

Legislator, Lawyer, Scholar, and
Teacher: Dave Frohnmayer’s
Contributions to Oregon
Administrative Law

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INTRODUCTION

I am honored to have been asked to address Dave Frohnmayer’s contributions to Oregon law—and more specifically, Oregon administrative law. I had the privilege of working for Dave as his deputy attorney general in the early 1990s before he left the Department of Justice to become dean of the University of Oregon School of Law. To me, Dave was not just my boss but, over the last two-and-a-half decades, my mentor, colleague, and friend. I miss his counsel and encouragement. But I continue to draw on lessons that I learned from him to this day.

Dave had a particular interest in administrative law throughout his career. He was intimately involved in the drafting of what is now the state’s administrative procedure statute. He applied it regularly as the head of an agency and as the state’s lawyer representing other agencies

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in court. And he was a nationally recognized scholar on the subject and taught it many times over the course of his career. This Article reviews Dave's contributions to the subject of Oregon administrative law in terms of those different roles that he played while in public service—as a legislator, as a lawyer for the state agencies subject to the requirements of the law, and as a scholar and teacher. In each of those roles, Dave affected the development of the law in positive and enduring ways.

I

DAVE AS A LEGISLATOR

Let's begin with Dave's work as a member of the Oregon Legislative Assembly. Dave served three terms in the legislature, from 1975 to 1981, as a representative of southern Eugene. Among other things, Dave was a member of the Legislative Counsel Committee, which had oversight of administrative agency procedures, and, in that role, he had the opportunity to influence significantly the contents of Oregon's Administrative Procedure Act (APA).

To appreciate that influence requires a brief digression on the history of administrative procedure legislation in Oregon. In the early part of the twentieth century, state and federal legislation began increasingly to assign to administrative agencies responsibility for dealing with a variety of social and economic issues—issues that previously had been dealt with by legislatures, justices of the peace, municipal officials, and the courts. By the 1930s, however, critics began to complain that the agencies often acted with no rules of procedure and, for that matter, no published substantive rules.

In 1939, the Oregon legislature responded by enacting a precursor to what is now Oregon's APA.¹ The new law required that every administrative agency order, rule, or regulation be filed with the secretary of state and required the secretary to publish "at regular intervals" a summary of each order, rule, or regulation that had been filed.² In addition, the new law provided that any orders, rules, or regulations that had not been filed with the secretary would not be effective against any person who had no knowledge of them.³ Notably,

¹ 1939 Or. Laws 927.

² *Id.*

³ *Id.* at 928.

the 1939 law purported to apply to all executive branch administrative agencies, without exception.⁴

Meanwhile, the American Bar Association (ABA) studied the operation of federal agencies. So did special committees appointed by President Franklin Roosevelt and then-Attorney General Robert Jackson. The end result was the enactment in 1946 of the Federal Administrative Procedure Act.⁵ The ABA also recommended a uniform APA for the states, which it sent to the National Conference on Commissioners of Uniform State Laws and which, in turn, ultimately produced a model state APA.⁶

In Oregon, after a few false starts, a bill based on the model state APA was passed by the legislature in 1957.⁷ Introduced at the request of the Oregon State Bar, the 1957 legislation followed the model state APA in dividing the universe of administrative decisions into roughly two types of administrative agency actions: rulemaking and adjudication of contested cases. Concerning the adoption of administrative rules, the new law required agencies to provide notice and an opportunity to comment before adopting any new rule.⁸ It also required agencies to include a “concise general statement of the[] basis and purpose” of any adopted rule.⁹ Upon adoption, each agency was required to file a copy of the rule with the Secretary of State, who was then required to compile, index, and publish all rules adopted by each agency.¹⁰ The law provided for judicial review of the validity of administrative rules by way of a declaratory judgment proceeding.¹¹

Concerning contested cases, the 1957 legislation required agencies to afford a hearing after reasonable notice, as well as a written decision

⁴ *Id.* at 927.

⁵ For an introduction to the origins of state and federal administrative procedure acts, see generally ARTHUR EARL BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* § 1.2 (1986).

⁶ On the development of the model act, see generally E. Blythe Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196 (1948).

⁷ 1957 Or. Laws 1292. For a summary and analysis of the 1957 legislation, see generally Richard A. Franzke & Richard F. May, Note, *The Oregon Administrative Procedure Act*, 1 WILLAMETTE L.J. 233 (1960).

