYING AN EXPANDED VERSION OF OREGON'S MODEL IN OTHER STATES

All fifty states have departments of transportation,¹⁷² as well as accompanying departments of motor vehicles.¹⁷³ Accordingly, although states may require different procedures for acquiring or maintaining driver's licenses, permits, or forms of identification,¹⁷⁴

2016/02/13/how-to-argue-about-automatic-voter-registration-as-oregon-gets-the-ball-rolling/ [https://perma.cc/U287-ATP7].

166. For further discussion of why automatic registration increases voter security and reduces the risk of fraud, see *infra* Parts IV.A.2, V.E.

167. See *Automatic Voter Registration and Modernization in the States*, BRENNAN CTR. FOR JUST. (Feb. 3, 2017), <http://www.brennancenter.org/analysis/voter-registration-modernization-states> [https://perma.cc/28Z3-YUSD].

168. See *id.*

169. *Id.*

170. Kennedy, *supra* note 152.

171. For a discussion of the early critiques of Oregon's statute, see *infra* Part V.A.

172. See *generally State Transportation Web Sites*, U.S. DEP'T TRANSPORTATION, <http://www.fhwa.dot.gov/about/webstate.cfm> [https://perma.cc/U8CG-LSSV].

173. See *generally 50 State DMV Links*, NEV. DEP'T MOTOR VEHICLES, http://www.dmvnv.com/50_state_dmv_list.html [https://perma.cc/94QQ-UXW7].

174. Compare COLO. REV. STAT. § 42-2-106(1)(a)(I), (b)(I), (c), (d)(I) (2017) (describing the requirements to receive a permit or temporary license), with IDAHO CODE § 49-306(1)-(2)

automatic voter registration can still be implemented in those states. Notably, however, many states already require localities to pull juror names from lists of licensed drivers, and, at any rate, not all residents interact with their local DMVs.¹⁷⁵ To ensure that automatic registration systems have a real impact on the diversity of voter rolls, this Part argues that states should develop an expanded form of Oregon's automatic registration model. This Part also explains why implementing automatic registration systems will help to lower electoral costs, increase voter security, and prevent voter fraud. Finally, this Part argues that to help ensure diversity in the potential pool of jurors, states should require their localities to use the names of registered voters, including automatically registered voters, when preparing jury source lists.

A. The Need for an Expanded Version of the Oregon Model

As all fifty states already have DMVs,¹⁷⁶ the structure is in place to implement automatic registration when persons engage in “qualifying interactions” with the DMV¹⁷⁷ in their respective states.¹⁷⁸ If states followed the Oregon model, such qualifying interactions could include applying for or renewing permits, licenses, or forms of identification.¹⁷⁹ Second, as long as states already provide for such services at their DMVs, few additional resources would be needed to implement an automatic registration process. As in Oregon, to begin the registration process, the Department of Transportation of that state would simply need to send a person's information to the Secretary of State after the person had such a qualifying interaction with the DMV.¹⁸⁰

The Secretary of State could then continue to follow the Oregon model as well by sending the information to the clerk of the county

(2017) (describing the application for a driver's license or permit), and KAN. STAT. ANN. § 8-240(a)-(c), (g)-(i) (2017) (describing the requirements to receive a driver's license).

175. See MIZE ET AL., *supra* note 16, at 14; see also *Bershatsky v. Levin*, 99 F.3d 555, 557 (2d Cir. 1996) (per curiam).

176. See *supra* note 173 and accompanying text.

177. See OR. SEC'Y OF STATE, *supra* note 146, at 4.

178. OR. REV. STAT. § 247.017(1)-(3) (2017).

179. See OR. SEC'Y OF STATE, *supra* note 146, at 4.

180. See OR. REV. STAT. § 247.017(1) (requiring the Department of Transportation to forward names to the Secretary).

where the person resides.¹⁸¹ The clerk would finish the process by notifying the person of their ability to opt out of the program, giving the person the opportunity to opt out, and then registering the person to vote if they do not opt out within a predetermined number of days.¹⁸² Oregon's statute likely serves as a good model with regard to an opt-out provision as well.¹⁸³ The three-week opt-out period gives people a chance to refuse before the state registers them, while preventing the state from holding on to their information indefinitely without actually registering them.¹⁸⁴

