

# Foreword

PRESIDENT MICHAEL H. SCHILL\*

## Foreword on David Frohnmayer

It is an honor to write the opening comments for *Oregon Law Review*'s special tribute issue in reflection of the life and influence of Dave Frohnmayer. I did not have the pleasure of, nor benefit from, meeting President Frohnmayer, although as a fellow law professor I knew of his reputation. I learned of his death just weeks before I accepted the Board of Trustees' offer to join the University of Oregon as its eighteenth president. At that time, I had just begun to study the great impact Frohnmayer made on the university, State of Oregon, constitutional law, and medical research in his many roles as a scholar, dean, president, state legislator, state attorney general, beloved community member, and grieving father. It was not until I arrived on the University of Oregon campus that I truly understood the depth and breadth of his contributions and how his foresight and tenacity influenced a fundamental shift in higher education.

Daily, as I walk through Johnson Hall, I see a painting of the UO's fifteenth president. Frohnmayer holds a steady, resolved, but warm gaze, his hands confidently planted on his hips. This stance of calm determination, I am told, was his *modus operandi*. The history books will likely best remember Dave Frohnmayer as the Oregon Attorney General who won six (of seven) Supreme Court cases,<sup>1</sup> successfully

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<sup>1</sup> Emp't Div., Dep't Human Res. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb (1993) (prevailed); Whitley v. Albers, 475 U.S. 312 (1986) (prevailed); Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) (prevailed); Oregon v.

arguing *Employment Division v. Smith*,<sup>2</sup> and also as the relentless father who fought to save his three daughters from the rare genetic disease Fanconi anemia.<sup>3</sup> Nevertheless, his influence on the structure of Oregon's higher education system easily earns him the rank of one of the most influential higher education leaders this state has ever produced.

Dave Frohnmayer was a native Oregonian, born in Medford in 1940.<sup>4</sup> He attended Harvard, Oxford as a Rhodes Scholar, and earned his law degree from the University of California, Berkeley.<sup>5</sup> He began teaching at the UO School of Law in 1971, and maintained close ties to the UO his entire life, as he served three terms in the Oregon House of Representatives and as Oregon Attorney General from 1981 to 1991.<sup>6</sup> He returned full time to the UO in the 1990s as dean of the law school, and then in 1994 began his service as president, which lasted until his retirement in 2009.<sup>7</sup> In all his endeavors, Frohnmayer was a public servant and fought for justice, and in his positions of great power, recognized and harnessed his influence for the public good.

As president of the UO, Frohnmayer's devotion to service manifested itself in his ability to fundraise and build relationships. During his service as president, the university increased its enrollment from 16,700 to a record 21,000 students and finished two fund-raising campaigns raising more than \$1.1 billion.<sup>8</sup> The university became a founding member of the Association of Pacific Rim Universities; hosted the annual meeting of the Association of American Universities; and completed or began construction projects totaling more than \$650 million that transformed the institution's ability to teach students, produce knowledge, and conduct research.<sup>9</sup>

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Elstad, 470 U.S. 298 (1985) (prevailed); *Tower v. Glover*, 467 U.S. 914 (1984) (did not prevail); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (prevailed); *Oregon v. Kennedy*, 456 U.S. 667 (1982) (prevailed).

<sup>2</sup> *Smith*, 494 U.S. 872.

<sup>3</sup> See Garrett Epps, *The Man Who Wrestled Death to a Draw*, ATLANTIC (Mar. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/03/the-man-who-wrestled-death-to-a-draw/387760/>; Curriculum Vitae, Dave Frohnmayer, President Emeritus and Professor of Law, University of Oregon, <http://frohnmayor.uoregon.edu/sites/default/files/frohnmayor/documents/resume.pdf> (last visited Apr. 25, 2016) [hereinafter Curriculum Vitae].

<sup>4</sup> Curriculum Vitae, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *David B. Frohnmayer's Legacy*, U. OR., <https://uoregon.edu/legacy> (last visited Apr. 25, 2016).

<sup>9</sup> *Id.*

Frohnmayer assumed the helm of the state's flagship university in 1994 in the midst of an unprecedented period of disinvestment in higher education. Measure 5,<sup>10</sup> which limited local property taxes and the state's ability to fund education, caused the state to drastically cut back on the amount it provided both to K-12 and higher education. From the time he assumed the presidency until the year he stepped down in 2009 and returned to the faculty, the state's funding contributions to the UO as a percentage of its total revenue declined 43.3 percent.

