

**HOUSE COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON CIVIL LAW**

**March 7, 2005 Hearing Room 357**

**8:30 A.M. Tapes 24 - 25**

**MEMBERS PRESENT:           Rep. Rep. Bob Ackerman, Chair**

**Rep. Linda Flores**

**Rep. Bill Garrard**

**Rep. Kelley Wirth**

**GUEST MEMBER:           Rep. Greg Macpherson**

**Rep. Wayne Krieger**

**STAFF PRESENT:           Sam Sears, Counsel**

**Louann Rahmig, Committee Assistant**

**MEASURES/ISSUES HEARD:**

**Oregon Constitutional Issues – Informational Meeting**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

<b>TAPE/#</b>	<b>Speaker</b>	<b>Comments</b>
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**TAPE 24, A**

<b>003</b>	<b>Chair Ackerman</b>	
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Calls the meeting to order at 8:35 a.m. Announces that there will not be a work session on HB 2283. Opens the informational meeting on Oregon constitutional issues.

## **OREGON CONSTITUTIONAL ISSUES – INFORMATIONAL MEETING**

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|-----|------------------------|--|
| 017 | Honorable Susan Leeson | Retired Associate Justice, Oregon Supreme Court. Refers to the <i>Constitutional Workshop Overview (EXHIBIT A)</i> , a summary of <i>Oregon Constitutional History Background (EXHIBIT B)</i> and a copy of <i>Oregon and United States Constitutions 2004 (EXHIBIT C)</i> previously distributed. |
| 035 | Leeson                 | Refers to the legislative oath of office in Oregon’s constitution ( <b>EXHIBIT C</b> ). Discusses why we have two constitutions, national and state. Explains that the original 13 states had exclusive sovereignty.   |
| 059 | Leeson                 | Points out that the drafters of the U.S. Constitution spelled out in Article I how much power the national government should have ( <b>EXHIBIT C</b> ). States that Article IV defines those powers.   |
| 088 | Leeson                 | Continues that the powers were put in three different departments. Indicates that the Bill of Rights was an afterthought of the U.S. Constitutional Convention.  |
| 103 | Leeson                 | Advises that the original Oregon constitution had 175 sections, 172 of which came from other states’ constitutions. Indicates that the only part of the original constitution that was created was the judicial branch, which was amended in 1910 by initiative.                                   |
| 120 | Leeson                 | Refers to Article I of the Oregon constitution, which is the Bill of Rights ( <b>EXHIBIT C</b> ). Informs that there are a number of items in the Oregon Bill of Rights that are not in the U.S. Constitution; i.e., Section 10.   |
| 147 | Leeson                 | Reads Article I, Section 20 of the Oregon constitution ( <b>EXHIBIT C</b> ).   |
| 167 | Leeson                 | Points out the state legislative authority in Article IV of the Oregon constitution ( <b>EXHIBIT C</b> ).  |
| 183 | Leeson                 |  |

Cites the major issues of 1857, which were strict regulation of corporations, keeping state government small, frugal government and strict debt limits.

- 202 Leeson Refers to Article VI of the U.S. Constitution which states it is the supreme law of the land (**EXHIBIT C**). Advises that adoption of the 14th amendment affected a huge change in the balance of power between the national government and the state government.
- 218 Leeson Continues that the U.S. Constitution contains separation of powers but does not say anything about the relationship of those branches to one another.
- 227 Leeson Indicates that Article III, Section 1 of the Oregon constitution names three separate departments and their relationship to each other: legislative, executive and judicial (**EXHIBIT C**).
- 248 Leeson Concludes comparison of the two constitutions.
- 252 Dave Heynderickx Acting Legislative Counsel. Informs that the state constitution took a different approach in defining the powers of the three branches of government.
- 279 Heynderickx Cites that there is nothing in the U.S. Constitution that says the supreme court is the final interpreter of the U.S. Constitution.
- 304 Heynderickx Continues with interpretation of statutes.
- 328 Heynderickx Refers to judiciary decisions on unconstitutionality.
- 376 Heynderickx Discusses interrelations among branches. States that the legislature has the power to control anything the executive branch does.

#### **TAPE 25, A**

- 011 Heynderickx Continues that there have been no big issues between the legislative power and the executive power. Indicates most questions are about rulemaking.
- 021 Heynderickx Comments on restrictions on agency rulemaking that have disappeared over time. Describes the Administrative Procedures Act.

