



2019 HIGHER EDUCATION FORUM

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ACADEMIC REORGANIZATION AT VERMONT LAW SCHOOL: SOME CONUNDRUMS AND SOME
OBSERVATIONS ABOUT THE SIGNIFICANCE OF WHAT HAPPENED THERE LAST YEAR

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The conundrum:

Standard 201 (“Law School Governance”) of the American Bar Association’s STANDARDS FOR APPROVAL OF LAW SCHOOLS says:

The dean **and the faculty** shall recommend the selection, retention, promotion, **and tenure** (or granting of security of position) of members of the faculty.

– Standard 201(b),
https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter2.pdf

But:

The principle of fiduciary duty is imposed by statute on the governing boards of nonprofit corporations in most states, *e.g.*:

... all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.

– 11B V[ermont] S.A. § 8.01(b),
<https://legislature.vermont.gov/statutes/section/11B/008/00008.01>

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I.

VERMONT LAW SCHOOL AND THE EVENTS OF 2018

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VLS Characteristics:

- Founded in 1972. Fully accredited by the ABA in 1978 and at all times thereafter.
- About 630 full-time students and 120 full-time and adjunct faculty members.
- Well-known nationally-ranked program in environmental law:

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U.S. NEWS & WORLD
REPORT's 2019-2020
rankings of
environmental law
programs,

<https://www.usnews.com/best-graduate-schools/top-law-schools/environmental-law-rankings>

RANK	LAW SCHOOL
1	Lewis & Clark
1	Pace
3	University of California Berkeley
4	VERMONT LAW SCHOOL
4	University of California Los Angeles
6	Columbia
6	Harvard
8	University of Colorado
8	Georgetown
8	NYU
8	University of Oregon
8	University of Utah

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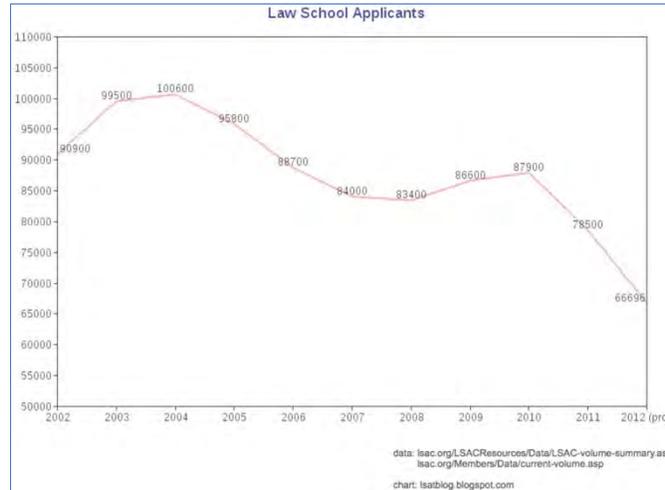
Some oddities about VLS:

- Unusual faculty governance structure.
- Unusual alumni(ae)(i) body.
- One of only a handful of independent, accredited, free-standing law schools (i.e., law schools not constituted as units of larger universities) in the United States.

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Chronology:

