

IS HIGHER EDUCATION LEARNING ANYTHING? THE DANGERS TO U.S. INSTITUTIONS OF HIGHER EDUCATION FROM THE DISRUPTIVE CHALLENGES OF THE TWENTY-FIRST CENTURY

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ABSTRACT

This Article attempts to outline the disruptive forces battering institutions of higher education in the United States with special emphasis upon those that will most likely result in institutional insolvency and/or industry restructuring. It does not provide legal analysis on past or present bankruptcies of institutions of higher education.¹

INTRODUCTION

This is a topic important to our nation because it addresses challenges to one of the most important contributors to the advancement of the United States for the past 478 years, since the founding of Harvard University in 1636.

There are many negative forces discussed in this material, and yet there are many positive developments in higher education. However, since this material is presented to bankruptcy experts, it is important to consider what might be coming their way and how the industry may need their expertise—thus, it will focus more on the negative challenges.

Actually, the author's hope in sharing this information is that it will not merely result in added business, but that the bankruptcy bar and restructuring industry will be encouraged to put on their creative restructuring hats and seek out and help higher education institutions to realistically face the environment and to restructure themselves to survive and thrive in the twenty-first century.

So, to lay the groundwork for the state of a significant part of the higher education industry, a sampling of headlines from the past few years is instructive:

- *Bryan College, Facing Enrollment Drop, Cuts Positions* "Bryan College, facing enrollment declines, is eliminating 20 of the 173 full-

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¹ First some disclaimers: (a) The author graduated from Stanford Law School without taking a single course in bankruptcy, but he has spent much of his career helping put two private institutions of higher education on a sustainable course, and is currently using his experience to help LivingStone International University in Uganda, and through his role as Chancellor, to help the newly consolidated University of Rwanda. (b) There is no original research in this material; it is all based on existing industry literature and personal conversations and observations. (c) The Article includes many quotes from experts who were courageous enough to question and challenge the status quo in one of the "sacred cow" industries in our country. (d) This Article references several charts and statistics—thus making it easy to both wow and deceive. The reader is so warned.

time employee positions The college is also halting retirement contributions for a year, and imposing salary cuts on top administrators."²

- *Moody's Downgrades Laureate's Credit Outlook*

Moody's I [sic] Investor Service . . . has downgraded the credit outlook for Laureate Education to negative from stable, citing the global for-profit chain's increasingly leveraged position. Laureate, which is based in Baltimore and enrolls 800,000 students at 200 campuses around the world, has used debt (now \$6 billion) to finance many of its acquisitions.³

- *Business School, Disrupted*⁴

- *The College-Cost Calamity: Many American Universities are in Financial Trouble*⁵

- *The Ivory Tower: Crumbling From Within?*⁶

- *Student Loan Defaults Reach Highest Level In More Than A Decade*⁷

- *Will Higher Education Be the Next Bubble to Burst?*⁸

² Scott Jaschik, *Bryan College, Facing Enrollment Drop, Cuts Positions*, INSIDE HIGHER ED (June 2, 2014, 3:00 AM), <https://www.insidehighered.com/quicktakes/2014/06/02/bryan-college-facing-enrollment-drop-cuts-positions>.

³ Paul Fain, *Moody's Downgrades Laureate's Credit Outlook*, INSIDE HIGHER ED (June 2, 2014, 3:00 AM), <https://www.insidehighered.com/quicktakes/2014/06/02/moodys-downgrades-laureates-credit-outlook>; see also Marc Beja, *Moody's Warns of 'Sharp Deterioration' in College Finances*, CHRON. HIGHER EDUC. (June 8, 2009), <http://chronicle.com/article/Moodys-Warns-of-Sharp/47301>.

⁴ Jerry Useem, *Business School, Disrupted*, N.Y. TIMES (May 31, 2014), http://www.nytimes.com/2014/06/01/business/business-school-disrupted.html?_r=0 (analyzing opposing viewpoints related to Harvard Business School's proposed online pre-MBA program); see also Goldie Blumenstyk, *More Than 100 Colleges Fail Education Department's Test of Financial Strength*, CHRON. HIGHER EDUC. (June 4, 2009), <http://chronicle.com/article/More-Than-100-Colleges-Fail/47492>; Doug Lederman, *College Credentials by Condé Nast*, INSIDE HIGHER ED (June 3, 2014), <https://www.insidehighered.com/news/2014/06/03/conde-nast-team-venture-fund-create-college-courses-credentials> (discussing potential partnership between Condé Nast publications and universities "to create a set of accredited certificate programs and eventually master's-degree programs"); *13 Reasons Colleges Are in This Mess*, CHRON. HIGHER EDUC. (Mar. 13, 2009), <http://chronicle.com/article/13-Reasons-Colleges-Are-in/33943>.

⁵ *The College-Cost Calamity*, ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559936> (examining long-term debt burdens on American institutions of higher education); see also Alice Brown, *Time to Close the College?*, INSIDE HIGHER ED (June 26, 2009, 3:00 AM), <https://www.insidehighered.com/views/2009/06/26/brown> (recommending steps colleges can take when faced with the prospect of closing); *Colleges in Crisis as Enrollment Dips*, HERE & NOW (Jan. 15, 2013), <http://hereandnow.wbur.org/2013/01/15/college-enrollment-crisis> (discussing decreases in college enrollment while tuition costs increase); Gabriela Montell, *In Hard Times, Colleges Search for Ways to Trim the Faculty*, CHRON. HIGHER EDUC. (July 1, 2009), <http://chronicle.com/blogs/onhiring/in-hard-times-colleges-search-for-ways-to-trim-the-faculty/7389>.

⁶ Jane S. Shaw, *The Ivory Tower: Crumbling From Within?*, JOHN WILLIAM POPE CTR. FOR HIGHER EDUC. POL'Y (Apr. 21, 2009), <http://www.popecenter.org/commentaries/article.html?id=2161#.VAyxbEsirwI> (discussing Jeff Sandefer's, the founder of the Acton School of Business, statements on problems with traditional higher education model).

⁷ Chris Kirkham, *Student Loan Defaults Reach Highest Level In More Than A Decade*, HUFFINGTON POST (Sept. 12, 2011), www.huffingtonpost.com/2011/09/12/for-profit-colleges-student-loan-_n_959058.html.

⁸ Joseph Marr Cronin & Howard E. Horton, *Will Higher Education Be the Next Bubble to Burst?*, CHRON. HIGHER EDUC. (May 22, 2009), <http://chronicle.com/article/will-higher-education-be-the/44400> (considering

- *The Higher Education Bubble*⁹
- *Higher Education: The Latest Bubble?*¹⁰
- *Private Student Loan Bankruptcy Bill . . . The 5th Attempt*¹¹
- *The Fall of a For-Profit Chain, Overstating the Liberal Arts' Demise?*¹²
- *Negative Outlook for US Higher Education Continues Even as Green Shoots of Stability Emerge*¹³

factors, like a 440% increase in average college tuition and fees over the last twenty-five years and the recent drift toward higher enrollment in public institutions, signifying higher education may be next bubble to burst).

