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Violations During the Pandemic of Law School Faculties' Authority to Decide Methods of Instruction

Richard K. Neumann Jr.

I. Introduction

Beginning in March 2020, when the COVID-19 pandemic initially spread throughout the country, universities quickly went online as faculties scrambled to figure out how to teach that way. During the summer and fall of 2020 and continuing into 2021, decisions were made about whether to return to classrooms and, if so, when and how. At some universities and their law schools, those decisions were made in a questionable manner.

A. Governance and Decisions About Teaching in 2020 and 2021

Even after surges of new infections, some university administrators demanded that courses be taught “in person” as much as possible throughout a university—including its law school. This might not have happened to most law schools, but it did happen to a significant number of them. This article’s Part II explains the extent to which it occurred.

Universities and their administrators who did this were wrong in three ways. (For brevity, I’ll use the word *administrators* to include presidents, provosts, and other managers as well as governing boards of trustees or regents.)

First, a demand of this kind was often based on budgetary fears that students would not enroll or stay enrolled if they weren’t taught “in person.” These fears turned out to be unfounded, which Part III explains in detail. Even though almost half the country’s colleges and universities began the fall 2020 semester primarily or fully online or quickly afterward went primarily or fully online, undergraduate enrollment in four-year nonprofit institutions did not fall significantly. Postgraduate and professional school enrollment actually increased. During the summer of 2020, there were also ample reasons to know that law schools in particular would be immune from any risk of enrollment shrinkage, which some universities ignored. Part III also describes partisan political interference at some state universities.

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Second, these weren't decisions about public health alone. They were also decisions about the quality of education. "In person" usually turned out to be a completely different modality—some students online, others in a classroom, and a faculty member trying to teach both groups simultaneously—an untested and primitive form of hybrid instruction that had no track record and had never been used on any scale before. It is not HyFlex teaching, and misuse of that term by university administrators has been at best ill-informed and in some instances insincere. This article's Parts IV and XI explain that during the pandemic the choice has never been between "in person" teaching and online teaching. Public health concerns continually put some students online because of contagion risks. The real choice has been between fully online teaching (nobody in a classroom) and simultaneous hybrid teaching (some students in a classroom while others are participating online).

Third, when university administrators made unilateral decisions about methods of instruction, they violated basic rules of shared governance. Some of those rules are general norms that apply everywhere in a university (Parts V and VI). The American Association of University Professors (AAUP) investigated some colleges and universities on this account (Part X).

To the extent a university's unilateral decisions included a law school, the university's actions also violated the American Bar Association's accreditation standards¹ and the Association of American Law Schools' Bylaws (Parts VII, VIII, and IX). In almost all states, a law school's graduates can be admitted to the bar only if the law school is accredited by the ABA. AALS member schools are required to conform to the AALS Bylaws. The ABA and AALS have very good reasons for requiring that law schools have primary authority to make their own academic policies. Unlike subjects taught in much of the rest of a university, law isn't only a field of study or a body of knowledge. Law is a profession. Methods of teaching that work elsewhere can be dysfunctional in education that is expected to turn college graduates into lawyers.

The ABA accreditation standards and the AALS Bylaws combine to require that decisions about modality—the mode of teaching—need a law faculty's approval as a curricular matter if a course is to be taught in a mode different from the one the faculty had approved before the pandemic began. That is true regardless of whether a teaching modality is to be used permanently or temporarily. Both the ABA and the AALS make the law school responsible for the quality of education—not just for the long haul in a school's history, but in *every semester* of a student's education.

In a typical law school, nearly all courses have been approved by the faculty for genuine in-person instruction with all students in the classroom—the teaching modality in use for hundreds of years. A tiny number of courses, if any at all, might have been faculty-approved for fully online instruction in which no students would be in a classroom. But in a typical law school before the pandemic, no course had been approved by a faculty for the untested modality of

1. To be precise, law schools are accredited by the Council of the ABA Section of Legal Education and Admissions to the Bar.

simultaneous hybrid instruction, the faults of which are described in Part IV. If a course were to be taught that way, both the ABA and the AALS require that the decisions be made *inside* the law school, and the AALS additionally requires that the decisions be made by the law school's *faculty*—not made by administrators elsewhere and imposed on the law school.

This article is about governance—who has the authority to decide—not about what the decisions should be. I discuss simultaneous hybrid teaching only to explain what the choices have been. A faculty might decide to use it as a modality, despite its faults, because the faculty sees value in certain situations—for example, with first-year students in their first semester. Reasonable faculty members can have differing views on this, and I take no position on it.

This article is not about individual faculty members' academic freedom, although in some respects the pandemic does raise academic freedom issues (Parts V and VI). Nor is it about public health issues affecting faculty and involving, for example, the Americans with Disabilities Act and the Age Discrimination in Employment Act. These issues are being written about thoughtfully elsewhere.²

B. The Context: Pandemic Mortality

As of June 30, 2022 — when the pandemic has not yet ended — the number of people in the United States who have died of COVID-19 is *much more than the total of all the Americans who died in all the wars in the 20th century*.

2. See, for example, Gary J. Simson et al., *It's Alright, Ma, It's Life and Life Only: Are Colleges and Universities Legally Obligated during the Coronavirus Pandemic to Exempt High-Risk Faculty from In-Person Teaching Requirements?*, 48 PEPPERDINE L. REV. 649 (2021); Meera Deo, *Investigating Pandemic Effects in Legal Academia*, 89 FORD. L. REV. 2467 (2021); Catherine A. Sandoval et al., *Legal Education in the Era of COVID-19: Putting Health, Safety and Equity First*, 61 SANTA CLARA L. REV. 367 (2020).

Table 1³
COVID deaths Compared to Combat Deaths

U.S. deaths directly caused by COVID January 20, 2020, to June 30, 2022	U.S. deaths in combat or resulting from military service in the 20th Century
COVID (2020, 2021, 2022).....1,014,262	World War I (1917-1918).....116,516 World War II (1941-1945).....405,399 Korean War (1950-1953).....36,574 Vietnam War (1965-1975).....58,220 Gulf War (1991).....383
COVID.....1,014,262 deaths as of June 30, 2022..... 127 weeks	20th century wars.....617,092 deaths total duration..... 1,006 weeks

Not only has COVID killed more, but it has also killed at a faster rate. In World War 2, Americans died in combat or from military service at the rate of 2,111 per week. But Americans have died at almost *four times* that rate from Covid—7,978 deaths per week.

During the first ten months of 2021, COVID was leading cause of death among persons aged 45 to 54 years and the second leading cause of death among those aged 35 to 44 years.⁴

3. Left column: *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths (last visited June 30, 2022). Weeks measured from first reported U.S. case (Jan. 23, 2020). Right column: *America's Wars*, DEP'T OF VETERANS AFFS., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf. Weeks measured from declaration of war (WW1), first military action involving the U.S. (WW2, Korea, Gulf), or military action on which Congressional authorization was based (Vietnam, *Maddox* incident) to armistice or last U.S. military action.

The COVID column doesn't include deaths *indirectly* caused by COVID—for example, people who died of heart attacks because they couldn't be treated in time while hospital emergency rooms were filled with COVID patients.

4. Meredith S. Shiels et al., *Leading Causes of Death in the US During the COVID-19 Pandemic, March 2020 to October 2021*, JAMA INTERNAL MED. (July 5, 2022).

Table 2 shows the COVID timeline in the United States in the context of higher education.

Table 2⁵
March 2020 to June 2022

	Deaths added to CDC data that day	Total U.S. COVID deaths	Factual context
March 15, 2020	19	101	Most universities have pivoted online.
April 15, 2020	2,707	33,825	A month later.
May 24, 2020	814	100,413	Deaths pass 100,000.
June 22, 2020	431	122,724	The summer lull.
July 30, 2020	1,422	158,641	The summer surge.
August 20, 2020	996	181,016	Fall semesters beginning or about to begin.
November 4, 2020	1,308	240,223	Autumn surge begins. Continues into winter.
January 13, 2021	4,082	402,160	Peak of the winter surge.
February 25, 2021	2,936	520,326	Winter surge continuing.
July 5, 2021	107	605,168	The summer lull.
August 20, 2021	1,586	631,601	Fall semesters beginning or about to begin.
September 14, 2021	2,440	672,602	Early autumn surge.
February 1, 2022	4,230	896,201	Peak of the winter surge.
April 16, 2020	48	989,008	The spring lull.
June 30, 2022	487	1,014,262	Compare to June 22, 2020, and July 5, 2021.

California, Texas, and Florida are the largest states by population. California had two surges of deaths: Dec. 2020–March 2021 and Feb.–March 2022. Texas had four surges: July–Aug. 2020, Nov. 2020–Feb. 2021, Aug.–Nov. 2021, Jan.–March 2022. Florida also had four: July–Sept. 2020, Nov. 2020–Feb. 2021, July–Oct. 2021, Jan.–Feb. 2022.

The national COVID death rate is 305 per 100,000 population as of June 30, 2022. The death rate for every state is in Appendix A near the end of this article. The rates for the largest states are California (232), Texas (300), and Florida (353).

5. *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths. For the dates when universities went online in March 2020, Hannah Lu et al., *Are College Campuses Superspreaders? A Data-Driven Modeling Study*, 24 *COMPUT. METHODS IN BIOMECHANICS & BIOMEDICAL ENG'G* 1136 (2021), <https://www.tandfonline.com/doi/full/10.1080/10255842.2020.1869221>.

The highest COVID death rates are in Mississippi (421 per 100,000 population); Arizona (419); Alabama (403); West Virginia (394); Tennessee (391); Arkansas (384); and New Jersey (383).

The lowest COVID death rates are in Vermont (104); Hawaii (105); Utah (151); Alaska (171); Washington (174); Maine (180); Oregon (185); New Hampshire (190); and the District of Columbia (191).

The CDC reports deaths for New York City separately from the rest of New York State. The state data includes the suburban counties around New York City but excludes the city itself. The state's COVID death rate is 255. The city's death rate is 485. But half the city's deaths occurred at the beginning of the pandemic, in April and May 2020, when the city was national COVID epicenter. During those two months, one out of every five people in the United States who died of COVID died in New York City.

These numbers are limited to deaths. They don't include damage to the quality of life for survivors from the exacerbation of preexisting medical conditions or from the debilitating brain fog, fatigue, and neurological harm of long COVID.

C. Classrooms and COVID

We take air for granted because we can't see it even though we're immersed in it. Much of what floats in the air is as invisible as the air itself.

We are constantly aware of air's temperature. But we barely notice air's freshness or lack of it. Modern and modernized classroom buildings are designed to minimize the intrusion of outside air, which is usually colder or warmer than the narrow temperature range in which people feel comfortable. That is to reduce heating and air-conditioning costs and harm to the environment from coal-fired electrical-generating plants. In a modern or modernized public building, few or no windows can be opened, and heating and air conditioning systems mostly recirculate the air already in the building, introducing little, if any, outside air.

The more people in a room relative to the room's size, the more each person breathes air that has very recently been inside other people's lungs. *The New York Times* created a simulation dramatically illustrating this in a K12 classroom. A link to the simulation is in the footnote.⁶ You can see the breath of a single infected student quickly sending viral particles to every part of the room. The simulation shows the mitigation effects of opening a window,⁷ installing a fan

6. Nick Bartzokas et al., *Why Opening Windows is a Key to Reopening Schools*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/interactive/2021/02/26/science/reopen-schools-safety-ventilation.html?action=click&module=RelatedLinks&pgtype=Article>.

7. A colleague and I taught in the same classroom, he in fall 2021 and I in spring 2022. Each class had more than 90 students. Because humans exhale carbon dioxide, a room's CO₂ level is a rough way of measuring whether breathed air is being replaced with fresh air. We placed CO₂ monitors at the front of the room during a couple of his classes and a few of mine. During his classes, the CO₂ count rose steeply in the first five minutes and stayed in the 1,500 ppm range until after students had left the room. During my classes, the CO₂ count stayed in the 800 ppm range throughout. The monitors were at the front of the room. In the back wall of

in the window, and installing a portable HEPA-filtering air purifier in the room. Unless the room has all three of these, the air exhaled by the infected student continues to circulate and is breathed by others in the room.

The National Institute of Environmental Health Sciences, part of the federal government's National Institutes of Health, recommends that a room's ventilation accomplish "a minimum of 5–6 air changes per hour," which would "replace about 99% of the volume of air in an indoor space with fresh filtered or outdoor air every 45–60 minutes."⁸ That might seem like a lot. But after watching the *Times*' simulation, you might want air replacement to happen much more frequently in a classroom where you teach during the pandemic.

In many universities, none of these mitigation measures occurred. Portable HEPA-filtered air purifiers weren't purchased and installed. And ventilation couldn't be improved without replacing classroom windows and retrofitting entire HVAC systems, which would be colossally expensive and couldn't possibly be accomplished within weeks.⁹

II. How Law School Modality Decisions Were Made for Fall 2020

In September and October 2020, I gathered information from faculty members about what happened at forty-seven law schools, almost a quarter of the total number of schools accredited by the ABA. Responses fell into three patterns, summarized in Table 3. Details are in Appendix B at the end of this article. Schools are not identified by name.

this large classroom, two windows can be opened. The only variable is that my colleague did not open the windows, and I did. See Zhe Peng & Jose L. Jimenez, *Exhaled CO₂ as a COVID-19 Infection Risk Proxy for Different Indoor Environments and Activities*, 8 ENV'T. & SCI. TECH. LETTERS 392, <https://doi.org/10.1021/acs.estlett.1c00183>.

