

The LAW of HIGHER EDUCATION

(STUDENT VERSION)

Kaplin
Lee
Hutchens
Rooksby

William A. Kaplin | Barbara A. Lee | Neal H. Hutchens | Jacob H. Rooksby

An authoritative, single-volume text on the law that bears on the conduct of higher education

The revised and updated *Sixth Edition* of *The Law of Higher Education: Student Version* offers an essential guide to the information, analysis, and practical suggestions on a wide range of legal issues pertinent to both public and private institutions. The authors provide a timely reference for coursework in higher education law and programs aimed at preparing law students and higher education administrators for leadership roles.

The text's discussions draw on court opinions, constitutional provisions, statutes, administrative regulations, and related developments. The *Sixth Edition* presents new material and contains information on recent developments and insights regarding topics in the previous editions. In addition, the revised edition reflects the many new and complex legal concerns that have arisen on America's campuses in recent years.

All chapters are introduced with a discussion of key terms and the topics students will encounter. The *Student Version* includes materials from the full *Sixth Edition* that are most relevant to student interests and classroom instruction. The text also contains a "crosswalk" that keys sections of the student edition to counterpart sections of the two-volume treatise.

The Law of Higher Education: Student Version's revised *Sixth Edition* continues to support the effective teaching and learning of higher education law.

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SIXTH EDITION

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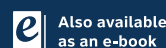
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The authors have prepared a compilation of teaching materials for classroom use (see below) that is available in electronic format free of charge for instructors who adopt this *Student Version* as a required text. In addition, we have a website supporting the *Student Edition* (as well as the full *6th Edition* of *The Law of Higher Education*) that is accessible to both instructors and students; it includes new developments, clarifications, and errata that update and supplement the *6th Edition* and the *Student Version*. We have also prepared an Instructor's Manual that provides suggestions on using the *Student Version* as a course text and on organizing and teaching higher education law courses. It is available, only to instructors, on the website. This website is hosted by the National Association of College and University Attorneys (NACUA) and is available at <https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education-6th-edition>. The teaching materials, *Cases, Problems, and Materials for Use with the Law of Higher Education, Fifth Edition, Student Version*, is for instructors and students in courses on higher education law or administration, as well as for leaders and participants in workshops that address higher education legal issues. These teaching materials include court opinions carefully edited by the authors and keyed to the *Student Version*, notes and questions about the cases, short problems designed to elicit discussion on particular issues, a series of "large-scale" problems suitable for role playing, and guidelines for analyzing and answering all the problems. *Cases, Problems, and Materials (Student Version)* is published by NACUA (which also hosts the website for the *Student Version* and the full *6th Edition*) and is available both in electronic format that can be downloaded from NACUA's website (<https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education-6th-edition>) and in hard copies that may be purchased at cost

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The authors, in cooperation with the publisher, have made arrangements for two types of periodic updates for the *Student Version* (and the full *6th Edition*) of *The Law of Higher Education*. First, the National Association of College and University Attorneys (NACUA) has generously agreed to host a website for the *Student Version* and the full *6th Edition* to provide periodic postings of new developments and clarifications that update and supplement both books. This website is available to all readers and may be accessed through the NACUA website (<https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education-6th-edition>). These updating services are intended as a response to the law's dynamism—to the rapid and frequent change that occurs as courts, legislatures, government agencies, and private organizations develop new requirements, revise or eliminate old requirements, and devise new ways to regulate and influence institutions of higher education.



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Crosswalk for the *Student Version and The Law of Higher Education, Sixth Edition*

The crosswalk below directs interested readers from particular sections of the Student Version to the parallel section or sections in *The Law of Higher Education, Sixth Edition*. Since LHE 6th is a larger work (2 volumes), it contains more citations of resources and more case examples than the Student Version. This additional material in LHE 6th may be useful to instructors preparing classes and to students engaging in research or independent study. In addition, LHE 6th includes various sections covering topics—usually specialized topics of primary interest to practitioners—that are not treated in the Student Version. Although these additional sections in LHE 6th are not shown on this crosswalk, interested readers may view the entire Table of Contents of LHE 6th by going to the NACUA website that supports LHE 6th and the Student Version (see “Notice of webSite and Periodic Supplements,” previously in the front matter).

Student Version

LHE 6th Edition

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- B. The Governance of Higher Education
- C. Sources of Higher Education Law
- D. The Legal Relationships within Institutions of Higher Education
- E. The Law/Policy Distinction
- F. The U.S. Legal System as It Relates to Higher Education Law