⁹ Lexington, *The Higher Education Bubble*, ECONOMIST (June 11, 2009, 7:24 PM), http://www.economist.com/blogs/lexington/2009/06/the_higher_education_bubble (considering how tenure may help the best universities in this economic crisis, but may hurt lesser universities in terms of enrollment since the economic crisis has forced potential students to consider "value for money"); see also David Frum, *Bursting the Higher Ed Bubble*, WEEK (May 27, 2009), http://theweek.com/article/index/96989/Bursting_the_Higher_Ed_Bubble; Dan Lips, *Popping the Higher-Education Bubble: A New Strategy To Improve College Across While Reducing The Taxpayer Burden*, NAT'L REV. ONLINE (Mar. 15, 2010, 4:00 AM), <http://www.nationalreview.com/articles/229312/popping-higher-education-bubble/dan-lips> (discussing how the education "bubble" may be popped through the "growing popularity of online learning . . . the increasing availability of free higher-education content online . . . [and] the emerging market of credit-by-examination options"); Peter J. Reilly, *When Will the Education Bubble Explode?*, FORBES (Nov. 2, 2011, 9:15 AM), <http://www.forbes.com/sites/peterjreilly/2011/11/02/when-will-the-education-bubble-explode/> (discussing how attitudes toward education may change and cause "the education bubble" to explode); Glenn Harlan Reynolds, *Further Thoughts On The Higher Education Bubble*, WASH. EXAMINER (Aug. 8, 2010, 2:00 AM), <http://www.washingtonexaminer.com/article/36356> (explaining future effects of the possible bursting higher education bubble on students, universities, online educational systems, and entrepreneurs). For a further discussion on the higher education bubble, see GLENN HARLAN REYNOLDS, *THE HIGHER EDUCATION BUBBLE* (2012).

¹⁰ Schumpeter, *Higher Education: The Latest Bubble?*, ECONOMIST (Apr. 13, 2011, 11:50 AM), http://www.economist.com/blogs/schumpeter/2011/04/higher_education/ (suggesting the education bubble has already began to pop); see also Mary Ann Bitter, *Infographic: The Higher Education Bubble, Part One*, OPENSOURCE.COM (Mar. 29, 2012), <https://opensource.com/education/12/3/infographic-education-bubble> (providing a visual of "the higher education bubble").

¹¹ See *Private Student Loan Bankruptcy Bill . . . The 5th Attempt*, STUDENTLOANJUSTICE.ORG, <http://studentloanjustice.org/action-room.htm> (last visited Oct. 21, 2014) (arguing student loans should have bankruptcy protections); see also *46 Percent Of Federal Loans Paid To For-Profit Institutions Will Go Into Default*, HUFFINGTON POST (Dec. 23, 2010, 9:00 AM), http://www.huffingtonpost.com/2010/12/23/46-percent-default-rate-o_n_800283.html (discussing "gainful employment" rule and its potential use in determining which colleges should be "allowed to receive tuition in the form of federal aid").

¹² *The Fall of a For-Profit Chain, Overstating the Liberal Arts' Demise?*, INSIDE HIGHER ED (Jun. 27, 2014, 7:21 AM), <https://www.insidehighered.com/audio/2014/06/27/program-8-fall-profit-chain-overstating-liberal-arts-demise-june-27-2014> (discussing pressures on both the for-profit education sector and the liberal arts education sector); see also Paul Fain, *Fallen Giant*, INSIDE HIGHER ED (Jun. 26, 2014), <https://www.insidehighered.com/news/2014/06/26/corinthians-failure-and-us-role-it-fuels-profit-critics> (detailing recent challenges of for-profit institutions of higher education, such as: declining enrollment; poor job market; increasing tuition rates; and bad publicity for such institutions).

¹³ Dennis Gephardt, *Negative Outlook for US Higher Education Continues Even as Green Shoots of Stability Emerge*, MOODY'S INVESTORS SERVICE 1-2 (July 11, 2014), available at https://www.moody's.com/login.aspx?lang=en&cy=global&ReturnUrl=https%3a%2f%2fwww.moody's.com%2fvie-wresearchdoc.aspx%3fdocid%3dPBM_PBM172867%26lang%3den%26cy%3dglobal (predicting a negative outlook for the United States' higher education sector because of limited revenue growth prospects and the inability of universities to adjust); see also Jeffrey Brown, *Is a College Diploma Worth the Soaring Student Debt?* PBS NEWSHOUR (May 27, 2011, 12:00 AM), http://www.pbs.org/newshour/bb/business-jan-june11-college_05-27/; Victor Davis Hanson, *Our Once-Great Universities Are Now Hidebound Dinosaurs*, INVESTORS.COM (June 9, 2014, 6:52 PM), <http://news.investors.com/ibd-editorials-viewpoint/060914-704030-college-campuses-no-longer-places-of-free-thought.htm?ntt=From%20Liberal%20Universities%20to%20Hidebound%20Dinosaurs&p=full>; Jeff Selinger, *The End of the Public University?*, LINKEDIN (Nov. 26, 2013),

In summary, the articles suggest that the environment in which higher education operates today and the rules of engagement are changing rapidly and drastically, and those who fail to prepare and adapt are doomed to decline or failure.

There are even more dire predictions about higher education.

*The higher ed revolution is coming. Just a few decades hence, half the colleges and universities in the United States will have disappeared, but schools like Harvard will have millions of students. In fifty years, if not much sooner, half of the roughly 4,500 colleges and universities now operating in the United States will have ceased to exist. The technology driving this change is already at work, and nothing can stop it. The future looks like this: Access to college-level education will be free for everyone; the residential college campus will become largely obsolete; tens of thousands of professors will lose their jobs; the bachelor's degree will become increasingly irrelevant; and ten years from now Harvard will enroll ten million students.*¹⁴

Adding to these bleak forecasts, Clayton Christenson, often touted as the number one management thinker today, has stated: "Fifteen years from now maybe half the [U.S.] universities will be in bankruptcy . . . in the end I'm excited to see that happen. So pray for Harvard Business School if you wouldn't mind."¹⁵

Institutions of higher education do not often think of themselves as needing bankruptcy-related services, but it is a growing phenomenon that such institutions are increasingly insolvent, and if it is not time to declare bankruptcy, some are precariously close or are already there, but not admitting it. Americans tend to think of higher education as a fundamental part of the fabric of society—it is always there; it is non-profit and thus not susceptible to the external forces buffeting every other industry; and it is infused with brand loyalty that blinds administrators, faculty, alumni, and boards. It is often considered too important to fail; yet that is merely a denial of reality—especially in the twenty-first century. Just because it has been a favored industry does not mean it is not vulnerable to the disruptive forces in our world. As Clay Shirky of New York University argued in his article, *The End of Higher Education's Golden Age*

<https://www.linkedin.com/today/post/article/20131126141548-17000124-the-end-of-the-public-university>, (detailing the struggle public universities experience in terms of a declining net-tuition revenue); Clay Shirky, *The End of Higher Education's Golden Age*, CLAY SHIRKY (Jan. 29, 2014, 4:20 PM), <http://www.shirky.com/weblog/2014/01/there-isnt-enough-money-to-keep-educating-adults-the-way-were-doing-it/> (attributing public higher education system problems to attempts in preserving practices which have "outlived the economics that made them possible"); Charlie Tyson, *For-Profit Anthem Education Abruptly Closes Campuses after Filing Bankruptcy*, INSIDE HIGHER ED (Aug. 29, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/08/29/profit-anthem-education-abruptly-closes-campuses-after-filing-bankruptcy>.

¹⁴ Nathan Harden, *The End of the University as We Know It*, AM. INTEREST (Dec. 11, 2012), <http://www.the-american-interest.com/articles/2012/12/11/the-end-of-the-university-as-we-know-it/> (second emphasis added).

¹⁵ Clayton Christensen Interview with Mark Suster at *Startup Grind 2013*, YOUTUBE.COM (Feb. 20, 2013), <https://www.youtube.com/watch?v=KYVdf5xyD8I>. Clayton Christensen of Harvard Business School is often touted as the principal management thinker today, and is co-author of *Disrupting Class: How Disruptive Innovation Will Change the Way the World Learns*.

earlier this year:

[W]e live in institutions perfectly adapted to an environment that no longer exists Our current difficulties are not the result of current problems. They are the bill coming due for 40 years of trying to preserve a set of practices that have outlived the economics that made them possible. . . . Arguing that we need to keep the current system going just long enough to get the subsidy the world owes us is really just a way of preserving an arrangement that works well for elites—tenured professors, rich students, endowed institutions—but increasingly badly for everyone else.¹⁶

I. RECENT HISTORY AND CURRENT STATUS OF U.S. HIGHER EDUCATION

Let us take a look at the current status, challenges, and forces within the higher education industry.