8. *Selection and Use of Portable Air Cleaners to Protect Workers from Exposure to SARS-CoV-2*, NAT'L INST. OF ENV'T HEALTH SCI., https://tools.niehs.nih.gov/wetp/public/hasl_get_blob.cfm?ID=13021.
9. Many universities bragged that they upgraded their HVAC systems by installing "hospital-grade" MERV-13 filters. A MERV number is just a measure of a filter's capabilities, like a car engine's horsepower number. A MERV-13 filter is more efficient than a MERV-12 filter. MERV-13 filters are the densest ones that won't damage a typical HVAC system. Although used in hospitals, MERV-13 filters can be purchased by consumers in sizes that fit in the slots where filters are supposed to be replaced several times a year in typical home air-conditioning systems. MERV-13s are in my home. In a public building, replacing the filters with MERV-13s would have been a wise improvement for indoor air quality long before the pandemic.

Table 3
Summary of Fall 2020 Modality Decision-Making at
Forty-Seven Law Schools¹⁰

# = 49	%	Types of school situations— grouped by responses from Appendix B
Group A 32 schools	68%	<ol style="list-style-type: none"> 1. Individual faculty decided for themselves. 2. Only volunteers taught in classrooms. 3. Decanal or other administrative decision based on or consistent with a faculty consensus (at most of these schools, all or nearly all classes were online). 4. Individual faculty were to be given choices, but the school went 100% online because of local community public health conditions.
Group B 6 schools	13%	<ol style="list-style-type: none"> 1. Decanal decisions with accommodations granted 2. Decanal authority exercised after consultation with faculty. 3. Faculty applied to teach remotely based on personal reasons, age, and family situations—applications usually approved.
Group C 9 schools	19%	<ol style="list-style-type: none"> 1. University pressured law school to require in-person teaching unless a teacher could justify remaining off-campus. 2. Imposition of simultaneous hybrid teaching over faculty wishes. 3. University said anyone without an ADA accommodation could be made to teach in person. 4. University and deans decided after accommodations based on personal and family situations—no faculty consultation. 5. University required as much in-person teaching as possible, using simultaneous hybrid, within public health requirements 6. University formula would have required significant percentage of in-person teaching, but the school went 100% online because of local community public health conditions.

In Table 3, the phrase “individual faculty decided for themselves” means that either (1) faculty stated individual preferences and were scheduled accordingly or (2) faculty who thought it unwise to teach in person had to state a reason but virtually every reason was accepted and all faculty who wanted to teach online did so.

Curricular decisions include *modality*—not only whether an offering is to be a casebook course, a writing course, a clinic, a simulation course, or a seminar, but also whether it is to be taught in person (the default) or online. In normal times, curricular decisions would be made in faculty meetings on the basis

10. For the meaning of “simultaneous hybrid,” see text *infra* at notes 49-58.

of committee reports. During the summer of 2020, that was impractical, and many schools' faculties made decisions through other processes, most often individually but also through informal consensus building.

In Group A (68% of the total), faculty had the primary role in making modality decisions, either individually or in collaboration with a dean's office, resulting in a consensus that equaled faculty approval, with no apparent interference from a university. The most common pattern was a school giving each faculty member the decision to choose the most appropriate modality for that faculty member's courses. In Group B (13%), faculty had a role but did not control the decisions. In Group C (1%), university administrators controlled the decisions.¹¹

At a number of schools, perhaps more so in Groups B and C, the burden of being in a classroom and teaching in a simultaneous hybrid modality has fallen disproportionately on faculty members who are not on tenure track. The consequences of that, and the memory of it, will be with us for a long time.

In November and December 2020, D. Benjamin Barros and Cameron M. Morrissey surveyed law school deans about their administrative experiences at that point in the pandemic. One of their questions was "If your law school is part of a university, how much freedom did the law school have to make its own decisions on whether to hold classes remotely?" Respondents were to choose a numerical point of a scale from zero to seven—the lower the number, the less freedom the dean had. Forty-one deans answered the question. Thirteen deans chose the number six or seven. Eighteen deans chose zero, one, or two.¹²

Two separate surveys—mine of faculty and Barros and Morrissey's of deans—show that a significant number of universities were interfering with law school curricular decisions.

Many faculty members have had strong reactions to the process through which these decisions were made. In some instances, the process has profoundly affected the relationship between faculties and their law schools and universities. At some schools, the relationship seems to have been strengthened through mutual respect and collaboration in a crisis. But at the minority of schools where faculty jurisdiction has been interfered with, the relationship seems to have been damaged, in some instances so deeply that it might not be repaired.

III. Why Some Universities Interfered with Faculty Governance

It is difficult at this moment to pin down the complete motivations behind what each individual university did. But there have been two patterns—one based on budget fears and assumptions and another separately based on political

11. The New York Times has a database showing the number of COVID-19 infections reported at nearly every university in the country. *Tracking the Coronavirus at US College and Universities*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html> (last updated Dec. 11, 2020).

12. D. Benjamin Barros & Cameron M. Morrissey, *A Survey of Law School Deans on the Impact of the COVID-19 Pandemic*, U. TOLEDO L. REV. 241, 246 (2021).

interference. Before discussing them, it is necessary to summarize the context created by the pandemic.

During the spring and summer of 2020, a number of scientific and mathematical studies predicted the campus outbreaks that occurred in the fall. Several of those studies, and the dates on which they became public, are listed in the footnote.¹³ They were reported, beginning in April, in the *Chronicle of Higher Education* and *Inside Higher Ed*.¹⁴ An additional and exhaustive study, published in July 2020 online in *JAMA Network*, equated a reliably, though not completely, safe campus reopening with COVID-testing every student every

13. Kim A Weeden & Benjamin Cornwell, *The Small World Network of College Classes: Implications for Epidemic Spread on a University Campus*, OSF, <https://osf.io/6kuet/> (created April 11, updated June 28); Benjamin Lopman et al., *A Model of COVID-19 Transmission and Control on University Campuses*, MEDRXIV (July 24), <https://www.medrxiv.org/content/10.1101/2020.06.23.20138677v3>; Philip T. Gressman & Jennifer R. Peck, *Simulating COVID-19 in a University Environment*, 328 MATHEMATICAL BIOSCIENCES 108436 (2020) (e-published Aug. 3, 2020); John M. Drake, *Scenario Analysis for an Outbreak of COVID-19 on a University Campus* (University of Georgia Working Paper, Aug. 15, 2020), <https://github.com/CEIDatUGA/covid-university-reopening/blob/master/manuscript.pdf>; Gavin Yamey & Rochelle P. Walensky, *Covid-19: Re-opening Universities Is High Risk*, BMJ (Sept. 1, 2020), <https://www.bmj.com/content/370/bmj.m3365>. In December 2020, Rochelle Walensky was selected by President-elect Biden to head the Centers for Disease Control and Prevention (CDC) and now serves as CDC director.
14. Among the earliest were Elizabeth Redden, *Degrees of Separation*, INSIDE HIGHER ED, (Apr. 14, 2020), <https://www.insidehighered.com/news/2020/04/14/sociologists-say-their-findings-student-interconnectedness-suggest-caution-needed>; Michael Vasquez & Francie Diep, *What Covid-19 Computer Models Are Telling Colleges About the Fall*, CHRON. OF HIGHER EDUC. (June 19, 2020), <https://www.chronicle.com/article/what-covid-19-computer-models-are-telling-colleges-about-the-fall>. Similar stories continued through the summer in the same publications and in the general media.

two days throughout the semester¹⁵—something so difficult that only a handful of colleges and universities came close to doing it.¹⁶

A. Budget Motivations

In a widely reported March 2020 survey of high school seniors who had planned to attend college, 17% said they were considering not enrolling full time for the 2020–2021 academic year, the most commonly voiced options being to enroll only part time or to take a gap year.¹⁷ At the same time, university administrators were hearing from current students unhappy with the quality of online instruction they had received in March and April, when entire faculties had to teach online without advance planning. Lawyers had seen class action opportunities, and some colleges and universities had been sued on the theory that students had paid for classroom-quality teaching and gotten less than what they were paying for.¹⁸

15. A. David Paltiel et al., *Assessment of SARS-CoV-2 Screening Strategies to Permit the Safe Reopening of College Campuses in the United States*, 3(7) JAMA e2016818 (July 31, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768923>; Amelia Nierenberg & Adam Pasick, *How to Return to Campus Safely: Test, Then Test Again*, N.Y. TIMES, Dec. 7, 2020, <https://www.nytimes.com/2020/12/07/us/college-campus-coronavirus-test-spring-semester.html> (“The most important [factor in campus safety] seems to be aggressive testing. Many colleges that ran their own testing programs successfully kept cases low; those that didn’t often became hot spots.”).

A study released on December 4, 2020, concluded that in fall 2020 infection rates did not correlate with the number of students on campus, the density of dorm occupancy, or whether instruction was “remote” or “hybrid.” Christopher W. Stubbs et al., *The Impacts of Testing Cadence, Mode of Instruction, and Student Density on Fall 2020 COVID-19 Rates on Campus*, MEDRxIV (Dec. 12, 2020), <https://www.medrxiv.org/content/10.1101/2020.12.08.20244574v1>. But those inferences are questionable because the sample of thirteen schools was unrepresentative of higher education nationally. They are all in Massachusetts and New York, where state governments had imposed strict requirements on the general population, bringing statewide infection rates well below the national average. Seven of the thirteen are among the wealthiest schools in the country and could spend money on general campus safety measures that more typical institutions could not afford. And the term “hybrid” has no statistically measurable basis. It is impossible to quantify the percentage of students who are actually in classrooms. See this article’s Part IV for why.

16. “[D]ata from more than 1,400 colleges . . . compiled by the College Crisis Initiative at Davidson College . . . show that more than 2 out of 3 colleges with in-person classes either have no clear testing plan or are testing only students who are at risk.” Elissa Nadworny & Sean McMin, *Even In COVID-19 Hot Spots, Many Colleges Aren’t Aggressively Testing Students*, NAT’L PUB. RADIO (Oct. 6, 2020), <https://www.npr.org/2020/10/06/919159473/even-in-covid-hot-spots-many-colleges-arent-aggressively-testing-students>.
17. Eric Hoover, *How Is Covid-19 Changing Prospective Students’ Plans? Here’s an Early Look*, CHRON. HIGHER EDUC. (Mar. 25, 2020), <https://www.chronicle.com/article/how-is-covid-19-changing-prospective-students-plans-heres-an-early-look/>.
18. Insisting on in-person instruction to avoid tuition lawsuits creates the risk of a different group of lawsuits from faculty, staff, and students who could become ill in connection with contagion clusters identifiable to a campus. It is unnecessary here to comment on what a university’s choice of which lawsuit risk to avoid reveals about the university itself. That is part of a broader question of what is revealed about a university and its administration by the way each of the pandemic-related risks has been ranked among university priorities.

A number of university administrators seem to have assumed that (1) many current and prospective students actually would not attend unless promised as much classroom teaching as possible and (2) this would be true everywhere in a university and not just in undergraduate departments. Both of these assumptions turned out to be wrong.

Even though 34% of colleges and universities began the fall 2020 semester or quickly went primarily online and another 10% did so fully online,¹⁹ total national undergraduate enrollment in the fall at four-year nonprofit colleges and universities, public and private collectively, fell less than 1% according to the National Student Clearinghouse Research Center, which collects a wide range of student data every year. The details are in Table 4 together with the law student enrollment statistics that law schools are required to report to the American Bar Association.²⁰

Table 4
Fall Semester Law School and University Enrollments, 2017 through 2020²¹

Fall	1st year J.D.	Total J.D.	Postgraduate at public & private nonprofit & % change from the preceding year	Undergraduate at public 4-yr institutions & % change from the preceding year	Undergraduate at private nonprofit 4-yr institutions & % change from the preceding year
2017	37,320	110,176	2,431,453 +0.3%	6,777,472 -0.2%	2,653,327 -0.9%
2018	38,390	111,561	2,513,558 +3.4%	6,757,862 -0.3%	2,680,946 +1.0%
2019	38,283	112,882	2,533,530 +0.8%	6,644,260 -1.7%	2,655,124 -1.0%

19. See *Here's Our List of Colleges' Reopening Models*, CHRON. HIGHER EDUC. (Oct. 1, 2020, 2:04 PM), <https://www.chronicle.com/search?q=Here%27s+Our+List+of+Colleges%27+Reopening+Models#nt=navsearch>.
20. In the background is a solidly based projection well known to university administrators but little known among faculties. Before the pandemic, higher education enrollment had been projected to fall precipitously after 2026 because of falling birthrates dating from the Great Recession that began in 2007. CHRON. HIGHER EDUC., *THE LOOMING ENROLLMENT CRISIS* (2019); NATHAN D. GRAWE, *DEMOGRAPHICS AND THE DEMAND FOR HIGHER EDUCATION* (2018). This cliff will hit law schools around 2029.
21. For J.D. enrollment statistics, see the ABA's *Standard 509 Information Report Data Overview* documents (most recently posted Dec. 15, 2021) at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2021/2021-509-enrollment-summary-report.pdf. For the other statistics in Table 4, see *Current Term Enrollment Estimates*, NAT'L STUDENT CLEARINGHOUSE RSCH. CTR. (most recently posted Jan. 13, 2022), <https://nscresearchcenter.org/current-term-enrollment-estimates/>. Click on the Past Report PDF links for fall semesters. See the Fall 2020 and Fall 2021 Reports' Table 3 and the Fall 2017 Report's Table 5.

2020	38,202	114,520	2,628,496 +3.7%	6,596,078 -0.7%	2,619,271 -1.4%
2021	42,718	117,501	2,638,595 +0.0%	6,344,722 -3.8%	2,560,584 -2.2%

In fall 2020, postgraduate enrollment *grew* by 3.7%. When postgraduate enrollment is added to the undergraduate numbers, total fall 2020 enrollment at four-year public and private nonprofit colleges and universities was almost exactly the same as it had been a year earlier, before the pandemic began: 11,832,914 (fall 2019) and 11,843,845 (fall 2020).²²

First-year J.D. enrollment was almost exactly the same in fall 2020 as it been in the two preceding years, and it grew in fall 2021. Total J.D. enrollment grew in fall 2020 and grew again in fall 2021. J.D. enrollment and post-graduate enrollment generally have been robust during the pandemic.

