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## DEREGULATION AND THE ‘GIG ACADEMY’

KAREN HALVERSON CROSS<sup>†</sup>

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### ABSTRACT

*For decades, colleges and universities in the U.S. have responded to increased competition, shrinking budgets, and other challenges by relying on growing numbers of part-time faculty. Scholars use the phrase “gig academy” to analogize higher education institutions and their growing reliance on adjunct faculty to the gig economy. This Article examines how the government and higher education accreditors have relaxed full-time faculty requirements at colleges and universities, failing to constrain a drastic increase of gig workers in academia. When evaluating institutional quality, accreditors and the federal government focus less on an institution’s faculty resources than on student outcomes, such as graduation and debt default rates. Although holding institutions*

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*accountable for student success is often appropriate, a negative consequence of this approach has been a lack of transparency and absence of public accountability regarding a college or university's investment in its faculty. The ABA, in contrast, maintains relatively strict full-time faculty requirements. But in response to pressure from the federal government, even the ABA has relaxed enforcement of these requirements over time. The Article argues that the ABA's strict rule-based approach may err on the side of raising educational costs but is preferable to reliance on vague standards. It also considers ways to improve public disclosure of higher education institutions' reliance on adjunct faculty.*

## I. INTRODUCTION

For decades, colleges and universities in the U.S. have responded to increased competition, shrinking budgets, and other challenges by relying on growing numbers of adjunct faculty.<sup>1</sup> Scholars use the phrase “gig academy” to analogize higher education institutions to the gig economy.<sup>2</sup> Traditional faculty roles of teaching and research have been unbundled, and part-time faculty are hired to do work more cheaply at the expense of student learning.<sup>3</sup> Like Uber drivers, adjunct faculty typically bear the costs of production associated with their work, including office space, computers, telephone, and internet, in addition to health insurance and other employee benefits.<sup>4</sup> The lack of security or regulatory control associated with these types of employment contracts undermines academic freedom and de-professionalizes faculty.<sup>5</sup>

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1. See *infra* Part II.A. This Article uses the terms “adjunct faculty” and “part-time faculty” interchangeably. It uses “full-time faculty” as the ABA Standards define the term: as a person whose “primary professional employment” is with the law school and who devotes “substantially all working time” during the academic year to faculty responsibilities (teaching, scholarship, and service). See *infra* note 131 and accompanying text.

In contrast, the U.S. Department of Education’s Integrated Postsecondary Education Data System (IPEDS) survey, which institutions must complete as a condition to remain eligible for student financial aid, leaves the differentiation between part-time and full-time faculty (“instructional staff”) to the reporting institution. *IPEDS Survey Components: Human Resources Glossary*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://nces.ed.gov/ipeds/use-the-data/survey-components/3/human-resources> [<http://web.archive.org/web/20210929210039/https://nces.ed.gov/ipeds/use-the-data/survey-components/3/human-resources>] (last visited Mar. 15, 2021).

2. See generally ADRIANNA KEZAR, TOM DEPAOLA, & DANIEL T. SCOTT, *THE GIG ACADEMY: MAPPING LABOR IN THE NEOLIBERAL UNIVERSITY* (2019).

3. *Id.* at 24 (restructuring has occurred in spite of its “documented negative effects on teaching and learning”).

4. *Id.* at 27.

5. GARY HALL, *THE UBERIFICATION OF THE UNIVERSITY* 20–22 (2016).

This Article examines how the government and higher education accreditors have relaxed full-time faculty requirements at colleges and universities, failing to constrain a drastic increase of gig workers in academia.<sup>6</sup> The basic purpose of accreditation is quality assurance,<sup>7</sup> not protecting faculty working conditions. But over-reliance on adjunct faculty can adversely affect institutional quality.<sup>8</sup> As the history of higher education accreditation suggests, the odds are low that an accrediting body would withhold approval from a college or university based solely on its over-reliance on adjunct faculty. When evaluating institutional quality, accreditors and the federal government focus less on an institution's faculty resources than on student outcomes, such as graduation and debt default rates. Although holding institutions accountable for student success is often appropriate,<sup>9</sup> a negative consequence of this approach has been a lack of transparency and absence of public accountability regarding a college or university's investment (or under-investment) in its faculty.

The Council of the American Bar Association (ABA) Section of Legal Education and Admissions to the Bar<sup>10</sup> maintains relatively strict full-time faculty requirements compared with those of other accreditors.<sup>11</sup> But in response to pressure from the U.S. Department of Justice (DOJ) and the U.S. Department of Education (DOE), even the ABA has relaxed its interpretation and enforcement of these requirements over time.<sup>12</sup>

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6. About half of college and university faculty (and 60% of law school faculty) are hired on a part-time basis. *See infra* note 16 and accompanying text and Appendix II. Since IPEDS leaves the definition of "full-time" and "part-time" faculty to the reporting institution, the figure for college and university faculty is an approximation. *Supra* note 1.

7. *See infra* notes 86–89 and accompanying text.

8. *See infra* Part II.B.

9. However, basing accountability on student outcomes may unfairly penalize certain institutions and should be approached carefully. *See infra* notes 116–117 and accompanying text.

10. The U.S. Department of Education recognizes the ABA Council as an accrediting body for purposes of eligibility for federal student financial aid. *Accreditation in the United States: Institutional Accrediting Agencies*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg6.html](https://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html) [[http://web.archive.org/web/20210922130757/https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg6.html](http://web.archive.org/web/20210922130757/https://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html)] (last visited Dec. 28, 2021).

11. *See infra* Part IV.A. This Article focuses on the ABA's full-time faculty requirements, contrasting them with other accreditation standards. It does not address the related issue of security of position for full-time faculty. But the ABA is also unique as an accrediting body in its requirements relating to security of position and tenure. The ABA requires institutions to adopt policies on academic freedom and tenure and to afford security of position similar to tenure for clinical faculty. For scholarship addressing the ABA's standards on security of position, *see infra* note 126.

12. *See infra* Part IV.B.

There is little scholarship addressing the faculty investments required of higher education institutions.<sup>13</sup> This Article argues that the ABA's rule-based approach may err on the side of raising educational costs but is preferable to reliance on vague standards. The Article also considers ways to improve public disclosure of higher education institutions' investments in full-time faculty. Part II addresses why over-reliance on part-time faculty should matter to accreditors. Part III provides background on higher education accreditation. Part IV discusses the evolution of the ABA's full-time faculty requirements and examines the ABA's shift away from vigorous enforcement of these requirements in response to pressure from the federal government. Part V contrasts the ABA's specific, full-time faculty requirements with those of other accrediting bodies and evaluates these differences based on the literature addressing rules versus standards. Part V also considers how accreditor disclosure requirements might better promote transparency and institutional accountability relating to full-time faculty adequacy.

## II. WHY RELIANCE ON PART-TIME FACULTY MATTERS FROM AN ACCREDITATION STANDPOINT

Similar to companies in other economic sectors, colleges and universities in the U.S. have responded to increased competition, shrinking budgets, and other challenges by relying on increasing numbers of contingent faculty. In 2016, close to three-quarters of higher education

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13. Gaston raises, but does not address in detail, whether accreditors should regulate an institution's heavy reliance on contingent faculty when it compromises educational quality. PAUL L. GASTON, *HIGHER EDUCATION ACCREDITATION: HOW IT'S CHANGING, WHY IT MUST* 65 (2014). Calls for accrediting bodies to address over-reliance on part-time faculty have been reported in the press. See Courtney Leatherman, *Do Accreditors Look the Other Way When Colleges Rely on Part-Timers?* CHRON. HIGHER EDUC. (Nov. 7, 1997), <https://www.chronicle.com/article/Do-Accreditors-Look-the-Other/101380> [<http://web.archive.org/web/20210929210432/https://www.chronicle.com/article/do-accreditors-look-the-other-way-when-colleges-rely-on-part-timers/>]; Peter Schmidt, *Accreditation Is Eyed as a Means to Aid Adjuncts*, CHRON. HIGHER EDUC. (Mar. 25, 2012), <https://www.chronicle.com/article/Accreditation-Is-Eyed-as-a/131292> [<http://web.archive.org/web/20210929210532/https://www.chronicle.com/article/accreditation-is-eyed-as-a-means-to-aid-adjuncts/>]. The American Association of University Professors (AAUP) has surveyed regional accreditors' rules on the use of part-time faculty. Earl Henry, *Looking the Other Way? Accreditation Standards and Part-Time Faculty*, AM. ASS'N UNIV. PROFESSORS, <https://www.aaup.org/AAUP/comm/rep/accredpt.htm> [<http://web.archive.org/web/20210930225530/https://www.aaup.org/AAUP/comm/rep/accredpt.htm>] (last visited Jun. 30, 2020). For a critique of the ABA accreditation standards (including their full-time faculty requirements) on grounds that they stifle competition, see Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035 (2001).

instructional faculty were in non-tenure-track positions.<sup>14</sup> Notably, a significant and growing share of higher education faculty are hired on a part-time basis. Part-time faculty made up under 22% of all higher education faculty in 1970.<sup>15</sup> By 2014, this percentage had increased to over 56% of all higher education faculty; reliance on part-time faculty was especially high in the community college (69%) and for-profit (84%) sectors.<sup>16</sup> Part-time faculty can be as effective in the classroom as full-time faculty. However, the terms of their employment are such that it is not realistic to expect part-time faculty to engage in student relationship building or to participate in the research or service work generally expected of full-time faculty. Similarly, due to the terms of their employment, part-time faculty typically are not capable of undertaking the substantial and ongoing work necessary to maintain and improve academic programs. Finally, heavy reliance on part-time faculty undermines academic freedom.

#### A. The “Gig Academy”

Over the past half-century, economic and social changes have created significant challenges for universities. These challenges include budget constraints (as costs rise and government support stagnates or declines), an increasingly competitive climate, demographic and technological changes, and public calls for accountability.<sup>17</sup> Institutions increasingly

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14. Relying on 2016 IPEDS data, the AAUP reported that 73% of instructional faculty in U.S. higher education institutions (including graduate assistants) were in non-tenure-track positions. *Data Snapshot: Contingent Faculty in US Higher Ed*, AM. ASS'N UNIV. PROFESSORS, (Oct. 11, 2018), <https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.XvJkned7k2x> [<http://web.archive.org/web/20210929210808/> <https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed>].

15. Relying on 1970 IPEDS data, Schuster and Finkelstein reported that 104,000 out of 474,000, or 21.9%, of all faculty in U.S. higher education institutions (not including graduate assistants) were in part-time positions. JACK H. SCHUSTER & MARTIN J. FINKELSTEIN, *THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS* 40–41 (2006).

16. *Number and Percentage Distribution of Instructional Staff at Title IV Degree-Granting Institutions Other than Medical Schools, By Sector of Institution and Employment Status: United States, Fall 2008, 2010, 2012, and 2014* (2017), NAT'L CTR. FOR EDUC. STAT., INTEGRATED POSTSECONDARY EDUC. DATA SYS. (2017), [https://nces.ed.gov/ipeds/Search?query=&query2=&resultType=all&page=1&sortBy=date\\_desc&sources=Tables%20Library&overlayTableId=12389](https://nces.ed.gov/ipeds/Search?query=&query2=&resultType=all&page=1&sortBy=date_desc&sources=Tables%20Library&overlayTableId=12389) [[https://web.archive.org/web/20220104143108/http://nces.ed.gov/ipeds/search/ViewTable?isOverlay=true&tableId=12389&\\_id=1641306667837](https://web.archive.org/web/20220104143108/http://nces.ed.gov/ipeds/search/ViewTable?isOverlay=true&tableId=12389&_id=1641306667837)]. The data excludes medical school instructional staff and graduate assistants.

17. JUDITH M. GAPPA ET AL., *RETHINKING FACULTY WORK: HIGHER EDUCATION'S STRATEGIC IMPERATIVE* 7–14 (2007).

respond to these challenges by relying on part-time and other non-tenure-track faculty.

Motives behind hiring adjunct faculty can be more complex than mere cost containment. Colleges and universities may hire part-time faculty to replace faculty on temporary leave, expand course offerings in areas subject to temporary increases in enrollment, or accommodate an expansion in remedial courses.<sup>18</sup> Institutions may also rely on adjunct faculty to enhance institutional flexibility and bring in experts who possess unique practical experience but would not be eligible for the tenure track.<sup>19</sup>

At the same time, institutions hire faculty on an adjunct basis for reasons of cost and convenience. Colleges and universities, even public ones, increasingly function less like social institutions and more like corporations subject to market pressures.<sup>20</sup> Thus, changes in faculty structure at colleges and universities mirror restructuring that has occurred in the broader economy in response to market competition and globalization. Higher education scholars invoke management theorist Charles Handy's concept of a shamrock organization, with one leaf—the managerial core—becoming an ever-smaller proportion of the workforce while the other two leaves—self-employed professionals and contingent workers—increase in number. Like shamrock organizations, college and university workforces are stratifying, with tenure-line faculty at the core.<sup>21</sup> The restructuring of labor in higher education institutions has been characterized as an “academic star system undergirded by a vast new ‘academic proletariat.’”<sup>22</sup> Kezar et al.'s characterization of higher education as the “gig academy” draws a similar analogy.<sup>23</sup> The point is that at many (perhaps most) institutions, reliance on part-time faculty has become more about cost containment than about filling a temporary curricular need or bringing a professional perspective to the classroom.

Indeed, adjunct faculty are utilized more heavily in some higher education sectors than others. Generally speaking, the less research-

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18. JOHN G. CROSS & EDIE N. GOLDENBERG, OFF TRACK PROFS: NONTENURED TEACHERS IN HIGHER EDUCATION 31 (2009).

19. ROGER G. BALDWIN & JAY L. CHRONISTER, TEACHING WITHOUT TENURE: POLICIES AND PRACTICES FOR A NEW ERA 128–29 (2002).

20. Patricia J. Gumpert, *Academic Restructuring: Organizational Change and Institutional Imperatives*, 39(1) HIGHER EDUC. 67, 70–71 (2000); Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J.L. & PUB. POL'Y 263, 301 (2007). For a case study of the corporatization of higher education, based on the University of Texas at Austin's closing of a student film program, see UNIVERSITY, INC. (Kyle Henry 1999), available at <http://vimeo.com/68909036> [<http://web.archive.org/web/20210414032859/https://vimeo.com/68909036>].

21. GAPPA ET AL., *supra* note 17, at 15.

22. SCHUSTER & FINKELSTEIN, *supra* note 15, at 340.

23. See *supra* notes 2–4 and accompanying text.

intensive the institution, the more heavily the institution tends to rely on part-time instructors.<sup>24</sup> As noted, reliance on part-time faculty is particularly pronounced in the community-college and for-profit sectors, where in 2014, 69% and 84% of the sector's faculty, respectively, were hired on a part-time basis.<sup>25</sup>

Institutions typically hire their adjunct faculty on a semester-to-semester basis, and often within a few weeks of the beginning of classes.<sup>26</sup> If the institution's scheduling needs change (*e.g.*, due to under-enrollment in a course), an adjunct may learn at the beginning of the semester that their course has been canceled, losing out on compensation for the time spent preparing to teach the course.<sup>27</sup> The median salary paid to adjunct faculty is about \$2,700 for a three-credit course,<sup>28</sup> and the vast majority of adjuncts do not have access to employer-sponsored health care or other benefits.<sup>29</sup> Adjunct faculty often are not provided an office, computer, or telephone to do their work.<sup>30</sup>

The uncertainty of employment and low pay associated with adjunct teaching may not be problematic for professionals who are teaching an occasional course on the side. But for faculty who rely on teaching as their principal means of making a living, adjunct working conditions can be exploitative. Childress describes an adjunct who, during one semester, taught four different writing-intensive courses to over 100 students at two different universities, both located over fifty miles from her home.<sup>31</sup> Since the pay was so low, the instructor picked up additional tutoring and freelancing jobs to make ends meet.<sup>32</sup> As of 2015, 31% of part-time faculty lived near or below the poverty line and 25% of families of part-time

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24. The AAUP's presentation of 2016 IPEDS data shows that a sector's share of part-time faculty as a percentage of all instructional faculty ranged from approximately 15% in Carnegie R1 institutions (doctoral universities with very high research activity) to almost 70% in the associates degree (community college) sector. The data do not differentiate for-profit institutions. AM. ASS'N UNIV. PROFESSORS, *supra* note 14.

25. *See supra* note 16 and accompanying text.

26. KEZAR ET AL., *supra* note 2, at 43.

27. *Id.* at 44.

28. HERB CHILDRESS, THE ADJUNCT UNDERCLASS: HOW AMERICA'S COLLEGES BETRAYED THEIR FACULTY, THEIR STUDENTS, AND THEIR MISSION 11 (2019).

29. KEZAR ET AL., *supra* note 2, at 45.

30. *See supra* note 4 and accompanying text.

31. CHILDRESS, *supra* note 28, at 3–4.

32. *Id.*



faculty either enrolled in public assistance programs or qualified for the Earned Income Tax Credit.<sup>33</sup>

It is not surprising that institutional reliance on part-time faculty, and the deterioration of faculty working conditions associated with this shift, has led to faculty unionization. Despite legal restrictions on college and university faculty's right to collectively bargain,<sup>34</sup> the level of unionized faculty in colleges and universities is significantly higher than that of other unionized employees in the U.S. workforce. Only 12% of the U.S. workforce was unionized in 2010,<sup>35</sup> compared with 27% of higher education faculty in 2012.<sup>36</sup> By 2012, the number of unionized faculty had

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33. Caroline Frederickson, *There Is No Excuse for How Universities Treat Adjuncts*, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/higher-education-college-adjunct-professor-salary/404461/> [<http://web.archive.org/web/20210924084813/https://www.theatlantic.com/business/archive/2015/09/higher-education-college-adjunct-professor-salary/404461/>]. Frederickson describes a homeless adjunct instructor who prepared courses in friends' apartments or her car, referring to her office as "the Pontiac Vibe parked on Stewart Avenue." *Id.*

34. In *N. L. R. B. v. Yeshiva Univ.*, 444 U.S. 672 (1980), the U.S. Supreme Court held that the National Labor Relations Act (NLRA) does not apply to faculty who exercise managerial authority within a university. Because of *Yeshiva*, most faculty at private higher education institutions are effectively excluded from the protections of the NLRA. But if contingent faculty lack the status and authority that tenure-line faculty enjoy, *Yeshiva* should not be a bar and thus the NLRA should apply. The irony is that, by giving greater authority (such as the right to participate in governance) to its part-time faculty, an institution can strengthen its legal challenge to unionization based on *Yeshiva*. William A. Herbert, *The Winds of Changes Shift: An Analysis of Recent Growth in Bargaining Units and Representation Efforts in Higher Education*, 8 J. COLLECTIVE BARGAINING ACAD. 1 (2016). In contrast, collective bargaining at public colleges and universities is governed by state law, not the NLRA, and thus is unaffected by the *Yeshiva* decision. Many public college and university faculty are unionized in states whose laws allow collective bargaining. For a listing of faculty collective bargaining units, see JOE BERRY & MICHELLE SAVARESE, *DIRECTORY OF U.S. FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUCATION* (2012).

