OREGON
CIVIL RIGHTS
NEWSLETTER

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Pendleton School District v. State: Does the Oregon Constitution Require the Legislature to Provide Adequate Funding for Public Schools?

> The gap continues to widen between actual funding levels and the resources needed to achieve Oregon's educational goals. . . .
>
> . . . .
>
> . . . Unless the state and districts can increase funding and efficiencies, the gap will not shrink, and the progress Oregon's schools have made over the decade will stop. The result will be an inadequate school system, a burden on the state economy, and the loss of our status as a high quality-of-life state.[1]

That was the conclusion reached in December 2004 by the Oregon Quality Education Commission (the "commission"), the entity created by the Oregon Legislative Assembly (the "legislature") to determine the level of funding needed to achieve legislatively defined educational quality requirements. Nevertheless, the legislature passed a budget for the 2005–07 biennium that fell $1.8 billion short of what the commission determined was required to meet those standards.

Among the 50 states and the District of Columbia, Oregon ranks 30th in terms of per-pupil K–12 funding,[2] down from 16th in 1992.[3] During that same period, when measured as a percentage of the average personal income of the state's citizens—in other words, looking at the issue from an affordability standpoint—Oregon's national standing dropped even more precipitously, falling from 11th in 1992[4] to 37th by 2004.[5] Inadequate funding has taken a toll on our schools.

David Angeli
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Only about one-third of Oregon's fourth graders and eighth graders are "proficient" in math and reading,[6] and only about one-half of the state's tenth graders are "meeting standards" in reading, math, and writing.[7]

As a result, on March 21, 2006, in *Pendleton School District v. State*, several school districts and public school students filed a lawsuit seeking declaratory and injunctive relief to compel the legislature to satisfy its obligations under Article VIII, sections 3 and 8, of the Oregon Constitution. On September 15, 2006, Multnomah County Circuit Court Judge Christopher Marshall rejected those claims and granted the state's motion for summary judgment, holding that the Oregon Constitution does not include any legislative funding mandate. The plaintiffs have appealed that decision, and briefing in the Oregon Court of Appeals was completed on May 18, 2007. This article provides some of the relevant background to the dispute and summarizes the arguments advanced by each of the parties in this important litigation.

Background

Before 1991, state law provided for public education funding through local property tax revenues, state general fund revenues, and other miscellaneous (including federal) funding. By far the largest share of the funding came from local property tax revenues. The state played a minimal role, providing less than 30 percent of overall operating funds.

Beginning in 1990, the passage of a series of voter initiatives shifted control from the local districts to the state and dramatically changed the face of school funding in Oregon. First, Measure 5, passed by initiative in 1990, severely restricted the number of dollars per thousand that could be assessed on local property. As a result, control of school funding effectively shifted to the legislature. Measures 47 and 50—passed in 1996 and 1997, respectively—reduced property taxes even further, thus increasing the state's school funding burden. As a result, the state currently provides approximately 70 percent of the funding to most school districts.

During this same period, while steadily increasing its involvement in school funding, the legislature became more involved in establishing qualitative standards for the state's schools. In 1991, the legislature passed the Oregon Education Act for the 21st Century (the "Act"), which set some of the highest academic standards in the country.

In the aftermath of these initiatives, many districts experienced significant reductions to their budgets.[8] The effective level of per-student

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Supreme Court Update

Matthew Duckworth
Busse & Hunt

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Decided

***Abdul-Kabir v. Quarterman*, No. 05-11284 (April 25, 2007)**

In a death penalty case arising out of Texas, the U.S. Supreme Court reversed the Fifth Circuit, holding 5–4 that a defendant cannot be sentenced to capital punishment unless the sentencing jury has been able to evaluate all evidence that might mitigate the defendant's mental culpability. The jury had been instructed to consider all mitigating evidence by answering yes or no on two special issues: the deliberateness of the crime and the future dangerousness of the criminal. The Court held that the jury instructions violated the Court's precedent requiring that juries be given the opportunity to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual.

***Brewer v. Quarterman*, No. 05-11287 (April 25, 2007)**

In a companion case to *Abdul-Kabir*, the Court reversed the Fifth Circuit in a 5–4 decision, holding that a jury must be allowed to respond to mitigating evidence in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death.

