Higher Ed "Do Not Resuscitate" Orders

Matthew Bruckner
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Abstract

Concerned about exploitative profiteers opening fly-by-night colleges to defraud students and then seeking respite in bankruptcy court, Congress chose to effectively preclude all institutions of higher education from reorganizing in bankruptcy court. This Article contributes to the literature on higher education bankruptcies by explaining why Congress’ solution could never achieve its fraud-prevention goal. It also compares the bankruptcy treatment of healthcare enterprises to that of higher education enterprises to support this claim.

Introduction

On September 24, 1888, the Saint Paul Normal and Industrial School opened its doors to fewer than a dozen African American students.¹ Over the next 125 years, Saint Paul became a hub for training the region’s educators.² The school grew over the years,

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adding programs and students, but always remaining focused on serving those most in need. Saint Paul, like many other historically black colleges and universities ("HBCUs"), primarily educated poor students from underserved communities, who were often the first in their families to attend college. As a result, Saint Paul "lacked a wealthy donor base or strong endowment" with which to weather financial troubles. Because of its weak financial condition, St. Paul’s accrediting body eventually stripped the college of its accreditation. Approximately one year later, on June 20, 2013, the college closed its doors forever.

Auburn Memorial Hospital ("Auburn") is a private nonprofit medical enterprise that admitted its first patient in 1880. Auburn served patients in various settings, including an in-patient hospital, two outpatient care centers and "a rehabilitation and long-term residential health care facility." It was the sole provider of certain hospital services to 80,000 Cayuga County residents, and cared for thousands of patients a year. By 2007, Auburn had become a regional economic engine. With almost 800 employees, Auburn is one of its county’s largest employers, and it contributed approximately $170 million annually to the local economy.

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3 Patterson, supra note 1 (“As of September 2009 it had an enrollment of 681 students.”).
4 Jealous, supra note 2.
5 Id.
7 Hawkins, supra note 6.
8 Affidavit of John D. Baran In Support of Chapter 11 Petitions and First Day Motions And Pursuant to Local Rule 2015-6 [Docket #33], In re Auburn Memorial Hospital, et al., Case No. 07-31126 (Bankr. N.D.N.Y., filed Apr. 24, 2007) [hereinafter, Baran Affidavit]
9 Id.
10 Id.
12 Samantha House, Auburn Community Hospital’s Strategic Plan Includes $95 Million Worth of Renovations, Construction, THE CITIZEN (Mar 30, 2014).
after losing money for several consecutive years, the hospital’s poor finances nearly caused it to close. Unlike St. Paul, however, Auburn successfully reorganized in bankruptcy by streamlining its operations and finances, including shedding burdensome debt and investing in new technologies and an upgraded physical plant.

In some ways, Auburn and Saint Paul suffered similar fates. Both were valued in their time, prospering as they served their regions. And both enterprises were buffeted by market forces. But Auburn overcame its financial troubles and is stronger than ever, having recently added additional doctors and other staff. By contrast, Saint Paul permanently closed its doors after trying, unsuccessfully, to merge with a financially stronger college.

http://auburnpub.com/news/local/auburn-community-hospital-s-strategic-plan-includes-million-worth-of/article_4a26c8f5-b17b-593e-a43a-6bb13e73d000.html; see also Baran Affidavit, supra note 8 (noting that Auburn had approximately 815 employees at the time of its bankruptcy filing, including 536 full-time employees, 239 part-time employees, and 40 per diem workers).

Rapp, supra note 11; see also Rachel Fields, 10 Successful Hospital Turnarounds, BECKER’S HOSPITAL REV. (Nov. 4, 2010), http://www.beckershospitalreview.com/hospital-management-administration/10-successful-hospital-turnarounds.html (“Over the course of a decade, Auburn Memorial Hospital experienced a prolonged period of financial contraction due to the departure of physicians, patients and service lines. Cash reserves were reduced, and the hospital found itself unable to invest. The hospital declared bankruptcy in April 2007.”)

Amaris Elliott-Engel, Hospital Declares Chapter 11 Bankruptcy, THE CITIZEN (Apr. 25, 2007), http://auburnpub.com/news/local/hospital-declares-chapter-bankruptcy/article_f506f808-10cd-5bf9-aeb3-02b1dd4e2e43.html (“Capital investment goals include modernizing the hospital’s operating rooms, instituting an electronic medical record system, renovating the heating and air conditioning system, renovating the Memorial wing into single-bed patient rooms and moving the hospital’s psychiatric ward into the main campus.”)


