

**VOTER REGISTRATION STATUS AS A JURY SERVICE EMPLOYMENT
TEST: OREGON'S RETRACTED ENDORSEMENT FOLLOWING *BUCKLEY V.
AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.***

ROSE JADE*

I. INTRODUCTION

This Article examines Oregon's brief experiment with requiring state circuit court jurors to be registered voters.¹ The law applied only to prospective jurors who would be serving on state criminal trials.² This jury service employment test was in force from November 5, 1996 to July 1, 1999. During this time, over one million Oregonians who were not registered to vote were nevertheless purposefully included each year on the annual jury source list.³ Nonregistered voters⁴ were subsequently disqualified from the opportunity to serve on criminal trials on the explicit basis that they were not registered to vote.⁵ The test was abandoned shortly after the U.S. Supreme Court decided *Buckley v. American Constitutional Law Foundation, Inc.*,⁶ a First Amendment case in which the Court applied strict scrutiny and

* B.S., Massachusetts Institute of Technology, 1992; J.D., Northeastern University School of Law, 1995. Member, Oregon State Bar; registered patent attorney; Executive Director of the Jury Service Resource Center [www.jury-service.org]; jury pool expert. Correspondence should be addressed to P.O. Box 2104, Newport, OR 97365 or may be e-mailed to srjade@alum.mit.edu. This author expresses thanks to the patient and courteous staff at the Oregon State Archives and various libraries and courts; to the State Legislators and Legislative Counsel; and to the many state and federal trial and appellate counsel and courts whose efforts contributed to the record. Special thanks to Corrinne Williams, Frank Stoller, Karen Steele, Richard Scholl, Robert Thornton, Julia Fenton, Lee Berger, Steve Johnson, and Kristi Giles for their ongoing support of this author's jury research. This Article is dedicated to the memory of the author's father, historian William Appleman Williams, and the author's stepfather, political scientist Howard E. Dean. Willamette Law Review and author share copyright.

1. Two different laws were in place from 1996-1999 that mandated exclusion of nonregistered voters from criminal jury service. See MEASURE NO. 40, OFFICIAL 1996 GENERAL ELECTION VOTERS' PAMPHLET—STATEWIDE MEASURES 140 (1996) (appearing as OR. CONST. art. I, § 42 (1999)); see also S.B. 936, 69th Leg. (Or. 1997) (suspending OR. REV. STAT. § 10.030 (2001) and appearing as section 9(b)(3)(f) in lieu thereof); see *infra* Part III for a discussion of these laws and their implementation by court staff and trial counsel.

2. *Id.*

3. See Appendix, Table 1, *Oregon Jury Pool Composition 1997-1999 Including Percent Breakdown of Persons Who Drive or Hold State Identifications and Are Not Registered to Vote*, col. K. The statewide total of nonregistered voters included on the annual state jury source lists was 1,125,112 for 1998 and 1,192,191 for 1999. See also discussion *infra* Part VII Argument 10 (Oregon has always allowed the annual state jury list to be made up from a database other than the voter registration list); cf. OR. REV. STAT. § 10.215(1) (2001) (since 1987, Oregon has explicitly mandated that the annual jury list be compiled from at least the voter registration list and the list of those drivers and identification (ID) card holders registered with the Oregon Department of Transportation (DMV)).

4. The term "nonregistered voters" refers to persons who are lawfully eligible to vote in Oregon but who have not yet registered to vote or for whom there is no evidence of voter registration. Importantly, and notwithstanding Oregon Revised Statutes (ORS) section 247.025 (stating that to vote in an election, a person's voter registration card must be received at the election office 21 days preceding the election), a nonregistered Oregon elector can register and cast a ballot on election day:

Procedure for voting by person for whom no evidence of registration is found.

(1) A person offering to vote and who claims to be an elector, but for whom no evidence of active or inactive registration can be found, shall be granted the right to vote in the manner provided in this section.

OR. REV. STAT. § 254.408 (2001). Such a provision is consistent with the declared policy of the State of Oregon: "OR. REV. STAT. § 247.005 (2001) Policy. It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise." As explained best by the Supreme Court of Indiana:

When the Constitution defines the qualifications of voters such qualifications cannot be changed nor added to by [a voter registration] statute. The theory upon which [voter] Registration laws may be supported is that they do not impair or abridge the elector's privilege, but merely regulate its exercise by requiring evidence of the right. Only a voter can register [to vote]. . . . [R]egistration itself is not one of the constitutional qualifications of a voter.

Fritch *et al.* v. State, 92 155 N.E. 25, 258 (Ind. 1927).

5. See *supra* note 1.

6. 525 U.S. 182 (1999).

struck down a Colorado law that required certain workers to be registered to vote.⁷

The first half of this Article (Parts II-VI) presents an overview of Oregon's jury selection system, including a history of the different jury service employment tests⁸ that have been imposed by the state, the mechanics of test enforcement, and an explanation of how Oregon courts have used voter registration status in the past.