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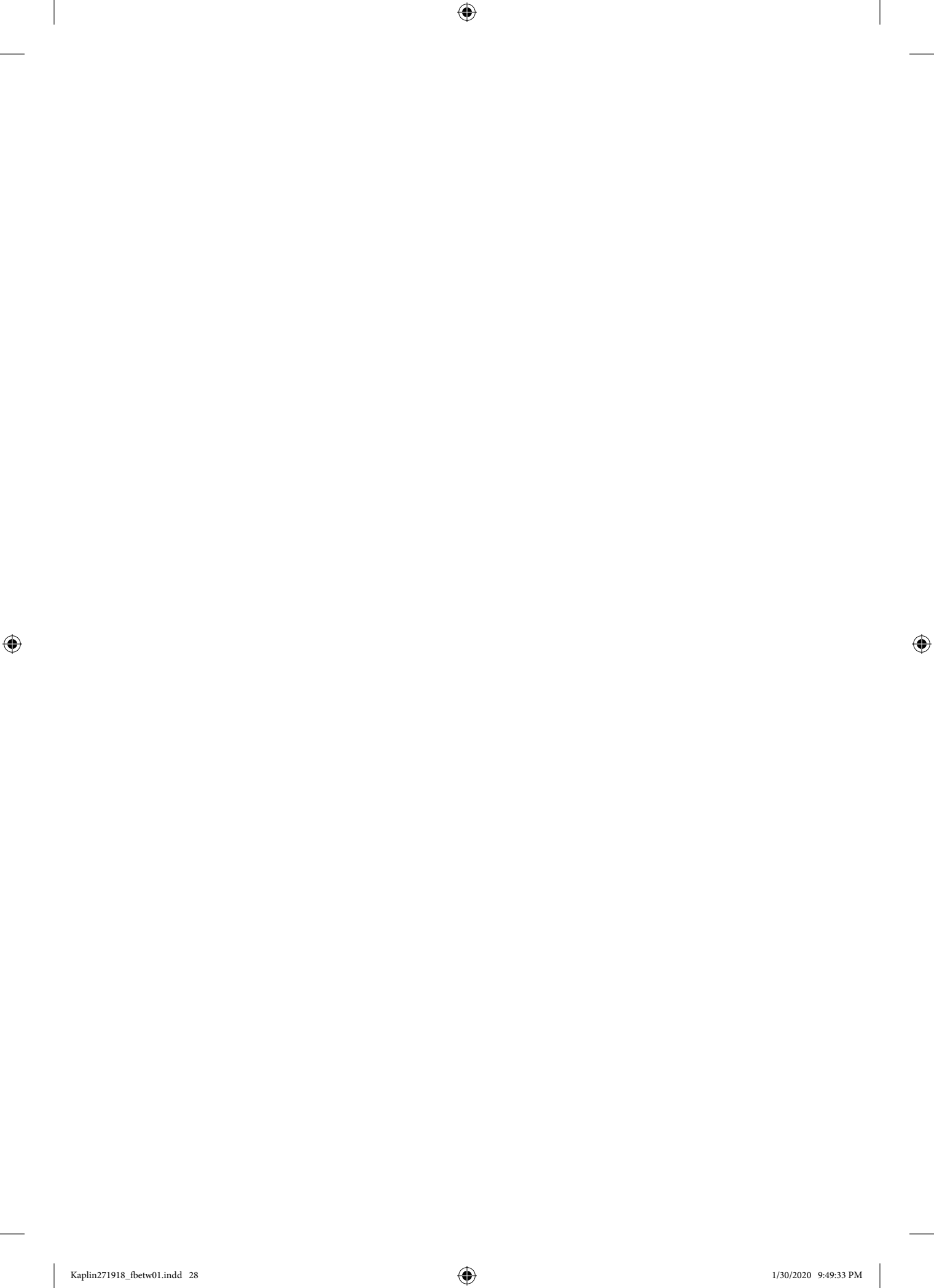
- A. *Constitution of the United States of America: Provisions of Particular Interest to Postsecondary Education*
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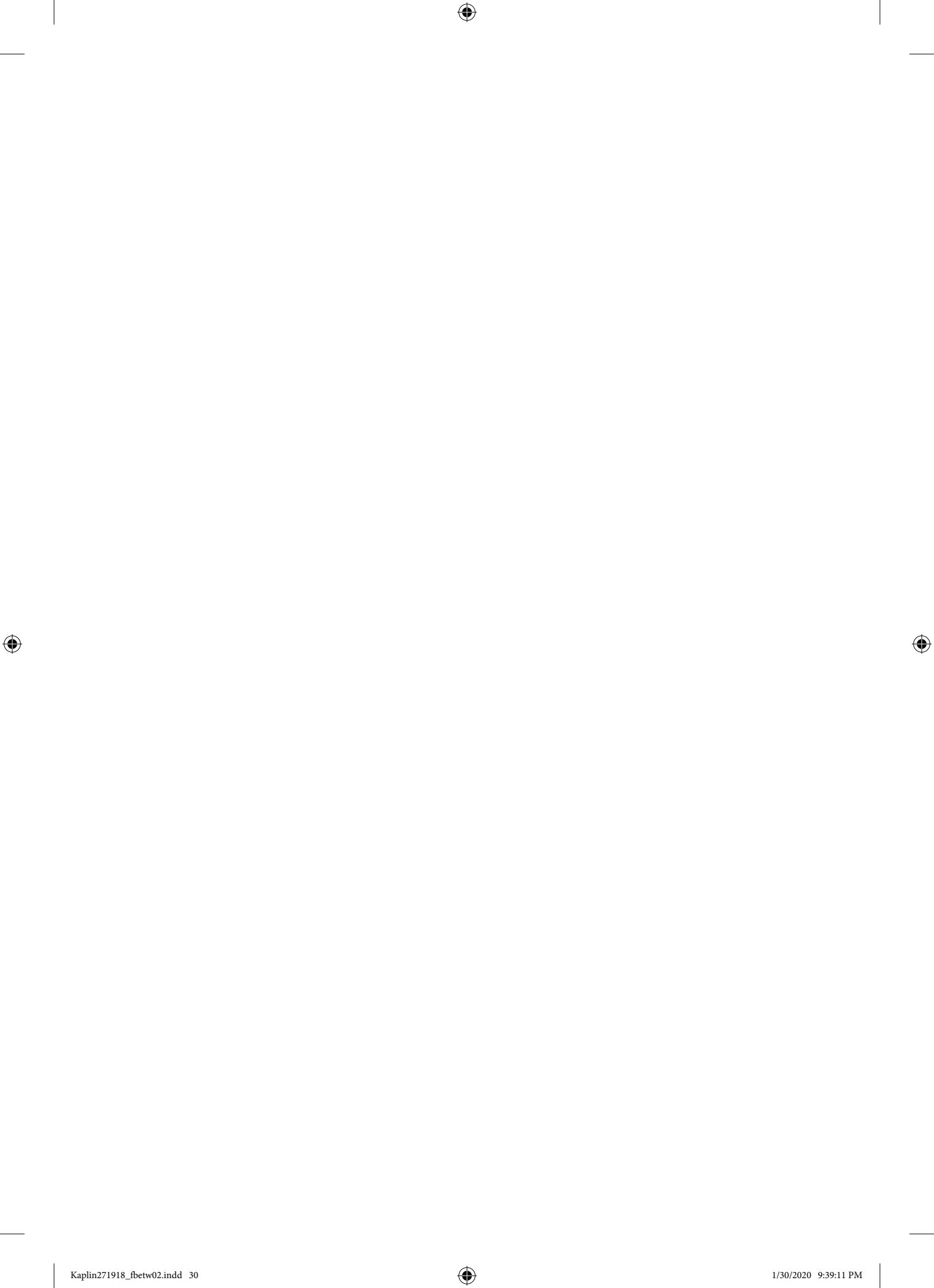
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Much as it takes a village to raise a child (a saying of obscure origin), it takes an “academical village” (Thomas Jefferson’s phrase) to raise a book—at least a book such as this that arises from, and whose purpose is to serve, a national (and now international) academic community. This Student Version of the sixth edition is dedicated to all those members of our academical village, especially the instructors and students, who in numerous and varied ways have helped raise this book from its origins through this sixth edition, and this Student Version, and to all those members who will face the great challenges of law and policy that will shape higher education’s future.



