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Crisis in Higher Education Governance: One State's Struggle for Excellence

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CRISIS IN HIGHER EDUCATION GOVERNANCE:
ONE STATE'S STRUGGLE FOR EXCELLENCE

JOAN E. VAN TOL*

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"Change is not made without inconvenience, even from worse to better."

I. INTRODUCTION

1989 is an important year for the West Virginia Board of Regents as it enters its twentieth year of existence and is subject to intense scrutiny by the public, the state's legislature and experts in the field of higher education. This article critically analyzes the governance structure of public higher education in West Virginia and proposes an alternative statutory framework for the regulation and promotion of higher education.

The following discussion will focus on the Board of Regents' performance and on legislative and judicial developments in the field of higher education in West Virginia during the past two decades.

It is hoped that this analysis and critique will provoke further discussion about and prompt action toward the development of a more appropriate statutory framework for the support of higher education in the state.

To place West Virginia's higher education system in perspective, it is helpful to survey other states' approaches to governance.


2. The Carnegie Foundation, funded by the Sarah and Pauline Maier Foundation, will conduct a study of West Virginia public higher education covering educational institutions' policies, missions, and resources together with economic and political factors affecting higher education in the state. The Carnegie Foundation, a private, nonprofit foundation that conducts policy studies and sponsors educational research, set a target date of November 1988 for completion of the West Virginia study. Governor's Press Office News Release, Mar. 20, 1988.

3. Governance in this context is a term of art which refers to external administrative governance and means the statutory framework through which the state regulates and promotes higher education. In West Virginia, the statutory framework for the governance of public institutions of higher education is found primarily in Article 26 of Chapter 18 of the West Virginia Code. W. VA. CODE §§ 18-26-1 to -30 (1984 & Supp. 1988).

4. West Virginia institutions of public higher education governed by the Board of Regents are West Virginia University, Marshall University, the College of Graduate Studies, West Virginia School of Osteopathic Medicine, West Virginia State College, Bluefield State College, West Virginia Institute of Technology, Fairmont State College, Shepherd College, Glenville State College, West Liberty State College, Concord College, Potomac State College, Parkersburg Community College, Southern West Virginia Community College, and West Virginia Northern Community College.

5. No attempt will be made to provide an in-depth discussion of this topic.
II. GOVERNANCE OF HIGHER EDUCATION—IN GENERAL

The administration of higher education in the United States has gone through several distinct and significant changes since the first colleges were founded in the colonies. From colonial times until the late 19th century, most colleges had lay governing boards and enjoyed complete autonomy from the states. Shortly after the establishment of the land grant colleges in 1862, many states centralized the administration of their public colleges and universities. In the 1940's and 1950's, some states relied on voluntary coordination among public institutions of higher education instead of a central regulatory agency to administer higher education on a statewide basis. In the 1950's there was an enormous growth in the student population, and with the "expanding functions of higher education," individual institutional governing boards reappeared and state-wide coordinating boards began to gain popularity. The reasons for this movement toward coordination have been succinctly summarized as follows:

1) the desire for a comprehensive plan for higher education services;

2) to reduce competition among public institutions for state funds;

6. Harvard (1636), William & Mary (1693) and Yale (1701) were the first three colleges to be established in the colonies. S. MARTORANA & E. HOLLIS, STATE BOARDS RESPONSIBLE FOR HIGHER EDUCATION 10 (1960).


8. The Morrill Act (also known as the First Morrill Act), 7 U.S.C. §§ 301-308 (1982), passed July 2, 1862, granted to each state 30,000 acres of public land for each Senator and each Congressman to which the state was entitled under the 1860 census. If not enough public land were available, the federal government would issue scrip; either land or scrip were to be sold by the state and the proceeds reinvested, with interest to be used for support of at least one college emphasizing "agriculture and the mechanic arts..." Id. § 304. No funds could be used for purchase or maintenance of any buildings. Id. § 305. Any territory that became a state after passage of the Act could participate in the land grant by accepting the Act's provisions within three years of statehood and by establishing at least one agricultural and mechanical college within five years of acceptance of the grant. Id. Land grant colleges tended to develop as autonomous institutions, similar to private colleges, rather than as a part of a state-wide higher education network. S. MARTORANA AND E. HOLLIS, supra note 6, at 11.


10. Id.

11. S. MARTORANA & E. HOLLIS, supra note 6, at 26.

3) to control the proliferation of degree programs;
4) to eliminate or reduce "intensive lobbying" and "bitter political rivalries" among competing institutions and their constituencies in the establishment of branch campuses and in the recruitment of students.\textsuperscript{13}

The need for some form of state-wide coordination of higher education is no longer seriously disputed.\textsuperscript{14} Virtually every state at-

\begin{itemize}
\item J. Millet, Conflict in Higher Education 26 (1984). At least two other commentators also noted the trend in many states during this time to reorganize state government. R. BerdaHL, supra note 7, at 29; Lyman A. Glenny was particularly suspicious of the trend, noting:

There exists a strong, fairly rapid trend toward the establishment of some kind of agency to coordinate publicly supported colleges and universities in many states. The movement toward reorganization and consolidation of state governments has strongly influenced this trend. There are many reasons for the establishment of central agencies of coordination, but the most important has been the wish to economize. The needs of higher education will be better served when the legislation establishing agencies and the agencies themselves place a greater emphasis on the more positive objectives.

S. Martorana & E. Hollis, supra note 6, at 10 (quoting L. Glenny, Autonomy of Public Colleges: The Challenge of Coordination 26 (1959)).

14. In an early report on the expansion of state supervision of higher education, the Committee on Government and Higher Education found that many educators were watching "with anxiety" the growth of these "super boards" or "master boards." The Efficiency of Freedom 20, Committee on Government and Higher Education (1959). The essay reported two problems which may have accounted for some of this anxiety. The first concerns whether the master board can perform the task of co-ordination without intruding in matters that lie properly within the jurisdiction of the governing boards of individual institutions. The second concerns the possibility that a co-ordinating agency may have a leveling move toward an average standard. Where this occurs, the best colleges and universities are pulled down while the worst are lifted up, and thus valuable models of excellence may be sacrificed to standards of uniformity.

Id. at 21. Serious questions about the appropriate structure for achieving coordination and about the extent of the coordinating agencies' authority do, however, still exist. "The real issue with respect to autonomy . . . is not whether there will be interference by the state but rather whether the inevitable interference will be confined to the proper topics and expressed through a suitable sensitive mechanism." R. BerdaHL, supra note 7, at 9.

In its 1971 report, The Carnegie Commission on Higher Education recognized the need for effective state-wide coordination of higher education, but recommended against "investing coordinating agencies with administrative authority, particularly over budget matters." The Capitol and the Campus 28-29 (Carnegie Comm'n on Higher Educ.) (1971). Five years later, the Carnegie Council on Policy Studies in Higher Education issued an even more critical view of this trend:

We regret the tendency toward centralization of authority over higher education because:
- it reduces the influence and sense of responsibility of students, faculty members, campus administrators, and members of campus governing boards—all persons who know the most about the institution and are most directly involved in its operations.
- this concentration seems to have had no measurable direct impact on policies or practices.

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tempts, in some fashion, to coordinate efforts and funding that support higher education.\textsuperscript{15} All public institutions of higher education are subject to some form of state involvement. This involvement can vary from a voluntary association of institutional governing boards\textsuperscript{16} to state-wide consolidated governance for all public colleges and universities.\textsuperscript{17} The legal basis for a state's involvement in public higher education is typically statutory or constitutional.\textsuperscript{18}

There are several types of administrative agencies through which state-wide coordination is effected. A simple but useful categorization of such agencies classifies them according to their statutory authority and function as either 1) state-wide governing boards, 2) state-wide coordinating boards, or 3) state-wide advisory boards.\textsuperscript{19}

One recent national study of higher education indicates that twenty-three states have state-wide governing boards, twenty-three

\begin{quote}
- the governance processes worsen, becoming more costly, cumbersome, time-consuming, and frustrating.
\end{quote}


16. In a voluntary association, members representing each institution work together to further each others' goals, commonly preparing a joint budget request to the state legislature, but the association has no legal power to enforce policy and budget decisions or to control the overall direction of state higher education or the expenditure of appropriations to each member institution. M. Moos & F.E. Rourke, The Campus and the State 207-09 (1959). California, Colorado, Illinois, Indiana, Ohio, and Nebraska had voluntary associations at the time of Moos' and Rourke's study but have since changed their systems of governance.

17. A consolidated governing board has centralized responsibility for both day-to-day operations and long-range planning functions, in a system "with no local or segmental governing bodies." R. Berdahl, supra note 7, at 19. The West Virginia Board of Regents is the consolidated governing board for public colleges and universities in West Virginia.


Other state constitutions grant the legislature the specific authority to establish and regulate public colleges and universities. See, e.g., Nev. Const. art. 11, §§ 4, 7; Colo. Const. art. VIII, § 5; Idaho Const. art. 9, § 10 (but legislative control, limited to accounting and funding matters, must not interfere with constitutional grant of supervisory authority to the board of regents. State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921)).

In other states, the higher education governance structures are creatures of statute—created by the legislature and subject to legislative whim. See e.g., Md. Educ. Code Ann. §§ 12-101, 12-105 (1985); Ill. Ann. Stat. ch. 144, paras. 22; 301, 307, 308; 322; 502b; 651; 802b; 1001, 1008 (Smith-Hurd 1986).

states have coordinating boards, and four states have neither a coordinating nor a governing board but rather have a unique form of governance which fits neither classification. A brief summary of the advantages and disadvantages of each of these forms of governance follows.

A. State-Wide Governing Boards

The primary advantage of the state-wide or consolidated governing board is that it typically has been granted broad statutory authority to govern the individual institutions within the "system." This authority generally extends to the selection and appointment of the chief executive officer for each institution and to the establishment of the operating and capital improvement budget of the campuses. Smaller institutions which are a part of a consolidated governing board often claim that central governing boards are more efficient. Some argue that the consolidated governing board is the only form of governance through which implementation of statewide planning can be achieved because the governing board has not only the authority to coordinate but also has the power to govern. Finally, legislatures in states with consolidated governing boards are


21. A more detailed discussion and analysis of the merits and demerits of these forms of governance is both beyond the scope of this article and beyond the expertise of the author; numerous scholarly works which more than adequately accomplish this task are available for the serious student of the governance of higher education. See, e.g., R. Berdahl, supra note 7. This article will focus on the efficacy of these various structures for the governance of higher education in West Virginia.

22. "State-wide governing boards" supervise all of a state's public institutions of higher education through a centralized administration. State statutes may vary in their definition of public education, however. In some cases the governing board supervises only senior colleges, but in others the governing board has jurisdiction over junior and community colleges also.

23. J. Millet, supra note 13, at 104. Consider also, however, the impact of the legislature's authority over appropriations; "the authority of a state-wide governing board is not so impressive in fact as it may appear in law." Id. at 104-05.