Part II provides a historical background of Oregon jury service eligibility and a detailed chronology of the events that led to the adoption of voter registration as a jury service employment test, by way of 1996 Ballot Measure 40 and 1997 Senate Bill 936. Part III presents a discussion of how the test was to be implemented, and the abandonment of the test two-and-a-half years later. Part IV includes a summary of how courts review jury service employment tests. Part V gives a brief "job description" of jury service, followed by Part VI, which summarizes the multiple constitutional and statutory rights that are affected by the passage of any jury service employment test. Such rights include a litigant's right to a jury that is drawn from a fair cross-section of the community, and a prospective juror's right to equal protection and due process during the jury selection process.

The second half of this Article (Parts VII-IX) provides historical documentation of the various public policy arguments that were promulgated to support exclusion of nonregistered voters from Oregon state criminal trial service, notwithstanding the fact that during the time the test was in place, nonregistered voters were allowed to serve as criminal trial jurors in Oregon's U.S. district courts and as state and federal grand and civil trial jurors.

In particular, Part VII discusses the lack of empirical evidence linking voter registration status to juror competency or bias. Part VIII presents each argument offered in support of using voter registration as a jury service employment test in Oregon, and rebuttal thereto. Part VIII also contains a necessary and thorough revisiting of the lengthy testimony surrounding the passage of the 1968 Federal Jury Service and Selection Act.⁹ Such careful parsing of the

7. *Id.* at 182-205. In *Buckley*, the Court struck down Colorado's practice of requiring citizen petition signature gatherers to be registered to vote because the law infringed on the fundamental political speech rights of those citizens who chose not to register to vote, and there was no compelling state reason to justify the First Amendment infringement. *Id.* at 195-96.

8. "Jury service employment test" refers to any state-promulgated criteria that a prospective juror must satisfy in order to be lawfully eligible to perform state court jury service (e.g., minimum age, U.S. citizenship, etc.). The term is interchangeable with "jury service eligibility test" or "jury service qualification test."

9. The Federal Jury Selection and Service Act of 1968 is found at Pub. L. No. 90-274, § 101, 82 Stat. 54, and codified as amended at 28 U.S.C. §§ 1861 et seq. [hereinafter the JSSA or the Act]. The legislative history of the JSSA is discussed throughout this Article, and extensively reviewed in Part VIII. Several congressional hearings were held in 1966-1967 relating to federal and state jury service and selection. What finally became the 1968 Act was S. 989, initially drafted by the Judicial Conference of the United States, the primary administrative body for the federal judiciary. *See* H.R. 1076, Cong. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1793. A more expansive version had been included in the original Civil Rights Act of 1966 but was not passed "in part because there was insufficient time for the Judicial Conference to reach a position on the proposed bill." *Federal Jury Selection: Hearings* (1967), *microformed on* SUDOC Y4.J89/2:J97/10 at 251. Proposals were introduced again in 1967 as legislation distinct from the Civil Rights Act. Extensive hearings on the proposal were held. The published testimony from the hearings, and the Congressional Reports are referenced herein as follows:

- *House Hearings on Civil Rights (Title I): Before the House Comm. on Judiciary*, 89th Cong. (1966), published at SUDOC Y4.J89/1:89/16
- *Senate Hearings on Civil Rights: Before the Senate Comm. on Judiciary, Senate Subcomm. on Constitutional Rights*, 89th Cong. (1966), published at SUDOC Y4.J89/2:C49/13/966/pt.2
- *Senate Hearings on Civil Rights: Before the Senate Comm. on Judiciary, Senate Subcomm. on Constitutional Rights*, 90th Cong. (1967), published at SUDOC Y4.J89/2:C49/13/967
- *Hearings on Federal Jury Selection: Before the Senate Comm. on Judiciary, Senate Subcomm. on Improvements in Judicial Machinery*, 90th Cong. (1967), published at SUDOC Y4.J89/2:J97/10
- House Report (Judiciary Comm.) No. 1076 (1968), *Jury Selection and Service Act*, *reprinted in* 1968 U.S.C.C.A.N., Vol. 2 (1792-1809) [hereinafter H.R. Rep. No. 1076 1968 U.S.C.C.A.N. 1792-1809]
- Senate Report (Judiciary Comm.) No. 891, 90th Cong. 1st Sess. (1967) (Report submitted by Mr. Tydings, from the Committee on the Judiciary, Together with Individual Views, to accompany S. 989) [hereinafter S.R. Rep. No. 891 (1967)]

pertinent arguments is critical to any future debate over the usefulness of such a test. To wit: although the State of Oregon has wisely abandoned the use of voter registration as a jury service employment test, Oregon state appellate courts continue to uphold the test on appeal, fueling support for the test's revival.

Part IX offers a conclusion, in agreement with Oregon Attorney General Hardy Myers' June 1999 statement to the Oregon State Legislature, that voter registration status has no "bearing" on a juror's "qualifications to serve competently or appropriately."¹⁰

10. See *Hearing on H.J.R.s 87A-94A, Before the Senate Comm. on Judiciary*, 1999 Leg., 70th Sess. (Or. 1999), available on audio tape 223A, at 128 (testimony of Hardy Myers, State Attorney General).