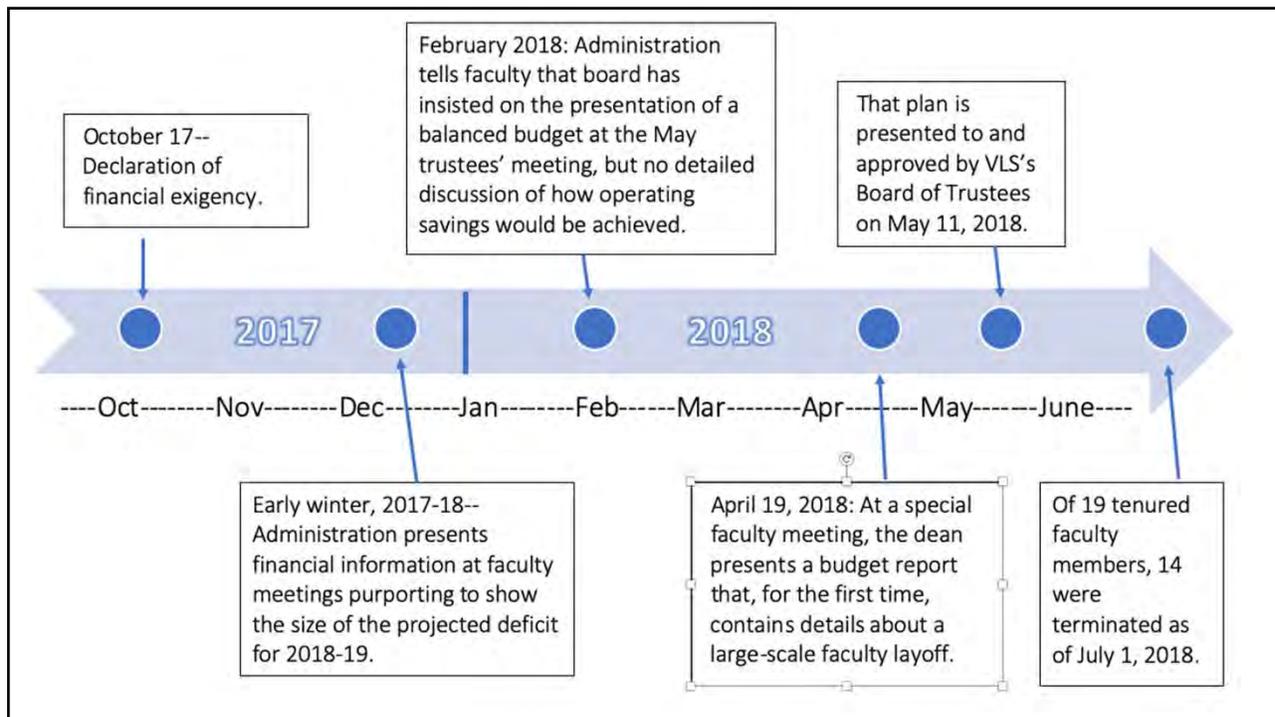
- Mid-2010s: applicant pool for law schools dries up.



- From 2012 to 2017 VLS operated every year at a deficit, and in the 2015-16 and 2016-17 academic years VLS reported large operating deficits due to deep tuition discounts and drops in graduate enrollment.

		Prior Year	Current Year
Revenue	8 Contributions and grants (Part VIII, line 1h)	5,260,800	3,739,963
	9 Program service revenue (Part VIII, line 2g)	26,257,291	27,622,220
	10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	597,419	492,036
	11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	0	-59,821
	12 Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	32,115,510	31,794,398
Expenses	13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)	9,841,550	10,356,660
	14 Benefits paid to or for members (Part IX, column (A), line 4)	0	0
	15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	14,036,718	15,810,917
	16a Professional fundraising fees (Part IX, column (A), line 11e)	0	0
	b Total fundraising expenses (Part IX, column (D), line 25) ▶776,627		
	17 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24e)	9,578,200	9,080,116
	18 Total expenses. Add lines 13-17 (must equal Part IX, column (A), line 25)	33,456,468	35,247,693
19 Revenue less expenses. Subtract line 18 from line 12	-1,340,958	-3,453,295	

From the VLS Form 990 for the 2017 tax year,
<https://projects.propublica.org/nonprofits/organizations/237251952/201901339349302340/IRS990>



In the aftermath of the layoffs and restructuring at VLS:

- Muted response in the media.
- No litigation (yet).
- AAUP investigation at VLS to determine whether AAUP-endorsed standards on shared governance were followed in the run-up to the 2018 restructuring and layoffs.
- Publication of the AAUP's investigatory report, followed by formal AAUP censure of VLS.

II.

VERMONT LAW SCHOOL AND THE AAUP'S 1966 STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES

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What is the AAUP?

The AAUP is a nonprofit membership association of faculty and other academic professionals. Headquartered in Washington, DC, [it has] members and chapters based at colleges and universities across the country.

Since [its founding] in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country's colleges and universities. ... [It] advance the rights of academics, particularly as those rights pertain to academic freedom and shared governance, and promote the interests of higher education teaching and research.