24. Id. at 105.

25. Id.


27. R. Berdahl, supra note 7, at 84-85.
more likely to make lump-sum appropriations when there is a central state agency governing higher education.28

Overcentralization and the leveling effect caused by the centralization of functions are the most commonly noted disadvantages of state-wide governing boards.29 Other observed weaknesses include: the vulnerability to political influence and pressures;30 inadequate performance in the planning role;31 and the regionalism and sectionalism which may beset the board.32 Finally, some experts in the field find the combined coordination and governance functions to be distinct and incompatible.33

B. State-Wide Coordinating Boards34

The primary advantage of a state-wide coordinating board is that it allows individual governing boards to tend to the management of their institutions while the state-wide coordinating board employs its comprehensive authority to coordinate the operations of the various institutions under its purview. The coordinating board can exercise its authority without direct responsibility for the administration of any particular institution.35 State-wide coordinating boards are


The Commission believes that creation of single governing boards or establishment of coordinating agencies with administrative responsibilities results in centralized detailed control layering of authority, means that similar processes are carried out at successive layers, and each decision affecting the operation of an institution takes longer and is more remote from the functioning level.

31. Id. at 111. In discussing the performance of the single board’s planning function Louis Mayhew noted, “[a] single board can develop monopolistic tendencies so that no real look to the future is possible for fear of jeopardizing the status quo.” R. Berdahl, supra note 7, at 84 (quoting L. Mayhew, Long Range Planning for Higher Education 59 (1969)).
33. Id.
34. “State-wide coordinating boards” exercise no direct governance authority; rather, they may draft a master plan for state higher education; approve degree programs; review and recommend state budget appropriations for individual institutions; in many states they may approve new branch campuses and off-campus teaching by existing institutions.
35. J. Milet, supra note 13, at 112-13, 114; R. Berdahl, supra note 7, at 32.
commonly perceived as being motivated by the interests of the state, not of an individual institution, and these boards usually recruit independent professional staff members.\textsuperscript{36}

The several disadvantages of state-wide coordinating boards are generally political in nature. Coordinating boards are typically vulnerable to criticism both from the institutions they coordinate and from the state government of which they are a part;\textsuperscript{37} they lack a political constituency;\textsuperscript{38} and they often have an "uncertain relationship to the legislative and executive branches."\textsuperscript{39} State-wide boards often have little or no control over the chief executives of the campuses they coordinate. As a consequence, some boards find that the individual institutions are too independent and are unwilling to make the compromises sometimes necessary to achieve coordination.\textsuperscript{40}

Finally, many coordinating boards perform poorly in the execution of their academic planning responsibilities either because they were given inadequate authority to implement their planning responsibilities or because they have inadequate staff and time to devote to their planning responsibilities.\textsuperscript{41}

C. State-Wide Advisory Boards\textsuperscript{42}

It is difficult to generalize about the advantages and disadvantages of advisory boards because their performance and success are, more than in the case of the two agencies discussed above, dependent to a large degree on "[their] objectivity and persuasive reasoning,

\textsuperscript{36} J. Millet, \textit{supra} note 13, at 113. \textit{See also} A. Brumbaugh, \textsc{State-wide Planning and Coordination of Higher Education} 31 (1963) (citing L. Glenny, \textsc{Autonomy of Public Colleges: The Challenge of Coordination} (1959)).

\textsuperscript{37} R. Berdahl, \textit{supra} note 7, at 32.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} J. Millet, \textit{supra} note 13, at 113.

\textsuperscript{40} \textit{Id.} at 118.

\textsuperscript{41} \textit{Id.} at 115-16.

\textsuperscript{42} An "advisory board" in Millet's scheme has the least authority of any higher education governance structure. Like the coordinating board, "the advisory board may prepare a master plan and may review program offerings and budget requests, but [it] does not have the authority to approve degree programs or to recommend operating and capital appropriations." \textit{Id.} at 101. An advisory board may review branch campuses and off-campus instruction but usually cannot review their establishment.
not upon [their] authority to act." Generally, however, advisory boards are non-threatening to institutional governing boards and to institutional executives and can serve effectively as a central body for the administration of certain higher education programs.

The disadvantages of advisory boards are fairly apparent. Advisory boards often do not adequately address legitimate state concerns; they lack authority to require action; they generally must wait for legislative or gubernatorial direction prior to initiating plans and studies; and they also have an uncertain relationship with the executive and legislative branches.

No one form of governance is ideal. Systems which operate successfully in one state may be entirely unsuited for another state. It is only when an individual state's political and historical background is carefully analyzed that one form of governance is preferable to the others.

III. THE GOVERNANCE OF PUBLIC HIGHER EDUCATION IN WEST VIRGINIA—"A BUMPY HISTORY"

This section briefly surveys the history of governance of higher education in West Virginia from 1863 to 1969 and describes the political and legal environments in which the West Virginia Board of Regents was established.

Unlike the state from which it was formed in 1863, West Virginia initially had no state-supported institutions of higher education. The Agricultural College of West Virginia was established as the

43. J. Millet, supra note 13, at 123.
44. Id.
45. Id.
46. In describing the state of higher education in West Virginia, a leading expert in the field described the history of governance in West Virginia as "bumpy." M. Chambers, Higher Education in the Fifty States 399 (1970).
48. Jackameit, supra note 47, at 64.
state's land-grant institution in 1867.\textsuperscript{49} This college was governed by an eleven person Board of Visitors who were initially appointed by the Governor.\textsuperscript{50} In 1868 the college was renamed West Virginia University, and the name of its governing body was changed to the Board of Regents.\textsuperscript{51} There were many changes in the administration of higher education in the thirty years which followed. Most of these changes were designed to permit one political party to gain or regain control of the Regents.\textsuperscript{52} By 1901, there were six separate governing boards, each with the statutory authority to manage and control an institution.\textsuperscript{53}

The first of several significant attempts at consolidation occurred in 1909 when the Legislature abolished the six separate governing boards and replaced them with a single State Board of Regents and the State Board of Control.\textsuperscript{54} The State Board of Regents was responsible for the administration of the educational affairs of all of the state institutions; the State Board of Control had "charge and control of the financial and business affairs" of the public institutions.\textsuperscript{55}

In 1919, in a move intended to further consolidate public education in West Virginia, the Legislature abolished the Board of Regents and created a new State Board of Education which had the control and management responsibilities for \textit{all} aspects of public education, including post-secondary public education.\textsuperscript{56} The State Board of Control's authority over the financial and business affairs of these public institutions remained unaffected.

In 1927, after several years of political struggles involving the president of West Virginia University and the State Board of Ed-

\textsuperscript{49}. \textit{Id.} at 43.
\textsuperscript{50}. \textit{Id.}
\textsuperscript{51}. \textit{Id.} at 44.
\textsuperscript{52}. \textit{Id.} at 44-46.
\textsuperscript{53}. Machesney, \textit{supra} note 47, at 35.
\textsuperscript{55}. \textit{Id.}
\textsuperscript{56}. Act of Feb. 21, 1919, ch. 2, 1919 W. Va. Acts 39. As an economy measure in 1932, there was an attempt to abolish the State Board of Education and transfer its duties to the Board of Public Works. This action was struck down on a constitutional technicality by the West Virginia Supreme Court of Appeals in Moats v. Cook, 113 W. Va. 151, 167 S.E. 137 (1932).
ucation, the Legislature created a separate Board of Governors for the University. Members of this seven person institutional governing board were appointed by the Governor, subject to confirmation by the Senate. Thus, the administration of public higher education was accomplished through a State Board of Education, a Board of Governors for West Virginia University, and the State Board of Control.

This modest first step toward decentralization was quickly criticized by the State Board of Education as an "undesirable and complicating factor in the educational system of the state;" not surprisingly, the State Board recommended that it be given the authority of the three existing boards.

Dissatisfaction with this somewhat decentralized administrative structure grew during the next decade. A bill introduced in 1935 proposed consolidation of all governing boards into one Board of Higher Education. The proposal failed on a close vote. It was in this politically turbulent environment that the Strayer Report, commissioned in 1945 by an interim committee of the Legislature, concluded that:

"While there is a certain appealing logic ... in the argument for the creation of a central administrative board for the general control of all matters relating to public education—elementary, secondary, and higher, it is the present contention that the University is not just another state institution. It is fundamentally different and must always be different if it is to serve its full purposes. The best
interests of the University will, it is believed, be conserved by the continuance of a separate Board of Governors.62

The report further found that "[t]here is no justification for the present dual system of governing boards, one having charge of the business affairs and the other concerned with the academic program."63

Two years later, the Legislature adopted this recommendation of the Strayer Report by eliminating the Board of Control's authority over the financial affairs of the state's colleges.64 Thus, the administration of higher education was reconsolidated with two separate governing boards, each responsible for the academic and financial affairs of its constituents.65

At the end of World War II, enrollment in West Virginia's public institutions increased dramatically, thereby placing new demands on the system. The Legislature once again commissioned a study of higher education. The results of this study were released in the 1956 Brewton Report which concluded that:

[t]he existence of two state boards that have independent responsibility under almost identical statutes for governing and coordinating two separate programs of higher education inevitably leads to wasteful duplication, unwarranted competition, institutional "empire building," and the imprudent use of political pressure groups. Economical and efficient operation of a system of higher education

62. Jackameit, supra note 47, at 136 (quoting G. Strayer, A REPORT OF A SURVEY OF PUBLIC EDUCATION IN THE STATE OF WEST VIRGINIA 740-41 (1945)).

63. Id. at 48. Voters rejected proposed amendments to the Constitution which would have implemented recommended reforms. See Jackameit, supra note 47, at 137.


65. Despite the legal independence of these governing boards, the Board of Public Works, the Director of the Budget and the State Auditor all exerted considerable influence over the educational affairs of the public colleges and universities. See Machesney, supra note 47, at 86-87 (quoting J. Brewton, PUBLIC HIGHER EDUCATION IN WEST VIRGINIA, A SURVEY 49 (1956)). See also Jackameit, supra note 47, at 149-56; State ex rel. Bd. of Governors v. Sims, 133 W. Va. 239, 55 S.E.2d 505 (1949); State ex rel. Bd. of Governors v. Sims, 134 W. Va. 428, 59 S.E.2d 705 (1950); State ex rel. Bd. of Governors v. Sims, 136 W. Va. 789, 68 S.E.2d 489 (1952); State ex rel. Bd. of Governors v. Sims, 140 W. Va. 64, 82 S.E.2d 321 (1954); State ex rel. Bd. of Educ. v. Sims, 139 W. Va. 802, 81 S.E.2d 665 (1954); State ex rel. Bd. of Educ. v. Sims, 143 W. Va. 269, 101 S.E.2d 190 (1957).
can be achieved only under the direction of a single board invested with the authority necessary to discharge creditably the duties assigned to it.66

The recommendations of the Brewton Report were reflected in proposed legislation but were not enacted in the 1957 session of the Legislature. Following the unsuccessful efforts to consolidate the governance of higher education into one central body, the Legislature set out to promote voluntary coordination between the State Board of Education and the Board of Governors.67

In 1961, pursuant to a resolution of the Legislature, the Governor appointed a Committee on Higher Education to “make specific recommendations” for higher education.68 The Committee recommended a voluntary form of coordination through the creation of a Commission on Higher Education to