Preface

Operating the colleges and universities of today presents a multitude of challenges for their leaders and personnel. Often the issues they face involve institutional policy, but with continually increasing frequency they have legal implications as well. For example:

- A staff member may decide to become a whistleblower and assert that another college employee is violating the law. If the complaining staff member's performance has been problematic, and "just cause" exists for dismissal, may the college discharge the whistleblowing staff member?
- A tenured faculty member may have been accused of sexually harassing a student by requiring the student to complete a project that the student finds offensive. What standards and processes should be used to determine whether the faculty member should be discharged, disciplined, or reprimanded?
- A student religious organization may approach the dean of students seeking recognition or an allocation from the fund for student activities. If membership is limited to students of a particular faith, or if the student organization does not admit gays or lesbians, how should the administration respond?
- A group of students petitions the administration to develop a "hate speech" code because they believe it will reduce the number of bias incidents on campus. Can a public institution enforce such a provision?

- A wealthy alumna may call the vice president for student affairs and offer to make a multi-million dollar donation for scholarships on the condition that they be awarded only to African American students from disadvantaged families. Can and should the vice president accept the donation and follow the potential donor's wishes?

To assist students and instructors who wish to study, research, or teach about issues such as these, and innumerable others, we have prepared this *Student Version* of our two-volume work, *The Law of Higher Education, 6th Edition* (“LHE 6th” or “full 6th Edition”). The *Student Version* provides foundational information, in-depth analysis, and practical suggestions on a wide array of legal issues faced by public and private institutions. The discussions draw upon pertinent court opinions, constitutional provisions, statutes, administrative regulations, and related developments. In order to enhance readability and keep the *Student Version* of manageable size, we have only occasionally included text or footnote citations to resources for further study and research, such as selected journal articles, books, and websites. We have, however, included a bibliography of such resources at the end of this book. In addition, we have created a convenient crosswalk from the various sections of the *Student Version* to the corresponding sections of the full 6th Edition, which are chockfull of text citations, footnotes, and annotated bibliographies (at the end of each chapter) that will be highly useful for any student or instructor seeking such resources. The crosswalk appears in the front matter of this book.

How the Student Version Was Developed

We have designed this special edition of *LHE 6th* for use in higher education law and higher education administration courses. Guided by our own experiences teaching courses and workshops in higher education law, and by the suggestions of teaching colleagues, we have selected the topics from the full 6th Edition that we believe are of greatest importance and interest to students of higher education law and their instructors. We have given primary consideration to the significance of the topic for the development of higher education law and policy, the topic's currency or timelessness for administrators of colleges and universities, and its usefulness in illustrating particular legal problems or the application of particular legal principles. The issues we have emphasized for each topic are usually ones that administrators, faculty members, or students could encounter at virtually any institution of higher education in the country (or, sometimes, in the world). In developing these issues, we have focused not only on the applicable law but also on pertinent policy considerations and on implications for practice.

We had to make difficult choices about which topics to omit or to treat much less expansively than they were treated in the full 6th Edition. For example, we included most of the topics and discussion in the chapters from the full 6th Edition involving institutional liability for tort claims, faculty employment issues, academic freedom, student affairs, and academic issues concerning

students. On the other hand, we omitted many of the topics and discussions involving the employment of administrators and staff members. We also omitted most of the full *6th Edition*'s discussion of government regulation of higher education—although we retained overviews of each level of government and illustrative examples of regulatory activities at each level. For the federal government, for example, we retained a discussion of federal copyright law and a discussion of federal civil rights laws (such as Title IX) prohibiting discrimination in programs that receive federal funding. Similarly, we omitted most of the material in the full *6th Edition* that discusses the various private educational associations, in particular the American Association of University Professors (AAUP), the accrediting agencies, and the intercollegiate athletics associations and most of the material on college and university relationships with the business world. But we retained overviews and illustrative examples for each of these topics. (The material on the AAUP is in Section 6.1.3.) Researchers interested in further information on topics or issues that we have compressed are invited to consult the crosswalk to *LHE 6th*; and to consult the Table of Contents of *LHE 6th* for topics we have omitted from the *Student Version*.

Besides re-editing and reorganizing the materials that we have adapted from *LHE 6th*, we have updated these materials to account for the most important developments occurring from the press deadline for *LHE 6th* to the press deadline for this *Student Version*; and we occasionally have made small insertions of new material to capture points of particular interest to students. In addition, we have prepared numerous study aids designed specifically for students and instructors, and integrated them into this book. These enhancements are:

- Introductory materials, titled “General Introduction to the Study of Higher Education Law,” that lay the foundation for, and facilitate the study of, the subject matter, and also include a section providing guidance for students who do not have background or training in the law.
- An appendix (Appendix B) that provides an overview of the American system of courts and highlights key distinctions between federal and state courts, and between trial and appellate courts.
- Another appendix (Appendix C) that provides practical guidelines for reading and analyzing judicial opinions.
- Another appendix (Appendix D) that presents a glossary of legal terms used in this book.
- Overviews at the beginning of chapters (in italics) that introduce the topics and concepts to be addressed in each chapter.
- Figures spread throughout the book that illustrate particular legal concepts and distinctions.
- A crosswalk (in the front matter) connecting each section in the *Student Version* to the corresponding section in the full *6th Edition* and designed for readers who may seek additional discussion, cases, or bibliographical resources available in *LHE 6th*.

In addition to these study aids that are incorporated into this *Student Version*, we have also prepared a separate volume of edited cases and practice problems, keyed to the *Student Version*, which is available to instructors for distribution to students. (See “Notice to Instructors” in the front matter.)

Developments in Higher Education Law Since the Publication of the Fifth Edition

In the six years since publication of the fifth edition and then its updates, many new and newly complex legal concerns have arisen on America’s campuses—from the ever-greater and more complex implications of the explosion in social media on faculty and student conduct and rights, to the continuing challenges to affirmative action in admissions and financial aid, to the membership practices of student religious organizations in the context of institutions’ nondiscrimination policies, to the clash between faculty and “institutional” academic freedom, to the rights of intercollegiate athletes. Indeed, it is difficult to identify any other entities—including large corporations and government agencies—that are subject to as great an array of legal requirements as colleges and universities are. To serve the needs occasioned by this continual growth of the law, this *Student Version* of *LHE 6th* retains the material of continuing legal currency from the *5th Edition* of *LHE*, that is within the parameters we have set out above. We reorganized and re-edited this material to accommodate the deletion of old and the addition of new developments and to maximize clarity and accessibility. To this base, we added considerable new material: more than one-third of the material in the 12 chapters of the *Student Version* did not appear in earlier editions of *The Law of Higher Education*. This new material integrates pertinent new developments and insights regarding topics in the earlier editions and introduces numerous new topics and issues not covered in earlier editions.