***Gonzales v. Carhart*, No. 05-380 (April 18, 2007)**
***Gonzales v. Planned Parenthood Federation of America, Inc.*, No. 05-1382 (April 18, 2007)**

The Supreme Court reversed decisions by the Eighth and Ninth Circuits, holding 5–4 that the Partial-Birth Abortion Ban Act of 2003, as a facial matter, is not void for vagueness and does not impose an undue burden on a woman's right to an abortion because of any overbreadth or because it lacks an exception for a woman's health.

***Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (May 29, 2007)**

The Court affirmed the Eleventh Circuit in a 5–4 ruling that an employer's decision regarding the amount of an employee's pay is a discrete act that occurs at a particular point in time. The Court held that the period for filing a pay discrimination charge under Title VII of the Civil Rights Act of 1964 begins to run when the pay-setting decision is made and that the later effects of a discriminatory pay decision, such as lower pay checks received by an employee during the charging period, do not restart the clock for filing an EEOC charge.

***Los Angeles County, California v. Rettele*, No. 06-605 (May 21, 2007)**

The Court reversed the Ninth Circuit in a per curium opinion, holding that sheriff's deputies did not violate the Fourth Amendment right to be free from unreasonable search and seizure when the deputies acted on a valid warrant to search a house, but were unaware that the suspects being sought no longer lived there. The Ninth Circuit held that having found two innocent residents sleeping in a bed, a reasonable deputy would have stopped the search upon discovering that the residents were of a different race than the suspects and would not have ordered them from their bed for a few minutes before allowing them to dress. The Court held that when the deputies ordered the residents from their bed, they had no way of knowing whether the African American suspects were elsewhere in the house and that the presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well.

***Scott v. Harris*, No. 05-1631 (April 30, 2007)**

The Supreme Court held 8–1 that a law enforcement official does not

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

Recent Decisions

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***Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007)**

In 2001, six female employees filed suit against Wal-Mart alleging that the retailer's corporate culture resulted in lower pay and fewer management positions for women, in violation of Title VII. *Dukes* is the largest employment discrimination class-action lawsuit in history, involving more than 1.5 million current and former employees of the retail giant. The Ninth Circuit upheld the class certification.

The court found that the evidence supported the plaintiffs' argument that Wal-Mart's personnel and management structure was uniform across the country, creating commonality. The court held that "all female employees faced the same discrimination" and employees from different job categories could challenge the general practice of discrimination. The court stated: "because the range of managers in the proposed class is limited to those working in Wal-Mart's stores, it is not a very broad class, and a named plaintiff occupying a lower-level, salaried, in store management position is sufficient to satisfy the 'permissive' typicality requirement."

***Incalza v. Fendi North America, Inc.*, 2007 WL 656355, No. 04-57119 (9th Cir. March 6, 2007)**

According to the Ninth Circuit, in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the U.S. Supreme Court held that an employer is "compelled to discharge immediately" an undocumented worker, finding that damages and reinstatement were not available under the National Labor Relations Act. However, in *Fendi*, the Ninth Circuit held that *Hoffman* did not apply to the plaintiff, because he was a properly documented employee when first hired, even though his documentation had lapsed. The Ninth Circuit held that an employee who may be able to resolve his authorization problems "within a short time" may be suspended or granted leave without pay for the interim period. Therefore, when the employer terminated the plaintiff without providing any such options, the termination was a breach of an employment agreement.

***Walton v. U.S. Marshals Service*, No. 05-17308 (9th Cir. Feb. 9, 2007)**

The Ninth Circuit has now established both a subjective and an objective test for a plaintiff to state a claim that he or she was "regarded as disabled." Under the subjective test, the plaintiff must establish that the employer believed that the plaintiff had an impairment and provide direct evidence that the employer subjectively believed that the plaintiff was substantially limited in a major life activity. Under the objective test, if the plaintiff does not have direct evidence of an employer's belief, the plaintiff must show that an impairment imputed to him or her was, objectively, a substantially limiting impairment. ✦

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education funding in 1998 was 20 percent lower than the 1990 level,[9] despite Oregon's flourishing economy during that period.