The most likely cause for undergraduate enrollment losses has nothing to do with classroom and online teaching. The pandemic left many families without financial resources to pay college costs. The unemployment rate nationally varied between 10.2% and 14.7% from April through July 2020²³—the months during which high school seniors make enrollment deposits and first-installment fall tuition payments are due for all students. Businesses were contracting, and many employees who still had jobs couldn't be sure that by fall they would still be working full time or at all. In ordinary times, college costs can have a staggering effect on a household budget. Committing to pay those costs during the pandemic might be far less than prudent in a family that is not affluent. A student who doesn't attend might mention lack of classroom teaching as a way of feeling less bad about a decision that is really financial.

22. The media reported that undergraduate enrollment fell 3.6% nationally in fall 2020. That percentage is higher than the one in Table 4 because it includes two-year associate degree community colleges, which lost 10.1% of their total enrollment, which is irrelevant to universities with law schools. It is troubling, however, for a separate reason: income inequality. Two-year associate degree community colleges have student bodies that are especially vulnerable in a weak economy, and those schools play a unique upward mobility role. An associate degree helps students, who are often employed while studying, move from poorly paid jobs requiring only a high school diploma into better-paying ones. Two-year community college enrollment has been falling for a long time, though not as dramatically as it did in 2020. In fall 2010, community colleges had 7,030,517 students. In fall 2019, enrollment was down to 5,368,470 students. In the pandemic fall semester of 2020, it was only 4,824,203. Whatever the causes for this long-term decline, accelerated in a pandemic year, community colleges have become substantially less able to help students and their families move upward from low-income jobs. See Lee Gardner, *How the Pandemic Worsened—and Highlighted—Community Colleges' Chronic Challenges*, CHRON. HIGHER EDUC. (Dec. 8, 2020), <https://www.chronicle.com/article/how-the-pandemic-worsened-and-highlighted-community-colleges-chronic-challenges>.

23. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS., https://data.bls.gov/timeseries/LNS14000000?years_option=all_years.

It was already obvious in the summer of 2020—when schools were deciding how teaching would occur in the fall—that law school enrollment would be steady or better. In a July 2020 survey of ninety-four law school admissions offices, 52% expected their first-year class enrolling in August to be about the same size as the one that enrolled in 2019, and 26% expected their 2020 first-year class to be larger than the year before.²⁴ There are also structural reasons for continuity inherent in the nature of law schools and their student bodies.

For students who are already in law school, there are strong incentives to stay there. It would be difficult for a law student to find any kind of career-consistent full-time employment while taking a year off during a pandemic. There is a risk that student loan repayments might be required during some of that year. At some schools, the student could lose a scholarship. Delaying admission to the bar by a year would also delay by a year the moment at which a law student begins earning a professional-level salary. There were additional—and obvious—incentives for a college senior to enroll in a law school. In 2020, college seniors were graduating into a bleak job market with high unemployment. Being out of school and unemployed can be a worse option than enrolling in law school and eventually earning a higher salary as a professional. And the immediate cost of legal education can seem bearable because limitations that restrict the size of federal student loans to undergraduate students don't apply to law and other postgraduate students.²⁵

Many universities suffered large financial losses during the pandemic. They have had to spend substantial amounts of money, not previously budgeted, on health measures to make campuses less dangerous. At most universities, revenue declined significantly,²⁶ and hundreds of thousands of university employees lost their jobs.²⁷ But, as the faculty at Johns Hopkins discovered, university claims of adversity shouldn't be taken at face value. There the faculty demanded and got a forensic audit of the university's finances. In April 2020, the university had projected a loss of \$51 million for the 2020 fiscal year. But the audit showed that the university eventually ended the fiscal year with a \$75 million surplus.²⁸

24. Karen Sloan, *Law Schools Expect Enrollments to Remain Steady Amid COVID-19*, LAW.COM (July 28, 2020 at 2:54 PM) <https://www.law.com/2020/07/28/law-schools-expect-enrollment-to-remain-steady-amid-covid-19/>.

25. *Federal Student Loans for College or Career School are an Investment in Your Future*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/understand-aid/types/loans>.

26. Paul N. Friga, *How Much Has Covid Cost Colleges? \$183 Billion*, CHRON. HIGHER EDUC. (Feb. 5, 2021), <https://www.chronicle.com/article/how-to-fight-covids-financial-crush>.

27. Dan Bauman, *The Pandemic Has Pushed Hundreds of Thousands of Workers Out of Higher Education*, CHRON. HIGHER EDUC. (Oct. 6, 2020), <https://www.chronicle.com/article/how-the-pandemic-has-shrunk-higher-educations-work-force>. Job losses fell disproportionately on staff, who are more ethnically diverse than faculty. "While workers of color represent just a quarter of higher ed's labor force . . . more than half the workers who lost jobs have been non-white." Dan Bauman, *Here's Who Was Hit Hardest by Higher Ed's Pandemic-Driven Job Losses*, CHRON. HIGHER EDUC. (April 19, 2021), <https://www.chronicle.com/article/heres-who-was-hit-hardest-by-higher-eds-pandemic-driven-job-losses>.

28. François Furstenberg, *The Era of Artificial Scarcity*, CHRON. HIGHER EDUC. (April 8, 2021),

Nor should claims of financial adversity be accepted without examining the pandemic's effect, if any, on the salaries and other compensation paid to a university's executives.²⁹ One would expect sacrifices to be shared by all.

Revenue from undergraduates comes mostly in three forms: tuition, dorm rent, and dining hall meals. Universities' promises of fall semester in-person teaching were intended to protect all three revenue streams. Dorm rent and dining hall revenue matter more than many faculties realize. If a school went 100% online in the fall semester, it might lose a relatively small fraction of its tuition revenue. But it would lose almost all its dorm rent and dining hall revenue because the only students on campus would be those who have special reasons for being there.³⁰ Because enrollments nationally did not fall, university-wide faculties that found themselves in classrooms turned out to be there in part so their universities could collect dorm rent and dining hall money from students who were on campus to attend those classes.³¹

<https://www.chronicle.com/article/the-era-of-artificial-scarcity>. "Irene Mulvey, president of the American Association of University Professors, . . . says that, while she understands that the pandemic has had financial impacts, they 'might not be as bad as some institutions want to claim, because they might want to use the crisis to make cuts they've wanted to make all along.'" Lee Gardner, *The Great Contraction: Cuts Alone Will Not Be Enough to Turn Colleges' Fortunes Around*, CHRON. HIGHER EDUC. (Feb. 15, 2021), <https://www.chronicle.com/article/the-great-contraction>.

29. *The Chronicle of Higher Education* publishes salary and other compensation paid to university presidents and other highly paid university executives. The data comes from the Forms 990 that colleges and universities are required to file with the Internal Revenue Service. Usually the *Chronicle* publishes the data about two years after colleges and universities are required to file the form, which itself is the year after the money is actually paid. The 2020 and 2021 data will thus be published in 2023 and 2024, respectively. Universities are capable of showing their Forms 990 directly to faculties although a university might not easily agree to do so, and interpreting a Form 990 requires some specialized accounting abilities. The *Chronicle* interprets the forms and publishes the data in a way that anyone can understand. The 2019 numbers are at Julia Piper and Brian O'Leary, *Executive Compensation at Public and Private Colleges*, CHRON. HIGHER EDUC. (Feb 15, 2022), https://www.chronicle.com/article/executive-compensation-at-public-and-private-colleges/#id=table_private_2019.
30. Audrey Williams June, *The Coronavirus Has Emptied Dorms and Dining Halls. Here's Why Refunds for Them Are a Tricky Calculation.*, CHRON. HIGHER EDUC. (April 10, 2020), <https://www.chronicle.com/article/the-coronavirus-has-emptied-dorms-and-dining-halls-heres-why-refunds-for-them-are-a-tricky-calculation/>.
31. Some, but not most, of the schools that went entirely online also voluntarily cut their own tuition revenue, typically by giving the entire student body a 10% discount. A school's decision to discount tuition might not be correlated to the size of its endowment. See, e.g., Lilah Burke, *Rebates and Reversals*, INSIDE HIGHER ED (July 24, 2020), <https://www.insidehighered.com/news/2020/07/24/some-colleges-discount-tuition-prices-online-fall> ("Nonselective institutions with small endowments may need to cut to remain competitive. . . . [W]ell-heeled universities would choose to discount tuition [out of] a mix of altruism and pressure from students); Danielle Douglas-Gabriel & Lauren Lumpkin, *Discount, Freeze or Increase? How Universities are Handling Tuition this Fall*, WASH. POST (July 31, 2020, 12:00 PM), https://www.washingtonpost.com/local/education/discount-freeze-or-increase-how-universities-are-handling-tuition-this-fall/2020/07/31/63d6fae6-ccf3-11ea-bc6a-6841b28d9093_story.html; Emma Kerr and Sarah Wood, *Colleges Giving Tuition Discounts*, U.S. NEWS (Jan. 5, 2022,

The budgetary reasons for forcing faculty to teach in classrooms are largely irrelevant to law schools. It was obvious during the summer of 2020 that national law school enrollment would not fall regardless of how classes were taught. Even if a law school was 100% online, a university would lose little or no dorm rent from absent law students. Law students typically live off campus anyway and have always done so. Losses from dining hall revenue would be tiny in relation to the whole, because law students living off campus typically don't eat three meals a day on campus. And law students aren't numerically a significant part of a university's student body.

B. Political Interference at Some State Universities

Barros and Morrissey's survey of deans included this question: "To what degree did you feel political pressure from public officials to hold classes in-person?" Of the 45 deans who answered the question, eight, all of them at public universities, "indicated a strong degree of political pressure to hold in-person classes."³²

This is a sample of the articles that appeared in the *Chronicle of Higher Education* and elsewhere in the media—

In opening their campuses this fall, the presidents of Iowa State University and the University of Iowa . . . have had to appease politicians and trustees who demand face-to-face instruction . . . The University of Iowa and Iowa State have become homes to some of the worst outbreaks of Covid-19 in the nation. . . . Faculty members at both universities say the staff and administration are doing their best but have their hands tied by a lack of support from Gov. Kim Reynolds . . . and pressure from members of the Board of Regents, who are appointed by the governor.³³

Table 5 shows the results of this type of political interference.

9:30 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/these-colleges-are-giving-tuition-discounts-this-fall>.

32. Barros & Morrissey, *supra* note 12, at 247-248. See Lindsay Ellis, *Colleges Pledged to Follow the Science. But Divides in Reopening Plans Reflected State Politics.*, CHRON. HIGHER EDUC. (Oct. 12, 2020), <https://www.chronicle.com/article/colleges-pledged-to-follow-the-science-but-divides-in-reopening-plans-reflected-state-politics>; *Has Reopening Become a Partisan Issue?* CHRON. HIGHER EDUC. (June 5, 2020), <https://www.chronicle.com/article/has-reopening-become-a-partisan-issue>.
33. Eric Kelderman, *Iowa Universities Are Caught Between Covid-19 and Politics*, CHRON. HIGHER EDUC. (Sept. 7, 2020), <https://www.chronicle.com/article/iowa-universities-are-caught-between-coronavirus-and-politics>.

Table 5
COVID Cases at Flagship Iowa Public Universities
and at Fully Online Universities of Comparable Size³⁴

	Fall 2020 opening status (Oct. 1, 2020)	COVID cases per thousand students (Dec. 11, 2020)	COVID cases (Dec. 11, 2020)	Size of student body
Iowa State Univ.	primarily in person	71.3	2496	34,992
Univ. of Iowa	primarily in person	98.0	3102	31,656
Drexel Univ.	fully online	4.3	106	24,634
George Wash. Univ.	fully online	7.8	221	28,172
Harvard Univ.	fully online	10.1	318	31,566
Johns Hopkins Univ.	fully online	30.6	799	26,152
Michigan State Univ.	fully online	46.7	2350	50,351
Univ. of Pennsylvania	fully online	41.8	1081	25,860

Except for Michigan State, all the non-Iowa universities in Table 5 are in older cities where a sizeable portion of the general population mingles daily on foot in public places and in public transportation—an environment in which COVID is easily spread. Those universities went fully online and limited their COVID cases. The Iowa universities did not, with consequences for their students, faculties, and staff.