— AAUP, *About the AAUP*, www.aaup.org/about-aaup

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What is the AAUP, continued:

- 45,000 dues-paying members.
- One of the largest faculty unions in the United States.
- Publisher of the AAUP REDBOOK, ACADEME, and other model policies.
- Litigator, both in its own name and in support of faculty plaintiffs.

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What is the AAUP, continued:

- The AAUP is a private membership organization, not a government agency. It has no enforcement power, no power to levy penalties or fines, and no authority to manage any institution other than itself.
- That said, the AAUP has had success over the years in persuading courts that its policy pronouncements represent national “best practices” and can appropriately be taken into account in giving meaning to otherwise vague terms in statutes, institutional policies, and faculty handbooks—terms such as “tenure” and “academic freedom.”

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What is the AAUP, continued:

- Standing committees of the AAUP conduct *investigations* of institutional practices, publishing *reports* in *Academe* (the AAUP's journal of record), and, in extreme cases, imposing "*censure*" or "*sanctions*" on institutions that fail to observe pertinent AAUP policies and standards.
- What is censure? It is a badge of opprobrium. It is a public form of putting pressure on an institution to revise its policies and practices. Censure is largely symbolic, although institutions try hard to avoid the stigma associated with it.

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The AAUP has played an outsized role in the articulation of standards for institutional governance in higher education and the championing of a particular model referred to as "shared governance." That model is embodied in one of the AAUP's most important policy formulations: the 1966 *Statement of Government of Colleges and Universities*, endorsed jointly by the AAUP, American Council on Education, and Association of Governing Boards of Universities and Colleges.

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What does shared governance mean? A helpful definition:

AGB BOARD OF DIRECTORS' STATEMENT ON
Shared Governance

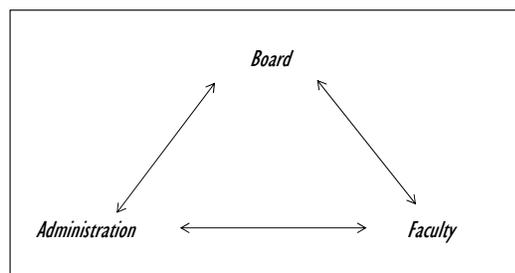
Introduction

One of higher education's most distinctive values is its commitment to shared governance. Simply put, shared governance is a fundamental principle of inclusion in key areas of institutional responsibility and decision making. Governing boards hold ultimate authority for an institution, as defined in bylaws and other foundational documents as well as state fiduciary principles. There is very little debate on this point. However, through longstanding academic practice, this authority is delegated to—or “shared with”—institutional leaders and faculty. Typically, presidents are charged with institutional leadership, strategic planning, and daily management, while faculty are charged with educational design and delivery. As the Association of Governing Boards of Universities and Colleges (AGB) said in its *Statement on Board Responsibility for Institutional Governance* (2010), shared governance “has historically resulted in continuous innovation and the concomitant effect that American college curricula and pedagogy define the leading edge of knowledge, its production, and its transmission.”

What does shared governance mean? [continued]

The Structure of the 1966 Statement on Government:

- Presupposes an interdependent governance role among three institutional entities: *governing board*, *president* (i.e., administration), and *faculty*.



What does shared governance mean? [continued]

The Structure of the 1966 Statement on Government:

- **With respect to the governing board:** “The governing board of an institution of higher education in the United States operates, with few exceptions, as the final institutional authority.”
- **With respect to the president (administration):** “The governing board entrusts the conduct of administration to the administrative officers—the president and the deans—and the conduct of teaching and research to the faculty. The board should undertake appropriate self-limitation.”

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What does shared governance mean? [continued]

The Structure of the 1966 Statement on Government:

- **With respect to the faculty:** “The faculty has ***primary responsibility*** for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely ***only in exceptional circumstances***, and ***for reasons communicated to the faculty.***”

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Let's start with this term—
"primary responsibility." What
does that mean and how is
"primary responsibility" exercised?