As currently interpreted by the NLRB, the NLRA also does not protect faculty at religiously affiliated institutions. The NLRB recently held it lacked jurisdiction over religiously affiliated higher education institutions on First Amendment grounds. *Bethany Coll.*, 369 N.L.R.B. 98 (2020); see also *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020). This legal development has already affected faculty unions; in May 2020 the board of Saint Xavier University, an institution affiliated with the Catholic Church, announced it would no longer recognize its 40-year-old faculty union. Deanna Isaacs, *After 40 Years, Saint Xavier University Wipes Out Its Faculty Union*, CHI. READER (Jun. 10, 2020), <https://www.chicagoreader.com/chicago/after-40-years-saint-xavier-university-wipes-out-its-faculty-union/Content?oid=80559707> [<http://web.archive.org/web/20210929211331/https://chicagoreader.com/columns-opinion/after-40-years-saint-xavier-university-wipes-out-its-faculty-union/>].

35. Ann M. May et al., *Representation of Women Faculty at Public Research Universities: Do Unions Matter?*, 63 INDUS. & LAB. RELS. REV. 699, 703 (2010).

36. BERRY & SAVARESE, *supra* note 34, at vi.

increased by 14% from 2006.<sup>37</sup> Recent unionization drives have been particularly successful with adjunct and other non-tenure-track faculty. Of the thirty-one new collective bargaining units for higher education faculty certified in 2016, over 70% (twenty-two) were non-tenure-track faculty units, and of the non-tenure-track faculty units, twenty of them included part-time faculty; seven of the units were made up of only part-time faculty.<sup>38</sup>

As Kezar and co-authors warned, continued displacement of labor from higher education institutions threatens to undermine fundamental tenets of academia—tenure, shared governance, academic freedom, and the “public good function of the university.”<sup>39</sup> In response to this threat, they recommend focusing on various forms of collective action to democratize the academic workplace, including collectivist forms of unionizing,<sup>40</sup> advocacy alliances,<sup>41</sup> and expanded shared governance models that include contingent faculty.<sup>42</sup> They also recommend public interest bargaining, an approach to collective bargaining that focuses on addressing social interests in addition to party interests.<sup>43</sup> In the context of education, social interests are those of students and other stakeholders.<sup>44</sup> Examples of public interest bargaining in education include the Chicago Teachers’ Union strike campaigns focused on equity for students;<sup>45</sup> a graduate student union contract that includes benefits for students who do diversity and inclusion work;<sup>46</sup> and a course cancellation clause in an

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37. *Id.* at ix.

38. Herbert, *supra* note 34, at 2–8 (data compiled from Tables 1–4).

39. KEZAR ET AL., *supra* note 2, at 148–50.

40. *Id.* at 153–54.

41. *Id.* at 156–57. One example of an advocacy alliance is the New Faculty Majority. See NEW FACULTY MAJORITY, <http://www.newfacultymajority.info/> [<http://web.archive.org/web/20210929211448/http://www.newfacultymajority.info/>] (last visited Dec. 28, 2021).

42. KEZAR ET AL., *supra* note 2, at 158. The Association of Governing Boards of Universities and Colleges issued a statement on shared governance that expressly recognizes the need to include the voices of contingent faculty (as well as those of students and staff) when discussing important issues. *AGB Board of Directors’ Statement on Shared Governance*, AGB (Oct. 10, 2017), <https://agb.org/agb-statements/agb-board-of-directors-statement-on-shared-governance/> [<https://web.archive.org/web/20210930195541/https://agb.org/agb-statements/agb-board-of-directors-statement-on-shared-governance/>].

43. KEZAR ET AL., *supra* note 2, at 154–56.

44. Gary Rhoades, *What Are We Negotiating For? Public Interest Bargaining*, 7 J. COLLECTIVE BARGAINING ACAD. 2 (2015).

45. Jackson Potter, *What Other Unions Can Learn from the Historic Gains We Won in the Chicago Teachers Strike*, IN THESE TIMES BLOG (Nov. 26, 2019, 6:08 PM), <http://inthesetimes.com/working/entry/22187/chicago-teachers-strike-2019-labor-victory> [<http://web.archive.org/web/20210506025500/https://inthesetimes.com/article/chicago-teachers-strike-2019-labor-victory>].

46. KEZAR ET AL., *supra* note 2, at 134.

adjunct faculty union contract that takes into account the interests of students enrolled in the cancelled course.<sup>47</sup>

This Article evaluates higher education accreditation and its influence on the disinvestment by U.S. colleges and universities in their faculty. As discussed in Part III, accrediting bodies tend to focus on student *outcomes* as opposed to institutional *inputs*; this focus allows colleges and universities relatively free rein to hire few (or potentially no) full-time faculty members. Although ABA standards are unique in requiring a minimum threshold of full-time faculty, the ABA has relaxed enforcement of its requirements in response to government pressure.

### *B. Effect of Full-Time Faculty Adequacy on Program Quality*

The previous section addresses how adjunct working conditions can exploit faculty. But substantial research has also shown that adjunct working conditions can adversely affect educational quality, principally because the lack of resources, support, and job security provided to adjuncts tends to deny them the opportunity to be fully available to students. Adjuncts often lack a space in which to store their belongings while on campus, not to mention a private space in which to meet with students.<sup>48</sup> At one public university the “bullpen” was a common room where instructors met with students; if an instructor’s office hours were scheduled at a peak time, spare seats in the bullpen were difficult to find.<sup>49</sup> Adjuncts are not compensated for extra time spent meeting with students outside of class, and their low pay and long hours can lead to burnout. Institutions tend not to provide orientation, mentoring, or professional development to their adjuncts, or to evaluate their teaching.<sup>50</sup> Referring to the conditions<sup>51</sup> adjuncts must work under, Childress concluded:

This is not a recipe for the attentive, patient mentoring of young minds. These are not working conditions that allow for either student or instructor to explore promising side roads, to make false

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47. Rhoades, *supra* note 44, at 5.

48. Frederickson, *supra* note 33, at para. 20.

49. *Id.*

50. KEZAR ET AL., *supra* note 2, at 99–100; *see also* Donald G. Hackmann & Martha M. McCarthy, *What Constitutes a Critical Mass? An Investigation of Faculty Staffing Patterns in Educational Leadership Programs*, 8(1) J. RES. ON LEADERSHIP EDUC. 5, 10 (2013) (over a third of adjuncts developed their syllabi without faculty guidance and fewer than a fifth of them were formally evaluated).

51. *See supra* notes 31, 32, and accompanying text.

starts that later pay off in surprising ways. This is simply the provision of a product at lowest cost.<sup>52</sup>

The point is not that adjuncts lack ability—unlike tenure-track faculty, adjuncts, like other non-tenure-track faculty, tend to be hired specifically to teach. Rather, the conditions of adjunct faculty employment tend to limit what they can offer students in the way of relationship building.<sup>53</sup>

The unsupported and insecure nature of their employment also adversely affects adjuncts' pedagogy and grading practices. Analyzing responses from a national survey of higher education instructional faculty, Baldwin and Wawrzynski found that part-time faculty were less likely than full-time faculty to employ learning-centered strategies in their teaching.<sup>54</sup> They also found part-time faculty to be significantly less likely than full-time faculty to use technology (websites and email) to communicate and interact with their students.<sup>55</sup> The authors concluded that the “fault lines” in teaching practices revealed by their research were principally between part-time and full-time faculty, as opposed to contingent and tenure-track faculty, giving “compelling reasons for concern” over increasing reliance on part-time faculty in higher education.<sup>56</sup> Additionally, institutions tend not to utilize multiple methods of assessing adjuncts' teaching, instead relying solely on student evaluations.<sup>57</sup> These conditions give adjuncts a strong incentive to “grade to please”; their lack of job security may make them less inclined to challenge students with unpopular views during class discussion, or to assign them low grades.<sup>58</sup>

Numerous studies document how faculty-student interaction promotes positive learning and student development.<sup>59</sup> The more contact students

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52. CHILDRESS, *supra* note 28, at 4.

53. *Id.* at 21.

54. Roger G. Baldwin & Matthew R. Wawrzynski, *Contingent Faculty as Teachers: What We Know; What We Need to Know*, 55(11) AM. BEHAV. SCIENTIST 1485, 1494 (2011). Learning-centered strategies refers to pedagogies that are more active, collaborative, and promoting of faculty-student contact. *Id.* at 1487. The study measured this by defining use of the following techniques as learning centered: essay (not short answer or multiple choice) exams, student evaluations of each other's work, research papers, group projects, oral presentations, or submitting multiple drafts of written work. *Id.* at 1492. Differences in the use of teaching strategies among faculty appointment types were not significant in a few academic fields, namely accounting and finance. *Id.* at 1494.

55. *Id.* at 1494.

56. *Id.* at 1503–05.

57. Frederickson, *supra* note 33, at 26–27.

58. *Id.*

59. KEZAR ET AL., *supra* note 2, at 111–17.

have with their faculty, the greater the developmental benefit.<sup>60</sup> Although all faculty-student contact is beneficial, more meaningful contacts made in an academic context (supervised internships, faculty-moderated discussions, or capstone experiences, as opposed to informal social contacts) are particularly important, and can incentivize students to pursue subsequent valuable opportunities during college.<sup>61</sup> Interactions with faculty are especially important for first generation, underrepresented minority, and low-income students; faculty interactions incentivize these students to better engage and work harder.<sup>62</sup>

Developing meaningful student-faculty relationships is particularly important during the first year of college, when experiences most strongly influence student learning and persistence.<sup>63</sup> During this time, students are looking for signals from faculty to guide them. If students' early experiences are with faculty who are unable to develop meaningful contacts with them, students are not as likely to seek out faculty later in their college careers.<sup>64</sup> Yet it is first-year courses that adjunct faculty typically teach.<sup>65</sup> Higher education institutions tend to assign adjuncts to teach the introductory, freshmen writing, or remedial education courses.<sup>66</sup> Tenure-track faculty generally teach more specialized and advanced courses that serve the majors, leaving lower-level, core courses to the part-time faculty and graduate assistants.<sup>67</sup> Based on enrollment records of thousands of public university students over a four-year period, one study found that first-year freshmen had taken an average of 48% of their first-semester coursework from part-time faculty.<sup>68</sup>

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60. George D. Kuh & Shouping Hu, *The Effects of Student-Faculty Interaction in the 1990s*, 24(3) REV. HIGHER EDUC. 309, 309 (2001) (citing studies).

61. *Id.* at 329.

62. KEZAR ET AL., *supra* note 2, at 114.

63. Robert D. Reason et al., *Developing Social and Personal Competence in the First Year of College*, 30(3) REV. HIGHER EDUC. 271, 274 (2007). Analyzing National Survey of Student Engagement data, this study found a statistically significant relationship between first-year college student perceptions of the supportiveness of their institutional environment (including relationships with faculty) and students' social and personal growth. *Id.* at 290.

64. KEZAR ET AL., *supra* note 2, at 100–01.

65. Law schools are the exception to this rule because ABA standards require substantially all of the first-year curriculum to be taught by full-time faculty. *See infra* Part IV.A.

66. Frederickson, *supra* note 33, at para. 25.

67. CHILDRESS, *supra* note 28, at 78.

68. CHARLES HARRINGTON & TIMOTHY SCHIBIK, CAVEAT EMPTOR: IS THERE A RELATIONSHIP BETWEEN PART-TIME FACULTY UTILIZATION AND STUDENT LEARNING OUTCOMES AND RETENTION? 9 (2001), <https://files.eric.ed.gov/fulltext/ED512352.pdf> [<https://web.archive.org/web/20220104163705/https://files.eric.ed.gov/fulltext/ED512352.pdf>].

Increased reliance by colleges and universities on part-time faculty has been found to negatively affect students' likelihood of graduating college;<sup>69</sup> staying in college past the first year;<sup>70</sup> or, in the case of community college students, transferring to a four-year program.<sup>71</sup> At the same time, part-time faculty (especially older instructors teaching courses tied to specific occupations, like education or engineering) have been found to have a modest, positive effect on a student's likelihood to take subsequent coursework in the same subject.<sup>72</sup> These findings are consistent with what many experts have concluded—that the problem is not adjunct faculty's teaching ability, but rather adjunct employment conditions.

Over-reliance on adjunct faculty also constrains the capacity of institutions' shrinking numbers of full-time faculty, who are left to shoulder the service work necessary for colleges and universities to fulfill their educational and research missions and comply with accreditation standards. An institution's ability to carry out its academic programs effectively depends on faculty who assess program-level student outcomes and monitor student success; administer academic policies; manage, evaluate, and improve the program's curriculum; recruit, train, and evaluate the institution's faculty (both full-time and adjunct); engage in public service and research; and participate in shared governance. Because

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69. Ronald G. Ehrenberg & Liang Zhang, *Do Tenured and Tenure-Track Faculty Matter?* 40(3) J. HUM. RES. 647, 654 (2005) (finding a 10% increase in an institution's percentage of part-time faculty is associated with a 2.65% reduction in a public institution's five- or six-year graduation rate (and a 3% reduction at private institutions)); Daniel Jacoby, *Effects of Part-Time Faculty Employment on Community College Graduation Rates*, 77(6) J. HIGHER EDUC. 1081, 1092–93 (finding a negative, statistically significant relationship between the percentage of part-time faculty at a community college and the college's three-year graduation rate).

70. HARRINGTON & SCHIBIK, *supra* note 68, at 11 (finding a negative, statistically significant relationship between first-semester students' exposure to part-time faculty and the retention rate of these students in the second semester); Eric P. Bettinger & Bridget T. Long, *The Increasing Use of Adjunct Instructors at Public Institutions: Are We Hurting Students?* in WHAT'S HAPPENING TO PUBLIC HIGHER EDUCATION 51 (Ronald Ehrenberg ed., 2006) ("students taking an adjunct-heavy course schedule in their first semester are less likely to persist into their second year").

71. M. K. Eagan, Jr. & Audrey J. Jaeger, *Effects of Exposure to Part-Time Faculty on Community College Transfer*, 50 REV. HIGHER EDUC. 168, 180 (finding a negative, statistically significant relationship between students' exposure to part-time faculty and their likelihood of transferring to a four-year program). For example, the average student in the sample had taken almost 40% of their academic credits from part-time faculty; such a student was 8% less likely to transfer than a student who had taken all of their courses with full-time faculty. *Id.*

72. Eric P. Bettinger & Bridget T. Long, *Does Cheaper Mean Better? The Impact of Using Adjunct Instructors on Student Outcomes*, 92(3) REV. ECON. & STAT. 598, 611 (2010).

of the lack of support generally afforded to them (as described above), adjunct faculty cannot be expected to shoulder this work.

Finally, a college or university's underinvestment in full-time faculty undermines academic freedom, an essential feature of higher education without which "our civilization [would] stagnate and die."<sup>73</sup> Security of employment is crucial to higher education because it allows faculty the freedom to teach, conduct research, and participate in institutional governance without fear of retribution.<sup>74</sup> As the U.S. Supreme Court observed, "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."<sup>75</sup> Similarly, the contingent nature of the employment may adversely affect adjunct teaching.<sup>76</sup> And since there is strength as well as safety in numbers, the faculty's ability to make sound and independent governance decisions is weakened when the share of the institution's full-time faculty is small.<sup>77</sup>

Considering these factors together with the "neoliberal audit culture"<sup>78</sup> that has pervaded higher education, one wonders whether academic careers are still attractive to potential entrants to academia. Hall questions whether working as a full-time academic is becoming obsolete; graduate students who in the past may have obtained a tenure-track position are now finding "there is no longer secure—let alone interesting or satisfying—employment to be had in higher education."<sup>79</sup> Institutional over-reliance on adjunct faculty adversely affects the working conditions of full-time faculty, which over time may inhibit faculty recruitment by shrinking the pool of interested candidates. The unavailability of secure and rewarding

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73. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

74. See generally 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE, AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLLS., <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<http://web.archive.org/web/20211001000215/https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>] (last visited Dec. 28, 2021). Although the 1940 Statement emphasizes the importance of tenure in promoting and protecting academic freedom, the Supreme Court has recognized that academic freedom protects all teachers and students. *Sweezy*, 354 U.S. at 250 (referring to the indispensability of academic freedom to all "teachers and students").

75. *Sweezy*, 354 U.S. at 250.

76. See Baldwin & Wawrzynski, *supra* notes 54–56 and accompanying text.

77. SUSAN RESNICK PIERCE, GOVERNANCE RECONSIDERED: HOW BOARDS, PRESIDENTS, ADMINISTRATORS, AND FACULTY CAN HELP THEIR COLLEGES THRIVE 46–48 (2014). Higher education institutions typically limit participation in shared governance to full-time faculty. Adrianna Kezar & Cecile Sam, *Governance as a Catalyst for Policy Change: Creating a Contingent Faculty Friendly Academy*, 28(3) EDUC. POL'Y 425, 427–28 (2014).

78. Hall uses this phrase in reference to the relentless monitoring of performance data by college and university administrators and the pressure on faculty to achieve high "customer" (*i.e.*, student) ratings. Hall, *supra* note 5, at 24–27.

79. *Id.* at 40.

faculty positions<sup>80</sup> may similarly dampen student interest in pursuing doctoral degrees, an important source of revenue for many universities.

To summarize, although adjunct faculty can provide a valuable practical perspective in the classroom, excessive reliance on adjunct faculty by institutions adversely affects student learning, due to the inherent nature of the adjunct employment relationship and a general lack of institutional support for adjuncts. Hiring a critical mass<sup>81</sup> of full-time faculty is also necessary to meet out-of-class responsibilities and governance needs of an institution. Put another way, over-reliance on part-time faculty indicates a college or university is underinvesting in its most important asset. But as described in the next section, focusing on an institution's faculty resources, or "inputs," has fallen out of favor among accreditors.

### III. HIGHER EDUCATION ACCREDITATION

Unlike other countries, the U.S. does not have a federal ministry of education.<sup>82</sup> The Tenth Amendment generally reserves to states the power to regulate education.<sup>83</sup> In addition, it is private commissions, not the

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80. In 2019, the American Historical Association reported data showing that the number of academic job openings for PhDs in history had not recovered since it fell precipitously in 2008. There were twice as many new history PhDs in 2016 as there were advertised job openings. Dylan Ruediger, *The 2019 AHA Jobs Report*, PERSP. ON HIST. (Jan. 28, 2019), <https://www.historians.org/publications-and-directories/perspectives-on-history/february-2019/the-2019-aha-jobs-report-a-closer-look-at-faculty-hiring> [<http://web.archive.org/web/20210811211913/https://www.historians.org/publications-and-directories/perspectives-on-history/february-2019/the-2019-aha-jobs-report-a-closer-look-at-faculty-hiring>]. Observing that fewer than half of matriculated students between 2005 and 2010 had obtained tenure-track positions, a committee at Yale University recently recommended restructuring its doctoral programs in the humanities. *Report of the Humanities Doctoral Education Advisory Working Group*, YALE (Feb. 1, 2021), <https://image.message.yale.edu/lib/fe311570756405787c1278/m/1/0bfeafd2-c069-43b3-b529bd6a7460fb89.pdf> [<http://web.archive.org/web/20210929212417/https://image.message.yale.edu/lib/fe311570756405787c1278/m/1/0bfeafd2-c069-43b3-b529bd6a7460fb89.pdf>].

81. Hackmann & McCarthy, *supra* note 50, at 24 (calling for state education departments, accrediting bodies, and professional associations to define the "critical mass" of faculty necessary to adequately staff university-based school leadership programs).

82. Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1493 (2011).

83. The Tenth Amendment reserves to the states, or to the people, powers not otherwise constitutionally delegated to the federal government. U.S. CONST. amend. X. *See also* WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 1535 (5th ed. 2013) (explaining that the Tenth Amendment does not delegate all authority over education to the states, since many federal constitutional powers are sufficiently broad to affect education).



government, that accredit U.S. higher education institutions.<sup>84</sup> But as a practical matter, growing reliance by institutions on federal funds has given the federal government substantial regulatory authority over higher education, since the federal government conditions an institution's access to funds on its compliance with federal requirements. In particular, colleges and universities must be accredited by a DOE-recognized entity as a condition to eligibility for access to student financial aid.<sup>85</sup>

Although the most commonly stated purpose of accreditation is quality assurance, it serves other purposes as well. The federal government emphasizes the objective of accreditation as ensuring accredited institutions meet an "acceptable" minimum quality standard.<sup>86</sup> Other purposes of accreditation are practical, including, as previously stated, ensuring student access to federal financial aid. Institutions rely on a college or university's accredited status when accepting transfer credits earned by students at the college or university. Additionally, prospective employers rely on an institution's accreditation when evaluating a student's academic credentials.<sup>87</sup> Accrediting bodies view the purpose of accreditation as being about institutional improvement as well as quality assurance.<sup>88</sup> ABA accreditation promotes institutional excellence, ensures attorney competence, and protects "student consumers."<sup>89</sup> Accreditation standards address different aspects of institutional quality, including governance; curriculum; faculty; student support; human, financial, technological, and physical resources; institutional integrity; and institutional planning.<sup>90</sup>

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84. Areen, *supra* note 82, at 1494.

85. *Id.* at 1483 (citing Higher Education Act of 1965, Pub. L. No. 89-329, § 435, 79 Stat. 1219, 1247-48 (codified as amended at 20 U.S.C. § 1001); JUDITH S. EATON, COUNCIL FOR HIGHER EDUCATION ACCREDITATION, AN OVERVIEW OF U.S. ACCREDITATION 3 (2015).

86. GASTON, *supra* note 13, at 6.

87. EATON, *supra* note 85.

88. For example, the New England Commission of Higher Education (NECHE), a regional accreditor, refers to its role as providing "public assurance about the educational quality of [the] degree-granting institutions" it accredits. But NECHE also expects the institutions it accredits to continually try to improve. *Standards for Accreditation: Preamble*, NEW ENG. COMM'N OF HIGHER EDUC. (2021), <https://www.necche.org/resource/s/standards-for-accreditation#preamble> [<https://web.archive.org/web/20211009130323/https://www.necche.org/resources/standards-for-accreditation>][hereinafter NECHE Standards] (last visited Dec. 28, 2021). *See also* Areen, *supra* note 82, at 1482-83 (describing how the objective of accreditation is "[q]uality [e]nhancement as [w]ell as [a]ssurance").

89. Judith Welch Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate*, 45 J. LEGAL EDUC. 441, 442 (1995).

90. *See, e.g.*, NECHE Standards, *supra* note 88. The Higher Education Act requires accrediting standards to address institutions' success with respect to student achievement,

In spite of their similar, quality-assurance objectives, the ABA, a specialized accrediting body, differs from regional accrediting bodies in significant ways. Regional accrediting bodies (such as NECHE) accredit a wide variety of institution types, including for-profit, not-for-profit, and public institutions as well as institutions with diverse missions.<sup>91</sup> The institutions the ABA accredits, although varied, are all law schools.<sup>92</sup> Additionally, ABA accreditation only extends to juris doctor (JD) programs, whereas regional accreditors accredit the entire institution, including at times large universities offering hundreds of degree programs.<sup>93</sup> Finally, since many states require students to graduate from an ABA-accredited program as a precondition to sitting for the bar exam,<sup>94</sup> the ABA's accreditation standards have been seen by some as a restraint on competition in the legal education market.<sup>95</sup>

A college or university must be recognized by the DOE for its students to be eligible for federal financial aid; for this reason, maintaining DOE recognition is of crucial importance to accrediting bodies. Accrediting bodies are reviewed at least once every five years.<sup>96</sup> Since 1992, the DOE has been supported in its review and recognition of accrediting bodies by a special advisory committee—the National Advisory Committee on Institutional Quality and Integrity (NACIQI).<sup>97</sup> NACIQI's membership comprises individuals who represent all sectors of higher education and are knowledgeable about higher education accreditation and

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curricula, faculty, facilities, fiscal and administrative capacity, and student support services, among other factors. 20 U.S.C. § 1099b(a)(5).

91. To provide a sense of the variety of institutions regional accreditors serve, consider the institutions listed on NECHE's roster, including Hartford Seminary, U.S. Coast Guard Academy, Brown University, Colby College, Berklee College of Music, Conway School of Landscape Design, University of New Hampshire, Roxbury Community College, and College Unbound. *Roster of Institutions*, NECHE, <https://www.necche.org/about-necche/all-institutions/> [<http://web.archive.org/web/20210929212513/https://www.necche.org/about-necche/all-institutions/>] (last visited March 7, 2021).

92. See *infra* note 133.

93. My institution, the University of Illinois Chicago, currently offers over 250 degree programs, including 86 undergraduate, 110 master's, and 66 doctoral programs. *Programs of Study*, UNIV. OF ILL. AT CHI., <https://www.uic.edu/academics/programs-of-study/> [<https://web.archive.org/web/20211106032925/https://www.uic.edu/academics/programs-of-study/>] (last visited March 7, 2021).

94. See *infra* note 121 and accompanying text.

95. See *infra* notes 175–6 and accompanying text.

96. Judith S. Eaton, *U.S. Accreditation: Meeting the Challenges of Accountability and Student Achievement*, 5 EVALUATION HIGHER EDUC. 1, 7 (2011).

97. Areen, *supra* note 82, at 1484, n.66.

administration.<sup>98</sup> Of the eighteen members currently serving on NACIQI, about half are chancellors, presidents, central administrators, or trustees at higher education institutions.<sup>99</sup> NACIQI is charged with various advisory responsibilities, most importantly advising the Secretary of Education on whether an accreditor's recognition should be renewed or not.<sup>100</sup>

For the past decade or more, accrediting bodies have been accused of failing to fulfill their basic responsibility—providing assurance to the public of institutional quality. In 2008, a NACIQI member complained that accrediting bodies had closed “a mere handful” of institutions in the preceding 60 years.<sup>101</sup> In 2009, the DOE's inspector general recommended imposing sanctions on the Higher Learning Commission, a regional accreditor, for accrediting a for-profit institution with an “egregious” credit-hour policy.<sup>102</sup> In 2016 and again in 2021, NACIQI recommended that the Secretary of Education derecognize the Accrediting Council for Independent Colleges and Schools (ACICS), an accreditor of for-profit institutions (including now-defunct Corinthian Colleges and ITT).<sup>103</sup> The low completion rates and high indebtedness of many students attending for-profit institutions call into question whether for-profit institutions should be eligible for federally-subsidized student loans, and whether

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98. 20 U.S.C. § 1011c(b)(2). One-third of NACIQI's members are appointed by the Secretary of Education, one-third by the Speaker of the House of Representatives (based on recommendations from both parties), and one-third by the President pro tempore of the Senate (based on recommendations from both parties). 20 U.S.C. § 1011c(b)(1).

99. *Bios*, NAT'L ADVISORY COMM. ON INSTITUTIONAL QUALITY & INTEGRITY, <https://sites.ed.gov/naciqi/bios/> [<http://web.archive.org/web/20210929212635/https://sites.ed.gov/naciqi/bios/>] (last visited March 7, 2021). One member, Robert Mayes, is CEO of Columbia Southern Education Group, which owns two for-profit universities. *Id.*

100. 20 U.S.C. § 1011c(c).

101. Anne D. Neal, *Seeking Higher-Ed Accountability: Ending Federal Accreditation*, 40 CHANGE: MAG. HIGHER LEARNING 24, 26 (2008).

102. GASTON, *supra* note 13, at 62.

103. Eric Kelderman, *Federal Advisory Panel Votes to Revoke Recognition of Embattled Accreditor*, CHRON. HIGHER EDUC. (Mar. 5, 2021), <https://www.chronicle.com/article/higher-ed-under-biden-live-updates?u> [<https://web.archive.org/web/20211229020404/https://www.chronicle.com/blogs/higher-ed-under-biden-harris?u>] Although then-Secretary of Education John King withdrew recognition of ACICS in 2016, King's successor, Betsy DeVos, later reinstated ACICS as a recognized accrediting body. Erica L. Green, *Betsy DeVos Reinstated College Accreditor Over Staff Objections*, N.Y. TIMES (Jun. 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/betsy-devos-for-profit-higher-education.html> [<https://web.archive.org/web/20211106033221/https://www.nytimes.com/2018/06/11/us/politics/betsy-devos-for-profit-higher-education.html>]. For additional details, see *Important Information on the Derecognition of ACICS*, U.S. DEP'T OF EDUC., <https://www.ed.gov/acics> [<http://web.archive.org/web/20210929212917/https://www.ed.gov/acics>] (last visited Dec. 28, 2021).

accreditors are able and willing to sanction institutions that fail to serve their students.<sup>104</sup> As Eaton stated in 2016:

Accreditation is now the public's business. . . . [T]he focus is on accreditation and whether it is a reliable source of public accountability. Media attention is on default rates as too high and graduation rates as too low, on repeated expressions of employer dissatisfaction with employees' skills . . . . [T]he public increasingly questions what accreditation accomplishes and, in particular, whether it is publicly accountable.<sup>105</sup>

Eaton's statement reflects a broad consensus on the need for greater accountability over accreditors, to ensure at a minimum that students finish college, find employment, and pay their debts.

In 2005, then-Secretary of Education Margaret Spellings appointed a high-level commission to develop a strategy and recommendations for improving U.S. higher education.<sup>106</sup> The commission's report cited data showing that the U.S. was falling behind other countries in educating its citizenry through the postsecondary level.<sup>107</sup> The report asserted that higher education must change from a reputation- to performance-based system, and urged that it develop a culture of accountability and transparency.<sup>108</sup> In particular, higher education accreditors were advised to "make performance outcomes . . . the core of their assessment *as a priority over inputs* or processes."<sup>109</sup> In fact, most regional accreditors had shifted to outputs-based assessment before the Spellings Commission issued its report.<sup>110</sup> One stated rationale for basing accreditation on outputs (as opposed to inputs) is that this approach gives colleges and universities

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104. See GASTON, *supra* note 13, at 62–63 for a similar argument.

105. Judith S. Eaton, *Pivotal Year for Accreditation*, INSIDE HIGHER ED (Dec. 1, 2016), <https://www.insidehighered.com/views/2016/12/01/growing-federal-role-accreditation-will-have-drawbacks-essay> [<http://web.archive.org/web/20210929212957/https://www.insidehighered.com/views/2016/12/01/growing-federal-role-accreditation-will-have-drawbacks-essay>]. At the time of her essay, Eaton was president of the Council for Higher Education Accreditation, a non-governmental association of colleges and universities that reviews and recognizes higher education accreditors.

106. U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 33 (2006) [hereinafter Spellings Report], <https://files.eric.ed.gov/fulltext/ED493504.pdf> [<https://web.archive.org/web/20211229022843/https://files.eric.ed.gov/fulltext/ED493504.pdf>].

107. *Id.* at 13 (citing 2005 Organization for Economic Cooperation and Development data).

108. *Id.* at 21.

109. *Id.* at 24 (emphasis added).

110. GASTON, *supra* note 13, at 122.

the autonomy to “determine how best to use their resources and what personnel . . . are needed to achieve student learning outcomes.”<sup>111</sup> On a political level, public demands for accreditor accountability are reflected in proposed higher education reform bills, including proposals that would further focus accreditation on student achievement. As Eaton observed, “from a federal perspective, ‘quality’ is now about higher graduation rates, less student debt and default, better jobs, and decent earnings.”<sup>112</sup>

This shift of focus from inputs to outcomes led accrediting bodies to adopt more flexible (*i.e.*, less specific) full-time faculty requirements. In the early 2000’s, the Accreditation Board for Engineering and Technology (ABET), a specialized accreditor, reoriented the focus of its standards from measuring inputs to student outcomes assessment. ABET eliminated an existing minimum full-time faculty requirement from its standards.<sup>113</sup> Currently, the faculty criterion in ABET’s accreditation standards for engineering programs requires only that the faculty be “of sufficient number . . . to cover all the curricular areas of the program” and “to accommodate adequate levels of student-faculty interaction . . . .”<sup>114</sup> Although ABET’s standards require that the faculty have “appropriate qualifications” and “sufficient authority” to implement the educational program,<sup>115</sup> the standards do not specify that faculty must have security of position or even that they must be employed on a full-time basis.

In contrast, the ABA’s full-time faculty requirements (described in the next section) are relatively specific, prescriptive, and input-focused. As noted, focusing less on inputs and more on student outcomes gives higher education institutions autonomy to allocate resources as they see fit, as long as the outcomes are met. But outcomes data should be interpreted with care, as there are factors that influence student outcomes that have little to do with institutional quality.<sup>116</sup> Holding colleges and universities

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111. *Id.* at 167 (quoting the Council for Higher Education Accreditation).

112. Eaton, *supra* note 105.

113. See *Whymeyer v. Dept. of State*, 997 A.2d 1254, 1256–57 (Pa. Commw. Ct. 2010) (describing ABET’s shift in approach); *Sinha v. Bd. of Trs. of Univ. of Ill.*, No. 98-C-7275 2001 U.S. Dist. LEXIS 12306, at \*4 (N.D. Ill. Aug. 15, 2001) (referencing ABET’s previous minimum faculty requirement).

114. ABET ENGINEERING ACCREDITATION COMMISSION, CRITERIA FOR ACCREDITING ENGINEERING PROGRAMS Criterion 6 (2019) [hereinafter ABET Criteria].

115. *Id.*

116. For example, a low proportion of community college students incur federal student loan debt. For this reason, the cohort default rate for community college students can be artificially high, even where the average amount and rate of student borrowing for the institution is low. In 2009, one community college had a cohort default rate of 50% because the cohort only included two student borrowers and one defaulter. Advisory Committee on Student Financial Assistance, *Hearing Transcript: Postsecondary Institution Ratings*

accountable for student outcomes may also unfairly penalize institutions that serve under-privileged groups.<sup>117</sup> Finally, as addressed in Part IV.A, by revising its standards to focus less on inputs, ABET has made its full-time faculty sufficiency requirement rather opaque and difficult to measure. The ABA's approach—maintaining a specific full-time faculty requirement (in addition to holding institutions accountable for outcomes like attrition<sup>118</sup> and bar passage<sup>119</sup>)—promotes transparency as well as institutional accountability regarding faculty adequacy. As a clear rule, the ABA's current requirement (Standard 403) is relatively straightforward to measure, facilitating compliance and promoting transparency regarding an institution's investment in faculty resources.

But as the ABA's experience has shown,<sup>120</sup> the federal government—both the DOJ's antitrust division and more recently the DOE and NACIQI—have pressured the ABA Council to *relax* its full-time faculty requirements, not vigorously enforce or strengthen them. The next section discusses the evolution of the ABA's full-time faculty standards and its shifting enforcement of those standards in response to government pressure.

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*System* (2014) 48 [hereinafter PIRS Hearing,] (on file with author) (testimony of Jee Hang Lee). Similarly, a college may graduate 75% of its students, but it is impossible to determine from that factor alone whether the institution has a quality educational program; the institution “could just be awarding a ton of nine-month certificates.” *Id.* at 11 (testimony of Ben Miller).

117. Ideally, student outcomes assessment should be adjusted to account for the resources and academic experience of the incoming students. Community colleges and institutions that serve underrepresented minority groups play a significant role in providing educational access to low-income and nontraditional students, students who likely will not graduate at the same rate or earn as much after graduation as other students. *Id.* PIRS hearing, at 42–43 (testimony of Jesse O'Connell).

118. The ABA requires law schools to report and publicly disclose attrition data, broken down between academic attrition and student transfers. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 509(b)(4) (2019–2020) [hereinafter ABA Standards]. An excessive academic attrition rate is evidence that an institution is not meeting other ABA standards. *Id.* Interpretation 501-3 (academic attrition rate above 20% creates a rebuttable presumption that a school is not in compliance).

Unless otherwise indicated, reference to the ABA Standards is to the 2020–2021 version. Current and past versions of the ABA Standards are available on the website of the ABA Section of Legal Education and Admission to the Bar, at [www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](http://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/) [[http://web.archive.org/web/20210929213556/https://www.americanbar.org/groups/legal\\_education/resources/standards/standards\\_archives/](http://web.archive.org/web/20210929213556/https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives/)] (last visited Mar. 23, 2021).

119. ABA Standard 316 requires at least 75% of a law school's graduates who sat for a bar exam to pass the exam within two years of graduation. ABA Standards, *supra* note 118.

120. *See infra* Part IV.B.

## IV. ABA FULL-TIME FACULTY REQUIREMENTS

Maintaining ABA accreditation is very important to law schools. Accreditation plants the imprimatur of the ABA on the institution. Additionally, most states either limit eligibility to take the bar exam to graduates of ABA-accredited law schools or impose onerous eligibility requirements on graduates of non-ABA-accredited schools.<sup>121</sup> Finally, the DOE recognizes the ABA Council as an accrediting agency,<sup>122</sup> which matters for those independent law schools that are not regionally accredited and thus rely on ABA accreditation as a precondition to eligibility for federal student financial aid.<sup>123</sup>

In contrast with other accrediting bodies, the ABA's accreditation standards are unique in their specificity and clarity regarding full-time faculty requirements. NACIQI has criticized the ABA Council for focusing on inputs like faculty resources.<sup>124</sup> In 1996, the ABA settled federal antitrust charges from the DOJ by entering into a consent decree that subjected the ABA to ten years of federal oversight of its accreditation practices, including full-time faculty requirements. Because of this pressure, it is unlikely today that the ABA would withhold or revoke a law school's accreditation based *solely* on the school's non-compliance with full-time faculty requirements (although it might do so if there was also evidence of low bar passage rates or other poor student outcomes).

This section discusses the evolution of the ABA's full-time faculty regulations and their enforcement. It first addresses the ABA standards regulating full-time faculty size and the portion of the curriculum to be

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121. As of 2020, nineteen states limit eligibility to take the bar exam to graduates of ABA-accredited law schools. An additional twenty states allow graduates of non-ABA-accredited, out-of-state law schools to sit for the bar only if they have practiced law for at least three years (many states require longer periods). Missouri and the District of Columbia allow graduates of out-of-state, non-ABA-accredited schools to sit for the bar if they have completed twenty-four (Missouri) or twenty-six (District of Columbia) semester hours of study at an ABA-accredited school. Washington requires graduates of non-ABA-accredited schools (whether in-state or out-of-state) to complete an LLM degree at an ABA-accredited school. Six states (Alabama, California, Massachusetts, Tennessee, Washington, and West Virginia) allow graduates of non-ABA-accredited, *in-state* schools to sit for the bar exam. Maine and New Hampshire allow graduates of Massachusetts School of Law to sit for the bar if they are admitted to the Massachusetts bar. NATIONAL CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 9–12 (2020).

