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# Creatively Financed Legal Education In A Marketized Environment: How Faculty Leveraged Buyouts Can Maximize Law Schools' Stakeholder Values

David Groshoff

### Cover Page Footnote

Associate Professor of Law and Director, Business Law Center, Western State University College of Law; Ed.M., Harvard University Graduate School of Education; J.D., The Ohio State University Moritz College of Law; M.B.A., Northern Kentucky University Haile/US Bank College of Business; B.A., Indiana University. I am indebted to Dr. Meira Levinson and Dr. Katherine K. Merseth of Harvard University's Graduate School of Education for ensuring that a tension exists in this Article between marketbased education solutions and an institution's civic responsibility. I am grateful to Dr. Duke Thompson of the Department of Finance at Northern Kentucky University's College of Business. I thank the tremendous team of reference librarians, led by Patricia O'Connor, at Western State's College of Law, including James Krusling, Scott Frey, and Lesley Chan, for obtaining essential information rapidly and effortlessly. I thank Dr. Effendi Leonard for his ongoing support, and I appreciate the invaluable dedication of my research assistants, Heather Samantello, Heidi Timmerman, and Christopher Beckom. I also thank Bar-Bri, Law-in-a-Flash, Gilbert's, and Emanuel's for evidencing that marketized, for-profit legal education resources represented the totality of what I needed to pass the bar exam, think critically in the world of business law, and provide reliable discussion points through which I could demonstrate intellectual depth to law school faculty appointment committees and my own promotion and tenure committee. 1. Andreas Ortmann, Capital Romance, in EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 3, 15 (David W. Breneman et al. eds., State University of New York Press 2006) [hereinafter EARNINGS FROM LEARNING] (quoting Roderick G. W. Chu, Chancellor, Ohio Board of Regents, regarding Ohio's legislators who approved aid programs for students attending for-profit colleges and universities).

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*David Groshoff*

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*David Groshoff*[*]

> "This [financial aid] money is not necessarily going to educate more students or to improve education. It's a scholarship ultimately going into profits."[1]

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## INTRODUCTION

Reading this law review Article presumably means that at some point you came to love—as well as perhaps occasionally (and only professionally, of course) despise—a number of law school professors. The professors that you love may: (a) possess long-standing reputations that cause wait lists to enroll in their courses; (b) receive university-wide awards outside of the law school for excellence as educators; (c) attract additional caché to the law school through their scholarly research, writing, and presentations; or (d) positively and indelibly impact students' academic, professional, and personal lives. For a moment, however, imagine your academic, professional, or personal life without ever having the opportunity to engage with those—or any other—venerated law school professors.

While seemingly far-fetched, such a scenario currently represents a legitimate nationwide threat, even at the least suspecting law schools. During my first semester as a tenure-track law professor at an American Bar Association ("A.B.A.") fully-accredited law school, in fewer than ten trading days, the market value[2] of the parent entity that controls the law school plummeted more than thirty-seven percent.[3] In the crasser language of dollar terms, my employer's market value declined more than three-quarters of a *billion* dollars from October 4, 2010, through October 18, 2010. Some readers likely will believe that such financial problems relegate themselves solely to those of us who chose to teach[4] at so-called "for-profit," "proprietary," or "fourth-tier toilet"[5] law

2. *See, e.g.*, TIM KOLLER ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 433-34 (McKinsey & Company, Wiley & Sons 2005) (comparing market value to intrinsic value).

3. The per-share stock price dropped from $15.73 to $9.90 between October 4, 2010 and October 18, 2010. *See Education Management Corporation (EDMC) Historical Prices*, YAHOO! FINANCE, http://finance.yahoo.com/q/hp?s=EDMC+Historical+Prices (last visited July 20, 2011). EDMC had 142,874,389 common shares outstanding on August 31, 2010. EDMC, Annual Report 1 (Form 10-K) (Sept. 1, 2010) [hereinafter *EDMC 10-K*]. Multiplying the market price per share by the number of common shares authorized, issued, and outstanding on each date quantifies in dollar terms the decline in EDMC's equity market capitalization. STEPHEN J. MOYER, DISTRESSED DEBT ANALYSIS: STRATEGIES FOR SPECULATIVE INVESTORS 48 (J. Ross Pub., 2005) (discussing capitalization and indicating that "equity, of course, is market derived").

4. This Article's author earned an Ed.M. rather than an LL.M., specifically in hopes of joining the faculty of a school that valued teaching a combination of theory and praxis as much as producing scholarship. He thereby voluntarily left a full-time position as an Assistant Professor of Finance at a *US News* First Tier school in chilly New England to join the tenure-track faculty of a creatively financed Fourth Tier law school in climate-friendly Southern California. *See* U.S. News & World Report, Best Colleges Issue 94 (Sept. 2009) (ranking Providence College #2, Tier 1, Regional Universities, Northern United States).

5. Supreme Court Justice Clarence Thomas has noted that bloggers have called the group of schools that *US News* ranks in the tier above my employer's as ***"Third Tier Trash"*** (emphasis added). *Compare* Tony Mauro, *Justice Thomas, on the Road Again*, CAL. SUP. CT. MONITOR, Feb. 5, 2010 ("Thomas took some pride in the fact that bloggers have called his clerks 'TTT - third tier trash,' . . . [stating his] 'preference for non-Ivy League law clerks.'"), *with* Kashmir Hill & David Lat, *Clarence Thomas Clarifies: His Clerks Aren't 'TTT'*, ABOVE THE LAW (Feb. 6, 2010), http://abovethelaw

schools. Other readers, whether students, faculty, or other law school stakeholders, may likely trust—since their law schools are housed within a flagship "state" university[6] or because their law schools reside in the hands of a small consortium of seemingly beneficent not-for-profit owners[7]—that their law schools are immune from facing capitalistic financial market pressures that can go to the heart of a law school's faculty or decanal[8] retention.

But those readers should think again. As Professor Christopher C. Morphew and Dr. Peter D. Eckel stated, "[t]he trend toward privatization in higher education is clearly accelerating . . . [and w]hat seemed like science fiction only a few years ago is now" becoming a reality.[9] For instance, public-sounding law schools, such as the

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.com/2010/02/clarence-thomas-clarifies-his-clerks-arent-ttt/ ("[Thomas] complained about 'smart bloggers' — or 'self-proclaimed smart bloggers' — labeling his clerks 'TTT' last year.").

6. *See, e.g.*, Bridget, Comment to *Mich. GOP Votes to Fine Colleges for Same-Sex Benefits* (*Reader Comments Section*), THE ADVOCATE (May 9, 2011, 3:18:30 PM) *available at* http://www.advocate.com/News/Daily_News/2011/05/09/Michigan_GOP_Votes_to_Fine_Colleges_for_Same_sex_Benefits/. This comment demonstrated a Michigan State University College of Law student's erroneous belief that her law school was publicly funded, stating,

> Name: Bridget Date posted: 5/9/2011 3:18:30 PM Hometown: Lansing Comment: @Al: the colleges are "skirting the law" because Michigan has a law that says that *public* institutions can't offer benefits to anyone but spouses and dependents. But most of the schools (like Michigan State University, where I go to law school and where my wife works) has something called Other Eligible Individuals (OEIs), meaning that gay and lesbian couples as well as straight unmarried couples can still receive benefits. Isn't Michigan just the greatest? :-/

*Id* (emphasis added).

7. *See*, *e.g.*, Repard, *infra* note 18 (discussing California Western School of Law's position as an acquisition target over the past several years).

8. *See* Closius' Resignation Letter, *infra* note 23 (referencing the Resignation of Dean Phillip Closius from University of Baltimore School of Law in meaningful part due to financial market pressures on an ostensibly public law school) and detailed analysis *infra* Parts III-IV.

9. Peter D. Eckel & Christopher C. Morphew, *Toward a Clearer Understanding of Privatization*, *in* PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY 181 (Christopher C. Morphew & Peter D. Eckel eds., Johns Hopkins Univ. Press. 2009) [hereinafter, PRIVATIZING THE PUBLIC UNIVERSITY]. "Privatization" generally refers to "the penetration of private capital, ownership and influence into what were previously publicly funded and owned entities and activities," while "marketization" generally refers to "the organization of the supply of higher education 'services' on market lines." Roger Brown, *Markets and Non-Markets*, *in* HIGHER EDUCATION AND THE MARKET 6, 17 (Roger Brown ed., Routledge 2011) [hereinafter,

Michigan State University College of Law,[10] the Western State University College of Law,[11] and the University of Virginia School of Law,[12] are, in fact, privately financed entities.[13] In July 2011, another flagship state law school—the University of Minnesota—announced its potential going-private transaction.[14]

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HIGHER EDUCATION AND THE MARKET]. "Marketization" also describes the process of students making consumer-driven decisions with federal financial aid and "the application of economic theory of the market to the provision of higher education." Roger Brown, INTRODUCTION to HIGHER EDUCATION AND THE MARKET 1; SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION 35 (Johns Hopkins Univ. Press 2004).

10. *See* KATHY REEVES BRACCO & WILLIAM R. DOYLE, PUBLIC AND PRIVATE FINANCING OF HIGHER EDUCATION: SHAPING PUBLIC POLICY FOR THE FUTURE 165 (Patrick M. Callan & Joni E. Finney eds., Oryx Press 1997).

> Michigan State University has gone so far as to purchase and operate a 'private' institution, the Detroit College of Law. Although legislators had made it clear before the purchase that no new public law schools were needed in the state, MSU took over the Detroit College of Law, saying that the college would not receive state money and would remain *fully* private. A member of the state board of education, skeptical that this would be the case, hinted that money could be distributed across various line items in many different ways. Michigan State University has since been criticized for duplicating the services of state law schools and ignoring legislative input. Nonetheless, MSU is now offering a 'private' educational service through the Detroit College of Law.

*Id*. (emphasis added).

11. *See*, *e.g.*, EDMC 10-K, *supra* note 3, at 13.

12. Patrick G. Lee, *Public Schools Ditching State Money for Private Funds*, WALL ST. J. LAW BLOG (July 6, 2011, 9:34 AM), http://blogs.wsj.com/law/2011/07/06/public-schools-ditching-state-money-for-private-funds/. *See generally* Robert C. Lowry, *Incomplete Contracts and the Political Economy of Privatization*, *in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 52-53 (describing the Virginia charter system, stating that the "University of Virginia law and business schools . . . do not receive any subsidies for operating expenses," and indicating that the University of Colorado recently obtained similar "enterprise" status, perhaps to avoid the state's Taxpayer Bill of Rights, and relating these creative arrangements to Cornell University's "distinction between endowed and statutory colleges charging separate tuitions") (internal citations omitted).

13. Broadly speaking, higher education institutes ("HEIs") that exist as public entities "receive direct financial support in the form of appropriations from state governments. At the other extreme, are private institutions that do not receive state appropriations. There are also institutions that fall somewhere in between these extremes." Robert Toutkoushian, *An Economist's Perspective on the Privatization of Public Higher Education*, *in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 60.

14. *See generally* Jenna Ross, *Two U of M schools consider switching to private-funding only,* STARTRIBUNE.COM (July 4, 2011), http://m.startribune.com/news/?id

Although contrary to one's initial instinctual reaction upon hearing the "state" law school name, a trend exists to privatize and creatively finance these entities. Creatively financed law schools ("CFLSs") inconspicuously scatter themselves throughout *all* tiers of *US News*' rankings.[15] A CFLS, therefore, may be a separate "silo-financed"[16] entity relative to the rest of its corresponding university, or it may be a type of hybrid-financed[17] entity. Besides creative financing, other law schools recently caught the attention of third party suitors and became subject to restructuring discussions that resembled traditional corporate merger and acquisition ("M&A") activity.[18] Maintaining creative financing and

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=124987709&c=y; Becca Shrake, *U Law School May Need to Go it Alone: The Law School May Be Forced to Become Financially Self-Sufficient*, MNDAILY.COM (June 1, 2011), http://www.mndaily.com/2011/06/01/u-law-school-may-need-go-it-alone; Dolph C. Simmons, Jr., *State Funding Cuts Spur Universities to Ponder Privatization*, LJWORLD.COM (July 9, 2011), http://www2.ljworld.com/news/2011/jul/09/state-funding-cuts-spur-universitiesponder-privat/; Karen Sloan, *Another Public Law School Considers Dispensing With State* Money, THE NAT'L L.J. (July 5, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202499376380&Another_public _law_school_considers_dispensing_with_state_money&slreturn=1&hbxlogin=1 ( "The University of Virginia School of Law, the University of Michigan Law School and the University of California, Berkeley School of Law each receive little to no public money, and former Arizona State University Sandra Day O'Connor College of Law Dean Paul Schiff Berman last year proposed eliminating public funding gradually over five years").

15. *See U.S. News Best Law Schools: Ranked in 2011*, U.S. NEWS & WORLD REPORT, *available at* http://grad-schools.usnews.rankingsandreviews.com/best-grad uate-schools/top-law-schools/law-rankings (last visited July 20, 2011) (ranking, *inter alia*, the University of Virginia, #9; Michigan State University, #95, Western State University College of Law; listed but ranking unpublished).

16. I employ this term to describe a law school that either receives its revenues and capitalization from sources other than the broader university or exists as a separate legal entity from the rest of its university. When referring to HEIs' organizational architectures, I prefer "silos" to, *inter alia*, Eckel and Morphew's "garbage cans." *See, e.g.*, Peter D. Eckel and Christopher C. Morphew, *The Organizational Dynamics of Privatization in Public Research Universities*, *in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 88, 95-96.

17. *See, e.g.*, David W. Breneman et al., *The Contemporary Provision of For-Profit Higher Education*, *in* EARNINGS FROM LEARNING, *supra* note 1 ( "[I]nitial research on 'hybrid' institutional forms suggests that the increasing adoption of commercial behavior in nonprofit higher education institutions represents a potentially problematic convergence of non-profit and for-profit forms.") (internal citation omitted).

18. *Compare* Tracy Jan, *Full UMass Board Gives Nod to Law School Plan*, BOSTON.COM (Dec. 10, 2009), http://www.boston.com/news/local/breaking_news

non-traditional organizational architectures, however, may lead to shocking results for the law students who attend these schools and the tenure-track faculty who teach there, potentially subjecting all of a law school's stakeholder constituencies—including society as the ultimate consumer of legal services—to undesirable spillover effects.[19]

Dubiously dovetailing into and exacerbating the foregoing discussion of law schools' marketized activity is the provocative content of a recent proposal by the A.B.A.'s Standards Review Committee (the "A.B.A. Committee" or the "SRC") to eliminate faculty tenure from the A.B.A.'s law school accreditation standards (the "A.B.A. Proposal").[20] In response, many tenured and tenure-track law professors stated that the A.B.A. Proposal directly impacts job security,[21] as well as their already eroding academic freedom.[22] This harmonic convergence of law

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/2009/12/full_umass_boar.html (discussing UMass-Dartmouth's 2009 purchase of the Southern New England School of Law), *with* Pauline Repard, *UCSD, Cal Western Talks for Law School Suspended*, SIGNONSANDIEGO.COM (Apr. 6, 2011), http://www.signonsandiego.com/news/2011/apr/06/ucsd-cal-western-merger-talks-law-school-called/ (reporting on the recently terminated merger talks between the California Western School of Law and the University of California San Diego). *See also infra* note 23 regarding University of New Hampshire's potential acquisition of the Franklin Pierce Law School.

19. For definitions of spillover effects as economic externalities, *see generally* David G. Post & David R. Johnson, *"Chaos Prevailing on Every Continent": Towards A New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1060 n.12 (1998) (stating that "[t]he notion of a spillover effect is similar to the familiar concept of an 'externality.' In its most common usage, an 'externality' describes a spillover effect that has the additional characteristic that it is not the subject of a market transaction."); Steven R. Salbu, *Public Health and International Law: Regulation of Borderless High-Technology Economies: Managing Spillover Effects*, 3 CHI. J. INT'L L. 137, 140 n.15 (2002) (defining spillover effects as "effects of conduct [that] extend beyond pre-established geographical boundaries—or 'spill over' into other jurisdictions").

20. *See* Karen Sloan, *Law Faculty Upset Over A.B.A.'s Proposed Tenure Shift*, THE NAT'L L.J., July 27, 2010 (stating that the committee reviewing the A.B.A.'s accreditation standards does not believe that A.B.A.-accredited law schools should be required to maintain a tenure system).

21. *Id.*

22. *See*, *e.g.*, *Widener Professor Could Lose Job for Hypothetical Talk of Dean's Shooting*, CHRON. OF HIGHER EDUC. (Feb. 14, 2011), http://chronicle.com/blogs/ticker/widener-professor-could-lose-job-for-hypothetical-talk-of-deans-shooting/30461 [hereinafter *Widener Professor Could Lose Job*] (stating that "[a] *tenured* professor at the Widener University School of Law has been placed on administrative leave and is fighting to keep his job after students complained about his frequent hypothetical references in class to the school's dean being shot. The newspaper reported today that

schools' creative financing, M&A activity, and the A.B.A. Committee's anti-tenure proposal arguably means that the owners of CFLSs have incentives to: (1) exacerbate the stripping of assets from law schools to affiliated entities, which caused a law school dean to resign in July 2011;[23] (2) cause financial exigency to the law school due to the lack of resources; (3) terminate faculty tenure due to such financial exigency; (4) reorganize the school with an entirely adjunctified and term-contract (i.e., outsourced)[24] faculty that fits the modern marketized higher

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the students complained . . . partly because they regarded his hypothetical discussions . . . as violent, racist, and sexist. . . . [The professor's] lawyer accused the [dean] of going after [him] because of his conservative views.") (emphasis added).