1) study continuously all aspects of the State’s total higher education program, and from time to time make recommendations with the purpose of achieving maximum coordination of that program, eliminating unnecessary duplication, and providing the highest quality programs at the most economical cost; 2) . . . make recommendations concerning the budget requests of the respective governing boards and the institutions of higher education under their jurisdiction . . . ; and 3) prepare a priority list for new construction and for major renovations to existing facilities at the several state colleges and universities.69

The Committee further recommended that the Board of Governors of West Virginia University and the West Virginia Board of Education be retained with the provision that the West Virginia Board of Education “proceed with deliberate haste (1) to develop a workable plan for separation of its functions pertaining to higher education from its other functions, and (2) to propose legislation to effect such a plan.”70

Once again the stage was set for a significant reform in the state’s administration of higher education, but the legislation implementing

66. Jackameit, supra note 47, at 87-88 (quoting J. BREWTON, PUBLIC HIGHER EDUCATION IN WEST VIRGINIA, A SURVEY 56 (1956)).
67. See Machesney, supra note 47, at 90. The two boards met periodically as the Joint Committee of the Board of Governors of West Virginia University and the West Virginia Board of Education. Id. at 90-98.
69. WEST VIRGINIA GOVERNOR’S COMM. ON HIGHER EDUC., A STRUCTURE FOR HIGHER EDUCATION IN WEST VIRGINIA 4 (1961) [hereinafter 1961 COMM. REPORT].
70. Id. at 5.
the Committee's recommendations died in the House and Senate committees.\footnote{71}

It was against this backdrop of several unsuccessful attempts to bring about significant change in the governance of higher education that the West Virginia Committee on Higher Education was appointed by the Governor in 1965.\footnote{72} As the Committee itself noted, "[u]nlike many past studies and reports on higher education conducted by experts from beyond the borders of the State, this report represents the considered judgment of those most intimately and actively engaged in the day-to-day government and administration of West Virginia's complex of higher education."\footnote{73}

The Committee on Higher Education concluded its report with five recommendations:

(1) establish an eleven member\footnote{74} West Virginia Board of Regents with carefully limited authority to study higher education (public and private) in West Virginia, to coordinate and allocate the functions among the state colleges and universities, and to allocate all federal funding programs.

(2) establish a Board of Governors of the State colleges to assume the responsibility of the State Board of Education for the governance of the eight state colleges.

(3) establish a Board of Governors of Marshall University to act as its governing body.

(4) retain the Board of Governors of West Virginia University.

(5) retain the West Virginia Board of Education leaving its supervisory powers over the free school system intact.\footnote{75}

These recommendations were based on the Committee's conclusion that some form of state-wide coordination of higher education was inevitable.\footnote{76} The Committee surveyed the coordination efforts

\footnote{71. Machesney, \textit{supra} note 47, at 99.  
74. The eleven members would be the presidents of the West Virginia Board of Education, the Board of Governors of West Virginia University, the Board of Governors of Marshall University, the Board of Governors of the State colleges; two gubernatorial appointees who are members of governing boards of two private colleges; and five gubernatorial appointees from the public at large. \textit{Id.} at 20-21.  
75. \textit{Id.}  
76. \textit{Id.} at 23.}
and experiences of other states to reach the conclusion that a Board of Regents with carefully defined power offered "the full opportunity to provide reasonable coordination, and at the same time preserve the maximum freedom of initiative on the part of each institution and its governing board." 77

Legislation to implement the Committee's recommendations was introduced in the 1967 legislative session but was not enacted. 78 In 1968 there was another attempt by the Legislature to radically restructure the governance structure by creating a single state board of education; this attempt at reorganization was also unsuccessful. 79

Once again, in 1969, legislation was introduced in the House which would establish a multiple governing board-coordinating board structure much like that which was recommended by the West Virginia Commission on Higher Education several years before. 80 This bill was hailed as "one of the most controversial pieces of legislation ever proposed in the West Virginia legislature." 81 Despite the controversial nature of the proposed reform, support for the multiple governing board-coordinating board concept was widespread among the college and university presidents, professional educators, experts in higher education and among the legislators, including the Speaker of the House. One of the few voices raised in opposition to the coordinating board concept was the president of West Virginia University, who spoke against the concept during a legislative hearing on reorganization of higher education. 82

As alternatives to the reorganization plan initially proposed, the president suggested that:

77. Id. at 24. The committee rejected the popular suggestion of one board for all of higher education, calling it "a natural but a deceptively simple answer to the complex problems of higher education." Id. at 25.
78. Machesney, supra note 47, at 103-04.
79. Id. at 108.
80. This bill would have also established a West Virginia Education Council to coordinate educational efforts of the elementary and secondary schools and the institutions of higher education. Machesney, supra note 47, at 110. A second bill to establish a single governing board was also introduced in the House a month later.
(1) [T]he Joint Committee of the Board of Governors and the State Board of Education make whatever changes in higher education the Legislature felt necessary.

(2) The Legislature should set up a new board to assume the State Board of Education’s responsibilities in higher education.

(3) A single board of regents to govern all public institutions of higher education [be created].

Shortly after these alternatives were suggested, the momentum which appeared to have been carrying the coordinating board concept to sure passage suddenly shifted, and the Legislature’s attention was turned to the creation of a single consolidated governing board, the third alternative suggested by the president of West Virginia University.

Ignoring the advice of the “experts” and responding to some last minute political maneuvering within a week of its proposal, the House Education Committee recommended passage of a bill to establish the West Virginia Board of Regents as the single consolidated governing board for all public institutions of higher education. The House of Delegates passed this bill without discussion even though the same proposal just one year before had provoked fierce opposition and intense debate. The Senate quickly passed the bill with minor amendments. Thus, with very little opportunity for a re-examination and close analysis of the proposed reforms and with virtually no discussion, the Legislature enacted “a bill that call[ed] for the most sweeping changes in the administration of education in the state’s history.”

Newspaper accounts of the passage of this “sweeping change” suggest that the Legislature believed it had finally found a workable, albeit imperfect, solution to the higher education governance dilemma which had haunted the state for so long.

Because there was no formal debate or discussion of the single governing board proposal before its passage in 1969, it is particularly

83. Id.
84. Machesney, supra note 47, at 113.
difficult to discern the legislative intent in adopting the consolidated governing board approach over the coordinating board concept. In 1979, the Academy for Educational Development reviewed “available relevant documents” and interviewed legislators and institutional personnel in an attempt to discern the legislative intent in creating the Board of Regents. Based on its review of the legislation creating the Board of Regents, the Academy concluded that the Legislature’s initial concerns were:

— to insulate the Legislature from institutional lobbying;
— to fix operational and budgetary responsibility for higher education with one entity; and,
— to promote state-wide planning designed to increase efficiency.

What is not apparent from the “legislative history” of the 1969 educational reform bill is why the single governing board approach was chosen over the coordinating board approach to address these legislative concerns. The Legislature adopted the single board proposal contrary to the recommendations of its consultant and at a time when the growing trend in the United States was toward the coordinating board approach. Despite the fact that the widely-accepted recommendations of the Governor’s Commission on Higher Education had unequivocally rejected the single board concept, there was no formal or recorded attempt to discredit these recommendations. The recommendations were merely ignored once the momentum for the single board concept grew. The relative ease with which the Legislature was able to adopt this radical reform in the governance of higher education suggests just how acute the governance problem had become. In retrospect, it appears clear that the Legislature was simply desperate to take action to address the “recurring, unanswered questions as to the appropriate state-level structure for public higher education which had harassed it for decades.”

88. ACADEMY FOR EDUC. DEV., INC., SUPPORT, PERFORMANCE AND PROTECTION OF HIGHER EDUCATION IN WEST VIRGINIA 113 (1979) [hereinafter 1979 AED REPORT].
89. Id. at 14.
90. M. CHAMBERS, supra note 46, at 401. The history of governance of higher education in West Virginia looks even “bumpier” when it is compared to the history of governance throughout the United States.
It was in this environment—and in light of this "bumpy history"—that the West Virginia Board of Regents was created to reform the system of higher education in West Virginia.

The following sections of this article discuss the performance of the Board of Regents in meeting its statutory obligations and the original legislative intent.

IV. TWO DECADES OF GOVERNANCE BY THE BOR

In the past twenty years, there have been two distinct phases in the governance of higher education in West Virginia. The first phase was a period of laissez-faire. It lasted through the end of the first decade of governance by the Board of Regents. This period saw the development of both internal and external policies and procedures, evidence that the Board’s principal concern was gaining control of its constituent institutions. There was little, if any, legislative or judicial interference in the Board’s activities during this early phase. Evaluations of the Board’s performance were perfunctory and generally favorable.91

After a decade of governance under the Board of Regents, criticism of the Board’s performance became more direct. The Board was criticized for its failure to meet its statutory responsibilities and for its failure to provide leadership in the development of educational policy. The Board’s lack of action created a vacuum into which the court and the Legislature intervened, and the administration of higher education shifted from the laissez-faire period into the interventionist period.

A. The Laissez-Faire Period

The original Board of Regents enabling legislation did not specifically enumerate its duties. Instead, the Legislature’s mandate was
broad; it provided that the "determination, control, supervision and management of the financial, business and educational policies and affairs of all state colleges and universities shall be under the control, supervision and management of the board." The Board was also charged with the responsibility to meet the higher education needs of the state, to avoid unnecessary duplication, and to submit budget requests on behalf of the various colleges and universities. While the Board's statutory duties were initially quite general, it was given virtually unlimited authority to execute its authority. Given the political climate and in light of the Legislature's determination to promote reform and efficiency in higher education by centralizing the operational, budgetary and state-wide planning responsibilities in one entity with full and plenary powers, one might reasonably have expected that the new Board would aggressively and expeditiously seize the initiative, immediately providing leadership in the development and implementation of state-wide policies to meet the needs of higher education.

Instead of doing so, the Board initially concentrated on the implementation of a rigid operational structure which emphasized a highly structured system of centralized decision-making with many checkpoints and levels of review. This control-oriented structure was criticized both by the institutions subject to it and by experts in the field of educational administration. While concentrating on the

94. Id.
95. The absence of a specific enumeration of detailed duties and responsibilities is not unusual. It has been observed that:
The statutes and constitutional provisions by which boards classified as governing or coordinating. . .have been created are usually phrased in language that clearly designates their authority and duty to govern or coordinate. . .On the other hand, the legally stated responsibilities of the governing-coordinating boards rarely include the full extent of the areas in which they exercise actual responsibility.
S. MARTORANA & E. HOLLIS, supra note 6, at 22.
96. As early as 1973, an ad hoc committee appointed by the West Virginia University Senate Executive Committee criticized the Board of Regents for its "apparent decision to function as an administrative agency that tightly controlled and operated the institutions on almost a day-to-day basis in a nondifferentiating pattern through a very small administrative staff reporting only once a month to the Board in formal meetings." W. DOHERTY, JR. & F. SUMMERS, WVU: SYMBOL OF UNITY IN A SECTIONALIZED STATE, 296 (1982).
establishment of internal procedures, the Board seemed hesitant to exercise its statutory authority and responsibility. 98

98. One instance of the Board's reluctance to seize the initiative in the exercise of its statutory authority is illustrated by the Board's decision in 1973 to seek an opinion of the Attorney General of West Virginia concerning its statutory authority "(1) to merge two existing state institutions of higher education; (2) to create a new institution of higher education; [and] (3) to abolish an institution of higher education." 55 Op. Att'y Gen. 107 (1973). The Legislature had expressly provided that "[t]he power herein given to the board to prescribe and allocate among the state colleges and universities specific functions and responsibilities to meet the higher educational needs of the state and avoid unnecessary duplication shall not be restricted by any provision of law assigning specific functions and responsibilities to designated state colleges and universities but such power shall supersede any such provision of law." Acts of Mar. 3, 1969, ch. 130, 169 W.Va. Acts 1142, 1149 (as codified in W. VA. CODE § 18-26-8) (1984 Repl. Vol.) (emphasis supplied). The Board sought the Attorney General's opinion because it did not believe it had the authority to act, and it did not want to suggest that such authority was desirable.