122. See *supra* note 10 and accompanying text.

123. Independent law schools that are ABA, but not regionally, accredited include: Appalachian School of Law; Atlanta's John Marshall Law School; Ave Maria School of Law; Brooklyn Law School; Charleston School of Law; Florida Coastal School of Law; and New York Law School.

124. See *infra* notes 200–12 and accompanying text.

taught by full-time faculty. It then shows how the ABA, in response to pressure from the federal government, shifted the focus of its enforcement efforts away from compliance with full-time faculty requirements.

*A. Standards on Full-Time Faculty Size and Instructional Role*

The DOE first recognized the ABA Council as an accrediting agency in 1952.<sup>125</sup> The ABA Council regulates law schools' use of adjunct faculty through its standards on faculty size (Standard 402) and the share of the curriculum to be taught by full-time faculty (Standard 403).<sup>126</sup> These standards have remained relatively consistent, but with a few revisions over the decades.

ABA Standards 402 and 403 were adopted almost 50 years ago, as part of a major revision of the standards undertaken in the early 1970s.<sup>127</sup> The 1973 versions of Standards 402 and 403 read as follows:

*Standard 402*

(a) The law school shall have not fewer than six full-time faculty members, in addition to a full-time dean and a law librarian. It shall have such additional members as are necessary to fulfill the requirements of this Chapter and the needs of its educational program, with due consideration for

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125. ABA Standards, *supra* note 118, Preface, at v.

126. ABA Standards, *supra* note 118, at Standards 402 and 403. The ABA Standards also govern tenure, academic freedom, and security of position for full-time faculty. Standard 405(b) requires law schools to establish policies on academic freedom and tenure, 405(c) requires them to afford security of position "reasonably similar" to tenure for clinical faculty, and 405(d) requires them to afford security of position for legal writing instructors. The history and implications of Standard 405 have been addressed extensively in the literature. *See, e.g.*, Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575 (2017); Donald J. Polden & Joseph P. Tomain, *Standard 405 and Terms and Conditions of Employment: More Chaos, Conflict, and Confusion Ahead*, 66 J. LEGAL EDUC. 634 (2017); Peter A. Joy, *ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education*, 66 J. LEGAL EDUC. 606 (2017); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School's Dirty Little Secrets*, 16 BERKELEY WOMEN'S L. J. 3 (2001); Melissa H. Weresh, *Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c)*, 34 LAW & INEQ. 137 (2016); Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008). The JOURNAL OF LEGAL EDUCATION devoted its Spring 2017 issue to ABA Standard 405(c).

127. ABA Standards, *supra* note 118, Preface at vi.



- (i) the size of the student body and the opportunity for students to meet with and consult faculty members on an individual basis,
- (ii) the nature and scope of the educational program, and
- (iii) adequate opportunity for effective participation by faculty in the governance of the law school.

(b) A full-time faculty member is one who during the academic year devotes substantially all his working time to teaching and legal scholarship, has no outside office or business activities and whose outside professional activities, if any, are limited to those which relate to his major academic interests or enrich his capacity as scholar and teacher, or are of service to the public generally, and do not unduly interfere with his responsibilities as a faculty member.

*Standard 403*

The major burden of the educational program and the major responsibility for faculty participation in the governance of the law school rests upon the full-time faculty members.

- (a) Students shall receive substantially all of their instruction in the first year of the full-time curriculum or the first two years of the part-time curriculum, and a major proportion of their total instruction from full-time faculty members. . . .<sup>128</sup>

The 1973 version prescribed a minimum number of full-time faculty<sup>129</sup> and was interpreted to hold law schools to a maximum student-to-full-time-faculty ratio.<sup>130</sup>

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128. ABA Standards [1973 version], *supra* note 118, Standards 402–403. Standard 403(c) used to state that a law school “should include experienced lawyers and judges as teaching resources” in the school’s program. This provision was removed in 2014.

129. From 1973 until the requirement was removed in 2005, Standard 402 required law schools to have at least six full-time faculty, in addition to a full-time dean and law librarian. ABA Standards [1973 version], *supra* note 118, Standard 402(a).

130. The ABA’s Council and Accreditation Committee historically looked to student-to-faculty ratios when considering compliance with faculty sufficiency standards; a law school with an excessive ratio of students to *full-time* faculty (for example, a ratio of over

Almost 50 years later, Standards 402 and 403 remain remarkably similar. The definition of “full-time faculty member” is now in the definitions section, but at its core still defines full-time faculty as someone who devotes substantially all of their working time during the academic year to their teaching, service, and research responsibilities.<sup>131</sup> Current ABA standards do not require a minimum number or ratio of full-time faculty,<sup>132</sup> but they still require most of the JD curriculum, including all first-year courses, to be taught by full-time faculty.<sup>133</sup> Perhaps the most significant drafting change—adding to Standard 403 the requirement that full-time faculty must teach more than half of all credit hours offered by the law school—was not new, but re-introduced a requirement that had existed in the standards (albeit in stricter form) before 1973.<sup>134</sup> What has changed over time is the strictness with which the ABA Council interprets and enforces Standard 402. From the 1970s until 1996, the ABA interpreted the standards to require institutions to maintain what in its estimation was a sufficiently low student to *full-time* faculty ratio to support a sound educational program.

Since the 1920s, the ABA Council has developed written interpretations of its standards, giving law schools an idea of how the

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30:1) was presumptively out of compliance with the ABA Standards. Thomas L. Schaffer, *Four Issues in the Accreditation of Law Schools*, 59 WASH. U. L. Q. 887, 891–94 (1981). As discussed in Part IV.B, the ABA later revised its interpretations to allow inclusion of part-time faculty in the calculation of the ratio, and eventually eliminated the ratio requirement.

131. The standards currently define “full-time faculty member” as:

[A]n individual whose primary professional employment is with the law school, who is designated by the law school as a full-time faculty member, who devotes substantially all working time during the academic year to [teaching, academic advising, scholarship, and service], and whose outside professional activities . . . do not unduly interfere with his or her responsibilities as a full-time faculty member. ABA Standards, *supra* note 118, Definition 9.

132. Current Standard 402 requires law schools to hire a “sufficient number of full-time faculty to operate in compliance with the standards and carry out its program of legal instruction.” See ABA Standards, *supra* note 118, Standard 402.

133. Standard 403(a) requires full-time faculty to teach “substantially all” of the first-year curriculum, and over half of all credit hours offered. ABA Standards, *supra* note 118, Standard 403(a). The ABA is not recognized by the DOE to accredit masters’ programs in law such as the LLM. Therefore, the ABA acquiesces to regulate degree programs other than the JD (the principal requirement being that other programs do not interfere with the institution’s ability to carry out its JD program). See ABA Standards, *supra* note 118, Standard 313.

134. The 1969 version of the ABA Standards required “at least 66 2/3 per cent of the total hours of instruction offered” by a law school to be taught by full-time faculty. ABA Standards [1969 version], *supra* note 118, Standard VII.

Council would enforce the standards during accreditation reviews.<sup>135</sup> In effect, the ABA's interpretations were "treated as extensions" of the actual standards.<sup>136</sup> Recognizing the de facto binding nature of the interpretations, a 1996 consent decree between the ABA and the DOJ<sup>137</sup> required the ABA to subject proposed interpretations to the same public comment and review process applicable to proposed standards, and to publish proposed interpretations in ABA publications.<sup>138</sup>

In 1978, the ABA Council and Accreditation Committee issued a detailed interpretation outlining the rationale for a student-faculty ratio requirement and explaining how the ratio would be calculated and applied when determining an institution's compliance with the ABA's full-time faculty requirements.<sup>139</sup> The interpretation cited a significant increase in the ratio of students to full-time faculty in legal education during the 1970s and listed the negative effects of this increase on educational quality—observed effects that are consistent with the research findings discussed in Part II.B.<sup>140</sup> The committee concluded that the size of an institution's full-time faculty in relation to its student body significantly affects its ability to establish and maintain a sound educational program.<sup>141</sup> A law school with a student to full-time faculty ratio of 30:1 or higher was declared to be presumptively out of compliance with the ABA Standards.<sup>142</sup> Only tenure-system faculty or faculty with "security of position reasonably similar to tenure" (professional skills faculty on a separate tenure track or faculty with renewable long-term contracts) were to be included when calculating the ratio.<sup>143</sup>

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135. Theodora Belniak, *The History of the American Bar Association Accreditation Standards for Academic Law Libraries*, 106 L. LIB. J. 151, 157 (2014).

136. *Id.* at 158.

137. *See infra* notes 182–190 and accompanying text.

138. *United States v. American Bar Ass'n*, 934 F. Supp. 435, 437 (D.D.C. 1996). Even before the 1996 consent decree, ABA interpretations had been periodically compiled and published, but after 1996 they became a more formal component of the standards. Belniak, *supra* note 135, at 166.

139. Schaffer, *supra* note 130, at 891–92. The text of the interpretation, titled *Interpretation of Standards 201 and 401–405* [hereinafter 1978 Interpretation], is published in ABA Standards [1989 version], *supra* note 118.

140. These effects included: students spending significant time in large-group classes, with less opportunity to benefit from collaboration or develop rapport with the teacher; less time for faculty to prepare materials or develop innovative teaching methods; less personal contact between students and faculty; increased "entropy" in the examination process; less time for faculty to think, write, or engage in public service; and less participation by faculty in shared governance. 1978 Interpretation, *supra* note 139, at 4–8.

141. *Id.* at 9.

142. *Id.* at 10.

143. *Id.*

As discussed in the next section, the ABA's detailed and demanding accreditation process subjected it to legal challenges and public criticism during the 1990s. Among the most vocal critics were law school deans, who published an open letter in 1994, describing the ABA accreditation process as overly costly, inflexible, and intrusive.<sup>144</sup> But law school deans at the time also acknowledged the value of the ABA's full-time faculty requirements. An author of the 1994 letter conceded the merit of an accreditation process whose function is to ensure "minimum standards of instructional competence" in legal education.<sup>145</sup> Another dean emphasized his support of the student-faculty ratio requirement:

I am the dean of a large dual-division school, and it is deans of such schools that tend to be most vocal in criticism of the ABA presumptions concerning student/faculty ratios. I have never understood the rational (as opposed to self-interested) basis for my colleagues' criticism. . . . [I]t would be extremely difficult, if not impossible, for us to offer a quality modern legal education with a ratio higher than 30:1.<sup>146</sup>

Writing in 2001, yet another dean touted the requirement as contributing more than any other accreditation measure in recent decades to improving the quality of legal education in the U.S., characterizing it as a "red flag" for inspection teams regarding the sufficiency of an institution's educational resources.<sup>147</sup> In short, the educational justification for the ABA's student to full-time faculty ratio requirement was incontrovertible; as one commentator put it, it was "controversial less on educational grounds than on fiscal grounds."<sup>148</sup>

In 1996, the ABA entered a consent decree with the DOJ that required it to establish a special commission to review and revise its standards, including "calculation of the faculty component" of the student-faculty ratio requirement.<sup>149</sup> Concurrent with the commission's review, the ABA adopted Interpretations 402-1 and 402-2 on the student-faculty ratio.

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144. Robert W. Bennett, *Reflections on the Law School Accreditation Process*, 30 WAKE FOREST L. REV. 379, 379 n.1 (1995). At the time of his essay, Bennett was Dean of Northwestern University School of Law.

145. *Id.* at 379.

146. John A. Sebert, *Modest Proposals to Improve and Preserve the Law School Accreditation Process*, 45 J. LEGAL EDUC. 431, 434 (1995). At the time of his essay, Sebert was Dean of University of Baltimore School of Law.

147. Robert K. Walsh, *The ABA's Standards for the Accreditation of Law Schools*, 51 J. LEGAL EDUC. 427, 429 (2001). At the time of his essay, Walsh was Dean of Wake Forest University School of Law.

148. Schaffer, *supra* note 130, at 894.

149. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 437–38 (D.D.C. 1996).

Interpretation 402-1 loosened the definition of faculty for purposes of the ratio to allow inclusion of “additional teaching resources”—adjunct faculty, non-tenure-track administrators who teach, librarian faculty, and tenure-system faculty who are also administrators—in the calculation of up to 20% of the ratio.<sup>150</sup> Individuals who fell within the category of “additional teaching resources” were included in the ratio as a fraction of a full-time faculty member—0.2 in the case of adjunct faculty.<sup>151</sup>

So recalculated, the student-faculty ratio became a somewhat meaningless number; in 2014, the ABA eliminated the ratio requirement by deleting Interpretations 402-1 and 402-2.<sup>152</sup> As the Standards Review Committee explained, including “additional teaching resources” in the student-faculty ratio significantly complicated its calculation and generated controversy over definitional issues, while significantly lowering ratios across schools.<sup>153</sup> The committee cited a report in which virtually all ABA-accredited law schools had ratios of 30:1 or lower and the vast majority had ratios of 20:1 or lower.<sup>154</sup> The recalculated ratio did not correlate with typical first-year class sizes, nor was it a meaningful piece of consumer information for prospective students.<sup>155</sup> Other factors, such as the share of a program’s credit hours taught by full-time faculty, were cited as more indicative of faculty adequacy than the recalculated student-faculty ratio.<sup>156</sup>

Concurrently with eliminating the student-faculty ratio requirement, the ABA strengthened the language of Standard 403, on the instructional role of faculty. Both changes emerged from the ABA’s comprehensive review of the standards during 2008–14. Standard 403 was revised by adding language specifying that “more than half of all credit hours” offered by a law school must be taught by its full-time faculty. As revised, Standard 403(a) reads in full:

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150. ABA Standards [1996 version], *supra* note 118, Interpretation 402-1.

151. *Id.* Other accrediting bodies, as well as the IPEDS survey, similarly count adjunct faculty as a fraction of full-time faculty for purposes of calculating an institution’s student-faculty ratio. Childress refers to this practice as “academia’s own version of the Three-Fifths Compromise.” CHILDRESS, *supra* note 28, at 24.

152. Compare ABA Standards [2013–14 version], *supra* note 118, Interpretation 402-1 and 402-2, with ABA Standards [2014–15 version], *supra* note 118.

153. Hulett H. Askew & Donald J. Polden, *Memorandum on Proposed Deletion of Interpretations 402-1 and 402-2 of the ABA Standards for the Approval of Law Schools*, (Nov. 2008), <https://taxprof.typepad.com/files/interpretation-402-1-402-2.pdf> [<https://web.archive.org/web/20211001003412/https://taxprof.typepad.com/files/interpretation-402-1-402-2.pdf>].

154. *Id.*

155. *Id.*

156. *Id.*

The full-time faculty shall teach substantially all of the first one-third of each student's coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.<sup>157</sup>

The Standards Review Committee characterized the revision as one that "clarifies" the then-existing standard, which had required full-time faculty to teach "the major portion of" a law school's curriculum.<sup>158</sup> But the change was significant, as discussed below.<sup>159</sup> Indeed, the ABA proposed retracting this revision to Standard 403 just a few years after it was adopted.

In March 2017, the ABA Council posted for notice and comment a proposal to revise Standard 403(a) to remove the second sentence, leaving only the requirement that full-time faculty teach substantially all of the first-year curriculum. The Council explained that this change would allow schools "more opportunity to innovate" and create course schedules suiting "the variety of full-time and part-time teaching resources"

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157. ABA Standards, *supra* note 118, Standard 403(a). The second alternative permits a law school to satisfy Standard 403(a) by reference to student contact hours instead of credit hours, presumably because the standards allow a credit hour to be awarded either for an hour of faculty instruction in a traditional course or for an equivalent amount of student work (an amount to be determined by the institution's written policies) completed in an externship, clinical, or similar experiential course or activity. *See* ABA Standards, *supra* note 118, Standard 310. Since the ABA does not regulate programs other than the JD program, *see supra* note 133, the reference to credit hours "actually offered by the law school" in Standard 403(a) refers only to courses offered in the JD program.

158. ABA Section of Legal Education and Admissions to the Bar, *Comprehensive Review of the ABA Standards for Approval of Law School Matters for Notice and Comment* (Sept. 6, 2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.pdf) [[https://web.archive.org/web/20211106162716/https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.pdf](https://web.archive.org/web/20211106162716/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.pdf)] (last visited Feb. 22, 2021).

159. *See infra* Part V.A.

available to them.<sup>160</sup> The Council also observed that counting the number of credit hours taught by full-time faculty “is more of an input measure.”<sup>161</sup>

The ABA’s proposal to weaken Standard 403(a) provoked a strong, almost universally negative, reaction from public stakeholders. A law school dean wrote in support of the proposal.<sup>162</sup> Thirteen individual and group stakeholders—including the Association of American Law Schools (AALS), the Society of American Law Teachers (SALT), the Clinical Legal Education Association (CLEA), the Association of Legal Writing Directors, the American Association of University Professors (AAUP), and the ABA Dispute Resolution Section—submitted statements against the proposal.<sup>163</sup> Some of the comments in opposition took issue with the ABA Council’s claim that the revision would promote innovation in legal education; as the AALS statement put it, “not everything that is less expensive should be considered an ‘innovation.’”<sup>164</sup> SALT observed how

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160. Gregory G. Murphy & Barry A. Currier, *ABA Standards for Approval of Law Schools Matters for Notice and Comment*, 2–3 (Mar. 24, 2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20170324\\_notice\\_and\\_comment\\_memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20170324_notice_and_comment_memo.pdf) [[https://web.archive.org/web/20211106162757/https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20170324\\_notice\\_and\\_comment\\_memo.pdf](https://web.archive.org/web/20211106162757/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20170324_notice_and_comment_memo.pdf)] (last visited Feb. 22, 2021).

161. *Id.* at 3.

162. David Yassky, *Proposed Changes to ABA Standards 403(a) and 503* (July 7, 2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/2017\\_comment\\_s403\\_and\\_s503\\_david\\_yassky.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2017_comment_s403_and_s503_david_yassky.pdf) [[https://web.archive.org/web/20211106162905/https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/2017\\_comment\\_s403\\_and\\_s503\\_david\\_yassky.pdf](https://web.archive.org/web/20211106162905/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2017_comment_s403_and_s503_david_yassky.pdf)]. At the time of his statement, Yassky was Dean of Pace University School of Law.

163. Links to the public statements submitted in response to the proposal are available on the ABA Section on Legal Education and Admission to the Bar’s notice and comment archive page at [https://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment/notice\\_comment\\_archive/](https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive/) [[https://web.archive.org/web/20210416095301/https://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment/notice\\_comment\\_archive/](https://web.archive.org/web/20210416095301/https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive/)] (last visited Feb. 22, 2021).