⁸ 1957 Or. Laws 1293.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1294–95.

that included findings of fact and conclusions.¹² Finally, the law provided for judicial review of all final decisions in contested cases.¹³

Interestingly, the 1957 law departed from the earlier legislation in its more limited scope. While the 1939 law applied to all executive branch agencies, the 1957 law exempted a number of the largest and most significant state agencies, among them the Public Utility Commission, the State Tax Commission, the Civil Service Commission, the Department of Motor Vehicles, and the State Industrial Accident Commission.¹⁴ It also exempted any other agency whose practices and procedures were required to conform to federal law as a condition of receipt of federal funds.¹⁵ Also of interest is the requirement—not found in the model state APA—that the attorney general publish model rules of administrative procedure for agencies to adopt.¹⁶

Over the course of the next twenty years, the legislature amended the Oregon APA, fleshing out and refining the basic structure that had been enacted in 1957. In 1971, the legislature significantly increased the scope of the APA by eliminating many of the exemptions originally included in the 1957 legislation.¹⁷ In 1975, it added a requirement that agencies must adopt rules governing their rulemaking procedures,¹⁸ and it established a process for oversight of administrative rules by the Office of Legislative Counsel and a Legislative Counsel Committee.¹⁹ In 1977, it added a requirement that agencies must keep on file a “statement of [] need” during the rulemaking process.²⁰

In 1977, the legislature also charged the Legislative Counsel Committee with conducting a thorough review of the state APA over the course of the 1977–79 interim and proposing recommendations about needed changes in the law. An Interim Subcommittee on Administrative Procedure Act Reform was organized, with Representative Dave Frohnmayer as its chair.²¹

¹² *Id.* at 1295–97 (notice and opportunity for hearing).

¹³ *Id.* at 1297–99.

¹⁴ *Id.* at 1292.

¹⁵ *Id.* at 1299.

¹⁶ *Id.* at 1293.

¹⁷ 1971 Or. Laws 1773.

¹⁸ 1975 Or. Laws 2094–95.

¹⁹ *Id.* at 133–34.

²⁰ 1977 Or. Laws 97.

²¹ See LEGISLATIVE COUNSEL COMM., FINAL REPORT OF THE SUBCOMMITTEE ON ADMINISTRATIVE PROCEDURE ACT ii (1978) [hereinafter FINAL REPORT].

Dave's approach to the interim subcommittee's work was pragmatic, side-stepping larger policy initiatives in favor of measures that would streamline the APA, making it more efficient without sacrificing accountability.²² It was work that required the interim subcommittee to dig into the messy details of administrative procedure. Over the following months, the interim subcommittee conducted hearings, during which it received testimony from administrative agency representatives and members of the interested public. During the course of those hearings, the interim subcommittee received a number of suggestions about improving the administrative process in Oregon.²³ And, in response to those suggestions, the interim subcommittee developed a number of proposed amendments to the APA. The Legislative Counsel Committee forwarded the proposed amendments to the 1979 legislature, and the legislature adopted nearly all of them.²⁴ A review of the legislative history reveals that Dave was the indispensable man throughout the process. As chair of the House Committee on Judiciary (and as a member of the conference committee that resolved differences resulting from amendments in the Senate), Dave carefully shepherded the bill from introduction to enrollment.²⁵

In its report to the Legislative Counsel Committee, Dave's interim subcommittee modestly referred to the amendments as being primarily of a "technical" nature.²⁶ The characterization, however, should not be understood as diminishing their important practical effects. A brief review of three examples will give an idea of their nature and significance.

The first amendment concerned the subject of subdelegation of rulemaking authority—that is, the authority of an agency head to delegate certain responsibilities to subordinates.²⁷ The APA referred to administrative "agenc[ies]," but left uncertain whether the

²² The Interim Committee, for example, declined to make any recommendations on more controversial policies such as whether to establish an independent hearing officer division. *Id. passim*.

²³ See FINAL REPORT, *supra* note 21, at vii.

²⁴ See David B. Frohnmayer, *The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform*, 58 OR. L. REV. 411, 420 (1980).

²⁵ See generally, e.g., *Oregon Administrative Procedures Act, Hearings on H.B. 2497 Before the Conference Committee*, 1979 Leg., 60th Sess. (Or. 1979); *Oregon Administrative Procedures Act, Hearing on H.B. 2497 Before the House Committee on the Judiciary*, 1979 Leg., 60th Sess. (Or. 1979) [hereinafter *Oregon APA Hearing*]; *Oregon Administrative Procedures Act Conference Committee Report on H.B. 2497*, 60th Sess. (Or. 1979).

²⁶ FINAL REPORT, *supra* note 21, at vii.

²⁷ 1979 Or. Laws 741.

requirements that apply to them could be satisfied by agency personnel other than the agency head, board, or commission, which made holding an agency accountable for compliance with the APA difficult. As Dave later explained in an article on the 1979 amendments, in the real world, “an enormous number of de facto delegations of rulemaking authority within agencies are shifting, lacking in clarity, and almost never embodied in a formal writing. Identifying the agency personnel who are responsible for final decisions becomes a major task for citizens and legislators.”²⁸

The Oregon Supreme Court had noted just such a problem in *Reynolds v. Children’s Services Division*, in which the operator of a day care center challenged the Department of Human Services’ revocation of her certificate of operation.²⁹ She obtained a formal hearing, which resulted in a final order of revocation.³⁰ In noting that fact, the supreme court complained that, “[i]t is not entirely clear from the record who exercised the authority of the agency in making this order.”³¹ The court observed that the relevant statute delegated authority over certificates to the Children’s Services Division (CSD) of the department, while the order was signed by a hearings officer and the manager of the Management Systems Unit of the division.³² “The record does not show whether authority to make a final order was delegated either to the hearings officer or to the manager,” which the court noted could affect the validity of the order.³³

Dave’s interim subcommittee recommended addressing that problem by amending the APA to allow expressly for an agency to subdelegate rulemaking authority to subordinate officers or employees within an agency so long as the delegation is made in writing and filed with the secretary of state.³⁴ The 1979 legislature adopted the proposed amendment, and the provision survives as an important part of the APA today.³⁵

²⁸ Frohnmayer, *supra* note 24, at 426.