A. *Perception of Perseverance*

Recognized as the first university, the University of Bologna was founded in 1088 and continues today.¹⁷ Many surviving and thriving universities began in the Middle Ages—for example, Oxford, Cambridge, Heidelberg, Vienna, Turin, and St. Andrews.¹⁸ There is a sense of stability, a sense of place, and stately buildings on our campuses that belie the risk that face many institutions. But, that confidence is waning. In the 2014 *Inside Higher Ed* survey of college and university business officers, only 24% strongly agreed they are confident about the sustainability of their business model over the next five years, and only 13% over the next ten years.¹⁹

We are not far from the Golden Age of higher education—a sixty year run of growth and amassing of resources since World War II. Our citizenry has considered a college degree as a ticket to upward mobility; there has been a surge of international students into American colleges; U.S. higher education has been generally free of competition, except among its own ranks, for students, faculty, reputation, and resources; the GI Bill has poured billions of dollars and millions of students into our universities; student loans have been available for the asking; the expanding governmental juggernaut has invested untold billions into research grants; and there has been a ten-fold increase in enrollment in sixty years. As we will see many of these factors are declining or are at least being seriously questioned at the policy level.

¹⁶ Shirky, *supra* note 13.

¹⁷ See *The University from the 12th to the 20th Century*, UNIVERSITA DI BOLOGNA (2014), <http://www.unibo.it/en/university/who-we-are/our-history/university-from-12th-to-20th-century> (summarizing history of the University of Bologna).

¹⁸ See Ernst Cobb, *Old Universities*, 72 J. EDUC. 523, 523 (1910) (listing oldest universities in the world).

¹⁹ See Scott Jaschik & Doug Lederman, *The 2014 Inside Higher Ed Survey of College & University Business Officers*, INSIDE HIGHER ED 8 (2014), available at <https://www.insidehighered.com/news/survey/sustainability-divestment-and-debt-survey-business-officers>.

B. Growth in Numbers and Tuition Costs

In 2010–2011, there were 4,599 degree-granting institutions and 2,870 are four-year institutions.²⁰ That is an increase of 42% in the number of institutions since 1980, to accommodate a 74% increase in the number of students over the same time period.²¹ Most of the student increases have been absorbed in the mega-universities, but most of the increase in the number of institutions has been in small independent colleges—many inefficient and underfunded.²²

It is reported that tuition and fees have climbed 30% faster than health care costs and four times the rate of inflation in recent years.²³ Tuition was 23% of median university income in 2001, and it has increased to 38% in 2010.²⁴ If recent trends continue, four years at a top-tier school will cost \$330,000 in 2020.²⁵

C. Cost Pressures—Real and Artificial

Institutions of higher education are facing enormous cost pressures. Expectations of the students and parents have multiplied many-fold. Campuses feel the need to create a resort-like atmosphere with gourmet food, four-star housing accommodations, climbing walls, state-of-the-art athletic facilities, and multiplied student services. Salaries have climbed faster than inflation, with some faculty, coaches, and administrators making \$1 million or more. For example, professors at Smith College earn an average of \$130,000, even with declining teaching loads.²⁶ Also, government regulatory burdens cause nearly all institutions to have legal counsel and compliance officers that were unheard of three or four decades ago. It should be noted that most of these cost pressures come from everything except the core business of educating and turning out good citizens.

D. Declining Status

In spite of the greatly increased costs, the social stature and perceived value of a college degree is declining. Families are questioning whether a college degree is still a ticket to upward mobility. Stories abound of jobless or underemployed graduates and credit-ruining college debt. For many institutions, they are not delivering value

²⁰ See *Number of Educational Institutions, by Level and Control of Institution: Selected years, 1980-81 through 2010-11*, DIG. EDUC. STAT. (Dec. 2012), http://nces.ed.gov/programs/digest/d12/tables/dt12_005.asp.

²¹ See Thomas D. Snyder & Sally A. Dillow, *Digest of Education Statistics 2012*, NAT'L CTR. FOR EDUC. STAT. 321, 443 (Dec. 2013), <http://nces.ed.gov/pubs2014/2014015.pdf>.

²² See *id.* at 308 (indicating most students attend larger colleges and universities).

²³ See Cronin & Horton, *supra* note 8.

²⁴ *The College-Cost Calamity*, *supra* note 5.

²⁵ Mark C. Taylor, *Academic Bankruptcy*, N.Y. TIMES, Aug. 14, 2010, at WK10 (urging higher education institutions to reform to prevent making college unaffordable for young people).

²⁶ See Catie Ferrara et al., *Academic Excess: Executive Compensation at Leading Private Colleges and Universities in Massachusetts*, CTR. FOR SOCIAL PHILANTHROPY & TELLUS INST. 5, 10 (Sept. 2011), available at https://www.insidehighered.com/sites/default/server_files/files/TellusAcademicExcess.pdf (asserting even schools with bad investment returns continually pay school officials large salaries).

commensurate with the extra costs. Among the concerns of this author is that many colleges are no longer teaching values, character, critical thinking, and citizenship because the prevailing political correctness today says there are no absolutes or values better than others. According to *Academically Adrift* by Richard Arum and Josipa Roksa, 45% of students surveyed at major universities demonstrated no significant learning in the first two years in critical thinking, complex reasoning, or writing, 36% do not improve in those categories over four years, and many others only marginally improved.²⁷

E. Public Relations

There is a tendency of boards and administrations to deny reality—the ostrich effect. After all, these traditional institutions have survived all changes to date! There are tremendous pressures on institutions to deliver a positive public relations message. In a July 21, 2014 address to the National Association of College and University Business Officers, Bill Gates said: "It is ironic . . . that academic institutions are so good at studying the world around them, but not themselves."²⁸ He further noted that colleges must hold themselves more accountable—or someone else will bring them to account.²⁹

F. Education Models

A major cultural factor in higher education has been the rise of for-profit educational institutions. Consider these statistics related to for-profit institutions:

- in 2010, enrolled 2.5 million students, had \$29.6 billion in revenue and very high profit margins;³⁰
- from 2000 to 2012, had a compound annual growth in revenue of 16%;³¹
- in 2012, had 11% of all higher education enrollments, 25% of financial aid, 46% of loan defaults, and enrolled 67% of students over age 25;³²

²⁷ See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 36–37 (2011); see also Scott Jaschik, 'Academically Adrift', *INSIDE HIGHER ED* (Jan. 18, 2011), https://www.insidehighered.com/news/2011/01/18/study_finds_large_numbers_of_college_students_don_t_learn_much (discussing data cited in *Academically Adrift*).

²⁸ Doug Lederman & Ry Rivard, *A More Nuanced Bill Gates*, *INSIDE HIGHER ED* (July 22, 2014), <https://www.insidehighered.com/news/2014/07/22/2014-07-22/slightly-more-nuanced-bill-gates-offers-vision-higher-education> (paraphrasing remarks made by Bill Gates to NACUBO on July 21, 2014).

²⁹ Bill Gates, *A New Era in Education: The Future of College*, GATESNOTES (Aug. 8, 2014), <http://www.gatesnotes.com/Education/The-Future-of-College-NACUBO-Remarks> (including remarks as delivered by Bill Gates to NACUBO's Annual Meeting urging higher education to reform).

³⁰ See *Post-Secondary Education: Coverage Report*, CAPSTONE PARTNERS 2 (2013), available at http://www.capstonellc.com/sites/default/files/Capstone%20Post-Secondary%20Education%20Q2_%202013.pdf.