However, states implementing automatic registration likely need to stray from the DMV-based model in certain ways. For example, in a number of urban areas, such as New York City, fewer people drive than in rural or suburban areas.¹⁸⁵ These people are less likely to obtain driver's licenses or interact with the DMV at all. Further, in areas suffering from high poverty levels, people may not be able to afford to buy or lease a vehicle, and consequently, may not attempt to obtain a permit or license. In providing for automatic registration solely through the Department of Transportation, the Oregon model does not address these potential issues.¹⁸⁶

Most importantly, many states already mandate that localities pull juror names from the state's list of licensed drivers.¹⁸⁷ Although implementing the Oregon program in such states would lead to the addition of the names of *non-licensed* drivers who have interacted with the DMV, such as by applying for permits or forms of identifi-

181. *See id.* § 247.017(2).

182. *See id.* § 247.017(2)-(4).

183. *See id.* § 247.017(3) (noting that a person will be registered to vote if they do not decline within twenty-one days).

184. *Cf. id.*

185. New York City is the population center of New York State, with 8,537,673 people as of July 2016. *Current Estimates of New York City's Population for July 2016*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/data-maps/nyc-population/current-future-populations.page> [<https://perma.cc/FV9H-HH98>]. However, only 3,627,513 New York City residents held driver's licenses in 2015, as compared to the 8,044,474 state residents with licenses who lived outside of the city. N.Y. STATE DEP'T OF MOTOR VEHICLES, NYS DRIVER LICENSES IN FORCE (2015), <https://dmv.ny.gov/statistic/2015licinforce-web.pdf> [<https://perma.cc/NXU7-M28J>].

186. *See OR. REV. STAT.* § 247.017(1).

187. *See MIZE ET AL.*, *supra* note 16, at 14.

cation, the jury systems in those states would not be significantly affected by Oregon's automatic registration program alone.¹⁸⁸

States can resolve these potential problems by automatically registering persons who engage with either public assistance offices, offices providing state-funded services to people with disabilities, or state DMV offices.¹⁸⁹ If such offices forwarded the names of qualifying persons to the Secretary of State for registration purposes, state registration lists would more likely include poor persons, persons with disabilities, and other minority groups that may not be able to acquire a license or go through formal registration channels. Additionally, the NVRA already requires these offices to provide registration services at their locations,¹⁹⁰ so they would likely need few additional resources to send potential voter information to the state.¹⁹¹ In fact, implementing automatic registration through the expanded model would likely enable states to save resources overall, while minimizing the incidence of voter fraud, as discussed below.¹⁹²

1. *Conserving Resources*

States that enact automatic voter registration schemes will likely save resources for three reasons. First, because instituting automatic processes standardizes the system and avoids human error, doing so generally saves money.¹⁹³ Second, if a state implemented an automatic registration system, individual electoral administrators would have less discretion over who gets registered to vote.¹⁹⁴ As a result, following the automatic process would reduce the likelihood

188. *See id.*

189. *See* National Voter Registration Act of 1993, Pub. L. No. 103-31, § 7(a)(2), 107 Stat. 77, 80 (codified at 52 U.S.C. § 20506(a)(2)(A)-(B) (2012)) (requiring states to provide registration opportunities at public assistance offices and offices that provide state services to persons with disabilities).

190. *See id.*

191. *Cf. id.*

192. *See infra* Parts IV.A.

193. *See* BRENNAN CTR. FOR JUST., *supra* note 20.

194. The Oregon model, for example, requires the Department of Transportation to forward people's names to the Secretary of State once they have a qualifying interaction with the DMV. *See* OR. REV. STAT. § 247.017(1) (2017). As long as other state registration statutes define "qualifying interactions," *see* OR. SEC'Y OF STATE, *supra* note 146, at 4, administrators will lack discretion to claim a person did not meet that requirement.

that any one person would be treated differently than any other person. A state with an automatic registration process would then likely face lower litigation costs, because fewer citizens would need to allege that the state had infringed upon their electoral rights.¹⁹⁵ The State of North Carolina experienced similar cost savings in 2007 after it cooperated with nonprofit voting-rights groups to improve agency registration.¹⁹⁶ That year, registration numbers increased without the need for litigation.¹⁹⁷ A state's implementation of an automatic registration scheme would likely have a similar effect, increasing registration numbers while decreasing litigation costs.