Like the full *6th Edition*, this *Student Version* covers all of nonprofit *post-secondary* education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institution, and from the traditional campus-based program to the innovative off-campus or multistate program, and to distance learning as well. The *Student Version* also reflects the same perspective as the full *6th Edition* and earlier editions on the intersection of law and education. As described in the preface to the *1st Edition*:

The law has arrived on the campus. Sometimes it has been a beacon, at other times a blanket of ground fog. But even in its murkiness, the law has not come “on little cat feet,” like Carl Sandburg’s “Fog”; nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes has stumbled. And even in its imperfections, the law has spoken forcefully and meaningfully to the higher education community and will continue to do so.

Organization and Content of the Student Version

We have organized this *Student Version* into 12 chapters. These chapters are in turn organized into five parts: (1) Perspectives and Foundations; (2) The College and Its Governing Board and Staff; (3) The College and Its Faculty; (4) The College and Its Students; and (5) The College and the Outside World. In turn, we have divided these five parts into 12 chapters. Each chapter is divided into numerous sections and subsections with their own titles.

Chapter 1 provides a framework for understanding and integrating what is presented in subsequent chapters and a perspective for assimilating future legal developments. Chapter 2 addresses foundational concepts concerning legal liability, preventive law, and the processes of litigation and alternative dispute resolution. Chapters 3 through 10 develop the legal concepts and issues that define the *internal* relationships among the various members of the campus community and address the law's impact on particular roles, functions, and responsibilities of students, faculty members, and trustees and administrators. Chapter 11 is concerned with the postsecondary institution's *external* relationships with government at the federal, state, and local levels. This chapter examines broad questions of governmental power and process that cut across all the *internal* relationships and administrative functions considered in Chapters 3 through 10. Chapter 12 also deals with the institution's *external* relationships, but the relationships are those with the private sector rather than with government. This chapter explores the various national and regional education associations with which postsecondary institutions interact, as well as the various research ventures that institutions engage in with private entities from the commercial world.

Prior to the first chapter, we have included a General Introduction with six sections. After the last chapter, we have included a bibliography of resources for research and independent study, as well as four appendices containing various study aids.

A Note on Nomenclature

The *Student Version* uses the terms “higher education” and “postsecondary education” to refer to education that follows a high school (or K–12) education. Usually, these terms are used interchangeably; but occasionally “postsecondary education” is used as the broader of the two terms, encompassing formal post-high school education programs whether or not they build on academic subjects studied in high school or are considered to be “advanced” studies of academic subjects. Similarly, this book uses the terms “higher education institution,” “postsecondary institution,” “college,” and “university” to refer to the institutions and programs that provide post-high school (or post-K–12) education. These terms are also usually used interchangeably; but occasionally “postsecondary institution” is used in the broader sense suggested above, and

occasionally “college” is used to connote an academic unit within a university or an independent institution that emphasizes two-year or four-year undergraduate programs. The context generally makes clear when we intend a more specific meaning and are not using the above terms interchangeably.

The term “public institution” generally means an educational institution operated under the auspices of a state, county, or occasionally a city, government. The term “private institution” means a nongovernmental, nonprofit, or proprietary educational institution. The term “religious institution” encompasses a private educational institution that is operated by a church or other sectarian organization (a “sectarian institution”), or is otherwise formally affiliated with a church or sectarian organization (a “religiously affiliated institution”), as well as an institution that has no affiliation with an outside religious organization but nevertheless proclaims a religious mission and is guided by religious values.

Recommendations for Using the Student Version and Keeping Up-to-Date

There are some precautions to keep in mind when using this book. The legal analyses throughout the book, and the practical suggestions, are not adapted to the law of any particular state or to the circumstances prevailing at any particular postsecondary institution. The book is not a substitute for the advice of legal counsel, nor a substitute for further research into the particular legal authorities and factual circumstances that pertain to any legal problem that an institution, administrator, student, or faculty member may face in real life. Nor is the book necessarily the latest word on the law. There is a saying among lawyers that “the law must be stable and yet it cannot stand still” (Roscoe Pound, *Interpretations of Legal History*, p. 1 (1923)), and the law moves especially fast in its applications to postsecondary education. Thus, we suggest that instructors and students keep abreast of ongoing developments concerning the topics and issues in this book. Various aids (described below) are available for this purpose.

First, we maintain a website, hosted by the National Association of College and University Attorneys (NACUA), Washington, D.C. (www.nacua.org), on which we announce or post pertinent new developments, keying them to this *Student Version* as well as to the full *6th Edition*. For further information on the website and the supplements, see page vii in the front matter of this book.

Next, there is another, very helpful, website: the Campus Legal Information Clearinghouse (CLIC), <http://counsel.cua.edu>, operated by the General Counsel’s Office at The Catholic University of America in conjunction with the American Council on Education, that includes information on recent developments, especially federal statutory and federal agency developments. In addition, there is a legal reporter that reprints new court opinions on higher education law and provides commentary on recent developments: *West’s Education Law Reporter*, published biweekly by Thomson/West Publishing Company, St. Paul, Minnesota.

For news reporting of current events in higher education generally, but particularly for substantial coverage of legal developments, instructors or students may wish to consult the *Chronicle of Higher Education*, published weekly in hard copy and daily online (<http://www.chronicle.com>); or *Inside Higher Ed.*, published daily online (<http://insidehighered.com>).

Other resources will be helpful not only for keeping abreast of recent developments but also for identifying pertinent research. *Higher Education Abstracts* provides information on conference papers, journal articles, and government and association reports; it is published quarterly by the Claremont Graduate School, Claremont, California (<https://onlinelibrary.wiley.com/journal/21501092>). The database of the Educational Resources Information Center (ERIC) (<http://www.eric.ed.gov>), sponsored by the U.S. Department of Education, performs a similar service encompassing books, monographs, research reports, conference papers and proceedings, bibliographies, legislative materials, dissertations, and journal articles on higher education. In addition, the IHELG monograph series published each year by the Institute for Higher Education Law and Governance, University of Houston Law Center, provides papers on a wide variety of research projects and timely topics.

Two specialty journals provide extended legal analysis on recent developments as well as classical concerns: the *Journal of College and University Law*, published quarterly by the National Association of College and University Attorneys (NACUA) and focusing exclusively on postsecondary education; and the *Journal of Law and Education*, which covers elementary and secondary as well as postsecondary education, and is published quarterly by Jefferson Law Book Company, Cincinnati, Ohio.

Endnote

Although the specific goal of this *Student Version* is to support the effective teaching and learning of higher education law, its broader goal is much the same as the goal for the full *6th Edition* and its predecessor editions, as set out in their prefaces. This goal is to provide a base for the debate concerning law's role on campus; for effective relationships between administrators and their counsel; and for improved understanding between the academic and legal worlds. The challenge of our age is not to remove the law from the campus or to marginalize it. The law is here to stay, and it will be more a beacon and less a fog. The challenge is for law and higher education to accommodate one another, preserving the best values of each for the mutual benefit of both. Just as academia benefits from the understanding and respect of the legal community, so law benefits from the understanding and respect of academia.