It was in this environment that in 1997, the Legislative Council on the Oregon Quality Education Model was appointed. The council, composed of distinguished educators, business leaders, and legislators, completed a comprehensive Quality Education Model, which incorporated the quality goals of the Act and research from state and national experts. The council found serious deficiencies in virtually every important aspect of Oregon's public schools.[10] On November 5, 1999, Governor Kitzhaber appointed the commission to validate and refine the Quality Education Model for use by state policymakers.

On November 7, 2000, Oregonians overwhelmingly passed Ballot Measure 1, which became section 8 under Article VIII of the Oregon Constitution. That section provides, in pertinent part:

> The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet these goals.[11]

In subsequent legislation, the legislature clarified that the "quality goals" for the state's system of public education are the goals articulated in the Act, as amended in 1995.[12] Those goals include a commitment to produce "the best educated citizens in the nation and the world,"[13] and "[t]o achieve the highest standards of academic content and performance."[14] The legislature also directed the commission to determine the amount of money necessary to satisfy those goals,[15] and to report to the legislature every two years regarding those costs and how best to achieve the stated goals.[16] Within 180 days after the legislature's regular session adjourns, the legislature must issue its own report.[17]

Since 2001, the commission and the legislature have issued a number of reports that recognize severe—and increasing—shortfalls in school funding. By December 2004, the commission noted not only that "[t]he gap continues to widen between actual funding levels and the resources needed to achieve Oregon's educational goals," but also that the quality of public education in Oregon was actually

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declining: "the Governor's proposed budget for 2005–07 [wa]s $1.4 billion less than the amount needed to fund th[e] programs that existed just six years earlier in 1999–2001." Nevertheless, on July 24, 2005, the legislature prompted the *Pendleton* litigation by approving a 2005–07 budget that left a $1.8 billion shortfall from the amount necessary to achieve the legislature's stated quality goals.

Article VIII, Section 8: A Funding Mandate or a Mere Reporting Requirement?

As set forth above, Article VIII, section 8(1), of the Oregon Constitution provides that the legislature "*shall* appropriate . . . *and* publish a report . . . ." (Emphasis added.) Relying on that plain language, the *Pendleton* plaintiffs contend that section 8 imposes two separate and independent requirements: The legislature "shall" adequately fund its stated educational goals "and" publish a report every two years explaining what it has done in that regard and why. The state disagrees with that reading, arguing that Measure 1 was intended merely "to put pressure on the legislature to fund the schools more fully *or* be forced to explain [in a report] why they did not do so." Thus, the outcome of the *Pendleton* litigation will depend largely on whether section 8's "and" really means "or."

Text and Context

"In interpreting a constitutional provision adopted through the initiative process, [the court's] task is to discern the intent of the voters."[18] The Oregon Supreme Court has been clear that "the best evidence of the voters' intent is the text of the provision itself. The context of the ballot measure's language may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further."[19]

Applying those standards, the *Pendleton* plaintiffs contend that the court's analysis need go no further than the text of section 8. That section plainly uses the conjunctive "and," which must be given its "plain, natural, and ordinary meaning."[20] That rule of construction "is doubly applicable" here because section 8 "is a constitutional amendment adopted by the voters."[21] Indeed, when interpreting similar language in the past, the Oregon Supreme Court has been clear that "shall" does not mean "should" and "and" does not mean "or."[22]

In response, the state contends that a textually dual mandate (to "appropriate" *and* "publish") "cannot possibly be harmonized" because "there can never be occasion to publish a report explaining the reasons for, extent, and effects of a shortfall [if] there can never be a shortfall." On that basis, the state concludes that section 8 "does not include a funding mandate," but rather a mere reporting requirement.