In a circular fashion, without defining just what authority the Board of Regents did have in the allocation and prescription of specific functions and responsibilities among the colleges and universities, the Attorney General concluded that because the Legislature had failed to specifically grant the Board the authority to create, merge or abolish institutions of higher education and because the existing institutions had all been created by statute, the Legislature did not intend to grant the Board of Regents the power to create, merge or abolish institutions of higher education. 55 Op. Att'y Gen. 107 (1973). While this interpretation of W. VA. CODE § 18-26-8 (Repl. Vol. 1984) seems unnecessarily stingy, particularly given the clear legislative intent to vest this type of responsibility with a single governing board, the opinion could hardly be surprising in light of the Board's reluctance to exercise its express statutory powers. Of course, the result of the Attorney General's advisory opinion was that the merger issue became even more politicized as it was placed before the Legislature for its consideration. This interpretation of the Board's authority was rendered more complicated by a subsequent opinion of the Attorney General which maintained that, while the Legislature had the exclusive authority to create new institutions of higher education, the Board of Regents did not have a mandatory duty to establish, operate, administer or control the institution authorized by the Legislature. 56 Op. Att'y Gen. 161, 168 (1975). The Attorney General recognized that the West Virginia Board of Regents, "in the exercise of the discretion granted to it by legislative action, and acting as the sole statutory agency created and existing for the purpose of coordinating, controlling, supervising, and administering all institutions of higher education in this state in the most efficient and economical manner possible," could choose to establish or locate the legislatively authorized institution where, in its judgment, it would best serve the interests of the citizens of the state, or it could choose not to establish the legislatively authorized institution. Id. at 170. Thus, in the opinion of the Attorney General (which was apparently accepted by the Board of Regents) the Board was without authority to initiate the merger or closing of existing institutions, and it could not, without prior legislative authority, create new institutions. At the same time, however, the Board could, in the Attorney General's opinion, refuse to implement the Legislature's decision to create and fund a new institution. In effect, according to the Attorney General, under the prevailing statutory provisions neither the Legislature nor the Board had the complete authority to promote the efficient allocation of specific responsibilities through the creation of new institutions or the merger or closing of existing institutions.

This was just one of several instances of the Board's reluctance to take the initiative in meeting its responsibilities.

Another instance occurred early in 1979, when the Board of Regents once again turned to the Attorney General for an opinion on the extent of its statutory authority to assess certain student fees. At issue was the imposition of a Higher Education Resources Fund (HERF) fee pursuant to W.Va.
As the Board proceeded cautiously and somewhat reluctantly to exercise its statutory authority, it virtually ignored those areas in which it could have had the most significant long-term impact. The planning, coordinating and allocating of functions among the colleges and universities and the development of system-wide policies for sound internal governance are two examples of areas which begged for the Board’s attention. Instead, the Board rigidly and aggressively pursued its administrative authority over the individual institutions.

One result of the Board’s focus on the control and supervision of the subordinate institutions was that there were few new initiatives for higher education during the first ten years of the existence of the Board of Regents. The system did experience a growth in the number of students, faculty and programs. Five new institutions were created, and there was an increase in the number of new buildings at some institutions. At the same time, however, the percentage of state appropriations for higher education dropped, and the per-student support declined. Legislative attention to higher education matters was minimal. From 1970-1978, there were no sig-

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The governing boards of state educational institutions shall fix enrollment, tuition and other fees for each semester or school term for the different classes or categories of students enrolling at the state educational institutions, and may include among such fees any one or more of the following: (1) health service fees; (2) infirmary fees; (3) student activities, recreational, athletic and extracurricular fees; and (4) graduate center fees and branch college fees, or either, if the establishment and operation of graduate center or branch colleges are otherwise authorized by law. All fees collected under (1), (2) and (3) shall be paid into special funds and shall be used only for the purposes for which the fees are collected.

Based on its reading of § 18-24-1 and a previous opinion of the Attorney General on a related issue, the Board believed it was prohibited from assessing the fee. In that earlier opinion, the Attorney General concluded that the specific enumeration of fees in § 18-24-1 which could be collected from students could not be construed to authorize fees for the West Virginia Student Public Interest Research Group. 55 Op. Att’y Gen. 148 (1973).

In an opinion which recognized the Board’s “plenary powers to control and supervise all higher educational institutions in the state and to do such things which are not contrary to law as the Board may deem necessary to secure the successful operation of the educational system and promote the designated objectives,” 58 Op. Att’y Gen. 41, 44 (1979), the Attorney General confirmed the Board’s specific authority to collect “enrollment, tuition, and other fees,” and held that the Board’s authority to fix other fees encompassed the HERF fee. Id. at 46.

100. Id.
significant statutory modifications to either the governance structure or to the authority of the Board of Regents. In short, the Board’s record of performance during the first ten years is most remarkable for its lack of real accomplishments.

The Board’s mediocre performance did not go wholly unnoticed. The first in-depth study of the new board was conducted in 1979 by the Academy for Educational Management. The study was commissioned by the Joint Committee on Government and Finance of the West Virginia Legislature to survey developments in higher education in the state since 1969, to assess the Board of Regents’ role in “promoting and guiding the appropriate development of the higher education system,” to “consider whether or not the role played by the Board of Regents is consistent with the language and intent of the enabling legislation,” and to “make recommendations on continuation, modification, or elimination of the single governing board structure.”

The Academy evaluated the Board of Regents “in terms of its performance in meeting the responsibilities of a state-wide governing board and with respect to specific charges in the enabling legis-

101. There was very little legislative activity in the first six years of the Regents' existence. The most notable legislation during this period related to the creation of the College of Graduate Studies, Act of Mar. 10, 1972, ch. 115, 1972 W. Va. Acts 627, and the authorization for a School of Osteopathic Medicine, Act of Feb. 25, 1975, ch. 200, 1975 W. Va. Acts 714. There was slightly more legislative activity in 1976 and 1977. Most of this activity related to the composition of the Board of Regents, which was increased to twelve members by the addition of representatives from the newly-created advisory council of students and advisory council of faculty. Act of Mar. 13, 1976, ch. 133, 1976 W. Va. Acts 616. In addition, the Legislature slightly modified the process by which members of the institutional board of advisors were appointed. Id. at 621. Finally, the powers and duties of the Board of Regents were amended to provide that “if a single budget is submitted, it shall be accompanied by a tentative schedule of proposed allocation of funds to the separate colleges and universities.” Id. at 620.

102. 1979 AED REPORT, supra note 88, at 1.

103. Id.

104. Id.

105. Id. at 16. The responsibilities of a state-wide governing board were identified as including “management, control and supervision of all public higher education institutions, management of state-wide higher education activities, budgeting, and planning.” Id. The focus of the discussion in this section will be on the Board’s performance in the areas of governance; i.e., management, control and supervision of all public higher institutions and management of state-wide higher education activities.
The Academy concluded that the Board had inadequately performed its governance and budgeting roles and had not responded appropriately to its planning mandate. The Academy gave a "qualified endorsement," however, to the Board for its performance in the area of state-wide activities.

In evaluating the Board's performance of its governance role, the Academy concluded that the Board of Regents had stressed control rather than management; had failed to establish and maintain positive relationships with the various campus constituencies; had not been adequately sensitive to the differences among institutions under its aegis; and had not developed an acceptable grievance or appeals procedure. Additionally, the Board of Regents had not utilized the various advisory structures well. Thus, while the Board of Regents has good control over the system, the current approach is not well-suited to the differentiated governance needs of the various institutions.

In summary, the Academy found that the Board of Regents had failed to successfully fulfill its role as the state-wide governing board for higher education. The Academy tempered its criticism by rec-
ognizing that "a confluence of factors, including the magnitude of the problem, and the personalities of key individuals" had prevented the Board from successfully fulfilling its role.\textsuperscript{111}

are not in the position to provide candid and helpful insights about the institutions.

7. The Board of Regents does not meet frequently enough on the various campuses, and the central staff does not spend adequate time discussing educational issues at the campus level. This results in ill-conceived efforts to standardize decisions for all institutions with inadequate sensitivity to the differing impacts and results.

8. The relative isolation from the governance structure, and the absence of mechanisms through which they can voice their opinions on educational issues, have led faculty to form erroneous judgments. The isolation has also contributed to a decline in morale and enthusiasm on the part of some faculty.

9. The state-level information system, which could be the best in the country, has failed to fulfill its potential because its use is data- and control-oriented, rather than policy- and management-oriented.

10. The absence of goals for institutional performance has made it impossible for the Board of Regents to undertake meaningful performance evaluations of institutional and presidential performance.

\textit{Id.} at 130-31.

The Academy was equally critical of the Board's performance in its budgetary role. In performing the budgeting role, the Board of Regents has not achieved the level of State support that it claims is necessary to operate the system. This failure is exacerbated by the apparent over-funding of a faculty formula that the Regent's staff defends as adequate. Based on its own formula calculations, there are major misallocations of faculty among institutions. Furthermore, the budgeting and allocation process does not relate, in any apparent manner, to either system-wide or institutional goals; has not been explained so that it is intelligible to most institutional personnel; and involves limited meaningful participation by institutional staff. Credit should be given to the Board of Regents for developing the foundation for a first-rate management information system, a potential that can be realized with a change in perception of the role of management information, and a modest amount of additional effort.

In responding to its planning mandate, the Board of Regents has attempted to make the process more participatory during the development of a second State-wide master plan. The master planning effort is fatally flawed, however, because State needs are inadequately documented; goals are not established; the capabilities of all postsecondary education to meet the needs are not adequately assessed; and projections are developed that are questionable, given the trends and the attitudes of State government officials. As a result, the Board of Regents' tactical planning efforts, some of which are quite good, are not undertaken within an overall development framework. The result may be short-term maximization with long-term negative impact. In addition, the Board of Regents has not utilized the second master planning effort to candidly address current or emerging issues. It has, thereby, lost some of its potential to develop intelligent responses.

\textit{Id.} at 165 (emphasis in original).