²⁹ *Reynolds v. Children’s Servs. Div.*, 571 P.2d 505, 507 (Or. 1977) (en banc).

³⁰ *Id.*

³¹ *Id.* n.1.

³² *Id.*

³³ *Id.*

³⁴ FINAL REPORT, *supra* note 21, at 3.

³⁵ OR. REV. STAT. § 183.325 (2015). For an example of a more recent case mentioning the significance of the issue of subdelegation, see *Marshall’s Towing v. Dep’t of State Police*, 116 P.3d 873, 875 n.5 (Or. 2005) (en banc) (“The question whether the Superintendent lawfully may delegate such authority has not been raised by any party, but the lack of statutory authority to that effect is a concern. The concern is made more palpable

A second of the 1979 amendments worth mentioning is the clarification of the “internal management directive” exception to the APA’s rulemaking requirements. As I mentioned, the APA required a series of notice, comment, and publication formalities as prerequisites to promulgating administrative rules. The statutory definition of the “rules” to which these requirements applied was sweeping, on its face covering practically every imaginable sort of administrative agency decision of any consequence.³⁶ Excepted from rulemaking requirements were a subset of agency actions known as “internal management directives,” obscurely defined as “directives, regulations or statements between agencies, or their officers or their employees [sic], or within an agency, between its officers or between employees [sic], unless a hearing is required by statute, or action by agencies directed to other agencies or other units of government.”³⁷

Dave pointed out that the statutory exception expressed not one, but four different exceptions, and with a qualification that applies to only three of them.³⁸ The courts, too, noted at the time that the term resisted easy understanding and application. In *Burke v. Children’s Services Division*, for example, the Oregon Court of Appeals addressed the validity of an action of the CSD of the Department of Human Resources, which terminated payments for day care services under the Aid to Dependent Children Program.³⁹ The action, prompted by budget concerns, was accomplished by means of a simple notice to day care providers, with no opportunity to be heard.⁴⁰ One of the providers challenged the validity of the notice, arguing that the agency action amounted to the adoption of a rule without compliance with APA rulemaking procedures.⁴¹ CSD responded that the notice was an “internal management directive” and thus exempt from any rulemaking requirements of the APA.⁴²

by the existence elsewhere (in ORS 183.325) of specific statutory authority for persons such as the Superintendent to delegate *rulemaking* authority.”).

³⁶ OR. REV. STAT. § 183.310(7) (1977) defined “rule” to mean “any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.”

³⁷ *Id.* § 183.310(7)(a).

³⁸ Frohnmayer, *supra* note 24, at 433 n.100.

³⁹ *Burke v. Children’s Servs. Div.*, 552 P.2d 592, 593 (Or. Ct. App. 1976).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

The court rejected the agency's reliance on the exception. It began by noting that the term "internal management directive" is a term that "does not lend itself to precise definition."⁴³ Relying on case law interpreting the Federal APA and on a similar provision in the New York Constitution, the court ultimately clarified the exception by concluding that "it better serves the policy of the APA to interpret the phrase 'internal management directive' narrowly so as to encompass only communications . . . [that] affect individuals solely in their capacities as members of the agency involved rather than as members of the general public."⁴⁴ Because the CSD notice affected not just members of the agency but members of the public, the court concluded, the internal management directive exception did not apply, and the agency's decision was subject to the rulemaking requirements of the APA.⁴⁵

In subsequent cases, the Oregon Court of Appeals reaffirmed and applied that gloss on the APA's definition of the "internal management directive" exception. The court held that, "[i]f the general public who may have occasion to deal with the agency is more directly affected by agency action than the employees [sic] of the agency in carrying out their duties, the action must be reflected in a properly enacted rule."⁴⁶

Dave's interim subcommittee picked up on the court of appeals' gloss on the statute and used it as the basis for revising the definition of "internal management directive" in the APA. Adopted by the legislature, the 1979 amendment clarified that the term "rule" does not include "internal management directives, regulations or statements which do not substantially affect the interests of the public."⁴⁷

The third of the 1979 amendments that I will mention relates to an agency's obligation to prepare a "statement of need" as part of its rulemaking process. Early versions of the Oregon APA adopted informal, notice-and-comment rulemaking requirements, which entailed publishing notice of intent to adopt a rule and providing an opportunity for comment.⁴⁸ In *International Council of Shopping Centers v. Oregon Environmental Quality Commission*, the agency complied with those minimal requirements in adopting rules regulating

⁴³ *Id.*

⁴⁴ *Id.* at 595.