Throughout his tenure as president, Frohnmayer argued against the state's abandonment of higher education.<sup>11</sup> But like any great lawyer, he did not just criticize the state. Instead, he saw that the UO's best hope would be fundamental legal change. While many correctly associate the dissolution of the Oregon University System with my predecessor Richard Lariviere,<sup>12</sup> Frohnmayer laid much of the foundation.<sup>13</sup> The remainder of this Foreword will discuss why Frohnmayer supported a change in governance, describe his proposal, examine the extent to which his ideas informed the ultimate legislation that was passed in 2013, and make some preliminary observations about the early performance of the new governance structure.

As early as 1998, Frohnmayer foreshadowed in a speech the importance that increased institutional autonomy would ultimately play in future reform of the UO. In a speech to the UO University Assembly, entitled *Facing the Future*,<sup>14</sup> he praised then-Governor John

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<sup>10</sup> See SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 8, 1994 12–23 (1994), <http://library.state.or.us/repository/2010/201003011350161/ORVPGenMari1994.pdf>; Sec'y of State, *Public Education in Oregon*, OR. BLUE BOOK, <http://bluebook.state.or.us/education/educationintro.htm> (last visited Apr. 25, 2016) (“Oregon has struggled with funding public education since Measure 5 passed in 1990.”).

<sup>11</sup> See, e.g., Jeffrey Selingo, *Oregon Colleges Prepare for Spending Cap*, CHRON. HIGHER EDUC. (Oct. 20, 2006), <http://chronicle.com/article/Oregon-Colleges-Prepare-for/34533>; President Dave Frohnmayer, Address Before the Univ. Assembly, Univ. of Or. (May 21, 1997), [http://pages.uoregon.edu/assembly/May21\\_97\\_minutes.html](http://pages.uoregon.edu/assembly/May21_97_minutes.html).

<sup>12</sup> See, e.g., *The New Partnership*, U. OR. (Dec. 7, 2011), <http://newpartnership.uoregon.edu/blog/2011/12/07/the-new-partnership/index.html> (last visited Apr. 25, 2016); Bill Graves, *The Rise and Fall of Richard Lariviere, University of Oregon President, Fired on Monday*, OREGONIAN (Dec. 3, 2011, 10:00 PM), [http://www.oregonlive.com/education/index.ssf/2011/12/the\\_rise\\_and\\_fall\\_richard\\_1/html](http://www.oregonlive.com/education/index.ssf/2011/12/the_rise_and_fall_richard_1/html).

<sup>13</sup> See DAVE FROHNMAYER, *THE COMING CRISIS IN COLLEGE COMPLETION: OREGON'S CHALLENGE AND A PROPOSAL FOR FIRST STEPS* 34–37 (2009).

<sup>14</sup> President Dave Frohnmayer, *Facing the Future*, Address Before the Univ. Assembly, Univ. of Or. (Jan. 7, 1998), <http://frohnmayer.uoregon.edu/speeches/facingthefuture/index.html>. The idea of independent boards was not necessarily a new one. Indeed, the Governor's Task Force on Higher Education and the Oregon Economy issued a report in 1997 recommending that each state system institution have the freedom to establish its own governing and policy structure, including its own governing board. See GOVERNOR'S TASK

Kitzhaber's call to create universities that are "more independent and better able to respond to the state's changing needs for higher education."<sup>15</sup> He predicted that the state's public universities would see substantive change as a result of the governor's call for more openness and accountability. Ultimately, it was Oregon's public universities with strong leadership from Frohnmayer that would drive that change, not the state system of higher education.<sup>16</sup>

In 2002, Frohnmayer joined with the other six presidents of Oregon's public universities and argued in favor of independent legal status.<sup>17</sup> In a letter to the System Strategic Planning Committee of the Oregon University System, they wrote, "Without significant changes in the financing, governance and regulation of higher education, access and quality will deteriorate. It is not possible to maintain the status quo."<sup>18</sup> Frohnmayer and the other presidents argued for greater flexibility to increase and use non-state revenues, the ability to operate more efficiently, and the ability to increase entrepreneurial activity.<sup>19</sup> Through additional financial autonomy, governance authority, and regulatory flexibility, the state higher education institutions would be able to manage enrollment and tuition, increase revenue, and maximize efficiency. To oversee these new responsibilities, the presidents proposed that, "each institution should be able to establish its own board of trustees to meet its specific needs, which may vary by institution."<sup>20</sup>