111. \textit{Id.} at 166. Interestingly, the Academy also assessed some fault for the Board's poor performance to the Legislature for its failure to offer sufficient guidance to the Board through articulation of specific goals for the higher education system. \textit{Id.}
The Academy offered two options for the Legislature's consideration. The first and the preferred option recommended that the Board of Regents be replaced by a state coordinating board and three associated governing boards.\textsuperscript{112} The second option recom-

\textsuperscript{112.} The Academy reasoned that a governance structure composed of a state coordinating Board of Higher Education (BHE) and three governing boards would best meet divergent needs of a large number of state institutions of higher education. The West Virginia Board of Higher Education, a state coordinating board responsible for state-level planning, would coordinate and perhaps operate state-wide educational activities; it would develop appropriation and allocation recommendations and would report annually to the Legislature on higher education performance. 1979 AED Report \textit{supra} note 88, at 171.

State-wide planning would encompass "development of specific and differentiated missions and goals" for public institutions of higher education. \textit{Id.} at 172. The Board's budget request to the Legislature should include both individual institutions' requests and the Board's recommendations in light of funding priorities. \textit{Id.} at 174. State-wide education activities would include federal grant programs, student aid, provision for high-cost specialized programs, educational television, and a consolidated management information system to serve its own needs and those of the three governing boards and state government planners. The eleven members of the Board would be appointed by the Governor and confirmed by the Senate for six-year terms, with no more than six members from the same political party. Board membership would include no more than two graduates of the same institution and at least two members who did not graduate from any West Virginia public institution of higher education. \textit{Id.} at 177. The Board would elect a Chancellor and would meet formally at least ten times each year; it would control public advocacy by institutions or governing boards and would determine which representatives of individual institutions or their governing boards testified before the Legislature on educational or budget matters. \textit{Id.} at 178.

The Academy proposed a Board of Visitors (BOV) as the governing board for West Virginia University and its branches, Marshall University, the School of Osteopathic Medicine, and the College of Graduate Studies (COGS). The BOV would supervise the institutions which offer graduate and professional instruction under BHE's state-wide guidelines. The BOV would define the decision-making process for academic, budget, and personnel matters and the roles of each institution's president, faculty, students, and any staff representatives. \textit{Id.} at 179. The BOV would select presidents for its institutions and review their performance; it would develop a personnel plan for all employees, including an "open and public grievance and appeals process." \textit{Id.} at 180. The BOV would be accountable for all resources used by its institutions. \textit{Id.} In developing budget requests and allocating legislative appropriations to its institutions, the BOV would demonstrate use of resources to further each institution's mission. \textit{Id.} at 181.

BOV membership would consist of seven members, five appointed by the Governor and confirmed by the Senate, with no more than four from the same political party and no more than two who graduated from the same BOV institution. One faculty representative and one student member, chosen by the elected student organization heads, would each have full voting powers. \textit{Id.} at 181-82.

The Academy proposed a Board of Governors (BOG) for the state undergraduate colleges (Bluefield State College, Concord College, Fairmont State College, Glenville State College, Shepherd College, West Liberty State College, West Virginia State College and West Virginia Institute of Technology). BOG powers and responsibilities would be the same as those of the BOV.

The third board, a Board of Trustees (BOT), would govern institutions focusing on "technical and transfer programs at the lower division level" (Parkersburg Community College, Southern West Virginia Community College, West Virginia Northern Community College, all of their branches, and the Greenbrier Center). \textit{Id.} at 184. The BOT would have the same responsibilities as the BOV and
mended that the single governing board structure be retained with major revisions in the procedures and operations of the Board of Regents. The Academy further recommended that the Regents' enabling legislation be amended to specifically indicate legislative priorities for higher education.113

The significance of the Academy Report is found not only in its recommendations, but also in the fact that the criticism of the Board which had been merely anecdotal or ill-formed, was by this report considerably substantiated. The report is also noteworthy as an attempt to identify at least some of the factors which contributed to the Board's inadequacies.

Despite the fact that it had commissioned the study, the Legislature did not immediately respond to the Academy's recommen-
dations. Instead, in the 1980 legislative session following the receipt of the Board’s report, the Legislature enacted just two minor amendments to the state regulatory scheme, neither of which addressed issues raised by the Academy report.114

There was a limited though significant legislative response to the Academy’s report in the next legislative session. In response to the Academy’s recommendations concerning the specific statutory enumeration of legislative priorities, the 1981 Higher Education Management Act completely revised the statutory description of the Board of Regents’ powers and duties.115 The amendments clarified the Board’s role in the budgeting process, mandated the involvement of faculty, classified staff and students in the Board’s planning and decision-making process, revised the appeal and grievance processes, and required the periodic evaluation of college and university presidents.116 In addition, the 1981 amendments altered the composition and appointment of the institutional advisory boards by providing for more diverse representation. However, the advisory boards’ authority and duty remained virtually unchanged.117 Notwithstanding these major modifications to the statutory authority of the Board of Regents, the Legislature generally maintained the laissez-faire attitude characteristic of the early phase of governance under the Board of Regents.118


116. Id.

117. 1981 W. Va. Acts ch. 91, W. VA. CODE § 18-26-9 (Repl. Vol. 1984), mandated a “board of advisors” (BOA) for each state college and university, to consist of an administrative officer, a faculty member, a student, a member of the classified staff, and seven lay citizens appointed by the BOR, of whom no more than four could be of the same political party. Such BOA’s would replace the seven-member advisory boards appointed by each state college or university president under prior § 18-26-9 (1976).

The older version of § 18-26-9 did not specify BOA duties, but the 1981 revision of W. VA. CODE § 18-26-9 provides that each institution’s BOA shall meet at least quarterly and that the BOA shall review its institution’s president’s statement of mission, academic programs, budget, and capital needs before its submission to the BOR. The BOA also serves as a search committee when a new president is sought for its institution.

118. Legislative modifications to the statutes on higher education were, during this first phase, relatively minor. See e.g., 1982 W. Va. Acts 52, where the definition of “higher educational institution” in W. VA. CODE § 18-26-2(g) (Repl. Vol. 1984) was amended to include private proprietary
The Board of Regents also failed to respond in a significant way to the Academy's recommendations. The Board claimed that significant modifications were made in 1979 as a result of the Academy's recommendations. However, a close examination of the Board's own detailed response to each of the Academy's thirty-two recommendations negates the Regents' claim. The record clearly shows that there were no significant administrative modifications in 1979 nor were significant revisions made in the following years.

Thus, despite its protests to the contrary, the Board of Regents virtually ignored the Academy's recommendations regarding internal restructuring of Board procedures. In turn, the Legislature ignored the Academy's recommendation that the statutory framework for the governance of higher education be completely revamped.

The troubling paradox of these responses to the Academy's report is that the Legislature acted on the recommendations which were directed to the Board of Regents, and it imposed, by statute, a more specific enumeration of policies and procedures which should

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colleges operated for profit. Section 18-26-13(a) on accreditation was amended to provide that the BOR's grant of the right to award degrees would not be invalidated by the section's accreditation standards.

The opportunity for the Legislature to critically evaluate the performance of the Board of Regents was presented again in mid-1984 when the Joint Committee on Government Operations received the legislative auditor's performance audit of the West Virginia Board of Regents. This audit, which was conducted pursuant to West Virginia's "sunset" laws (W. Va. Code § 4-10-9(c) (Repl. Vol. 1987)) was for the purpose of determining "whether there is a demonstrable need for the continuation of the particular entity..." Id. The performance audit of the Board was far from rigorous. Although it was conducted pursuant to the statutorily prescribed criteria, with few exceptions the audit report reflected the Board of Regents' own response to the performance audit questionnaire. These responses were reported and accepted with little or no examination. The performance audit also neutrally reported the recommendation of the Academy for Educational Development which related to the Board's internal operations and procedures; the audit report further contained the Board of Regents' responses to these recommendations. There was no attempt, however, to critically assess either the merits of these recommendations or the Board's response to them. Interestingly, particularly in light of the purpose of the sunset legislation, or the actions of the Board taken in response to them, neither the Legislative Auditor in his performance audit, nor the Board of Regents in its response to the performance audit questionnaire, directly addressed the Academy's recommendation that the single governing board be abolished.

119. West Virginia Bd. of Regents, Performance Audit Questionnaire Response 7 (June 30, 1984).
120. Id. app. § 1 (Repl. Vol. 1984).
121. Recall that this was essentially the recommendation of the W. Va. Comm'n on Higher Education in 1968. See text accompanying note 80-83, supra.
have been administratively developed.\textsuperscript{122} It is ironic that the Board was required by statute to modify its internal procedures and operations when it had earlier declined to implement these procedures voluntarily.

B. The Interventionist Period

One consequence of the \textit{laissez-faire} phase of governance was that higher education in West Virginia suffered from a serious lack of leadership. As the Board of Regents concentrated its attentions on the issues of control and internal administrative procedures, it neglected to fulfill its leadership role in the development of educational policies for the state. As institutions and individuals who had suffered from the lack of leadership turned to the courts and the Legislature to express their concerns, the governance of higher education shifted into the interventionist phase.

An analysis of the judicial and legislative developments affecting higher education during the past ten years illustrates how the courts and Legislature have filled the void created by the Board's inaction.\textsuperscript{123}

1. Judicial Developments

Five recent decisions of the West Virginia Supreme Court of Appeals are surveyed as examples of the judicial activity characteristic of this phase. In \textit{North v. W. Va. Board of Regents},\textsuperscript{124} the court examined the constitutionality of the procedures by which a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} W. Va. \textsc{Code} § 18-26-8(a) (Repl. Vol. 1987).
\item \textsuperscript{123} The relationship between the law and higher education in this regard is significant: [T]he volume of academic litigation will depend most of all upon the extent to which colleges and universities maintain order in their own houses. Many court decisions reveal a substantial and appropriate degree of deference to internal due process. One reason why the University of California has fared so well in the courts seems to be the extent to which campus procedural rules have anticipated the judicial decree. R. O'\textsc{Neill}, \textsc{Courts, Government & Higher Education} 16 (1972). It has also been observed that "[a]n educational institution can neither conduct a sound educational program if its operational procedures are set by legislative act, nor can it be properly administered if an agency outside the institution exercises undue and restrictive financial control." M. \textsc{Chambers}, \textit{supra} note 46, at 9.
\end{enumerate}
\end{footnotesize}
medical student was expelled from the West Virginia University School of Medicine for misconduct.

The court held that the petitioner’s liberty or property interest in his medical school education was such that the University could not order his expulsion without providing minimal constitutional due process protections. The court remanded the case to the trial court for further proceedings. In remanding the case, the court established specific guidelines for conducting disciplinary hearings in cases involving such expulsions.125

The significance of the court’s decision in North rests not so much in its holding that students facing expulsion from a state institution are entitled to due process, but in the fact that the court defined, in fairly precise terms, the type of hearing to which North was entitled.126 North stands as the first in a series of cases in which the court stepped in to make higher education policy where the Board of Regents had failed to do so.