Third, as noted above, the federal voting acts already require states to provide registration resources at various public offices.¹⁹⁸ For example, the NVRA requires states to provide registration opportunities, as well as standardized registration forms, at the DMV, public assistance offices, and offices that provide state-funded assistance to persons with disabilities.¹⁹⁹ In complying with the NVRA, states have likely already acquired the resources needed to implement automatic registration. These offices need only to forward the names and information of persons who interact with their offices to the Secretary.²⁰⁰ Moreover, pursuant to the HAVA, states must already use "a single, uniform, official, centralized, interactive computerized statewide voter registration list."²⁰¹ States should not need further resources to put together a comprehensive voter registration list because one should already exist.²⁰²

195. See Tokaji, *supra* note 11, at 484 (noting that in 2007, North Carolina state officials cooperated with voting rights groups to improve agency registration, resulting in "a five-fold increase in registrations per month ... without the need for a lawsuit").

196. *Id.*

197. *See id.*

198. See National Voter Registration Act of 1993, Pub. L. No. 103-31, § 7(a)(1)-(3), 107 Stat. 77, 80 (codified at 52 U.S.C. § 20506(a)(1)-(3) (2012)).

199. *See id.*

200. See OR. REV. STAT. § 247.017(1) (2017) (requiring the Department of Transportation to forward the information of persons who have qualifying interactions with the DMV to the Secretary).

201. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303(a)(1)(A), 116 Stat. 1666, 1708 (codified at 52 U.S.C. § 21083(a)(1)(A) (2012)).

202. *See id.*

Furthermore, the burden will not fall on the public offices to determine whether someone previously registered to vote.²⁰³ Instead, after the office sends a person's information to the Secretary, and the Secretary forwards the information to the county clerk, the clerk could cross-check the person's information with the state-maintained list.²⁰⁴ Few to no additional resources will need to be used to implement automatic registration in these states.²⁰⁵ The cost savings that will likely result from automatic registration can then be used to implement outreach programs targeted at minority groups or low-income persons, thereby further enhancing the positive effects of automatic registration.²⁰⁶

2. Preventing Voter Fraud

Implementing automatic voter registration is unlikely to increase the incidence of voter fraud in the United States. Notably, a number of studies suggest voter fraud is already very rare.²⁰⁷ For example, the News21 study on Election Fraud in America found only 361 cases of registration fraud between 2000 and 2012,²⁰⁸ a miniscule number compared to the 146 million registrations in that same period.²⁰⁹ Also, in states where politicians frequently express concern over voter fraud, including Arizona, Georgia, Kansas, Ohio, and Texas, attorneys general successfully prosecuted only thirty-eight cases between 2012 and 2016.²¹⁰ None of those prosecutions were

203. The Oregon statute does not require the Department of Transportation to determine if the person registered previously, placing that burden on the county clerk instead. *See* OR. REV. STAT. § 247.017(3).

204. *See id.* § 247.017(2)-(3).

205. *See* BRENNAN CTR. FOR JUST., *supra* note 20.

206. *See* Saunders, *supra* note 8, at 67-68 (describing voter outreach programs used to diversify jury pools that could be used analogously to encourage minority voting).

207. *See, e.g.*, Sami Edge & Sean Holstege, *Study Finds No Evidence of Widespread Voter Fraud*, NBC NEWS (Aug. 26, 2016, 10:10 AM), <http://www.nbcnews.com/news/us-news/study-finds-no-evidence-widespread-voter-fraud-n637776> [<https://perma.cc/4YRC-KZUB>].

208. For a list of cases of voter registration fraud prosecuted between 2000 and 2012, see *Election Fraud in America*, NEWS21 (Aug. 12, 2012, 2:10 PM), <http://votingrights.news21.com/interactive/election-fraud-database/> [<https://perma.cc/485G-8JS9>] (follow "Registration Fraud" hyperlink under "Type of Accusation").

209. Edge & Holstege, *supra* note 207.

210. *See id.*

for voter impersonation, which is the concern voter identification laws are meant to address.²¹¹

These already infrequent incidents of voter fraud will not likely increase under an automatic registration system that utilizes information from public offices such as the Department of Transportation. For example, the Oregon model addresses concerns about noncitizens voting.²¹² The Oregon Motor Voter Registration Manual states: “Only an individual with a record of providing documentation to DMV establishing that the individual is a U.S. Citizen will be registered through the Oregon Motor Voter process.”²¹³ Accordingly, the Oregon model not only prevents noncitizens from fraudulently voting, but also helps ensure the state correctly identifies registration-eligible citizens.