Upon stepping down as president in 2009, Frohnmayer was commissioned by the Oregon University System (OUS) Chancellor George Pernsteiner "to explore alternatives to the current unstable and inadequate level of state funding for higher education in Oregon."<sup>21</sup> His report, entitled *The Coming Crisis in College Completion: Oregon's Challenge and a Proposal for First Steps*, was released in November 2009 and received significant press coverage.<sup>22</sup> *The Coming*

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FORCE ON HIGHER EDUC. & ECON., HIGHER EDUCATION AND THE OREGON ECONOMY 46 (1997) [hereinafter GOVERNOR'S TASK FORCE].

<sup>15</sup> Frohnmayer, *supra* note 14.

<sup>16</sup> *See id.*

<sup>17</sup> Letter from Phillip Creighton et al., President, E. Or. Univ., to Sys. Strategic Planning Comm., Or. Univ. Sys. (June 20, 2002) (on file with Oregon Law Review).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* FROHNMAYER, *supra* note 13, at 3.

<sup>22</sup> *See, e.g.*, Greg Bolt, *Frohnmayer Urges Higher Ed Overhaul*, REG.-GUARD, Nov. 19, 2009, at A1; Bill Graves, *Frohnmayer: Make Oregon Universities Public Corporations*,

*Crisis* begins with a description of the state's disinvestment in higher education along with a strong argument in support of the importance of higher education. According to Frohnmayer, the two citizen-led initiatives, Measure 5 in 1990 and Measure 11 in 1994, limited tax collections and mandated expenditures that shifted state appropriations from higher education to human services, courts, and jails.<sup>23</sup> In a six-year period ending in the 2005–07 biennium, per capita spending on the Oregon University System dropped forty-four percent, while spending increased sixteen percent and fifty percent on human services and public safety/judicial services, respectively.<sup>24</sup> He stated that this precipitous drop in higher education support came at a time in which the demand was increasing for highly educated workers and as the United States' dominance as the global leader in innovation and education was being challenged around the world.<sup>25</sup>

Frohnmayer argued that the solution to meeting the state and nation's education needs and overcoming the state's public universities' funding challenges was a complete overhaul of the public higher education infrastructure. His proposal, entitled *The Independent Public Corporation Enabling Act of 2010*,<sup>26</sup> called for the establishment of independent boards for each of the three public research universities in the state: the UO, Oregon State University (OSU), and Portland State University (PSU).<sup>27</sup> Under the Act, the state would enable and allow a delegation of authority, but would not automatically create the institutional boards.<sup>28</sup> Frohnmayer considered this flexibility important and necessary for the legislature to act with speed. The proposal would: (1) delegate to the Oregon State Board of Higher Education (OSBHE) the authority to create independent public corporations to lead and govern each public university;<sup>29</sup> (2) grant each board individual control over university operations, tuition setting, admission standards, and cost and revenue management;<sup>30</sup> (3) create overlapping membership between the OSBHE and each governing board to ensure consistency in performance and goal setting in

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OREGONIAN (Nov. 18, 2009, 8:22 PM), [http://www.oregonlive.com/education/index.ssf/2009/11/frohnmayer\\_make\\_universities\\_p.html](http://www.oregonlive.com/education/index.ssf/2009/11/frohnmayer_make_universities_p.html).

<sup>23</sup> See FROHNMAYER, *supra* note 13, at 6.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 34.

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.* at 34–37.