23. Such diversion of funds currently occurs at rates of anywhere between twenty-five to forty-five percent of some law schools' revenues. *See, e.g.*, *UB Law School Dean Closius' Resignation Letter*, BALTIMORE BUS. J. (July 29, 2011), *available at* http://www.bizjournals.com/baltimore/news/2011/07/29/ub-law-school-dean-closius.html?page=all [hereinafter *Closius' Resignation Letter*]. The *outgoing* Dean of the University of Baltimore School of Law stated that "[a]s of academic year 2010-11, the University retained approximately 45% of the revenue generated by law tuition, fees and state subsidy. Using any reasonable calculation of the direct and indirect University costs, the University was still diverting millions of dollars in law school revenue to non-law University functions." *Id*; *see also* David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU-1 (quoting Lawrence E. Mitchell, the *incoming* dean of the Case Western Reserve University School of Law as stating, "having just come from a two-day meeting of new and current deans organized by the American Bar Association, I can tell you that some law schools pay 25 or even 30 percent [to subsidize other parts of their universities]"). Some academics call this process "cross-subsidization." *See, e.g.*, ROBERT ZEMSKY ET AL., REMAKING THE AMERICAN UNIVERSITY MARKET-SMART AND MISSION-CENTERED 62-66 (Rutgers Univ. Press 2005). This Article employs "asset stripping" and "cross subsidization" to connote the same concept, depending on context. Law school asset stripping occurs despite approximately 80% of law students using financial aid—the key to law schools' revenue models, detailed *infra* Part II—to finance their legal educations. *See* Ryan Brown, *As Graduate-Student Population Grows, So Does Its Reliance on Financial Aid*, July 26, 2011, CHRON. OF HIGHER EDUC., http://chronicle.com/article/As-Graduate-Student-Population/128402/. *Cf.* Karen Langley, *UNH, Law Merger Nears: No Rush to Move Franklin Pierce*, CONCORD MONITOR, May 8, 2009 (quoting University of New Hampshire Vice President for Planning and Budgeting in the context of UNH's potential acquisition of Franklin Pierce Law School as stating "[w]e aren't looking for [the law school] to contribute their profits to UNH . . . . If this happens, we want to maintain a strong law school, which means reinvesting in the law school to make it even better.").

24. The reader should not confuse the term outsourcing with offshoring. "Outsourcing," for example, "is sending work traditionally handled inside a company or firm to an outside contractor for performance." Maria L. Proctor, *Considerations in*

education institute ("HEI") business model, lacking academic freedom, faculty governance, and tenure; and thereby (5) control a law school whose mission is to maximize the enterprise's financial value,[25] on the backs of law students' tuition dollars that flow from financial aid sources, regardless of faculty quality or student experience. Such a process would likely lead to the next generation of legal professionals being bar-pass-ready but otherwise financially, intellectually, and interpersonally unprepared to advise society's legal services consumers.

Part I of this Article provides an historical overview of faculty governance, academic freedom, and tenure. This synopsis includes the policy push behind tenure's existence at the collegiate level coming at the height of the U.S. government's anti-Communist investigations.[26] Specifically, this Part analyzes the strengths and weaknesses of a tenure-based system in the context of a law school faculty and its benefits for law students. This Part also discusses the rationale behind faculty governance at law schools, describes the interrelationship between faculty governance and tenure, and provides examples of how private owners of some schools have chipped away at faculty governance,[27] while perhaps nudging the A.B.A. Committee to take an anti-tenure stance. With a nod to the proposed solution in Part IV, and despite tenure's many drawbacks, Part I concludes that in legal education, the security that faculty governance, academic freedom, and tenure bring to a law professor's scholarly research, publishing, and teaching ensures a

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*Outsourcing Legal Work*, MICH. B.J., Sept. 2005, at 20. "Offshoring," however, refers to "the transfer of work to a foreign country, whether it is performed by another office of the same company or a separate company." Jessica Schauer, Book Note, *Federal Trade Adjustment Assistance for Workers: Broken Equipment*, 26 B.C. THIRD WORLD L.J. 397, 398 n.5 (2006) (reviewing THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005)) (referencing C. Alan Garner, *Offshoring in the Service Sector: Economic Impact and Policy Issues*, ECON. REV., 3d Quarter 2004, at 5).

25. For example, corporate "[m]anagers and board members . . . should set long-term shareholder value creation as their primary objective." KOLLER ET AL., *supra* note 2, at 4. Meanwhile "'nonprofits maximize profits and distribute them in disguised form (as higher wages and perks), or they may maximize revenues that lead to power and prestige for their managers.'" SLAUGHTER & RHOADES, *supra* note 10, at 334 (quoting E. James, *Commercialism Among Nonprofits: Objectives, Opportunities, and Constraints*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 273 (B.A. Weisbrod, ed., Cambridge Univ. Press 1998)).

26. *See*, *e.g.*, Walter P. Metzger, Dissent, *On Institutional Mergers and Acquisitions*, 68:2 ACADEME 1a, 4a-7a (Mar.-Apr. 1982).

27. *See*, *e.g.*, *infra* note 62 (discussing faculty governance in greater detail).

critical piece of a properly functioning law school's organizational architecture and societal legal system.

Part II then analyzes the creative financing of marketized HEIs, ostensibly including public law schools that are actually private,[28] quasi-private,[29] closely held corporate,[30] and publicly held corporate[31] law schools. This Part reviews marketized HEIs' and law schools' general business models. These business models typically generate revenues largely from student loan debt sources while the law school's controlling entity then diverts between twenty-five and forty-five percent of those revenues to other, non-law school functions of a university.[32] Part II next evidences that law schools recently became attractive target candidates for corporate-like M&A activity. The University of California San Diego's failed attempt to acquire the California Western School of Law in early 2011,[33] and the Commonwealth of Massachusetts' successful acquisition of the formerly named Southern New England School of Law in early 2010[34] illustrate recent law school M&A activity and demonstrate the issue's relevance and timeliness. Such activity provides a rationale for using law schools' financial statements as an analytic in proposing this Article's solution in Part IV.

Part III argues that in such a paradigm, where law school owners and the A.B.A. ease the ability for outsourced faculty to replace traditional tenure-track law professors, and in which reorganization activity increasingly becomes a recurring concern for law schools, law students would witness a materially worsened law school experience than exists today.[35] In such a world, law students likely would be denied

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28. *See, e.g.*, REEVES BRACCO & DOYLE, *supra* note 10 (regarding Michigan State University College of Law).

29. *See, e.g,* Lee, *supra* note 12 (referencing the University of Virginia School of Law).

30. *See, e.g,*. Repard, *supra* text accompanying note 18 (discussing the California Western School of Law).

31. *See, e.g,* EDMC 10-K, *supra* note 3, at 13 (discussing Western State University College of Law).

32. *See Closius' Resignation Letter*, *supra* note 23; *see also* Segal *supra* note 23.

33. *See, e.g.,* Repard, *supra* note 18 (regarding the California Western-University of California, San Diego merger discussions).

34. *See, e.g.*, Jan, *supra* note 18 (evidencing the Commonwealth of Massachusetts' successful acquisition of the Southern New England School of Law).

35. *See, e.g.*, Sloan, *supra* note 20 (The security that comes with tenure is the only way to ensure that faculty will remain free to teach, research, participate in governance decisions, and speak on matters of public concern without fear of reprisal,' reads a letter

the ability, for example, to wrestle with controversial hypotheticals in class, which some administrators have begun to squelch.[36] Outside of class, this encroaching paradigm would result in a variety of spillover effects to traditional law schools. For example, student-run law reviews would receive significantly fewer manuscripts to publish, not only because academic freedom would no longer exist to protect professors' scholarly ideas but also because outsourced faculty generally face no research or publication requirements. Such a constriction would correspondingly limit opportunities for law students to obtain *the* hallmark resume credential throughout a lawyer's career—service on a law journal—and would lead outsourced faculty to free-ride on the scholarship produced by faculty at schools able to withstand the competitive pressures of a marketized HEI environment.[37] Part III concludes that the paradigm that this Article describes, and in which law and other professional schools are finding themselves in larger numbers, is a meaningful threat to all of a law school's stakeholders, from the student-consumer to professors to alumni to society.

Part IV articulates this Article's solution to a world of (1) creatively financed law schools where (2) corporate-like M&A activity regularly occurs, (3) financial exigency is likely to follow, and (4) law professors' job security and faculty governance models become threatened. Specifically, this Part proposes to embrace and integrate academic capitalism by applying core tenets of corporate law and finance in a pragmatic but yet unheard of manner to law schools—a faculty leveraged buyout ("FLBO"). Just as a mortgage enables an individual or family to purchase a residential home via the use of financial leverage (debt), the leverage piece of a FLBO would permit a law school's faculty to finance the purchase of the law school entity from the law

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that the Society of American Law Teachers has submitted to the Standards Review Committee.").

36. *See Widener Professor Could Lose Job, supra* note 22.

37. *See, e.g.*, David W. Breneman, *The University of Phoenix: Icon of For-Profit Higher Education*, *in* EARNINGS FROM LEARNING, *supra* note 1, at 71, 87 (

> "[Phoenix] could not exist were it not for the scholarly and publishing works of faculty in traditional institutions. Essentially, [Phoenix] rides on the availability of scholarly knowledge generated elsewhere, and packages that knowledge effectively . . . [A] global economic analysis of [Phoenix] would have to credit traditional academia with generating an enormous externality for [its] benefit . . . . [A]n entire educational system populated only with [Phoenix]-type institutions would be intellectually barren and would not produce new knowledge. [Phoenix] thus depends critically upon the existence of the traditional sector for most of its intellectual input and for its ultimate success.").

school's existing owners. The FLBO mechanism would allow law professors to regain control and governance of their schools, despite the faculty members likely lacking the collective personal wealth to do so. To restore full faculty governance of the law school as an institution, this Part (a) employs traditional business valuation methodologies to arrive at a typical law school's generic financial value, and then (b) implores law professors at creatively financed law schools to enlist investment banks[38] to underwrite tens of millions of dollars of high yield debt to fund the buyout. With the faculty driving the FLBO process, the law school entities themselves would constitute the issuers[39] of the FLBO debt that the investment bank would sell to the investing public. As a result, the law school's traditional cash flows would cover the required principal and interest payments to the bondholders[40] to whom the investment bank sold the debt securities that financed the FLBO.[41] Part IV concludes that FLBOs would enable tenured law professors to function as theoretical law firm partners or corporate principals, while tenure-track junior faculty would mirror associates in law firms or corporate structures, with the added compensation incentive beyond tenure of obtaining an equity[42] interest in the law school. In addition, law schools could use equity rewards for non-faculty stakeholders as well, such as for alumni bar passage or career accomplishments.

This Article concludes that given the (a) existing financial engineering occurring at many law schools; (b) current A.B.A. Proposal against law professor tenure; (c) erosion of faculty governance in the face of competitive economic pressures in the HEI marketplace; (d) recent corporate-like M&A activity involving law schools; and (e)

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38. *See infra* Part IV.

39. *See generally* 15 U.S.C. § 77b(a)(4) (2006); 15 U.S.C. § 78c(a)(8) (defining "issuer" generally as a "person who issues or proposes to issue any security").

40. For purposes of this Article, the terms "debt," "leverage," "bonds," "notes," "indentures," and "debentures" have substantially the same meaning. *See*, *e.g.*, George S. Corey, M. Wayne Marr, Jr. & Michael F. Spivey, *Are Bondholders Owed a Fiduciary Duty?*, 18 FLA. ST. U.L. REV. 971, 972-74 (1991).

41. Or this party could also be a holder who obtained the debt via a secondary market transaction. *See* Kevin N. Peter, *Comments: Section 12(2) of the Securities Act of 1933: Does it Apply to the Secondary Market? The Circuits are Fighting*, 31 HOUS. L. REV. 1205 (1994).

42. "Equity" here means an equity security (i.e., stock ownership), not the fairness of a court of equity. *See generally* Barry P. Barbash, Phillip Isom & Stephen O'Conner, *SEC Adopts Rule Defining "Venture Capital Fund" for Purposes Of Exemption From the Investment Advisers Act*, 19 METRO. CORP. COUNSEL 26 (N.E. Ed. September 2011).

potential for law schools' owners to eliminate tenure through financial exigency claims[43]—combined with highly sophisticated financial contracts[44]—law school faculties should consider new options.

Specifically, this Article asserts that law professors should step down from their ivory towers and acknowledge the real-world threat that faces them. That threat comes from law school owners who desire to maximize their financial interests by stripping law school assets and outsourcing professors' jobs via eliminating tenure and outsourcing the law schools' instructors. To restore full faculty governance and secure a meaningful system of academic freedom in terms of scholarly research, publication, and teaching capacity, professors at CFLSs can capitalistically engage in FLBOs. Despite having a profound impact on both the legal profession and financial markets, the issues upon which this Article attempts to spark debate admittedly reside in the rarely enmeshed but highly technical interdisciplinary area of law, market economics, higher education, and modern finance. Yet if left undiscussed and misunderstood, these issues may unsuspectingly whipsaw all of a law school's stakeholders, for whom a FLBO could otherwise generate meaningful value.

## I. ACADEMIC FREEDOM AND TENURE IN HIGHER EDUCATION

As law professor Mark L. Adams stated, "[f]or a professor, tenure is often viewed as the 'Holy Grail' of academic employment,[45] a

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43. *See*, *e.g.*, Gwen Seaquist & Eileen Kelly, *Faculty Dismissal Because of Enrollment Declines*, 28 J.L. & EDUC. 193, 194-99 (1999) (exploring the definition of "financial exigency").

44. *See infra* note 228 (defining and detailing Credit Default Swaps ("CDS"), empty creditors, and the procedural decoupling of economic interests from ownership and creditor interests).

45. *Compare* Ashby Jones*, Are Law Professors Just Plain Lazy*, WALL ST. J. L. BLOG (Feb. 3, 2010, 3:45 PM), http://blogs.wsj.com/law/2010/02/03/are-law-professors-just-plain-lazy/ (quoting Washington University Law Professor Brian Tamanaha's assertion that "most of the time [tenure] functions to confer immunity on professors to work as little as they please beyond teaching their assigned classes . . . impos[ing] a high cost on law schools (in money as well as institutional productivity and morale)."), *with* MONTY PYTHON AND THE HOLY GRAIL (Python Pictures 1975).

Bridgekeeper: "What . . . is your quest?"
Sir Lancelot: "To seek the Holy Grail."
Bridgekeeper: "What. . . is your favourite colour?"
Sir Lancelot: "Blue."
Bridgekeeper: "*Go on. Off you go*."
Sir Lancelot: "Oh, thank you. Thank you very much."

potentially quixotic pursuit that may yield great rewards."[46] Understanding a general history of faculty tenure, therefore, and its relationship to academic freedom and professional higher education, helps to underpin the reader's ability to contextualize both the panic and blindness of faculty working in a rapidly marketized environment that embraces the HEI business model described *infra* Part II.

### A. THE GROWTH OF LANGDELLIAN PROFESSIONAL EDUCATION AND THE AAUP

Seven years after the death of Stanford University's founder, Leland Stanford, his widow had taken effective control of Stanford University.[47] In 1900, Mrs. Stanford terminated noted economist and professor Edward Ross because Mrs. Stanford's views regarding immigrant labor and railroads clashed with the professor's.[48] Most American universities at that time were proprietary,[49] or privately owned, leaving professors without the First Amendment rights enjoyed by faculty at publicly owned schools.[50] Following this event, because professors "began to conceive of themselves not as mere employees, but as professional scholars who were answerable to the professional judgment of their peers, they began to create the idea of academic freedom."[51] This era led to two significant events relative to this Article's analysis.

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Sir Robin: "*That's easy*."

*Id.* (emphasis added); *see also* Brian Tamanaha, *Straight Talk About Tenure,* BALKINIZATION BLOGSPOT, (May 8, 2007), http://balkin.blogspot.com/2007/05/straight-talk-about-tenure.html.

46. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 68 (2006).

47. Robert Post, Presentation at the Academic Freedom Forum: *Academic Freedom, Its History and Evolution Within the UC System*, 1 (June 11, 2003), http://www.universityofcalifornia.edu/senate/committees/ucaf/afforum/post.pdf; *see generally* Stanford University, *Jane L. Stanford: The Woman Behind Stanford University*, HISTORY OF STANFORD UNIVERSITY, http://janestanford.stanford.edu/biography.html (last visited Jan. 14, 2012, 4:52 PM).

48. *Why Tenure is an Important Institution: Tenure and Promotion at Penn State*, PENN STATE ALUMNI LIBRARY, http://alumni.libraries.psu.edu/tenureimpo.html (last visited July 29, 2011).

49. Post, *supra* note 47, at 1.

50. *See id.*

51. *Id.*

First, the education of future lawyers and other professionals shifted from apprenticeships to law and professional schools.[52] By the late nineteenth century, legendary Harvard Law School Dean Christopher Columbus Langdell "viewed academic merit as the means not only to elevate the legal profession but also to safeguard the integrity of the legal system."[53] Langdell instituted the requirement of a bachelor's degree prior to entering law school, a three-year course of academic study, and scholarly requirements combined with "the independent career track for faculty."[54] Langdell's achievements at Harvard Law School spread nationwide:

> [Langdell's] enduring legacy lies in his system of academic meritocracy that proliferated throughout American professional education over the course of the twentieth century. Indeed, it is no exaggeration to say that every professional school in the United States since the mid-twentieth century has felt the impress of the system that Langdell invented and instituted" in the late nineteenth century.[55]

Second, in response to actions such as Mrs. Stanford's, professors' complaints led to an American Economic Association investigation, which ultimately resulted in the creation of the American Association of University Professors ("AAUP").[56] The AAUP's initial public pronouncement regarding academic freedom and tenure occurred in 1915.[57] In a nutshell, the 1915 Declaration claimed that "[n]either the owners of proprietary universities nor the public, who owned state universities, could presume to judge the professional work of professors."[58] The 1915 Declaration asserted that "Academic freedom comprises three elements: freedom of inquiry and research; freedom of teaching in the university or college; and freedom of extramural utterance or action." The 1915 Declaration described tenure as encompassing basic ideas such as institutional understandings of the

52. *Id.*

53. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION C. C. LANGDELL 1826-1906 5 (Univ. of N.C. Press 2009).

54. *Id*. at 7.

55. *Id.* at 8-9.

56. Post, *supra* note 47, at 1.

57. *General Report of the Committee on Academic Freedom and Academic Tenure,* 1 BULL AM. ASS'N. U. PROFESSORS, 15, 16 (Dec. 1915), *available at* http://www.jstor.org/stable/pdfplus/40216731.pdf?acceptTC=true [hereinafter *1915 AAUP Declaration*].