³¹ *Id.*

³² *Id.* at 3 (discussing for-profit institutional growth); Sandy Baum and Kathleen Payea, *Trends in For-Profit Postsecondary Education: Enrollment, Prices, Student Aid and Outcomes*, COLLEGEBOARD.ORG/TRENDS 1, 3 (2011), available at <https://trends.collegeboard.org/sites/default/files/trends-2011-for-profit-postsecondary-ed-outcomes-brief.pdf>; 46 Percent of Federal Loans Paid to For-Profit Institutions Will Go Into Default, HUFFINGTON

- receive 80% of revenue from federal aid programs, averaging \$6,997 per student;³³
- from 2011 to 2012, for-profit enrollments declined 7.2%, while overall higher education enrollment declined only 1.8%;³⁴
- seventy-four mergers through 2010 for \$11.8 billion;³⁵
- the largest fourteen institutions had an average market cap of \$776.5 million, with Apollo, DeVry, and Grand Canyon Education, Inc. at or approaching \$2 billion each;³⁶ Apollo had earnings before interest, taxes, depreciation, and amortization of \$758 million in the most recent reported year.³⁷

Of total revenue, 25% is spent on advertising and recruiting; 17% on educating; and 19% constitutes profit.³⁸ Title IV regulations now forbid commission/bonus/incentive payments for recruiting.³⁹ For two very large for-profits, recent closings and/or bankruptcy was the outcome—Corinthian Colleges (107 campuses; shutting most campuses in mid-2014; in 2010, 110,000 students; in 2014, 72,000 students and \$80 million loss in first three months of year) and Anthem Education (41 campuses; declared bankruptcy on August 25, 2014; in 2006, 21,969 students and \$18 million profit; in 2009, 10,000 students and \$4 million loss; \$1 million to \$10 million assets, \$50 million to \$100 million debts).⁴⁰

In contrast, the prevailing education model tends to follow the pattern of wealthy schools. It is characterized by high tuition costs and high discounting. According to the National Association of College and University Business Officers (NACUBO), first-time, full-time freshmen students received an average discount rate of 46.4% in 2013.⁴¹ This model also requires large numbers of full-paying students who are hard to find, propped up by approximately 820,000 international students, primarily from China, India, South Korea, and Saudi Arabia.⁴² Expensive instruction; low faculty loads and small class sizes; residential life on beautiful campuses; relatively rigid schedules and

POST (Dec. 23, 2010 9:00 AM), http://www.huffingtonpost.com/2010/12/23/46-percent-default-rate-o_n_800283.html.

³³ See Joseph R. D'Angelo, *Restructuring the For-Profit Education Sector: Entering a New Era*, 28 ASS'N INSOLVENCY & RESTRUCTURING ADVISORS J. 7, 7–8 (Spring 2014).

³⁴ See Caralee Adams, *Colleges See Drop in Enrollment This Fall*, EDUC. WEEK (Dec. 18, 2012, 3:01 PM), http://blogs.edweek.org/edweek/college_bound/2012/12/college_enrollment_in_the_fall.html (reviewing recent drops in for-profit and higher education enrollment numbers).

³⁵ See D'Angelo, *supra* note 33 at 7.

³⁶ See *id.* at 7.

³⁷ See *id.*

³⁸ See *id.* at 9.

³⁹ See 20 U.S.C. § 1094(a)(20) (2012).

⁴⁰ See Paul Fain, *Corinthian's Failure (and U.S. Role in It) Fuels For-Profit Critics*, INSIDE HIGHER ED (June 26, 2014, 3:00 AM) (discussing struggles and collapse of Corinthian Colleges); Tyson, *supra* note 13 (explaining details surrounding Anthem Education's bankruptcy).

⁴¹ Ry Rivard, *As Prices Rise, Colleges are Offering Students Steeper Discounts, Again*, INSIDE HIGHER ED (July 2, 2014, 3:00 AM), <http://www.insidehighered.com/news/2014/07/02/prices-rise-colleges-are-offering-students-steeper-discounts-again>.

⁴² See Drew Desilver, *Record Number of International Students Studying in U.S.*, PEW RESEARCH CTR. (Nov. 12, 2013), <https://www.pewresearch.org/fact-tank/2013/11/12/record-number-of-international-students-studying-in-u-s/> (providing data for countries that represent greatest portion of foreign students studying in the United States).

calendars with little flexibility; one-size fits all curriculum; limited course and degree offerings; leadership recruited as stewards to preserve the best of the university, not as innovative leaders; stately (i.e., expensive) buildings; massive investments in brick and mortar; molasses-style movement (one report of two years to change the name of a degree); shared governance; very high marginal cost and little scalability also characterize this model. It coasts on claimed uniqueness—learning for its own sake; research; and environment. In two words: "ivory tower." Is the higher education industry venerable? Yes, but there is a growing sense of unease. Could such stable institutions be disrupted? The print media serves as a dire example. For some, there has been a 60% decline in print advertising in ten years.⁴³ One-hundred-fifty year-old newspapers are closing.⁴⁴ Look also at music, books, plain old telephone service, and cable television—all information-based industries impacted by technology.⁴⁵ Similarly, higher education is an information-based industry subject to most of the same political, geographic, and economic forces.

II. TWENTY-FIRST CENTURY DISRUPTIVE FORCES OUTSIDE THE ACADEMY THAT CHALLENGE SUSTAINABILITY

Each one of the following forces deserves a separate discussion and deeper consideration. We have learned in the past fifty years that change is the only constant in our world. As American actor Will Rogers is often credited with saying, "Even if you're on the right track, you'll get run over if you just sit there." It is reported that only 16% of today's college students fit the traditional undergraduate student model—ages eighteen to twenty-two, full-time students, and living on campus.⁴⁶ Just as the traditional college student body is changing, so too are the types of education they are pursuing.

A. Competition Between Educational Models

For-profit institutions, like Apollo Education Group and University of Phoenix, are on the rise. These institutions are grabbing a higher market share. Non-profits must compete with these for-profit institutions. For example, Georgia Institute of Technology now offers a computer science master's degree for \$7,000.⁴⁷ There is also

⁴³ See Katerina Eva Matsa, *News Magazines Hit by Big Drop in Ad Pages*, PEW RESEARCH CTR. (July 15, 2013), <http://www.pewresearch.org/fact-tank/2013/07/15/news-magazines-hit-by-big-drop-in-ad-pages/> (referring to Newsweek's 60% decline in ad pages from 2002 to 2012, causing it to end its print edition in 2012).

⁴⁴ See Howard Kurtz, *Final Edition: Rocky Mountain News to Shut Down Today*, WASH. POST, Feb. 27, 2009, at D03 (reporting Rocky Mountain News is shutting down and mentioning other newspapers like, The Philadelphia Inquirer, Daily News, Chicago's Tribune Co., and the Minneapolis Star-Tribune have filed for chapter 11 bankruptcy).

⁴⁵ *Id.*

⁴⁶ See Gyan Devi, *Problems & Solutions for Nontraditional Students*, SCHOLARSHIP OPPORTUNITY (June 26, 2014), <http://scholarshipopportunity.org/nontraditional-student-problems/> (addressing the changing identity of "traditional" undergraduate student).

⁴⁷ See Martha C. While, *The \$7,000 Computer Science Degree – and the Future of Higher Education*, TIME.COM (May 21, 2013), <http://business.time.com/2013/05/21/the-7000-computer-science-degree-and-the-future-of-higher->

competition from abroad. The number of Chinese colleges in 1999 was 1,071; by 2009, it was 2,305.⁴⁸ Finally, institutions must consider the increased cost of recruiting—averaging \$2,000 to \$4,000 in many colleges.⁴⁹

B. Cultural Shifts

Cultural shifts may be perceived as good or bad. Current cultural shifts have created shortened attention spans, a desire for quick fixes, an obsession with sound bites ruling debates, and a general lack of depth. The current zeitgeist has focused on simplification and lack of critical thinking.⁵⁰ Indeed, some families are even questioning the value of college.⁵¹ There is a wholesale abandonment of long-held cultural, political, economic, and moral values.⁵² In this context, what passes for a college education is being redefined and much of what passes for higher education brings to mind former Boston University President John Silber's famous quote: "Higher than what?"⁵³

There are too many soft courses to accommodate these cultural changes. Economist Thomas Sowell recently noted that these changes "allow students to spend years in college without becoming educated in any real sense."⁵⁴ In Oklahoma, a generally conservative state, institutions of higher education offer courses such as: Billiards; Star Wars and the Hero's Journey; Six Years in the Life: The Beatles and the Counterculture; Disney Dogs and Popular Pets; Monsters, Mummies, Myths: A Study

education/ (explaining Georgia Institute of Technology's use of a massive open online course, thereby reducing costs).