High on-campus infection rates like the ones in Iowa also endangered local people in surrounding communities.³⁵ This is shown by the cell phone GPS

34. COVID-19 cases numbers are from *Tracking the Coronavirus at U.S. Colleges and Universities*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html>. Status and student body size are from *Here's Our List of Colleges' Reopening Models*, CHRON. HIGHER EDUC. (Oct. 1, 2020, 2:04 PM), <https://www.chronicle.com/article/heres-a-list-of-colleges-plans-for-reopening-in-the-fall/>. See also Emma Pettit, *Colleges Ask Professors to Return to the Classroom. Their Answer? That's Reckless*, CHRON. HIGHER EDUC. (Nov. 12, 2020), <https://www.chronicle.com/article/colleges-ask-professors-to-return-to-the-classroom-their-answer-thats-reckless>.
35. See Danielle Ivory, Robert Gebeloff & Sarah Mervosh, *Young People Have Less Covid-19 Risk, but in College Towns, Deaths Rose Fast*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/12/us/covid-colleges-nursing-homes.html>. But see Benjamin Schmidt, *Are College Students Killing Townies?*, CHRON. HIGHER EDUC. (Dec. 17, 2020), <https://www.chronicle.com/article/are-college-students-killing-townies>.

study³⁶—which discovered a correlation between the arrival of students for fall semester classroom instruction and the subsequent off-campus outbreaks among the local populations—as well as the La Crosse genomic sequencing study—which traced the routes of viral substrains that were introduced into communities by returning students and ended up in nursing homes.³⁷

Here is another example of political interference—

In Florida, . . . faculty unions at three public universities—the University of Central Florida, the University of Florida and Florida Atlantic University—are filing grievances against their institutions regarding in-person instruction. . . . Tom Auxter, associate professor of philosophy at [the University of] Florida, said the university appears to be bowing to political pressure from state lawmakers including . . . governor Ron DeSantis³⁸

And another—

In March, as the Covid-19 pandemic exploded globally, the Georgia Institute of Technology ordered an immediate campus shutdown. Classes switched to online instruction. Students moved out of their dorms. But the University System of Georgia objected. The state wanted Georgia Tech to suspend in-person classes

36. The sample covered the period from July 15 to September 13, 2020 and included 779 counties with one or more college or university campuses. Martin S. Andersen et al., *College Openings, Mobility, and the Incidence of COVID-19*, MEDRXIV (Sept. 23, 2020), <https://www.medrxiv.org/content/10.1101/2020.09.22.20196048v1>; Melissa Korn & Brianna Abbott, *Reopening Colleges Likely Fueled Covid-19 Significantly, Study Finds*, WALL ST. J. (Sept. 22, 2020, 10:52 AM), <https://www.wsj.com/articles/reopening-colleges-likely-fueled-covid-19-significantly-study-finds-11600776001> (The researchers “found little uptick in case counts for those communities where students moved back to be near campus, but were taking classes online. The biggest surge came near schools with in-person instruction, with particular spikes in places where students came from hot-spot zones elsewhere in the country”).
37. Lu et al., *supra* note 5; Craig Richmond et al., *SARS-CoV-2 Sequencing Reveals Rapid Transmission from College Student Clusters Resulting in Morbidity and Deaths in Vulnerable Populations*, RESEARCHGATE (Oct. 14, 2020), https://www.researchgate.net/publication/346221324_SARS-CoV-2_sequencing_reveals_rapid_transmission_from_college_student_clusters_resulting_in_morbidity_and_deaths_in_vulnerable_populations. See Francie Diep, *Where Campuses Reopened, Covid-19 Cases Spiked. Where Colleges Went Remote, They Declined*, CHRON. HIGHER EDUC. (Jan. 8, 2021), <https://www.chronicle.com/article/where-campuses-reopened-covid-19-cases-spiked-where-colleges-went-remote-they-declined>, and Danielle Ivory, Robert Gebeloff & Sarah Mervosh, *Young People Have Less Covid-19 Risk, but in College Towns, Deaths Rose Fast*, N.Y. TIMES (Dec. 12, 2020, updated March 2, 2021), <https://www.nytimes.com/2020/12/12/us/covid-colleges-nursing-homes.html>.
38. Colleen Flaherty, *Against Face-to-Face Teaching Mandates*, INSIDE HIGHER ED (Nov. 10, 2020), <https://www.insidehighered.com/news/2020/11/10/professors-fight-face-face-spring-teaching-mandates>. In January 2021, the University of Florida briefly installed “what critics called a ‘tattle’ button on the Gator Safe mobile app [allowing] students to report a ‘course concern’ if their professor changed a scheduled in-person class to online.” After outraged faculty complaints, “the university . . . removed the button from the app. Students can still report faculty members who reschedule a course, but they now must fill out a form to do so.” Michael Vasquez, *With Covid Cases High, U. of Florida Expands In-Person Classes Sixfold*, CHRON. HIGHER EDUC. (Jan. 19, 2021), <https://www.chronicle.com/article/with-covid-cases-high-u-of-florida-expands-in-person-classes-sixfold>

for only two weeks, delaying a final decision on the rest of the semester. The university's president, Ángel Cabrera, backed down

The state's higher-education system, with a Board of Regents appointed by its . . . governor, is noticeably hands-on in making decisions that affect its 26 institutions Critics fear that Georgia colleges are losing their independence, which potentially weakens the voice of faculty as well. And in the Covid-19 era, the stakes have grown higher, because university decisions now have life-or-death consequences.³⁹

These situations were straightforward and widely reported. But political influence can be more subtle. In a story titled *State Politics Influenced College Reopening Plans, Data Show*, a reporter for Inside Higher Ed quoted a professor of higher education and administration:

There are a lot of things about relationships between public institutions and political leaders and pressures that are not totally explicit and not completely happening in a public space A lot of the time, I think it's a complicated dance where institutional leaders are trying to guess at how their decisions are going to be interpreted and whether they will be rewarded or penalized for those decisions.⁴⁰

Because political interference can fly under the radar, we might never know the full extent of it.

Political interference on COVID issues is part of a larger picture and can't be appreciated without at least a glimpse at that larger picture. An example is the political interference in Florida that has put the state's public universities at risk of becoming unaccredited and their students at risk of becoming ineligible for federally subsidized student loans.

Florida universities are accredited by the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). In May 2021, SACSCOC sent a letter to the Florida university system's Board of Governors asking for information relevant to whether the process of appointing the president of Florida State University violated SACSCOC conflicts of interest rules.⁴¹ And in November 2021, after University of Florida administrators prohibited three

39. Michael Vasquez, *Georgia's Top-Down Management of Higher Ed Causes Covid-19 Chaos*, CHRON. HIGHER EDUC. (June 30, 2020), <https://www.chronicle.com/article/georgias-top-down-management-of-higher-ed-causes-covid-19-chaos>.

40. Madeline St. Amour, *Political Influence on Fall Plans*, INSIDE HIGHER ED (Sept. 3, 2020), <https://www.insidehighered.com/news/2020/09/03/state-politics-influenced-college-reopening-plans-data-show>.

41. Eric Kelderman, *"A Mandate for Musical Chairs": Florida Bill Would Require Colleges to Change Accreditors*, CHRON. HIGHER EDUC. (Feb. 4, 2022), <https://www.chronicle.com/article/a-mandate-for-musical-chairs-florida-bill-would-require-colleges-to-change-accreditors>; Emma Whitford, *Florida Could Make Switching Accreditors Mandatory*, INSIDE HIGHER ED (Feb. 11, 2022), <https://www.insidehighered.com/news/2022/02/11/florida-bill-would-require-colleges-change-accreditors>.

professors from testifying in a voting rights lawsuit, SACSCOC sent a letter to the University of Florida president asking for information relevant to whether SACSCOC's rules on academic freedom had been violated.⁴²

The Florida legislature's reaction was to enact in March 2022 a statute requiring every public university and college in the state to apply for institutional accreditation from an accreditor other than the current one, which is SACSCOC.⁴³ The statute also created a cause of action through which an accreditor could be liable for "liquidated damages" to a college or university "negatively impacted by retaliatory action" by the accreditor.⁴⁴

It's hard to imagine any new accreditor willing even to consider a university's application for accreditation where a decision on that application could expose the accreditor to potentially ruinous financial liability. The statute allows a university to continue with SACSCOC if no new accreditor is willing to grant accreditation. But SACSCOC itself would be exposed to the same liability and can on its own decide to withdraw entirely from accrediting state schools in Florida.

A student is eligible for federally subsidized student loans only if the student is enrolled in an accredited school.⁴⁵ If a university becomes unaccredited, its students become ineligible.⁴⁶ Federal law limits accreditor-shopping by universities. Unless a university complies with strict Department of Education requirements, its students can become ineligible for student loans while the university seeks a new accreditor even if there's no period during which the university is unaccredited.⁴⁷

42. Kelderman, *supra* note 41; Whitford, *supra* note 41; *U. of Florida's Accreditor Will Investigate Denial of Professors' Voting-Rights Testimony*, CHRON. HIGHER EDUC. (Nov. 1, 2021), <https://www.chronicle.com/article/u-of-floridas-accreditor-will-investigate-denial-of-professors-voting-rights-testimony>; Lindsay Ellis, *After Scathing Criticism, U. of Florida Will Let Professors Testify Against the State*, CHRON. HIGHER EDUC. (Nov. 5, 2021), <https://www.chronicle.com/article/after-scathing-criticism-u-of-florida-will-let-professors-testify-against-the-state>.

43. Fla. Stat. § 1008.47(2) (effective: April 19, 2022). The statute does not apply to programmatic accreditors such as the ABA for law schools. See text at notes 95-101 for the difference between institutional accreditors such as SACSCOC and programmatic accreditors such as the ABA.

44. Fla. Stat. § 1008.47(3). A Florida university wouldn't be able to go straight to court. Federal law requires that a university agree to arbitration first. 20 U.S.C. § 1099b(e).

45. 20 U.S.C. § 1001(a)(5); 20 U.S.C. § 1099b(j).

46. Because programmatic accreditors like the ABA are exempt from the Florida statute, a law school at a Florida public university could continue to be accredited by the ABA even if the law school's university loses its accreditation. If that happens, the law school's students would remain eligible for federal loans even if other students in the university are not. For student loan purposes, the law school's students would be on the same footing as students at free-standing law schools like Brooklyn and Southwestern, which are not part of a university.

47. 20 U.S.C. § 1099b(h); 34 C.F.R. § 600.11(a).

IV. Modalities: “In person,” Online, and Simultaneous Hybrid⁴⁸

In most of the country, genuine “in person” and “in a classroom” teaching ceased, in a pedagogical sense, in March 2020. Those two terms—“in person” and “in a classroom”—have been used for either of two reasons, only one of which is accurate.

In a public health sense, a class is “in person” or “in a classroom” if the teacher is in the physical presence of at least some students, creating a contagion risk. This usage is accurate. It also has nothing to do with pedagogy, curriculum, or method of instruction.

The other usage might be by those who have wanted faculty members to be physically present in classrooms. If teaching can be described as “in person” and “in a classroom,” the terms can be used to imply a familiar image—a teacher and all of a class’s students interacting together in one space, sharing the experience of learning. But in much of the country that did not happen even when a teacher was in a classroom. In this sense—the pedagogical one—the two terms have been used inaccurately. Sometimes they have been used by students and their families who had hoped for classroom-quality learning, had read or heard the terms being used by universities, and had an inaccurate impression of what would actually happen during the fall 2020 semester. They had gotten that impression because the terms were being used by some university administrators as branding language. The truth is that what faculty were doing was a primitive form of hybrid teaching—some students in the room and others elsewhere, connected via Zoom.⁴⁹

Hybrid education is a broad term. It means education that uses both in-class teaching and online teaching. Before 2020, *hybrid* typically meant that some material would be learned in a classroom and that other material would be learned separately online. In a hybrid degree program, some courses might be in a classroom and some courses might be online.⁵⁰ In a hybrid course, all the students might be in a classroom during part of the course, and all of them might be online during another part. The course would be structured so that all students would be in the classroom when in-class teaching would be more beneficial, and all students would be online when online teaching would be

48. For the record, I am not an advocate of online education generally, but I taught entirely online during 2020 and 2021. Some details are in note 121.

49. Webex might be used instead. But Zoom is more common, and for brevity, I’ll use the word Zoom to refer to any platform of the type.

50. At least nine law schools have part-time J.D. programs based on this model and were created before the pandemic: Dayton, Denver, Loyola (Chicago), Mitchell Hamline, New Hampshire, Seton Hall, Syracuse, Suffolk, and Touro. For a description of the Dayton and New Hampshire programs as well as the large amount of teaching and student effort involved in hybrid J.D. programs, the need to ensure that off-tenure-track faculty are treated fairly in workload distribution, and some of the methods used to require student engagement during asynchronous segments, see Lilah Burke, *Faculty and Pedagogy in the Hybrid J.D.*, INSIDE HIGHER ED (Oct. 2, 2019), <https://www.insidehighered.com/digital-learning/article/2019/10/02/how-instructors-have-shaped-curricula-two-hybrid-jd-programs>.

more beneficial. Before 2020, *hybrid* was not generally understood to mean teaching two groups of students simultaneously, some in the classroom while others are online.

Then suddenly, for public health reasons, millions of K-12, undergraduate, and postgraduate teachers had to start doing exactly that—presenting the same material both in person and online *simultaneously*—a modality with no name. During the pandemic, this has been called hybrid or HyFlex because both classrooms and the internet are involved. But to use either of these terms is to confuse what has been happening haphazardly with educational structures that took many years to design and have well-established track records. Eventually, the English language will settle on a word or phrase for the name for what millions of teachers had to do beginning in the fall of 2020. *Blended* has been used sometimes as an adjective. But it isn't a name, and merging it with *hybrid* as *blended hybrid* sounds like applying a kitchen appliance to a teaching method. *Simultaneous hybrid* does evoke an accurate image, and I'll use it here.

If a pure lecture course were taught in simultaneous hybrid—some students in the room physically and others via Zoom—the teacher would be lecturing to two passive audiences and need only remember to make sure that the Zoom students can see whatever the teacher writes on a board. In some undergraduate courses with large enrollments—courses where students learn only knowledge and are not learning intellectual and professional skills—pure lecture might be acceptable pedagogy.

But for more than a hundred years that has not been acceptable in legal education. Langdell started teaching from a casebook in 1870, and by the early twentieth century Socratic casebook teaching—interactive teaching—had become the national norm. Modern law school skills and writing classes are even more interactive. In-class interaction permeates legal education.

During the pandemic, the word *HyFlex* has been used inaccurately to refer to teaching to two audiences simultaneously. Sometimes the word has been used mistakenly out of sincere misunderstanding. At other times it has been misused as hype. HyFlex is short for Hybrid Flexible. A course does not become HyFlex just because a student has the flexibility to decide whether to attend class physically or via Zoom. There's a lot more to it than that.

HyFlex is a specific form of hybrid teaching developed by Brian Beatty and colleagues at San Francisco State University.⁵¹ “[S]tudents can take a HyFlex course in one of three ways: in-person synchronous, online synchronous, and online asynchronous [moving] back and forth between those modes throughout the duration of the course as it fits their needs and contexts.”⁵² EDUCAUSE, the higher education IT consortium, describes it this way:

51. HYBRID-FLEXIBLE COURSE DESIGN: IMPLEMENTING STUDENT-DIRECTED HYBRID CLASSES (Brian J. Beatty ed., 2019).
52. Kevin Gannon, *Our HyFlex Experiment: What's Worked and What Hasn't*, CHRON. HIGHER EDUC. (Oct. 26, 2020), <https://www.chronicle.com/article/our-hyflex-experiment-whats-worked-and-what-hasnt>.