58. Post, *supra* note 47, at 2.

appointment of a faculty member's term, with a permanent appointment following a certain length of service, which a university could only revoke based on clear, enumerated, legitimate grounds following an institutional notice and hearing.[59]

The AAUP revisited academic freedom and tenure in landmark fashion via its 1940 Statement of Principles.[60] After couching higher education as a public good,[61] the 1940 AAUP asserted that:

> Tenure is a means to certain ends; specifically: (1) [f]reedom of teaching and research and of extra-mural activities, and (2) [a] sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.[62]

In other words, self-regulation should rule in academia, with decisions made via faculty governance. Faculty play a "key role . . . in determining policy, at least in 'not for profit' institutions."[63]

Beyond these policy statements, the AAUP has nearly consistently defended academic freedom and tenure in higher education, with some significant historical successes.[64] As Walter Metzger stated, the AAUP took a "libertarian position on the Communist issue in the McCarthy period [that sought to dismiss academics suspected of having communist ties]. Tenure is our stock-in-trade; if we don't defend it against the

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59. *See* 1915 AAUP Declaration, *supra* note 57, at 40-42.

60. *Academic Freedom and Tenure: Statement of Principles, 1940*, 27 BUL. AM. ASS'N. U. PROFESSORS 40, 40 (Feb. 1941*), available at* http://www.jstor.org/stable/pdfplus/40219177.pdf?acceptTC=true [hereinafter *1940 AAUP Statement*]; *see also* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 6 (1990) (stating, hyperbolically, that AAUP "Committee A incants the words and phrases of the 1940 Statement with a reverence usually reserved for the hymning of a doxology, and the AAUP Washington staff ponders its every word with an exegetical skill that invites comparison with that of gospel hermeneuts and Talmudic scholars").

61. *Cf. infra* note 125 (describing higher education as an arguable public benefit).

62. *1940 AAUP Statement*, *supra* note 60, at 41.

63. BROWN, *supra* note 9, at 26. For a detailed discussion of faculty governance, *see*, *e.g.*, Gabriel Kaplan, *Governing the Privatized Public Research University*, *in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 120-24.

64. *Membership Brochure,* AM. ASS'N OF UNIV. PROFESSORS (Aug. 25, 2010), http://www.aaup.org/NR/rdonlyres/ECD0804A-FB73-4BD2-A93D-597164D8B790/0/2012membershipapplication.pdf.

contrary tide and hope to be vindicated by posterity, who will?"[65] Professor Matthew W. Finkin wrote, "[t]he AAUP's *raison d'être* is the defense of tenure."[66] As a result, Dean Langdell drove professional education's transformation from apprenticeships into a scholarly pursuit, and the AAUP sought to protect the scholarship of the professoriate via a near-obsession on the importance of scholarly freedom and tenure within academia.[67]

### B. THE A.B.A.

As legal education settled into its new home within law schools, the A.B.A. became parasitically involved in these schools' admissions processes and ultimate accreditation to increase students' ability to sit for a state bar exam of their choosing upon graduation.[68] During the

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65. Metzger, *supra* note 26, at 7a.

66. Mathew W. Finkin, In Defense of the Majority, *On Institutional Mergers and Acquisitions*, 68 ACADEME 2, 1a, 8a (Mar.-Apr. 1982).

67. For arguments against tenure in the modern landscape, *see generally* STEPHEN H. ABY & JAMES C. KUHN IV, ACADEMIC FREEDOM: A GUIDE TO THE LITERATURE, BIBLIOGRAPHIES AND INDEXES IN EDUCATION NUMBER 20, at 154-55, 162-63, 166-67 (Greenwood Press 2000); Stanley Fish, *Vocationalism, Academic Freedom and Tenure*, N.Y. TIMES (July 11, 2011, 8:30 PM), http://opinionator.blogs.nytimes.com/2011 /07/11/vocationalism-academic-freedom-and-tenure/?nl=todaysheadlines&emc=thab1 (reviewing Naomi Schaeffer Reiley's book THE FACULTY LOUNGES: AND OTHER REASONS WHY YOU WON'T GET THE COLLEGE EDUCATION YOU PAID FOR and discussing Reiley's conclusion that "[t]here is no reason why tenure shouldn't be abolished at the vast majority of the four thousand degree-granting colleges and universities in the United States.").

> What Riley shows is that vocation-oriented teaching, teaching beholden to corporations and politically inflected teaching do not square with the picture of academic labor assumed by the institutions of tenure and academic freedom. She says that, given the direction colleges and universities are going in, faculty members have little claim to the protection of doctrines that were fashioned for an academy that holds itself aloof from real world issues, either political or mercantile.

Fish, *supra* note 67.

68. *See Comprehensive Guide to Bar Admission Requirements 2012,* NATIONAL CONFERENCE OF BAR EXAMINERS, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (last visited May 5, 2012*)*. Few exceptions exist for students to sit for a bar exam without attending an A.B.A.-accredited law school. *See*, *e.g.*, California-accredited schools whose graduates are prohibited from taking another state's bar exam. *Admission and Educational Standards*, CALIFORNIA BAR, http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=5LAwXeKsh6U%3d&tabid=1227 (last visited May 5, 2012) (warning that a legal education from an unaccredited law school may not satisfy other jurisdictions' educational requirements to sit for the bar,

twentieth century, the A.B.A. transformed into a socio-economically powerful rent-seeking cartel[69] that—until required by judicial order in the mid-1990s—protected law professors to the point of arguably setting minimum salary requirements for A.B.A.-accredited faculty.[70] At the same time, while shamelessly seeking to expand its anti-competitive position, the A.B.A. fought to prevent proprietary law schools from obtaining A.B.A.-accreditation. In fact, the A.B.A. would not accredit a for-profit law school until the U.S. Justice Department successfully sued the A.B.A. in the mid-1990s for alleged violations of the Sherman Antitrust Act.[71]

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thereby denying students at these CalBar schools the opportunity to sit for another state's bar examination).

69. *See*, *e.g.*, Arthur Austin, *Ivy League Price-Fixing: Conflict From the Intersection of Education and Commerce,* 21 ST. JOHN'S J. LEGAL COMMENT. 1, 5 (2006) (describing the MIT/Ivy League arrangement as "[t]he coupling of the nation's most prestigious institutions, all located within shouting—collusion—distance, produced a synergized form of market power. The longevity of the arrangement certifies its success in maintaining cartel discipline."); George C. Christie, *Symposium*: *Legal Education in an Era of Change, The Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 314 (1987) (arguing that a need exists to maintain a minimum workload for law faculties); John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMMENT. 269, 281 n.34 (2001) (citing, *inter alia*, Mark Glick, *Is Monopoly Rent Seeking Compatible with Wealth Maximization?,* 1994 BYU L. REV. 499, 499 (1994)); Elson, *supra* note 69, at 284 n.49 (referencing, *inter alia*, Daniel Wise, *A.B.A. to Alter Accreditation Process: Federal Civil Antitrust Complaint Settled*, N.Y.L.J., June 1995, at 1); Richard C. Reuben, *An Alternative Law School Sues A.B.A.: Massachusetts Dean Challenges Association's "Monopoly Power" in Accreditation*, 80 A.B.A.. J. 25, 25 (1994) (citing the claim of Dean Lawrence R. Velvel of Massachussets School of Law, that the A.B.A.'s cartel power increased salaries and decreased law faculty workloads); George B. Shepherd & William G. Shepherd, *Scholarly Restraint? A.B.A. Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2114, 2135 (1998) (claiming that A.B.A. accreditation standards inure to the sole benefit of a law school's faculty, leaving students supporting the revenues); *see also infra* text accompanying notes 132-133.

70. *See generally* Mass. Sch. of Law at Andover v. United States, 118 F.3d 776 (D.C. Cir. 1997); *Standards for Approval of Law Schools and Interpretations*, 1994 A.B.A., Standard 405(b) [hereinafter, *A.B.A. Standard 405(b)*].

71. Editorial Article, *What Is Going On With Western State and the A.B.A.? An Examination of Western State University's Bid to Obtain American Bar Association Approval,* 31 W. ST. U. L. REV., 265, 272-274 (2004); *see also* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984) ( "[A]naked restraint on price and output requires some competitive justification even in the absence of a detailed market

Since then, the HEI environment has become more marketized, regardless of the perceived public, private, for-profit, or non-profit nature of the institution.[72] Unusual activities among the A.B.A. and some of its member schools are now occurring. For example, the A.B.A.'s Standards Review Committee has recommended that the A.B.A. no longer require accredited law schools to maintain a tenure policy per A.B.A. Standard 405(b).[73] The A.B.A.'s new position on tenure has met swift response from the legal academy in general[74] but also from University of Pennsylvania Emeritus Law Professor Robert A. Gorman, former President of the American Association of Law Schools ("AALS"), a more elite group of law schools given that member schools cannot apply for AALS membership until five years after A.B.A. accreditation,[75] and former President of the AAUP. Moreover, the AAUP itself submitted its concerns to the A.B.A.'s Standards Review

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analysis."). As a result, the A.B.A. had little legal ground on which to stand because CFLSs enhance competition in higher education, an admittedly commercial activity. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ( "{T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."); Michael C. Petronio, Comment, *Eliminating the Social Cost of Higher Education: The Third Circuit Allows Social Benefits to Justify Horizontal Restraints of Trade in United States v. Brown,* 83 GEO. L.J. 189, 192, 193 n.25 (1994) (stating that "[s]ection 1 of the Sherman Act provides that '[e]very contract, combination in the form of trust or . . . conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal.' However . . . [a] spectrum of analytical standards for determining whether conduct constitutes an unreasonable restraint of trade has emerged from Supreme Court precedent.") (citing, *inter alia*, Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)) ("The true test of legality [under the Sherman Act] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); *see also infra* text accompanying notes 134-135 (describing higher education as commercial activity).

72. *See infra* Part II (discussing marketized higher education in detail).

73. *See*, *e.g.*, Letter from Robert A. Gorman to A.B.A. Standards Review Committee (July 5, 2010); A.B.A. Standard 405(b) (urging the preservation of law school's maintenance of "an established and announced policy with respect to academic freedom and tenure" as a condition precedent to A.B.A. accreditation).

74. *See* Sloan, *supra* note 20.

75. In addition, the AALS requires tenure. *See* AALS HANDBOOK: MEMBERSHIP REQS., BYLAWS AND EXEC. COMM. REGS. PERTAINING TO THE REQS. OF MEMBERSHIP, *available at* http://www.aals.org/about_handbook_requirements.php ( "[A] faculty member shall have academic freedom and tenure in accordance with the principles of the [AAUP].").

Committee, attaching to its letter a Statement citing the 1915 Declaration and the 1940 Statement and their relationship to law schools.[76]

Regardless, little time passed between Professor Gorman's and the AAUP's letters to the A.B.A.'s Standards Review Committee and one law school dean's attempt to overtly challenge her faculty's academic freedom and tenure.[77] During the 2010-11 academic year, the dean of two privately owned law schools,[78] Linda Ammons, was so offended by a tenured faculty member's in-class hypotheticals, which are typical for law school classes,[79] that she attempted to dismiss that professor for using such hypotheticals.[80] In late July 2011, a process of faculty governance exonerated the conservative law professor[81] whose civil complaint alleges the dean's attempts to "violate his academic freedom in the classroom"[82] and "retaliate against" him "for his . . . political and legal views."[83] Moreover, "highly structured labor markets" such as those in academia, "*and the institution of tenure* limit the ability of nonprofit providers to adapt quickly to changes . . . "[84]

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76. Letter from Cary Nelson, President, Am. Ass'n of Univ. Professors, to Donald J. Polden, Dean, Santa Clara Univ. Sch. of L., and Margret Marin Barry, Professor, Columbus Sch. of L. (July 1, 2010), *available at* http://www.saltlaw.org/userfiles/file /SALT%20PDF%20Documents%20/7-19-10_Comment%20-%20security%20of%20 position%20AAUP%20July%202010.pdf.

77. Robert L. Shibley, *Widener Law School Attempting to Fire Professor for Classroom Speech*, Foundation for Individual Rights in Education (Mar. 23, 2011); Adam Kissel, *The Persecution of a Professor*, FRONTPAGE MAG (July 27, 2011), http://frontpagemag.com/2011/07/27/the-persecution -of-a-professor/.

78. Widener University has two law schools, one in Harrisburg, Pennsylvania, and the other constituting Delaware's sole law school.

79. Plaintiff's Restated and Amended Complaint ¶ 20, Connell v. Ammons, No. S11C-04-010 ESB (Del. Super. Ct. July 4, 2011) ("Professors from other law schools have testified as expert witnesses for plaintiff that this teaching methodology is within the pedagogical mainstream of U.S. law schools.").

80. *See, e.g.*, John Irving, *Widener Law Professor Exonerated*, NAT'L ACAD. OF SCHOLARS (July 21, 2011), http://www.nas.org/articles/Widener_Law_Professor_Exonerated.

81. *Id*.

82. Plaintiff's First Amended Complaint ¶ 18, Connell v. Ammons, No. S11C-04-010 ESB (Del. Super. Ct., July 11, 2011), *available at* http://thefire.org/public /pdfs/475d3507d952d5ba15a5a0fee067ede5.pdf?direct.

83. *Id*. ¶ 24.

84. BRENEMAN ET AL., *supra* note 17, at 11.

### C. THE DISCONNECT BETWEEN MARKETIZED HEIS AND ENDURING AAUP PRINCIPLES

Despite the correspondence drafted by the current AAUP president and a former AAUP *and* AALS president, the AAUP's words alone regarding law faculty tenure lack sufficient power to protect law faculty in a dynamic and marketized HEI environment.[85] As a result, understanding the basic contours of how tenure and academic freedom function in the current academically capitalist HEI landscape, proves essential to digesting the detailed financial and business analytics presented *infra* in Parts II and IV, respectively. First, the term "'academic capitalism' involves institutions . . . expanding managerial professions and managerial capacity, and in restratifying academic fields."[86] Moreover, "[a]cademic capitalism is sometimes met with confusion or resistance at the department level."[87] Some scholars have claimed that marketization has caused academics to be "cynical," "bitter," and "not just anxious but *truly angry*."[88] However, rather than resisting academic capitalism or being confused, cynical, or angered by it, this Article instead embraces capitalist ideas and market theory to develop its solution to the problems faced directly by law faculty (and indirectly by other stakeholders, including students, alumni, and the general public) in a marketized HEI landscape.

But before getting there, the reader must understand the broader context overhanging the current HEI marketplace. For example, "[i]n traditional colleges and universities, one speaks of governance and of administration, but less often of management,"[89] which represents the appropriate term in a for-profit arena. The President of perhaps the best known marketized university,[90] the University of Phoenix ("Phoenix"), stated "'*The AAUP statement on shared governance doesn't work here. This is not the same sort of organization*. [Phoenix] has always distinctly divided the academic issues from the management issues . . . The management . . . is done by *professional management*, not by

85. *See supra* note 77.
86. SLAUGHTER & RHOADES, *supra* note 9, at 308.
87. *Id.* at 333.
88. ZEMSKY ET AL., *supra* note 23, at 52.
89. Breneman, *supra* note 37, at 84.
90. *Id.* at 71.

academics."[91] Another Phoenix administrator "specifically argues that the lack of tenured faculty has allowed the organization to innovate."[92] Additionally, an outside scholar wrote, that lacking tenure is one of the "defining characteristics" of for-profit institutions.[93]

Marketized HEIs employ several factors that contradict the Langdellian model of legal education. First, marketized HEIs recognize that they must spend greater resources to ensure revenue growth.[94] Those resources must come from the largest cost center – faculty salaries.[95] "[T]he marketing of educational services requires staff able to compete with other institutions and organizations to capture market share. The more the market activity, the greater the managerial staff; the more the managerial staff,"[96] and the greater the managerial staff, the less room exists, therefore, for faculty governance.

> [C]olleges and universities have greatly expanded middle management . . . The managerial, nonfaculty professionals who manage . . . activity are less directly focused than are faculty on teaching and research, and more closely linked to intermediating networks of senior administrators involved in promoting university-business cooperation and partnership, and new economy academic capitalism. *Institutional expenditures for administration go up, while expenditures for instruction go down*.[97]

Administrators outnumbered full-time faculty members in U.S. higher education beginning in 2006.[98] Putting it all in perspective, Phoenix's faculty represents a microcosm of the for-profit HEI industry. And "[Phoenix] faculty, in short, are employees, do not have tenure, and can be let go, subject to laws that prevent wrongful dismissal. Under these circumstances, many of the governance issues that absorb time and

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91. GARY A. BERG, LESSONS FROM THE EDGE: FOR-PROFIT AND NONTRADITIONAL HIGHER EDUCATION IN AMERICA 110-11 (Praeger Publishers, 2005) (emphasis supplied) (quotation omitted).

92. *Id.* at 111.

93. *Id.* at 150.

94. *See* BERG, *supra* note 91, *passim*.

95. Roger Brown, *The Impact of Markets*, *in* HIGHER EDUCATION AND THE MARKET, *supra* note 9, at 43; *see also* ANDREW J. COULSON, MARKET EDUCATION: THE UNKNOWN HISTORY, *passim* (Transaction Publishers, 1999).

96. SLAUGHTER & RHOADES, *supra* note 9, at 307.

97. *Id.* at 332 (emphasis added).

98. *See*, *e.g.*, Scott Jaschik, *The Shrinking Professoriate*, INSIDE HIGHER EDUC. (Mar. 12, 2008), http://insidehighered.com/news/2008/03/12/jobs.

energy in traditional institutions simply are not present" under a private or for-profit model.[99] Phoenix stated, "[w]e believe that the population we serve is better served by a practitioner faculty."[100]

> Salaries are the major operating expense of a law school, and senior faculty salaries have risen well ahead of inflation in the past three decades. Law professors are paid approximately double the average of college and university professors generally . . . [and a]s salaries have risen for law professors, teaching loads have gone down[101]. . . . It is easy to imagine a less academic and more market-driven model of legal education . . . .[102]

For-profit HEIs are all about "outcomes and achieving them."[103] This explains why a marketized, non-tenured law school model makes sense in a new academically capitalized HEI system, because the most notable outcome—bar passage and licensure—is an easily measured outcome.[104]

Second, for-profit HEI's "understand better than their nonprofit competitors, that the education industry is a service industry first and foremost, and that those who want to survive have to focus on students' *and their prospective employers'* satisfaction[105] instead of alternative priorities such as faculty research,"[106] another key piece of the

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99. Breneman, *supra* note 37, at 85.