Electoral administrators will also have fewer opportunities to discriminate against particular individuals under the Oregon model.²¹⁴ Once people prove their citizenship, the state enters their information into the system, and they do not have to submit further proof of identity later in the process.²¹⁵ Moreover, in states where large numbers of citizens lack birth certificates or other citizenship papers, states remain free to provide registration through other means.²¹⁶ Automatic registration systems can act as supplemental registration sources in those states, instead of replacing other forms of registration.

Lastly, the Oregon statute places the registration burden on the state, not the citizen.²¹⁷ As a result, the state actually has more

211. *See id.*

212. OR. SEC'Y OF STATE, *supra* note 146, at 4.

213. *Id.*

214. *See infra* Part IV.B.1.

215. *See* OR. REV. STAT. § 247.017(1) (2017) (requiring the Department of Transportation to forward a person's information to the Secretary of State once the person has a qualifying DMV interaction).

216. *See, e.g.,* KAN. STAT. ANN. § 25-2309(a) (2017) (“Any person may apply in person, by mail, through a voter registration agency, or by other delivery to a county election officer to be registered.”); NEV. REV. STAT. § 293.517, *amended by* Act of June 12, 2017, sec. 47, § 293.517, 2017 Nev. Laws Ch. 548 (West) (“[A]ny ... elector residing within the county may register to vote: ... by appearing before the county clerk, a field registrar or a voter registration agency, ... [b]y completing and mailing or personally delivering to the county clerk an application to preregister or register to vote[,] ... [a]t his or her residence with the assistance of a field registrar ... or ... [b]y submitting an application to preregister or register to vote by computer, if the county clerk has established a system.”).

217. *See supra* notes 149-50 and accompanying text.

power to ensure proper registration procedures occur. When the county clerk receives a potential elector's information, the clerk may cross-reference that information with the statewide registration list.²¹⁸ The clerk can then confirm the person has not already been registered.²¹⁹ If the person has been registered, the clerk can decline to register that person.²²⁰ Such a system reduces the likelihood that a person can register twice under a different address or changed name, limiting an individual's ability to commit voter fraud.

B. Using Registered Voters' Names for Jury Pool Lists

For an automatic registration system to be effective in diversifying jury source pools, states must require that their localities pull juror names from registration lists, including lists of automatically registered voters. If states implement automatic registration systems and mandate the use of registered voters' names in jury source lists, both access to the franchise and jury pool diversity will increase.²²¹

1. Increasing Access to the Franchise

Implementation of an automatic registration system, based on an expanded version of the Oregon model, will increase access to the franchise for three reasons. First, as seen in Oregon, automatic voter registration will likely increase registration numbers by reducing the burden placed on the individual.²²² Second, automatic registration will likely reduce the incidence of voter discrimination. As the system will apply equally to all qualified persons who interact with the DMV or public assistance offices, individual administrators will have fewer chances to apply registration procedures in a discriminatory manner.²²³ A lower incidence of voter discrimination

218. See *supra* notes 141, 202 and accompanying text.

219. See OR. REV. STAT. § 247.017(3).

220. See generally *id.*

221. *But see* Williams, *supra* note 11, at 625 (claiming using voter registration lists for jury pools is overinclusive because not everyone is familiar with their voting jurisdiction).

222. See *supra* notes 157-59 and accompanying text.

223. *Cf.* OR. REV. STAT. § 247.017(1)-(2) (requiring the Department of Transportation to provide the Secretary of State with the names of *each person* who interacts with the DMV); OR. SEC'Y OF STATE, *supra* note 146, at 4 (noting that U.S. citizens who are at least sixteen

will then likely lead to increased registration of persons of color, the poor, the elderly, and young persons, groups that have been the victims of discriminatory voter laws in the past.²²⁴

Third, the automatic system will likely lead the state to register those persons who have avoided voting out of a desire to escape jury duty.²²⁵ If states remind such people that they could potentially become eligible for jury duty through other means, such as after general DMV interactions, these people may be less likely to opt out.²²⁶ Depending on the number of people avoiding registration for these purposes, voter registration could increase significantly through this process.