⁴⁸ See Yuzhuo Cai, *Chinese Higher Education Reforms and Tendencies*, NORWEGIAN CTR. FOR INT'L COOPERATION EDUC. 28 (Nov. 2011), available at <http://www.siu.no/eng/Globalmeny/Publikasjoner/Alle-publikasjoner/Chinese-Higher-Education-Reforms-and-Tendencies> (showing number of higher education institutions in China from 1998–2010).

⁴⁹ See 2011 *Cost of Recruiting an Undergraduate Student: Benchmarks for Four-Year and Two-Year Institutions*, NOEL-LEVITZ REP. ON UNDERGRADUATE ENROLLMENT TRENDS 4 (2011), available at <https://www.noellevitz.com/papers-research-higher-education/2011/2011-report-cost-of-recruiting-undergraduate-student> (displaying cost range to recruit single undergraduate student).

⁵⁰ See Janna Quitney Anderson & Lee Rainie, *Millennials Will Benefit and Suffer Due to Their Hyperconnected Lives*, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT 12 (Feb. 29, 2012), available at http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Future_of_Internet_2012_Young_brains_PDF.pdf (examining effect of changing communication and information gathering on expectations of millennials).

⁵¹ See cf. Paul Taylor et al., *Is College Worth It?: College Presidents, Public Assess Value, Quality and Mission of Higher Education*, PEW RESEARCH CTR. SOCIAL & DEMOGRAPHIC TRENDS 9 (May 16, 2011), available at <http://www.pewsocialtrends.org/files/2011/05/higher-ed-report.pdf> (revealing only 35% of the public polled felt students "receive[d] good value" for the money spent on college education).

⁵² See cf. Douglas Belkin, *Study Finds Many Colleges Don't Require Core Subjects Like History, Government; Few Schools Study Areas Such as Economics or Foreign Languages*, WALL ST. J. (Oct. 15, 2014), <http://online.wsj.com/articles/study-finds-many-colleges-dont-require-core-subjects-like-history-government-1413345842> (discussing university administration lack of care for core subjects and describing change in social norms of students).

⁵³ See Brandon Dutcher, *When Higher Education Isn't*, OKLAHOMA COUNCIL PUB. AFFAIRS (June 2, 2011, 1:39 PM), <http://www.joinocpa.org/articles/1210> (criticizing poor choice of class curriculum while quoting late Boston University President John Silber).

⁵⁴ Thomas Sowell, *The "Education" Mantra*, CREATORS.COM (2011), <http://www.creators.com/conservative/thomas-sowell/the-education-mantra.html> (condemning modern day higher education for not challenging students, resulting in students who become less productive members of society).

of Bad Archaeology and Pop Culture; South Park and Stereotypes: TV Racism in the Obama Era; Sociology of Gender and Sexuality in Media; Rough Girls and Sweet Boys: Gender, Personality and Communication; and Food, Culture, and Society. But there is less attention to math, language, history, science, economics, and other liberal arts courses. In a similar vein, an Oklahoma University professor once published academic research entitled *Towards Queering Food Studies: Foodways, Heteronormativity, and Hungry Women in Chicana Lesbian Writing*.⁵⁵ This degradation of the curriculum can be found multiplied thousands of times throughout U.S. higher education. Is it any wonder that families are losing faith in the value of higher education—or that its cost is escalating?

The above is just one indication of the dumbing down of K-12 and college education. There is an easily demonstrable lack of preparation—emotionally, intellectually, and socially for college or for life. As a result, higher education is having to invest heavily in remedial classes. To demonstrate the diluted curricula of American schools today, the eighth grade tests of the 1800s are oftentimes beyond the capability of most college graduates.⁵⁶ The stories of abysmal learning at many universities have been well documented.

C. Advancements in Technology

Technology is a great tool for delivery of much academic content. According to the National Center for Education Statistics, five and a half million students took online classes in 2012, and about half of those were in fully online programs.⁵⁷ From 2000 to 2010, online enrollments had approximately 31% compound annual growth rate.⁵⁸ Online enrollments already account for approximately 42.6% of for-profit enrollment.⁵⁹ Massive open online courses (MOOCs) are gaining respect, by offerings such as edX—at Harvard and MIT; Coursera—at Stanford, Penn, Princeton, University of Michigan, and UC Berkeley; Udacity; and Western Governors University. There are now 283 schools with online programs.⁶⁰ *U.S. News* is now ranking online degrees and received

⁵⁵ See Julia C. Ehrhardt, *Toward Queering Food Studies: Foodways Heteronormativity, and Hungry Woman in Chicana Lesbian Writing*, 14 *FOOD & FOODWAYS: EXPLORATION IN THE HISTORY & CULTURE OF HUMAN NOURISHMENT* 91 (2006), available at <http://www.tandfonline.com/doi/pdf/10.1080/07409710600691931#preview>.

⁵⁶ See Egberto Willies, *Most Adults Would Likely Fail this 1912 8th Grade Test*, *DAILY KOS* (Aug. 13, 2013, 7:53 AM), <http://www.dailykos.com/story/2013/08/13/1230894/-Most-Adults-Would-Likely-Fail-This-1912-8th-Grade-Test-Try-It-VIDEO>.

⁵⁷ See Carl Straumsheim, *Identifying the Online Student*, *INSIDE HIGHER ED* (June 3, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/06/03/us-releases-data-distance-education-enrollments>.

⁵⁸ See Elaine Allen & Jeff Seaman, *Changing Course: Ten Years of Tracking Online Education in the United States*, *BABSON SURVEY RES. GROUP* 17 (Jan. 2013), available at <http://www.onlinelearningsurvey.com/reports/changingcourse.pdf> (illustrating the compound annual growth of online enrollment over the last decade).

⁵⁹ See David Nagel, *1 in 10 Students Enrolled Exclusively in Online Courses*, *CAMPUS TECH.* (June 4, 2014), <http://campustechnology.com/articles/2014/06/04/1-in-10-students-enrolled-exclusively-in-online-courses.aspx> (observing private, for-profit institutions had highest rate of fully online students).

⁶⁰ See Eric Brooks and Robert Morse, *Methodology: Best Online Bachelor's Programs Rankings*, *U.S. NEWS & WORLD REP.* (Jan. 7, 2014, 8:30 PM), <http://www.usnews.com/education/online-education/articles/2014/01/07/methodology-best-online-bachelors-programs-rankings-2014>.

1,000 applications in a recent year.⁶¹ Online learning has the following benefits: convenience; mass customization versus "fit our" model; flexibility; cost; interactivity; and accommodating different learning styles. Faculty roles are changing from "sage on stage" to "guide on the side." Several studies demonstrate that students learning through technology do as well on tests as those in the classroom and that the time required is much less.⁶² The Internet is destroying or drastically altering all industries that rely on the sale of information. Nearly all young people today are "digital natives" versus "digital immigrants" like the older generations. Credentialing will be the key to dramatically increasing online education, and that is now being promoted by the American Council on Education ("ACE"), by many schools, and being experimented with by the regional accrediting agencies. As reported by the *Los Angeles Times*, Anant Agarwal, an MIT computer science professor and edX's first president, stated in an interview, "MIT's and Harvard's mission is to provide affordable education to anybody who wants it."⁶³ That should put the fear into the higher education industry.