<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.*

exchange for state resources;<sup>31</sup> (4) give the OSBHE and Chancellor the role of establishing missions, performance agreements, and state funding tied to achievements designed to meet state higher education goals;<sup>32</sup> (5) enhance investment capacity including the creation of bonding authority, local/regional tax base, and incentives for philanthropic support;<sup>33</sup> (6) use the state's full faith and credit to secure financial leverage and bond-rating capacity;<sup>34</sup> (7) provide a statutory structure in which the university boards would have broad authority subject only to specific statutory restrictions which would be applied by the OSBHE;<sup>35</sup> and (8) ensure that a "continuing vigorous role for university faculties" be maintained through the importation of preexisting charters.<sup>36</sup>

Frohnmayr argued that the advantages of his proposal for independent boards were great; he pointed to the success of Oregon Health Sciences University (OHSU), which was spun off from the OUS in 1995.<sup>37</sup> He explained that as a public corporation, OHSU "saved quality academic medicine in Oregon" and that it "demonstrably improved the stature and effectiveness of that institution in the face of the turbulent economic competition within the health care industry."<sup>38</sup> Independent boards could be tailored for each university, and central oversight could remain with the state.<sup>39</sup> He also predicted resistance to increased autonomy but argued:

[T]hat change is not an abandonment of the universities' public mission but instead that a new public university model is the only way to sustain that public mission. The underlying reality is that most university resources now come from private or external sources, but university operations are bound by archaic, crippling, and expensive state restrictions. Those requirements are not serving the needs of today's and tomorrow's Oregonians.<sup>40</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 35–36.

<sup>33</sup> *Id.* at 36.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Frohnmayr called this an "opt in" model of statutory delegation. He was concerned that an "opt out" model would saddle the universities with regulations not meant for them due to legislative neglect. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 37; see also JOE ROBERTSON, OHSU AS A PUBLIC CORPORATION: LAUNCHING A PERIOD OF GROWTH AND PROGRAMMATIC EXCELLENCE (2011), <http://www.ohsu.edu/xd/about/initiatives/upload/OHSU-Public-Corp-Report.pdf>.

<sup>38</sup> FROHNMAYER, *supra* note 13, at 42.

<sup>39</sup> *Id.* at 42–43.

<sup>40</sup> *Id.* at 46 (emphasis omitted).

The process that got us from *The Coming Crisis* to the passage of the legislation establishing independent boards in 2013 and the dissolution of the OUS in 2015 was a long and tumultuous one.<sup>41</sup> Much of what Frohnmayer envisioned was subsequently argued for by his successors, Presidents Richard Lariviere and Michael Gottfredson and Interim President Robert Berdahl. In a statement issued as the legislation headed to a vote, Governor John Kitzhaber wrote, “Local governing boards at our public universities will produce increased transparency and public accountability, while at the same time leveraging increased private investment and community engagement.”<sup>42</sup>

Of the eight features identified by President Frohnmayer as being the most crucial to his proposal, most were either included in Senate Bill (SB) 270 or realized during the implementation process. SB 270 authorized the formation of institutional governing boards at the UO and PSU, as well as provided options for OSU and the regional and technical universities to establish their own governing boards.<sup>43</sup> The legislation authorized the governor to appoint, with legislative confirmation, the trustees to each university’s governing board and established that each board would include one member from the faculty, staff, and student body.<sup>44</sup> It also granted institutional governing boards discrete powers formerly held by the OSBHE, including but not limited to: the ability to hire and fire university presidents;<sup>45</sup> to issue revenue bonds in consultation with the Oregon State Treasury;<sup>46</sup> control its revenue, property, and investments;<sup>47</sup> and set tuition rates.<sup>48</sup>

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<sup>41</sup> Univ. of Or., *New Board to Govern the UO: State Legislature Approves S.B. 270, Establishing Board of Trustees*, 93 OR. Q. 20, 20–21 (2013) [hereinafter *New Board*], <http://www.oregonquarterly.com/new-board-to-govern-the-uo>; Dash Paulson, *The End of the Oregon University System*, EUGENE WEEKLY (July 9, 2015, 1:00 AM), <http://www.eugeneweekly.com/20150709/news-briefs/end-oregon-university-system>.

<sup>42</sup> Press Release, Governor’s Office, Governor Kitzhaber Statement on Passage of Senate Bill 270 (July 3, 2013), <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=190>.

<sup>43</sup> See S. 270 §§ 2–3, 77th Legis. Assemb., Reg. Sess. (Or. 2013). Subsequent to the passage of SB 270, all seven of the universities opted to create independent governing boards. See OPB, *Independence Growing at Oregon’s Small Universities*, OPB.COM (June 6, 2014, 6:50 AM), <http://www.opb.org/news/article/independence-growing-at-oregons-small-universities/>.

<sup>44</sup> Or. S. 270 §§ 6–7.

<sup>45</sup> *Id.* § 9.