One year later, in a case involving the termination of a probationary faculty member, the court considered the issue of whether

125. West Virginia Board of Regents, Policies, Rules, and Regulations Regarding Student Rights, Responsibilities, and Conduct in West Virginia State Universities and Colleges (August 4, 1970) and West Virginia Board of Regents Policy Bulletin No. 9 (June 30, 1971 amendment) contained administrative regulations governing the conduct of such hearings. In North’s case, a committee of medical school faculty and administrators conducted a hearing but gave North no formal notice of charges before or during the hearing. North was invited into the hearing only after the committee had heard the “adverse information,” and he was then subjected to cross-examination by the committee. North, 160 W. Va. at 250, 233 S.E.2d at 414.

The same committee conducted the second hearing, at which North gave his explanation of the charges but was not represented by an attorney. No “verbatim record or transcript” of the hearing was made. Id. at 251, 233 S.E.2d at 414.

126. Id. at 257, 233 S.E.2d at 417. The court went even further and in dicta held that the same standard [of due process] “may well apply to lengthy suspensions which would have the practical effect of preventing the student from completing his academic program.” Id.

Although the law in the area of student rights was relatively new at the time the court rendered its first decision in North, it was nonetheless fairly well-settled, and the rudiments of procedural due process were known to most governmental entities which were obligated to provide it. Despite this fact, the court made an effort to quite clearly describe the hearing which the Board of Regents, through the University, was required to conduct.

The guidelines promulgated by the court were not advisory or illustrative; rather, there is little doubt that the court intended the University to strictly adhere to these guidelines in all student disciplinary proceedings. The court acknowledged its intent the second time it considered North’s appeal, stating “We set the guidelines for the process that a university must follow in student disciplinary proceedings . . . .” North v. W. Va. Bd. of Regents, 332 S.E.2d 141 (W. Va. 1985).
a probationary faculty member who met the objective eligibility criteria for tenure was entitled to procedural due process before being denied tenure. In *Morton v. McLendon* the court concluded, based on the existence of the Board of Regents’ policy on tenure and the tenure program of the college, that this probationary faculty member had more than a unilateral expectation of tenure. The court held that this interest constituted “a sufficient entitlement so that she could not be denied tenure on the issue of her competency without some procedural due process.”

The court next considered what due process protections existed under the Board and college policies to safeguard against erroneous deprivation of the protected right. On this point, the court concluded “there are currently no orderly procedures or protections that exist for one who meets the objective standards for tenure eligibility but is denied tenure.” Accordingly, the court required the Board of Regents to add an additional step in the existing process whereby the probationary faculty member who had met the objective standards for tenure eligibility would be given notice of the reasons why tenure was denied. In addition, the court held that a hearing before an unbiased hearing tribunal was required so that the faculty member could submit evidence to rebut the reasons given for the denial of tenure.

Once again, the Board’s failure to adequately define the rights of its faculty through the promulgation of appropriate procedures resulted in judicial imposition of a procedure where the court not only adjudicated the dispute between the parties, but also established a state-wide policy on tenure.

Before the Board could respond to the mandate of *Morton v. McLendon* to modify its existing policies on tenure, the Legislature exhibited its own willingness to become involved in specific academic

128. Id. at 443, 249 S.E.2d at 925.
129. Id. at 444, 249 S.E.2d at 926.
130. Id. The Board of Regents’ policy which was in effect at the time of this case did permit an appeal to the Board by non-tenured faculty of non-retention decisions. 128 C.S.R. 36 §15.1 (1974). The court held that this review should follow the hearing mandated by its decision in McLendon v. Morton, 162 W. Va. at 446, n.13, 249 S.E.2d at 927, n.13.
issues. A statute was enacted in the 1984 legislative session which granted all probationary faculty members certain procedural and substantive rights.131

This new statute went beyond the holding of McLendon by granting certain procedural and substantive rights to all probationary faculty, not just to those who meet the objective tenure eligibility criteria.132 When the Board finally modified the policy, it had very little discretion left in this area because the Legislature had already codified rights beyond those guaranteed in McLendon.

Certain procedures of the Board of Regents were again the focus of the West Virginia Supreme Court of Appeals in Clarke v. W. Va. Bd. of Regents.133 In Clarke, the court reviewed the Board’s appeal procedures applicable to “for cause” terminations of tenured faculty members. The court acknowledged that neither the statute nor the Board of Regents’ policies required the hearing examiner appointed by the Board to conduct appeals in these matters, to make specific findings of fact and conclusions of law, or to state the reasons for his decision and the evidence which supported these reasons. Nonetheless, over a strong dissent, the court required such findings and conclusions.134

The court’s attention to the Board of Regents’ affairs shifted to a completely different arena in UMWA v. Parsons.135 The issue in Parsons was the constitutional obligation of a state university to permit the presentation of contrasting political views in paid advertisements which are broadcast during athletic events.136 While the substantive issue in Parsons is not central to this discussion, the manner in which the court resolved the dispute is of interest.

134. Id. at 717, 279 S.E.2d at 179. On the second issue, the propriety of a post-deprivation hearing, the court found that the Board had contravened its own policies in removing the appellant from the payroll prior to the hearing on his dismissal, Id., and held that suspension with pay during the pendency of the hearing would have protected the interests of the appellant as well as the institution.
136. Id. at 346.
Invoking some of the principles of the fairness doctrine, the court held that under the West Virginia Constitution "when a state agency or instrumentality sells advertising for broadcast which presents one side of a politically controversial issue of public concern, it is obligated . . . to preserve its neutrality by providing a reasonable opportunity for the presentation of contrasting points of view. . . ." 138

The court went beyond the articulation of this new principle to prescribe the method by which the university was to fulfill its obligation to present contrasting points of view. While recognizing that under the traditional fairness doctrine a flexible approach to implementation of the doctrine should be employed, the court held that "several factors militate against allowing respondents to exercise such discretion in this case." 139 The court then specifically concluded that the UMWA would have a right to respond to the controversial advertisements if they appeared again. In addition, the court ordered that the Board of Regents promulgate standards for evaluating requests for response time. 140 The relief granted in Parsons was controversial even among the members of the court. Although the court issued a unanimous opinion, a dissenting footnote criticized the majority for moulding relief "in a legislative fashion." 141

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137. Id. at 353. The "fairness doctrine," a common law principle developed since the advent of broadcast media, is based on the fact that broadcasting channels, and therefore access to the public, are limited. The Federal Communications Commission (F.C.C.) for some years sought to ensure the public's opportunity to hear both sides of controversial issues of public importance. If a proponent of one view evidenced to the F.C.C. that an F.C.C. licensee/broadcaster had shown "unfairness and imbalance" in reporting an issue of sufficient controversy and importance to the public, the broadcaster would be required to provide program time for presentation of opposing views. Id. at 354.

138. Id. at 359. The factors identified by the court were that the respondents had failed to seek out persons to respond to the advertisements even though they were aware of the politically controversial character of the advertisements, the UMWA had been denied access, the respondents had failed to contact an alternative opposing viewpoint, no other person or group had requested the opportunity to respond to the advertisements, and the UMWA had expressed a direct interest in presenting the opposing view. Id. at 359-60.

139. Id. at 359. In response to the Parsons decision, the Board of Regents promulgated Policy Bulletin # 3, 128 C.S.R. 3 (1983) which applies to all Board of Regents' controlled broadcast media programming and which limits the sale of commercial advertising time to the "sale of standard product commercials which are designed to advocate or promote the sale of a product or services."

140. Parsons, 305 S.E.2d at 360, n. 19. The dissenters objected to the majority's decision to award prospective relief only.
decision is yet another vivid example of how the court was prompted by the Board’s inaction to intervene in the development of educational policy.

The final case in this series offers the most striking example of an area in which the Board abdicated its responsibilities. In *WVU-ACE v. Saunders*142 the West Virginia Supreme Court of Appeals considered a writ of mandamus to compel modification of a policy of West Virginia University which prohibited solicitation of employees for membership in non-University organizations during “declared work time in working areas of the University.”143 The court issued the writ on the ground that such regulations must be narrowly drawn to minimize the potential chilling effects of regulations governing the exercise of constitutional rights; it went further, though, and dictated what the precise modification to the policy should be.144 In essence, the court drafted the regulation for the University.

It is not surprising that the court assumed some of the responsibility for making educational policy for the state of West Virginia, because the Board of Regents had shown little leadership, ability or success in doing so itself.145

2. Legislative Developments

The Legislature also played a greater role in the governance process during the second decade of the Board of Regents. Whereas the Legislature’s involvement in higher education had previously been limited to matters of funding, some minor restructuring, and administrative details which could have arguably been handled inter-

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142. WVU-ACE v. Saunders, 1985 W. Va. Sup. Ct. App. (exp. let. serv.) No. 16719 at 220 (July 17, 1985). The policy at issue had been promulgated by West Virginia University, modified and subsequently approved by the Board of Regents.
143. *Id.* at 220.
144. *Id.* at 221. The court granted the writ of mandamus instructing inclusion of the phrase “while work tasks are being performed” in the policy of the respondents.
145. Perhaps the court can be fairly criticized for the extent to which it intruded into the policy-making function of the Board of Regents. However, the Board’s own lack of leadership in this area may be combined with the activism of the West Virginia Supreme Court of Appeals to explain the nature and extent of the court’s intervention, but the court cannot be faulted for taking the initiative in these circumstances.
nally by the Board,\(^{146}\) around 1983 the Legislature shifted its attention to policy matters involving higher education. In addition, the Legislature provided outlets through which dissatisfied constituents of the Board of Regents could express concerns and seek action.

A review of the significant legislative developments in the past six years highlights this shift. The first evidence of the fact that the Legislature was beginning to become more active in important policy matters of the Board is found in a 1983 amendment to the West Virginia Code which created a statutory scheme for determining the seniority of classified employees of the Board.\(^{147}\) Next, in 1984, the Legislature created but did not fund a full-time faculty salary schedule which dictated a system-wide minimum pay scale for faculty at Board of Regents institutions.\(^{148}\) During the next year, despite the fact that there were already in existence several different appeals procedures, the Legislature added a completely new statutory grievance procedure which covered all Board of Regents employees.\(^{149}\) The Legislature also created an Eminent Scholars Program\(^{150}\) and

\(^{146}\) Some of the legislative action has, of course, been necessary to provide the Board with the requisite statutory authority to act in certain areas; for example, in the issuance of revenue bonds for construction of new facilities or in the reconstructing of the composition of the Board. For example, \(\text{§ } 18-12A-3\) authorized the BOR to approve revenue bonds for Marshall University buildings, raising the maximum stated interest rate from five percent, in the 1963 version of the statute, to seven per cent and the maximum yield on discounted bonds from six to eight percent. A 1974 amendment of \(\text{§ } 18-12A-3\) removed the \$5,700,000 cap on total capital improvement revenue bonds for Marshall University. Act of Mar. 9, 1974, ch. 120, 1974 W. Va. Acts 692.