100. *Id.* at 91. *Cf. infra* text accompanying note 116 (comparing the use of adjunct faculty at the University of Kentucky College of Law and the University of Massachusetts School of Law – Dartmouth).

101. Maimon Schwarzchild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. L. ISSUES 3, 6, 8 (2008) (indicating also that the current law school business model depends on students willing to incur debt, whether the federal government continues to offer loans and subsidies, and whether the A.B.A. continues its monopoly relative to who can take bar exams across state lines).

102. *Id. at* 10.

103. BERG, *supra* note 91, at 111 (quotation omitted).

104. Bar passage information is publically available. *See*, *e.g.*, *Ohio State Bar Examination Results,* THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM (Nov. 3, 2011), http://www.sconet.state.oh.us/AttySvcs/admissions/barresultsrelease/.

105. *See*, *e.g.*, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,* 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR (arguing for more skills and clinical training and commonly referred to as the "MacCrate Report"); Gary A. Munneke, *Legal Skills for a Transforming Profession,* 22 PACE L. REV. 105, 130-35 (2001).

106. Andreas Ortmann, *Why Wall Street Fell in Love with Higher Education*, *in* EARNINGS FROM LEARNING, *supra* note 1, at 150 (emphasis added).

Langdellian model of legal education.[107] In the current higher education market, non-selective non-profit HEIs offer higher faculty teaching loads with less academic support, materially contributing to faculty's inability to "pursu[e] serious scholarship."[108] Because "[s]cholarly work is not part of the job [at a for-profit institution,] and the institution of tenure is inconceivable, [t]his approach would be more threatening to faculty in traditional colleges and universities . . . but . . . the connections—and implications—are far from obvious."[109]

Third, "colleges and universities have downsized and essentially outsourced their instructional production workers, replacing full-time with part-time and contingent faculty. The percentage of faculty who are part-time has doubled in the last twenty years despite research pointing to the significance of contact with faculty for student learning, satisfaction, and success."[110] At Phoenix, for example, inside the classroom, instructors have little to no academic freedom.[111] In fact, "[c]onsistency in what course material is delivered and in the learning objectives is more important at the University of Phoenix because of its lack of full-time permanent faculty, who at traditional universities are the guardians of the curriculum."[112] Already in the U.S., Britain, and Australia, an increasing gulf exists between full-time faculty and adjunct or contingent faculty, creating a two-tier workforce.[113]

> Starting in the 1980s and escalating through the 1990s, the number of part-time and adjunct faculty exploded . . . . That the growth of this contingent workforce inside the academy paralleled the growing reliance on temporary and transitory workers in the economy at large[114] was just one more sign that universities were themselves becoming more like enterprises, more able if not exactly ready to apply the lessons of the larger economy to their own

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107. *See* KIMBALL, *supra* note 53.
108. ZEMSKY ET AL., *supra* note 23, at 54.
109. Breneman, *supra* note 37, at 87.
110. SLAUGHTER & RHOADES, *supra* note 9, at 332.
111. *See* Breneman, *supra* note 37, *passim*.
112. BERG, *supra* note 91, at 118.
113. *See*, *e.g.*, Brown, *supra* note 9, at 6 (citations omitted).
114. *See* ZEMSKY ET AL., *supra* note 23, at 27 and accompanying text (discussing A.B.A. potentially removing tenure as accreditation requirement).

> operations. The net result was that faculty . . . were becoming a smaller minority in the institutions they once dominated.[115]

For example, as of July 2011, the faculty ratio at the University of Kentucky's College of Law is about 2:1 tenure-track to adjunct faculty, while the faculty at the University of Massachusetts School of Law - Dartmouth, a recent law school subject to M&A activity, has a faculty composition nearly the opposite, 2:1 outsourced faculty to tenure-track faculty.[116]

Having articulated the basic relationship between the A.B.A., AAUP, tenure, academic freedom, and scholarly requirements, to faculty composition and CFLSs generally within a marketized HEI landscape, Part II of this Article will detail how these pieces and players fit within the general HEI business model.

## II. MARKETIZED HEIS: HISTORY, REVENUE GENERATION, AND STRATEGIC BUSINESS MODELS

Higher education accounts for approximately $225 billion in annual expenditures,[117] and marketization in higher education "is a rapidly growing phenomenon."[118] Indeed, in 1999, the education industry[119] was the second largest industry in the U.S. behind health care.[120] Yet that

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115. *See* ZEMSKY ET AL., *supra* note 23, at 27-28; *see also* Brown, *supra* note 95, at 28.

116. *See Adjunct & Visiting Faculty*, UNIV. OF KENTUCKY COLLEGE OF LAW, http://www.law.uky.edu/index.php?pid=165 (last visited July 30, 2011); *Faculty Directory*, UNIV. OF KENTUCKY COLLEGE OF LAW, http://www.law.uky.edu/index.php ?pid=80 (last visited July 30, 2011).

117. ZEMSKY, ET AL., *supra* note 23, at 123.

118. BROWN, *Introduction* to HIGHER EDUCATION AND THE MARKET 2.

119. *See Occupational Safety & Health Administration: Industry Group 8221 Colleges, Universities and Professional Schools*, U.S. DEP'T OF LABOR, http://www.osha.gov/pls/imis/sic_manual.display?id=69&tab=group (last visited July 30, 2011) (evidencing education's position as a recognized industry participant is the United States Department of Labor Standard Industrial Classification ("SIC") Code 8221 "Colleges, Universities and Professional Schools," which both the SEC and investment professionals continue to apply when identifying economic industries in the U.S.); *see also SEC Division of Corporation Finance: Standard Industrial Classification (SIC) Code List*, SEC, http://www.sec.gov/info/edgar/siccodes.htm (last visited July 30, 2011).

120. =Ortmann, *supra* note 106, at 146 (stating that health care interestingly went through its own privatization and M&A activity during the 1980s that "many consider a template of things to come in the education industry").

year, fewer than ten Wall Street analysts covered the education sector,[121] evidencing its position in a highly fragmented, illiquid, and inefficient marketplace.[122] While between 15-23 analysts cover the sector today,[123] higher education still fails to meet the neo-classical economic assumptions,[124] and education Professor Brian Pusser asserted that "[f]or at least three decades, economists have pointed to difficulties in attempting to apply market models to higher education."[125]

For example, "higher education does not meet the conditions of a perfect market [because] . . . a key condition of the perfectly competitive market is that producers, consumers, and resource owners must possess perfect knowledge[126]," and asymmetrical knowledge exists in the education industry. Some scholars indicate that "imperfect consumer knowledge may derive from college and university marketing efforts that are aimed at influencing consumer choices . . . ." and another "condition of the perfectly competitive market, the homogeneity of products," also does not apply, as "all college educations are not the same."[127] Perhaps underscoring the dirigiste nature of all capitalist economies failing to meet neoclassical economic models because of a lack of perfect information, "the perfectly informed customer of economic theory," also, "is nowhere to be seen."[128]

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121. Ortmann, *supra* note 106, at 146.

122. *See*, *e.g.*, John Krainer & Stephen F. LeRoy, *Equilibrium Valuation of Illiquid Assets*, 19 J. OF ECON. 223 (2002).

123. *Apollo Group Inc. (APOL) Analyst Opinion*, YAHOO FINANCE, http://finance.yahoo.com/q/ao?s=APOL+Analyst+Opinion (last visited July 30, 2011); *Corinthian Colleges Inc. (COCO) Analyst Opinion*, YAHOO FINANCE, http://finance.yahoo.com/q/ao?s=COCO+Analyst+Opinion (last visited July 30, 2011); *EDMC Analyst Opinion,* YAHOO FINANCE, http://finance.yahoo.com/q/ao?s=EDMC+ Analyst+Opinion (last visited July 30, 2011).

124. *See*, *e.g.*, Terry M. Moe, *The New Economics of Organization*, 28:4 AM. J. OF POL. SCI. 739 (1984).

125. Brian Pusser, *Higher Education, Markets, and the Preservation of the Public Good, in* EARNINGS FROM LEARNING, *supra* note 1, at 31.

126. SLAUGHTER & RHOADES, *supra* note 9, at 284 (citations omitted).

127. *See id.* at 284. Buttressing the importance of HEI marketing, Professor Richard Chait wrote an article in the *Chronicle of Higher Education* entitled, *The Growing Hucksterism of College Admissions*, stating that "[o]ver the past twenty years, college admissions have shifted from essentially a selection function to a marketing function." *Id.* at 287.

128. FRANK NEWMAN ET AL., THE FUTURE OF HIGHER EDUCATION: RHETORIC, REALITY, AND THE RISKS OF THE MARKET 91 (Jossey-Bass, 2004) (internal citations omitted).

Underscoring the developing marketization and informational asymmetries inherent in the HEI industry, the academic literature on postsecondary organizations contains "little, if any, consideration of subunits and groups within the organization, or of their multiple connections with various units and groups outside the organizations."[129] In particular, little research exists relative to law schools' financing, organizational architectures, and reorganizations in the recent marketized HEI economy. Regardless, HEIs remains fragmented[130] and inefficient. As a result, this Part attempts to use law school data when possible, but when unable to do so employs broader HEI data.

### A. HIGHER EDUCATION'S EXTENSIVE EXISTENCE AS A COMMERCIAL ENTERPRISE

Historian Stanley Chodorow stated,

> By the middle of the twelfth century, there were dozens of teachers and thousands of students [in Paris], and, by the 1180s, it appears, the teaching masters there had formed the guild—the *universitas*—that would be the seed of the modern university. The university was a craft guild, with the form and functions of all other craft guilds, [that] . . . organized and regulated the business of the teaching masters in the city. The guild was a collective entity, the very definition of a corporation. The teaching masters who belonged to the university made and sold knowledge. They made knowledge by applying logical analysis to the classic texts in grammar, philosophy, theology, medicine, and law.[131]

Moreover, "well into the nineteenth century, proprietary [private, for-profit] education was a source of training for professional occupations *in areas such as . . . law*."[132] As recently as the mid-1990s, Federal District Court Judge Louis C. Bechtle described the commercial nature of education, stating,

> That MIT is a significant commercial entity is beyond peradventure. The *magnitude of MIT's economic activity is* certainly *far greater than that of the vast majority of businesses*. MIT has an operating

129. SLAUGHTER & RHOADES, *supra* note 9, at 8-9.
130. EDMC 10-K, *supra* note 3, at 7.
131. ZEMSKY ET AL., *supra* note 23, at 49-50.
132. Sarah E. Turner, *For Profit Colleges in the Context of the Market for Higher Education, in* EARNINGS FROM LEARNING, *supra* note 1, at 51 (emphasis added) (internal citations omitted).

> budget of approximately $1.1 billion and an endowment of $1.5 billion. MIT's annual revenues from tuition, room and board charges are approximately $200 million.
>
> MIT provides educational services to its students, for which they pay significant sums of money. The exchange of money for services is "'commerce' in the most common usage of that word." By agreeing upon aid applicants' families' expected financial contribution, the Ivy Overlap Group schools were setting the price aid applicants and their families would pay for educational services. The court can conceive of few aspects of higher education that are more commercial than the price charged to students.[133]

And despite recently increased M&A activity with law schools,[134] Professor Walter P. Metzger asserted in 1982 that

> A merger is not an extraordinary event: the absorption of one college or university by another . . . has been going on since the founding of the Republic. A good many of our private college began by taking over private academies; a good many of our state universities began by swallowing up private colleges. Dozens of medical schools in this country were impelled to trade their separate existences for . . . profitable association with universities; *innumerable law schools . . . were moved to do the same*.[135]

Therefore, HEIs—including law schools—historically have maintained commercial roles as industrial players, from revenue generators to M&A participants, within western and U.S. economies. Erudition of the financing and business strategies that underpin HEIs'

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133. United States v. Brown Univ., 805 F. Supp. 288, 298 (E.D. Pa. 1992) (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975)) (emphasis added), *rev'd*, 5 F.3d 658, 668 (3d Cir. 1993) (forcing the lower court to apply social welfare justifications). The Third Circuit nonetheless "agreed with the district court in holding that the gratuitous *offering of financial assistance to incoming students was a 'commercial transaction*,' not a charitable act, and thus within the purview of the Sherman Act." Theodore J. Stachtiaris, Note, *Antitrust in Need: Undergraduate Financial Aid and the United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1748 (1994) (emphasis added). The case involved the Justice Department charging the eight Ivy League schools (Brown, Columbia, Cornell, Dartmouth, Harvard, Princeton, Yale, and University of Pennsylvania) which settled, and MIT, which chose to litigate, with antitrust violations. *Brown Univ.*, 805 F. Supp. at 289.

134. *See supra* notes 18, 33, 34.

135. Metzger, *supra* note 26, at 4a (emphasis added).

commercial and industrial positioning is crucial to understanding this Article's articulated dilemma, as well as proposed solution.

## B. EXPANDING MARKETIZED HIGHER EDUCATION

### *1. Development of Today's Marketized HEI Environment via Portable Revenue Sources*

Following the Second World War's conclusion in the late 1940s, Congress enacted the GI Bill.[136] The GI Bill permitted military veterans to obtain federal financial assistance to attend the vocational, non-vocational, non-profit, or proprietary post-secondary educational institutions of their choosing.[137] A generation later, part of President Lyndon Johnson's Great Society programs included the Higher Education Act of 1965 ("HEA").[138] Similar to the GI Bill, Title IV of HEA ("Title IV") permitted individual student portability of federal financial aid.[139] Congress' reauthorization of the HEA in 1972 authorized what later became known as "Pell Grants"—aid directly to students who could choose to use the funds at an accredited institution, rather than providing the federal financial assistance directly to institutions that could use the funds on behalf of students.[140] During 1972's reauthorization of the Higher Education Act, Congress made proprietary schools eligible for Title IV federal financial aid.[141]

> "The neoliberal state began to turn students into consumers as early as 1972, when Congress shifted higher education funding from institutions to students. Combined with rising tuition, the shift from

136. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 587 (codified at 38 U.S.C. § 101) [hereinafter, *G.I. Bill*].

137. *Id.*

138. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 1219 (codified as amended at 20 U.S.C. §§ 1070-109) [hereinafter, *HEA*].

139. *See*, *e.g.*, Brian Pusser & David A. Wolcott, *A Crowded Lobby: Non-Profit and For-Profit Universities and the Emerging Politics of Higher Education, in* EARNINGS FROM LEARNING, *supra* note 1, 170.

140. *Id.* at 171. During this time, however, states largely directed (albeit dwindling) financial support to institutions, not individuals. *Id.* at 170. The shift from grants to loans has transferred the payment burden to the consumer. SLAUGHTER & RHOADES, *supra* note 9, at 37 (internal citations omitted).

141. *See* Turner, *supra* note 132, at 55.

> grants to loans over the course of the past thirty years has confirmed students' identity as consumers of higher education."[142]

Therefore, unsurprisingly, "[s]ince 1972, federal student financial aid in grant form diminished relative to the cost of higher education, while the supply of loan money expanded rapidly."[143]

While federal and state governments have failed to create a meaningful yet constitutional voucher system at the K-12 level,[144] subsidized student loans have done so at the higher education level.[145] Unlike the fight over vouchers and charter schools to generate student choice at the K-12 level, since 1972, consumer choice, via loan portability, has driven the HEI marketplace.[146] The A.B.A. lost its battle

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142. SLAUGHTER & RHOADES, *supra* note 9, at 22.

143. *Id.* at 42.

144. *Cf.* Zelman v. Simons-Harris, 536 U.S. 639 (2002) (5-4 decision containing an unusually high six opinions and holding that Ohio's voucher program did not violate the establishment clause of the First Amendment to the U.S. constitution); OHIO REV. CODE ANN. § 3313.978(A) (LexisNexis 2006) (articulating Ohio's voucher requirements for K-12 students).

145. ZEMSKY, ET AL., *supra* note 23, at 164.

146. Mirroring, however, some concerns of opponents of school choice in K-12 education, certain disturbing statistics exist regarding post-secondary student loans. *See* Brown, *supra* note 95, at 31-34, 47 (quoting WALTER P. HELLER & DAVID A. STARRETT, *On the Nature of Externalities*, *in* THEORY AND MEASUREMENT OF ECONOMIC EXTERNALITIES 37 (Steven A.Y. Lin ed., 1976) (stating that for those at the 20th percentile in 2003, the proportion of income required to pay public university tuition in 1967 shifted to 30 percent in 2003 but for the families in the 95th percentile, the percentage of income grew from 2 to 3.5 percent. A so-called "distributional inequality" exists in this funding scheme that favors middle class students to the detriment of lower class students)*; see also* Brown, *supra* note 9, at 14-15 (internal citations omitted); Eckel & Morphew, *supra* note 16, at 91 (internal citations omitted). However, nonprofits' use of portable aid served to benefit those with the greatest ability to repay their loans, leading to further social stratification, benefitting the well-off. However, for-profits' targeted niche (and creatively financed law schools' unique silo able to target a niche [centers, certificate programs, etc.]) can help level the playing field. EDMC's law school student body is consistently among the most diverse in the nation in terms of culture, ethnicity, socio-economic background, and number of first-time college graduates/law school graduates, with its two most recent first-time bar pass rates (the measure for the for-profit/vocational model) being over 75 percent. Moreover, driving consumer choice—and thus the precious Title IV dollars needed to generate HEIs' revenues—are "outside organizations like *USNews and World Report* rat[ing] college and university performance, judging their worth to the student/parent consumer." SLAUGHTER & RHOADES, *supra* note 9, at 23.

against for-profit schools when a federal trial court ordered the A.B.A. "enjoined and restrained from . . . adopting or enforcing any Standard, Interpretation, or Rule, or taking any action that has the purpose or effect of prohibiting a law school from . . . being an institution organized as a for-profit entity."[147] Following the A.B.A.'s failed attempt to prevent for-profit accredited law schools in 1996, both the 1997 Taxpayer Relief Act and the 1998 Higher Education Act contained provisions benefitting consumer choice at for-profit HEIs.[148] Simultaneously, state HEI financing shifted from "appropriations to tuition revenues in a conscious commitment to high-tuition, high-aid policies" that "give an increasing share of monies to students through financial aid and to decrease the share given directly to higher education institutions."[149] Doane and Pusser indicated that "[t]o date, there has been little empirical investigation of the effect of entrepreneurial revenue generation close to the academic core."[150] As a result, while better market-based solutions may exist—such as income-contingent loans,[151] in which private investors loan funds to students or obtain

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147. United States v. A.B.A., 934 F. Supp. 435, 436 (D.D.C. 1996) (modified Final Judgment at 2001 U.S. Dist. LEXIS 2279). In addition, the

> [P]rimary reason American legal education so effectively entrenches the wealthy and denies access to the non-wealthy is that it operates as a rent-seeking cartel which in its essential aspects acts just like other industry cartels that use governmental restrictions on market entry in order to boost their members' profits . . . [and t]he lynch-pin of the cartel is, of course, ABA accreditation.