In considering those arguments, it is worth noting that the state's argument—made through the Oregon attorney general—contrasts sharply with the attorney general's own opinion, when he officially certified the ballot title for Measure 1 in 1999, that Measure 1's "unambiguous language creat[ed] a funding mandate."[23]

Moreover, the two clauses of section 8 are easily harmonized. By initiating and adopting section 8, the voters imposed on their legislators—who had failed for ten years to satisfy the promises they made in the Act—the same type of dual obligation that all taxpayers have under the Internal Revenue Code. Federal law recognizes separate violations for failing to pay owed taxes and for failing to file a tax return reflecting nonpayment.[24] Similarly, the legislature has two separate but equally mandatory obligations: appropriating *and* reporting. Whether legislators meet or fail to meet the appropriation mandate of section 8, they must report, just as taxpayers must, whether or not they have paid their taxes.

Supplying additional support for the view that funding and reporting are separate and distinct obligations are the legislature's own "Legislative Findings," announced after the passage of Measure 1 in 2000: "[T]he Legislative Assembly *shall* appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets the quality goals established by law. *Furthermore* [not 'alternatively'], the people of Oregon require that the Legislative Assembly publish a report . . . ."[25]

Extrinsic Evidence of Voter Intent

While the *Pendleton* plaintiffs argue that section 8's meaning is clear enough to avoid an examination of extrinsic evidence of voter intent, the state points out that "caution is required in ending the analysis before considering the history of an initiated . . . constitutional provision."[26] The state then focuses on certain aspects of Measure 1's history to support its argument that when the voters said "and," they really meant "or."[27]

The Ballot Title

The state relies heavily on the ballot title's "Estimate of Financial Impact," which read: "There is no financial impact on state or local government expenditures or revenues." The state argues that voters cannot have understood "no financial impact on state expenditures" to mean that they were voting to *mandate* state expenditures.

That argument reflects a subtle but important misunderstanding of the *Pendleton* plaintiffs' position. The plaintiffs do not contend that Measure 1 mandated new state expenditures. Rather, Measure 1 required the legislature to fund whatever standards *it* would *later* establish by law. If the legislature set it sights on mediocrity, no additional funding would likely have been required at all. But if the legislature established lofty goals—as it did in the enabling legislation nine months *after* the voters passed Measure 1—it would be required to fully fund those goals. At the time Measure 1 was proposed,

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it was impossible to discern what policy choice the legislature would make, and assigning a financial impact to the funding of requirements not yet established would have been presumptuous and speculative, if not unlawful. Indeed, that was precisely the reasoning articulated by the Financial Estimate Committee that drafted Measure 1's Estimate of Financial Impact.[28]

Moreover, the other sections of the ballot title—which the state largely ignores—lend substantial support to the plaintiffs' reading of section 8. For example, the following ballot title caption and "Result of 'Yes' Vote/Result of 'No' Vote" language appeared on every ballot in the state:

1 AMENDS CONSTITUTION: LEGISLATURE MUST FUND SCHOOL QUALITY GOALS ADEQUATELY; REPORT; ESTABLISH GRANTS

YES	**RESULT OF "YES" VOTE:** ÒYesÓ vote requires legislature to fund school quality goals adequately, issue report, establish equalization grants.
NO	**RESULT OF "NO" VOTE:** ÒNoÓ vote rejects requirements that legislature fund school quality goals adequately, issue report, establish grants.

This language cannot reasonably be read to suggest that the legislature's obligation to "report" was intended as a substitute for the separate obligation to "fund school quality goals adequately," any more than the requirement to "establish equalization grants" could reasonably be read as a substitute for Measure 1's other two requirements (funding and reporting).

The Voters' Pamphlet

Similarly, the "Explanatory Statement" section of the voters' pamphlet made clear that Measure 1 imposed on the legislature separate and independent funding and reporting requirements: "The measure *requires* the legislature to fund a sufficient amount of money to meet public quality goals as established by the legislature. The measure *also* requires the legislature to publish a report . . . ." (Emphasis added.)

Nevertheless, the state relies on several of the voters' pamphlet's "arguments in favor" to support its argument that "and" means "or." Anyone willing to pay a $500 fee, however, can have his or her argument included in the voters' pamphlet.[29] Accordingly, Oregon law sensibly recognizes that such arguments are inherently unreliable, and provides that voters must be cautioned about potential inaccuracies contained therein.[30] True to form, the voters' pamphlet's "arguments in favor" contained conflicting language with respect to the meaning of Measure 1. Some suggested that the legislature's funding and reporting requirements were merely alternatives, while others referred to Measure 1's funding "requirement."