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Barbara Kaplin typed manuscript inserts and maintained files as needed, and Joann Segarra at Rutgers University created several of the figures used throughout the book.

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The National Association of College and University Attorneys (NACUA) has hosted a website for several years on which we could post updates to the Fifth Edition and *Student Version*, and now the Sixth Edition and its progeny. The website also contains our *Instructor's Manual* for faculty who adopted either the treatise or the *Student Version* as a classroom text. NACUA and its CEO, Kathleen Curry Santora, have supported our work in countless ways for over a decade, and we are most grateful to Kathleen and her staff for their support and encouragement. NACUA publications, particularly *The Journal of College and University Law* and *NACUANotes*, also provided us with important information and guidance in the development of most sections of the Sixth Edition.

Our spouses and families once again tolerated the years of intrusion that successive editions of “the book” have imposed on our personal lives. They encouraged us when this sixth edition seemed too overwhelming to ever end. And they looked forward (usually patiently) to the time when the sixth edition would finally be finished—and we would get a little breathing space before any of us dare mention the forbidden words “seventh edition.”

The Authors

William A. Kaplin is professor of law emeritus at the Columbus School of Law, Catholic University of America, in Washington, DC, where he also served for many years as Special Counsel to the Office of General Counsel. He has been a visiting professor at Cornell Law School, and at Wake Forest University School of Law; and from 2007 to 2012 he was Distinguished Professorial Lecturer at Stetson University College of Law and Senior Fellow at its Center for Excellence in Higher Education Law and Policy. He was also a distinguished visiting scholar at the Institute for Higher Education Law and Governance, University of Houston, and a visiting scholar at the Institute for Educational Leadership, George Washington University. He is a former member of the Education Appeal Board at the U.S. Department of Education and the former editor of the *Journal of College and University Law* and has served on the Journal's editorial board for many years. He was also a founding member of the U.S./U.K. Higher Education Law Roundtable that met every three years at New College, Oxford University, and a mentor/leader for the biannual Higher Education Law Roundtable for emerging scholars at the University of Houston Law Center.

Professor Kaplin received the American Council on Education's Borden Award, in recognition of the First Edition of *The Law of Higher Education*; and the Association for Student Judicial Affairs' D. Parker Young Award, in recognition of research contributions; and he has been honored twice by the National Association of College and University Attorneys, being named a Fellow of the Association (1990) and being presented the Life Member Award in 2018. He has also been honored through the establishment, by the Center for Excellence in Higher Education Law and Policy at Stetson University, of the *William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship*, a national award presented annually to a leading scholar in the field.

In addition to the various editions and updates of *The Law of Higher Education*, Professor Kaplin's books include *The Law of Higher Education Fourth Edition: Student Version* (with Barbara Lee) (Jossey-Bass, Inc., 2007); *Cases, Problems, and Materials for Use with The Law of Higher Education* (with Barbara Lee) (NACUA, 2006); and *A Legal Guide for Student Affairs Professionals, 2d ed.* (with Barbara Lee) (Jossey-Bass, Inc., 2009). Among his other books are *State, School, and Family: Cases and Materials on Law and Education* (with co-authors) (Matthew Bender, 2nd ed., 1979) and *Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press, 2004).

Bill Kaplin received his B.A. degree in political science from the University of Rochester and his J.D. degree *with distinction* from Cornell University, where he was editor-in-chief of the *Cornell Law Review*. He then worked with a Washington, D.C., law firm, served as a judicial clerk at the U.S. Court of Appeals for the District of Columbia Circuit, and was an attorney in the education division of the U.S. Department of Health, Education and Welfare, before joining the Catholic University law faculty.

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In addition to coauthoring the Third, Fourth, Fifth, and Sixth Editions of *The Law of Higher Education* and *The Law of Higher Education, Student Version*, supplements and updates to the main volume, as well as *A Legal Guide for Student Affairs Professionals* (1997), Professor Lee also coauthored *Academics in Court* (1987, with George LaNoue), as well as numerous articles, chapters, and monographs on legal aspects of academic employment. She serves as an expert witness in tenure, discharge, and discrimination cases, and is a frequent lecturer and trainer for academic and corporate audiences.

Barbara Lee received her B.A. degree, *summa cum laude* in English and French from the University of Vermont. She received an M.A. degree in English and a Ph.D. in higher education administration from The Ohio State University. She earned a J.D., *cum laude* from the Georgetown University Law Center. Prior to joining Rutgers University in 1982, she held professional positions with the U.S. Department of Education and the Carnegie Foundation for the Advancement of Teaching.

Neal H. Hutchens is a Professor and chair in the Higher Education Department, School of Education at the University of Mississippi. Prior to his current appointment, he served as a faculty member at Pennsylvania State University. Hutchens was the 2015 recipient of the William A. Kaplin Award from the Center for Excellence in Higher Education Law and Policy at Stetson University College of Law. He serves on the Litigation Committee for the American Association of University Professors. He is also a past member of the Board of Directors for the Education Law Association.

Hutchens's scholarship has appeared in publications that include the *University of Pennsylvania Journal of Constitutional Law*, *Journal of College and University Law*, *Counselor Education and Supervision*, *Kentucky Law Journal*, *West's Education Law Reporter*, *Journal of Law and Education*, and *Journal of Student Affairs Research and Practice*. He is on the editorial board for *The Review of Higher Education* and for *Education Law & Policy Review*, and is a member of the authors' committee for *West's Education Law Reporter*.

Neal Hutchens earned a Ph.D. in education policy with a specialization in higher education from the University of Maryland. He has a J.D. from the University of Alabama School of Law, where he graduated *summa cum laude* and was a member of the Order of the Coif and of the *Alabama Law Review*.

Jacob H. Rooksby is Dean and Professor of Law at Gonzaga University School of Law in Spokane, Washington, where he also holds appointment as a Professor of Education. In addition to his administrative role, Dean Rooksby has taught courses in torts, intellectual property (IP) subjects, law and higher education, and social media and the law. He formerly practiced law with Cohen & Grigsby, P.C. in Pittsburgh, Pa., and McGuireWoods LLP in Richmond, Va., where he was a member of the firm's IP litigation/patents department and higher education practice team. He also has experience serving as an expert witness in intellectual property litigation.