Elson, *supra* note 69, at 270 (referencing Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 860-64 (1996); Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance after Lingel v. Norge Division of Magic Chef, Inc.*, 41 HASTINGS L.J. 1149, 1298 (1990)).

148. *See* SLAUGHTER & RHOADES, *supra* note 9, at 44.

149. *Id.* at 283 (internal citations omitted).

150. Dudley J. Doane & Brian Pusser, *Profit Centers in Service to Academic Core, in* EARNINGS FROM LEARNING, *supra* note 1, at 95.

151. *See, e.g.*, Melody, *Selling Your Personal Equity: $300K Now For 3% of Your Lifetime Income,* TRANSCAPITALIST (Jan. 18, 2010), http://www.transcapitalist.com/transcapitalist/2010/1/18/selling-your-personal-equity-300k-now-for-3-of-your-lifetime.html (describing three high-achieving young people who sold a percentage of their expected future earnings in exchange for a present value ascribed to their future earnings based on various risk-adjusted discount rates); David A. Moss, *College Access for All: Promoting Investment in Education Through Income-Contingent Lending,* THE TOBIN PROJECT (May 2007), *available at* http://www.tobinproject.org/downloads/RP_College_Access_for_All.pdf (indicating the idea "included both Milton Friedman and James Tobin, two Nobel laureates from opposite ends of the political spectrum."); Pamela Sud, *Buying Equity in a First Grader?*, METHOD LOGICAL (Feb. 24, 2011),

"equity stakes" in the future earnings of students with whom they invest funds—the current policy represents "an educated roll of the dice that the students who receive federal loan dollars will use them to better themselves and their communities."[152]

However, the schools that receive these federal loan dollars use the funds for revenue growth. For example, between October 1999 and October 2009, EDMC achieved a compounded annual enrollment growth rate ("CAEGR") of 18.9 percent, and the company's average enrollment growth during fiscal year 2010 was 22.5 percent, year-over-year.[153] EDMC explicitly states that "[f]or-profit providers have captured an increasing share of the growing demand for post-secondary education over the last several years . . . [because] non-profit public and private institutions can face limited financial capability . . . due to a combination of state funding challenges, significant expenditures required for research, *and the professor tenure system*."[154] Of EDMC's 13,400 full-time employees, approximately 3,000 were (non-tenure-track) faculty members (roughly twenty-two percent of the workforce), and EDMC also employed 6,800 adjunct faculty members—an adjunct-to-full-time non-tenure-track multiple of approximately 2.25x.[155] Thus, scholarly output and faculty tenure explicitly undermine a marketized HEI business model built on revenue growth and reduction of the largest cost centers, even if those cost centers drive academic reputation and prestige.

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http://methodlogical.wordpress.com/2011/02/24/buying-equity-in-a-first-grader/ (describing the author's exploration of impact investing for social returns at the Harvard Kennedy School).

152. Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done to Reduce Them*, 40 J.L. & EDUC. 225, 271 (2011).

153. EDMC 10-K, *supra* note 3, at 5.

154. *Id.* at 7 (emphasis added).

155. *Id.* at 33. *Cf. supra* text accompanying notes 189-190 (regarding the similar role of part-time practitioner faculty in the Phoenix business model). *See also* David Hricik, *Life in Dark Waters: A Survey of Ethical Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379 (2001) (stating that "current [ABA] accreditation standards encourage law schools to 'include experienced practicing lawyers and judges as teaching resources to enrich the educational program.' Adjuncts play many roles in law schools, and their roles are expanding . . . . Half of all law professors are adjuncts.") (internal citations omitted). For the opacity involved in determining how adjunctified a law school's faculty may become*, see Standards for Approval of Law Schools*, 2007-2008 A.B.A., Standard 402 and Interpretations 402-1-2.

The marketized HEI business model is as reliant on Title IV funds as one could imagine. For instance, in fiscal year 2010, over eighty-nine percent of EDMC's net revenues came from Title IV sources.[156] Education Department rules mandate that at least ten percent of for-profits' revenues come from sources other than Title IV.[157] Under the so-called "90/10 Rule," an HEI may lose future Title IV eligibility if, for two consecutive fiscal years, more than 90 percent of an HEI's revenue comes from Title IV sources.[158] As a microcosm of the broader HEI industry, therefore, EDMC is ensuring that it extracts as much as it can from Title IV sources. While non-Title IV funding represents little more than ten percent of EDMC's revenues, public universities that contain law schools, including the University of Colorado and Penn State University, "receive less than 10% of their overall funding from state appropriations for full-time enrollments,"[159] thus subjecting them to new funding models in a marketized academic landscape.

Briefly re-focusing the discussion from the revenue side to the cost side, according to an article in *The Chronicle of Higher Education*, for-profit HEIs "devote 20 percent of their operating budgets to marketing" and activities related to driving revenues, while the figure for non-

156. EDMC 10-K, *supra* note 3, at 22.

157. SLAUGHTER & RHOADES, *supra* note 9, at 45.

158. EDMC 10-K, *supra* note 3, at 29. Beyond the 90/10 Rule, Secretary of Education Arne Duncan explicitly has targeted for-profit HEIs. For example,

> [P]reviously, DOE had vaguely framed its proposed regulations in terms of 'protecting the integrity of Title IV loan programs,' but a statement issued by Education Secretary Arne Duncan noted that the for-profit sector's rapid enrollment growth, debt loads, and default rates 'prompted' the latest changes to the law [which dealt with incentive compensation and job placement, as well as graduation rates].

Johnson, *supra* note 152, at 257. Some of Secretary Duncan's strategies regarding for-profit HEIs raise questions with a number of legal scholars, including Judge Posner of the United States Court of Appeals for the Seventh Circuit. *See*, *e.g.*, Richard Posner, *The Controversy over For-Profit Colleges*, BECKER-POSNER BLOG (June 20, 2010), http://www.becker-posner-blog.com/2010/06/the-controversy-over-forprofit-collegesposner.html. In addition, other arms of the federal government have taken aim at for-profit HEIs. *See, e.g.*, Neal McCluskey, *GAO Confirms: It Did Nothing Wrong, and It's None of Your Business,* CATO@LIBERTY (Feb. 8, 2011), http://www.cato-at-liberty.org/gao-confirms-it-did-nothing-wrong-and-its-none-of-your-business/ ( "According to its own investigation, [the Government Accountability Office found] errors were made in producing a report highly damaging to for-profit colleges, but no one had any bad intentions and the report still stands.").

159. Mark Stater, *Policy Lessons from the Privatization of Public Agencies, in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 134.

profits is five percent, which is seventy-five percent lower.[160] However, a material cost advantage for privately funded for-profit schools includes the inefficiencies inherent in public and private non-profits.[161] Typically, the term "inefficient" has been used to refer "to faculty paying too much attention to their research instead of teaching."[162] One scholar indicated that he had "little doubt that the ability of for-profits to emerge, and thrive, in what should be a hostile environment to them . . . only because of the *appalling inefficiency* . . . of traditional providers of postsecondary education."[163] However, in the face of these traditional schools' inefficiencies, significant changes appear to be occurring within traditional HEIs that begin to blur some historical lines in a marketized environment.

### *2. Marketization Forces Change Among Even Traditional HEIs*

Despite many ostensible and longstanding differences between traditionally financed and creatively financed HEIs, they both are moving toward a marketized model. Unlike CFLSs, traditional universities receive "commercial revenue, tax revenue, and donations."[164] In addition, research schools can generate additional funding by taking equity stakes in inventions or intellectual property, or by licensing that intellectual property and receiving a royalty stream in return.[165] Traditional HEIs also can generate revenues through extension programs,[166] real estate foundations, endowment offices, and patent offices.

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160. Brown, *supra* note 95, at 43 (quoting E. Strout, *Breaking Through the Noise of a Crowded Field,* CHRON. OF HIGHER EDUC., May 19, 2006).

161. *Id.*

162. Ortmann, *supra* note 106, at 151. Two types of relevant efficiencies exist in this context. First, "static efficiency" represents "the ratio of outputs to inputs at any one point in time." Second, "dynamic efficiency" means "sustaining a higher rate of growth over time through product and process innovation and better management of resources." Brown, *supra* note 9, at 6-7.

163. Ortmann, *supra* note 106, at 151 (emphasis added).

164. Pusser, *supra* note 125, at 32.

165. SLAUGHTER & RHOADES, *supra* note 9, at 252; *see also* LAWRENCE C. SOLELY, LEASING THE IVORY TOWER: THE CORPORATE TAKEOVER OF ACADEMIA (South End Press 1995) (stating that corporations are, in effect, taking over traditional academia); NORMAN E. BOWIE, UNIVERSITY-BUSINESS PARTNERSHIPS: AN ASSESSMENT (Rowman & Littlefield Publishers, Inc. 1994).

166. *See* Doane & Pusser, *supra* note 150, at 94.

However, a traditional non-profit HEI can only raise equity capital if it works collaboratively with a for-profit entity or creates a for-profit subsidiary.[167] Recent research

> now point[s] to the internal embeddedness of profit-oriented activities as a point of reorganization (and new investment) by higher education institutions to develop their own capacity (and to hire new types of professionals) to market products created by faculty and develop commercializable products outside of (though connected to) conventional academic structures and individual faculty members.[168]

For example, "the rise of 'wholly owned subsidiaries' is not uncommon . . . Colorado State University, University of North Carolina, and the University of Illinois have each created spin-offs[169] to . . . generate revenue for their 'parent companies.'"[170] Moreover, "privatization emerged as a major focus and a deep concern of many leading analysts and observers of public higher education at the turn of the twenty-first century."[171] Nonetheless, even in the arena of publicly traded companies, few individuals understand such reorganizations and

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167. Breneman et al., *supra* note 17, at 10 (internal citations omitted).

168. SLAUGHTER & RHOADES, *supra* note 9, at 11.

169. Spin-offs constitute one flavor of corporate reorganizations and restructurings. For Harvard Business School Professor Stuart Gilson's detailed contextualization of spin-offs, including basic tax treatments, *see* STUART C. GILSON, CREATING VALUE THROUGH CORPORATE RESTRUCTURING: CASE STUDIES IN BANKRUPTCIES, BUYOUTS, AND BREAKUPS 9-10 (John Wiley & Sons, Inc. 2001). Other types of reorganizations and restructurings include split-offs, carve-outs, share repurchases, tracking stock issuances, and leveraged buyouts ("LBOs"). *Id.* at 1-6. From 1980 through 2001, over 1,500 corporations reorganized via equity spin-offs, split-offs, and carveouts, alone. *Id.* at 1-2. As a result, UNC's and Illinois' spinoffs represent academic capitalism following the lead of the market's capitalism. *See also* JAMES E. MORRIS, ACCOUNTING FOR M&A, EQUITY, AND CREDIT ANALYSIS (McGraw-Hill 2004).

170. Eckel & Morphew, *supra* note 16, at 91 (internal citations omitted).

171. Michael K. McLendon & Christine G. Mokher, *The Origins and Growth of State Policies that Privatize Public Higher Education*, *in* PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at 7 (internal citations omitted). McLendon and Mokher also identify five privatizing trends in state policy relative to higher education: (1) declining state funding; (2) deregulation of tuition setting authority; (3) expansion of prepaid tuition and tax-favored college savings programs; (4) the creation of state merit aid/scholarship programs, for example, in Kentucky, Tennessee, West Virginia, Florida, Georgia, Louisiana, Michigan, Missouri, Nevada, and South Carolina, that permit students to apply the aid to private tuition charges; and (5) decentralization of governance. *Id.* at 11, 18 (internal citations omitted).

restructurings.[172] When discussing the "extent to which and the rapidity with which public universities are becoming 'privatized,' . . . institutions must compete vigorously in the economic marketplace . . . and are viewed by policymakers and university leaders alike as quasi-state agencies, if state related at all."[173]

Therefore, "in principle, the nonprofit calculus is no different from that underlying the incentive in the for-profit sector to boost shareholder value."[174] Indications exist of non-profits acting as for-profits. For example, "[m]anagers and board members . . . set long-term shareholder value creation as their primary objective,"[175] while "'nonprofits maximize profits and distribute them in disguised form (as higher wages and perks), or they may maximize revenues that lead to power and prestige for their managers.'"[176] Moreover, the "CEO of a for-profit enterprise, educational or otherwise," has a "mission . . . to maximize shareholder value."[177] The CEOs of traditional HEIs (university presidents), in fact, work within compensation structures similar to private, for-profit HEIs,

> both of which are closer to the general structure of pay for CEOs in the corporate world than to the structure of pay in most public organizations. When public and nonprofit universities adopt compensation packages that are structured like those of the private sector, *they become more committed to an academic capitalist knowledge/learning regime*.[178]

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172. GILSON, *supra* note 169, at vii, xvi, 3-4 (stating that "[d]espite the expanding impact and reach of corporate restructuring, however, much of what transpires in a restructuring is typically hidden from public view. As a result, many of those directly affected by a restructuring—managers, directors, employees, and investors—may have little in the way of experience or training to prepare them for the critical . . . challenges they will face . . . . [M]uch of what has been written about corporate restructuring is based on publicly known facts and data . . . [and] most of what transpires inside these companies is still a black box.").

173. *Preface* to PRIVATIZING THE PUBLIC UNIVERSITY, *supra* note 9, at vii-x.

174. ZEMSKY, ET AL., *supra* note 23, at 67.

175. KOLLER ET AL., *supra* note 2, at 4.

176. SLAUGHTER & RHOADES, *supra* note 9, at 334 (quoting E. James, *Commercialism Among Nonprofits: Objectives, Opportunities, and Constraints, in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 273 (B.A. Weisbrod ed., 1998)).

177. ROBERT ZEMSKY, ET AL., *supra* note 23, at 63.

178. SLAUGHTER & RHOADES, *supra* note 9, at 251-52 (emphasis added).

As a result, "academic capitalism[179] blurs the boundaries between public and private sectors."[180] Therefore, "the not-for-profit model looks like the for-profit model, but mission attainment is substituted for profit."[181] "In reality, very little of what the for-profits do hasn't been done in some way by traditional institutions."[182]

### *3. The Marketized HEI's Strategic Business Model: Deliver Measurable Outcomes Without Academic Freedom, Tenure, and Faculty Governance*

An argument exists that part of the transformation in HEIs, even at the undergraduate level, is shifting to produce skills-based graduates. For instance, because "[c]orporations need well-educated workers in business related areas" such as "*law*—to create and protect knowledge-based products, processes, and services," business has become the core curricula of undergraduate HEIs; simply put, "the majority of all courses taken in four-year schools are in business fields."[183]

For-profit schools focus on vocational skill development because the skills taught are easy to quantify and verify via certification; practitioners can replace research scholars as instructors, and modest property, plant, and equipment requirements exist for such schools.[184] This scenario sounds eerily like a law school. Just taking one example of a CFLS, Michigan State University College of Law describes itself as "a *private institution* of higher learning *exclusively devoted to professional education* in law."[185] Amplifying HEIs' general shift to skills that correspond with measurable outcomes—such as passing the bar exam and job placement figures, is increasing investigatory pressure by the federal government, which is threatening to pull Title IV funding from

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179. Professors Slaughter and Rhoades stated that:

> Academic capitalism in the new economy sees groups of actors within colleges and universities—faculty, students, administrators, and managerial professionals—as using a variety of state resources to intersect the new economy . . . . Their individual decisions to engage in organized activities that promote market and marketlike activities consolidate the academic capitalist knowledge/learning regime.

*Id.* at 306.

180. *Id.* at 329.

181. ZEMSKY, ET AL., *supra* note 23, at 59.

182. BERG, *supra* note 91, at 169.

183. SLAUGHTER & RHOADES, *supra* note 9, at 19.

184. Turner*, supra* note 132, at 58-59.

185. *See*, *e.g.*, History of Michigan State University College of Law, *available at* http://www.law.msu.edu/history.html (last visited July 20, 2011) (emphasis added).

certain schools based on default rates, gainful employment numbers, and other questionably drafted agency rules.[186]

To deliver these measurable outcomes, marketized HEIs, such as Phoenix, remain in the dark not because of the revenue side but because of cost side decisions[187] that impact tenure, academic freedom, and faculty governance. Concerning faculty governance, marketized HEIs believe "that academics are not qualified to make management decisions for the organization, and that the institution is better off if managers control nonacademic areas."[188] Regarding tenure, Phoenix employs a business model that relies heavily on part-time practitioner-instructors, not academic faculty.[189] For example, in 2004, Phoenix retained 18,000 part-time instructors, with 1,400 full-time faculty, *none of whom were tenured* or tenure-track,[190] because "*the basic explanation for [Phoenix's] profitability is to be found in these figures*."[191] Marketized HEI economics push certain of Phoenix's decisions vis-à-vis academic freedom. For instance, Phoenix drives economies of scale by requiring instructors to teach from established and uniform syllabi, textbooks, and learning materials, not only permitting Phoenix to leverage purchasing

186. *See*, *e.g.*, Johnson, *supra* note 152, *passim*. To remain eligible for Title IV funding, a proprietary school (why the distinction even exists deserves scrutiny, given the other similarities between for-profits and non-profits, discussed *supra* text accompanying notes 174-182) must pass either the loan repayment rate test or a debt-to-income test. Program Integrity: Gainful Employment, 75 Fed. Reg. 43616, 43616-43620 (proposed July 26, 2010) (to be codified at 34 C.F.R. § 668); *see also* United States *ex. rel* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1168 (9th Cir. 2006), which included assertions under the False Claims Act, 31 U.S.C. § 3729(a)(2) (2006). The myopic view of the Department of Education, however, fails to review the total mix of a student's debt portfolio. Students are financially incentivized to default on dischargeable and higher-interest consumer credit card debt, for example, rather than lower-interest, non-dischargeable student loan debt, but no reason exists as to why an HEI should be penalized if some students make choices that appear contrary to their economic interests, except for the federal government wanting to reiterate its superiority position.