Each class session and learning activity is offered in-person, synchronously online, and asynchronously [prerecorded] online. Students can decide—for each class or activity—how to participate

. . . The instructor develops the course, tools, and channels and organizes the curriculum to reflect that structure All of the educational resources must be online, and students typically participate in a chat space along with the live video of the session Sometimes a teaching assistant or a student in the class helps moderate the chat or other backchannels A key differentiator of HyFlex is the asynchronous option, which often requires significant faculty preparation to be equivalent to the other learning paths. *Simply streaming all F2F [face-to-face] classes, for instance, does not meet the definition of HyFlex*

Students who must work and/or take care of family can benefit from true HyFlex course designs because the asynchronous pathway can enable them to maintain progress toward their academic goals Meanwhile, HyFlex might not be the best fit for lab classes, *programs that require synchronous participation*, or certain disciplines⁵³

HyFlex wasn't designed to teach students how to think like professionals. It was developed to teach "graduate students in an educational-technology program," most of whom were "full-time educational professionals (i.e., they already had day jobs), and were pursuing graduate work from a variety of locations and experiences."⁵⁴ In other words, HyFlex was created for students who *already are professionals*.

In a thoughtful article in the Chronicle of Higher Education, Kevin Gannon, a history professor, describes many of HyFlex's characteristics—two of which would cause law faculties to reject it out of hand. One is the enormous effort needed to create—HyFlex veterans say "build"—a HyFlex course, which can't be done in a few weeks: "HyFlex courses are hard to build, and even harder to teach [and] in a Covid-19 semester, amid all the extra cognitive load involved for both instructors and students, the resources for doing so may simply not be available."⁵⁵ The other is that HyFlex is inappropriate for any type of intensively interactive teaching—in a law school or anywhere else. "It's no coincidence that faculty members who are finding HyFlex a difficult fit are those whose classes are either completely or mostly discussion-based"⁵⁶ Even in a big-investment form like HyFlex, pedagogical quality goes downhill fast the moment interactivity begins.

53. Natalie Milman et al., *7 Things You Should Know About the HyFlex Course Model*, EDUCAUSE (July 7, 2020), <https://library.educause.edu/resources/2020/7/7-things-you-should-know-about-the-hyflex-course-model> (emphasis added).

54. Gannon, *supra* note 52.

55. *Id.*

56. *Id.*

The widespread teaching that happened in higher education during 2020 and 2021 was not HyFlex. It was instead a primitive form of hybrid with one distinguishing characteristic: things are simultaneous. Neither of the following statements about a simultaneous hybrid course is significantly less true than the other:

A. This is an in-person course in which a portion of the students are online.

B. This is an online course in which a portion of the students are in a classroom.

The proportion of students in the classroom versus those online is not particularly relevant to quality. First, the teacher must accomplish the extraordinary feat of being equally effective to both groups of students simultaneously because neither group deserves worse treatment than the other. Second, techniques that work well for students who are physically present often don't work well for students who are online, and vice versa. If a teacher's effort is divided between two groups of students using inconsistent teaching techniques, students will get less regardless of where they are.⁵⁷

Simultaneous hybrid is neither fully in-person teaching nor fully online teaching.⁵⁸ It is a *third modality*.

V. Governance and Academic Freedom

These are different concepts, and for clarity I must explain the differences. This article analyzes only faculty governance concerning curriculum and methods of instruction. It does not analyze other governance issues or academic freedom issues, although academic freedom issues do arise in higher education's responses to the pandemic.

Throughout higher education there is an allocation of authority between faculty and administrators. Faculty generally have primary governance over academic policy. Administrators primarily govern the practicalities of running a university. The practicalities can be mundane. Or they can be profound—raising

57. Some schools put a great deal of effort and ingenuity into reducing simultaneous hybrid's disadvantages and getting as much value from it as possible. What those schools accomplished deserves to be understood and appreciated. I hope it will be through articles and professional conference presentations. Here I'm describing characteristics of the modality as it would be experienced in most law schools in typical situations.

58. See Alison Adams et al., *Open Letter from UF Faculty Against the Spring Plan*, IND. FLA. ALLIGATOR (Dec. 11, 2020), <https://www.alligator.org/article/2020/12/open-letter-from-uf-faculty-against-the-spring-plan> (citing approximately 200 faculty members: "[T]he reality is that our last-minute, improvised plan for undergraduate education [in the spring] semester will not provide the best, or even a sufficient, learning and teaching environment. . . . It is a last-minute, improvised, doubling-up of two classes in one, which will create harder learning environments than a typical face-to-face class or a typical online class").

This may be the general university experience, but there are exceptions. For an example of getting simultaneous hybrid to work in a Renaissance literature and art course and an advanced Italian grammar course. Deborah Parker, *An Essential Worker*, INSIDE HIGHER ED (Dec. 9, 2020), <https://www.insidehighered.com/advice/2020/12/09/professor-explains-why-she-chose-teach-person-semester-and-how-she-made-it-work>.

money, creating new departments, consolidating old ones, setting a vision for a university's future, for example.

Sometimes authority overlaps. A common example is that a faculty body makes an initial decision to grant tenure to a colleague, but that decision is technically a recommendation because it always needs approval by administrators—a dean or department chair, a provost, a university president, and ultimately a governing board. A candidate for tenure always needs both faculty approval and administrative approval.

A faculty's governance authority belongs to the faculty as a group. But a faculty member's academic freedom is individual and is divided into four categories.⁵⁹ One is the freedom to teach in the way the faculty member thinks best. The second is freedom to investigate and report the results, which academics often think of as freedom to research and publish, although that's an example rather than a definition. The third, sometimes called freedom of extramural communication,⁶⁰ is the freedom to speak and write for audiences outside the university without interference by the university. The fourth, sometimes called freedom of intramural communication,⁶¹ is the freedom to speak and write on internal university affairs, such as while participating in governance.

An example will illustrate where some of the dividing lines are.⁶² In a law school, the faculty, exercising its governance authority, defines a course and puts it into the curriculum. If you teach the course, you must teach it as the faculty has defined it. For example, if you teach Contracts, and if at your school the official course description summarizes what the faculty thinks it approved, you are required to teach it as described.⁶³ You are not free to omit a core contract concept like consideration even if you find its issues tedious. Unless your faculty has authorized teaching Contracts partially online (simultaneous hybrid) or fully online, you are not free to switch to Zoom whenever you'd like. The default everywhere is that all students must be in the room unless a faculty has authorized another modality.

For a moment let's assume that we are in normal times and nobody is thinking about online teaching. Your dean has authority to assign you to teach the

59. On academic freedom generally, see MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* (2009); RICHARD HOFSTADTER & WILLIAM P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955). For a careful analysis of the academic freedom case law by a large university's general counsel, see Frederick P. Schaffer, *A Guide to Academic Freedom*, O.J. COLLECTIVE BARGAINING ACAD. (2014), <https://thekeep.eiu.edu/jcba/volo/iss9/12/>.

60. FINKIN & POST, *supra* note 59, at 127.

61. FINKIN & POST, *supra* note 59, at 113.

62. For a less concrete discussion, see AM. ASS'N OF UNIV. PROFESSORS, *ON THE RELATION OF FACULTY GOVERNANCE TO ACADEMIC FREEDOM* (1994), <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom>.

63. See, e.g., *Riggin v. Bd. of Trs.*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (describing how a tenured faculty member fired for, among other offenses, failing to cover material listed in the school's official course description).

course even if you'd rather not; to schedule it at 8:00 a.m. even if you're not a morning person; and to schedule you into a room you despise. These are administrative practicalities and have nothing to do with the quality of education or academic policy. If you don't teach that course at that time and place, you commit insubordination.⁶⁴

Although you must teach the course as the faculty has defined it and at the time and place the administration has specified, you have academic freedom otherwise to teach as you wish.⁶⁵ During the scheduled class time, you own the room. You can teach the subject in whatever way you think best as long as you teach competently,⁶⁶ do nothing illegal, and don't abuse your students' academic freedom to learn.⁶⁷

64. For examples of tenured faculty members fired for insubordination, see *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558 (6th Cir. 2012) (refusing to teach an assigned course); *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004) (detailing among other offenses, ending a class a month before the semester ended); *Riggin v. Bd. of Trs.*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (detailing among other offenses, "frequently fail[ing] to meet classes as scheduled at the prescribed hour or for the prescribed length of time").
65. See, e.g., Am. Ass'n of Univ. Professors, *Statement on the Freedom to Teach* (Nov. 7, 2013), <https://www.aaup.org/news/statement-freedom-teach#.YqDAXqjMKUj>; AM. ASS'N OF UNIV. PROFESSORS, *FREEDOM IN THE CLASSROOM* (2007), <https://www.aaup.org/report/freedom-classroom>.
66. See, e.g., these cases where tenured faculty members were fired: *Agarwal v. Regents of the Univ. Minn.*, 788 F.2d 504, 506 (8th Cir. 1986) ("incompetent as a teacher, frequently harassing students," etc.); *King v. Univ. Minn.*, 774 F.2d 224, 225 (8th Cir. 1985) ("poor teaching performance, excessive unexcused absences from class, . . . low enrollment in his classes"); *Potemra v. Ping*, 462 F. Supp. 328, 330-31 (S.D. Ohio 1978) (detailing how faculty member was not responding to questions in class, criticizing students for asking questions, behaving belligerently to students, giving failing grades vindictively); *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218, 224 (E.D. N.C. 1976) ("a poor teacher . . . apparently unwilling to prepare for class; . . . difficulty interacting with [and] little interest in his students; . . . failed to keep office hours and to advise properly his students"); *Peterson v. N.D. Univ. Sys.*, 678 N.W.2d 163 (N.D. 2004) (revealing confidential information about a student to other students, ending a class a month before the semester ended, and ignoring student questions and individual student requests for assistance); *Riggin v. Bd. of Trs.*, 489 N.E.2d 616 (Ind. Ct. App. 1986) (teaching without adequate preparation, habitually discussing irrelevant material in class, failing to cover material listed in the school's official course description, canceling classes, and not keeping regular office hours).
67. Students have academic freedom, too. Academic freedom came into American higher education in the late 19th and early 20th centuries when our universities were modeling themselves on German universities, where academic freedom was recognized and protected. An American faculty member's academic freedom began as the German *Lehrfreiheit*, the teacher's freedom "to examine bodies of evidence and to report his findings in lecture or published form," or in other words "freedom of teaching and freedom of inquiry." HOFSTADTER & METZGER, *supra* note 59, at 386-87; FINKIN & POST, *supra* note 59, at 79. German universities also recognized *Lernfreiheit* – the student's academic freedom to learn in the student's own way. *Id.*; HOFSTADTER & METZGER, *supra* note 59, at 386-87. The German concept was much broader than a freedom to learn without hindrance or abuse. Although in the U.S. neither academics nor judges are in the habit of using the phrase *students' academic freedom*, the concept is deeply imbedded in our expectations of colleagues and in the law of higher education, as the cases in the preceding footnote illustrate.

This example involves only one of the four academic freedoms. The other three—freedom to investigate and report results, freedom to speak and write for an external audience, and freedom to speak and write internally while participating in governance—might be more likely to lead to disputes during a pandemic. But pandemic academic freedom issues would need exploration in depth elsewhere. Here I'm only explaining what governance is and the difference between governance issues and academic freedom issues.

VI. Some Terms of Art—and What They Really Mean

Sometimes conversations about governance and academic freedom can seem like the scene in *The Princess Bride* where, for the nth time, Vizzini exclaims “Inconceivable!” and Inigo Montoya, in puzzlement, says “You keep using that word. I do not think it means what you think it means.” Below are some terms that are sometimes spoken and written in universities without a full understanding of their meaning and in ways that imply that faculties have less authority than they actually do.

A. “Shared Governance”

Sometimes the term *shared governance* is used, perhaps with a hint of dismissiveness, as though administrators have real control over governance but out of noblesse oblige share some of it with faculty, in form though not really in substance. That is *not* what shared governance means.

Governance, wrote William G. Bowen and Eugene M. Tobin, is “simply the location and exercise of authority.”⁶⁸ They added that governance “is far from a static concept” and that “many intelligent people in the academy know very little about governance.”⁶⁹ During the pandemic, a number of law faculties might not have considered the full extent of their governance authority, which was often larger than they realized.

In 2003 the Center for Higher Education Policy Analysis, which is now the Pullias Center for Higher Education at the University of Southern California, surveyed 1610 administrators and 400 faculty members at a wide range of colleges and universities.⁷⁰ The 400 faculty members were all faculty senate presidents or other faculty with experience in governance issues. The administrators were provosts and academic vice presidents (411 respondents) and department chairs (1199). (The center characterized the 1199 department chairs as “faculty,” but that’s not accurate. A department chair is an administrator similar to a law school dean. Although neither a chair nor a dean is a university-wide administrator, both are subdivision administrators who answer to university administrators.)

68. WILLIAM G. BOWEN & EUGENE M. TOBIN, *LOCUS OF AUTHORITY* ix (2015). Bowen is a former president of Princeton University, and Tobin is a former president of Hamilton College.

69. *Id.*

70. WILLIAM G. TIERNEY & JAMES T. MINOR, *CENTER FOR HIGHER EDUCATION POLICY ANALYSIS, CHALLENGES FOR GOVERNANCE: A NATIONAL REPORT* (2003), <https://pullias.usc.edu/download/challenges-for-governance-a-national-report/>.

Even in this administrator-heavy population, only about a quarter (27%) thought that shared governance is hierarchical and that the real “authority remains with the senior administration and the board of trustees,” the only sharing being informational in that a faculty’s role is to be informed of the decisions being made and free to express views.