<sup>46</sup> *Id.* §§ 19, 23.

<sup>47</sup> *Id.* § 11.

<sup>48</sup> *Id.* § 10. Tuition increases over 5% must be approved the Higher Education Coordinating Commission. *Id.*

SB 270 also made clear the primacy of the board in shared governance. According to the statute, “[t]he president and professors constitute the faculty and as such have the immediate government and discipline of a university with a governing board and the students therein, *except as otherwise provided by law or action of the governing board.*”<sup>49</sup>

SB 270 transferred statewide academic and policy coordination for public universities from the OSBHE to the Higher Education Coordinating Commission (HECC),<sup>50</sup> and required universities to continue to participate in certain shared administrative services, including benefits, collective bargaining, and risk management, to realize efficiencies.<sup>51</sup> SB 270 also provided that the faculty, defined as the president and professors, continue to serve as the “immediate government and disciplin[ary body] of [the] university,” and shall retain control over issues, including course of study and materials to be used;<sup>52</sup> however it also required that universities with governing boards submit “significant changes to academic programs offered at the public universities” to the HECC to ensure they were consistent with the mission of the university and did not unnecessarily duplicate academic programs of other Oregon public universities.<sup>53</sup>

Additionally, the HECC was established with the passage of SB 242.<sup>54</sup> In 2014, the legislature rechartered the HECC as the single point of statewide authority for higher education in Oregon.<sup>55</sup> In conjunction with SB 270, it transferred authorities that had previously been held by the State Board of Higher Education for developing the biennial budget request, allocating legislatively-appropriated resources, and approving new academic programs. In June 2015, OUS was disbanded.<sup>56</sup>

The current governance of the public universities in the State of Oregon initially granted under SB 270 is largely consistent with Frohnmayer’s vision as articulated in *The Coming Crisis*. Each board exercises roughly the same powers he would have devolved to them.

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<sup>49</sup> OR. REV. STAT. § 352.146 (2015) (emphasis added). The statute further provides: “[t]he faculty may, subject to the supervision of the governing board and ORS 352.089, prescribe the course of study to be pursued in the university and the textbooks to be used.” *Id.*

<sup>50</sup> Or. S. 270 § 8.

<sup>51</sup> *Id.* § 14.

<sup>52</sup> *Id.* § 18.

<sup>53</sup> *Id.* § 41.

<sup>54</sup> S. 242, 76th Legis. Assemb., Reg. Sess. (Or. 2011).

<sup>55</sup> See H.R. 3120, 77th Legis. Assemb., Reg. Sess. (Or. 2013).

<sup>56</sup> S. 80, 78th Legis. Assemb., Reg. Sess. (Or. 2015).



One important difference, however, is that there is no required overlap between the membership of the HECC and the individual institutional boards of trustees.

After less than two years, it is still too early to assess with any level of certainty how Oregon's implementation of much of the Frohnmayer framework has worked in practice. Perhaps one way to approach the question is to examine the arguments made by proponents and opponents of SB 270 as it worked its way through the legislative process.

In the debates accompanying the adoption of SB 270, the primary arguments in favor of independent boards in large measure echoed those set forth by Frohnmayer in *The Coming Crisis*. Supporters, including UO's and PSU's presidents, business interests, legislators, and state higher education officials, argued that allowing universities their own institutional boards would give universities increased ability to solicit financial resources, maintain control over those resources, and provide more focused advice and oversight to individual universities, allowing them to thrive and meet the state's post-secondary educational goals.<sup>57</sup> Advocates said this local control would provide more transparency, public accountability, support of higher education, and more access and affordability for Oregon residents.<sup>58</sup>

The arguments against independence included concerns that the state would lose political oversight and tuition-setting power over universities. Students, through the Oregon Student Association, argued there was no mechanism to keep universities accountable and that the creation of the boards would be expensive.<sup>59</sup> Labor groups also expressed concerns about having representation on the boards and the impact the boards may have on regional universities.<sup>60</sup>

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<sup>57</sup> Letter from Joel Fischer, Senior Policy Analyst, Or. Bus. Ass'n, to Mark Hass, Chair, Senate Educ. & Workforce Dev. Comm. (2012), <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/1869>.

<sup>58</sup> *Testimony Before the S. Educ. & Workforce Dev. Comm. on S. 270*, 77th Legis. Assemb., Reg. Sess. (Or. 2013) (statement of Matt Donegan, Chair, State Bd. of Higher Educ.).