⁴⁵ *Id.*

⁴⁶ *Gray Panthers v. Pub. Welfare Div.*, 561 P.2d 674, 676 (Or. Ct. App. 1977).

⁴⁷ 1979 Or. Laws 742.

⁴⁸ *E.g.*, 1957 Or. Laws 1293.

certain sources of air pollution.⁴⁹ The petitioners who challenged the validity of those rules on judicial review filed a motion with the court of appeals to require the agency to supplement the record on review to include a transcript of all hearings, all scientific evidence and other written materials submitted to the agency, and any staff reports.⁵⁰ According to the petitioners, administrative rules must be supported by a complete record establishing the factual predicates for the agency's decisions.⁵¹ The court denied the motion, explaining that, in adopting the state APA, "it is apparent that the legislature had opted to provide only for informal rulemaking procedures," which require only notice and an opportunity for interested persons to comment.⁵²

In response to the *International Council of Shopping Centers* decision, the legislature amended the APA in 1977 to require agencies to prepare a "statement of the need for the rule and a statement of how the rule is intended to meet the need," as well as references to "applicable portions of the principal documents, reports or studies prepared by or relied upon by the agency in considering the need for and in preparing the rule."⁵³ Agencies, however, were not required to publish the statement of need; rather, they were permitted merely to make them "available for public inspection" at the agencies' main offices.⁵⁴

Dave's interim subcommittee reported "a lack of substantial compliance" with the statement of need requirements.⁵⁵ Moreover, testimony from several agencies revealed instances in which no one asked for the statement of need, apparently because no one knew it existed.⁵⁶ To remedy those problems, the 1979 amendments reworked the statement of need requirement so that it became part of an agency's notice of proposed rulemaking, ensuring that interested persons are informed of the agency's intentions and the bases for its proposed rules before any hearings.⁵⁷ As Dave later said of the amendment, "the

⁴⁹ *Int'l Council of Shopping Ctrs. v. Or. Env'tl. Quality Comm'n*, 556 P.2d 138, 139 (Or. Ct. App. 1976) (en banc).

⁵⁰ *Id.*

⁵¹ *Id.* at 140.

⁵² *Id.*

⁵³ 1977 Or. Laws 97.

⁵⁴ *Id.* at 96.

⁵⁵ FINAL REPORT, *supra* note 21, at 4.

⁵⁶ *Oregon APA Hearing*, *supra* note 25, at 17 (statement of Elizabeth Stockdale, Office of Legislative Counsel).

⁵⁷ 1979 Or. Laws 593.

legislature clarified precisely when in the rulemaking process the statement of need must be prepared. By making it part of the public notice contents, it ensured that the statement would be available for public inspection prior to any scheduled oral hearing.”⁵⁸

There were many other amendments included in the 1979 legislation initially proposed by Dave’s interim subcommittee—including streamlining legislative counsel review of proposed administrative rules,⁵⁹ redefining a “contested case” to exclude proceedings in which the agency’s decision rests solely on the results of a test,⁶⁰ spelling out the scope of judicial review of a challenged rule,⁶¹ and adding a requirement that the officer presiding at a contested case hearing must place on the record the substance of any *ex parte* contacts.⁶² All of the amendments reflect the sort of careful and pragmatic consideration of public policy and practical effects that characterized the amendments that I have mentioned in greater detail.

II

DAVE AS AN AGENCY HEAD AND THE ATTORNEY GENERAL

Second, let’s consider Dave’s contributions to Oregon administrative law in his role as the head of an agency and as attorney general. Under Oregon law, the attorney general is the lawyer for the State of Oregon, its departments, agencies, boards, commissions, and officials. He or she heads the Oregon Department of Justice, which has “[f]ull charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof” that may require the services of a lawyer to protect the interests of the state.⁶³ Moreover, the attorney general and the Department of Justice are the *exclusive* lawyers for the state,⁶⁴ subject only to the attorney general’s authorization for an agency to hire outside counsel because he or she concludes it is in the public interest or because of conflicts of interest.⁶⁵

The upshot of all that was that Dave, as attorney general, found himself on the front line of the operation of the state’s APA. For eleven years, it was his job to provide advice to the administrative agencies of

⁵⁸ Frohnmayer, *supra* note 24, at 466.

⁵⁹ 1979 Or. Laws 740–41.

⁶⁰ *Id.* at 741–42.

⁶¹ *Id.* at 745–46.

⁶² *Id.* at 746.

⁶³ OR. REV. STAT. § 180.220(b) (2015).

⁶⁴ *Id.* §§ 180.210, 180.220.

⁶⁵ *Id.* § 180.235(1).

the state about how to comply with the requirements of the state APA on a day-to-day basis. Dave's work in that respect was notable in several ways.