D. Skewing of Common Sense Economics Creates and Inflates the Higher Education Bubble

In recent years, the "college bubble" has become an increasingly prevalent topic—an internet search of "college bubble" returns over 48 million results. That staggering number ought to at least get our attention. It is important to consider what created and continues to inflate the bubble. The federal government changed the funding paradigm for higher education from family to government and debt. The tremendous growth in student loans has created what has been labeled the "Student Debt Bomb."⁶⁴ Next to housing, higher education is now the highest source of debt—even above credit cards—at \$1 trillion, a growing and significant portion of all personal debt.⁶⁵ Student loan debt

⁶¹ See Eric Brooks and Robert Morse, *Best Online Programs Rankings Coming Jan. 8*, U.S. NEWS & WORLD REP. (Dec. 5, 2013, 9:30 AM), <http://www.usnews.com/education/blogs/college-rankings-blog/2013/12/05/best-online-programs-rankings-coming-jan-7> ("Nearly 1,000 distance education programs submitted a completed U.S. News questionnaire during the summer of 2013 . . .").

⁶² See Adam Driscoll et al., *Can Online Courses Deliver In-Class Results? A Comparison of Student Performance and Satisfaction in an Online versus a Face-to-Face Introductory Sociology Course*, 40 TEACHING SOCIOLOGY 312, 313 (2012), available at <http://tso.sagepub.com/content/40/4/312.abstract> (finding "[a] large number of empirical comparisons between online and [face-to-face] courses find that online students perform as well as or better than [face-to-face] students" but acknowledging many studies suffer from "methodological weaknesses").

⁶³ Larry Gordon, *Harvard, MIT Partner to Offer Free Online Courses*, L.A. TIMES (May 3, 2012), <http://articles.latimes.com/2012/may/03/local/la-me-0503-harvard-online-20120503>.

⁶⁴ See *The Student Loan "Debt Bomb": America's Next Mortgage-Style Economic Crisis?*, NAT'L ASS'N CONSUMER BANKR. ATTORNEYS (Feb. 7, 2012), available at <http://nacba.org/Portals/0/Documents/Student%20Loan%20Debt/020712%20NACBA%20student%20loan%20debt%20report.pdf>.

⁶⁵ See *Quarterly Report on Household Debt and Credit*, FED. RES. BANK N.Y. 1, 3 (Aug. 2014), available at http://www.newyorkfed.org/householdcredit/2014-q2/data/pdf/HHDC_2014Q2.pdf (reporting outstanding student loan balance increased to \$1.12 trillion, which is 10% of the total debt balance, the second highest below the 70% mortgage debt and above the 6% credit card debt).

now averages at least \$23,000 per graduate, and some borrowers owe over \$100,000.⁶⁶ Personally, the author is aware of graduate students with over \$200,000 in student loans. Defaulting on payments is at an all-time high. This level of debt has societal impact as well—such debt makes some borrowers now unmarriageable!

Approximately 3.1% of America's GDP was spent on higher education in 2007.⁶⁷ Some 2.1% of this (\$300 billion) was tax-funded.⁶⁸ As with any bureaucracy that is funded by the government and which is granted a licensing monopoly, it exists above all to make sure that the funding and licensing continues.

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act removed private student loans from bankruptcy protection. There have been several bills to try to overturn it, including the Fairness for Struggling Students Act of 2013⁶⁹ and the Private Student Loan Bankruptcy Fairness Act of 2011.⁷⁰ By such actions, once again the government has sought to remove the link between cause and effect, between the act and its natural consequences, between risk and reward. To consider another Will Rogers quip: "Be thankful we're not getting all the government we're paying for."

E. Further Examination of the Higher Education Bubble

Let us compare the higher education bubble to the all-too-familiar housing bubble. Were lenders greedy? Sure, but they were just as greedy before the bubble. However, before the bubble, lenders were also cautious. Profit appealed to their greed; risk appealed to their caution. The balancing forces of greed and caution—profit and risk—are what cause a free market to produce the right amount of loans. What changed was that government meddling removed caution by separating loan profits from loan risks. The government (i.e., the taxpayers) shouldered the mortgage risks and banks got to keep profits without risk. The government created the conditions for wholesale failure. And failure ensued.

Just as the government sought to engineer people into houses, it now seeks to engineer them into higher education. As explained by Anthony Davies and James R. Harrigan writing for *U.S. News & World Report*:

Congress established Sallie Mae in 1972 to encourage banks to loan more money for college. The Affordable Care Act of 2010 allowed the government to loan money directly to students. The following year the Taxpayer Relief Act extended tax breaks to student

⁶⁶ See Meta Brown et al., *Grading Student Loans*, LIBERTY STREET ECON. (Mar. 5, 2012), <http://libertystreeteconomics.newyorkfed.org/2012/03/grading-student-loans.html#.VEgaovnF9z1> ("The average outstanding student loan balance per borrower is \$23,000 The proportion of borrowers who owe more than \$100,000 is 3.1 percent.").

⁶⁷ See *Education at a Glance 2010: OECD Indicators*, ORG. FOR ECON. CO-OPERATION & DEV. 218 (2010), available at <http://www.oecd.org/education/skills-beyond-school/45926093.pdf>.

⁶⁸ See *id.* at 220.

⁶⁹ S. 114, 113th Cong. (2013) (aiming to "amend title 11, United States Code, with respect to certain exceptions to discharge in bankruptcy").

⁷⁰ H.R. 2028, 112th Cong. (2011) (attempting to "amend title 11 of the United States Code to modify the dischargeability of debts for certain educational payments and loans").

loan borrowers. Predictably, the Federal Reserve artificially kept interest rates at historically low levels, making college loans cheaper.⁷¹

By law, lenders cannot deny Stafford and Perkins loans, which are types of federal student loans, "based on the borrower's credit or employment status."⁷² But, what other reason is there to deny a loan? And just as home buyers took out loans to speculate on houses they could never hope to afford, students are taking out loans to cover educations they often cannot complete and which often do not hold value in the market even when completed. Government meddling has again separated profit from risk. Universities get to keep the tuition profits while taxpayers are forced to shoulder the risk of students not paying back their loans. Once again, government has created the conditions for wholesale failure, and failure is upon us.

Also, university investment returns on endowments are declining, impacting payouts that support university operations.⁷³ At the same time, the price of a college education has soared—just as one would expect from a market flooded with cheap money. From 1976 to 2010, the prices of all commodities rose 280%. The price of homes rose 400%.⁷⁴ How much did private education costs increase? A whopping 1,000%.⁷⁵

While the U.S. College and Higher Education Bubble isn't an *asset* bubble like stock or real estate bubbles, it is a *bubble-like phenomenon* with very similar risks and implications as asset bubbles. The crucial components of all bubbles are present in the US college bubble: a highly convincing and partially-legitimate [cultural appeal], soaring prices and profits, decreasing affordability, a highly overpriced/overvalued product, blatant profiteering, a "gold rush" mentality, extrapolation of the boom's growth far into the future and debt-fueled overinvestment/overexpansion. The end result will be similar to what asset bubbles experience when prices become overvalued and unaffordable: prices will be forced down to realistic levels again and large-scale industry downsizing will occur, resulting

⁷¹ Anthony Davies & James R. Harrigan, *Why the Education Bubble Will Be Worse Than the Housing Bubble*, U.S. NEWS & WORLD REP. (June 12, 2012, 11:30 AM), <http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/12/the-government-shouldnt-subsidize-higher-education>.

⁷² See *id.*; see also 20 U.S.C. § 1091(a)(1)–(6) (2012) (codifying that to be eligible for a federal student loan, a student need only prove, *inter alia*, enrollment or acceptance to an academic program at an institution of higher learning eligible for Title IV funding, proof of U.S. citizenship, and that they are not in default on any education loan or owe a refund on an education grant).