2. Increasing Jury Representation

If states require their localities to pull names for jury pools from the lists of registered voters, including automatically registered voters, jury pool diversity should increase. As seen in Oregon—where the automatic registration system led to an increase in the number of registered voters living in areas with lower incomes, lower levels of education, and greater racial diversity²²⁷—the increase in both general and minority registration numbers will diversify localities' potential pool of jurors. As a result, states will have a more diverse jury pool to choose from during jury selection, even if those states take names solely from voter registration lists.²²⁸ And, as Anwar, Bayer, and Hjalmarsson noted in their study on Florida jury pools, greater jury pool diversity leads to fairer trial outcomes, even when the juries that ultimately serve lack perfect diversity.²²⁹ As long as states ensure that their localities pull from lists of registered voters, automatic registration should stand as an

years old and Oregon residents can register through the Motor Voter Process).

224. See *infra* Part IV.B.2.

225. See Knack, *supra* note 31, at 99 (claiming the increased likelihood of being called for jury duty disincentivizes people from registering to vote).

226. As noted above, a number of states pull juror names from other sources, such as DMV records or tax assessment rolls. See, e.g., COLO. REV. STAT. ANN. § 13-71-107(1) (West 2017); S.D. CODIFIED LAWS § 16-13-4.1 (2017); MIZE ET AL., *supra* note 16, at 14.

227. See Griffin et al., *supra* note 23.

228. See *id.*

229. See Anwar et al., *supra* note 2, at 1019-20.

effective way to address problems with jury pool diversity and to help protect defendants' Sixth Amendment rights.

V. COMMON CONCERNS WITH THE USE OF AUTOMATIC VOTER REGISTRATION

Despite the evidence that automatic voter registration increases registration numbers, conserves resources, and prevents fraud, critics may still question the system's applicability or long-term effectiveness in other states, or even in Oregon itself. Critics may also question the effectiveness of using automatic registration specifically to ensure the appropriate diversity of jury pools. Some of the potential concerns with the enactment of automatic voter registration are considered in this Part, which also provides responses and potential remedies to address those concerns.

A. Criticism of the Oregon Model

Despite early positive commentary on Oregon's law,²³⁰ not all critics believe Oregon's automatic registration system will be successful, especially in increasing voter turnout. For example, in a piece for the *New York Times*, Michael Wines argued there was no guarantee that increased registration in Oregon would increase voter turnout, especially considering the relatively low turnout in Oregon's 2016 presidential primaries.²³¹ Kristena Hansen, a writer for the *Associated Press*, noted a similar critique, claiming that Oregon's new law did not make it much easier to vote in its closed primary system.²³² As Hansen noted, the law automatically registers persons as nonaffiliated.²³³ Accordingly, a person who wishes to vote in a primary must still exert the effort required to align themselves with a party by returning a form sent by mail.²³⁴

230. See *supra* Part III.C.2.

231. Michael Wines, *Jury out on Effectiveness as Some States Make Voting Easier*, N.Y. TIMES (June 4, 2016), <http://www.nytimes.com/2016/06/05/us/jury-out-on-effectiveness-as-some-states-make-voting-easier.html> [<https://perma.cc/U9PN-LTL4>].

232. Kristena Hansen, *Oregon Automatic Voter Registration a Success, with a Hitch*, ASSOCIATED PRESS (May 13, 2016), <https://apnews.com/570f8b51845d4507a6f1502ef2c78502> [<https://perma.cc/UDB6-SBHP>].

233. *Id.*

234. *Id.*

These turnout concerns appear to be unfounded. Almost 100,000 ballots issued through Oregon's automatic registration system were returned for the general presidential election in 2016, which accounts for 42.73 percent of the total ballots issued to automatically registered voters.²³⁵ Additionally, “[o]f the [Oregon Motor Voter] participants who registered as Democrats, 84.08% returned ballots,” while 84.06 percent of the Oregon Motor Voter participants who registered as Republicans “returned their ballots,” suggesting that the automatic registration system was successful in increasing voter participation on both sides of the two-party divide.²³⁶ In total, Oregon voters cast more ballots in the 2016 general election than ever before, with 2.02 million votes cast and a return rate of 78.9 percent for all eligible voters.²³⁷

Lastly, Oregon's law has had a positive impact on registration numbers, which is the main focus of this Note.²³⁸ As long as automatic registration increases the pool of available jurors, issues with primary elections may be addressed through time without affecting jury selection pools.