W. VA. CODE § 18-12B-1 (Act of Apr. 9, 1977, ch. 90, 1977 W. Va. Acts 233) authorized the BOR to issue revenue bonds, under conditions similar to those of §§ 18-11A-3 and 18-12A-3, for capital improvements at any institution of higher education under BOR governance. In addition to general authority, BOR was directed to sell bonds for specific projects at individual institutions.


authorized a continuing education program for faculty and classified staff.\footnote{151}

In 1986 the Legislature amended the still unfunded faculty salary schedule and the classified employee salary schedule and classification system.\footnote{152} In addition, the Legislature created two new institutes, one for West Virginia University and one for Marshall University.\footnote{153}

The troubling aspect of this flurry of legislative activity relating to Board of Regents policy is that it further underscores the Board’s abdication of responsibility. The Board clearly had the statutory authority \textit{and duty} to set policy in these areas, but it did nothing. Legislative action would not have been necessary to accomplish these changes had the Board exercised its broad powers.\footnote{154}

\section*{C. Two Decades Summarized}

As two decades of governance under the West Virginia Board of Regents near an end, it is clear that the Board has failed to accomplish the reforms envisioned by the Legislature in 1969. One need only recall the apparent legislative intent underlying the creation of the Board of Regents to see the Board’s inadequacies.\footnote{155}

The Legislature has not been insulated from institutional lobbying. Instead, as funding for higher education has declined, lobbying by institutional representatives has intensified; it has become a commonplace activity of many public colleges and universities. The first legislative goal has been ignored by the Board of Regents.

154. The Legislature’s willingness to act on concerns of dissatisfied constituents of the Board of Regents no doubt contributed to the perceptions of the Board’s ineffectiveness. Moreover, by providing this avenue for making “end runs” around the Board, the Legislature may have underscored the lack of confidence in the Board’s leadership which many constituents had already expressed.
155. \textit{Supra} note 88 and accompanying text.}
The Board of Regents has also frustrated the legislative intent that budgetary and operational responsibilities be fixed in one entity; instead, because the Board has failed to assume a leadership role, the Legislature and the courts have been forced to become active in this area and assume some of these responsibilities.

Finally, the Board has done little to promote state-wide planning activities to increase efficiency. There is no evidence of significant cost-saving measures instituted by the Board; the number of institutions within the system has grown, and the Board has not been successful in its attempts to consolidate or merge institutions within the system. Moreover, the Board has failed to develop, through a system-wide planning process, a well-reasoned plan for the future of higher education in West Virginia.

After two decades of ineffectiveness, it seems unlikely that the Board of Regents will suddenly reverse its course and fully exercise the power and responsibility granted it. The Board’s credibility has been severely damaged over the last decade.\textsuperscript{156} It has been soundly criticized and gently warned; the Legislature has given it more specific direction; it has twice been threatened with extinction. The Board of Regents has turned a deaf ear to these legislative efforts and the quality of higher education has suffered the consequences of the Board’s inability to operate effectively within the sphere of authority granted it. In fact, “[b]y almost any measure, higher education in West Virginia is in terrible shape.”\textsuperscript{157} The time is ripe for the development of a legislative alternative.

V. ALTERNATIVE FORMS OF GOVERNANCE

During the past twenty years, several alternative forms of governance have been proposed; three of the alternatives merit further

\textsuperscript{156} Most of the popular criticism of the Board of Regents’ performance is, in fact, a criticism of the consolidated governing board structure. This criticism is typically focused on the following points:
- the Board of Regents fails to adequately recognize different institutional missions;
- the Board of Regents fails to promote these institutional differences;
- institutional differences are homogenized by the Board of Regents;
- the Board of Regents tends to stifle competition among the colleges and universities;
- the Board of Regents is too far removed to understand campus problems.
examination to determine whether they offer viable solutions to the problems which currently plague higher education in West Virginia.

A. The H.B. 1484 Proposal

The most recent alternative, H.B. 1484, was proposed during the 1986 legislative session as the West Virginia Legislature was considering the expiration of the Board of Regents pursuant to the statutory sunset provisions. House Bill 1484 was intended to streamline the administration of the system of higher education in West Virginia by substituting a commission on higher education for the board of regents and by establishing a board of trustees for each institution of higher education so as to allow for a decentralization of decision-making authority which will enable each institution to more fully tailor its policies to its specific goals and missions. The proposal envisioned a three-member West Virginia Commission on Higher Education which the Governor would appoint. The Commission would assume most, but not all, of the duties of the Board of Regents. A separate board of trustees would be appointed by the Governor for each college and university. Each eleven member board would have the power and duty to determine, control, supervise and manage its own institution's financial and business policies and affairs.

The approach taken in H.B. 1484 is the least desirable of the three alternatives because it incorporates and exacerbates the worst features of both the consolidated governing board and the coordinating board approaches. The House proposal retains much of the former Board of Regents' authority but shifts it to a three person,
full-time commission. This central body would still have responsibility for the determination, management, control and supervision of educational policy, the area in which the Board of Regents has been the most ineffective. This proposal would perpetuate a basic flaw of the consolidated governing board structure: the vesting of centralized authority in a body which is not directly accountable to its constituents. Under this proposal the management, control, supervision and determination of financial and business affairs, the area in which the Board of Regents was at least minimally effective, would be decentralized. Thus, H.B. 1484 would perpetuate the unwise centralization and would decentralize authority where central control can be effective.

Moreover, the H.B. 1484 proposal would push decentralization and local governance to an extreme by creating fifteen separate governing boards. Without skillful administration from a strong central body, the proliferation of separate governing boards could be expected to result in unnecessary and costly duplication of programs.

**B. The AED Proposal**

A different alternative was proposed earlier by the Academy for Educational Development (AED) in its 1979 study of higher education in West Virginia. The Academy recommended the adoption of a coordinating board structure for governance with the creation of a West Virginia Board of Higher Education and three separate governing boards. The AED suggested that the Governor appoint an eleven member Board of Higher Education which would be responsible for

- state-level planning; for coordination and operation, when appropriate, of statewide educational activities; for state-level review and approval of proposed and existing academic programs; for the development of recommendations on the level of support for higher education; for the allocation of appropriated funds to the various systems; and for annual reporting to the legislature on the performance of higher education in the state.

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162. 1979 AED REPORT, supra note 88 at 170.
163. Id. at 171.
The Board’s first priority would be planning.\textsuperscript{164}

Three separate nine member governing boards would be appointed by the Governor to govern and manage the colleges and universities. A Board of Visitors would oversee West Virginia University, Marshall University, the West Virginia School of Osteopathic Medicine and the College of Graduate Studies.\textsuperscript{165} A Board of Governors would be responsible for Bluefield State College, Concord College, Fairmont State College, Glenville State College, Shepherd College, West Liberty State College, West Virginia Institute of Technology and West Virginia State College.\textsuperscript{166} The third governing body would be a Board of Trustees for Parkersburg Community College, Southern West Virginia Community College, West Virginia Northern Community College, and their branches.\textsuperscript{167}

The state-level coordinating agency recommended by the Academy would have no institutional members, and thus it would be essentially an independent entity accountable only to the Governor. The Academy’s proposal fails to provide an adequate outlet for the recognition of institutional concerns. Without direct institutional input and in light of the political nature of the Board, it would be difficult for the Board of Higher Education to meet the priority of state-wide planning for higher education.

Perhaps the most serious deficiency in the AED proposal is that its categorization of the colleges and universities fails to give adequate consideration to the diversity which exists among these institutions. The categorization of institutions recommended by the Academy is based on the erroneous assumption that the colleges and universities within each category have similar institutional missions. For example, under the AED proposal the same Board of Visitors would attempt to govern West Virginia University, a four-year, land grant, doctoral-degree granting institution with a research emphasis; Marshall University, a four-year institution with limited doctoral-programs; the West Virginia School of Osteopathic Medicine, a four-

\textsuperscript{164} Id.
\textsuperscript{165} Id. at 179.
\textsuperscript{166} Id. at 183.
\textsuperscript{167} Id. at 184.
year medical school; and the College of Graduate Studies, a small institution with a limited mission. An attempt to govern these four institutions with their diverse interests and missions would have a leveling effect on each institution and would exacerbate the damage the individual institutions have already incurred under the Board of Regents. 168

C. The Committee on Higher Education Proposal

Perhaps the best alternative is the one originally recommended by the West Virginia Committee on Higher Education in 1966 and introduced, but rejected by, the 1969 Legislature in favor of the consolidated governing board. 169 The Committee on Higher Education proposal (the Committee proposal) would establish a West Virginia State Board of Education, an eleven member central coordinating body with very limited authority and three separate governing boards. 170 More specifically, according to this proposal, West Virginia University and Marshall University would each have a separate nine member Board of Governors with full authority over the affairs of each institution. 171 The remaining state colleges, with their emphasis on undergraduate education, would be governed by a Board of Governors of State Colleges. 172

Five members of the central coordinating body, which would be known as the Board of Regents, would be appointed by the Governor. Two members would be representatives of the governing bodies of two private colleges in West Virginia. The presidents of the West Virginia Board of Education, the Board of Governors of West Virginia University, the Board of Governors of the State Colleges,

168. The Academy's proposal to create a single Board of Visitors to manage and govern West Virginia University, Marshall University, and the West Virginia School of Osteopathic Medicine utterly fails to take into account the different missions of three institutions. In this respect, the recommendation differs little from the consolidated governing board approach of which the Academy was quite critical, except that it reduces the number of dissimilar institutions grouped in one system.

169. 1966 COMM. REPORT, supra note 32.

170. Id.

171. Id. at 20-21.

172. The West Virginia Committee on Higher Education proposal pre-dates the creation of the West Virginia School of Osteopathic Medicine, the several community colleges, and the College of Graduate Studies.
and the Board of Governors of Marshall University would serve as the remaining four members.173

Under this proposal, the West Virginia Board of Regents would make studies and recommendations relating to higher education; it would allocate specific functions among the state colleges and universities to avoid unnecessary duplication; it would submit institutional budget requests to the Legislature; and it would allocate federal funding. In summary, the Board of Regents would serve primarily as a coordinating body with very limited governance authority over the individual colleges and universities.174

The Board of Regents proposed under this alternative would have the advantage of being less political; only five of its eleven members would be appointed by the Governor. Moreover, because the presidents of each of the four governing boards would serve as members of the Board of Regents, the Regents would be more directly accountable to the institutions. Institutions within the system would have a more effective voice in the coordination of higher education through their members on the Board of Regents. With the inclusion of the President of the West Virginia Board of Education and two representatives of private colleges on the Board of Regents, the interests of the private colleges as well as the interests of the State Board of Education would be integrated with the concerns of higher education.

D. An Assessment of the Alternatives

Each of the alternatives discussed above promotes decentralization in the governance of higher education. While the degree and scope of decentralization would vary with each alternative, the theme of these proposals is clear: fundamental changes in the current governance structure must be made in order to promote the development and implementation of a state-wide plan for the future of higher education in West Virginia and to permit individual institutions to be more directly and locally governed.

173. *Id.* at 20.
174. *Id.*

https://researchrepository.wvu.edu/wvlr/vol91/iss1/2
This theme is not new. In fact, it was the very message of the Carnegie Commission’s 1959 report on the governance of higher education in the United States. The Commission recommended the following guiding principles for the governance of institutions of higher education:

1. Legal autonomy should be given to every institution of higher education that carries on a substantial program of teaching and research.

2. Legislatures are encouraged, when allocating funds to higher education, to avoid all attempts to legislate specifics of education policy.