First, he tackled the job with energy and enthusiasm. He did not passively wait for agencies to come to him with specific issues to resolve. Instead—as you imagine a teacher would—he asserted all the power of the office he held to educate and train administrative agencies in advance about the requirements of the law. Recall that the original 1957 Oregon APA included a unique requirement that the attorney general prepare model rules of administrative procedure.⁶⁶ In the years following the enactment of that law, attorneys general dutifully published pamphlets that consisted of about fifteen pages of model rules of procedure, followed by a few pages of sample forms.⁶⁷ Dave saw the obligation to supply model rules as an opportunity to teach agencies about their responsibilities under the law. Under his direction, the brief pamphlet was transformed into an *Oregon Attorney General's Administrative Law Manual*, containing what is essentially a textbook on Oregon administrative law, complete with explanations of the history of the law and its provisions, the interpretation of relevant provisions by the courts, and practical checklists for agencies to use when trying to ensure compliance with its requirements.⁶⁸ It has become something of a bible for every administrative agency official. It has also become a source for the courts in litigation about the interpretation of the APA.⁶⁹

⁶⁶ 1957 Or. Laws 1293.

⁶⁷ The 1971 version of *The Attorney General's Model Rules of Practice and Procedure Under the Administrative Procedure Act*, for example, consisted of a sixteen-page pamphlet that included twenty-nine rules with sample forms. LEE JOHNSON, STATE OF OR., THE ATTORNEY GENERAL'S MODEL RULES OF PRACTICE AND PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT (1971).

⁶⁸ DAVE FROHNMAYER, STATE OF OR., OREGON ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT (1988). This version, for example, includes a 172-page commentary, the model rules of procedure, the full text of the Administrative Procedure Act, sample forms, and a number of checklists. *Id.* Dave's successors—especially Hardy Myers—continued that instructional focus in the publication of subsequent editions of the manual. The 2008 edition, for instance, now includes in excess of 223 pages of commentary, along with sample notices and orders, instructions on the basics of rule drafting, forms and rules from the secretary of state for filing administrative rules, a glossary, the text of the APA, and a table of cases. HARDY MYERS, STATE OF OR., OREGON ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURES ACT (2008).

⁶⁹ *See, e.g.,* Cole v. Driver & Motor Vehicle Servs. Branch, 87 P.3d 1120, 1133 n.22 (Or. 2004) (citing manual); Forelaws on Bd. v. Energy Facility Siting Council, 811 P.2d 636,

Second, in a related vein, Dave initiated the “Public Law Conference,” a biennial continuing education program free to all agency officials, conducted by Department of Justice lawyers. The conference included an introduction to the APA, as well as more in-depth classes on rulemaking procedure, the conduct of contested case hearings, judicial review of agency rules and of final orders in contested cases, statutory interpretation for administrative agency officials, and the like. Again, Dave approached the job not as a reactive lawyer, but as an enthusiastic teacher: He was eager to educate his agency pupils about the requirements of the law so that they could learn to comply on their own and without the necessity of expensive legal advice or, worse, litigation. I am pleased that the tradition of conducting the Public Law Conference continues to this day. Only last year, in October, the Department of Justice sponsored the latest conference, a two-day affair attended by so many agency officials that it required the Salem Convention Center to house it.⁷⁰

Third, Dave took seriously his obligation to be the exclusive source of legal policy for the State of Oregon and its agencies and officials. Throughout his tenure as Oregon’s attorney general, Dave worked to insulate his lawyers from the possibility of capture by their agency clients. In Dave’s view, Department of Justice lawyers owed their agency clients *independent* legal advice. That did not always make Dave popular with the state’s agencies, many of whom preferred “in-house” lawyers who were subject to the supervision of policymakers and more likely to provide advice that was to the liking of their superiors. On more than one occasion, my duties as Oregon’s deputy attorney general included having an uncomfortable conversation with an agency head that they were not entitled to hire their own lawyers. In fact, in one case, Dave’s commitment to the independence of the attorney general as the exclusive source of state legal policy led to litigation.

In *Frohnmayr v. State Accident Insurance Fund Corp.*, the issue squarely presented was whether the attorney general had the final say

641 n.12 (Or. 1991) (en banc) (same); *Gritter v. Adult & Family Servs. Div.*, 48 P.3d 195, 198 (Or. Ct. App.) (“The Oregon Attorney General’s Administrative Law Manual (2001) supports that interpretation”), *vacated as moot*, 53 P.3d 469 (Or. Ct. App. 2002); *Reforestation Gen. Contractors, Inc. v. Nat’l Council on Comp. Ins.*, 872 P.2d 423, 426 n.7 (Or. Ct. App. 1994) (citing manual).