<sup>59</sup> Letter from the Or. Student Ass'n to Or. Educ. Inv. Bd. Subcomm. on Governance (Dec. 11, 2012), <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/1867>.

<sup>60</sup> *Testimony Before the S. Educ. & Workforce Dev. Comm. on S. 270*, 77th Legis. Assemb., Reg. Sess. (Or. 2013) (statement by Marc Nisenfeld, SEIU Local 503); Letter from Len Norwitz, SEIU Local 503, to Senate Educ. & Workforce Dev. Comm. (Feb. 28, 2013), <https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/5219>.

It seems clear that the creation of independent boards has indeed spurred a more school-specific approach to each university's needs. Each board has worked with its president to help its respective school achieve its own goals. Indeed, one of the primary criticisms of the old OUS system was that it leveled the schools and did not permit experimentation and the pursuit of individualized academic objectives.

Over time, one of the key factors influencing whether the goals of SB 270 will come to fruition is the role of the HECC. As its name implies, the HECC's job is to coordinate the activities of the various universities. Its powers include the approval of new programs and degrees, tuition increases over five percent, legislative requests for funding the universities, and the distribution of funds to the universities through a complicated formula.

Thus far, the HECC has empowered local boards and universities to grow their programs and has not acted, as the OUS did, to constrain innovation and potential competition.<sup>61</sup> Under the old system, universities were discouraged from venturing outside their geographical areas, and, even within these "spheres of influence," they were not allowed to develop programs that existed elsewhere in the state. Arguably, this practice of protectionism might have made sense in a tightly hierarchical system in which the state paid for the lion's share of the expenses. Today, however, with the state's share of funding considerably less than ten percent for many universities, such an approach does not make sense. Most of the money funding new programs will be from private sources (tuition and philanthropy), so the risk of duplication of expense is minimal. Most importantly, basic economics and experience teach us that protectionism and monopoly inevitably lead to mediocrity and a lack of innovation. To its credit, the HECC has resisted the request of at least one university to use its regulatory power to block universities from entering its sphere of influence.<sup>62</sup>

As might be expected, while the HECC and the seven public universities continue to establish their relationship, friction will develop from time to time. Many university presidents fear that, over time, as the HECC grows, it will take on many of the functions and behaviors as the OUS. In particular, there is a concern that the line between coordination and regulation could become blurry, prompting

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<sup>61</sup> This practice was criticized in GOVERNOR'S TASK FORCE, *supra* note 14, at 33.

<sup>62</sup> See, e.g., Allan Brettman, *University of Oregon Scores Graduate Degree Program Over PSU Objections*, OREGONIAN (Mar. 13, 2015, 6:55 AM), [http://www.oregonlive.com/playbooks-profits/index.ssf/2015/03/university\\_of\\_oregon\\_scores\\_gr.html](http://www.oregonlive.com/playbooks-profits/index.ssf/2015/03/university_of_oregon_scores_gr.html).

push back from the seven major universities' presidents.<sup>63</sup> If that line is crossed, the entire purpose of independent boards embodied by Frohnmayer in *The Coming Crisis*, and in SB 270, would be thwarted.

In terms of incentives for philanthropy, the dissolution of OUS and the creation of independent boards have been a tremendous success. As the state's financial commitment to public higher education has declined, philanthropy has become more and more important. Yet, one of the fears expressed by many potential donors is that a gift to a school could be subtracted from the remaining state budget allocation to that school, thereby resulting in zero impact. From the beginning, the HECC has recognized this potential problem and has promised that there would be no philanthropic "penalty" built into its funding model.<sup>64</sup>

The selection of trustees has also furthered the goal of incentivizing philanthropy. The current governor and her predecessor appointed and reappointed boards which include a substantial number of men and women who are both deeply committed to their universities and philanthropic support of those institutions. While trustee donations are certainly not expected or required as part of the nomination or approval process, many trustees have generously contributed over the years.

In response to the concerns of the opponents of SB 270, the legislature ultimately required representation from the faculty, staff, and students on the independent governing boards. There is an inherent tension between the appointment of representatives from constituencies and the need for all board members to look at the "big picture" and act on behalf of the best interests of the university as a whole. Only experience that comes with time and a review of such

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<sup>63</sup> Letter from Thomas A. Insko et al., Oregon Pub. Univ. Presidents' Council, to Ben Cannon, Exec. Dir., Higher Educ. Coordinating Comm'n (Nov. 5, 2015) (on file with Oregon Law Review).