3. Legislative interim committees and service agencies should continue their valuable function of keeping legislatures informed, but they should never act as instruments of control over educational administration.

4. Legislatures should review and revise those statutes pertaining to higher education and fiscal and management controls which have become outmoded or which impede the effective management of the institution by the responsible officers.

These principles, enunciated by the Carnegie Commission some thirty years ago, should guide us in the consideration of an appropriate governance structure for higher education in West Virginia.

It appears that we have gone full circle in the consideration of alternatives; it is time to implement a governance structure which, consistent with these principles, promotes the dual goals of decentralization and institutional autonomy.

176. To implement this principle, the committee specifically recommended either a constitutional amendment or statute that would include the following provisions:
(a) creation of an independent board for a single institution or related groups of institutions;
(b) definition of the manner of selecting governing board members for overlapping terms of, say, six to nine years;
(c) assignment to the board of full responsibility for the expenditure of funds allocated to the institution and for all internal policies of the institution;
(d) requirement that the board submit full accounts of all financial and academic activities and be subject to a post-audit of its income and expenditures;
(e) prohibition against interference by any state executive agency with the internal affairs of the institutions.

Id. at 30.
177. Id. at 30-31.
178. In her remarks to the House Education Committee which was studying H.B. 1484, then acting president of West Virginia University, Diane L. Reinhard, proposed the following five standards for evaluating an effective system of higher education:
1. It must recognize the diversity of responsibilities carried by the various colleges and universities, as outlined in official statements of mission.
A governance model which is most consistent with these principles and which promises the best hope of meeting these goals is proposed and discussed below. The West Virginia Legislature should give serious and thoughtful consideration to this proposal which tracks the coordinating board model but also incorporates some of the concepts of the consolidated governing board model.

E. A New Alternative: The West Virginia Commission on Higher Education

This alternative proposes the creation of a five person state-wide coordinating body, the West Virginia Commission on Higher Education, to replace the existing Board of Regents.\textsuperscript{179} Three separate and virtually autonomous governing boards would be created as follows: The Board of Trustees for Marshall University; the Board of Trustees for West Virginia University; and the Board of College Trustees for the eight state colleges and the three community colleges.\textsuperscript{180} The chairs of each of these governing boards would be mem-

\textsuperscript{2} It should be structured to discourage unnecessary program duplication and to encourage cooperative efforts among institutions. It should therefore include some central academic program approval authority.

\textsuperscript{3} It must encourage maximum flexibility with appropriate accountability, in the management of each college or university, in order to ensure effective use of limited financial resources and enhance the full use of the human talent and energy available at each institution.

\textsuperscript{4} It should include a structured and participative mechanism for the development of general plans for the future of higher education in West Virginia.

\textsuperscript{5} It should provide for effective advocacy on behalf of higher education in general, and the specific colleges and universities that constitute the systems.

D. Reinhard, Remarks before the House Education Committee (Feb. 4, 1986) (available from this author upon request).

\textsuperscript{179} To enhance efforts at coordination, a representative from the State Board of Education and a representative from the faculty, students and staff could be added to this coordinating body, as non-voting members.

\textsuperscript{180} This model anticipates the merger, closure or transfer of the West Virginia School of Osteopathic Medicine and the West Virginia College of Graduate Studies. The proposed Board of College Trustees is more akin to a consolidated governing board than an institutional governing board because of the number of institutions it would govern; nevertheless, because the interests of the state colleges are so similar, a single board of trustees with a focus on undergraduate education can still better serve the colleges than the existing Board of Regents, which must attempt to accommodate extremely diverse interests.
bers of the Commission along with two persons appointed by the Governor.

The Commission's statutory authority would be expressly limited to planning for postsecondary education and program review and assessment of existing programs to avoid unnecessary duplication. Also included in the Commission's statutory authority would be collection and management of information to be used by the individual institutions for the development and management of higher education and institutional policies.

The management, governance, and development of educational policies for individual state institutions would be left to the respective boards of trustees which would be given broad statutory authority.

As a largely nonpolitical entity, the Commission on Higher Education would have less concern for the political ramifications of its decisions. The coordinating body would have one priority, planning for postsecondary education in West Virginia. Accordingly, its attention could be more focused. With a clear and limited statutory mandate, the Commission could undertake its planning responsibilities with greater vigor, particularly where little or no administrative or governance responsibilities exist to divert its attention. Moreover, as representatives of individual institutions with vested interests in the future of higher education in West Virginia, the majority of the Commission members would have a high stake in ensuring that the Commission's planning mandate was effectively fulfilled.

The three autonomous governing boards would provide more local and direct management of the institutions. These separate institutional governing boards would more effectively accommodate the diverse missions of the different colleges and universities. Without the pressures of competing and perhaps incompatible institutional interests at a higher, centralized level, the diverse missions and interests of the individual colleges and universities could flourish when they were no longer subordinate to the interests of the central administration.

The more "local" Board of Trustees would be far more responsive to institutional needs. With more access and responsibility
for decision-making on an institutional level, the faculty, staff and students at each institution would have a greater opportunity to influence governance matters. With more accountable institutional governing boards which provide direct access to faculty, staff, and students, it is likely that the faculty, staff, and students would no longer find it necessary to circumvent the institutional decision-making processes by seeking relief from the courts and the Legislature. Educational policy and decision-making could then be returned to the colleges and universities.

The multi-tiered administrative process created by the Board of Regents has often been burdensome, complicated, time-consuming and unnecessarily controlling. The administrative structure anticipated by this proposal would eliminate that process. Individual governing boards could develop and implement their own administrative policies and procedures which would serve the missions and specific needs of a particular college or university. Desirable institutional differences would be promoted and encouraged.

This model differs from the other alternatives previously discussed in several important ways. First, the state-wide coordinating body proposed by this model is intended to be more removed from the political process and more accountable to individual colleges and universities. By contrast, the entire three member central coordinating council proposed in H.B. 1484 would have been appointed by the Governor. Under the AED proposal the Governor would have appointed all eleven members of the West Virginia Board of Higher Education. In the Committee proposal, the Governor would appoint seven members of the eleven member, state-wide coordinating body.

In the alternative proposed here, only two members of the five member central coordinating body would be gubernatorial appointees; the majority of the Commission members would be directly accountable to the educational community through their institutional governing boards. By minimizing one aspect of the political influence over the future of higher education on a state-wide level, this model places greater reliance on the collective wisdom and judgment of the providers and consumers of the educational services.

The second important distinction between this alternative and those previously discussed lies with the authority of the central coordinating body proposed under each alternative.
Under the H.B. 1484 alternative, the coordinating body would have many of the same statutory responsibilities and duties possessed by the current Board of Regents. However, the responsibility of determining the financial and business affairs of each institution would be transferred to the local governing board which would be created for each institution.

The AED proposal would make planning the central coordinating body's first priority, but the West Virginia Board of Higher Education would still be responsible for the allocation of funds throughout the system.

According to the Committee proposal, the central coordinating body would have both budgetary and planning authority over the individual institutions. Under the proposal put forth here, the Commission's authority would be quite limited. It would have only the authority to engage in activities which were directly related to its statutory planning mandate.

A more critical difference between the alternative proposed here and those which have been previously proposed is that this model implicitly accepts (and perhaps promotes) more competition among the institutions of higher education and their respective governing boards for increasingly scarce state resources. The competitive environment would inspire some institutions to strengthen their good programs and eliminate their weak programs in order to survive. Other institutions or programs might simply fail to survive the competition. The result of the competition, however, would be that institutions and programs would be maintained as a matter of sound educational policy and planning, and not as a matter of politics.

Certainly, this alternative has the disadvantages which are inherent in any coordinating board structure.181 Without explicit au-

181. Under the recently reorganized Maryland higher education system, the new Maryland Higher Education Commission is given the specific authority to "coordinate the overall growth and development of postsecondary education in the state." Act of May 17, 1988, ch. 246, 1988 MD. 2370 (to be codified at Md. EDUC. CODE ANN. 11-205(B)(1)). The Commission is further empowered to consult with the governing boards and agencies concerned with postsecondary education in the state [to]. . .consider and evaluate on an ongoing basis the present and future needs for postsecondary education and research throughout the state; the present and future capabilities
authority to support the implementation of the recommendations which result from its emphasis on planning for higher education, the Commission would be relatively weak. Without effective coordination efforts, there could be a proliferation of unnecessary or duplicative programs. The three governing boards could, without effective coordination, compete for resources to the detriment of the entire higher education community. However, the scope of the Commission's authority could be expanded, consistent with the guiding principle of decentralization, to accommodate these concerns.

In addition, under this proposal, the state colleges would likely argue that their interests are under-represented in the coordinating board because they, as a group, have only one representative on the Commission. Students, faculty and staff could similarly argue that their interests would not be adequately represented on the central coordinating agency. In fact, however, these interests would be more directly and more effectively represented on the local governing bodies anticipated in this proposal because they would not be diluted by the interests of institutions with dissimilar missions. Local governing boards would be given the opportunity to exercise leadership responsibilities in appropriate areas. This form of governance allows institutional leaders to emerge and promote the diverse missions of their institutions. Faculty, staff and students could have a more significant role in the governance of their institutions.

On balance, this new alternative effectively meets the dual goals of increased decentralization and institutional autonomy. The role of the central coordinating body would be carefully delineated to

of the different segments of postsecondary education in the state; the long-range and short-range objectives and priorities for postsecondary education and methods and guidelines for achieving and maintaining them; and the appropriate role, function, and mission of each institution of postsecondary education in the state.

Act of May 17, 1988, ch. 246, 1988 Md. 2370 (to be codified at Md. Code Ann. 11-205(b)(2)(I)-(IV)).

The problem of duplicative or unnecessary expansion in existing or new programs is addressed by giving the Commission the responsibility and authority to issue certificates of approval or authority to offer new or modified programs. Act of May 17, 1988, ch. 246, 1988 MD. 2370 (to be codified at Md. Educ. Code Ann. 11-205(B)(3)). This authority also extends, to a limited degree, to programs offered by private institutions of higher education. Moreover, the Commission has the statutory authority to direct public institutions to discontinue unreasonably duplicative existing programs. Act of May 17, 1988, ch. 246, 1988 MD. 2370 (to be codified at Md. Educ. Code Ann. 11-305(D)(7)(I).
ensure that it could accomplish, with adequate support and deference from the legislature and courts, the mission of state-wide planning for higher education.

VI. CONCLUSION

There is no doubt that any proposal which calls for a reform in the administration of higher education will be controversial. If the proposals are vigorously debated and if the debate is focused on solutions, the future of higher education in West Virginia is promising. On the other hand, if West Virginians avoid the controversy and the difficult decisions which lie at the heart of the controversy and if political expediency prevents the State from making the difficult decisions which are required when reforms of entrenched institutions are undertaken, the future of higher education will be dismal indeed.

Clearly, the history of governance in West Virginia has been bumpy; there is no guarantee that its course will be smoother in the future. The future of higher education must not be obscured by the past; nor should it be determined by default. Reforming the system of higher education in West Virginia will require an enormous effort. The enormity of the task should not daunt the efforts of those creative and informed people whose concerned participation can only lead to improvement.