Dean Rooksby's primary scholarship focus concerns the impact of IP law and policy on higher education. His book on IP law and policy issues in higher education, *The Branding of the American Mind*, was published in 2016 by Johns Hopkins University Press.

Dean Rooksby holds J.D., M.Ed. (social foundations of education), and Ph.D. (higher education) degrees from the University of Virginia. He earned his undergraduate degree, *summa cum laude*, in Hispanic studies and government from the College of William & Mary, where he was inducted into Phi Beta Kappa.



General Introduction: The Study of Higher Education Law

In the study of higher education law, as with most learning, it is important to begin with a foundation on which to build. This General Introduction to the *Student Version*, combined with Chapter 1 that follows, provides this foundation. The materials in the General Introduction have two purposes: (1) to introduce, illustrate, and integrate particular foundational matters that are discussed in greater depth in Chapter 1; and (2) to help students to develop a framework for organizing their thinking about, and integrating, the materials that are contained in the succeeding chapters of this book.

A. The Universe of Education Law

Higher education is part of a broader universe of education law. This universe encompasses not only the law regarding higher and other postsecondary education but also the law regarding “lower” education, that is, elementary and secondary education (K–12) as well as preschool education.¹ These “higher” and “lower” sectors can be further divided into public education and private education sectors, as indicated in Figure I.1, thus producing a universe of four quadrants: public higher education, public lower education, private higher education, and private lower education. Finally, the private education quadrants can be subdivided into private education provided by secular institutions and private education provided by religious institutions, as Figure I.1 also indicates. Each sector displayed in Figure I.1 is legally distinct from the other sectors. The boundary lines within the education law universe thus represent important legal distinctions—distinctions undergirding legal analysis of education law problems. (For an example, see *State ex rel. Gallwey v. Grimm*, 48 P.3d

¹For resources on elementary/secondary education, see Victoria Dodd, *Practical Education Law for the Twenty-First Century*, (2d ed., Carolina Academic Press, 2010); Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation* (Thomson/West, 2004); and William Valente & Christina Valente, *Law in the Schools* (6th ed., Prentice-Hall, 2004).

		PUBLIC EDUCATION		PRIVATE EDUCATION	
				Secular	Sectarian
HIGHER EDUCATION		Public Colleges, Universities, and Community Colleges		Private, Secular Colleges and Universities	Private, Religiously Affiliated Colleges and Universities
LOWER EDUCATION		Public Elementary Schools, Secondary Schools, and Preschools		Private, Secular Elem. Schools, Secondary Schools, and Preschools	Private, Religiously Affiliated Elem. Schools, Secondary Schools, and Preschools

Figure I.1 The Education Law Universe

274, 279–84 (Wash. S. Ct., 2002) [state constitution’s restriction on state funding of “schools” does not apply to higher education].) Because the applicable sources of law (Section 1.4 of this book), the legal reasoning, and the results or conclusions reached may differ from one sector to another, it is important to begin analysis of each judicial opinion by determining the sector of the education law universe with which it deals. Similarly, when first approaching a new issue or problem, it is important to ascertain its location within this universe.

In a higher education law course, therefore, one would ask: Does this case or problem deal with public higher education or with private higher education? (See Section 1.5 of this book for discussion of this distinction.) If it is private higher education, then one would ask: Does this case or problem deal with secular higher education or with religious higher education? (See Section 1.6 for discussion of this distinction.) To further expand understanding, one could also ask whether the problem or case would be reasoned or resolved differently—and why—if it had involved private rather than public (or public rather than private) higher education, or had involved religious rather than secular (or secular rather than religious) higher education. Finally, for the broadest perspective, one might ask whether the case or problem would be reasoned or resolved differently if it had involved lower education rather than higher education.

These distinctions and their significance in various contexts are emphasized throughout the *Student Version*.

B. The Governance of Higher Education

Early in the study of higher education law, attention should be given to the *governance* of higher education, that is, the structures and processes by which higher education institutions are governed. As more fully explained in Section 1.3 of this book, the concept of governance can be divided into two categories: *internal* governance (that is, within the institution) and *external* governance (that is, external to the institution); and external governance, in turn, may be further divided into two subcategories: *public* external governance (that is, by government) and *private* external governance (that is, by private associations).

A focus on governance is important to the student of higher education law because, as also explained in Section 1.3, “[g]overnance structures and processes provide the legal and administrative context within which issues and disputes arise” and “the framework within which parties seek to resolve problems and disputes.” Since the structures and processes for higher education governance differ markedly from those for elementary and secondary education, the basic boundary line in the “Education Law Universe” (Section A above) is equally applicable to matters of governance. Similarly, the boundary lines between public and private higher education institutions, and between private secular and private religious institutions, also indicate parallel distinctions in the governance of higher education. Thus, just as the law may vary from one sector to another of the education law universe, the governance structures and processes may vary as well. Whenever one is analyzing a legal problem or reading a judicial opinion, therefore, it is helpful to begin not only by determining the sector of the universe within which the problem or case falls but also by identifying the particular governance structure or process from which the problem or case arose and through which it might be (or might have been) resolved.

C. Sources of Higher Education Law

As a keystone of their internal governance systems, higher educational institutions create “internal law” that delineates authority and rights, and embodies the rules and procedures, by which institutions govern themselves. There are three main sources of internal law: institutional rules and regulations (Section 1.4.3.1 of this book), institutional contracts (Section 1.4.3.2), and academic custom and usage (Section 1.4.3.3). Circumscribing this internal law is the external law (here, public external law) created by the federal government and state and local governments through their own governance processes (Section 1.4.2). These sources of law, and the interrelations among them, are another factor to consider—along with the education law universe sectors (Section A above) and the governance structures and processes (Section B