164. Ass’n of L. Schs., *Comment by the Association of American Law Schools on Proposed Revision to ABA Standard 403(a)*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/20170728\\_comment\\_s403\\_aals.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20170728_comment_s403_aals.pdf) [[https://web.archive.org/web/202111004045829/https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/20170728\\_comment\\_s403\\_aals.pdf](https://web.archive.org/web/202111004045829/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20170728_comment_s403_aals.pdf)] (last visited Dec. 29, 2021); *see also* Barnhizer, et al., *Comment on Proposed Revision to Standard 403* (July 10, 2017), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/2017\\_comment\\_s403\\_prof](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2017_comment_s403_prof)

excessive reliance on adjunct faculty would deprive law schools of the full-time faculty resources needed to properly support, evaluate, and mentor those adjunct faculty.<sup>165</sup> One statement emphasized the disproportionately negative impact the proposed change would have on students of color and the communities they serve.<sup>166</sup> In addition to the written comments, representatives of SALT and CLEA publicly testified against the proposal.<sup>167</sup> In light of the strongly negative public response to the proposal, the Council eventually withdrew it.<sup>168</sup>

To summarize, the ABA no longer interprets its standard on full-time faculty size by requiring institutions to maintain a minimum student to full-time faculty ratio. Its interpretation on student-faculty ratios was relaxed in response to the consent decree the ABA entered into with the DOJ, as discussed in the next section. Although the ABA does not interpret its standards to require a minimum student-faculty ratio, the standards retain bright-line requirements with respect to the full-time faculty's central role in instruction, requirements that make the ABA something of an outlier in comparison with other accrediting bodies.

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essors\_barnhizer\_candeub\_kuykendall\_lawton.pdf [https://web.archive.org/web/20211004051611/https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/2017\_comment\_s403\_professors\_barnhizer\_candeub\_kuykendall\_lawton.pdf] (“Innovation occurs when faculty members have a long-term commitment to an institution.”).

165. Soc’y of Am. L. Tchrs., *Comments on Proposed Revisions to Standard 403* (Jul. 9, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/2017\_comment\_s403\_salt.pdf [https://web.archive.org/web/20211004052545/https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/2017\_comment\_s403\_salt.pdf].

166. Theodore P. Seto, *Comments on Proposed Revisions to Standard 403(a)* (July 10, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/2017\_comment\_s403\_theodore\_seto.pdf [https://web.archive.org/web/20211004052729/https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/2017\_comment\_s403\_theodore\_seto.pdf].

167. *Public Hearing: Amendments to Standards and Rules of Procedure for Approval of Law Schools*, A.B.A., at 12, 24 (July 13, 2017) https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/20170713\_stds\_403a\_503\_hearing\_transcript.pdf [https://web.archive.org/web/20200802104940/https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/council\_reports\_and\_resolutions/comments/20170713\_stds\_403a\_503\_hearing\_transcript.pdf].

168. ABA, 49 SYLLABUS [ix] (2018).



To be sure, the ABA's strict faculty requirements have an elitist history.<sup>169</sup> In 1929, the chair of the ABA's Section on Legal Education and Admissions to the Bar declared the ABA's most important responsibility to be educating the public of the need to eliminate "commercialized" law schools, institutions that historically were relatively accessible to applicants from marginalized groups.<sup>170</sup> For decades the ABA Standards prohibited law schools from operating "for private profit."<sup>171</sup> Responding to the DOJ's antitrust investigation and to other critics, the ABA has since revised its standards to ensure they do not unreasonably restrict competition in the legal education market. Additionally, as addressed in the next section, the ABA relaxed interpretation and enforcement of its full-time faculty requirements in response to pressure from the DOJ and, more recently, NACIQI.

### *B. Federal Pressure and Its Effect on ABA Enforcement*

In 1995, the then-president of the AALS noted "an explosion of interest" in law school accreditation.<sup>172</sup> Law school deans publicly criticized the ABA's detailed and demanding accreditation standards.<sup>173</sup> A panel of college and university presidents developed a plan for accreditation reform, including strategies to limit the power of specialized accreditors like the ABA.<sup>174</sup> Most significantly, an antitrust lawsuit filed against the ABA by the Massachusetts School of Law (MSL) prompted the DOJ to investigate whether the ABA's accreditation practices violated the Sherman Act.<sup>175</sup>

For decades the ABA had denied accreditation or imposed sanctions on law schools for noncompliance with its full-time faculty

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169. At the turn of the 20<sup>th</sup> century, as increasing numbers of ethnic minority and low-income students enrolled in night schools to study law, many argued for law schools to adopt more rigorous admission standards. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 94–99 (1976). As Auerbach observed, advocates for higher standards used them "as a weapon . . . to beat back the flow of newcomers to the profession from ethnic minority groups." *Id.* at 99.

170. Donna Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 31 *AM. BAR FOUND. RES. J.* 515, 526 (1978).

171. *Id.* at 529 (quoting ABA Standards [1973 version], Standard 202). Pre-1973, the standards stated that an independent law school bore the burden of demonstrating that it did not operate "as a commercial enterprise." ABA Standards [1969 version], Standard I.B.

172. Wegner, *supra* note 89, at 441.

173. See *supra* notes 144–48 and accompanying text. See also John A. Seibert, *ABA Accreditation Standards and Quality Legal Education*, 11 *TEX. REV. L. & POL'Y* 395, 396 (2007) (referring to significant criticism of the ABA Standards during the 1990s, on grounds that they were too prescriptive and stifled innovation).

174. Wegner, *supra* note 89, at 441.

175. Lao, *supra* note 13, at 1037, n.11.

requirements.<sup>176</sup> MSL, an independent law school whose mission was to make law school more affordable and accessible by relying extensively on “expert adjunct professors,”<sup>177</sup> was one such institution. Lack of full-time faculty was a significant factor behind the ABA’s denial of MSL’s application for provisional accreditation in 1993. The ABA cited eleven reasons for denying MSL’s application, including the institution’s high student-faculty ratio and its heavy reliance on adjunct faculty.<sup>178</sup> Several months later, MSL filed a complaint against the ABA, the AALS, the Law School Admission Council, and a group of individual defendants. MSL asserted that the defendants, through enforcement of the ABA’s allegedly anticompetitive accreditation standards, had engaged in monopolistic conduct in violation of the Sherman Act.<sup>179</sup> Among the standards MSL cited as anticompetitive were Standard 403 and the ABA’s interpretation on student-faculty ratios.<sup>180</sup> Although MSL’s legal challenges were ultimately unsuccessful, they entangled the ABA in years of litigation.<sup>181</sup>

MSL’s antitrust complaint prompted the DOJ to conduct its own investigation. In 1995, the DOJ filed a civil antitrust complaint against the ABA, claiming that “legal educators had captured the ABA law school

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176. *See, e.g.*, *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1254–55 (3d Cir. 1977) (regarding ABA site teams visiting Delaware Law School in 1974 and 1975 and recommending against accreditation, in part due to a lack of full-time faculty); *Audain v. Am Univ.*, 1998 U.S. Dist. LEXIS 23623, \*3 (D.D.C. 1998) (discussing the probation of American University’s College of Law because of high student-faculty ratio). In some cases, institutions did not even apply for accreditation since they had no prospect of being approved. *See, e.g.*, *In re Laclede Sch. of L.*, 700 S.W.2d 81, 83 (Mo. 1985) (discussing how non-accredited law school had no full-time faculty members).

177. *Mass. Sch. of L. v. Am. Bar Ass’n*, No. 95-CV-12320-MEL 1997 U.S. Dist. LEXIS 7033, at \*3 (D. Mass. May 8, 1997) (quoting Complaint at 22).

178. *Id.* at \*5. In addition to the high student-faculty ratio and heavy reliance on adjunct faculty, the ABA also cited the heavy teaching loads of MSL’s full-time faculty and MSL’s failure to give its faculty reasonable opportunities for leaves of absence. *Id.* As the site team report observed, “[s]tudents will have much of their course work with instructors who are part-time, or adjuncts who are not regularly in the building throughout the day, who all share a single office, and who are not available at the school most of the week.” *Id.* at \*6, n.2. Only six of MSL’s faculty met the ABA definition of full-time faculty, serving a student body with 293 full-time and 515 part-time students. *Id.*

179. *Mass. Sch. of L.*, 1997 U.S. Dist. LEXIS 7033 at \*33.

180. *See id.* at \*46.

181. The Third Circuit affirmed the District Court’s summary judgment for the defendants in 1997. *Id.* at \*61–62. While appeal of its antitrust claims was still pending in the Third Circuit, MSL sued the ABA in Massachusetts state court, alleging that the ABA’s denial of its application for a variance from the standards was fraudulent and in breach of contract. *Mass. Sch. of L.*, 1997 U.S. Dist. LEXIS 7033 at \*32. The ABA removed the case to federal court and the District Court dismissed MSL’s claims. When affirming, the First Circuit characterized the “gargantuan” record in the MSL litigation as “capable of inducing taphophobia in even the hardest appellate panel.” *Id.* at \*29.

accreditation process.”<sup>182</sup> The anticompetitive practices alleged in the complaint included the ABA’s salary requirements for law faculty and staff,<sup>183</sup> its limits on teaching loads,<sup>184</sup> and its prohibition on for-profit law schools.<sup>185</sup> The complaint also challenged the ABA’s maximum student-faculty ratio requirement, emphasizing how calculation of the ratio was limited to full-time faculty and excluded, among others, adjunct professors.<sup>186</sup> Although the complaint acknowledged the rationale for the ratio was to ensure adequate contact between students and faculty, the DOJ alleged that the ABA did not consider it when enforcing the requirement.<sup>187</sup>

With the acquiescence of the ABA Board of Governors, the DOJ filed a proposed consent decree to settle its claims very shortly after it filed the complaint.<sup>188</sup> The final decree required the ABA to change some of the practices listed in the DOJ’s complaint, such as monitoring salaries and prohibiting for-profit law schools, and limited the percentage of law school deans or faculty who could serve on the ABA Council or its committees.<sup>189</sup> The decree required the ABA to establish a commission to review the ABA Standards, including in particular the faculty component of the student-faculty ratio requirement, to determine whether the standards or its interpretations should be revised.<sup>190</sup> Concurrent with the commission’s review, the ABA adopted Interpretation 402-1, which relaxed the requirements for calculating the ratio.<sup>191</sup> Finally, the decree required the ABA to appoint an independent (non-educator) consultant to validate all ABA Standards and Interpretations as well as a compliance officer to monitor ABA accrediting activities and ensure compliance with the decree.<sup>192</sup>

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182. Wegner, *supra* note 89, at 443 (quoting Complaint at 4, *United States v. Am. Bar Ass’n*, 934 F. Supp. 435 (1996) (No. 95-1211) [hereinafter Complaint]).

183. Complaint, *supra* note 182, at 5–6.

184. *Id.* at 8.

185. *Id.* at 6.

186. *Id.* at 7–8.

187. *Id.* at 8.

188. Wegner, *supra* note 89, at 442. News of the proposed consent decree and the Board of Governors’ acquiescence to it prompted two leading members of the ABA Council to resign in protest. *Id.* at 442 n.6.

189. *United States v. Am. Bar Ass’n*, 934 F. Supp. 435, 436–37 (1996); Areen, *supra* note 82, at 1487.

190. *Am. Bar Ass’n*, 934 F. Supp. at 437–38.

191. See *supra* notes 150–51 and accompanying text.

192. *Am. Bar Ass’n*, 934 F. Supp., at 437–38; Wegner, *supra* note 89, at 444.

It is not clear that the ABA's full-time faculty requirement violated the Sherman Act.<sup>193</sup> Additionally, some of the consent decree's requirements were later criticized by accreditation experts as inconsistent with best practices.<sup>194</sup> Most significantly, the DOJ investigation and consent decree must have influenced how the ABA later interpreted and enforced its full-time faculty requirements. The consent decree's requirements led to the ABA's relaxing, and ultimately eliminating, its student-faculty ratio requirement.<sup>195</sup> The decree also subjected the ABA Council to years of federal oversight,<sup>196</sup> which may have played a role in 2005, when the ABA revised Standard 402 to eliminate the requirement that law schools employ at least six full-time faculty.<sup>197</sup> The decree and federal oversight also likely discouraged the ABA from enforcing its other full-time faculty requirements.

In addition to the DOJ's antitrust investigation and consent decree, for years NACIQI<sup>198</sup> has pressured the ABA to adopt an outcomes-focused approach to accreditation. This pressure is evident in exchanges that occurred between ABA representatives and NACIQI members at public

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193. In their analysis of antitrust law as it applies to accreditation, Havighurst and Brody predicted that "an antitrust agency or court would be hard-pressed to question the ABA's opinion concerning the maximum number of classroom hours that a law school may require its professors to teach," since such a standard is reasonably related to teaching quality. Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, 57 L. & CONTEMP. PROBS. 199, 204 n.20 (1994). They observed it is "far from clear" that accreditation alone affects competition and argued that private accreditor programs like the ABA's ordinarily should be subject to rational basis review. *Id.* at 218, 227. *See also* Wegner, *supra* note 89, at 445 (questioning the rationale behind the DOJ's challenge of the ABA's student-faculty ratio and teaching load standards).

Writing in 2001, Lao argued that the ABA Standards were anticompetitive and aimed at promoting "an elite-style legal education;" she suggested the standards should be relaxed to allow institutions to provide a more utilitarian, modest education at lower cost. Lao, *supra* note 13, at 1086–91. But Lao acknowledged that an antitrust challenge might not be successful, since courts "may be unwilling to review policy choices reflected in the accrediting standards or to substitute their own opinions for those of the ABA" under a rule of reason analysis. Lao, *supra* note 13, at 1096.

194. *See* Areen, *supra* note 82, at 1487–88. Areen characterized the consent decree's limiting of legal educators' participation in the accreditation process as placing the ABA "out of step with" other accrediting bodies, which rely heavily on peer evaluation. She suggested the close involvement of legal educators serves to benefit, not undermine, the goals of accreditation. *Id.* *See also* Eaton, *supra* note 87, at 4 (stating that higher education accreditation is done "primarily" by faculty and administrators at peer institutions).

195. *See supra* notes 147–54 and accompanying text.

196. Wegner, *supra* note 89, at 446.

197. *See supra* note 129.

198. *See supra* notes 97–100 and accompanying text.

hearings held in 2006, 2011, and 2016 to consider whether to renew the ABA's recognition as an accrediting body.<sup>199</sup>

At its 2011 meeting, NACIQI ultimately voted to recommend renewing the ABA's recognition. But the committee interrogated the ABA delegation at length about its accreditation practices, and three NACIQI members voted against the recommendation.<sup>200</sup> Areas of concern raised by NACIQI members included student outcomes assessment, student bar passage, publication of student job placement data and other consumer information, student loan defaults, and standards (including full-time faculty requirements) that were claimed to increase the cost of education.<sup>201</sup>

An exchange between the ABA's then-deputy consultant on legal education (Dan Freeling) and a NACIQI member (Jamiene Studley) during the 2011 meeting is revealing. The exchange addressed the ABA's faculty sufficiency requirements (Standards 402 and 403):

MS. STUDLEY: If a school is performing very well against the outcome measures that you use . . . [a]re they freed up from the input measures, or the formula in terms of, say balance of number and type of faculty?

MR. FREELING: Our view is they are freed up. It is extraordinarily rare, in fact I can't remember in the past five years . . . that we have cited schools for student/faculty ratio.<sup>202</sup>

Freeling also suggested that, if a school had a student-faculty ratio exceeding the 30:1 threshold, it could then demonstrate success on student

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199. Transcripts of meetings from the past ten years are available on the DOE website. See *National Advisory Committee on Institutional Quality and Integrity: Archive of Meetings*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/naciqi/archive-of-meetings/> [<http://web.archive.org/web/20210517231649/https://sites.ed.gov/naciqi/archive-of-meetings/>] (last visited Dec. 30, 2021). Although the transcript of NACIQI's 2006 meeting with the ABA is not publicly available, NACIQI members pointedly questioned the ABA representatives at that meeting as well. *National Advisory Committee on Institutional Quality and Integrity: Meeting*, U.S. DEP'T OF EDUC., at 15–16, 60–61 (Jun. 9, 2011), <https://sites.ed.gov/naciqi/files/naciqi-dir/2011-spring/6-9-11-naciqi-transcript.pdf> [<https://web.archive.org/web/20210517231934/https://sites.ed.gov/naciqi/files/naciqi-dir/2011-spring/6-9-11-naciqi-transcript.pdf>] [hereinafter 2011 Transcript].

200. See Eric Kelderman, *American Bar Association Takes Heat from Advisory Panel on Accreditation*, CHRON. HIGHER EDUC. (June 9, 2011), <https://www.chronicle.com/article/american-bar-association-takes-heat-from-advisory-panel-on-accreditation/> [<https://web.archive.org/web/20211004132652/https://www.chronicle.com/article/american-bar-association-takes-heat-from-advisory-panel-on-accreditation/>].

201. 2011 Transcript, *supra* note 199, at 67–76, 128.

202. *Id.* at 92–93.

outcome measures, such as academic attrition and bar passage rates.<sup>203</sup> This exchange highlights both NACIQI's negative view of an inputs-focused approach and the ABA's response, emphasizing how it was not enforcing the student-faculty ratio requirement.

At the 2016 meeting, NACIQI voted to recommend partially suspending ABA recognition. Although the DOE did not follow NACIQI's recommendation, for several months the ABA's status as a DOE-recognized accreditor was uncertain.<sup>204</sup> The political environment in 2016 was one of public frustration over the perceived failure of accreditors to hold colleges and universities accountable for low student completion rates, high student debt loads, and abuses in the for-profit sector.<sup>205</sup> It was also a time when the employment market for law graduates had not yet recovered from the 2008 financial crisis and applications to law schools had experienced years of decline. Undersecretary of Education Ted Mitchell set the tone at the outset of the meeting, stating "[t]he only way" to have an accreditation process that "allows the flexibility for innovation and the rigor to hold institutions accountable" is to focus on student outcomes.<sup>206</sup>

During the ABA's presentation of its petition for recognition renewal, NACIQI members grilled the ABA representatives on student debt, job placement, and low bar passage rates, citing examples of schools that had misled students regarding job placement or otherwise had poor student outcomes.<sup>207</sup> When asked whether the ABA put on probation, or withdrew its approval from, any schools due to low bar passage rates, the ABA representatives replied that it had not.<sup>208</sup> The committee also pressed the ABA on whether it was holding law schools accountable for poor graduate job placement data, or for the effect job placement had on student debt levels.<sup>209</sup> A committee member asked about ABA standards, including

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203. *Id.* at 94.

204. The NACIQI meeting was held on June 22 and the DOE's letter to the ABA was dated three months later—September 22, 2016. Stephanie Francis Ward, *ABA Won't Be Suspended from Accrediting New Law Schools*, A.B.A. J. (Sept. 23, 2016, 8:22 AM), [https://www.abajournal.com/news/article/aba\\_wont\\_be\\_suspended\\_from\\_accrediting\\_new\\_law\\_schools](https://www.abajournal.com/news/article/aba_wont_be_suspended_from_accrediting_new_law_schools) [[http://web.archive.org/web/20211004141901/https://www.abajournal.com/news/article/aba\\_wont\\_be\\_suspended\\_from\\_accrediting\\_new\\_law\\_schools](http://web.archive.org/web/20211004141901/https://www.abajournal.com/news/article/aba_wont_be_suspended_from_accrediting_new_law_schools)].

205. See *supra* notes 104–05 and accompanying text.

206. *National Advisory Committee on Institutional Quality and Integrity (NACIQI)*, U.S. DEP'T OF EDUC., at 5, (June 22, 2016), <https://sites.ed.gov/naciqi/files/2016/08/naciqi-transcripts-062216-508.pdf> [<http://web.archive.org/web/20211004142418/https://sites.ed.gov/naciqi/files/2016/08/naciqi-transcripts-062216-508.pdf>] [hereinafter 2016 Transcript].

207. *Id.* at 198, 207.