⁷⁰ See generally OR. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S PUBLIC LAW CONFERENCE: CONFERENCE SCHEDULE (2015), <http://docplayer.net/7978950-The-attorney-general-s-public-law-conference.html> (describing the workshops available to agency officials during the conference).

over whether an agency could hire outside counsel to provide its legal advice.⁷¹ In 1982, Department of Justice lawyers had advised the governor and the legislature concerning the authority of the legislature to transfer funds from the State Accident Insurance Fund (SAIF) to the General Fund in response to a state budgetary shortfall.⁷² Acting on that advice, the legislature met in a special session and adopted legislation ordering the transfer of some \$81 million from one fund to the other.⁷³ It goes without saying that SAIF was not pleased with the legislation. And in response, it authorized counsel other than the attorney general or Department of Justice lawyers to initiate a legal action challenging the lawfulness of the legislature's action.⁷⁴ It further goes without saying that Dave was not pleased with SAIF's decision. And in response, he initiated an action of his own for a declaration that SAIF lacked the authority to hire its own counsel without the approval of the attorney general.⁷⁵

The Oregon Supreme Court unanimously sided with Dave. The court held that SAIF, as an agency of state government, was subject to the provision of the law that declares the attorney general as the exclusive arbiter of the state's legal policy, subject only to his or her own determination that it is in the public interest to have others provide legal services to state agencies or officials.⁷⁶

The mention of the *Frohnmayer* decision leads to another way that Dave affected the development of administrative law in this state—namely, litigation. As the state's attorney general, Dave and the lawyers at the Department of Justice were tasked with representing the state's agencies in litigation involving challenges to their compliance with the requirements of the APA. And, indeed, the attorney general's name appears on some five-dozen reported appellate decisions involving the interpretation and application of the state APA during Dave's tenure.

Several of those decisions are now regarded as landmark administrative law decisions, and each decision reflects the sort of pragmatism that we have seen in Dave's approach to administrative law in his other work. In *Trebesch v. Employment Division*, for example, the Oregon Supreme Court was required to determine precisely when

⁷¹ *Frohnmayer v. State Accident Ins. Fund Corp.*, 660 P.2d 1061, 1061 (Or. 1983).

⁷² *Id.* at 1063.

⁷³ *Id.*

⁷⁴ *Id.* at 1064.

⁷⁵ *Id.* at 1064–65.

⁷⁶ *Id.* at 1071.

rulemaking is required under the Oregon APA.⁷⁷ It is an unemployment compensation case, in which the initial decision maker, the assistant director of the Employment Division, denied benefits with the explanation that the claimant's search for employment was not "systematic and sustained" within the meaning of the statute setting out the conditions for obtaining unemployment benefits.⁷⁸ The claimant sought judicial review, arguing that the agency had failed to promulgate a rule explaining what exactly the law required when it conditioned benefits on a "systematic and sustained" effort to find work.⁷⁹

The claimant argued that rulemaking is required before an agency can apply any statutory term that entails policymaking of any sort.⁸⁰ Representing the Employment Division, Dave and his staff lawyers at the Department of Justice argued that the claimant's position was not practicable and that, instead, whether rulemaking is required depends on the nature of the statutory terms involved.⁸¹ The court agreed with Dave that rulemaking is not always required, and that, depending on the case, an agency's interpretation of statutory terms may be announced either by rule or by order in a contested case.⁸² Whether rulemaking is required, the court held, depends on the character of the terms involved, in the context of the agency structure and the allocation of authority within it.⁸³

The court followed that rule in *Forelaws on Board v. Energy Facility Siting Council*.⁸⁴ In that case petitioners challenged the issuance of a license for storage of industrial waste sludge on the ground that, among other things, the agency had failed to promulgate rules interpreting relevant statutory provisions, relying instead on "interpretive rulings."⁸⁵ Dave and the Department of Justice argued that, under *Trebesch*, rulemaking was not required.⁸⁶ And again, the court agreed. Whether rulemaking is required, the court said, depends on the

⁷⁷ *Trebesch v. Emp't Div.*, 710 P.2d 136, 137 (Or. 1985) (en banc).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 139.

⁸¹ *Id.* at 138.

⁸² *Id.* at 141.

⁸³ *Id.* at 143. The court ultimately concluded that, in that case, the assistant director of the Employment Division had not provided an interpretation of the term at all—either by rule or by order in a contested case. *Id.* Accordingly, it reversed and remanded the decision for the assistant director to do so. *Id.*

⁸⁴ *Forelaws on Bd. v. Energy Facility Siting Council*, 760 P.2d 212 (Or. 1988) (en banc).

⁸⁵ *Id.* at 218.

⁸⁶ Brief for Respondent at 20–21, *Forelaws on Bd.*, 760 P.2d 212 (1988) (No. S33953).

“specific statutory scheme under which an agency operates and the nature of the rule that the agency wishes to adopt.”⁸⁷

As a final illustrative case from the Frohnmayer era, I will cite *People for Ethical Treatment of Animals v. Institute of Animal Care*.⁸⁸ This was another landmark decision, involving the issue of organizational standing under the APA.⁸⁹ The University of Oregon’s Institutional Animal Care and Use Committee had approved proposed research on the auditory system of barn owls.⁹⁰ People for the Ethical Treatment of Animals (PETA) filed a petition to challenge the final order approving that research.⁹¹ The university committee, however, moved to dismiss the petition on the ground that the state APA authorized only “aggrieved” persons to seek judicial review of such administrative agency orders, and PETA had failed to establish that it was “aggrieved.”⁹² PETA argued that it satisfied the statutory standing requirement by having zealously advocated its positions before the administrative agency and lost.⁹³ Dave and the Department of Justice rejoined that such a conception of statutory standing is impracticable, as it would confer standing without reference to whether an individual or organization *actually* would be affected by the outcome of the case.⁹⁴

The Oregon Supreme Court sided with the university. “Although we have no doubt that PETA’s zeal makes it sufficiently adversarial,” the court observed, “zeal does not provide the requisite ‘personal stake’ in the outcome” that the statute required.⁹⁵

⁸⁷ *Forelaws on Bd.*, 760 P.2d at 214 (citing *Trebesch*, 710 P.2d at 138).