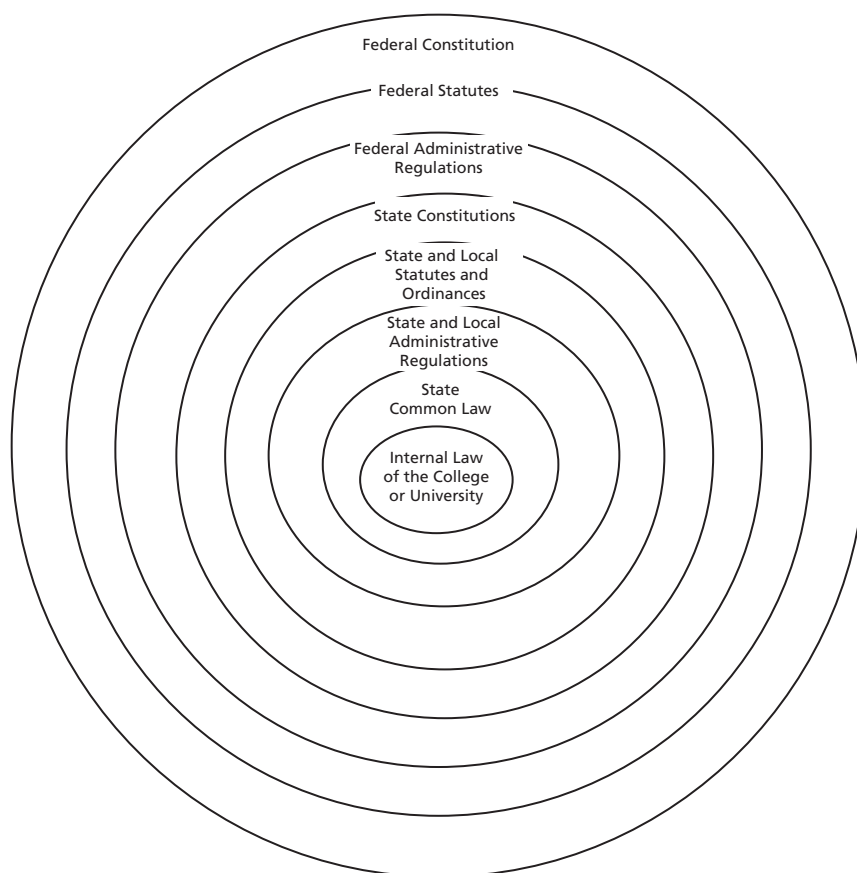


Figure I.2 The External Law Circumscribing the Internal Law

above)—when reading judicial opinions or analyzing problems in higher education law. It will be helpful, therefore, to identify the pertinent source(s) of law that provide(s) the basis for the judicial opinion or that can be used to analyze the problem. Figure I.2 depicts the various sources of law and the order in which each source “trumps” other sources. Each ring of law in the figure is superior to the other rings that are farther inside and inferior to the other rings of law that are farther outside. Thus, when there is inconsistency or conflict between two applicable sources of law, the law in the ring farthest from the center will prevail.

D. The Legal Relationships Within Institutions of Higher Education

The internal governance of an institution of higher education (see Section B above) is generally the responsibility of the board of trustees or board of regents (see Section 3.1 of this book). The board, as the entity vested with the institution’s legal authority, has legal relationships with the institution’s officers, administrators, and staff members; with its faculty members; and with its

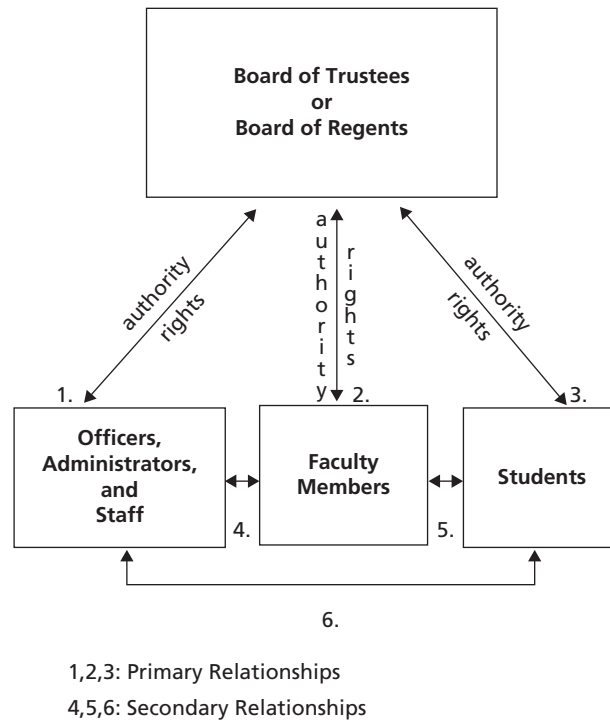


Figure I.3 Internal Legal Relationships in Higher Education Institutions

students. Each relationship encompasses both questions of authority (usually the board's [or institution's] authority) and questions of rights (usually the rights of officers, administrators, and staff, of faculty members, or of students). In turn, there are legal relationships among the institution's officers, administrators, and staff; its faculty members; and its students. These are the three "secondary relationships" depicted in Figure I.3.² The secondary relationships also encompass both questions of authority and questions of rights. (For an interesting example of such secondary relationships, see *Woodruff v. Ohman*, 29 Fed. Appx. 337, 162 Ed. Law Rep. 707 (6th Cir. 2002), and 166 Fed. Appx. 212 (6th Cir. 2006) [faculty member/staff member conflict].)

The three primary legal relationships depicted in Figure I.3 typically are the primary focus of higher education law. Chapters 3 and 4 of the *Student Version* focus on the legal relationships between the institution (board) and its officers, administrators, and staff. Chapters 5 and 6 focus on the legal relationships between the institution (board) and its faculty; and Chapters 7 through 10 focus on the legal relationship between the institution (board) and students. In addition, the institution has legal relationships with the outside world—for

²Faculty members also have legal relationships with other faculty members, as students do with other students, and as officers, administrators, and staff members do with other officers, administrators, and staff. These additional secondary relationships are not depicted in Figure I.3. For an illustrative discussion of student-to-student relationships, see Section 7.1.5 of this book.

example, with government agencies, private education associations, and corporate research partners and other commercial entities. These external relationships are depicted in Figure I.4 and are addressed in Chapters 11 and 12. For external relationships, as for internal, there are also secondary relationships that may develop between external entities and the institution's officers, administrators, staff, faculty members, or students. For example, a government agency may award a student financial assistance, thus creating a legal relationship between the agency and the student with respect to the conditions for retaining the assistance. These secondary external relationships are not depicted in Figure I.4.

External relationships often intersect with and help define the relationships that are directly depicted in Figure I.4. The rights that faculty members may assert against their institutions (boards), for example, such as rights to nondiscrimination in employment, are created in part by federal law; and the federal government's obligation to enforce this external law (see Section 5.4.1 of this book) creates a legal relationship between the federal government and postsecondary institutions.

In the study of higher education law, it is important to look for these various legal relationships and to sort them out as best one can. Thus, whenever analyzing a judicial opinion or addressing a legal problem, it will be helpful to determine not only what sector of the education law universe is implicated, what governance structure or process is involved, and what source(s) of law applies (see Sections A, B, and C above) but also what legal relationship(s) is at issue and how it helps to define the contours of the dispute.