208. *Id.* at 182–83, 211.

209. *Id.* at 182–88.

full-time faculty requirements, that “drive[] up the cost of a legal education[.]”<sup>210</sup> Another asked whether the ABA had data showing whether these requirements were “absolutely critical to legal quality education,” or instead reflected a “guild mentality.”<sup>211</sup> One suggested the ABA should allow a law school to operate with “nothing but adjuncts” if doing so could dramatically reduce costs.<sup>212</sup> The harsh questioning and unsuccessful recommendation the ABA endured during the meeting likely influenced the ABA Council when it proposed relaxing Standard 403(a) the following year. The stated rationale for the Council’s proposal—allowing schools more flexibility to innovate and characterizing the counting of hours taught by full-time faculty as “more of an input measure”<sup>213</sup>—reflects the influence of federal pressure.

Since the 2016 NACIQI meeting, the ABA has twice revoked its approval of an accredited law school. It withdrew its approval of Thomas Jefferson School of Law in 2019 and Arizona Summit Law School in 2018. It put Atlanta’s John Marshall Law School on probation in 2018. The ABA also withdrew its approval of several additional schools that ceased operations for financial reasons; the ABA had sanctioned some of them before they closed. The Appendix lists instances since 2017 when the ABA imposed sanctions on, or removed approval from, an institution. In none of these instances did the ABA cite a school’s failure to comply with its full-time faculty requirements.<sup>214</sup> The standards the ABA has cited as grounds for recent sanctions include Standards 501 (admissions policies), 301 (rigorous academic program), 316 (bar passage), 309 (student support), and 202(a) and (d) (financial resources).<sup>215</sup> In 2020, the ABA issued a public notice, finding ten accredited law schools out of compliance with its new, stricter bar-passage standard.<sup>216</sup> Although the

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210. *Id.* at 187.

211. *Id.* at 198–99.

212. *Id.* at 215–16.

213. *See supra* notes 160–61 and accompanying text.

214. Similarly, review of the ABA’s public accreditation notices page does not show any instances since 2016 where the ABA issued a public notice of noncompliance based on a law school’s violation of Standard 402 or 403. *See Sanctions, Remedial Action, and Significant Noncompliance under Rule 11(a)(4)*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/public-notice/sanctions-remedial-action-noncompliance/](https://www.americanbar.org/groups/legal_education/public-notice/sanctions-remedial-action-noncompliance/) [[http://web.archive.org/web/20211004145158/https://www.americanbar.org/groups/legal\\_education/public-notice/sanctions-remedial-action-noncompliance/](http://web.archive.org/web/20211004145158/https://www.americanbar.org/groups/legal_education/public-notice/sanctions-remedial-action-noncompliance/)] (last visited Dec. 30, 2021).

215. *See id.*

216. Stephanie Francis Ward, *10 Law Schools are out of Compliance with Bar Passage Standard*, *ABA Legal Ed Section Says*, A.B.A. J., (May 28, 2020, 12:30 PM) <https://www>

ABA has recently stepped up its enforcement efforts, the stated grounds for imposing sanctions (or giving public notice of a school's noncompliance with ABA standards) have not included full-time faculty inadequacy.

During the same time period, many ABA-accredited schools relied heavily on adjunct faculty. On average, schools employed 60% part-time faculty during the 2018–19 academic year, and slightly less than 60% during 2016–17 and 2017–18.<sup>217</sup> Fifteen schools employed 75% or more part-time faculty during 2018–19.<sup>218</sup> The reported part-time faculty data are somewhat misleading, since law schools tend to employ adjuncts to teach a single course in a given semester or year. A more useful data point would be the share of the curriculum taught by full-time faculty, but the ABA does not currently require schools to make this information publicly available.<sup>219</sup>

To a significant degree, reliance on adjunct faculty is appropriate to legal education, a professional program whose purpose is to prepare students for the practice of law. Most adjuncts who teach law are experienced attorneys and judges and provide a valuable practical perspective for law students. Recognizing the value of working professionals as legal educators, the ABA Standards used to state that law schools “should include” experienced practicing legal professionals, with appropriate orientation and support, to enrich the educational program.<sup>220</sup> At the same time, as the ABA Standards recognize, a JD curriculum taught principally by adjuncts would be inadequate; a sound educational program

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.abajournal.com/news/article/legal-ed-posts-public-notice-for-schools-out-of-compliance-with-bar-passage-standard [http://web.archive.org/web/20211004150720/https://www.abajournal.com/news/article/legal-ed-posts-public-notice-for-schools-out-of-compliance-with-bar-passage-standard]. Standard 316, which requires at least 75% of a law school's graduates who sit for a bar exam to pass an exam within two years, was revised in 2019. *Id.*

217. Percentages are calculated from data in ABA Section of Legal Education and Admissions to the Bar, *Standard 509 Required Disclosures: All Schools Data*, A.B.A., <http://www.abarequireddisclosures.org/Disclosure509.aspx> [https://web.archive.org/web/20211106172830/https://www.abarequireddisclosures.org/Disclosure509.aspx] (last visited Mar. 13, 2021) [hereinafter *Standard 509 Database*]. Law schools report faculty data annually through the ABA Annual Questionnaire. According to the questionnaire's instructions, part-time (“non-full-time”) faculty include all instructors who taught during the previous academic year, including the summer term. Full-time staff who do not have faculty rank and teach a course are counted as part-time faculty. Annual Questionnaire, *infra* note 302, at Part V, Question 2.

218. *Id.*

219. See *infra* Part V.B.1 (discussing why the ABA should make this information publicly available).

220. ABA Standards [2013–14 version], *supra* note 118, Standard 403(c). The ABA removed this language from Standard 403 when it was revised in 2014.



in law must comprise a significant core of courses taught by full-time faculty.<sup>221</sup>

To conclude, as the ABA's history shows, the federal government, most accrediting bodies, and other experts in higher education focus almost exclusively on student outcomes when it comes to institutional assessment. It is doubtful today that a college or university, even one whose faculty is disproportionately made up of adjuncts, would be at risk of losing its accreditation on the basis of faculty inadequacy, so long as basic student outcomes measures (completion, debt default, employment, and/or licensure rates) for that institution were acceptable.<sup>222</sup> In this sense, higher education accreditation not only has failed to protect against, but has contributed to, the current state of the gig academy in the U.S.

However, it may be unrealistic to expect accrediting bodies, especially regional accreditors that regulate a much broader range of institutions than specialized accreditors do,<sup>223</sup> to impose sanctions on institutions that fail to adhere to full-time faculty minimums. Yet the extent of a college or university's reliance on adjunct faculty obviously matters to accrediting bodies. Most accreditation standards still address faculty adequacy, as discussed in the next section. As an alternative to strict enforcement, requiring institutions to be more transparent about their investments in full-time faculty would address public demands for accountability in higher education and might also shape institutional behavior. The next section explores how higher education accreditors might improve transparency regarding compliance with their faculty adequacy requirements.

## V. RULES, STANDARDS, AND REGULATORY DISCLOSURE

This section contrasts the ABA's full-time faculty requirements with the more flexible, but vague, standards of other accrediting bodies. It argues that clearer guidelines would put institutions on notice of expected best practices and, in combination with mandatory reporting requirements, facilitate the gathering and public reporting of full-time faculty data. The section first contrasts the precision of ABA Standard 403(a) with comparable regulations of other accrediting bodies, and then addresses how regulatory disclosure might improve publicly available information

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221. ABA Standards, *supra* note 118, Standard 403(a).

222. As a case in point, in 1999, the North Central Association, a regional accreditor that has long taken an outcomes-focused approach to accreditation, accredited Jones International University, an online institution with 96% adjunct faculty. Schmidt, *supra* note 13. Jones International University ceased operations in 2015. *See also* Leatherman, *supra* note 13 (describing several less extreme examples).

223. *See supra* notes 91–93 and accompanying text.

about faculty resources and potentially influence college and university behavior.

#### *A. Rules versus Standards*

Legal theorists have long debated the pros and cons of rules versus standards. A rule determines up front the limits of permissible conduct, whereas a standard leaves the determination of permissible conduct to the adjudicator when applying the standard after the fact.<sup>224</sup> For example, a speed limit may be expressed either as a rule (a prohibition on driving over 55 miles per hour) or a standard (a prohibition on driving “at an excessive speed”).<sup>225</sup>

From this standpoint, the ABA’s full-time faculty requirement looks more like a rule than the regulations of other accrediting bodies. ABA Standard 403(a),<sup>226</sup> which requires full-time faculty to teach substantially all first-year courses and more than half of all credits in the JD curriculum, operates like a rule. In contrast, the Higher Learning Commission’s Criterion 3.C.2, which requires “sufficient numbers and continuity of faculty members to carry out both the classroom and non-classroom roles of faculty,”<sup>227</sup> exemplifies a standard. Table 1 contrasts ABA Standard 403(a) with the faculty adequacy regulations of five other major accrediting bodies, including two regional accreditors and specialized accreditors for engineering, business, and medicine.

**Table 1: Accreditors’ Faculty Adequacy Regulations**

<b>Accreditor</b>	<b>Type of accreditor</b>	<b>Faculty adequacy regulation</b>	<b>Rule or standard?</b>
HLC	Regional: Midwest	Sufficient numbers and continuity of faculty to carry out classroom and non-classroom faculty roles. <sup>228</sup>	Standard

224. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

225. *Id.* at 560.

226. *See supra* note 157 and accompanying text.

227. *Criteria for Accreditation*, HIGHER LEARNING COMM’N, Criterion 3.C.2 (2019) [hereinafter HLC Criteria] [https://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision\\_2019\\_INF.pdf](https://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision_2019_INF.pdf) [https://web.archive.org/web/20210705192317/https://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision\_2019\_INF.pdf].

228. *Id.*

NECHE	Regional: Northeast	Adequate number of faculty and academic staff whose time commitment is sufficient to assure accomplishment of essential classroom and out-of-class responsibilities. <sup>229</sup>	Standard
AACSB	Specialized: business	Normally, “participating faculty members” will deliver at least 75% of the school’s teaching across the unit and 60% of teaching within each discipline. <sup>230</sup>	Standard
ABA	Specialized: law	Full-time faculty shall teach substantially all of the first year and more than half of all credit hours offered. <sup>231</sup>	Rule
ABET	Specialized: engineering	Faculty are of sufficient number to cover all curricular areas and to accommodate adequate levels of faculty-student interaction, advising, service, professional development, and interaction with practitioners and employers. <sup>232</sup>	Standard

229. NECHE Standards, *supra* note 88, Standard 6.2.

230. 2020 *Guiding Principles and Standards for Business Accreditation*, AACSB, Standard 3.1 (2020) <https://www.aacsb.edu/-/media/documents/accreditation/business/standards-and-tables/2020-business-accreditation-standards.pdf?la=en&hash=E4B7D8348A6860B3AA804567F02C68960281DA2> [<https://web.archive.org/web/20211230195543/https://www.aacsb.edu/-/media/documents/accreditation/business/standards-and-tables/2020-business-accreditation-standards.pdf?la=en&hash=E4B7D8348A6860B3AA9804567F02C68960281DA2>] [hereinafter AACSB Standards]. The language in the table is from the commentary to Standard 3.1.

231. ABA Standards, *supra* note 118, Standard 403(a). For the full text of Standard 403(a), see *supra* note 157 and accompanying text.

232. ABET Criteria, *supra* note 114, Criterion 6.

LCME	Specialized: medical	Sufficient cohort of faculty to deliver the curriculum and meet other institutional needs. <sup>233</sup>	Standard
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All but one of the faculty adequacy regulations summarized in Table 1 are written like standards. More significant than the generality of the thresholds stated in all but the ABA regulation is the fact that *only the ABA regulation specifies that faculty must be employed on a full-time basis* to count for purposes of the regulation. The HLC, NECHE, ABET, and LCME regulations do not set a required threshold of full-time faculty or even require that faculty be employed full time, other than to state that faculty must have sufficient “time” or “continuity” to address the program’s needs. At first glance, AACSB Standard 3 looks like a rule. But its requirement refers to “participating faculty members,” which is defined like a standard, as someone who “actively and deeply engages in the activities of the school in matters beyond teaching responsibilities.”<sup>234</sup> In contrast, the ABA Standards provide a precise definition of full-time faculty<sup>235</sup> and ABA Standard 403(a) specifies the portion of the curriculum that must be taught by full-time faculty. Of the examples in Table 1, only the ABA’s full-time faculty requirement is written like a rule.<sup>236</sup>

There are tradeoffs associated with using a standard versus a rule. Although standards may be easier to create, they tend to be more difficult to apply.<sup>237</sup> The adjudicator (for example, a judge, or an accreditation site visit team) must determine what the standard means each time a standard is applied.<sup>238</sup> A standard similarly presents challenges for the public, who

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233. *Functions and Structure of a Medical School: Standards for Accreditation of Medical Education Programs Leading to the MD Degree*, LIAISON COMM. ON MED. EDUC., Standard 4.1 (2020), [https://medicine.vtc.vt.edu/content/dam/medicine\\_vtc\\_vt\\_edu/about/accreditation/2018-19\\_Functions-and-Structure.pdf](https://medicine.vtc.vt.edu/content/dam/medicine_vtc_vt_edu/about/accreditation/2018-19_Functions-and-Structure.pdf) [[https://web.archive.org/web/20211230200755/https://medicine.vtc.vt.edu/content/dam/medicine\\_vtc\\_vt\\_edu/about/accreditation/2018-19\\_Functions-and-Structure.pdf](https://web.archive.org/web/20211230200755/https://medicine.vtc.vt.edu/content/dam/medicine_vtc_vt_edu/about/accreditation/2018-19_Functions-and-Structure.pdf)] [hereinafter LCME Standards].

234. AACSB Standards, *supra* note 230, Standard 3 Definitions. The definition goes on to state that participating faculty members normally are considered “ongoing” members of the faculty, regardless of whether appointments are on a part- or full-time basis. *Id.*

235. *See supra* note 131 for the ABA Standards’ definition of full-time faculty member.

236. The HLC Criteria and NECHE Standards are not unique in their generality; the faculty sufficiency requirements in other regional accreditation standards are similarly vaguely written. *See Leatherman, supra* note 13 (“no accreditor stipulates a formula for achieving the right balance” between full- and part-time faculty); Henry, *supra* note 13 (stating that accreditation standards tend to be written “in such general terms that, given an effective spin, virtually any topic or issue could be said to have been addressed”).

237. Kaplow, *supra* note 224, at 562–63.

238. *Id.*

must figure out its meaning in order to comply with it.<sup>239</sup> For this reason, rules tend to better promote compliance.<sup>240</sup> Additionally, since they tend to be more transparent, rules are more likely to lead to the development of community norms, providing the public an added incentive to comply with them.<sup>241</sup> Finally, rules limit the discretion of the adjudicator, allowing less leeway for the adjudicator to make bad or corrupt decisions when applying the regulation to concrete cases.<sup>242</sup>

Diver identifies three goals to be balanced when determining how precise a regulation should be: transparency, accessibility (the regulation is easily applicable to concrete situations), and congruence (the content of the regulation aligns with the intended behavior).<sup>243</sup> Determining the precision of a regulation may involve tradeoffs among these goals.<sup>244</sup> Diver uses the example of the Federal Aviation Administration's (FAA) mandatory retirement rule (prohibiting pilots from flying commercial airplanes after their sixtieth birthday) to illustrate these tradeoffs. The bright-line, precise rule is both transparent and accessible, but at the cost of congruence, "depriv[ing] society of the services of safe, experienced sexagenarians."<sup>245</sup> More precise rules promote compliance and minimize disputes over application at the cost of being over- or under-inclusive.<sup>246</sup> Ultimately, the benefits of transparency and applicability (as well as erring on the side of public safety) won out over concerns that the FAA rule was too strict or imposed costs on older pilots.<sup>247</sup>

Applying this analysis to accreditors' faculty adequacy requirements, the ABA's relatively precise rule enhances transparency and promotes compliance. But it does so by potentially erring on the side of ensuring a quality educational experience,<sup>248</sup> which limits the flexibility for law schools to reduce costs by hiring more adjunct faculty. On the other hand, the other faculty adequacy regulations listed in Table 1 provide flexibility for colleges and universities to allocate faculty resources as they see fit.

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239. *Id.* at 564.

240. *Id.*

241. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 54–55 (2000).

242. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 44–45 (1990).

243. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983).

244. *Id.* at 71.

245. *Id.* at 72–73.

246. *Id.* at 73–74.

247. *Id.* at 80–83.

248. It is also possible the ABA's precise rule might err on the side of being too lenient. But in the past, the ABA has experienced pressure from the government for being overly strict with its full-time faculty requirements, not for being overly lenient. *See supra* Part IV.B.

But these standards do so by promulgating vague regulations that allow for significant discretion in their enforcement. Because the standards disincentivize compliance, they have failed to constrain colleges and universities from relying on vast numbers of adjunct faculty.

As discussed in Part III, when evaluating institutional quality, the government as well as accreditors tend to look to student outcomes. At a basic level, student outcomes assessment involves determining whether students in a program graduate, obtain a license to practice, get a job, or repay their loans.<sup>249</sup> Other student learning outcomes—such as demonstrating the ability to communicate effectively, conduct research, identify and navigate ethical challenges, or engage in critical thinking—are more nuanced.<sup>250</sup> Relying on student attainment of these more subjective standards as a measure of a program's quality involves significant discretion. Using more nuanced outcomes as a basis for making accreditation decisions requires much greater effort, expertise, and sound judgment on the part of accreditors than a quantitative rule would require. At the same time, measuring minimum educational quality solely by reference to outcomes like graduation or student loan repayment rates arguably sets too low a bar for institutions to meet. The advantage of establishing a precise full-time faculty sufficiency threshold is that it operates to put accreditors (and the public) on notice that an institution is at risk of not carrying out its program of study effectively and in compliance with applicable accreditation standards.

### *B. Regulatory Disclosure*

If it is unrealistic to expect all accrediting bodies to hold institutions to strict full-time faculty requirements, an alternative is to require colleges and universities to publicly disclose full-time faculty data. Regulatory disclosure relies on markets and public opinion<sup>251</sup> to promote regulatory objectives, like protecting the environment or preventing fraud in securities markets. If designed well, disclosure schemes not only improve

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249. The accreditation standards of NECHE require institutions to measure student success in achieving the following outcomes: rates of progression; retention, transfer, and graduation; default and loan repayment rates; licensure passage rates; and employment. NECHE Standards, *supra* note 88, Standard 8.6.

250. ABET's accreditation standards for engineering programs requires programs to document student attainment of specific outcomes, including but not limited to: the ability to identify, formulate, and solve complex engineering problems; to communicate effectively; to function effectively on a team; and to conduct experimentation, analyze data, and use engineering judgment to draw conclusions. ABET Standards, *supra* note 114, Criterion 3.

251. Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 RISK ANALYSIS 155, 163 (1998).

publicly available information but also promote compliance by the entity disclosing the relevant information.<sup>252</sup> This section first addresses scholarship on disclosure-based regulation. It then describes two higher education mandatory disclosure regimes: the ABA's Standard 509 and the DOE's College Navigator. The section also considers how required disclosure of faculty resources data by colleges and universities might be improved, applying literature on disclosure-based regulation to the higher education context.