⁷³ See Andrew Martin, *College Endowment Returns Fall Steeply*, NYTIMES.ORG (Oct. 25, 2012), http://www.nytimes.com/2012/10/26/business/college-endowment-returns-fall-steeply.html?_r=0. But see Press Release, *Building on 11.7% Gain in FY2013, Educational Endowment' Investment Returns Averaged 15.5% in FY2014*, NACUBO.ORG (Jan. 29, 2015), [http://www.nacubo.org/About_NACUBO/Press_Room/2014_NACUBO-Commonfund_Study_of_Endowments_\(Final_Data\).html](http://www.nacubo.org/About_NACUBO/Press_Room/2014_NACUBO-Commonfund_Study_of_Endowments_(Final_Data).html) (indicating that investment returns are increasing in most recent year).

⁷⁴ See Jonathan Ping, *Charts: College Tuition vs. Housing Bubble*, MY MONEY BLOG (Aug. 31, 2010), <http://www.mymoneyblog.com/charts-college-tuition-vs-housing-bubble-vs-medical-costs.html>.

⁷⁵ See *id.*

in massive capital losses.⁷⁶

In recent years, state governments are moving rapidly toward a "user pays" model by providing less support for state institutions. There is a cultural and political pressure that claims higher education is for all, but the truth is that in recent years only half of graduates are working in jobs that require a college education.⁷⁷

Furthermore, the enormous and growing gap between the well-endowed institutions and the under-endowed institutions stratifies higher education into the haves versus have-nots. It is no longer unusual to hear of multi-billion dollar fund-raising campaigns. Wealthy institutions frequently outbid one another for faculty and resources. Less well-funded schools are unable to compete with them, and that is undermining educational diversity which has been a major source of greatness in American higher education. Dozens of small schools have experienced declines in enrollment in the past three years,⁷⁸ and they are trying to address it with massive increases in the discount rate—thus further undermining their own revenue source—a deadly downward spiral.

A potential contributing factor to this downward spiral is the changing accreditation process. Accreditation was once the higher education mote—protecting established institutions from the forces of competition, but accreditation is now recognizing other ways of validating education. Accreditation will soon no longer be based on seat time, but rather on content—what was learned, not how it was learned. Even ACE is calling for "learning assessment accreditation" or "competency-based education" which allows students to "earn credit based on what they know, not where or how they learned."⁷⁹ Six hundred corporations and government agencies are now using ACE and other sources to establish their own accrediting criteria.⁸⁰

Along with the changing accrediting criteria, there is a push toward occupational training and judging education by its relevance to finding jobs. Employers and others funding education want a say in the content of the curriculum, which in the past has been the sole purview of the faculty.

Interestingly, even research is now highly commercialized, and there is less fundamental original research, a staple of the traditional higher education system. With so much online and in libraries, information is no longer the private treasure of

⁷⁶ Jesse Colombo, *The College Bubble (incl. Education & Student Loan Bubble)*, BUBBLE BUBBLE, <http://www.thebubblebubble.com/college-bubble/> (last visited Jan. 27, 2015).

⁷⁷ See cf. Susan Adams, *Half of College Grads Are Working Jobs That Don't Require A Degree*, FORBES.COM (May 28, 2013, 6:39 PM), <http://www.forbes.com/sites/susanadams/2013/05/28/half-of-college-grads-are-working-jobs-that-dont-require-a-degree/> ("Nearly half of grads from four-year colleges are working in jobs that don't require a four-year degree.").

⁷⁸ Michael McDonald, *Small U.S. Colleges Battle Death Spiral as Enrollment Drops*, BLOOMBERG (Apr. 14, 2014), <http://www.bloomberg.com/news/2014-04-14/small-u-s-colleges-battle-death-spiral-as-enrollment-drops.html> (describing recent drop in enrollment at small schools).

⁷⁹ Paul Fain, *Change From Within*, INSIDE HIGHER ED (Mar. 4, 2013, 3:00 AM), <https://www.insidehighered.com/news/2013/03/04/ace-doubles-down-prior-learning-assessment>.

⁸⁰ See *Adult Learners: Using Your ACE Credit Recommendations*, AM. COUNCIL ON EDUC., <http://www.acenet.edu/news-room/Pages/Adult-Learners-Using-Your-ACE-Credit-Recommendations.aspx> (last visited Jan. 27, 2015).

universities. Again, the public is questioning the value of higher education in this new information paradigm.

Furthermore, there is ever-increasing government regulation—Washington and some state legislatures think they have all the solutions, using composite scores to evaluate recipients of federal financial aid. Use of the composite scores is a one-size-fits-all effort to determine if institutions are improperly capitalized, illiquid, and sustainable, but these scores, while indicative of potential problems, are often skewed by hedging techniques and other factors.⁸¹ Over 100 institutions failed the tests in the most recent year.⁸²

It is estimated that gainful employment regulations, which require institutions to report thirty-six data elements, will cost higher education \$60 million to comply initially and \$10 million per year thereafter.⁸³ It is important to note that institutions cannot use bankruptcy restructuring, without losing title IV funding and accreditation.⁸⁴ Because of this, regulatory reporting requirements and legal causes of action are proliferating.

There is also now a demand for accountability and flexibility. Education costs have dramatically outpaced inflation and even health care.⁸⁵ Price sensitivity is real and is affecting selection. Students are demanding unbundling of courses and credits (i.e., more portability), insisting on less time devoted to learning, and calling for more customized programs.

Finally, rating agencies, such as S&P and Moody's are decreasing bond ratings for universities. In January 2013, Moody's expressed a negative outlook for the entire higher education sector, citing "mounting fiscal pressure on all key university revenue

⁸¹ See *Financial Responsibility Composite Scores*, FED. STUDENT AID, OFFICE U.S. DEP'T EDUC., <https://studentaid.ed.gov/about/data-center/school/composite-scores> (last visited Jan. 27, 2015) (explaining methodology of U.S. Department of Education's financial responsibility composite score, which includes three ratios taken from an institution's audited financial statements); see also Ry Rivard, *Scores of Problems*, INSIDE HIGHER ED (Mar. 10, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/03/10/can-us-government-tell-colleges-poor-financial-shape-those-are-not> (noting criticisms of composite scoring, including the scores' failure to take into account complexity of universities).

⁸² See Goldie Blumstyk, *More Than 100 Colleges Fail Education Department's Test of Financial Strength*, CHRON. HIGHER EDUC. (June 12, 2009), <http://cpe.ky.gov/nr/rdonlyres/7291bfc8-404a-48e0-8370-e644c1e29572/0/morethan100collegesfaileducationdepartmentstestoffinancialstrength.pdf> (reporting data compiled by U.S. Department of Education reflects 114 private colleges failed Department's financial-responsibility test).

⁸³ See Michael Stratford & Paul Fain, *Many Comments, Few Surprises*, INSIDE HIGHER ED (May 28, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/05/28/public-comments-flood-us-department-education-gainful-employment-proposal> (discussing responses to proposed "gainful employment" regulations, which would cost approximately \$60 million in the first year to implement and subsequently \$10 million per year, and highlighting criticism by ACE, whose letter during public comment period suggests that regulations would require "16 categories of disclosures with 36 separate data elements").

⁸⁴ See 20 U.S.C. § 1002(a)(4) (2012) (exempting institutions filing for bankruptcy from meeting definition of institute of higher education, thereby excluding institutions from title IV funding).