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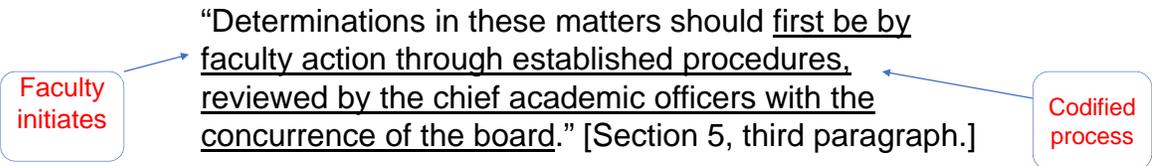
From the 1966 *Statement*:

Faculty
initiates

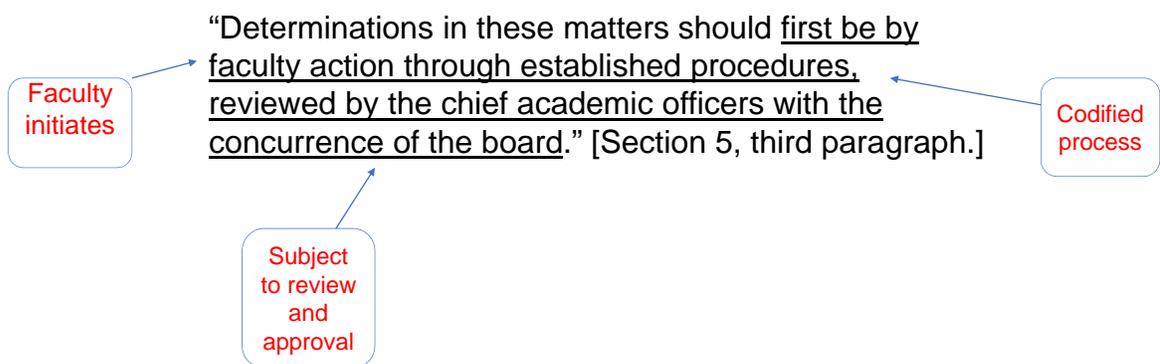
“Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board.” [Section 5, third paragraph.]

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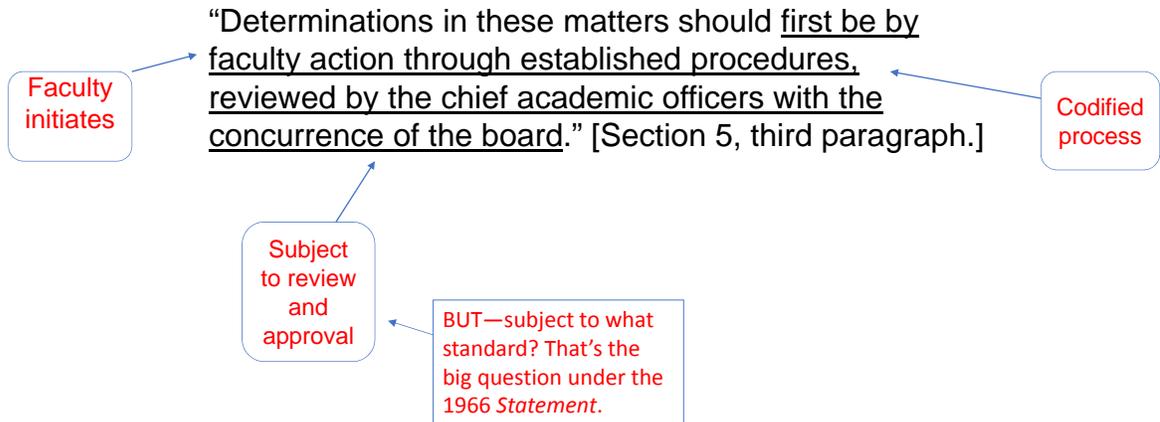
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And here we get back to this critical language.

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From Section 5, third paragraph of the 1966 Statement:

“The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.”

A.
Presumption
that faculty is
acting within
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30

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primary
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B.
Administration and/or board must
be put to the task of justifying the
override or modification.