B. Automatic Registration Effectiveness

Critics of automatic registration systems may argue registration numbers are already high and the problem with elections in the United States lies in turnout, not registration. These critics may then argue automatic voter registration will not actually increase registration numbers. Notably, however, U.S. citizens often over-report political participation.²³⁹ In fact, estimates of overreporting by social scientists suggest Census Bureau numbers “for registration and voting are inflated by approximately 10% in presidential election years and between 15% and 23% in non-election years.”²⁴⁰

235. Press Release, Or. Sec'y of State, Nearly 100,000 Oregon Motor Voter Registrants Participate in Nov. 8 Election (Nov. 14, 2016), <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1569> [<https://perma.cc/2FQN-CJZG>].

236. *Id.*

237. *Id.*

238. *See supra* Part III.C.1.

239. Williams, *supra* note 11, at 607.

240. *Id.* (footnote omitted).

Within this trend, people of color tend to overreport registration and voting at almost *twice* the rate of white persons.²⁴¹

Consequently, automatic registration remains needed to increase registration numbers and, in turn, the diversity of jury pools. As noted in Part III, early reports out of Oregon show that automatic registration has increased registration numbers in the state as a whole, as well as in specific localities.²⁴² Implementing automatic registration in other states will likely increase numbers in those states as well.

C. Peremptory Challenges

Some critics may argue automatic registration will not prevent attorneys from threatening jury diversity by using peremptory strikes to remove people of color during jury selection.²⁴³ To the contrary, automatic registration will help increase jury diversity even in localities where peremptory strikes may be used to remove persons of color from the jury.

In *Batson v. Kentucky*, the Supreme Court held that “the Equal Protection Clause forbids the prosecutor [from] challeng[ing] potential jurors solely on account of their race.”²⁴⁴ Even after that decision, however, parties can still strike jurors during voir dire as long as they have a purportedly race-neutral reason for doing so.²⁴⁵ Parties can easily satisfy the “race-neutral” standard.²⁴⁶ Courts have accepted such reasons as the potential juror was “too young,” the potential juror was “[n]ot mature enough,” and the potential juror “[h]ad family members in prison.”²⁴⁷ Accordingly, critics of automatic registration in the jury context may be concerned that parties re-

241. *See id.*

242. *See supra* Part III.C.1.

243. *See, e.g.,* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) (claiming race-based juror strikes still plague trials in the United States).

244. 476 U.S. 79, 89 (1986).

245. *See id.* at 97 (holding the State must “come forward with a neutral explanation for challenging black jurors” once the defendant makes a prima facie case of discrimination).

246. *See* Bellin & Semitsu, *supra* note 243, at 1091.

247. *See id.*

main capable of using peremptory strikes to remove unwanted jurors, and especially jurors of color.²⁴⁸

Despite these continued concerns with peremptory strikes, automatic voter registration can still help to ensure jury diversity, as long as jurisdictions limit the number of strikes parties can use.²⁴⁹ Moreover, as Anwar, Bayer, and Hjalmarsson found in their study on jury trials in Florida, trial outcomes will be more fair if persons of color are present in the jury pool, even if attorneys ultimately strike those jurors.²⁵⁰ By increasing the overall diversity of the jury selection pool, automatic registration can help to ensure that parties' use of peremptory strikes will fail to unfairly alter trial outcomes.

D. Jury Service Avoidance

Some critics of the current jury system claim jury service discourages people from voting because those people want to avoid jury duty.²⁵¹ One commentator even argues that jury service serves as another form of a poll tax, because the threat of facing the personal and financial costs of jury service discourages people from registering to vote.²⁵² These critics could even argue people will avoid interactions with public offices in general if states implement automatic registration. However, states should still use automatic registration systems even if certain state residents may attempt to avoid jury service.

248. See, e.g., *id.* at 1077 (“[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.”).

249. Although the number of permissible peremptory strikes varies, federal and state courts often limit the number of available strikes. See Jeanette E. Walston, Comment, *Do Non-Discriminatory Peremptory Strikes Really Exist, or Is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Peremptory Strikes?*, 17 TEX. WESLEYAN L. REV. 371, 374 (2011).

250. See Anwar et al., *supra* note 2, at 1019-20.

251. See Knack, *supra* note 31, at 99; Alexander E. Preller, Note, *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, 2 (2012).

252. Preller, *supra* note 251, at 3 (claiming the linkage of voter registration and jury duty acts as a poll tax by placing “an impermissible economic burden on American citizens' right to vote”).

Jury service is a civic duty of the people of the United States.²⁵³ States should not avoid reform simply to satisfy the desires of citizens who wish to avoid such responsibilities.²⁵⁴ Also, as noted above, most localities remain capable of pulling jurors from other sources.²⁵⁵ If states notify citizens of their potential to be chosen for jury service based on information from other sources, reluctant persons may decide not to opt out of voter registration.