187. *See* Breneman, *supra* note 37, at 79.

188. BERG, *supra* note 91, at 195; *see also infra* Part IV (evidencing EDMC's embrace of this model as well).

189. Breneman, *supra* note 37, at 72; *cf.* EDMC's faculty composition, *infra* Part III.

190. *Id.* at 72-73, 77.

191. *Id.* at 73. Part-time faculty made approximately $1,000-$1,600 per course, which had twenty-four hours of faculty contact with students, and interviews with more than twenty Phoenix faculty indicated that "few 'do it for the money.'" *Id.* at 76.

power with book publishers,[192] but also stripping instructors of all but the faintest bit of academic freedom in the classroom. Granularizing this general view of marketized HEIs' approaches toward academic freedom is the argument that a traditional law school model assumed the "notion that legal scholarship is worth the increased . which substantially funds its production [and] not only lacks any empirical support, it cannot withstand the test of common sense . . . ."[193] Beyond following creative market models on the revenue side, traditional HEIs also have begun to follow some of these marketized models on the cost side in ways that impact tenure, faculty governance, and academic freedom. As Professors Slaughter and Rhodes stated, "the neoliberal state has reinterpreted labor law to *increase workplace flexibility* . . . that allow[s] . . . universities to . . . alter[] accreditation practices [and] . . . *accept hiring practices that decenter full-time faculty – the states affirm lack of faculty involvement in shared governance* . . . ."[194] Part II-C, *infra*, highlights several examples of the impact the marketized HEI business model has had on traditional state-run HEIs.

### C. REORGANIZING THE PUBLIC LAW SCHOOL AND UNIVERSITY TO FIT A MARKETIZED MODEL

In the 1970s, the University of Michigan ("Michigan") and the University of California Berkeley ("UC Berkeley") generated substantially similar revenues.[195] But Michigan strategically moved in a marketized direction in the 1980s to a point in which people began referring to the school as "The University of Michigan, Inc.,"[196] and by moving towards a revenue-growth business model away from direct government dependency, Michigan's annual revenues exceeded UC Berkeley's by over $400 million.[197] When one of UC Berkeley's professional schools—its business school—ultimately switched to a creative financing model by privatizing at the turn of the millennium, tuition unsurprisingly skyrocketed, raising UC Berkeley's MBA program's tuition by greater than 301 percent over the ensuing

192. *Id.* at 77, 82.
193. Elson, *supra* note 69, at 276.
194. SLAUGHTER & RHOADES, *supra* note 9, at 21-22 (emphasis added).
195. ZEMSKY ET AL., *supra* note 23, *passim.*
196. ZEMSKY, ET AL., *supra* note 23, at 8. As an Ohio State alumnus, however, I continue to refer to the University of Michigan by a variety of other names, inappropriate for placement within legal scholarship.
197. *Id.* at 8.

decade.[198] Compared to UC Berkeley, however, the always privately-financed Stanford MBA program's tuition—located in the same general geographic area and tier of *US News* rankings—rose by a significantly lower 72.5 percent over the same time period.[199] Dean Judy Olian of UCLA's Anderson School of Business has stated that her goal is to wholly eliminate state support, because doing so would provide, inter alia, *flexibility regarding* revenue generators such as tuition and fees and expense centers such as *faculty compensation*.[200] The dean of UC Davis' business school has similar plans to privatize the school to enable more similarly centralized decision-making regarding the schools' revenues and expenses.[201]

In the law school context, the University of Virginia's School of Law embraced a creative and marketized private funding model in 2005;[202] and as the University of Minnesota Law School ponders going wholly private in 2011, state funding will comprise fewer than ten percent of the school's budget in 2011-2012.[203] As a growing number of once public law schools currently scramble to engineer inventive financial or organizational restructurings to address state funding crises, and because the ABA is tight-lipped about releasing law schools' financial data (even for scholarly research purposes),[204] understanding the private, for-profit educational model provides potential guidance as to what may occur within law schools.

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198. John A. Byrne, *The Privatization of California's B-Schools*, POETS & QUANTS, http://poetsandquants.com/2011/06/22/the-privatization-of-californias-b-schools/ (last visited July 30, 2011).

199. *Id.*

200. *Id.*

201. *See id.*

202. *See* Dolph C. Simmons, Jr., *State Funding Cuts Spur Universities to Ponder Privatization*, LJWORLD.COM (July 9, 2011), http://www2.ljworld.com/news/2011/jul/09/state-funding-cuts-spur-universities-ponder-privat/?print.

203. *Id.*; *see also supra* text accompanying note 159 (evidencing several instances of state funding at or below the ten percent threshold at Penn State University and the University of Colorado, both of which house law schools).

204. E-mail from Kenneth R. Williams, ABA Data Specialist, to Western State College of Law Associate Dean of Academic Affairs Susan Keller (June 24, 2011) (on file with author) (stating that law schools' financial reports are "intended for exclusive and official use by those persons authorized by the Council to receive it" in response to Keller's e-mail indicating that a faculty member wanted to use this information for research purposes).

Even within the world of for-profits, many of whom publish financial disclosures with the SEC, "[t]he basic demographics of the for-profit sector of the higher education market are not well documented."[205] As University of Virginia Professor Brian Pusser indicated,

> Add to the mix the rise of attention-garnering publicly traded companies like the University of Phoenix . . . and the partnerships between universities like Cornell and New York University with private venture capital funds . . . add some business superstars like . . . Michael Milken and the pot begins to boil. Add a growing chorus of protests over the rising costs of higher education, with a pinch of critiques of the higher education bureaucracy reminiscent of those leveled earlier at the elementary-secondary system by [school choice advocates John E.] Chubb and [Terry] Moe, and familiar aromas will fill the metaphoric kitchen. Stoke the fire with research provided by groups relatively new to higher education: stock analysts . . . and there may inevitably be considerably more heat than light shed on the subject.[206]

As Part II-D, *infra*, highlights, however, a likelihood exists that marketized HEIs will emanate even less light and greater influence following the Supreme Court's contentious 5-4 decision in *Citizens United v. FEC*.[207]

### *1. Civic Engagement in a Post-Citizens United HEI Market*

Even before *Citizens United*,[208] education Professors Brian Pusser and David Wolcott stated that through the ability to shape regulations and policies, for-profit HEIs "may ultimately prove to be of the greatest significance."[209] Marketized HEIs have often attempted to lobby for initiatives that could hugely benefit them.[210] Prior to 2002's Shays-Meehan Campaign Finance Reform Bill, which banned soft-dollar political contributions, Apollo directed 68% percent of its soft money to Republican candidates, and DeVry directed 100% to Republicans.[211] In 2003, the University of California system, the largest public education system in the country, spent more than $1.2 million on political

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205. Breneman et al., *supra* note 17, at 7.
206. Pusser, *supra* note 125, at 29.
207. 130 S. Ct. 876 (2010).
208. *Id.*
209. Pusser, *supra* note 125, at 29.
210. *Id.*
211. Pusser & Wolcott, *supra* note 139, at 181-182.

lobbying;[212] meanwhile, the Apollo Group, Phoenix's parent corporation, also found itself among the Top 15 political lobbying schools, even outspending flagship state schools, such as Big Ten stalwart Michigan State University (along with its privately financed law school).[213]

While 501(c)(3) charitable organizations cannot directly contribute to candidates with state or federal funds,[214] individuals employed at those organizations can.[215] And in the 2004 election cycle, over 90% percent of funds contributed from employees of the University of California and Harvard University went to Democrats; the only HEI employee group to provide more funds to Republicans than the Apollo Group was the University of Texas, the homestate flagship university of Republican then-President Bush, who faced re-election that year.[216] According to Pusser and Wolcott, "[t]hese data support . . . [that] for-profits have made direct campaign contributions and targeted them at key legislators."[217]

The rise in HEIs' civic and political engagements mirrors academic capitalism's rise over the past fifteen years. For example, in 1980, twenty-one congressional earmarks existed for HEIs amounting to approximately $16 million; by 2003, Congress gave HEIs more than 1,900 earmarks, representing an annual expenditure of approximately $2 billion annually.[218] But marketized HEIs do not stop their civic engagement at the legislative branch. To illustrate, in 2001, Phoenix's parent company, the Apollo Group, "nominated the former chair of the House Committee on Education, to the university's corporate board. In

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212. *Id.*

213. *Id.*

214. *Id.* at 178.

215. *Id.*

216. *Id* at 178-79. Having said that, more than 60% percent of employee contributions from each of the Top 15 higher education campaign contributors went to Democrats.

In the interest of disclosure, my political contributions that year are a matter of public record; at the time of that election cycle, however, I was not an academic and instead was employed as an officer within JPMorgan and served as a member of several publicly held corporations' boards of directors.

217. Pusser & Wolcott, *supra* note 139, at 182 (stating that six members of the House Committee on Education and the Workforce and three members of the Senate Committee for Health, Education, Labor, and Pensions received funding from Apollo's and other for-profits' Political Action Committees ("PACs").

218. *Id*. at 175.

October 2001, Sally Stroup, then chief Washington lobbyist for the Apollo Group, was appointed the Assistant Secretary of Education" in the George W. Bush administration.[219]

What do marketized HEIs want in return for their civic engagement? One example stands out in the context of how law schools finance themselves and generate revenues. In trying to eliminate the 90/10 Rule, marketized HEIs "envision themselves as able to run on students' Pell grants alone, especially if students are able to receive federal aid for low-cost education delivered by adjuncts and taken one course at a time, on-line."[220] Given the civic engagement accomplishments of marketized HEIs in a pre-*Citizens United* environment, the ability of for-profit HEIs to shape the landscape of academic capitalism and marketization is unfathomable in a post-*Citizens United* world in which corporations now enjoy First Amendment rights for purposes of political contributions.[221]

## III. THE PARADE OF REAL AND IMAGINED HORRIBLES

As distinct entities, law schools generally do not: (a) patent ideas or technological inventions that can generate licensing revenues or equity stakes; (b) provide skills for which many current employers are willing to pay tuition;[222] or (c) maintain endowments or sufficient donative sources to cover ongoing operational expenses.[223] Moreover, the law schools unattached to broader universities or enterprises remain dependent on: (x) generating revenue growth via tuition (or class size) increases; (y) cutting costs in the largest cost center (faculty compensation); and (z) the continued existence of Title IV eligibility.[224]

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219. *Id*. at 173 (internal citations omitted). As an aside, Phoenix's founder and Apollo Group's president, John Sperling, invested approximately $9 million of his profits from Phoenix/Apollo in Texas A&M and publicly traded company, Genetic Savings & Clone, to clone his dog, Missy. The Missyplicity project, led by Genetic Savings & Clone and some members of Texas A&M's faculty who were equity holders in the company, produced a cloned cat, but not a dog. Sperling withdrew his funding from Texas A&M. *See* SLAUGHTER & RHOADES, *supra* note 9, at 2-4.

220. SLAUGHTER & RHOADES, *supra* note 9, at 45.

221. *Id.*

222. For example, many employers will pay for an MBA; a tiny number of corporations (and no law firms or governmental entities that I could find) will pay to groom in-house legal talent.

223. *See supra* Part II.B.

224. *Id*.

On the other hand, as currently constituted, CFLSs attached to broader enterprises simply do not fit the academically capitalist business model of other marketized HEIs. If "[l]aw schools tend to be moneymakers . . . even at poorly rated programs,"[225] then even law schools attached to parent or sibling entities face two undeniable problems in a marketized HEI system: (i) a desire on the part of the parent or sibling entities to expand asset stripping from the law school well beyond the forty-five percent figure;[226] and (ii) an almost fiduciary duty on the part of those governing law schools to maximize the law schools' economic value on behalf of the entity's owners. As a result, strong internal and external incentives exist to model a law school's architecture and business models to reflect the tenure, academic freedom, faculty governance, and business models to substantially mirror other marketized HEIs.

A seemingly obvious way for owners to achieve such a goal is to further asset strip the law school to a level of such economic distress that its owner places the law school into Chapter 11 bankruptcy reorganization.[227] Once in Chapter 11, Sections 363 and 365 arguably would permit faculty tenure to be discharged as an executory contract,[228]

225. Annie Lowery, *Law of Averages*: *Why the law-school bubble is bursting,* SLATE.COM (Mar. 18, 2011 4:49 PM), http://www.slate.com/id/2288751/; *see also* Nathan Koppel, *Law School Loses Its Allure as Jobs at Firms Seem Scarce,* WALL ST. J (Mar. 17, 2011), http://online.wsj.com/article/SB10001424052748704396504576204692878631986.html?mod=wsj_share_twitter.

226. *See*, *e.g.*, *supra* note 23.

227. 11 U.S.C. § 101 (2006).

228. *Id.* §§ 363(l), 365(b)(1); Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 DUKE L.J. 517 (1996); George G. Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 U. TORONTO L.J. 679 (1993). A legitimate question exists as to how a law school's owners could benefit from a bankruptcy reorganization, since the pre-bankruptcy reorganization creditors generally become the post-bankruptcy reorganization owners. The answer is through the financial engineering of the past decade that developed new financial instruments (although not necessarily "securities" so as to escape regulation), such as Credit Default Swaps ("CDSs").

A CDS is a contract that allows parties to disentangle their ownership interests from financial interests. This decoupling allows parties to place essentially unregulated and undisclosed bets on an underlying business entity's financial collapse. To illustrate, while SEC filings may list persons as holding a significant ownership percentage of an entity, those owners may simultaneously possess a CDS betting against the entity, coupled with a significant creditor position in the business entity. In such a case, a CDS would bring the CDS holder a more meaningful financial windfall following the

Credit Default Swaps ("CDSs") would permit the pre-bankruptcy owners to maintain post-bankruptcy ownership, and, upon emergence from bankruptcy, the law school could then hire solely adjunct and term instructors that mirror the marketized HEI business model that exists in the competitive landscape.[229] Since law schools' and marketized HEIs' funding models[230] both greatly rely on Title IV funding for financial support, however, eliminating faculty tenure via a bankruptcy process is unlikely in the law school setting.[231] Specifically, Title IV prohibits schools that have undergone bankruptcy from receiving Title IV funding,[232] regardless of the bankruptcy code's typical automatic stay provisions.[233]

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entity's financial collapse, rather than success. The creditor stake would also allow the CDS holder essentially to retain its pre-bankruptcy ownership position post-bankruptcy. Because CDSs and many creditor positions do not require disclosure to the SEC or even to a bankruptcy court, owners with specific agendas may engage this process in a stealth manner. *See*, *e.g.*, Andrew Scott, CFA, *Introduction to Credit Derivatives*, J.P. Morgan Securities, Inc. (Dec. 2005); Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167 (2011); Michael C. Schouten, *The Case for Mandatory Ownership Disclosure*, 15 STAN J.L. BUS. & FIN. 127 (2009).

Professors Hu and Westbrook called such creditors "empty creditors" who "are likely to behave differently from more traditional creditors and raise concerns parallel to those of empty voters and thus can be usefully considered using a parallel analytical framework." Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1329-30, 1366, 1382-89, 1395-98, 1401-03 (2007) (discussing "economic decoupling" between voting and financial interests as well); *see also* Patrick D. Fleming, *Credit Derivatives Can Create a Financial Incentive for Creditors to Destroy a Chapter 11 Debtor: Section 1126(e) and Section 105(a) Provide a Solution*, 17 AM. BANKR. INST. L. REV. 189, 189 (2009); Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 735 (2008).

229. *See supra* Parts II-III.

230. *Id.* Having said that, however, some marketized HEI's have created their own private loan programs. *See*, *e.g.*, EDMC 10-K, *supra* note 3, at 42 ("In August 2008, we introduced the Education Finance Loan Program, which enables students who have exhausted all available government sponsored or other aid and have been denied a private loan to borrow a portion of their tuition and other educational expenses at our schools not covered by other financial aid sources.").

231. *See*, *e.g.*, *supra* note 227.

232. *See* 34 C.F.R. § 668.26 (2010).

233. *See* 11 U.S.C. § 362(b)(16) (2006) (stating generally that while the commencement of a bankruptcy proceeding operates as a stay that prevents numerous actions against the debtor entity, agencies defined in Section 435(j) of the HEA or the Secretary of Education nonetheless may rule a debtor HEI ineligible to receive Title IV funding).

A second option to eliminate faculty tenure is financial exigency outside of the bankruptcy reorganization context.[234] Continuing to asset strip a law school combined with a meaningful short-term reduction in the number of students in the entering classes could create sufficient financial exigency to remove tenured faculty members. Such an argument becomes even more plausible in a continuingly weak domestic economy in which applications to law schools for the most recent cycle declined by 11.5% year-over-year.[235]

Robert Gorman, Emeritus Professor of Law at the University of Pennsylvania and former chair of both the AALS and AAUP ominously asserted that

> [t]he [law school] deans also contend that tenure increases institutional costs and inhibits flexibility in staffing and program design. Operating law schools more cheaply and maximizing unilateral decanal/administrative control are familiar managerial objectives. Once again, the ALDA [American Law Dean

234. *See* AAUP, *Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons*, 62 BULL. AM. ASS'N. U. PROFESSORS 17, 17, 19 (1976) (defining "financial exigency" as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means . . . [beyond t]ermination of an appointment with continuous tenure . . . ."); *see also* Hahn v. Univ. of District of Columbia, 789 A.2d 1252 (D.C. 2002); Bd. of Cmty. Coll. Trustees v. Adams, 117 Md. App. 662 (Md. Ct. Spec. App. 1997); Polishook v. City Univ. of N.Y., 234 A.D.2d 165 (N.Y. App. Div. 1st Dep't 1996); Refai v. Cent. Wash. Univ., 49 Wn. App. 1 (Wash. Ct. App. 1987); Mark L. Adams, *supra* note 46, at 73-75 (referencing 1940 STATEMENT OF PRINCIPLES, *supra* note 60, at 3-4; Walter P. Metzger, *Academic Tenure in America: A Historical Essay, in* COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 93, 152-53 (1973)) (contextualizing financial exigency and tenure via the recent faculty dismissals at Tulane University following Hurricane Katrina and stating that "Tulane . . . will eliminate the majority of doctoral programs and several undergraduate majors, resulting in 233 faculty members being terminated, sixty-five of them tenured. Under AAUP guidelines, the university must provide advance notice of the terminations, discuss the plan with the faculty, and provide adequate severance pay."); Robert W. McGee, *Academic Tenure: Should It Be Protected By Law?*, 20 W. ST. U. L. REV. 593, 601-02 (stating that without government involvement in tenure, "it is likely that a number of approaches would emerge. Some schools would continue to grant the traditional form of tenure; others would abandon it entirely; and some schools would adopt new combinations and permutations of tenure.").