⁸⁸ *People for the Ethical Treatment of Animals v. Institutional Animal Care*, 817 P.2d 1299 (Or. 1991).

⁸⁹ *Id.* at 1300.

⁹⁰ *Id.*

⁹¹ *Id.* at 1301.

⁹² *Id.*

⁹³ Petition for Reconsideration and Review at 8, *People for Ethical Treatment of Animals*, 817 P.2d 1299 (No. 88C–11844) (“[I]t is enough that the petitioner actively advocated a position before the decisionmaking agency and lost.”).

⁹⁴ Response to Petition for Review at 5, *People for Ethical Treatment of Animals*, 817 P.2d 1299 (No. 88C–11844).

⁹⁵ *People for the Ethical Treatment of Animals*, 817 P.2d at 1304–05.

III DAVE AS A SCHOLAR AND TEACHER

The subject of administrative law was also an area of special interest to Dave academically. He taught the class as a young law professor in the years before his election to the office of attorney general and, in that capacity, wrote an essay on regulatory reform that won the ABA's Ross Essay Award in 1980.⁹⁶ At the time, calls for "regulatory reform" were all the rage.⁹⁷ Dave did not jump on the bandwagon. But neither did he reject it. Instead, Dave—characteristically—called for more measured, pragmatic thinking about the subject. In Dave's view, broad calls for regulatory reform were doomed to failure because they failed to reflect the messy realities of regulation, which involved different types of regulation aimed at different types of social ills.⁹⁸ In Dave's typology, three different categories of regulation were aimed at three different types of problems: market regulation of natural monopolies, regulation of environmental and other social costs of industry, and regulation of government itself.⁹⁹ In Dave's view, reform could be successful only if it identified those distinct varieties of regulation and addressed the distinct problems that they pose.¹⁰⁰ Dave offered a variety of practical suggestions, ranging from legislative insistence on more carefully articulated standards to govern review of agency action and sunset laws to help provide milestones for legislative evaluation of regulatory legislation, to economic impact statements designed to routinize consideration of economic costs in regulatory decision-making.¹⁰¹

The same year that Dave published his award-winning essay, he also drafted what is probably the definitive article about Oregon's APA, its

⁹⁶ David B. Frohnmayer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A. J. 871, 871 (1980).

⁹⁷ It was an era when, for example, Congress dramatically reduced federal regulation of airlines, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); interstate trucking, Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); and railroads, Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). During the same era, Congress more generally aimed at introducing flexibility and efficiency into federal regulation with the enactment of such legislation as the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); and the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980).

⁹⁸ Frohnmayer, *supra* note 96, at 871.

⁹⁹ *Id.* at 872-73.

¹⁰⁰ *Id.* at 873-74.

¹⁰¹ *Id.* at 876.

genesis, amendment, and implementation.¹⁰² Modestly entitled “An Essay on State Administrative Rulemaking Procedure Reform,” the article—which, at seventy-one pages with 337 footnotes could hardly be called an “essay”—reviews the origins of Oregon’s APA and its structure, followed by a detailed subject-by-subject analysis of the various components of the APA, each with its own historical introduction and critical examination.¹⁰³ It has proved an enduring resource—cited by other scholars¹⁰⁴ and by appellate courts in Oregon¹⁰⁵ and elsewhere¹⁰⁶—in examining the origins and intended operation of various provisions of the APA.

As Oregon’s attorney general, Dave continued to write on the topic of administrative law, now bringing to bear not just his formidable intellect but also his experience as the head of an administrative agency and as the lawyer for all of the state’s agencies, boards, and commissions. In an article published in the *Willamette Law Review*, he urged the state legislature to assume greater responsibility for articulating clearly its policy choices, using “plain, unequivocal, common sense directives for the resolution and implementation of those choices.”¹⁰⁷ Using examples from his personal experience as the state’s attorney general—especially the *Trebesch* litigation—he noted how ambiguous expressions of legislative policy choices simply shift

¹⁰² Frohnmayer, *supra* note 24.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., William R. Anderson, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 784 n.12, 797 n.22 (1989); Keith Aoki et al., *Trading Spaces: Measure 37*, MacPherson v. Department of Administrative Services, and *Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273, 318–19 n.240 (2005); Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 318 n.84, 329 n.134 (1986); F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida’s New APA*, 24 FLA. ST. U. L. REV. 309, 347 n.222 (1997); William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 178 n.179 (1991).