About half the respondents (47%) thought that shared governance means “fully collaborative decision-making”—a “collegial model”—in which “faculty and administration make decisions jointly and consensus is the goal.”

Another quarter (26%) thought that shared governance means a distribution of authority in which the “faculty have a right to make decisions in certain areas, and the administration and [governing] board in others.” In a formal sense, this is the model of shared governance required by the ABA Standards and the AALS Bylaws where law schools are concerned.

That is not to say that three-quarters of the respondents were wrong about their universities’ law schools. Actually, three-quarters of them might have been right. The “fully collaborative decision-making” model with jointly made decisions aimed at consensus (47%) by definition involves the faculty’s deferring to administrators’ expertise in some areas and administrators’ deferring to faculty expertise in others. That deference would make the “fully collaborative decision-making” model an emotionally intelligent way of accomplishing the substance of what the ABA and AALS formally require.

Other surveys were conducted in 2001 by Gerald Kaplan and in 2007 by William Cummings and Martin Finkelstein.⁷¹ The results were approximately consistent with the 2003 Center for Higher Education Policy Analysis survey.

The nationally authoritative document on shared governance—the 1966 Statement on Government of Colleges and Universities⁷²—is consistent with both the collaborative-decision-making and distribution-of-authority models of shared governance. It specifically rejects the hierarchical model. The 1966 Statement is treated as representing a consensus in higher education because it was the product of consultation among the American Association of University Professors (the AAUP), the American Council on Education (the ACE), and the Association of Governing Boards of Universities and Colleges (the AGB).⁷³ Because the AAUP was and still is the most committed of the three organizations, the document is often called the 1966 AAUP Statement on Government.

Beginning in the 1990s, it became no longer rare for university presidents to come from backgrounds other than academia. University governing boards began to include members who assume their roles to be like directors on the boards of corporations, and the AGB became somewhat ambivalent about

71. LARRY G. GERBER, *THE RISE AND DECLINE OF FACULTY GOVERNANCE: PROFESSIONALIZATION AND THE MODERN AMERICAN UNIVERSITY* 158–164 (2014).

72. AM. ASS’N OF UNIV. PROFESSORS, *STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES* (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities>.

73. GERBER, *supra* note 71, at 82, 95–100.

the 1966 Statement.⁷⁴ But the AGB continues to treat the 1966 Statement as authoritative. In 2017, it issued a Board of Directors' Statement on Shared Governance, which expresses a commitment to shared governance while also describing disappointments expressed by individual board members who seem not to have realized before going on university boards how much of their own personal effort and patience shared governance would require. Their surprise might be predictable. Corporate boards of directors are often under the impression that they don't share governance with employees.

In its final pages, the 2017 AGB Statement lists ten "Threshold Conditions for High-functioning Shared Governance." Here is the first one: "A shared commitment on the part of faculty, administration, and board members to the principles of shared governance, and a current, shared understanding among faculty, board, and president of what shared governance actually is and how it operates/functions/works in their institution." To that the AGB added this footnote: "Specific reference to the AAUP Statement on Government of Colleges and Universities in the institution's governing documents is an important foundation for this shared commitment."⁷⁵

Although college and university faculty authority might have shrunk on some types of issues, it has grown over the last 50 years regarding curriculum. The AAUP surveyed colleges and universities in 1971, 2001, and 2021⁷⁶ on several categories of governance issues, among them "institutional curriculum"⁷⁷ and "program curriculum."⁷⁸ The results are in Tables 6 and 7.

Table 6
Institutional Curriculum Authority

	Faculty dominance or primacy	Joint Action/Authority	Administrative dominance, primacy, discussion, or consultation
1971	41.1 %	38.7 %	20.2 %
2001	62.8 %	30.5 %	6.6 %
2021	60.1 %	25.5 %	14.4 %

74. *Id.* at 155-58.

75. ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, AGB BOARD OF DIRECTORS' STATEMENT ON SHARED GOVERNANCE 12 (2017), https://agb.org/wp-content/uploads/2019/01/2017_statement_sharedgovernance.pdf.

76. *The 2021 AAUP Shared Governance Survey: Findings on Faculty Roles by Decision-Making Areas*, BULL. OF THE AAUP, July 2021, at 82, 93, <https://www.aaup.org/sites/default/files/2021-AAUP-Shared-Governance-Survey-Findings-on-Faculty-Roles.pdf>.

77. "[G]eneral education, distribution requirements, minimum/maximum requirements in major, etc." *Id.* at 84.

78. "[A]pproval of individual courses and major/minor requirements." *Id.*

At doctoral-degree granting universities, the 2021 institutional curriculum authority results were somewhat different from colleges and universities in general (Table 6): 54% faculty dominance or primary; 28.5% joint; and 17.5% administrative. There was no significant difference among types of colleges and universities regarding program curriculum authority (Table 7).⁷⁹

Table 7
Program Curriculum Authority

	Faculty dominance or primacy	Joint Action/Authority	Administrative dominance, primacy, discussion, or consultation
1971	43.4 %	35.1 %	21.6 %
2001	54.2 %	38.8 %	9.0 %
2021	76.0 %	18.4 %	5.6 %

B. “A University’s Academic Freedom” and “Institutional Academic Freedom”

It is *not* true that a university has academic freedom that outranks the academic freedom of individual faculty members. The phrases *a university’s academic freedom* and *institutional academic freedom* have a precise legal meaning that has nothing to do with a university’s relationship with its faculty. The meaning instead concerns a university’s relationship with the outside world.

The two phrases refer to a university’s institutional autonomy, as in this oft-quoted sentence from Justice Powell’s 1978 opinion in *Regents of the University of California v. Bakke*, an affirmative action case: “The freedom of a university to make its own judgments as to education includes the selection of its student body.”⁸⁰ And this more recent one from *McAdams v. Marquette University*: “A university’s academic freedom is a shield against governmental interference”⁸¹ And, as Judge Posner put it in *Piarowski v. Illinois Community College Dist.* 515, the term academic freedom “is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy”⁸²

C. “Garcetti”

The Supreme Court decision in *Garcetti v. Ceballos*⁸³ does *not* mean that faculty in public universities have no protection against retaliation for what they say

79. *Id.* At 89-90.

80. 438 U.S. 265, 312.

81. 914 N.W.2d 708, 737 (Wis. 2018).

82. 759 F.2d 625, 629 (7th Cir. 1985).

83. 547 U.S. 410 (2006).

when participating in governance. In both public and private universities, participating in governance is protected as a form of academic freedom.⁸⁴

Gil Garcetti⁸⁵ was the district attorney for Los Angeles County when Richard Ceballos, a deputy district attorney, disagreed with some prosecutorial decisions and expressed his disagreement, to the annoyance of supervisors. Afterward Ceballos was reassigned unfavorably and denied a promotion. Relying on *Pickering v. Board of Education*, a 1968 Supreme Court case,⁸⁶ he sued, alleging a violation of his First Amendment rights. When *Garcetti v. Ceballos* reached the Supreme Court in 2006, the Court carved out an exception to the *Pickering* rule for job-related speech.

Both *Pickering* and Ceballos had complained about matters the public would care about. *Pickering*, a high school teacher, had complained publicly, in a letter to a newspaper, that his employer, a school board, had handled tax money badly. Ceballos had complained internally that a prosecution had been mishandled. It wasn't part of *Pickering's* job to comment on how tax money was spent. But it was part of Ceballos's job, as a deputy with some supervisory responsibilities, to comment on certain types of prosecutorial decisions made by others in the same office. The Court held that for that reason Ceballos's complaints were not protected by the First Amendment. "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁸⁷ In dissent, Justice Souter wrote: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'"⁸⁸

The Court's opinion was written by Justice Kennedy, who for twenty-three years, while in private practice and then while on the Ninth Circuit bench, had taught as an adjunct professor at McGeorge School of Law in Sacramento. Justice Kennedy inserted this comment into the Court's opinion: "Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value We need not, and . . . do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching,"⁸⁹ which are among the duties of public university faculties.

Since then, lower courts have declined to hold that *Garcetti* strips First Amendment protection from scholarship or teaching done by faculty in public univer-

84. See note 108, *infra* and accompanying text on how academic freedom is protected in law schools.

85. Gil Garcetti has not been the mayor of Los Angeles. That is Eric Garcetti, Gil's son.

86. 391 U.S. 563.

87. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

88. *Id.* at 438.

89. *Id.* at 425.

sities.⁹⁰ But some courts have held that intramural academic speech, including speech on governance issues, is no longer protected by the First Amendment.⁹¹

Garcetti arguably removed First Amendment protection from intramural speech, including speech while participating in governance.⁹² Private university faculty never had that protection in the first place, because retaliation by private university administrators is not state action. *Garcetti* did no more than put public and private university faculty on the same footing.

VII. ABA Standards and AALS Bylaws

The ABA Standards for Approval of Law Schools⁹³ and the AALS Bylaws⁹⁴ are separate sets of requirements. Nearly all law schools must satisfy both ABA accreditation allows a law school's graduates to sit for bar exams. An accredited school is expected to comply with the ABA Standards. An AALS member school is expected to comply with the AALS Bylaws and can be sanctioned under Bylaw 7-1 for noncompliance with the requirements of membership, which are in the Bylaws' Article 6.

An ABA accreditation site inspection is also an AALS membership site inspection. The ABA inspection team as a whole reports to the ABA on facts relevant to whether the school is in compliance with the ABA accreditation standards. The AALS designates one member of the ABA team to be the AALS reporter charged with submitting a similar report to the AALS on compliance with AALS requirements.

Governance and academic freedom are regulated by ABA Standards and by AALS Bylaws in ways that are specific to law schools. The governance requirements in law schools are not identical to those that apply elsewhere in a university. Sometimes university administrators are not especially aware of this, which is understandable, because they are responsible for large organizations in many of which the law school is a small part. But not being fully aware of something doesn't make it not true.

Less than full awareness at the university level might be attributable to the way universities and parts of universities are separately accredited. A univer-

90. *See, e.g.*, *Adams v. Trs. Univ. N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

91. At the appellate level, *see Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010); *Gorum v. Sessions*, 561 F.3d 179 (3d Cir. 2009); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012).

92. Ellen M. Babbitt et al., "Shared" Governance? *New Pressure Points in the Faculty/Institutional Relationship*, 41 J. COLL. & UNIV. L. 93, 99-101 (2015).

93. AM. BAR ASS'N, 2021-2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2021), https://www.americanbar.org/groups/legal_education/resources/standards/.

94. ASS'N AM, L. SCHS., BYLAWS (2022), <https://www.aals.org/about/handbook/bylaws/>.

sity as a whole is accredited by one of the six regional accreditors.⁹⁵ This is called *institutional* accreditation. Professional schools are separately subject to *programmatic* accreditation—law schools by the ABA, medical schools by the Liaison Committee on Medical Education (LCME),⁹⁶ architecture schools and departments by the National Architectural Accrediting Board (NAAB),⁹⁷ and so on. A university needs institutional accreditation. A professional school separately needs programmatic accreditation.⁹⁸ Unless a medical school has LCME accreditation, its graduates cannot be licensed to practice medicine. Unless an architecture school has NAAB accreditation, its graduates cannot become licensed architects. And unless a law school has ABA accreditation, its graduates, with few exceptions, cannot be admitted to the bar.

University administrators are well aware of the university-wide accreditation standards enforced by their university's regional institutional accreditor. But many are much less aware of a professional school's accreditation standards, which are specialized, often highly detailed, and specific to only one part of a university. A mid-sized university might include two or three dozen schools or departments accredited by different programmatic accreditors⁹⁹ while other parts of the university need no programmatic accreditation at all.

A law school dean might know a lot about the ABA Standards but little, if anything, about the standards enforced by the university's regional accreditor. A university president might know a lot about the university's regional accreditor's standards but little, if anything about the ABA Standards that govern the law school.

The ABA Standards include unusually strong governance requirements—much stronger than the requirements of any of the regional institutional accreditors. In

95. See PAUL L. GASTON, *HIGHER EDUCATION ACCREDITATION: HOW IT'S CHANGING, WHY IT MUST III-38* (2014). The six regional institutional accreditors are the Higher Learning Commission, <https://www.hlcommission.org/Policies/criteria-and-core-components.html>; the Middle States Commission on Higher Education, <https://www.msche.org/standards/>; the New England Association of Schools and Colleges, <https://www.neasc.org/overview/faq>; the Northwest Commission on Colleges and Universities, <https://www.nwccu.org/accreditation/standards-policies/standards/>; the Southern Association of Colleges and Schools Commission on Colleges, <https://sacscoc.org/accrediting-standards/>; and the WASC Senior Colleges and University Commission, <https://www.wscuc.org/resources/handbook-accreditation-2013/table-contents>. There is a seventh regional institutional accreditor—the Accrediting Commission for Community and Junior Colleges of the Western Association of Schools and Colleges—but it's irrelevant to universities with law schools.
96. Liaison Committee on Medical Education, *Standards, Publications, & Notification Forms* (2022), <https://lcme.org/publications/>.
97. National Architectural Accrediting Board, *2020 Conditions and Procedures* (2020), <https://www.naab.org/accreditation/conditions-and-procedures/>.
98. For the history of programmatic accreditation, sometimes called specialized accreditation, see GASTON, *supra* note 95, at 19-20 and 161-163.
99. For example, Northern Kentucky University has units answerable to 24 different programmatic accreditors, and the University of Cincinnati has units answerable to 24 programmatic accreditors, GASTON, *supra* note 95, at 154.

the past, the difference has created few issues. University administrators usually have better things to do than interfere with the way law students are taught. But at some universities, that has not been true during the COVID-19 pandemic.

Law schools and medical schools are also, as schools, members of organizations specific to their fields. Medical schools are members of the Association of American Medical Colleges.¹⁰⁰ Nearly all ABA-accredited law schools are members of the Association of American Law Schools.¹⁰¹ The AALS Bylaws include unusually strong requirements on law school governance.