Scholars have addressed how cognitive biases limit the potential effectiveness of disclosure-based regulation.<sup>253</sup> Disclosures that are not standardized or designed to facilitate comparisons are less likely to be useful to consumers.<sup>254</sup> To induce changes in consumer behavior, the disclosed information should be "concrete" and "emotionally interesting," since this kind of information is more likely to bring up personally relevant associations in the reader.<sup>255</sup> For mandated disclosure to be effective, therefore, the disclosed information must be useful to the intended audience.<sup>256</sup> As Sunstein observes, "[w]ith respect to information, less may be more. If information is not provided in a clear and usable form, it may actually make people less knowledgeable than they were before . . . . People also face a pervasive risk of 'information overload[.]'"<sup>257</sup> Dalley identifies several conditions that must be present for regulatory disclosure to operate in markets to influence institutional behavior: consumers must sufficiently care about the information to change their behavior in response to it, the decision must be within the consumers' control, and the entity making the disclosures must be in a position to change its behavior in response to changes in consumer behavior.<sup>258</sup>

A well-known study of restaurant hygiene card requirements<sup>259</sup> illustrates how regulatory disclosure can affect behavior. The study found that adoption of a county ordinance requiring Los Angeles restaurants to

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252. Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1108 (2007).

253. *Id.* at 1113–17; Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 626–29 (1999); Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 FLA. ST. U. L. REV. 389, 437–39.

254. Dalley, *supra* note 252, at 1116.

255. *Id.* at 1117 (referring to the availability bias in behavioral economics literature).

256. *Id.* at 1120.

257. Sunstein, *supra* note 253, at 627. Additionally, mandated disclosure may have "disproportionately little effect" on low-income, elderly, and uneducated individuals. *Id.* at 628.

258. Dalley, *supra* note 252, at 1120–21.

259. Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q. J. ECON. 409 (2003).

prominently display hygiene grade cards in their windows induced the restaurants to improve their hygiene quality. Before the grade cards were introduced, restaurant revenue was not sensitive to hygiene scores. But afterwards, obtaining an A grade caused restaurant revenue to be 5% higher than obtaining a B grade.<sup>260</sup> The grade cards also caused local hospitalizations related to foodborne illnesses to decrease by 20%.<sup>261</sup> The restaurant hygiene grading card example illustrates how disclosure requirements can induce the disclosing party to change its behavior in response to market pressure. The example also highlights the importance of well-designed regulatory disclosure.<sup>262</sup> To be effective, regulations should mandate that the relevant information be presented in a compelling and useful way and in a manner that facilitates comparisons among disclosers.

There is reason for skepticism that prospective students, particularly low-income and first-generation students, would make college choices in response to publicly available full-time faculty data. Many prospective students and their families are overwhelmed by the college information available to them; one financial aid administrator characterized the information overload as “a blizzard of white noise.”<sup>263</sup> A study of Chicago Public School students found that half of the students who aspired to attend a four-year college ended up attending community college or not attending college at all.<sup>264</sup> Many students enrolled in colleges with lower selectivity levels than what matched their qualifications.<sup>265</sup> Information overload and a lack of guidance for prospective students, therefore, potentially limit the effectiveness of regulatory disclosure.

On the other hand, regulatory disclosure may prompt a political response from the discloser, even if there is little or no consumer response.<sup>266</sup> Public opinion, both in a broad sense and operating in

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260. *Id.* at 410.

261. *Id.* The reduction in foodborne illnesses was not only explained by customers changing their restaurant choices, but also by improvements in hygiene quality. *Id.* at 410–11.

262. See *Id.* at 432 (discussing how hygiene grade cards provide a useful signal that assists consumers in sorting high-quality from low-quality establishments).

263. PIRS hearing, *supra* note 116, at 59 (testimony of Jesse O’Connell).

264. MELISSA RODERICK ET AL., FROM HIGH SCHOOL TO THE FUTURE: POTHoles ON THE ROAD TO COLLEGE 3 (2008), <https://consortium.uchicago.edu/publications/high-school-future-potholes-road-college> [[http://web.archive.org/web/20211004181423/https://consortium.uchicago.edu/sites/default/files/2018-10/CCSR\\_Potholes\\_Report.pdf](http://web.archive.org/web/20211004181423/https://consortium.uchicago.edu/sites/default/files/2018-10/CCSR_Potholes_Report.pdf)].

265. *Id.* at 85. The mismatch between qualifications and college choice was attributed to multiple factors, including a lack of guidance as to what was available and the fact that students did not understand the financial aid process or apply in time to receive an aid award. *Id.* at 85–86.

266. Sunstein, *supra* note 253, at 619.



“smaller communities related directly to” the disclosing entity, can play a role in enforcing norms.<sup>267</sup> Sunstein gives the example of a statute requiring companies to place an eco-label on their products; regardless of the consumer response to the product labels, the companies may be incentivized to become more environmentally conscious from the risk of a negative reaction from stakeholders such as shareholders or local legislators.<sup>268</sup> In another example, activist shareholders and non-governmental organizations exert leverage over multinational corporations by publicizing the sweatshop conditions under which their products are made.<sup>269</sup> Like multinational corporations, colleges and universities are sensitive to public opinion, and have a diverse range of stakeholders who exert influence over them, including faculty, staff, students, trustees, donors, alumni, and the local community. Baker et al. found that Canadian universities responded to public sector salary disclosure laws by raising the salaries of their female faculty.<sup>270</sup> The introduction of pay transparency laws reduced the gender pay gap in Canadian public universities by 30%, attributable mainly to increases in female salaries.<sup>271</sup> These effects were seen primarily in universities with unionized faculty, suggesting that faculty unions are an influential stakeholder group.<sup>272</sup>

Additionally, information intermediaries—experts who make complex information accessible to the public—may cut through information overload and enhance the effectiveness of publicly-disclosed information.<sup>273</sup> Examples of intermediaries in the securities market include portfolio managers, rating agencies, and the financial press, who sift through, analyze, and present disclosed information.<sup>274</sup> Nongovernmental organizations operate as information intermediaries in the context of environmental regulation.<sup>275</sup> In the higher education context, intermediaries that gather, analyze, and standardize information disclosed

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267. Kleindorfer & Orts, *supra* note 251, at 159.

268. Sunstein, *supra* note 253, at 619.

269. David J. Doorey, *Who Made That?: Influencing Foreign Labor Practices through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 355–56 (2005).

270. See Michael Baker, et al., *Pay Transparency and the Gender Gap*, (Nat’l Bureau of Econ. Rsch., Working Paper No. 25834, 2019), [https://www.nber.org/system/files/working\\_papers/w25834/w25834.pdf](https://www.nber.org/system/files/working_papers/w25834/w25834.pdf) [[http://web.archive.org/web/20210903214137/https://www.nber.org/system/files/working\\_papers/w25834/w25834.pdf](http://web.archive.org/web/20210903214137/https://www.nber.org/system/files/working_papers/w25834/w25834.pdf)].

271. *Id.* at 4.

272. *Id.* at 20.

273. Dalley, *supra* note 252, at 1101; Kwoka & DuPey, *supra* note 253, at 438.

274. Dalley, *supra* note 252, at 1102.

275. Kleindorfer & Orts, *supra* note 251, at 161 (referring to nongovernmental organizations as “public surrogates”).

by colleges and universities for public consumption include ranking bodies such as *U.S. News & World Report* (*U.S. News*).

In spite of the often-negative attention *U.S. News* attracts,<sup>276</sup> the impact of the *U.S. News* rankings on the reputation of colleges, universities, and law schools is undeniable. The *U.S. News* rankings strongly influence the choices prospective students and their families make, whether at the undergraduate or graduate level.<sup>277</sup> A rise or fall in an institution's rankings affects the number of applications it receives, its selectivity rate, the average credentials of its entering class, and the amount of merit aid it must spend to attract a strong entering class.<sup>278</sup> As Bastedo and Bowman observed, “[w]hen prestige is academic currency, the result is a ‘positional arms race’” to attract the best students.<sup>279</sup> The rankings have significantly affected how elite colleges and universities are rated by peer institutions in subsequent years, independent of other measures of institutional quality and performance.<sup>280</sup> The fact that institutions try to “game the system” is further evidence of the influence the *U.S. News* ratings exert over higher education institutions.<sup>281</sup>

*U.S. News* divides colleges and universities into different groups (national universities, national liberal arts colleges, regional universities,

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276. Seto cites dozens of law review articles dedicated to the law school rankings alone. Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU. L. REV. 493, 493 n.1 (2007). In 1997, 150 law school deans signed a letter of protest against the rankings. *Id.* at 493–94.

277. Michael N. Bastedo & Nicholas A. Bowman, *U.S. News & World Report College Rankings: Modeling Institutional Effects on Organizational Reputation*, 116 AM. J. EDUC. 163, 179 (2010) (citing multiple studies).

278. RONALD G. EHRENBERG, REACHING FOR THE BRASS RING: HOW THE U.S. NEWS & WORLD REPORT RANKINGS SHAPE THE COMPETITIVE ENVIRONMENT IN U.S. HIGHER EDUCATION 4 (2001), <https://files.eric.ed.gov/fulltext/ED470061.pdf> [<http://web.archive.org/web/20211004191446/https://files.eric.ed.gov/fulltext/ED470061.pdf>].

279. Bastedo & Bowman, *supra* note 277, at 180.

280. *Id.* at 165.

281. See, e.g., Stephanie C. Emens, *The Methodology & Manipulation of the U.S. News Law School Rankings*, 34 J. LEGAL PROF. 197 (2009) (discussing the strategies law schools utilize to move up in the rankings); Bastedo & Bowman, *supra* note 277, at 179 (referring to the numerous ways colleges and universities try to manipulate reported data); EHRENBERG, *supra* note 278, at 9–18 (citing examples of the same). A former business school dean at Temple University was indicted on wire fraud charges for submitting false data to *U.S. News*. Scott Jaschik, *Ex-dean at Temple Indicted on Charges of Manipulating Rankings*, INSIDE HIGHER ED (Apr. 19, 2021), <https://www.insidehighered.com/admission/s/article/2021/04/19/ex-dean-temple-indicted-charges-manipulating-rankings> [<http://web.archive.org/web/20211004192303/https://www.insidehighered.com/admissions/article/2021/04/19/ex-dean-temple-indicted-charges-manipulating-rankings>].

and regional colleges), and ranks each group separately.<sup>282</sup> Its methodology<sup>283</sup> involves weighing seventeen factors, metrics of institutional quality, organized into eight categories.<sup>284</sup> Faculty resources is given a weight of 20%; the factors included in this category comprise class size, faculty compensation, percent faculty with a terminal degree in their field, percent full-time faculty, and student-faculty ratio.<sup>285</sup> Notably, *U.S. News* relies principally on the survey data it collects from colleges and universities; it only relies on IPEDS data when a college or university fails to respond to the survey.<sup>286</sup> *U.S. News* and collaborators developed the survey tool, the Common Data Set, to gather more standardized data from colleges and universities.<sup>287</sup> The survey uses a uniform definition of

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282. Robert Morse & Eric Brooks, *A More Detailed Look at the Ranking Factors*, U.S. NEWS & WORLD REP. (Sept. 13, 2020, 9:00 PM), <https://www.usnews.com/education/best-colleges/articles/ranking-criteria-and-weights> [<http://web.archive.org/web/20211004192420/https://www.usnews.com/education/best-colleges/articles/ranking-criteria-and-weights>]; see also EHRENBERG, *supra* note 278, at 7–8 (describing *U.S. News* methodology as of 2000).

283. The law school rankings are handled differently. Although both the Best Colleges and law school rankings include student-faculty ratio as a factor within the faculty resources category, the list of factors used and the weights given to them are different. Compare Morse & Brooks, *supra* note 282, with Robert Morse, Ari Castonguay, & Juan Vega-Rodriguez, *Methodology: 2021 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 16, 2020, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<http://web.archive.org/web/20211004192706/https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>]. The data sources differ as well. For the Best Colleges rankings, *U.S. News* uses the student-faculty ratio from the Common Data Set, see *infra* note 285, whereas for the law school rankings, schools self-report the student-faculty ratio using the full-time faculty definition and faculty counts from the ABA Annual Questionnaire. E-mail from Robert J. Morse, Chief Data Strategist, U.S. NEWS & WORLD REP., to author (Mar. 22, 2021, 8:45 CST) (on file with author).

284. The categories are graduation and retention rates, social mobility (graduation rate of Pell Grant recipients), graduation rate performance (comparing predicted with actual graduation rates), academic reputation, faculty resources, student selectivity, financial resources per student, and average alumni giving rate. Morse & Brooks, *supra* note 282.

285. *Id.* Similar to the IPEDS survey, *infra* note 318 and accompanying text, the Common Data Set counts a part-time faculty member as one-third of a full-time faculty member for purposes of calculating the student-faculty ratio. See *Common Data Set 2020–2021*, COMMON DATA SET, Part I-2, <https://commondataset.org/> [<http://web.archive.org/web/20211004211759/https://commondataset.org/>] (last visited Dec. 30, 2021).

286. E-mail from Robert J. Morse, Chief Data Strategist, U.S. NEWS & WORLD REPORT, to author (Mar. 22, 2021, 8:34 CST) (on file with author). Fewer than 10% of the colleges and universities surveyed fail to respond. *Id.*

287. *U.S. News* collaborated with The College Board and Peterson's, an educational services company, to develop the Common Data Set, with the stated objective of improving the quality and accuracy of reported information from higher education institutions. *Common Data Set Initiative*, COMMON DATA SET, <https://commondataset.org/> [<http://>

full-time faculty.<sup>288</sup> The IPEDS survey, in contrast, leaves the definition of full-time faculty to the reporting institution.<sup>289</sup>

To summarize, it is doubtful that mandated public disclosure of full-time faculty data would significantly affect the higher education market by changing enrollment decisions of prospective students and their families. But faculty data are more likely to be influential if presented in a compelling way that facilitates comparisons among institutions, as discussed below. Additionally, mandated disclosure of full-time faculty data may influence public opinion of higher education institutions through the targeted pressure of stakeholder groups and the work of information intermediaries like *U.S. News*. Colleges and universities are quite sensitive to public opinion, whether on a national or local level. Although most of the faculty resources data *U.S. News* uses to calculate its college ratings are reported directly to it, improving the transparency of IPEDS faculty resource data would be useful to public consumers while promoting competition among college and university ranking bodies.

### 1. ABA Standard 509

Responding to a DOE requirement, the ABA adopted Standard 509 in 1996.<sup>290</sup> In its original form, the standard was relatively general, simply requiring law schools to “publish basic consumer information” in a “fair and accurate manner.”<sup>291</sup> In 2012, after the reporting violations described below, the ABA strengthened Standard 509, moving details from Interpretation 509-1 into the text and adding to the list of required disclosures. Language also was added to Standard 509 to clarify that its violation could result in the imposition of sanctions.<sup>292</sup> In 2013, the ABA revised Standard 509 again to standardize the format in which some of the

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web.archive.org/web/20211004211759/https://commondataset.org/] (last visited Dec. 30, 2021).

288. *Common Data Set 2020–2021*, *supra* note 285, at Part I-1. The Common Data Set uses the same definition of “full-time instructional faculty” that the AAUP uses for its annual Faculty Compensation Survey. *Id.* The definition includes faculty who are employed on a full-time basis with contracts for the full academic year and excludes administrators who teach part time. *Id.*

289. *See supra* note 1.

290. Wegner, *supra* note 89, at 448.

291. ABA Standards [1996 version], *supra* note 118, Standard 509. Interpretation 509-1 specified what counted as basic consumer information, a list that included “composition and number of faculty and administrators.” *Id.*

292. ABA Standards [2012–13 version], *supra* note 118, Standard 509.

consumer information was to be published.<sup>293</sup> Standard 509 consumer data are published on schools' websites and are also publicly available through the ABA.<sup>294</sup> The adjunct faculty data referenced above<sup>295</sup> were collected from the ABA's Standard 509 database. The ABA has made significant strides in its gathering and publishing of law school consumer information. The data law schools must report and make available on their websites in a standardized format include student outcomes data (bar passage, attrition, and post-graduation employment data) as well as class size and full- and part-time faculty data.<sup>296</sup> Regulatory disclosure has become a significant part of the ABA's accreditation work.

Law schools that have violated Standard 509 have faced severe consequences. In 2011, the ABA publicly censured Villanova for reporting inaccurate admissions data, requiring it to undergo a compliance audit for two years.<sup>297</sup> In 2012, the ABA sanctioned the University of Illinois for reporting inaccurate admissions data, imposing a \$250,000 fine and two years of compliance monitoring.<sup>298</sup> The ABA utilized the fines collected to conduct targeted auditing of schools' disclosures.<sup>299</sup> When the job market for law graduates collapsed after the 2008 financial crisis,

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293. See Memorandum from Barry A. Currier, Managing Director, to the American Bar Association, Section of Legal Education and Admissions to the Bar, Office of the Consultant on Legal Education, (August 2013) [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2013\\_standard\\_509\\_memo.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2013_standard_509_memo.pdf) [[http://web.archive.org/web/20211004213147/https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2013\\_standard\\_509\\_memo.pdf](http://web.archive.org/web/20211004213147/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2013_standard_509_memo.pdf)] (describing the information for which the ABA Council "prescribes a particular form, manner and time frame of publication" and discussing the reporting and publication requirements).

294. Standard 509 Database, *supra* note 217.

295. See *supra* notes 217–18 and accompanying text.

296. For example, UIC Law's current Standard 509 Information Report, available at <https://uofi.app.box.com/s/mf934d0lcaph5gbbnsdzcgjo1y6m12a4> [<https://web.archive.org/web/20220105171335/https://uofi.app.box.com/s/mf934d0lcaph5gbbnsdzcgjo1y6m12a4>] (last visited Jan. 5, 2022).

297. Martha Neil, *ABA Raps Villanova re Inaccurate Admission Data, Says Law School Must Post Censure Online*, A.B.A. J. (Aug. 15, 2011, 8:23 PM), [https://www.abajournal.com/news/article/abas\\_legal\\_ed\\_section\\_sanctions\\_villanova](https://www.abajournal.com/news/article/abas_legal_ed_section_sanctions_villanova) [[http://web.archive.org/web/20211004214009/https://www.abajournal.com/news/article/abas\\_legal\\_ed\\_section\\_sanctions\\_villanova](http://web.archive.org/web/20211004214009/https://www.abajournal.com/news/article/abas_legal_ed_section_sanctions_villanova)]. The sanctions were not more severe since Villanova reported the violation and promptly addressed it once it came to light. *Id.*

298. Mark Hansen, *U of Illinois Law School is Publicly Censured by the ABA, Fined for Misreporting Admissions Data*, A.B.A. J. (July 24, 2012, 8:20 PM), [https://www.abajournal.com/news/article/u\\_of\\_illinois\\_law\\_school\\_is\\_publicly\\_censured\\_for\\_misreporting\\_admissions\\_d](https://www.abajournal.com/news/article/u_of_illinois_law_school_is_publicly_censured_for_misreporting_admissions_d) [[http://web.archive.org/web/20211004214543/https://www.abajournal.com/news/article/u\\_of\\_illinois\\_law\\_school\\_is\\_publicly\\_censured\\_for\\_misreporting\\_admissions\\_d](http://web.archive.org/web/20211004214543/https://www.abajournal.com/news/article/u_of_illinois_law_school_is_publicly_censured_for_misreporting_admissions_d)].