¹⁰⁵ See, e.g., *Fremont Lumber Co. v. Energy Facility Siting Council*, 936 P.2d 968, 971 (Or. 1997); *Dika v. Dep’t Ins. & Fin.*, 817 P.2d 287, 288 (Or. 1991) (en banc).

¹⁰⁶ See, e.g., *Woodland Private Study Grp. v. Dep’t of Env’tl. Prot.*, 533 A.2d 387, 392–93 (N.J. 1987); *Mountain Fuel Supply Co. v. Pub. Serv. Comm’n of Utah*, 861 P.2d 414, 421 (Utah 1993); *Aetna Life Ins. Co. v. Mitchell*, 303 N.W.2d 639, 651 n.1 (Wis. 1981) (Abrahamson, J., dissenting).

¹⁰⁷ David Frohnmayer, *Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power*, 22 WILLAMETTE L. REV. 219, 221 (1986).

power from the legislative to the other branches of government, in particular, administrative agencies.¹⁰⁸

In 1988, Dave was asked to address a Western States Seminar on State and Local Administrative Law.¹⁰⁹ His comments identified what he saw as emerging trends in state administrative law. Principal among them, Dave noted that a generation of administrative law produced by courts had been superseded by one of legislation, with which the courts, Dave observed, have tended to insist on strict compliance.¹¹⁰

In a similar vein, in 2000, Dave was asked to speak at a conference for the National Administrative Law Judge Foundation, at which he again offered his observations about the development of administrative law and his perceptions about emerging trends.¹¹¹ Interestingly, Dave built on his original 1980 American Bar Association Journal article on regulatory reform, noting that it was striking to him how—after several decades of experience as a legislator, public official, teacher, and scholar—the concerns he identified back then still resonated with him.¹¹²

Let me suggest several themes that can be found in Dave’s academic writing on the subject of administrative law. First, Dave emphasized the importance of state—as opposed to federal—administrative law. Dave often noted that, while the Federal APA has remained essentially unchanged since its enactment in 1946, state legislatures and state courts have been the source of continuing innovation in the area over the preceding decades.¹¹³

Second, Dave urged lawyers and scholars to attend not just to judicial opinions on administrative procedure, but also to legislation as the ultimate source of law governing the administrative process. As he stated in his address to the Western States Conference on State and Local Administrative Law, “[l]awyers often give too much attention to case law and consequently, only passing attention to statutes.”¹¹⁴ Dave admonished that the point was of more than academic significance, for failure to understand that common law doctrines of administrative law

¹⁰⁸ *Id.* at 234–35.

¹⁰⁹ Dave Frohnmayer, *National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and New Utah Administrative Procedure Act*, 3 *BYU J. PUB. L.* 1, 1 (1989).

¹¹⁰ *Id.* at 3–7, 19.

¹¹¹ David Frohnmayer, *Administrative Law: Review of a Century*, 20 *J. NAT’L ASS’N ADMIN. L. JUDGES* 119 *passim* (2000).

¹¹² *Id.* at 119–21.

¹¹³ Frohnmayer, *supra* note 109, at 2 n.11.

¹¹⁴ *Id.* at 3.

have given way to legislatively prescribed procedures can lead to “[a]ccusations of administrative law malpractice, accompanied by the twin perils of insurance premium increases and blemishes on professional reputation.”¹¹⁵

Third, to Dave, history—understanding how we got where we are at any given point in time—was always important. No matter the occasion, Dave could not resist placing ideas in historical context. His address to the National Association of Administrative Law Judges began with a recapitulation of nearly the entire early history of administrative law, from early-twentieth century decisions such as *Londoner v. City and County of Denver*¹¹⁶ and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*,¹¹⁷ through *Goldberg v. Kelly*¹¹⁸ and *Mathews v. Eldridge*.¹¹⁹ His “essay” on the Oregon APA began with what he described as the “legislative history” of the subject generally and then included a detailed examination of the sources of each of the procedural requirements imposed by the Act.¹²⁰ To Dave, you could not understand a principle without understanding its origins.

Fourth and finally, in all events, Dave was persistently pragmatic. It was never enough for Dave to recount the history of a provision or to expound on the possible theoretical justifications for one doctrine or another. Dave always, always ended with some sort of practical suggestion about how administrative law should work in the real world. Even in his most theoretical pieces—his “Regulatory Reform” article, for instance—Dave always ended with common-sense, real-world, practical suggestions.¹²¹

CONCLUSION

As Oregon administrative law continues to evolve in this new century, it is fitting that we reflect on those themes—still salient today—as well as Dave’s many other contributions, over a career in

¹¹⁵ *Id.*

¹¹⁶ Frohnmayer, *supra* note 98, at 121 (citing *Londoner v. City & Cty. of Denver*, 210 U.S. 373 (1908)).

¹¹⁷ *Id.* (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441 (1915)).

¹¹⁸ *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

¹¹⁹ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

¹²⁰ Frohnmayer, *supra* note 24, at 416–20.

¹²¹ Frohnmayer, *supra* note 96, at 876.

public service as a legislator, as the state's lawyer, and as a scholar and teacher.