VIII. A Law School's Authority over Methods of Instruction (ABA Standards and AALS Bylaws)

Under both the ABA Standards¹⁰² and the AALS Bylaws,¹⁰³ a university does not have primary authority over a law school's curriculum. The AALS requirements are explained a few paragraphs hence. The ABA requirements are explained here.

Under ABA Standard 201(a),

[t]he dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including *curriculum, methods of instruction* and evaluation, admissions policies and procedures, and academic standards.¹⁰⁴

100. AAMC, *Institutional Membership* (2022), <https://www.aamc.org/who-we-are/institutional-membership>.

101. The Association of American Law Schools, *Member Schools* (2022), <https://www.aals.org/member-schools/>.

102. AM. BAR ASS'N, 2021-2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2021), https://www.americanbar.org/groups/legal_education/resources/standards/.

103. ASS'N AM, L. SCHS., BYLAWS (2022), <https://www.aals.org/about/handbook/bylaws/>.

104. AM. BAR ASS'N, 2021-2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 201(a) (2021), https://www.americanbar.org/groups/legal_education/resources/standards/ (emphasis added). This is the Standards' plain wording and plain meaning. The ABA does not, however, make a law school's site inspection reports available to the public, and it is thus difficult to pin down exactly how the ABA enforces that plain wording and plain meaning.

Architecture's accreditor, the National Architectural Accrediting Board, does exactly the opposite. All its Visiting Team Reports are on the NAAB website at <https://www.naab.org/accredited-programs/visiting-team-reports/>. There you can read, for example, the 2021 report in which the NAAB found that the Cornell University Department of Architecture failed to satisfy five of the NAAB Conditions. The report identifies the Conditions and explains how the school didn't satisfy them. You can also read the 2021 report in which the Columbia University Graduate School of Architecture, Planning and Preservation failed to satisfy four of the NAAB Conditions. The report explains why and how. And you can read the 2018 Harvard University Graduate School of Design site visit report, which found that the school did nicely but still failed to satisfy one of the NAAB Conditions.

Medical schools are accredited by the Liaison Committee on Medical Education. The LCME doesn't treat its inspection reports as public documents, but the content seems to be accessible to researchers. For examples, see Dan Hunt et al., *The Variables That Lead to Severe Action Decisions by the Liaison Committee on Medical Education*, 91 ACAD. MED. 87 (2016), and Dan Hunt et al.,

The ABA's curricular requirements are in the Standards' Chapter 3, where many sentences begin "A law school shall" or "A law school may."

ABA Standard 201(d) requires that—

[t]he policies of a university that are applicable to a law school shall be consistent with the Standards. The law school shall have separate policies where necessary to ensure compliance with the Standards.

Thus under 201(d), a law school is out of compliance if its university does not respect the school's "authority" to determine, under 201(a), "curriculum [and] methods of instruction and evaluation."¹⁰⁵

IX. A Law Faculty's Authority over Methods of Instruction (AALS Bylaws)

The ABA Standards don't settle who in a law school makes these decisions. In Standard 201(a), quoted above, the dean and the faculty are both subjects of the sentence. The list includes matters that are plainly administrative, such as admissions procedures, and matters that are plainly pedagogical.

But AALS Bylaw § 6-5(a) does settle the matter by vesting curricular and modality jurisdiction in the faculty:

In keeping with the principles of shared governance of the American Association of University Professors, a member school shall vest in the faculty primary responsibility for determining academic policy.¹⁰⁶

The incorporation by reference is to the 1966 Statement on Government of Colleges and Universities, which is often called the AAUP Statement on Government, and where these are the most relevant sentences:

When an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.¹⁰⁷

Through the cross-reference, the phrase "academic policy" in AALS Bylaw § 6-5(a) means everything about academic policy listed in the AAUP Statement

The Unintended Consequences of Clarity: Reviewing the Actions of the Liaison Committee on Medical Education Before and After the Reformatting of Accreditation Standards, 87 ACAD. MED. 560 (2012). Researchers do not have access to ABA site inspection reports.

105. *Id.*

106. ASS'N AM. L. SCHS., BYLAWS (2022), <https://www.aals.org/about/handbook/bylaws/>.

107. AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities>.

on Government. Even in a university where the AAUP Statement on Government has been treated as exhortatory,¹⁰⁸ it is mandatory in the law school because it is incorporated by reference into the AALS Bylaws.

In the AAUP Statement on Government, after the second of the two sentences block-quoted above, is another sentence, which begins (italics added) “On these matters the *power of review* or *final decision* lodged in the governing board or delegated by it to the president should be exercised adversely *only in exceptional circumstances* and for *reasons communicated to the faculty*.” This sentence does not alter the analysis here. There are two reasons.

First, *exceptional* means exceptional. It doesn’t mean something about which administrators feel strongly. The COVID-19 pandemic might be an exceptional event. But nothing about a pandemic prevents a law faculty from making its own teaching modality decisions—which is proved by the fact that 70% of the faculties in Table 3 and Appendix B did exactly that. It is also proved by the additional facts that administrators’ fears about enrollment were exaggerated concerning undergraduate departments and are irrelevant to law schools, both of which are explained in detail in this article’s Part III.

Second, a university administrator has only the “power of review or final decision.”¹⁰⁹ That means power to review and confirm or reverse *a decision that*

108. The 1940 Statement of Principles on Academic Freedom and Tenure is mandatory throughout a university because nearly all universities have adopted it as policy, and it is typically part of a teacher’s employment contract just as faculty policies and manuals are. On the contractual relevance of the 1940 Statement, see, e.g., *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 680 (4th Cir. 1978) (“The Krotkoff-Goucher contract must be interpreted consistently with the understanding of the national academic community about tenure and financial exigency”). On faculty policies and manuals, see, e.g., *Saha v. Geo. Wash. Univ.*, 577 F. Supp. 2d 439, 442 (D.D.C. 2008) (“Plaintiff’s contractual relationship with the University appears to consist of only two documents: the Faculty Code and the Faculty Handbook”). In both respects, see cases cited by PHILIP LEE, *ACADEMIC FREEDOM AT AMERICAN UNIVERSITIES: CONSTITUTIONAL RIGHTS, PROFESSIONAL NORMS, AND CONTRACTUAL DUTIES* 122–123 (2014) and J. Royce Fichtner & Lou Ann Simpson, *Trimming the Deadwood: Removing Tenured Faculty for Cause*, 41 J. COLL. & UNIV. L. 25, 28–30 (2015).

In law schools, the 1940 Statement of Principles on Academic Freedom and Tenure is mandatory for an additional reason. ABA Standard 405(b) & Appendix 1 requires that a law school’s faculty have the academic freedom protections of the 1940 Statement or an equivalent. AM. BAR ASS’N, 2021-2022 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, APPENDIX 1: STATEMENT ON ACADEMIC FREEDOM AND TENURE (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-appendices.pdf. Law schools satisfy 405(b) through the 1940 Statement because their universities have already adopted it as binding policy.

109. Parallel language is in the 1994 AAUP Statement on the Relationship of Faculty Governance to Academic Freedom. AM. ASS’N OF UNIV. PROFESSORS, ON THE RELATIONSHIP OF FACULTY GOVERNANCE TO ACADEMIC FREEDOM (1994), <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom>.

Since such decisions as those involving choice of method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty

a faculty has already made. It is not administrative power to make the initial and only decision and force it on a law faculty that hasn't had an opportunity to decide anything.

The word *curriculum* and the phrase *methods of instruction* occur together in the ABA Standards and, through the AAUP cross-reference, in the AALS Bylaws. They aren't separate concepts. Modality decisions are inseparable from curricular content decisions.¹¹⁰

A subject matter course is added to the curriculum specifically as a casebook course or as a seminar. A skills course is added to the curriculum to be taught specifically in a simulation modality or specifically as a clinic. By default, a course is adopted to be taught in person unless a faculty makes a specific decision to authorize it through a different modality. These procedures are close to universal in law schools.

X. AAUP Investigations of University-Wide Governance Violations During the Pandemic

The AAUP issued a Guidance for Campus Operation During the Pandemic (2020),¹¹¹ in which these sentences appear:

In response to growing concern over unilateral actions taken by governing boards and administrations during the COVID-19 pandemic, the AAUP affirms that the fundamental principles and standards of academic governance remain applicable even in the current crisis.

competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters—that is, the administration should “concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.”

The words inside quotation marks are from the Statement on Government's section on faculty status decisions.

110. In legal education, one of the earliest jurisdictional issues over modality occurred in 1870 after Christopher Columbus Langdell walked into his Harvard Contracts class and broke precedent by asking incessant questions and declining to lecture. All but seven of the students stopped coming to class. The rest complained bitterly, as did alumni. The president of the university, Charles Eliot, met with the students, heard them out, and told them to go back to the law school and learn (Kimball's book suggests that Eliot trusted Langdell's methods *because* of the students' approval, not despite their disapproval). Eliot felt that Langdell knew more than he did about how to teach law. There were no ABA accreditation standards, and the AALS did not yet exist. During the following decades, Langdell so often asked students “Could you suggest a reason?” that the question became his trademark, and he asked it in a way that made many students deeply loyal to him. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 36, 52–55 (1983); BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 141–146 (2009); Samuel L. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437 (1906); William Schofield, *Christopher Columbus Langdell*, 55 AMER. L. REG. 273 (1907).
111. Am. Ass'n of Univ. Professors, *Pandemic Resources: Guidance for Campus Operation* (May 5, 2020), <https://www.aaup.org/issues/covid-19-pandemic/pandemic-resources-guidance-campus-operation>.

Some institutions have moved to a blended instructional model for the 2020–21 academic year. The appropriate faculty governance body and, when applicable, the faculty union should have primary responsibility for determining institutional policies and practices around this form of instruction

The AAUP also issued Principles and Standards for the COVID-19 Crisis (2020),¹¹² in which this appears:

Under the Statement on Government, decisions related to canceling classes, holding them online, altering the academic calendar, replacing letter grades with pass-fail or incomplete designations, or canceling final exams and papers fall within the faculty's area of primary responsibility. Even in areas where the faculty does not exercise primary authority—such as budgetary matters and long-range planning—the faculty still has the right, under principles of shared governance, to expect meaningful participation in the decision-making process. None of these decisions should be made unilaterally by administrations or governing boards.

The COVID-19 pandemic should not become the occasion for administrations to circumvent widely accepted principles of academic governance, as some faculty members have reported has happened at their institutions.

In June 2020, the AAUP Committee on College and University Governance issued Principles of Academic Governance during the COVID-19 Pandemic,¹¹³ in which this appears:

Under the [1966] Statement on Government, decisions to revise (even if only temporarily) tenure and promotion procedures and standards, to elect a preferred method of delivering courses, or to replace letter grades with pass-fail or incomplete designations fall within the faculty's area of primary responsibility. Even in areas in which the faculty does not exercise primary authority—such as whether and how to reopen campus, budgetary matters, and long-range planning—the faculty still has the right, under widely observed principles of academic governance, to participate meaningfully. No important institutional decision should be made unilaterally by administrations or governing boards.

In September 2020, the AAUP opened an investigation into seven (later eight) colleges and universities over alleged violations of basic governance principles

112. Am. Ass'n of Univ. Professors, *Pandemic Resources: FAQs on AAUP Principles and Standards*, (April 1, 2020), <https://www.aaup.org/issues/covid-19-pandemic/pandemic-resources-faqs-aaup-principles-and-standards>. On March 10, 2020, when campuses were just beginning to close, the AAUP issued a Statement on COVID-19 and the Faculty Role in Decision-Making, which was quickly overtaken by subsequent events in March and April. Am. Ass'n of Univ. Professors, *Statement on COVID-19 and the Faculty Role in Decision-Making* (March 10, 2020), <https://www.aaup.org/news/statement-covid-19-and-faculty-role-decision-making#.X8MoGbN7mcx>.
113. Am. Ass'n of Univ. Professors, *Principles of Academic Governance During the COVID-19 Pandemic* (June 28, 2020), <https://www.aaup.org/news/principles-academic-governance-during-covid-19-pandemic#.YqChL6jMKUk>.

during the pandemic.¹¹⁴ The AAUP does not have the ABA's enforcement power as an accrediting agency or the AALS's sanctioning power as an institutional membership organization. But the AAUP has a well-developed protocol for conducting investigations like this,¹¹⁵ and it has been doing them since 1930 on academic freedom issues. If a college or university is censured or sanctioned, it is listed on the AAUP's website as a censured or sanctioned school with a link to the AAUP's investigation report,¹¹⁶ which can have a predictable effect on the institution's reputation.

In May 2021, the AAUP issued a report detailing its investigating committee's findings about events at the eight colleges and universities.¹¹⁷ The report found that these schools were examples of widespread "opportunistic exploitations of catastrophic events" by administrators to erode faculty roles in governance, illustrated by the nationally reported statement, in a candid moment, by an administrator at a university that was not under investigation: "Never waste a good pandemic."¹¹⁸ The report concluded that the "COVID-19 pandemic has presented the most serious challenges to academic governance in the last fifty years."¹¹⁹ In June 2021, the AAUP put six of the eight schools on its list of sanctioned institutions.¹²⁰

The AAUP investigation and sanctions were mostly focused on the governance aspects of budget and job security issues—not on curricular questions at the level of how specific courses are to be taught.