E. Voter Privacy Concerns

Lastly, some critics may be concerned that automatic registration will threaten voter privacy and/or safety.²⁵⁶ Oregon's House Republicans raised these concerns in opposition to the state's automatic registration bill.²⁵⁷ Although these concerns are valid, if states follow Oregon's model, voter privacy and safety risks will likely be minimized.

First, Oregon protects several groups of vulnerable people, including domestic abuse victims, by encouraging them to sign up for a free Address Confidentiality Program.²⁵⁸ The DMV separately codes the information of victims who sign up for the program and then filters that information out of the automatic registration system.²⁵⁹ If states with similar protection programs filter the names of victims out of the voter information system, such persons will be protected as well.

Second, as Jonathan Brater of the Brennan Center noted, Oregon's law has actually likely increased the security of voter rolls

253. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946) (“Jury service is a duty as well as a privilege of citizenship ... that cannot be shirked on a plea of inconvenience or decreased earning power.”).

254. See *id.*

255. See MIZE ET AL., *supra* note 16, at 13-14.

256. See Press Release, House Republican Office, *supra* note 135.

257. *Id.*

258. See *Address Confidentiality Program (ACP)*, OR. DEP'T JUSTICE, <https://www.doj.state.or.us/crime-victims/victims-resources/victims-services/address-confidentiality-program-ACP/> [<https://perma.cc/65DZ-LFWX>] (describing the program as “a free mail forwarding service” that “helps survivors of domestic violence, sexual assault, stalking or human trafficking shield their physical address” and noting participants “are provided with a substitute address” to use in place of their home address).

259. See OR. SECRETARY ST., *supra* note 139.

overall.²⁶⁰ As the Brennan Center argues, the automatized system is likely more accurate and thus “less vulnerable to manipulation.”²⁶¹ Accordingly, states that implement automatic registration using Oregon’s model with regard to data protection should see an increase in voter security as well. These findings show that fears about voter security are likely unfounded. Automatic registration should not threaten the privacy or security of the persons included in the system.

CONCLUSION

The jury is one of the United States’ oldest institutions.²⁶² Jury trials have been available in criminal and civil suits since the signing of the U.S. Constitution, and the right to an impartial jury in criminal trials has been apparent since the promulgation of the Bill of Rights.²⁶³ Despite the importance of the jury in safeguarding peoples’ rights, however, juries often lack the necessary diversity to ensure criminal defendants face fair judgment.²⁶⁴ The reasons for the lack of jury diversity can be traced to the source of jury selection pools. Many states use either voter registration rolls or licensed driver lists as the source for jury selection. Registration rolls, in turn, often lack diversity due to restrictive voter laws that put barriers in the way of racial minorities, the young, the elderly, and persons with disabilities.²⁶⁵ Meanwhile, licensed driver lists may lack the names of poor persons and those who choose not to acquire a license.

State implementation of automatic voter registration, modeled on an expanded version of the registration law in the State of Oregon, can address both of these problems. The Oregon model provides for automatic registration when persons interact with their local DMVs.²⁶⁶ Other states should base their automatic registration systems on the Oregon DMV model, while also providing for automatic

260. See Brater, *supra* note 163.

261. See BRENNAN CTR. FOR JUSTICE, *supra* note 20, at 7.

262. See *supra* Part I.A.1.

263. See *supra* Part I.A.1.

264. See *supra* Part I.C.

265. See Williams, *supra* note 11, at 626.

266. See *supra* Part III.B.

registration after interactions with public assistance offices and offices providing state-funded services for persons with disabilities.²⁶⁷ If states codify automatic registration and mandate that their localities use registration lists for jury source lists, not only will registration numbers and the potential diversity of juries increase, but states will also see a decrease in electoral administration costs and the incidence of voter fraud, results that should be celebrated by persons across the political spectrum.²⁶⁸

*Julie A. Cascino**

267. *See supra* Part IV.

268. *See supra* Part IV.

* J.D. Candidate 2018, William & Mary Law School; B.A. English and Economics 2015, Wittenberg University. I would like to thank the staff of the *William & Mary Law Review* for their helpful comments and edits during the publication process. I would also like to thank my family and friends, and especially Matt Preda, for their continued support of my academic and professional pursuits.