⁸⁵ See Michelle Jamrisko & Ian Kolet, *College Costs Surge 500% in U.S. Since 1985: Chart of the Day*, BLOOMBERG (Aug. 26, 2013), <http://www.bloomberg.com/news/print/2013-08-26/college-costs-surge-500-in-u-s-since-1985-chart-of-the-day.html> (indicating in 28 years, tuition increased 538%, compared to medical costs increasing by 286%, and inflation increasing by 121%).

sources."⁸⁶ Since 2009, Moody's ratings have been negative for all institutions except well-funded research and highly selective universities.⁸⁷

Moody's outlook for the U.S. higher education sector is negative. The outlook expresses our expectation for the fundamental credit conditions in the sector over the next twelve to eighteen months. Since sector outlooks represent our forward-looking view on conditions that factor into ratings, a negative outlook indicates that negative rating actions are more likely on average.⁸⁸

III. POSITIVE FORCES IMPACTING HIGHER EDUCATION

While this has been a fairly negative Article, I am optimistic that most of higher education will respond to counter some of the trends and forces. First, the demand and external economics are improving. As noted in the July 11, 2014 Moody's report, there is a strong long-term demand for higher education, especially at the associate's and master's degree levels, coupled with increased endowment returns, greater demand for educated workers, improved household balance sheets, and greater consumer confidence. Second, inertia will be on the side of higher education, though with less impact as the speed of change accelerates. Third, international student numbers are still increasing. This advantage, however, may not be favorable long-term because other countries are rapidly catching up. For example, even a French university is now offering degrees in English. Fourth, alumni and benefactors will maintain a brand loyalty to their alma mater or certain institutions. Fifth, the devotion of faculty and staff provides an important positive force. Other favorable factors include the ever present need and demand to teach critical thinking and the fact that institutions are waking up to the need for teaching values and their critical role in building a strong society through critical thinking and character formation, not just occupational training.

Modern society is continuing its shift from manual labor to a knowledge-based society. Recently, the use of technology has increased in education. MOOCs and other online learning platforms are having a profound impact among higher education institutions, but it will be an evolutionary shift. There is much more likely to be blended learning, rather than the extremes of all online or all seat-time on campus.

⁸⁶ 2013 Outlook for Entire US Higher Education Sector Changed to Negative, MOODY'S INVESTORS SERV. (Jan. 16, 2013), https://www.moodys.com/research/Moodys-2013-outlook-for-entire-US-Higher-Education-sector-changed--PR_263866#.

⁸⁷ See *Annual Sector Outlook for U.S. Higher Education for 2010*, MOODY'S INVESTORS SERV. 1 (Jan. 2010), available at <https://www.mtholyoke.edu/sites/default/files/iplanning/docs/annualsectoroutlookforushighereducation2010.pdf> (reporting negative outlook for U.S. higher education in 2010); *2011 Outlook for U.S. Higher Education*, MOODY'S INVESTORS SERV. 1 (Jan. 14, 2011), available at <http://www.nhhefa.com/documents/moodys2011OutlookforU.S.HigherEducation.pdf> (maintaining negative outlook for "large majority of rated universities" in 2011); *U.S. Higher Education Outlook Remains Mixed in 2012*, MOODY'S INVESTORS SERV. (Jan. 23, 2012), https://www.moodys.com/research/Moodys-US-higher-education-outlook-remains-mixed-in-2012--PR_235778 (placing negative outlook for "bulk of rated colleges and universities" in 2012); *2013 Outlook for Entire US Higher Education Sector Changed to Negative*, *supra* note 86.

⁸⁸ Gephardt, *supra* note 13.

University presidents and faculty will continue to play a vital leadership role in gradually integrating the use of technology into higher education. For example, Bowdoin College President Barry Mills commented that, "Rather than being disruptive to Bowdoin, [he is] convinced that technology and modes of learning emancipated by technology will have the power, potentially, to incrementally, rather than disruptively, improve our educational model."⁸⁹

Additionally, higher education leadership is waking up to the challenge—universities are increasingly searching for leadership, for change, for business skills, and with a bias for action. Leaders recognize that resource allocations cannot just trim across the board, but that they must shed programs, campuses, buildings, etc., to compete in this new paradigm.

Finally, the deep traditions and faith in higher education represent continuing positive forces. In spite of the growing negative press, there is much residual faith in the value of a college degree. Evidence from the U.S. Bureau of Labor Statistics suggests that higher education still pays more than it costs.⁹⁰ Upward mobility through higher education is still true for most Americans. Education has been and will continue to be one of the major contributing factors to our prosperity and freedom. Appropriate to consider here, in the 1940s, newspaper columnist, Sydney J. Harris is credited with stating, "The whole purpose of education is to turn mirrors into windows."

IV. SOME INSIGHTS INTO CORRECTION

I was asked to present challenges and thankfully, not solutions. But, I do want to appeal to your restructuring expertise to help this industry, not just to survive, but to thrive. I will be cautious about predicting the future.

A. A Partial List of Recommendations

University leadership must recognize that the institution cannot change the external forces—it can only resist, ignore, or innovate. Unfortunately, the greatest temptation is to ignore. "When we are no longer able to change a situation . . . we are challenged to change ourselves."⁹¹ To begin with, university leadership should identify forces as benign, positive, negative, or both—and develop strategies to address each of them. For example, some disruptive forces, such as technology, might be used for benefit.

Institutions must strengthen their financial reserves and begin focusing on a solid balance sheet. University leadership should consider unbundling degrees and accepting credits from multiple universities. Additionally, they must watch for opportunities for

⁸⁹ See Kevin Kiley, *Elite Liberal Arts Colleges Question Financial Models*, USATODAY.COM (Oct. 10, 2011, 11:53 AM), <http://usatoday30.usatoday.com/news/education/story/2011-10-10/smith-college-financial-model/50718510/1> (internal quotations omitted).

⁹⁰ See *Education Still Pays*, U.S. BUREAU LABOR STAT. (Sept. 2014), <http://www.bls.gov/careeroutlook/2014/data-on-display/education-still-pays.htm> (demonstrating "workers with more education have lower unemployment and higher earnings than workers with less education").

⁹¹ VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 112 (2006).

needed mergers. However, a merger could just delay the inevitable if other factors are not addressed (i.e., a short-term fix).

To succeed, the university must focus on what to stop doing, and resist the constant pressure to always add new programs and services that are not central to the mission or are not well-funded. Tenure systems must also evolve to allow flexibility—it is good to protect faculty against retaliation for new or different ideas, but not good to protect against economic forces and mission changes. In 1975, 45% of faculty members were tenured or on a tenure track; today it is less than 25%.⁹²

All of these strategies require leaders to differentiate their institution from the pack, be market sensitive, and demonstrate value. Business models must change to maintain the core mission in a new environment. Finally, above all, "higher education must resist the 'first instinct' of such situations, 'to hunker down, hide out, take refuge in the fox hole, and wait for the storm to pass.'"⁹³

Elite (i.e., well-endowed) universities will survive this easily, but a large segment of current universities and colleges may not survive if they are not distinctive, have a purpose and a price that is desirable, and adjust to the storms of culture, while protecting and maintaining the central values of education.

CONCLUSION

Big changes are coming, and old attitudes and business models are set to collapse as new ones rise. Awareness of the impact of the external forces and the internal traditions is growing, while still lagging somewhat behind reality. Severe financial contraction and/or adjustment in the higher education industry is on the way. Yet, some may not consider such an outcome as negative. For example, Nathan Harden expressed the following contrary view in *The End of the University as We Know It*: "But if our goal is educating as many students as possible, as well as possible, as affordably as possible, then the end of the university as we know it is nothing to fear. Indeed, it's something to celebrate."⁹⁴

Let me close with the final advice from my fellow Oklahoman, Will Rogers: "Instead of giving money to found colleges to promote learning, why don't they pass a constitutional amendment prohibiting anybody from learning anything? If it works as good as the Prohibition once did, why, in five years we would have the smartest race of people on earth."

⁹² See John W. Curtis & Saranna Thornton, *Here's the News: The Annual Report on the Economic Status of the Profession, 2012-13*, Am. Ass'n of Univ. Professors 7–8 (Mar.–Apr. 2013), available at <http://www.aaup.org/file/2012-13Economic-Status-Report.pdf>.

⁹³ Scott Jaschik, *Gordon Gee's Call for 'Reinvention' of Higher Ed*, INSIDE HIGHER ED (Feb. 9, 2009, 4:00 AM), <https://www.insidehighered.com/news/2009/02/09/gee> (quoting West Virginia University President, E. Gordon Gee).

⁹⁴ Nathan Harden, *The End of the University as We Know It*, AM. INTEREST (Dec. 11, 2012), <http://www.the-american-interest.com/articles/2012/12/11/the-end-of-the-university-as-we-know-it/>.