053	Leeson	States that the legislature is the proactive branch and the courts are reactive branches, as they cannot act until there is a case in controversy.
068	Heynderickx	Interjects that as a drafter, he is always looking for a decision from the supreme court to provide a clear path on an issue, but it rarely happens.
072	Leeson	Refers to Article I of the Oregon Bill of Rights on the right to bail <b>(EXHIBIT C)</b> and ORS 135.285. Advises that when the court discovers that there is a statute that “does the job,” making constitution interpretation unnecessary, it will take the statute route.
100	Heynderickx	Adds that on occasion the court of appeals will comment on an issue that was raised that may be significant and ask parties to brief them.
114	Leeson	Explains that if a case makes it necessary to interpret the constitution, the court will look at the drafter’s intent, starting with the words used, arrangement in sentence, definitions and meanings.
139	Leeson	Continues that a review of historical circumstances may be necessary. Indicates that if a constitutional provision has been adopted by initiative, the voters’ intent needs to be determined.
161	Heynderickx	Expands on methods used to identify intent.
176	Leeson	Comments that in 1857 voters had no voice except an up or down vote.
180	Heynderickx	Discusses the history of the constitution process.
215	Heynderickx	Continues that the courts rely on text as there is no specific historical evidence.
228	Leeson	Observes that the wording in Article I, Section 8 of the Oregon Bill of Rights and the 1st Amendment of the U.S. Constitution on freedom of speech are very different <b>(EXHIBIT C)</b> .

238	Heynderickx	Comments on the recent development to focus on the Oregon constitution first. Provides “pecking order” to be followed in applying the two constitutions and federal and state laws.
294	Heynderickx	Discusses amendments vs. revisions to the constitution. Refers to Article IV, Section 1 of the Oregon Constitution ( <b>EXHIBIT C</b> ).
340	Leeson	Clarifies that the reference should be to Article XVII.
343	Heynderickx	Continues that separate measures were sent out and several did not pass, as people rule differently on separate amendments than on a whole package.
374	Heynderickx	Comments on Ballot Measure 37, a statutory provision initiated by Ballot Measure 7 which was a constitutional amendment that was struck down as being a revision.
381	Heynderickx	Advises that the legislature has the authority to do a revision.
403	Rep. Macpherson	Asks about the extent opponents’ comments are taken into account by the court.
429	Leeson	Responds that she looks at the text in context, including related ballot measures, and the relevant history and does not look at arguments against. Clarifies that she is not speaking for the court.

**TAPE 24, B**

012	Heynderickx	Replies that he looks at text as arguments are usually vague.
022	Rep. Garrard	Asks why all tax measures must originate in the House.
025	Leeson	Responds that comes from political theory, as the House is the body closest to the people.
028	Rep. Wirth	Inquires if changes in the rulemaking process were done all at once or piecemeal over time.

036	Heynderickx	Clarifies that at one time the courts took the position that if the legislature was going to delegate rulemaking authority, they should place certain requirements on the agencies. Explains that over time such limitations have not been put on the legislature.
045	Heynderickx	Cites the general directives on the Clean Air Act and Clean Water Act as an example.
060	Rep. Wirth	Asks about interpreting the intent of voters passing initiatives and which were the most difficult.
064	Leeson	Refers to <i>Armatta vs. Kitzhaber</i> and the appropriate constitutional provisions that should be analyzed. Indicates that the courts ignored Article 17, which states what can be done by initiative and that amendments are to be voted on separately.
087	Heynderickx	Adds that constitutional language is very hard to draft.
103	Rep. Flores	Refers to comments on supreme court as arbiter. Asks about the current trend of the U.S. Supreme Court using the European perspective in interpreting the U.S. Constitution.
113	Leeson	Responds that the U.S. Supreme Court started a process about six years ago to look at documents outside of the U.S. to cast light on the U.S. Constitution. Talks about the ongoing debate among U.S. justices on that issue.
130	Rep. Flores	Asks Mr. Heynderickx if it is possible that some administrative rules under the authority of the Executive Branch are intended to override the legislative process.
141	Heynderickx	Replies that all rules are subject to judicial challenge, and some rules are determined to be invalid, the most common reason being that they conflict with statute. Advises that Legislative Counsel reviews all rules for that purpose.
163	Rep. Flores	Asks if reviews are done regularly or upon request.
166	Heynderickx	Answers that reviews are done on a regular basis, and any member can ask for a rule review.
172	Chair Ackerman	