Contemporaneous News Reports

The state also relies on some editorials from the *Oregonian* and other newspapers expressing the view that Measure 1 would merely require the legislature to appropriate adequate funding "or" explain why it failed to do so. However, in determining what Measure 1 meant, the plain language of the ballot measure itself—supported by the ballot title, the accompanying explanatory statement, and the contemporaneous understanding of both the executive and legislative branches—is obviously a more reliable guide to meaning than a handful of editorials speculating about the intent of those who drafted the measure. Furthermore, to the extent that newspaper articles are relevant at all, other contemporaneous stories (albeit a minority) accurately reported what the attorney general had concluded when he certified the ballot title: Ballot Measure 1 would impose a legislative funding mandate.[31]

Article VIII, Section 3: Is "Adequacy" Implicitly Required?

Nationwide, school financing cases have taken the form of either "equity" claims or "minimum standards" claims. The equity approach relies on the equal protection provisions of the federal or applicable state constitution to argue that students in poor districts are not afforded the same educational opportunities as students in more affluent districts. The minimum standards, or "adequacy," approach, which is typically based on the general "education clause" of the applicable state constitution, rests on the premise that the state constitution guarantees a certain qualitative standard of education for all students. Overall, plaintiffs have prevailed in roughly three-quarters of the "adequacy" cases decided to date.

Oregon's general educational provision, found in Article VIII, section 3, of the Oregon Constitution, requires that "[t]he Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools."[32] The *Pendleton* plaintiffs allege that section 3 implicitly requires the legislature to provide an adequate K–12 public school system, and that the current school system is not constitutionally adequate.

Plaintiffs have on several occasions challenged Oregon's system of K–12 school funding. With one exception, however, those cases dealt exclusively with *equity* challenges. And due to subsequent changes to Oregon's school financing system, the one case that addressed an adequacy challenge is not useful in evaluating the *Pendleton* plaintiffs' claims.

Olsen v. State

In *Olsen v. State*,[33] the plaintiffs challenged the *equity* of Oregon's public school financing scheme, contending that (1) "the amount of money available for education depends upon the value of the property in the individual school districts and this varies greatly," and (2) "this variation in wealth results in unequal educational opportunities for the children of the state."[34] Nothing in the opinion suggests that the plaintiffs challenged the *adequacy* of Oregon's education funding generally.

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The Oregon Supreme Court rejected the plaintiffs' claims, relying heavily on the fact that education funding in Oregon was then largely a matter of *local* concern. Local governments at the time supplied 78 percent of the funding for public schools,[35] and the legislature had "not expressly stated any objective that [was] to be attained by its system of school financing."[36] Under those circumstances, the court concluded that disparities in educational opportunities among various districts were not unconstitutional.[37] As discussed previously, circumstances have changed dramatically since *Olsen* was decided. The state now supplies more than 70 percent of school funding, and the legislature has defined a comprehensive set of standards.

To the extent that *Olsen* speaks to adequacy at all, it supports the *Pendleton* plaintiffs' position. In *Olsen* the court held that section 3 "is complied with if the state requires and provides for a minimum of educational opportunities in the [school] district *and* permits the districts to exercise local control over what they desire, *and can furnish*, over the minimum."[38]

That holding is critical for two reasons. First, by holding that the legislature must provide at least "a minimum of educational opportunities," the court recognized that section 3 does impose *some* adequacy requirement. Second, the "minimum of educational opportunities" standard articulated in *Olsen* was premised on the understanding that, at that time, local school districts were permitted to furnish "what they desire . . . over the minimum."[39] Local school districts are now effectively powerless to remedy deficiencies in the state's funding, presumably making the state responsible to make up the difference.

Coalition for Equitable School Funding

In *Coalition for Equitable School Funding, Inc. v. State of Oregon*,[40] the Oregon Supreme Court again considered the constitutionality of Oregon's public school funding. The *Coalition* plaintiffs asserted that the state's funding scheme failed (1) to guarantee that all public school students receive equal educational opportunities *and* (2) to "provide to school districts sufficient state funds . . . to satisfy *all* educational standards imposed by state law."[41] In other words, the plaintiffs relied on both equity and adequacy arguments.