<sup>64</sup> In 2014, before the official governance transitions, the public universities worked with the HECC to establish a funding formula based on enrollment, mission, and degrees awarded, called the Student Success and Completion Model (SSCM). At the January 23, 2014 meeting of the Board of Trustees of University of Oregon, Board Chair Chuck Lillis sought to clarify whether universities that were successful at fundraising or finding other independent means of revenue production would be penalized by receiving less revenue in the formula. *BD. OF TRUSTEES OF UNIV. OF OR., SPECIAL MEETING OF THE BOARD 5* (Jan. 23–24, 2014), [http://trustees.uoregon.edu/sites/trustees2.uoregon.edu/files/january\\_bot\\_minutes\\_040214b\\_-\\_final.pdf](http://trustees.uoregon.edu/sites/trustees2.uoregon.edu/files/january_bot_minutes_040214b_-_final.pdf). Then-HECC Chair Tim Nesbitt and Executive Director Ben Cannon said in that conversation that no, there would be no such penalty. *Id.* at 10. Subsequently, this verbal reassurance was codified in the funding formula that specifically states, "Non-PUSF income to a public university such as tuition, auxiliary revenue or private philanthropy will not be included in the SSCM." *OR. ADMIN. RULE 715–013–0025(10)* (2015).

appointments will answer the question of whether dedicated constituency representatives are too narrowly focused to contribute to successful governance.

A final objection of student activists to the creation of independent boards was that insulating boards from politics might lead to less restraint on tuition increases. Ultimately, this objection makes little sense and, in any event, is not borne out by experience. Politicizing the tuition-setting process is a sure way for institutions of higher education to rush down the road to mediocrity. Most tuition increases are directly attributable to cutbacks in state support. In the absence of tuition increases, universities would have no way to maintain quality or their mission to provide quality research and education. Indeed, the largest increases in memory were under the former OUS system. For example, in 2011–13, tuition among Oregon’s seven universities increased by an average of 7.5% in response to a \$222 million cutback in state support.<sup>65</sup> However, in 2015–16, the first year in which the boards were fully functional, tuition increases were moderate, ranging from 1.2% at OSU<sup>66</sup> to 5.0% at the Oregon Institute of Technology.<sup>67</sup>

While it is still too early to predict how Oregon’s experiment with independent governing boards will play out, the early signs are quite promising. If Dave Frohnmayer were with us today, I think he would be very proud. But he would also remind us that while a good structure is necessary, it is not sufficient. Much greater public support and private philanthropic investment will be necessary for universities such as the University of Oregon to achieve eminence. From what I know about Dave’s faith in the people of Oregon and the alumni of the university, I would imagine he would be quite optimistic today.

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<sup>65</sup> Bill Graves, *Oregon’s 7 Universities Propose Tuition Increases Averaging 7.5 Percent*, OREGONIAN (June 1, 2011, 6:06 AM), [http://www.oregonlive.com/education/index.ssf/2011/06/oregon\\_universities\\_propose\\_tu.html](http://www.oregonlive.com/education/index.ssf/2011/06/oregon_universities_propose_tu.html).

<sup>66</sup> Mark Floyd, *OSU Board of Trustees Sets Tuition, Fees for 2015-16*, OSU: NEWS & RESEARCH COMM’NS (Mar. 20, 2015), <http://oregonstate.edu/ua/ncs/archives/2015/mar/osu-board-trustees-sets-tuition-fees-2015-16>.

<sup>67</sup> OR. UNIV. SYS., 2015–16 ACADEMIC YEAR & 2016 SUMMER SESSION FEE BOOK 3 (2015), <http://www.oit.edu/docs/default-source/business-affairs-documents/2015-16-ous-feebook-final-06052015.pdf?sfvrsn=4>. Comparatively, UO increased its tuition by 3.8%. Francesca Fontana, *University of Oregon Tuition Increases Approved Despite Student Criticism*, DAILY EMERALD (Mar. 5, 2015, 1:00 PM), <http://www.dailyemerald.com/2015/03/05/oregon-tuition-increase/>.