235. Lowery*, supra* note 225.

> Association] Board has the industrial model[236] in mind, and not the academic model, in which academic excellence is the key and faculty participation in governance is a central element . . . . "[L]egal education is not primarily achieved by better managers." *I fear that all too many of the ALDA Board members have as their objective a law school staffed largely by low-paid part-time and untenured faculty, who work on one-year or very short-term contracts* . . . . The ALDA letter . . . contends that the scrapping of tenure will allow for "experimentation" and "innovation"[237]

as they relate to faculty retention, compensation, and governance.

Given law schools' (i) primary method of revenue generation; (ii) positioning within broader organizations as subject to asset stripping; (iii) the recognition that the marketized model of HEIs represents existing economic reality; and (iv) the A.B.A. Committee's anti-tenure stance relative to accreditation in a marketized HEI system, Professor Gorman may not represent the proverbial Chicken Little while the academic world as law schools have known it, arguably may be coming to an end.

Legitimate arguments thus suggest that the economic model for A.B.A.-accredited law schools continues to evolve in material ways for faculty, students, and other stakeholders. In the face of these potentially sweeping changes, however, this Article does not attempt to defend the A.B.A.'s historical cartel powers or to make broadly sweeping pronouncements that tenure, faculty governance, and academic freedom rest at the core of an always-correct model for every law school, law student, and law school stakeholder. I generally tend to believe in market-based solutions to education.[238] For schools beyond those few whose scholarly output is unquestioned (the so-called "Top-14," for instance), operating an outdated model of law school financing in a marketplace where competitor A.B.A.-accredited law schools engage in

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236. This Article presumes that Professor Gorman's "industrial model" mirrors a marketized model, and that an "academic model" reflects the idea that because higher education produces a social good as an externality, HEIs do not fit into a typical economic market or model.

237. *See* Letter from Professor Robert A. Gorman, *supra* note 73 (quoting AALS President Reese Hansen) (emphasis added).

238. *See*, *e.g.*, David Groshoff, *Unchartered Territory: Market Competition's Constitutional Collision with Entrepreneurial Sex-Segregated Charter Schools*, 2010 BYU EDUC. & L.J. 307 (2010) (supporting educational innovation and market development in majority publicly financed K-12 schools and exploring certain constitutional limits that may set the contours of that market's development).

a marketized HEI business model—unconstrained by tenure,[239] academic freedom,[240] and faculty governance[241]—likely will create the financial exigency that could eliminate existing tenure, faculty governance, and academic freedom, even under the strongest of the AAUP's pronouncements.[242] As a result, Part IV proposes an academically capitalist, market-based solution. This proposal asserts that a Faculty Leveraged Buyout in a marketized HEI landscape can maintain faculty governance, tenure, and academic freedom, while also providing economic incentives for junior faculty, alumni, and other law school stakeholders to capitalistically reshape the post-modern law school in a manner that can still preserve some of law school's arguably most important features, including: (1) longstanding faculty members with reputations as outstanding scholars and teachers, unafraid to ask the vexing and politically incorrect questions needed to develop the critical-thinking, analytical, professional, communication, and leadership skills that the next generation of legal services consumers deserve;[243] (2) students who know that their faculty members are experts in their area of law in both theory and practice and are not simply practitioners thrown into a classroom to tell a semester's worth of "war stories;"[244] (3) alumni whose ties to the school go back as far as their experience as a student with that still existing faculty base; while embracing a marketized economic landscape that demands more from law faculty.[245]

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239. *See supra* text accompanying notes 46-47.

240. *See*, *e.g.*, *supra* note 52 and accompanying text.

241. *See*, *e.g.*, *supra* note 64 and accompanying text.

242. *See*, *e.g.*, *supra* notes 27, 58-61 and accompanying text.

243. *See*, *e.g.*, Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 627-28 n.14 (2004).

244. *See*, *e.g.*, Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney,* 82 MINN. L. REV. 705, 781-82 (1998) (stating that "[m]any in the academy scorn 'war stories,' and for good reason. Used improperly, they can waste time and take the place of hard thinking by both professor and student. By the same token, war stories, when used carefully, can be marvelous teaching tools.").

245. *See*, *e.g.*, Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 248 (asserting that "[h]aving neither a solid grounding in educational theory nor in law practice, the professorate has little experience in either. The average law school professor was trained as neither an educator nor as an experienced practitioner. They were hired to teach primarily because they were outstanding law students. Despite all of their other

## IV. EMBRACING ACADEMIC CAPITALISM THROUGH A FACULTY LEVERAGED BUYOUT

> I think of all the education that I missed.
> But then my homework was never quite like this . . .
> I heard about your lessons, but lessons are so cold.
> I didn't know about this school.[246]

In 2004, University of Arizona education Professors Sheila Slaughter and (former AAUP General Secretary) Gary Rhoades stated,

> Those colleges and universities unable or unwilling to integrate with the new economy have difficulty accessing new programs and opportunities. Similarly, programs, departments, or colleges that resist, ignore, or are unable to intersect the new economy within institutions that are generally pursuing an academic capitalist knowledge/learning regime rarely share in its rewards and incentives.[247]

In 2008, Ohio State English Professor Frank Donoghue asserted that

> Any meaningful debate about tenure has to start with the fact that it is slowly but surely disappearing, and the current workforce in higher education is unwittingly hastening its extinction . . . . The extreme polemics of this debate . . . are . . . irrelevant to the

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attributes, in general they know little of practice, receive insufficient feedback as to whether their training is effective, and do not have sufficient personal knowledge in either education or law practice to draw upon in their teaching. It is hard to imagine a less rational system to train new attorneys."); *see also* David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 1001-1003 (1991) (claiming that "[t]rue excellence in teaching and scholarship is rarely achieved, but it is the integrated goal to which every committed law professor should aspire . . . . In the law school, a professional school, scholarship takes much of its meaning from, and should in turn energize, the applied context of classroom teaching dynamics . . . . Scholarship without teaching tends to be abstract and highly egocentric; teaching without scholarship tends to be pedantic and superficial. One cannot be fully real without the other. The professional law school must be grounded in both theory and praxis, in both scholarship and teaching.").

246. VAN HALEN, HOT FOR TEACHER (Warner Bros. 1984).

247. SLAUGHTER & RHOADES, *supra* note 9, at 22.

> demographic realities and the firsthand accounts of the changing nature of work in higher education.[248]

And in late July 2011, Harvard Business School Professors Clayton M. Christensen and Henry J. Eyring claimed that

> Private universities without national recognition and large endowments are at great financial risk. So are public universities, even prestigious ones such as the University of California at Berkeley. . . . With the advent of high-quality online learning, there are new less expensive institutional alternatives to traditional universities, their standing enhanced by changes in accreditation standards that play to their strengths in demonstrating student learning outcomes . . . . For the vast majority of universities change is inevitable . . . . Ideally, the faculty members, administrators, and alumni who best appreciate the totality of the university's contributions to society will, in the spirit of self-regulation, play a leading role in revitalizing their beloved institutions. They have the capacity to determine their own fate . . . .[249]

As a result, schools and faculty members face tremendously increasing market forces regarding tenure, faculty governance, and academic freedom in a rapidly changing landscape. In the face of these changes, this Part seeks to educate and integrate law school faculty members with the marketized HEI economy directly. Specifically, this Part demonstrates how faculty at CFLSs can opportunistically embrace and exploit academic capitalism to maintain three of the most important, oft-criticized, and currently threatened hallmarks of legal academia:[250]

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248. FRANK DONOGHUE, THE LAST PROFESSORS: THE CORPORATE UNIVERSITY AND THE FATE OF THE HUMANITIES, 55 (Fordham Univ. Press, 3d ed. 2008). *See* Ellen Gibson, *Highest-Paid University Presidents*, BLOOMBERG BUS. WK. (last visited July 28, 2011), http://images.businessweek.com/ss/09/02/0216_college_pres/2.htm; *see also* Scott Jaschik, *Gordon Gee's Call for "Reinvention" of Higher Ed.,* INSIDE g the 2007-08 highest paid public university president, Ohio State's E. Gordon Gee, as stating that HEI's face a choice: "reinvention or extinction"); *cf. supra* text accompanying notes 177-178 (describing CEO-like compensation HIGHER ED. (Feb. 9, 2009), http://www.insidehighered.com/news/2009/02/09/gee (quotinor marketized HEI presidents).

249. Clayton M. Christenson & Henry J. Eyring, *How Disruptive Innovation is Remaking the University*, HARVARD BUS. SCH. (July 25, 2011), http://hbswk.hbs.edu/item/6746.html?wknews=07272011 (excerpted from CLAYTON M. CHRISTENSEN & HENRY J. EYRING, THE INNOVATIVE UNIVERSITY (John Wiley & Sons, Inc. 2011)).

250. *See supra* Part III.

(1) tenure, (2) academic freedom, and (3) faculty governance.[251] This Part relies on millennia-old strategies still employed by modern business leaders to educate non-business law faculty and stakeholders on the relevant components of modern finance and competitiveness strategy to deploy a tactical strategy that would wrest control away from owners who see tenure and faculty governance as obstacles to an effective business model, in an environment in which law schools' governing cartel has staked an anti-tenure position. Noted Harvard Business School Professor and competitiveness expert Michael Porter

> [Q]uoted from Sun Tzu['s *The Art of War*] when he lectured the National Football League owners on [competitiveness] . . . . Venture capitalist Asher Edelman made *The Art of War* required reading for admission to his course on entrepreneuring at Columbia University.[252] Quantity orders for *The Art of War* have been placed by business organizations . . . . the very simplicity of *The Art of War* makes Sun Tzu's lessons readily transferable to business strategy. *The ancient principles of Sun Tzu establish a firm foundation for understanding the strategic rules of business in the new millennium*.[253]

Articulating each of Sun Tzu's business lessons is beyond this Article's scope, but the general ideas behind them, such as laying plans, understanding the challenge, marshalling resources, strategically varying one's tactics, and intelligently understanding an opponent's strengths, weaknesses, opportunities, and threats, all underpin this Part's business-centered strategic proposal.

### A. EDUCATING PARTICIPANTS ABOUT THE KEY TERMS

Following a July 2011 *New York Times* article excoriating him, New York Law School's Dean Richard A. Matasar responded, "The *Times* article suggests that it is impossible to reform legal education from within. That is simply untrue . . . I have always said that our first responsibility is to control those things we can control—the quality of

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251. *See*, *e.g.*, *supra* note 64.

252. The text also constituted required reading as part of the MBA program from which I graduated.

253. GERALD A. MICHAELSON AND STEVEN MICHAELSON, SUN TZU: THE ART OF WAR FOR MANAGERS: 50 STRATEGIC RULES UPDATED FOR TODAY'S BUSINESS xviii-xix (Adams Media 2nd ed. 2010) (emphasis added).

what we give our students."[254] This Part argues that the legal academy indeed can reform legal education from within by availing itself of the resources it can garner and control.

The first resource that the legal academy must garner is an understanding of the economics of marketized higher education. Most law professors teach in non-business areas and, perhaps, are unfamiliar with the rapid changes in the business model and competitive landscape of law schools.[255] In fact, "despite the implications of applying market logic to colleges and universities, many, even most [academics], are not particularly successful capitalists."[256] This failure has occurred despite other scholars having identified law (along with medicine and business) as a "*prime example*" of a professional program with a "strong market position[]"[257] Meanwhile, the individuals leading marketized universities are those who understand the realities of academic capitalism.[258] This Part helps explain these specialized transactions so that faculties may add such knowledge to the resources they control.

Second, the legal academy must recognize that to maintain faculty governance and tenure within marketized legal education, faculties must streamline their decision-making process. For example, the organizational characteristics of many HEIs permit for poor, "garbage can" decision-making.[259] Such architecture prevents rapid decision-making and pivoting necessary to compete in the current marketplace.

Third, despite researching and citing a large body of scholarly work on the economics of law school and the financing of HEIs to write this Article, *none* of the texts encountered mentioned the acronymical term "EBITDA."[260] To varying degrees, these texts, often written by economists and educational or legal theorists, mentioned the typical

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254. Richard A. Matasar, *Law School Cost, Educational Outcomes, and a Reformer's Agenda*, NEW YORK LAW SCHOOL (last visited July 28, 2011), http://www.nyls.edu/news_and_events/matasars_response_to_nytimes/.

255. *See* THE ASSOCIATION OF AMERICAN LAW SCHOOLS 2010-2011, DIRECTORY OF LAW TEACHERS (West/Association of American Law Schools 2010-2011).

256. SLAUGHTER & RHOADES, *supra* note 9, at 308.

257. ZEMSKY ET AL., *supra* note 23, at 55.

258. *See supra* notes 92, 95-98, 100-104, 106-107, 111-112 and accompanying text.

259. *See* Stanley O. Ikenberry, *Privatizing the Public Research University*, *in* PRIVATIZING THE PUBLIC UNIVERSITY: PERSPECTIVES FROM ACROSS THE ACADEMY 95-96 (Christopher C. Morphew & Peter D. Eckel eds., Johns Hopkins Univ. Press. 2009) (internal citations omitted).

260. *See infra* text accompanying notes 267, 269-274 for a detailed definition and contextualization of EBITDA.

litany of elementary financial terms, including "revenues," "expenses," "costs," "margins," and—an amorphous term that lacks meaningful non-accounting financial definition, "profits."

The key to understanding the financing of marketized HEIs and this Article's proposed solution lies with understanding both EBITDA and market multiples. Despite EBITDA's heavy use by courts and professional investment analysts, EBITDA's importance apparently was lost upon the many scholars cited in, and researched for, this Article regarding modern educational finance.[261] But

> in practice investment bankers estimate the value of a seller by comparing it with other recently sold [entities] that are similar in asset size. The sales price of the similar [entity] is divided by its earnings before interest, taxes, depreciation, and amortization (EBITDA) to obtain the market value as a multiple of EBITDA. This ratio is then multiplied by the EBITDA of the seller."[262]

Moreover, "courts have taken to measuring a company's earnings by its earnings before interest, taxes, depreciation, and amortization (EBITDA)."[263] Further underscoring EBITDA's ostensibly obvious importance to marketized HEI financing is the placement of EBITDA's role in HEI within the first several pages of the most recently available annual report filed with the SEC of Western State's parent entity.[264] In pertinent part, the EDMC 10-K states, "EBITDA . . . [is] used by

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261. *See*, *e.g.*, THEODORE M. BARNHILL, JR. ET AL., HIGH-YIELD BONDS: MARKET STRUCTURE, PORTFOLIO MANAGEMENT, AND CREDIT RISK MODELING 10 (McGraw Hill 1999); MOYER, DISTRESSED DEBT ANALYSIS: STRATEGIES FOR SPECULATIVE INVESTORS 96, *supra* note 3, at 96 (J. Ross Pub., 2005) ("[M]ost people involved in finance on a daily basis simply accept EBITDA as a reasonable measure of cash flow."); *see also infra* text accompanying note 263 (describing courts' reliance on EBITDA).

262. Paul Gertler & Jennifer Kuan, *Does It Matter Who Your Buyer Is? The Role of Nonprofit Mission in the Market for Corporate Control of Hospitals*, 52 J.L. & ECON. 295, 298 n.5 (2009).

263. Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 CARDOZO L. REV. 99, 100 (2009). In his piece, Miller describes various EBITDA multiple valuation methodologies. *Id.* at 103, 191-92. *But see* John Mills et al., *Defining Free Cash Flow*, CPA J. (Jan. 2002), http://www.nysscpa.org/cpajournal/2002/0102/features/f013602.htm (describing some deficiencies with EBITDA, defining "free cash flow" ("FCF"), which accounts for changes in working capital and capital expenditures, and articulating some problems inherent in FCF. Regardless, EBITDA is the typical industry standard, and this Article, therefore, stresses EBITDA's current relevance, not its perfection).

264. EDMC 10-K, *supra* note 3.

management to measure operating performance [and m]anagement believes that EBITDA is helpful . . . because EBITDA excludes the results of decisions that are outside the control of operating management."[265] One might think, with all of the scholarly discussion regarding HEI markets, that someone would have been concerned with intrinsic, rather than theoretical, economic *value*, regardless of the HEI market's inefficiencies or illiquidity. But the absence of a discussion of EBITDA relative to economic discussions of education financing, underscores either the paucity or quality of research regarding education.[266]

Since the reader now recognizes the importance of EBITDA and market multiples, s/he must also recognize that no sexy or exciting way exists to describe the entity valuation process that will leave one in an awakened state, particularly in a law, rather than a finance, journal. At its essence, however, EBITDA simply represents an acronym for "Earnings Before Interest, Taxes, Depreciation, and Amortization."[267] EBITDA thus serves as a proxy for cash flows uncommitted elsewhere within an enterprise, exemplifying its importance to debt and equity stakeholders in the (HEI) marketplace. Neither revenues nor net incomes nor costs nor assets determine an entity's value. Instead, "intrinsic value is based on an enterprise's "ability to generate cash flow in the future,"

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265. *Id.* at 56-58.