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The 1966 Statement on Government: Some General Comments

1. Offers no definition of “shared governance.”
2. Deliberately not prescriptive: *“It is not intended that the statement serve as a blueprint for governance on a specific campus or as a manual for the regulation of controversy among the components of an academic institution, although it is to be hoped that the principles asserted will lead to the correction of existing weaknesses and assist in the establishment of sound structures and procedures.”*
3. General, almost vague, in tone, and – with the important exception of the “faculty” section – surprisingly lacking in operational specifics.
4. Explicit acknowledgment that the board “operates ... as the final institutional authority.”

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The 1966 Statement on Government: Some General Comments

5. Most important: some operational rules on the meaning of shared governance in the faculty context:
 - a. Faculty initiates.
 - b. Presumption that faculty recommendation is appropriate.
 - c. Rule that faculty recommendation will not be rejected except for compelling reasons expressed in writing.

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The two principal findings in the AAUP's report on VLS:

- VLS violated language in the 1966 *Statement on Government* requiring the institution to provide the faculty with a “full opportunity ... [to participate in] appropriate joint planning and effort.” As stated in the AAUP's report on VLS:

... [A]bsent from the administration's approach was the fundamental understanding that shared governance requires far more than merely providing information to faculty members and inviting their perspectives before making a decision. *At no time during spring 2018, when the administration presented various expenditure-reducing proposals for discussion, did the administration afford the faculty—as a body—the opportunity to make a recommendation or take a vote to record its position.* [Emphasis supplied.]

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- VLS violated the 1966 *Statement on Government's* operational rule that proposed policy in the faculty's primary areas of responsibility should be initiated *by the faculty*:

By acting unilaterally in the decisions involving the elimination of fourteen tenured appointments, the administration—with the approval of the board of trustees—effectively undermined the authority of the faculty in important areas of its primary responsibility, most egregiously in the determination of faculty status and in the oversight of teaching and curriculum, thereby violating generally accepted principles of academic governance.

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III.

Some Takeaways

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1. There is sketchy language in many accreditation standards relating to shared governance—although that language falls far, far short of what the AAUP insists upon in the 1966 *Statement*. *E.g.*:

- Middle States Commission on Higher Education, Standard VII, para. 1: “[A]n institution demonstrates a clearly articulated and transparent governance structure that outlines roles, responsibilities, and accountability for decision making by each constituency, including governing body, administration, [and] faculty ...”
[www.msche.org/wp-content/uploads/2018/06/RevisedStandardsFINAL.pdf.]
- New England Commission on Higher Education, Standard 3.15: “The institution places primary responsibility for the content, quality, and effectiveness of the curriculum with its faculty. Faculty have a substantive voice in matters of educational programs, faculty personnel, and other aspects of institutional policy that relate to their areas of responsibility and expertise.”

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Hmm. Will
NECHE eventually
find that
Vermont Law
School does not
meet this
standard?

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2. It’s possible that events at VLS last year will cause governing boards to take a fresh look at governance structure and the board’s shared governance obligations, and will spark renewed interest in the 1966 *Statement on Government*.

- See Middle States Standard VII, para. 5: institutions must engage in “periodic assessment of the effectiveness of governance, leadership, and administration.”

3. It’s possible that the AAUP’s censure of Vermont Law School will affect governance negotiations during collective bargaining at institutions with unionized faculty—particularly if the union is AAUP-affiliated.

4. It may be more important than ever for trustees, particularly new trustees, to receive orientation on the meaning of shared governance.

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5. Final thought: Consider this language from Standard 3.13 in the NECHE accreditation standards:

... the chief executive officer and senior administrators consult with faculty, students, other administrators, and staff, and are appropriately responsive to their concerns, needs, and initiatives. The institution's internal governance provides for the appropriate participation of its constituencies, promotes communications, and effectively advances the quality of the institution.

How do administrators demonstrate “appropriate responsiveness” to the concerns of other constituencies? What kind of governance-related faculty participation is “appropriately responsive”? In determining whether faculty have an “appropriate” opportunity to participate in institutional governance, will accrediting agencies—and eventually courts—turn to the 1966 *Statement on Government* to decide what's appropriate and what isn't?

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