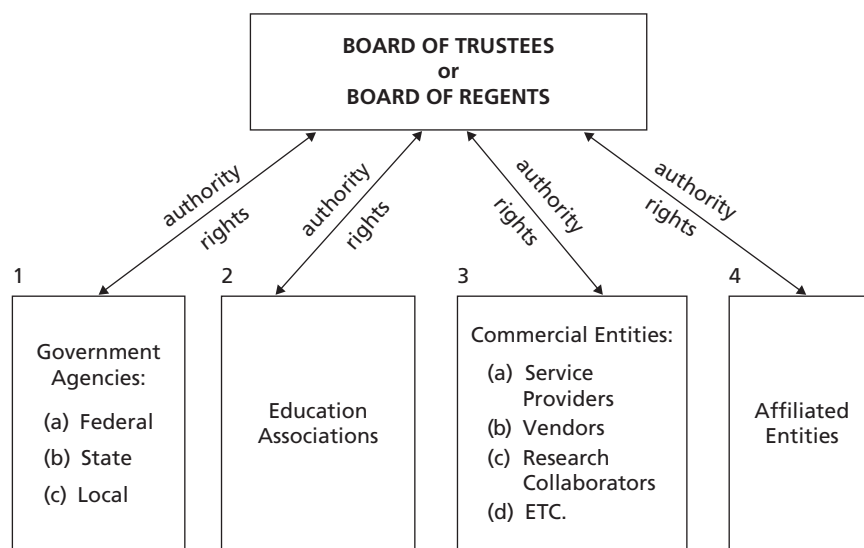


Figure I.4 External Legal Relationships in Higher Education Institutions

E. The Law/Policy Distinction

In addition to the various distinctions addressed in Section A–D above, there is another overarching distinction between legal issues and policy issues that students must take into account when studying higher education law. As explained in Section 1.7 of this book, legal issues are stated and analyzed using the norms and principles of the legal system, while policy issues are stated and analyzed using norms and principles of administration and management, the social sciences and physical sciences, and other relevant disciplines.

It is important to sort out these varying norms and principles when analyzing judicial opinions or addressing particular problems. Thus, in addition to considering the legal issues that are presented by the case or problem, one may also ask, “What are the educational policy or public policy issues presented?” and “How do the legal issues and policy issues relate to one another?” Law students and lawyers may, and do, think about and react to legal issues differently from education students, educators, and administrators; and the same may be said for policy issues. Among the most practical insights that may come from a higher education law course or workshop are these insights concerning respective norms and roles, and the ways in which administrators, educators, and attorneys may be guided by these norms and roles in working together on matters with legal ramifications.

F. The U.S. Legal System As It Relates to Higher Education Law

The law applicable to higher education emerges from both the context of federalism (the division of powers between federal and state governments) and the context of separation of powers (the allocation of powers among the legislative, executive, and judicial branches of government). Legal issues concerning higher education may thus arise not only in the courts (state courts and federal courts) but also in Congress, state legislatures, and local government legislative bodies, and in a wide variety of federal, state, and local administrative agencies—all of which are important participants in the “external” governance of higher education (see Section B above). Similarly, legal disputes and problems may be resolved not only in judicial opinions but also in **statutes** and ordinances, and in **administrative regulations** and rulings. It is important, therefore, for students studying higher education law to have a basic understanding—in relation to higher education’s concerns—of the U.S. legal system, the system of courts that is a constituent part of the legal system, the use of court cases as legal **precedents**, the roles of lawyers within the legal system, and the legal materials and research tools by which one accesses the law developed through the legal system.

Various sections of Chapters 1 and 2 of the *Student Version* include basic introductory background on these matters. Some of the legal concepts and descriptive material in these chapters may already be generally familiar to law students and lawyers, who may use this material for review and to sensitize themselves to the particular concerns of higher education. Students and educators without legal training or background, on the other hand, should find the material in Sections 1.3.3, 1.5.1, and 1.6.1 to be especially helpful. Sections 1.3.3, 1.5.1, and 1.6.1 provide basic information on the U.S. legal system; Sections 1.4.4, 2.1.4, and 2.2.1 provide basic information on the U.S. court system; Sections 1.7 and 2.1.7 provide basic information on the roles of attorneys; Sections 1.4.2, 1.4.4, and 1.4.5 provide basic information on “case law” and other legal materials and research tools. In addition, Sections 11.1, 11.2.1, and 11.3.1 of this book, taken together, describe the constitutional structure of federalism as it applies to higher education. In addition, Appendix A of this book, “The Constitution of the United States: Provisions of Particular Interest to Postsecondary Education,” provides an overview of the U.S. Constitution, which is the foundation and framework for the entire U.S. legal system; Appendix B, “The Judicial System of the United States,” provides an organizational overview of the federal and state courts; and Appendix C, “Reading and Analyzing Judicial Opinions,” provides an introduction to the study of case law.

For further information on these matters geared specifically to education students and educators, but also of use to law students and lawyers, see Sarah Redfield, *Thinking Like a Lawyer: An Educator’s Guide to Legal Analysis and Research* (Carolina Academic Press, 2002), a resource that focuses directly on education students’ and educators’ interactions with law and lawyers; and Steve Permut, Ralph Mawdsley, and Susan Silver, *Research Methods for Studying Legal Issues in Education, 2d edition* (Education Law Association, 2015), which addresses qualitative and quantitative methods as well as policy-oriented methods for research in education law. For other helpful resources, see the following publications:

1. Regarding an introduction to the American legal system, including the system of federal and state courts, see Margaret Johns and Rex Perschbacher, *The United States Legal System: An Introduction* (4th ed., Carolina Academic Press, 2017); E. Allan Farnsworth, *An Introduction to the Legal System of the United States* (4th ed., Oxford University Press, 2010); Stephen Elias, *Legal Research: How to Find and Understand the Law* (18th ed., Nolo, 2018), Chapters 3 and 7; and Steven Burton, *An Introduction to Law and Legal Reasoning* (3rd ed., Aspen Publishers, 2007), Chapters 6–9.
2. Regarding the legal profession and the role of lawyers, see Johns and Perschbacher, above, Chapter 2.
3. Regarding the basics of legal research and analysis, see AALL Legal Information Service to the Public, *How to Research a Legal Problem: A Guide for Non-Lawyers* (American Association of Law Libraries, available

at https://www.aallnet.org/wp-content/uploads/2018/01/HowTo-ResearchLegalProblemFinal_2014.pdf; Burton, above, Introduction and Chapters 1–5; Elias, above; and Christopher Wren and Jill Wren, *The Legal Research Manual* (2d ed., Adams & Ambrose, 1999).

4. For definitions and explanations of legal terms, see D. Mellinkoff, *Dictionary of American Legal Usage* (West, 1992); Elias and Levinkind, above, Appendix C, and Wren and Wren, above, Appendices L and M.