The court rejected the plaintiffs' claims, once again citing the Oregon Constitution's then-existing emphasis on local control, and local funding, of public schools. The court's decision rested almost entirely on what was then a recent addition to the Oregon Constitution: the Safety Net,[42] which gave local school districts authority to levy property taxes sufficient to satisfy any perceived inadequacies in the state's level of education funding.[43]

As the court explained, "[w]hen the people enacted the Safety Net, they were confronting expressly the problem of public schools that lacked assured funding sufficient to meet state standards. The people adopted a solution based on local funding."[44] Given the clarity of the Safety Net provision, the court expressly declined to define the contours of Article VIII, section 3, or what that section "would mean for funding under different facts."[45]

The *Pendleton* case involves very "different facts." The Safety Net and its implementing legislation—the explicit foundation for the *Coalition* decision—were repealed in 1997 by Ballot Measure 50.[46] Local school districts are now severely constrained in their ability to levy taxes to compensate for shortfalls in the state's funding. Even if every district in the state adopted the maximum levy permitted by law, the total additional revenues would amount to only a tiny fraction of the funding shortfall determined by the Oregon Quality Education Commission.

Withers v. State of Oregon

In *Withers v. State of Oregon*,[47] public school students again challenged public school funding in Oregon. The Oregon Court of Appeals rejected the plaintiffs' claim that their own alleged deprivation of "educational opportunities that are available in other districts" amounted to a constitutional violation.[48] The court expressly recognized that the *Withers* plaintiffs did "*not* complain that [the then] current funding [was] inadequate to ensure that they receive the minimum education required by law."[49] As a result, the teachings of *Withers* have no bearing on the *Pendleton* plaintiffs' adequacy claims.

Sherwood School District 88J v. Washington County Education Service District

The final case to comment on section 3, *Sherwood School District 88J v. Washington County Education Service District*,[50] similarly had nothing to do with the adequacy of Oregon's public schools. Rather, "[a]t issue in [*Sherwood*] [wa]s the constitutionality of a state law that alter[ed] the boundary of a local school district."[51] The plaintiffs' claims were not premised on section 3 at all.[52]

The court's discussion of section 3 was limited to its analysis of the plaintiffs' argument that, "when viewed in the context of other constitutional provisions and relevant cases concerning public schools and public school funding, Article IV, section 23, properly may be seen as a more narrow prohibition against *directly providing funds to one school district not made available to others*."[53] In other words, the *Sherwood* plaintiffs asserted only an equity argument, to which section 3 was only tangentially relevant. In dicta, citing *Olsen* and *Withers*, the court of appeals noted that

> the Oregon Supreme Court has determined that the guarantee of a '*uniform*' system of common schools provided in Article VIII, section 3, does not mean that levels of local school funding must be precisely *equal*; indeed, that section does not pertain to school

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> funding at all. To the contrary, the court held, Article VIII, section 3, requires only that the education system must be *uniform* 'in terms of prescribed course of study and educational progression from grade to grade.'[54]

In the *Pendleton* litigation, the state mistakenly seizes on the *Sherwood* court's statement that "that section does not pertain to school funding at all,"[55] to attack the plaintiffs' section 3 adequacy claim. But like the *Olsen* and *Withers* cases, *Sherwood* had nothing whatsoever to do with perceived inadequacies in Oregon's K–12 public schools. Rather, the *Sherwood* court reiterated what the *Pendleton* plaintiffs concede: that section 3's "uniformity" provision does not require equal funding among school districts.

Conclusion

Oregon's legislators have paid little more than lip service to their promise of ensuring that the state has the "best educated citizens in the nation." In the *Pendleton* litigation, the state contends that lip service is all that is constitutionally required of the legislature. As discussed above, that argument contravenes the plain language of the provisions at issue and violates established canons of constitutional interpretation.