		Inquires if Legislative Counsel issues a report on rules reviewed and findings.
177	Heynderickx	Responds that the rules are reviewed to see if the agency has authority to adopt the rule.
191	Rep. Krieger	Expresses frustration about U.S. Supreme Court decisions. Refers to Measure 37 and the intent of transferability. Asks what the court would look at for voters' intent.
207	Leeson	Replies that Oregon Supreme Court decisions are usually unanimous and explains the process to reach those decisions. Prefers not to comment on Measure 37 matters.
225	Heynderickx	States that it will be hard to determine intent as the tendency is not to discuss the details of the text. Advises that the courts will have to use the text.
251	Chair Ackerman	Refers to V. in the overview ( <b>EXHIBIT A</b> ). Believes real examples under Article I, Sections 10, 17 and 20 will be relevant in review of some bills being referred to the committee.
260	Rep. Macpherson	Comments on the length of the Oregon Constitution in comparison to the U.S. Constitution. Refers to material still in the Oregon Constitution that is no longer valid and asks how to clean it up.
285	Heynderickx	Believes that there are items that should "go away," including the old Article 7.
313	Heynderickx	Discusses a group that was formed to produce a draft revised constitution.
325	Leeson	Suggests using parenthetical notes to alert readers of supreme court declarations invalidating provisions.
342	Heynderickx	Explains that some of that has been done and refers to notes following Article 45. Indicates that a revised Oregon Constitution was submitted to the voters in 1970 and was defeated.
367	Rep. Flores	

Asks about course of action when an administrative rule is not implemented within the timeframe of statute.

377 Heynderickx Responds that there is not a general enforcement provision. Advises that mandamus is a judicial remedy where one can ask the court to force the agency to comply.

**TAPE 25, B**

002 Rep. Flores Asks if it would be Legislative Counsel's responsibility to determine whether a deadline in statute is attainable, given the rulemaking process.

008 Heynderickx Replies that agencies can adopt temporary rules in a fairly short timeframe; however, permanent rules take months. Advises that sometimes there are political issues on rule content that delay adoption.

016 Chair Ackerman Inquires if the legislature can limit agency rulemaking authority.

020 Heynderickx Responds, yes.

022 Chair Ackerman Asks presenters to proceed with overview.

025 Heynderickx Reads Article I, Section 20 of the Oregon Constitution (**EXHIBIT C**). Cites a recent case decision from the court of appeals.

056 Heynderickx Continues that much of what we do divides people into classes and that is all right as long as there is a rational basis for the decision.

090 Heynderickx Informs that the Oregon Constitution contains radically different language about privileges and immunities vs. equal protection in the U.S. Constitution.

100 Heynderickx Refers to household income "classification" in the tax law. Cites examples of irrational laws that would be stricken down by the courts.

130 Rep. Flores Seeks clarification that the reference to "sex" is about gender rather than sexual orientation.



136	Heynderickx	Cites a 1998 court of appeals case that found sexual orientation to be a true class based on a rational bases analysis.
149	Heynderickx	Quotes from Article I, Section 10 of the Oregon Constitution <b>(EXHIBIT C)</b> . Comments that a literal reading suggests a remedy for every injury. States there is no equivalent provision in the U.S. Constitution on due process of law.
173	Heynderickx	Continues with discussion of laws passed by the legislature limiting damages and abolishing a cause of action.
211	Heynderickx	Discusses the right to jury trial and awarding of damages.
245	Chair Ackerman	Asks if requests by a person or group for immunity from civil claims for their actions come under Article I, Section 10.
251	Heynderickx	Responds that they do; however, it depends on the facts of the case and what is being claimed.
275	Chair Ackerman	Adjourns the informational meeting at 10:17 a.m.

## **EXHIBIT SUMMARY**

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- A. **Constitutional Workshop, printed overview, Dave Heynderickx, 1 p.**
- B. **Constitutional History Background, Oregon, printed text, Dave Heynderickx, 4 pp.**
- C. **Constitutions, Oregon and United States, printed text, Dave Heynderickx, 116 pp**