266. *Compare* Jason L. Riley, *Was the $5 Billion Worth It?*, WALL ST. J., July 23, 2011, http://online.wsj.com/article/SB10001424053111903554904576461571362 279948.html (stating that "[c]ompared with R&D spending in the pharmaceutical or information-technology sectors, [Bill Gates] says, next to nothing is spent on education research. 'That's partly because of the problem of who would do it. Who thinks of it as their business?'"), *with* Andrew J. Coulson, *People Think of Something as Their Business When It Is Their Business*, CATO INST., July 25, 2011, http://www.cato-at-liberty.org/people-think-of-something-as-their-business-when-it-is-their-business/ (asserting "a vast army of academics has been cranking out research in this field for generations . . . . [T]he problem is not a lack of research, but rather that most of the research is useless and that the rare exceptions have been ignored . . . . [b]ecause, as Bill Gates correctly observes, hardly anyone thinks of education as their business. And how do you get masses of brilliant entrepreneurs to think of education as their business? You make it easy for them *to make it their business*. When and where education is allowed to participate in the free enterprise system, entrepreneurs enter that field just as they do any other–and excellence is identified and scales up. It is a process that happens automatically due to the freedoms and incentives inherent in that system.")

267. EBITDA "is defined as net income (loss) plus interest (income) expense, net, loss on early retirement of debt, provision for (benefit from) income taxes and depreciation and amortization." EDMC 10-K, *supra* note 3, at 57.

then discounted by the entity's expected future cash flows (generally represented by EBITDA) by an appropriate discount rate.[268]

Just as many of their students have debt on their personal balance sheets, numerous law schools leverage their institutional balance sheets by issuing significant amounts of debt.[269] As a result, understanding and identifying the cash flows that a school's operations generate and that remain uncommitted elsewhere, represent key drivers of the school's current value, as well as the financial future of an HEI in a marketized HEI economy. Other benefits of EBITDA include its elimination of accounting gimmickry required under Generally Accepted Accounting Principles ("GAAP")—such as depreciation and amortization—that have no bearing on cash currently moving through an entity, as well as EBITDA's ability to eliminate disparate tax treatments among entities that arise due to entity type or jurisdictional locations. Therefore, generally speaking, EBITDA combined with market multiples of other HEIs represents a convenient way to compare cash flows among entities, regardless of the enterprises' varying tax treatments,[270] capital structures, or previous capital expenditures.[271] Lastly, EBITDA multiples represent a material variable in entity restructurings and reorganizations, including leveraged buyouts ("LBOs"), which lie at the heart of this Article's proposed solution.[272]

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268. KOLLER ET AL., *supra* note 2, at 52.

269. New York Law School, for example, floated $135 million in debt securities in 2006 and, according to its dean, is currently "one of only a handful of schools of our size and structure with an A rating." Matasar, *supra* note 254; Segal, *supra* note 23. Moreover, analysts at high yield or "junk" bond desks follow bonds of Western State's parent company, which means that their bonds maintain a below investment grade rating. E-mail from Wall Street firm (on file with author); EDWARD I. ALTMAN & SCOTT A. NAMMACHER, INVESTING IN JUNK BONDS: INSIDE THE HIGH YIELD DEBT MARKET 4 (John Wiley & Sons 1987) (= "[T]he term junk originated in the mid-1970s to describe those corporate securities that lost their investment grade status due to a fundamental deterioration in the quality of their operating and financial performance.").

270. Eliminating the variability of tax treatments is particularly important when comparing HEIs, as non-profit, public institutions generally have no tax liability and also have no need for the corporate tax shield that accompanies the debt issuances of for-profit HEIs.

271. *See*, *e.g.*, ASWATH DAMODARAN, INVESTMENT VALUATION: TOOLS AND TECHNIQUES FOR DETERMINING THE VALUE OF *ANY* ASSET 691 (John Wiley & Sons, 2d ed. 2002) and accompanying Figure 25.1 (describing an asset purchase as an "acquisition").

272. *See*, *e.g.*, STUART C. GILSON, *Technical Note: Valuing Companies in Corporate Restructurings*, *in* GILSON, *supra* note 169, at 498; Richard Ruback, *RJR*, NABISCO

B. THE TACTICAL MECHANICS OF AN LBO AND A PROPOSED FLBO

In a vanilla LBO, new ownership acquires a company, entity, subsidiary, or operating division "in a transaction funded by debt [leverage] supported by the earnings of the firm itself."[273] In other words, the new owners do not need to fund the equity capital personally to purchase the target entity. In the context of a proposed Faculty Leveraged Buyout ("FLBO"), this consideration is crucial. Law faculty—while comfortably compensated but not rich as a group—likely could not independently deploy millions of dollars to own a law school. While the post-LBO entity sometimes must sell assets to cover interest payments associated with the increased debt-load, an attractive feature of a FLBO versus a LBO is that the FLBO halts asset stripping from the law school to other parts of a larger entity. Keeping these assets and revenues entirely within the FLBO's law school strengthens, rather than weakens, the law school's ability to service the debt-load associated with the FLBO.

The FLBO process would begin with a law school's faculty agreeing to retain an investment bank.[274] Some investment banks already maintain meaningful equity positions in an existing HEI with a wholly

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HARV. BUS. SCH. CASE NO. 9-289-056, at 1-12 (Aug. 29, 2006); *see also* DAMODARAN, *supra* note 271, at 691 (discussing the famous RJR Nabisco LBO).

273. ALTMAN & NAMMACHER, *supra* note 269, at 171; *see also* KOLLER ET AL., *supra* note 2, at 15-16.

274. *See also* DAMODARAN, *supra* note 271, at 693-724 (discussing the many steps in an acquisition, including, inter alia, acquiring undervalued firms [this seems to be the case in fragmented industries, such as the HEI industry]; skill in execution; potential tax benefits [whether via Net Operating Loss Carryback/Carryforwards will exist, writing up asset values post-takeover, the interest tax shield that will likely ensure following an issuance of LBO debt, etc.]; changes in management practices [faculty governance]; target entity [law school] valuation generally based on determining five years' worth of projected cash flows, adding a terminal year firm value, and discounting all future cash flows to the present by some cost of capital, often, although not always correctly, a weighted cost of capital ("WACC") [When it comes to such valuations, as Sir Mix-A-Lot may have said, "Baby Got WACC"], selecting the appropriate comparable firms and multiples, and structuring the acquisition, and setting the appropriate exchange ratio and accounting considerations [e.g., purchase versus pooling]); *see also* EDMC 10-K, *supra* note 3, at 7 (stating that "the post-secondary education industry is highly fragmented . . . .").

owned law school subsidiary,[275] which a law faculty may not appreciate, given a potential conflict of interest. In short, the investment bank's role would be to (a) determine an appropriate amount of debt that the faculty could raise;[276] (b) ascertain the appropriate interest rate that the marketplace would demand for that debt;[277] (c) find investors willing to invest in that debt; and (d) complete the transaction in which the funds flow from the investors to the now-faculty-controlled law school entity purchased at an agreed upon price from existing owners, with the law school making scheduled interest payments to the investors (or assigns) secured by the investment bank.[278]

The most immediate benefit of an FLBO would be a return to complete faculty governance. The second benefit would be the faculty's ability to ensure that it controls the tenure process, not a larger, marketized HEI in which tenure is anathema to the marketized HEI's business model. But beyond the assurance of faculty governance and tenure, an FLBO potentially provides law schools with additional flexibility to incentivize a variety of stakeholders, including tenured faculty, junior faculty, students, and alumni. For example, just as partners at law firms receive partner draws upon a successful year, the tenured faculty—assuming the FLBO debt is reduced to reasonable levels as articulated in the FLBO indenture—could declare meaningful dividends. Tenure-track faculty would have not only the incentive of earning tenure, but also the additional financial rewards that could come from having an ownership stake in the school. Assuming that the faculty held Series B shares (with transfer restrictions articulated in the charter to ensure that non-faculty could not become owners, at least without a first refusal right), then alumni of the school who passed the bar or who achieved career or community success could receive Series A shares.[279]

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275. *See* EDMC 10-K, *supra* note 3, at 49. Having said that, Providence Equity Partners, Goldman Sachs, and Leeds Equity Partners may "acquire and hold interests in businesses that compete directly or indirectly" with that company. *Id.*

276. Phoenix founder John Sperling indicated that once an educational institution is built, "'then you go out to the capital markets and they shower money on you like it's going out of style.'" BERG, *supra* note 91, at 122-23.

277. For example, EDMC's current debt outstanding reflects rates between 8.75% and 10.25%. EDMC 10-K, *supra* note 3, at 99.

278. In most buyout situations, the target entity—here the law school—continues to exist but does so privately, often via a tender offer. *See*, *e.g.*, DAMODARAN, *supra* note 271, at 691 and accompanying Fig. 25.1.

279. Shared ownership of an HEI's assets has existed for generations. *See*, *e.g.*, Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 CATH. U. L. REV. 347, 387-400 (2004) (indicating that fraternities

All of these steps arguably strengthen the alignment of interests between a law school and its constituent stakeholders.

### C. SO, WHAT'S A FACULTY TO PAY TO FLBO ITS LAW SCHOOL?

As recently as July 2011, a former A.B.A.-accredited law school dean—when describing an A.B.A.-accredited law school's revenues and expenses—described the A.B.A. and the law school process as a case of "regulatory capture."[280] Other critics have described the A.B.A. as a cartel.[281] And given that background, it should come as no surprise that the A.B.A. rejected my attempt to obtain law schools' financial information.[282] Nonetheless, some digging through various databases turned up several law schools' recent audited financial statements, including several schools who were involved in public M&A discussions.[283]

Auditors of public company financial statements typically conduct their audits in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB").[284] Conversely, auditors of

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owned campus housing and land at schools such as Williams College (from 1833-1962); Bowdoin College (from 1841-1997); Bucknell University (from 1887-Present); Amherst College (1836-1984); and Denison University (1800s-1995)).

280. David Van Zandt, *The Case Against Law School: Should the Standard Three Years of Law School, Followed by the Bar Exam, Be the Only Path to a Legal Career?* N.Y. TIMES (July 25, 2011 11:40AM), http://www.nytimes.com/Roomfordebate /2011/07/21/the-case-against-law-school/reduce-credit-requirements-for-law-school. Van Zandt is President of the New School and former Dean of Northwestern University Law School. *Id*.

281. *See*, *e.g.*, *supra* notes 70-72 and accompanying text.

282. E-mail from Kenneth R. Williams, *supra* note 204.

283. Audited financial statements on file with author.

284. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 404, 116 Stat. 745, 789 (codified at 15 U.S.C. § 7262 (2006), which Congress enacted after the Enron and WorldCom accounting scandals, created the PCAOB. The PCAOB's first chairperson, William Webster, had to resign his position as PCAOB's head quickly after appointment, due to his service as *chair* of the *audit committee* of the board of directors of U.S. Technologies, which (i) had been under investigation for … wait … yes … accounting irregularities *and* (ii) had, with Webster's blessing, recently fired U.S. Technologies' initial auditors who had brought material deficiencies to the audit committee's attention! *See*, *e.g.*, ZABIHOLLAH REZAEE & RICHARD RILEY, FINANCIAL STATEMENT FRAUD: PREVENTION AND DETECTION 159 (John Wiley & Sons, Inc. 2d ed. 2009) (stating also that "because SOX and the PCAOB were created to improve the accuracy and reliability of corporate disclosures, William Webster and then-SEC

non-profit entities often employ Government Accounting Standards issued by the United States Comptroller General.[285] While auditors of public companies essentially present uniform financial statement formats, the auditors' presentation of the information contained in non-profit audits can vary significantly.[286] As a result, a complete understanding of these financials is impossible without speaking to a member of the auditing team, which I did not do as part of my research for this Article. Nonetheless, the two private, "non-profit" law schools and one public state-run law school that I reviewed seemed typical of reviewing small, private entities in a still segmented industry.[287] Net losses existed at two of the schools, with back-of-the-envelope EBITDAs varying from between approximately $1.25 million and $9 million.[288]

A number of for-profit education providers exist that trade publicly on national exchanges, including my law school's parent company. Sampling six of them yielded an average trailing twelve month ("TTM") EBITDA figure of $677.65 million, although the Education Industry's Average TTM EBITDA, per finance.yahoo.com, stood significantly below that figure at $19.52 million. Regardless, the average EBITDA-to-Enterprise Value multiple for the six entities that I sampled ranged between 2.26x and 7.20x, with an average of 4.57x, a median of 4.04x, and a standard deviation of 1.95. As a result, the public company comparables suggest that a law faculty could reasonably expect to pay between 4.0-5.0x the TTM EBITDA.

But before student, faculty, and other stakeholder readers go rushing out the door (anything to stop talking about EBITDA and quantitative analysis in a law review article!) to FLBO their law schools, and before any discussion of investment banking fees occurs,[289] a

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chairman Harvey Pitt came under considerable fire. Pitt resigned from the SEC and Webster stepped down about a week later.").

285. *See* REZAEE & RILEY, *supra* note 284.

286. *Id.*

287. In a highly segmentized market, however, the predictability of returns and valuation becomes more difficult. *See*, *e.g.*, Lior Menzly & Oguzhan Ozbas, *Market Segmentation and Cross-Predictability of Returns*, J. FIN. (forthcoming), *available at* http://www.afajof.org/journal/forth_abstract.asp?ref=596.

288. *See supra* note 283.

289. This Article includes no such discussion, as readers likely know that I-Bankers are paid quite well. *See*, *e.g.*, Paul Oyer, *The Making of an Investment Banker: Stock Market Shocks, Career Choice, and Lifetime Income*, 63 J. FIN. 2601, 2624 (2008) (stating, *inter alia*, that member professions that typically employ individuals with business-focused graduate degrees "earn an average of $286K 15 years after

number of meaningful arguments exist that a 4.0-5.0x EBITDA/Enterprise Value multiple overvalues the intrinsic value of the school and requires meaningful discounting.

Beyond the typical liquidity, marketability, and ownership concentration discounts that basic corporate finance and valuation books discuss[290] that would adjust the intrinsic value of the law school downward, this Article—*supra* Part II[291]—highlighted the similarities inherent in the developing marketization of CFLSs and higher education today, as well as the U.S. hybridly financed health care industry in the 1980s.[292] For example, UC Berkeley Business School Professor Paul Gertler and Stanford Institute for Economic Policy Research Visiting Scholar Jennifer Kuan predicted that "a nonprofit seller will charge a lower price to a buyer with better aligned incentives. The predicted price differential suggests a dual-price equilibrium based not on market failure or temporary information asymmetry but rather on different organizational forms."[293] In other words, the active takeover market for hospitals during their marketization demonstrated that the organizational architectures of the buyer and the seller helped drive the transaction's ultimate purchase price. According to Gertler and Kuan,

> [N]onprofits behave differently in the competitive market for corporate control. When dealing with for-profits, nonprofits behave like for-profits, buying and selling at the same prices. But when dealing with nonprofits, they behave markedly differently, selling at a substantial discount to like-minded nonprofits. Religious hospitals discount only to other religious hospitals, while less restrictive nonreligious nonprofits discount to all nonprofits. Given the religious alignment of these results, we interpret the nonprofit mission as playing a deciding role in price discrimination. That said, the mission need not be religious; in the anecdote cited, a nonreligious nonprofit sold to another nonreligious nonprofit at a

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graduation, while someone who starts as an investment banker can expect to earn $1.2 million at that point," representing "almost double the $645K earned by management consultants" at the same time after graduation).

290. *See*, *e.g.,* JOHN J. STOCKDALE, BVR'S GUIDE TO DISCOUNTS FOR LACK OF MARKETABILITY (2011 ed., Bus. Valuation Res. 2011).

291. *See supra* note 119.

292. Gertler & Kuan, *supra* note 262 *passim*.

293. Gertler & Kuan, *supra* note 262, at 296.

> discount, while the losing for-profit bidder, Columbia/ HCA, was later convicted of Medicare fraud.[294]

Therefore, not only should those individuals prepared to engage in a marketized HEI FLBO of a CLFS understand traditional valuation methodologies, those potential acquirers should also be aware that the organizational architecture of their acquisition target may result in meaningful discounts from what otherwise might appear to be the law school's intrinsic value. Moreover, despite marketized HEIs' insistence that faculty cannot and should not govern, because managers manage best, faculty members should be aware that recent studies suggest that in the context of corporate takeovers, *groups*, not individuals, submitted financially sounder acquisition bids, in large part due to the collaborative learning that occurs through the process inherent in shared governance.[295] As a result, those groups materially decreased their risk of falling prey to the economic winner's curse phenomenon.[296]

## CONCLUSION

This Article underscored the unique opportunity that HEIs in the U.S. possess to provide opportunities for a broad base of professionally minded students. Attempting to bring more cultural relevancy into the legal profession, I accepted my current position at a marketized school of opportunity that educates one of the most diverse student bodies of any A.B.A.-accredited law schools in the country. Given recent M&A activity among law schools, including privatization and spinoffs, combined with decanal attempts to remove faculty tenure, this Article cautions students, faculty members, and stakeholders at traditional law schools not to stand idly by and allow legal education to reshape itself under a marketized HEI business model that explicitly rejects academic

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294. *Id.* at 304-05 (finding also that while non-profits and for-profits appeared to pay the same acquisition consideration for for-profit targets, non-profits received statistically significant—when the coefficients on for-profit buyers were restricted to zero—forty-three percent discounts when purchasing a non-profit and twenty-nine percent discounts when purchasing government-owned hospitals). *Id.* at 300-01.

295. Marco Casariet al., *When Do Groups Perform Better than Individuals? A Company Takeover Experiment* (June 22, 2011) (Quaderni DSE Working Paper No. 763, 2011) *available at* http://ssrn.com/abstract=1873267.

296. *See, e.g.*, RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50-52 (FREE PRESS 1992) (explaining a "winner's curse" as the difference between true value and the value overpaid to secure the asset during an auction or bidding process).

freedom, tenure, and faculty governance. No doubt, many problems beyond the scope of this Article must occur to reshape legal education in a learner-driven and mission centered manner; but professing law—controversial at its core—requires the security of academic freedom, tenure, and faculty governance.

To preserve these most important hallmarks of a meaningful legal education, as law professors, students, and stakeholders continue to witness mergers, spinoffs, splitoffs, tenure removal, and institutional privatization, this Article argues that faculty at law schools that either are currently—or are faced with becoming—CFLSs should strongly consider embracing academic capitalism and marketization for the purpose of undergoing a FLBO. Doing so demonstrates a commitment to join the competitive economic landscape while ensuring that the most important hallmarks of legal academia continue to exist for the next generation of consumers and lawyers-in-training.