With the addition of Article VIII, section 8, the Oregon Constitution now contains some of the most specific and ambitious requirements in the nation with respect to the adequacy of public education. Nevertheless, after declining steadily over the past 15 years, Oregon now ranks a lowly 37th nationally in terms of per-student spending as a percentage of the personal incomes of the state's citizens, and the quality of Oregon's schools has deteriorated steadily during that period. As the Oregon Quality Education Commission noted in its December 2004 report, if that trend continues, all Oregonians will suffer and Oregon will lose its "status as a high quality-of-life state." ✦

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Endnotes

1. Oregon Quality Education Commission, *Final Report* 2–3 (Dec. 2004).
2. U.S. Census Bureau, *Public Education Finances 2004* 11 (2006) ("2004 Census Report").
3. U.S. Department of Commerce, Economics and Statistics Administration, Census Bureau, *1992 Census of Governments, Vol. 4, No. 1 (Government Finances—Public Education Finances)* 24 (2005) ("1992 Census Report").
4. *See* 1992 Census Report at 25.
5. *See* 2004 Census Report at 12.
6. *See* Joint Special Committee on Public Education Appropriation, *Report on Adequacy of K–12 Education Funding as Required by Article VIII, Section 8, of the Oregon Constitution (2005-2007 Education Budget)* at 5 (March 2006).
7. *Id.* at 12.
8. *See* Legislative Council on the Oregon Quality Education Model, *The Oregon Quality Education Model* 23 (April 1999).
9. *Id.*
10. *See id*. at 47–72.
11. Or. Const., Art. VIII, § 8(1).
12. ORS 327.506.
13. ORS 329.035(3).
14. ORS 329.035(4)(a).
15. ORS 327.506(2).
16. ORS 327.506(4).
17. ORS 171.857(1), (5).
18. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or. 551, 559, 871 P.2d 106 (1994) (citation omitted).
19. *Id.*
20. *Li v. State of Oregon*, 338 Or. 376, 389, 110 P.3d 91 (2005).
21. *Northwest Natural Gas Co. v. Frank*, 293 Or. 374, 381, 648 P.2d 1284 (1982).
22. *See Preble v. Department of Revenue*, 331 Or. 320, 324–325, 14 P.3d 613 (2000).
23. Letter submitting certified ballot title to Oregon secretary of state, Nov. 23, 1999.
24. *See* 26 USC § 7201; 26 USC § 7206; *see also United States v. Larson*, 612 F.2d 1301, 1305 (8th Cir. 1980).
25. ORS 327.497(3) (emphasis added).
26. *Shilo Inn v. City of Portland*, 333 Or. 101, 129, 36 P.3d 954 (2001).
27. In cases in which an examination of history is appropriate, courts examine the information that was available to the voters, such as "the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or. at 560 n. 8.
28. At an August 1, 2000, meeting of the Financial Estimate Committee, it was recognized that Ballot Measure 1 "requires that we need to [fund] quality education standards set by the legislature," but that the long-term fiscal impact of Ballot Measure 1 depended on the legislature's policy choices. Transcript of meeting, on file with author.
29. *See* ORS 251.255(2).
30. *See* ORS 251.265.
31. *See, e.g.*, Kelly Kennedy, "Officials Paint Bleak Picture," *The Oregonian*, Sept. 29, 2000, at E2 (recognizing that Ballot Measure 1 would "amend[] the state constitution so the Legislature has to fund schools adequately to meet quality goals"); Jim Tankersley, "Tigard-Tualatin Board Opposes Ballot Measures," *The Oregonian*, Sept. 25, 2000, at E2 (describing Measure 1 as an initiative "that would require the Legislature to sufficiently fund schools to meet state education goals"); Jim Tankersley, "Sherwood Opposing Measures," *The Oregonian*, Sept. 13, 2000 (same); Lisa Grace Lednicer, "Billions Hang on Upcoming Voters' Pamphlet Fiscal Estimates," *The Oregonian*, Aug. 9, 2000, at A1 (recognizing that Ballot Measure 1 would "force the Legislature to give elementary and secondary schools enough money to meet academic standards").
32. Or. Const., Art. VIII, § 3.
33. 276 Or. 9, 554 P.2d 139 (1976).
34. *Id*. at 11.
35. *Id*.
36. *Id*. at 22–23.
37. *See id*. at 27.
38. *Id*. (emphasis added).
39. *Id*.
40. 311 Or. 300, 811 P.2d 116 (1991) (en banc).
41. *Id*. at 305 (emphasis in original).
42. Art. XI, § 11a (repealed 1997).
43. *See Coalition*, 311 Or. at 307–308.
44. *Id*. at 309.
45. *Id*. at 311 n. 14.
46. Ballot Measure 50 became Article XI, section 11, of the Oregon Constitution.
47. 133 Or. App. 377, 891 P.2d 675 (1995).
48. 133 Or. App. at 381–382.
49. *Id*. at 384 (emphasis added).
50. 167 Or. App. 372, 6 P.3d 518 (2000).
51. 167 Or. App. at 375.
52. *Id*. at 377.
53. *Id*. at 379 (emphasis added).
54. *Id*. at 382 (emphasis added).
55. *Id*.