299. 2016 Transcript, *supra* note 206, at 193–94 (testimony of Barry Currier).

students sued numerous law schools, alleging false or misleading reporting of graduate employment data.<sup>300</sup> In adjudicating these claims, an institution's compliance with Standard 509 was an important factor.<sup>301</sup> The prospect of enforcement, whether by the ABA or through stakeholder litigation, creates strong incentives for law schools to provide accurate information.

However, there is an important omission from the ABA's public disclosure requirements: they do not mandate disclosure of law schools' compliance with ABA Standard 403(a). The Standard 509 disclosures should include data on the number and percentage of courses taught by full-time faculty, both for first-year courses and for all courses taught during the reporting year. Requiring institutions to report publicly on their adherence to Standard 403(a) would promote compliance and provide the public with concrete and useful data on law school faculty resources. The share of a student's classes taught by full-time faculty is a concrete indicator of the student experience. Law schools are already required to report course-level information to the ABA in their annual questionnaires, including the names of the faculty teaching each course,<sup>302</sup> so including data on Standard 403(a) compliance should not overburden schools.<sup>303</sup>

## 2. College Navigator

College Navigator and College Scorecard are government-developed tools for researching and comparing college and university data. The data that appear in these tools are reported to the federal government, mainly to the DOE's National Center for Education Statistics (NCES).

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300. Christopher Polchin, *Raising the Bar on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 207–08 (2012).

301. See, e.g., *Phillips v. DePaul Univ.*, No. 12-CH-3523, 2012 Ill. Cir. LEXIS 3299, at \*22–23 (Ill. Cir. Ct. Sept. 11, 2012) (“compliance with ABA Standard 509 precludes any claim for consumer fraud based on the provision of employment information to prospective and enrolled students”); cf. *Gomez-Jimenez v. N.Y. L. Sch.*, 956 N.Y.S.2d 54, 58–59 (N.Y. App. Div. 2012) (finding the law school's disclosures to be “statistical gamesmanship” that the ABA criticized in revised guidelines, but not materially misleading).

302. See *Questionnaires & Applications: Annual Questionnaire*, A.B.A., Part V, Question 3 [hereinafter *Annual Questionnaire*], [https://www.americanbar.org/groups/legal\\_education/resources/questionnaire/](https://www.americanbar.org/groups/legal_education/resources/questionnaire/) [http://web.archive.org/web/20211004220627/https://www.americanbar.org/content/dam/aba/administrative/legal\_education\_and\_admissions\_to\_the\_bar/Questionnaires/2021/2021-22-aq-instructions-complete.pdf] (last visited Dec. 30, 2021).

303. Standard 403(a) allows schools to meet the standard either by showing that (i) more than half of all credit hours offered or (ii) two-thirds of student contact hours are taught by full-time faculty. ABA Standards, *supra* note 118, Standard 403(a). To facilitate comparisons among institutions, schools should be required to report on the same metric, which likely would be credit hours offered.

began surveying colleges and universities on a voluntary basis during the 1960s; it developed the IPEDS survey during the 1980s.<sup>304</sup> In 1991, Congress made IPEDS reporting mandatory as a condition to eligibility for federal student financial aid.<sup>305</sup> IPEDS' role has evolved from a compliance reporting tool to a repository of data for higher education institutions and the public.<sup>306</sup> College Navigator was a product of the 2008 amendments to the Higher Education Act; the Obama Administration launched College Scorecard in 2015.<sup>307</sup> College Scorecard facilitates comparisons of data across institutions on factors like student diversity, average annual cost, graduation rate, and post-graduation earnings.<sup>308</sup> In 2016, Google announced it was collaborating with College Scorecard to make Scorecard data appear in Google searches of a particular institution.<sup>309</sup> Although faculty resources data are not retrievable for comparison through College Scorecard, they are accessible in College Navigator, which allows a deeper dive into more granular college data.

College Navigator allows students to research the wealth of information that colleges and universities report to the government through the IPEDS survey—from admissions and student enrollment data to net price (cost minus financial aid), student debt default rates, and campus crime data.<sup>310</sup> The faculty resources data on College Navigator include numbers of full- and part-time faculty and student-faculty ratio. Table 2 displays faculty resources data recently retrieved from the College Navigator page for the University of Wisconsin-Madison, my undergraduate alma mater.

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304. Elise S. Miller & Jessica M. Shedd, *The History and Evolution of IPEDS*, 181 NEW DIRECTIONS INST. RES. 47, 48 (2019).

305. *Id.* at 49. The DOE also imposes substantial fines for noncompliance with IPEDS reporting obligations, which has improved response rates significantly. *Id.*

306. *Id.* at 52.

307. *Id.* at 50.

308. See *College Scorecard*, U.S. DEP'T OF EDUC. [https://collegescorecard.ed.gov/search/\[http://web.archive.org/web/20211004215720/https://collegescorecard.ed.gov/search/?page=0&sort=completion\\_rate:desc&toggle=institutions\]](https://collegescorecard.ed.gov/search/[http://web.archive.org/web/20211004215720/https://collegescorecard.ed.gov/search/?page=0&sort=completion_rate:desc&toggle=institutions]) (last visited Jan. 5, 2022).

309. Eaton, *supra* note 105.

310. See, e.g., *College Navigator: University of Wisconsin-Madison General Information*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/collegenavigator/?q=university+of+wisconsin+madison&s=all&id=240444#general> [http://web.archive.org/web/20211004215911/https://nces.ed.gov/collegenavigator/?q=university+of+wisconsin+madison&s=all&id=240444#expenses] (last visited Dec. 30, 2021).

**Table 2:** University of Wisconsin-Madison Faculty Data<sup>311</sup>

Faculty by Primary Function, Fall 2019	Full-time	Part-time
Total faculty	4,839	1,357
Instructional	3,588	1,138
Research and public service	1,251	219
Student-faculty ratio – 17:1		

Although the amount of institutional data available to prospective students and their families through these tools is extensive, the data can and should be improved.

Most significantly, the full-time faculty information reported to IPEDS is unreliable for comparison purposes, because definitions of “full-time” and “part-time” faculty are left to the reporting institutions. Since definitional approaches vary significantly across institutions, the faculty counts reported in IPEDS are not reliable.<sup>312</sup> In contrast, the survey instrument developed and used by *U.S. News* adopts a uniform definition of full-time faculty, addressing a limitation of the IPEDS survey.<sup>313</sup> However, *U.S. News* controls the data it collects, and since the *U.S. News* survey is not mandatory, the response rate, although high, cannot achieve the level of IPEDS. Participation in the IPEDS survey is mandatory for any institution that is eligible for federal financial aid, ensuring a typical response rate of about 100%.<sup>314</sup> Incorporating the Common Data Set

311. *Id.*

312. DENISE S. GATER & JOHN V. LOMBARDI, THE USE OF IPEDS/AAUP FACULTY DATA IN INSTITUTIONAL PEER COMPARISONS 2–3, 6 (2001), <https://mup.umass.edu/sites/default/files/mup-pdf/MUP-Publication-2001-The-Use-of-IPEDS-AAUP-Faculty-Data-in-Institutional-Peer-Comparisons.pdf> [<http://web.archive.org/web/20211004220104/https://mup.umass.edu/sites/default/files/mup-pdf/MUP-Publication-2001-The-Use-of-IPEDS-AAUP-Faculty-Data-in-Institutional-Peer-Comparisons.pdf>]. Although NCES has since improved consistency by combining the faculty salary and staff surveys, the lack of a consistent definition of “full-time faculty” in the IPEDS survey remains a concern. E-mail from Bill Hayward, Associate Vice Provost and Director, Office of Institutional Research, University of Illinois at Chicago, to author (Mar. 23, 2021, 17:08 CST) (on file with author).

313. *See supra* note 287–88 and accompanying text. Many universities make their responses to the survey public (the Common Data Set). *See, e.g.*, Stanford University Communications, *Stanford Common Data Set*, <https://ucomm.stanford.edu/cds/> [<http://web.archive.org/web/20211004220200/https://ucomm.stanford.edu/cds/>] (last visited Dec. 30, 2021).

314. *IPEDS Survey Methodology: Web Content: Introduction*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ipeds/ReportYourData/IpedsSurveyMethodologyPrint?section=1> [<http://web.archive.org/web/20211004220329/https://nces.ed.gov/ipeds/ReportYourD>



definition of full-time faculty into the IPEDS survey would improve IPEDS faculty data while also harmonizing the full-time faculty definition with one colleges and universities are already using. Improving publicly available IPEDS data would also support the work of other higher education ranking bodies, lowering barriers on entry to, and promoting competition within, the rankings market.<sup>315</sup> For example, *Washington Monthly* is a college rankings body that describes itself as the public interest “answer to *U.S. News*.” *Washington Monthly* ranks four-year colleges “based on what they do for the country.”<sup>316</sup> It utilizes IPEDS data to calculate its rankings.<sup>317</sup>

Another limitation of the faculty resources data presented in College Navigator is that they are unlikely to be meaningful to the public. Since the faculty data are presented at the university level, they are abstract and not indicative of what a student might expect in terms of program faculty. Nor do the data provide a sense of what the first-year classroom experience will be like. Although student-faculty ratio is a metric that facilitates comparisons among institutions, it does not give a clear picture of a college or university’s reliance on adjunct faculty. The ratio is calculated by

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ata/IpedSurveyMethodologyPrint?section=1] (last visited Dec. 30, 2021); Miller & Shedd, *supra* note 304, at 49.

315. In her analysis of bond rating agency regulation, Hill discusses the natural barriers on entry to the rating agency market, particularly the need for substantial resources and “an established reputation” to make reliable comparisons among large numbers of bond issues. Claire A. Hill, *Regulating the Rating Agencies*, 82 WASH. U. L. Q. 43, 62–63 (2004). Therefore, the main regulatory goal should be “to neutralize” barriers on entry to the rating agency business. *Id.* at 84. See also Seto, *supra* note 276, at 561 (suggesting that the secrecy of reported information “raises significant barriers to entry for possible *U.S. News* competitors”).

316. *2019 College Rankings*, WASH. MONTHLY, <https://washingtonmonthly.com/2019college-guide> [http://web.archive.org/web/20211004220542/https://washingtonmonthly.com/2019college-guide] (last visited Dec. 30, 2021).

317. *A Note on Methodology: 4-Year Colleges and Universities*, WASH. MONTHLY, (Sept.–Oct. 2019), <https://washingtonmonthly.com/magazine/september-october-2019/a-note-on-methodology-4-year-colleges-and-universities-10/> [http://web.archive.org/web/20211004220732/https://washingtonmonthly.com/magazine/september-october-2019/a-note-on-methodology-4-year-colleges-and-universities-10/]. The Wall Street Journal/Times Higher Education College Rankings similarly uses IPEDs data on student-faculty ratios at institutions. *Wall Street Journal/Times Higher Education College Rankings 2022 Methodology*, THE WORLD UNIV. RANKINGS (Sept. 14, 2021), <https://www.timeshighereducation.com/world-university-rankings/wall-street-journal-times-higher-education-college-rankings-2022> [https://web.archive.org/web/20211230225540/https://www.timeshighereducation.com/world-university-rankings/wall-street-journal-times-higher-education-college-rankings-2022].

including both full- and part-time faculty, with each part-time faculty member counting as one-third of a full-time faculty member.<sup>318</sup>

The IPEDS survey should be revised to gather more concrete information on full-time faculty staffing of undergraduate courses, especially introductory courses because of their demonstrated impact on the college experience and student success.<sup>319</sup> Although the Common Data Set does not include this information either, it does include data on the numbers of varying sizes of undergraduate “class sections” offered at institutions (in increments ranging from fewer than ten to 100 or more students).<sup>320</sup> The Common Data Set already utilizes a uniform definition of “full-time faculty,” so harmonizing IPEDS definitions and questions with those in the Common Data Set would improve data while minimizing reporting burdens on institutions.

## VI. CONCLUSION

Colleges and universities responded to the financial strain brought on by the coronavirus pandemic by laying off a tenth of their faculty and staff. Over 570,000 higher education employees—disproportionately low-income and non-white—left the work force between March 2020 and April 2021.<sup>321</sup> A few institutions used the COVID-19 pandemic as cover to abrogate tenure. The University of Akron invoked *force majeure* under its collective bargaining agreement with the faculty union, laying off ninety-seven tenured and non-tenured full-time faculty.<sup>322</sup> The Kansas Board of Regents voted to significantly weaken tenure at public

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318. *IPEDS 2019–2020 Survey Materials: Instructions*, NAT'L CTR. FOR EDUC. STAT., Part F, Line F16, [https://surveys.nces.ed.gov/IPEDS\\_PY/VisInstructions.aspx?survey=6&id=30074&show=all](https://surveys.nces.ed.gov/IPEDS_PY/VisInstructions.aspx?survey=6&id=30074&show=all) [[https://web.archive.org/web/20211106180636/https://surveys.nces.ed.gov/IPEDS\\_PY/VisInstructions.aspx?survey=6&id=30074&show=all](https://web.archive.org/web/20211106180636/https://surveys.nces.ed.gov/IPEDS_PY/VisInstructions.aspx?survey=6&id=30074&show=all)].

319. See *supra* notes 63–68 and accompanying text (discussing the importance of faculty-student relationships during the first year of college).

320. *Common Data Set 2020–2021*, *supra* note 285, at 1-3.

321. Dan Bauman, *Here's Who Was Hit Hardest by Higher Ed's Pandemic-Driven Job Losses*, CHRON. HIGHER EDUC. (Apr. 19, 2021), <https://www.chronicle.com/article/heres-who-was-hit-hardest-by-higher-eds-pandemic-driven-job-losses> [<http://web.archive.org/web/20211004230225/https://www.chronicle.com/article/heres-who-was-hit-hardest-by-higher-eds-pandemic-driven-job-losses>].

322. Lilah Burke, *Arbitrator Sides with U of Akron on Faculty Layoffs*, INSIDE HIGHER ED (Sept. 21, 2020), <https://www.insidehighered.com/quicktakes/2020/09/21/arbitrator-sides-u-akron-faculty-layoffs> [<http://web.archive.org/web/20211004222103/https://www.insidehighered.com/quicktakes/2020/09/21/arbitrator-sides-u-akron-faculty-layoffs>].

institutions,<sup>323</sup> and Saint Xavier University announced it no longer recognized its forty-year-old faculty union.<sup>324</sup> As the chair of Saint Xavier's Board explained in a letter to the faculty, "[c]ontinued delay and stalemate" with the union prevented the university from "adapt[ing] to external pressures or act[ing] on innovation[.]"<sup>325</sup> But the pandemic is finally easing, and the recently-enacted \$1.9 trillion relief bill allocates \$40 billion to public colleges and universities. As relief-bill funding flows to public institutions and students begin to return to college campuses, it remains to be seen whether this trend will reverse itself.

The response of colleges and universities to the pandemic illustrates how dramatically faculty employment has shifted from decades past, when higher education institutions generally hired faculty as a long-term investment, with the expectation that faculty would earn tenure. This Article addresses the failure of accrediting bodies to prevent or slow the trend in higher education to employ faculty essentially as gig workers. It proceeds from the premise that extreme reliance on adjunct faculty undermines student learning, de-professionalizes faculty, and weakens university governance. It concludes that the ABA's specific, rule-based approach to regulating faculty sufficiency, in spite of the potential costs, is preferable to the approach of other accreditors, who utilize vague faculty sufficiency standards. Either Congress or NCES should act to improve mandatory reporting of faculty resources in higher education. Ironically, by developing a survey instrument with a consistent definition of full-time faculty, *U.S. News* has done more than most accreditors to make institutional investments in faculty more transparent.

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323. William H. Widen, *Kansas, Crisis, Tenure and the US Contracts Clause*, JURIST (Jan. 25, 2021, 9:00 AM), <https://www.jurist.org/commentary/2021/01/william-widen-kansas-tenure/> [<http://web.archive.org/web/20211004222222/https://www.jurist.org/commentary/2021/01/william-widen-kansas-tenure/>].

324. Isaacs, *supra* note 34.

325. Emma Whitford, *St. Xavier University Cuts Ties With Faculty Union*, INSIDE HIGHER ED (Jun. 22, 2020), <https://www.insidehighered.com/news/2020/06/22/citing-pandemic-related-pressures-st-xavier-university-cuts-ties-faculty-union> [<http://web.archive.org/web/20211004231037/https://www.insidehighered.com/news/2020/06/22/citing-pandemic-related-pressures-st-xavier-university-cuts-ties-faculty-union>]. The university's decision also coincided with a National Labor Relations Board decision holding it lacked jurisdiction to regulate religiously-affiliated institutions. *Id.*

APPENDIX: RECENT ABA SANCTIONS AND WITHDRAWALS OF  
APPROVAL<sup>326</sup>

<b>Institution</b>	<b>Date of ABA Action</b>	<b>ABA Standard(s) at Issue</b>	<b>Comments</b>
Concordia University School of Law	Nov-20	N/A	ABA withdrew approval when law school closed in 2020 for financial reasons.
Arizona Summit Law School	Aug-20	202a (Financial resources) 301a (Rigorous program) 309b (Academic support) 501b (Admission of those capable of completion and bar passage)	Put on probation in 2017. Due to continued non-compliance with standards, ABA withdrew approval in Aug 2020.
Valparaiso University School of Law	Aug-20	501a (Admissions policies) 501b (Admission of those capable of completion and bar passage)	Censured for noncompliance but later brought into compliance. ABA withdrew approval when institution ceased operations in Aug 2020.
Whittier Law School	Aug-20	N/A	ABA withdrew approval when law school closed in 2020 due to declining enrollment and poor bar passage of recent graduates.

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326. *Public Accreditation Notices: Sanctions, Remedial Action, and Significant Noncompliance Under Rule 11(a)(4)*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/public-notice/sanctions-remedial-action-noncompliance/](https://www.americanbar.org/groups/legal_education/public-notice/sanctions-remedial-action-noncompliance/) [http://web.archive.org/web/20211004231535/https://www.americanbar.org/groups/legal\_education/public-notice/sanctions-remedial-action-noncompliance/] (last visited Dec. 30, 2021).

<b>Institution</b>	<b>Date of ABA Action</b>	<b>ABA Standard(s) at Issue</b>	<b>Comments</b>
Thomas Jefferson School of Law	May-19	202a (Financial resources) 202d (Anticipated financial condition) 301a (Rigorous program) 501b (Admission of those capable of completion and bar passage)	Placed on probation in November 2017. Due to continued non-compliance with the standards, ABA withdrew approval in May 2019.
Atlanta's John Marshall Law School	Nov-18	301a (Rigorous program) 309b (Academic support) 501a (Admissions policies) 501b (Admission of those capable of completion and bar passage)	Due to continued non-compliance, ABA placed institution on probation and directed remedial action. Taken off probation in Dec 2019.
Charlotte School of Law	Feb-18	301a (Rigorous program) 501a (Admissions policies) 501b (Admission of those capable of completion and bar passage)	Censured and put on probation for continued non-compliance with standards. ABA withdrew approval when state license to operate JD program expired in 2017.
Texas Southern University Thurgood Marshall School of Law	Jun-17	104 (Reporting)	Censured for noncompliance with Standard 104.