XI. Law School Governance Throughout the Pandemic—and Afterward

During the pandemic, the real modality choice has been between online teaching and simultaneous hybrid teaching.¹²¹ A simultaneous hybrid modality

114. Am. Ass'n of Univ. Professors, *AAUP Launches a COVID-19 Governance Investigation* (Sept. 21, 2020), <https://www.aaup.org/media-release/aaup-launches-covid-19-governance-investigation#.YqCjvKjMKU1>. An eighth school was added in October.
115. *Standards for Investigations in the Area of College and University Governance*, Summer 2020 AAUP BULL. 18 (2020), <https://www.aaup.org/sites/default/files/StandardsforInvestigations2020.pdf>.
116. Am. Ass'n of Univ. Professors, *Censure List*, <https://www.aaup.org/our-programs/academic-freedom/censure-list> (last visited 7/5/2022); Am. Ass'n of Univ. Professors, *Sanctioned Institutions*, <https://www.aaup.org/our-work/shared-governance/sanctioned-institutions> (last visited 7/5/2022).
117. AM. ASS'N OF UNIV. PROFESSORS, SPECIAL REPORT: COVID-19 AND ACADEMIC GOVERNANCE (2021), <https://www.aaup.org/special-report-covid-19-and-academic-governance>.
118. *Id.* at 2. The administrator tried to walk back the comment after faculty at his school became outraged, but "to many faculty members the gaffe seemed to exemplify what in political circles is called saying the quiet part out loud." *Id.*
119. *Id.* at 34.
120. *Report of the Committee on College and University Governance, 2020–21*, BULLETIN OF THE AAUP (July 2021) at 104, <https://www.aaup.org/issue/summer-2021-bulletin>.
121. See Part IV, *supra*. To explain the pandemic governance issues, I have had to explain in the modality options available. For the record, I should describe briefly my own teaching experience during the pandemic.

requires specific faculty approval for at least two reasons. First, simultaneous hybrid teaching is partially online, and almost every course in a curriculum has been approved by default for exclusively in-person instruction. For reasons explained in Part IV, the fact that a portion of the learning happens in a classroom doesn't make a simultaneous hybrid course a classroom course.

The second reason is that simultaneous hybrid teaching is a separate and unique modality with features not found in pure in-person teaching and not found in pure online teaching. A simultaneous hybrid modality's merits and demerits might differ from one course to another, which only a faculty has the ability to judge.¹²² Despite simultaneous hybrid's faults, there might be reasons

From March 2020 through January 2022, I taught fully online. I'm not an advocate of online teaching, and I'm skeptical of claims made by its advocates although I'm more open-minded now than I had been.

One of my courses is Contracts. Most of the course works better in the classroom. But after the pandemic I'll still hold a few classes online. Using Zoom's screen-share I can put a difficult section of the Uniform Commercial Code or the Restatement on students' computer screens so we can dissect it. On a book page, UCC § 2-207, for example, can seem impenetrable. But in Word or WordPerfect on a computer screen, the words can come alive. What would § 2-207 look like if the words were to say what they really mean? Where are the gaps where courts have had to add meaning? Why are those gaps there? (This involves some UCC history.) What would § 2-207 look like if the gaps weren't there? Words come alive when they become untethered and can move. Students can learn how to interpret law by interrogating its wording aggressively.

One-to-one conversations with students work better online than in my office. As a student and later as a teacher, I found the best form of education to be the proverbial image of Horace Mann and a student, sitting on a log talking. In Zoom, the student and I are guests in each other's homes, which is as close as you can get to sitting on the log. In my office, students naturally assume the official student role. On Zoom, we're two human beings talking about problems and how to solve them.

I also teach a course called Drafting and Negotiating Contracts and Statutes. To my surprise, it's entirely more effective on Zoom than in a classroom. The quality difference is so thorough and so fundamental that in October 2020 my faculty approved a permanent conversion of the course so that it will be taught 100% online even after the pandemic ends.

Drafting can be taught better online because with screen-share the class can collectively draft and redraft contractual or statutory provisions. To students, this has a unique immediacy because they're in their workspaces at home where they do their own writing. On their screens during class nearly all the real estate is taken up by the provision being drafted or redrafted. As the group tries out ideas and makes decisions, with the teacher typing the words students want, the words appear and change on the screen where students are accustomed to seeing their own words while they write. To students, this doesn't feel like a classroom exercise. It feels real. They're experiencing and internalizing the process of writing.

Many aspects of negotiation can be taught better through Zoom. Lawyers now negotiate less in person and more by telephone and email, often with proposed documents as attachments. Teaching this process in a classroom is like using a beach as a place to teach opera singing. The venue undermines the skill being taught. For students to learn this kind of negotiation, nobody—not the teacher nor any of the students—should be in the same room as anyone else. The only effective venue is Zoom, with a few students' cameras turned off and with their emails and proposed documents on screen while the students negotiate.

122. In 1999, the AAUP issued a Statement on Online and Distance Education, in which this appears: "As with all other curricular matters, the faculty should have primary responsibility for determining the policies and practices of the institution in regard to distance education."

to use it in some instances—for example, in the fall semester of the first year, to help students form personal connections with teachers, other students, and the school. Only a faculty has the expertise to make an informed decision about this, which is what a faculty has the authority to do.

A faculty that has the authority to *permit* online teaching also has the authority to *require* it.¹²³ A faculty can require that online teaching—and no other modality—be used in every course. If a faculty believes that in some courses simultaneous hybrid's advantages outweigh its disadvantages, the faculty has the authority to require that every course be taught online with those specific exceptions. A faculty has the authority to make these decisions one semester at a time. And if a public health situation deteriorates to a point where the only way to deliver a quality education is to move courses online, a faculty has the authority to do that because a faculty has a responsibility to produce lawyers.

If, at a particular school, administrators have made decisions that properly belong to a faculty, a precedent has been set. The faculty might want to consider ways of making sure that that precedent doesn't become part of institutional memory, citable in future years to rationalize other intrusions on faculty governance.

Regardless of how decisions have been made, where a simultaneous hybrid modality has been used or where true in-person teaching has occurred during the pandemic, many faculty members who have taught that way have suffered

The rules governing distance education and its technologies should be approved by vote of the faculty concerned or of a representative faculty body, officially adopted by the appropriate authorities, and published and distributed to all concerned." AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON ONLINE AND DISTANCE EDUCATION (1999), <https://www.aaup.org/report/statement-online-and-distance-education>.

123. A faculty would need to satisfy ABA accreditation requirements.

Throughout the pandemic, the ABA has given variances to law schools to teach online as much as needed for public health reasons. In February 2022, the ABA decided that it would no longer require applications for those variances. They're automatic. The rules governing these variances are in the ABA's *Guidance Memo Regarding Continuation of COVID-19 Emergency Variances* (March 2022), https://www.americanbar.org/groups/legal_education/accreditation/consultants_memos/.

A variance exempts a school temporarily from requirements in the ABA Standards. In August 2020, the ABA "reserved and deleted" its Standard 306, which had governed "distance education courses"—courses where students are separated from teachers for more than one-third of the instructional time. Now (July 2022), the ABA is in the process of adopting a new Standard 306, setting out requirements for distance education courses, and amending Standard 311(e), which includes two limitations. One limits a student's total distance education courses to a maximum of one-third of the 83 credit hours required by the ABA to earn a J.D. The more practical way to express this rule, without changing the meaning, is that at least two-thirds of 83 credits must be earned in non-distance education courses. Many schools require more than 83 credits for graduation. The ABA requirement is two-thirds of 83. It isn't two-thirds of the graduation credits required by the school. The other limitation is that no more than "10 of those credit hours may be granted during the first one-third of a student's program of legal education."

Neither of these limitations apply to J.D. programs authorized to be taught predominantly online under Standard 105(a)(12)(ii), for example the special distance education J.D. programs at the schools listed in note 50, *supra*.

something like battle fatigue. Every time they went into a classroom, many of them showed—in a word I hope we remember for a very long time—courage.

Appendix A
Total Deaths per 100,000 Population by State as of June 30, 2022

Alabama	404	Montana	322
Alaska	171	Nebraska	224
Arizona	419	Nevada	359
Arkansas	384	New Hampshire	190
California	232	New Jersey	383
Colorado	222	New Mexico	379
Connecticut	310	New York (except NYC)	255
Delaware	306	New York City	485
District of Columbia	191	North Carolina	242
Florida	356	North Dakota	301
Georgia	363	Ohio	332
Hawaii	105	Oklahoma	366
Idaho	278	Oregon	185
Illinois	305	Pennsylvania	357
Indiana	355	Rhode Island	341
Iowa	307	South Carolina	350
Kansas	307	South Dakota	332
Kentucky	366	Tennessee	391
Louisiana	375	Texas	300
Maine	180	Utah	151
Maryland	245	Vermont	104
Massachusetts	304	Virginia	242
Michigan	370	Washington	174
Minnesota	233	West Virginia	394
Mississippi	421	Wisconsin	254
Missouri	338	Wyoming	317

Appendix B

Fall 2020 Modality Decision-Making at Forty-Seven Law Schools

Region abbreviations: NE=Northeast. MW=Midwest. S=South. W=West.

Milieu abbreviations:

Mega metro = metropolitan area population of 6 million or more.

Metro = 2 to 6 million.

Small metro = 500K to 2 million.

Small city/town = less than 500K

“Individual faculty decided for themselves” means that either—

(1) faculty stated individual preferences and were scheduled accordingly *or*

(2) faculty who thought it unwise to teach in person had to state a reason but virtually every reason was accepted and all faculty who preferred to teach online did so.

Clinics aren't included in these responses because they are more answerable to client needs, courts, and ethical obligations than to university administrators, who tend not to think of them as classroom courses, although that should not be taken to exclude the possibility that university interference might have occurred.

School (region)	Type	Milieu	Result & process
NE-1	private	mega metro	Individual faculty decided for themselves.
NE-2	private	mega metro	In-person sections taught by volunteers, including administrators.
NE-3	private	metro	Individual faculty decided for themselves—nearly all 1st-yr classes taught online.
NE-4	private	metro	Faculty applied to teach remotely based on personal reasons, age, and family situations—applications usually approved.
NE-5	private	metro	Faculty applied to teach remotely based on personal reasons, age, and family situations—applications usually approved.
NE-6	public	small city/ town	Faculty applied to teach remotely based on personal reasons, age, and family situations—applications usually approved.
NE-7	private	metro	Individual faculty decided for themselves—most 1st-yr classes taught online.
NE-8	private	mega metro	Decanal decision based on a faculty consensus—all classes taught online.
NE-9	private	mega metro	Dean granted all requests for remote teaching regardless of the reason. Most faculty teaching in person or simultaneous hybrid.
NE-10	public	mega metro	Individual faculty were given choices, but the school went 100% online because of local community public health conditions.

NE-11	public	mega metro	University almost entirely online. Administrative decision reflected widespread faculty consensus.
NE-12	public	mega metro	University almost entirely online. Administrative decision reflected widespread faculty consensus.
NE-13	private	metro	Administrative decision consistent with a faculty consensus—all classes taught online.
NE-14	private	mega metro	Administrative decision consistent with a faculty consensus—all classes taught online.
NE-15	private	mega metro	University decision to go online and simultaneous hybrid. Law school faculty met every week or every other week after March 2020 and fully supported the decisions.
NE-16	private	mega metro	Faculty and decanal consensus was that teaching would be online except for a few 1st-yr courses taught via simultaneous hybrid by volunteers, but the school went 100% online because of local community public health conditions.
NE-17	private	mega metro	Simultaneous hybrid sections taught by volunteers. All else online.
NE-18	private	mega metro	Decanal decision in consultation with individual faculty depending on the nature of the course and class size.
NE-19	private	small city/ town	Faculty voted to put all courses online. Overruled by the university, which required a simultaneous hybrid format instead although several upper-level courses went online.
NE-20	private	mega metro	University required that all courses be in-person, which became simultaneous hybrid because of COVID or COVID-exposed students. Classes with enrollment too large to fit in socially-distanced classrooms went online.
MW-1	public	metro	Individual faculty decided for themselves.
MW-2	public	small city/ town	Decanal decision based on faculty consensus, including many summer faculty meetings—all classes taught online only.
MW-3	public	metro	Individual faculty decided for themselves.
MW-4	public	small city/ town	Individual faculty decided for themselves.
MW-5	private	mega metro	No one teaching in person who doesn't want to.

MW-6	private	mega metro	University pressured school to require in-person teaching unless a teacher could justify remaining off-campus. Limited <u>decanal</u> amelioration.
MW-7	private	metro	Individual faculty decided for themselves.
S-1	public	small metro	Individual faculty decided for themselves.
S-2	public	small city/ town	Individual faculty decided for themselves.
S-3	private	small metro	University and deans decided after accommodations based on personal and family situations—no faculty consultation.
S-4	public	metro	Individual faculty decided for themselves.
S-5	private	small city/ town	Individual faculty decided for themselves.
S-6	private	small metro	Imposition of simultaneous hybrid teaching over faculty wishes.
S-7	public	mega metro	Individual faculty decided for themselves.
S-8	private	small city/ town	To be entirely online, a faculty member needed to get an ADA accommodation. Age treated as irrelevant. Policy created without faculty consultation.
S-9	public	small metro	Individual faculty decided for themselves.
S-10	private	metro	Individual faculty decided for themselves.
S-11	public	mega metro	Individual faculty decided for themselves.
S-12	public	small city/ town	University required as much in-person teaching as possible, using simultaneous hybrid, within public health requirements.
S-13	private	mega metro	Consultative decision-making. Several 1st-yr courses simultaneous hybrid. Others online.
W-1	public	small city/ town	Only volunteers teaching in person—nearly all courses taught online.
W-2	private	metro	Decanal decisions with accommodations granted.
W-3	public	small metro	University formula would have required significant percentage of in-person teaching, but the school went 100% online because of local community public health conditions.
W-4	public	small metro	Consultative decision-making. Several 1st-yr courses simultaneous hybrid. Nearly all others online.
W-5	public	metro	Individual faculty decided for themselves.

W-6	private	metro	Individual faculty were to be given choices, but the school went 100% online because of local community public health conditions.
W-7	public	mega metro	Formal and informal decanal/faculty conversations led to a consensus to go online. Decanal position that no teacher who felt that it would be unsafe would be compelled to go into a classroom.
W-8	private	mega metro	University said anyone without an ADA accommodation could be made to teach in person. Limited decanal amelioration.