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violate the Fourth Amendment by attempting to stop a dangerous, high-speed car chase that threatens the lives of innocent bystanders, even when doing so places the fleeing motorist at risk of serious injury or death. The Court reversed an Eleventh Circuit decision, which held that ending a high-speed pursuit of the motorist's car by bumping the car's rear, causing it to leave the road and crash, constituted excessive force during a seizure.

***Smith v. Texas*, No. 05-11304 (April 25, 2007)**

In a 5–4 vote, the Court reversed a decision by the Criminal Court of Appeals of Texas, holding that when there is a reasonable likelihood that the jury believed it was not permitted to consider mitigating evidence, a defendant is entitled to relief under state harmless-error framework.

***Uttecht v. Brown*, No. 06-413 (June 4, 2007)**

The Court reversed the Ninth Circuit in a 5–4 vote, holding that in a death penalty case the trial court did not abuse its discretion by granting the state's motion to excuse a juror for cause when the juror's attitude toward capital punishment could have prevented him from returning a death sentence under the facts of the case.

***Whorton v. Bockting*, No. 05-595 (Feb. 28, 2007)**

In reversing the Ninth Circuit, the Supreme Court held unanimously that *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), does not apply retroactively to cases already final on direct review. *Crawford* held that testimonial statements from witnesses who are absent from trial are admissible only when the declarant is unavailable and only when the defendant has had a prior opportunity to cross-examine the witness. In *Whorton*, the Court held that the *Crawford* rule is not retroactive because it is procedural and not a watershed rule that implicates "the fundamental fairness and accuracy of the criminal proceeding."

***Winkelman v. Parma City School Dist.*,**
No. 05-983 (May 21, 2007)

The court held 7–2 that the Individuals with Disabilities Education Act grants parents independent enforceable rights and, as a result, parents, either on their own behalf or as representatives of their child, may proceed in court unrepresented by counsel even though they are not trained or licensed as attorneys. The Court reversed a Sixth Circuit decision and resolved a three-way circuit split.

Certiorari Granted

***Federal Express Corp. v. Holowecki*,**
No. 06-1322 (June 4, 2007)

The Court will review a Second Circuit case that held that an "intake questionnaire" submitted to the EEOC may constitute a charge of discrimination under the Age Discrimination in Employment Act even when there is no evidence that the EEOC treated the questionnaire as a charge or that the employee who submitted the questionnaire reasonably believed it constituted a charge.

Presorted Standard
US POSTAGE PAID
Portland, Oregon
Permit #341

Oregon State Bar
Civil Rights Section
P.O. Box 1689
Lake Oswego, OR 97035

***U.S. v. Williams*, No. 06-694 (March 26, 2007)**

The Court agreed to decide the constitutionality of the "pandering" provision of the PROTECT Act, 18 USC § 2252A(a)(3)(B), which prohibits a person from "knowingly . . . advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is unlawful child pornography. The Eleventh Circuit held that the provision was overly broad and impermissibly vague and, thus, facially unconstitutional.

Dismissed

***BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*,**
No. 06-341 (April 12, 2007)

Before oral argument, the Court granted BCI Coca-Cola's motion to dismiss the case, which presented the question regarding the circumstances under which an employer may be liable under federal antidiscrimination laws because of a subordinate's discriminatory animus when the person who actually made an adverse employment decision did not act out of discriminatory animus. ✦

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