Rapp, supra note 11 (noting that post-bankruptcy, Auburn added 25 additional doctors).

A year after closing, Saint Paul signed a lease with the Department of Health and Human Services (“HHS”) “to house around 500 undocumented and unaccompanied children,” but even that plan was scrapped after residents objected. See Nick Dutton & Joe St. George, Plans to Use St. Paul’s College for Immigrant Kids on Hold, CBS 6 (June 16, 2014), http://wtvr.com/2014/06/16/ext-st-pauls-college-campus-may-be-used-to-house-undocumented-unaccompanied-
St. Paul’s inability to overcome its financial woes owes a great deal to its inability to take advantage of the tools available under chapter 11 of the Bankruptcy Code, which contains the bankruptcy reorganization provisions. Although Saint Paul’s supporters worked on plans to have another HBCU, St. Augustine’s University, acquire the college, the deal was abandoned in May 2013. One factor cited in St. Augustine’s decision to abandon the acquisition was Saint Paul’s debt—estimated between four and five million dollars—that St. Augustine’s would had to have assumed if it bought Saint Paul outside of bankruptcy. In bankruptcy, such debts are eligible to be discharged, paving the way for Saint Paul’s acquisition. But, for reasons discussed later in this Article, that option was not available to Saint Paul. As a result, Saint Paul closed, leaving Lawrenceville, Virginia with a vacant 184-acre campus, forcing students to switch colleges, and costing the local community valuable jobs. By contrast, Auburn used chapter 11 to successfully reorganize, keeping its facilities open for patients and preserving jobs and community resources.

As discussed elsewhere, institutions of higher education—including all colleges and universities—are effectively precluded from reorganizing in bankruptcy. Congress has
imposed an involuntary “do not resuscitate” order on colleges and universities, condemning some socially valuable enterprises to an unnecessary death.\textsuperscript{24} This treatment is unusual, as institutions of higher education are one of the only types of enterprises that are not afforded an opportunity to use the tools available in a bankruptcy reorganization.\textsuperscript{25} This is a mistake. Bankruptcy’s broadly available reorganization provisions were designed to increase social welfare by allowing distressed enterprises to return to viability despite their past mistakes.\textsuperscript{26}

in the federal student loan and grant programs. See infra, note 200. Therefore, only a school that is willing to give up access to Title IV funds may reorganize. See, e.g, Mike Morris, Morris Brown Trustee: College Emerging From Bankruptcy, AJC.COM (Mar. 27, 2015, 12:27 PM), http://www.ajc.com/news/news/morris-brown-trustee-college-emerging-from-bankruptcy/nkgbx/ (describing Morris Brown’s “victorious” emergence from chapter 11 with a class of approximately twenty students); Angela Bronner Helm, Morris Brown College “Victoriously Emerges” From Bankruptcy, NEW PITTS. COURIER (Mar. 28, 2015), http://newpittsburghcourieronline.com/2015/03/28/morris-brown-college-victoriously-emerges-from-bankruptcy/; See also Matthew Bruckner, Comment to Enron & ITT Tech, PRAWFSBLAWG (Sept. 9, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/09/enron-itt-tech.html (explaining the “functional prohibition” on bankruptcy reorganization for colleges and universities).

Because access to Title IV funds is critical to most colleges’ survival, virtually no colleges or universities have successfully reorganized in bankruptcy since the law was changed to terminate a college’s Title IV eligibility upon its bankruptcy filing. See, infra, notes 197-198. See also Phyllis Maguire, Allegheny’s Failure Sends Shock Waves Through Academia, ACP-ASIM OBSERVER, Dec. 1998, http://www.acpinternist.org/archives/1998/12/failure.htm (noting that Allegheny University of the Health Sciences was part of the larger reorganization of AHERF, which reorganization was made possible because of a custom-designed carve-out from 20 U.S.C. §1002(a)(4)(A)).


\textsuperscript{25} Cf. 11 U.S.C. § 109 (listing entities that are per se ineligible to be a debtor, including among others, railroads, certain types of insurance companies, and banks). But many entities that are excepted from chapter 11 have recourse to a standalone reorganization provision. For example, bank holding companies are typically reorganized through a FDIC receivership. See 12 U.S.C. § 1819 (2012). See infra, text surrounding notes 130-132 for more information about the tools available in a bankruptcy reorganization.

\textsuperscript{26} Cf. Diane Lourdes Dick, The Chapter 11 Efficiency Fallacy, 2013 B.Y.U. L. REV. 759, 765 (2013) (suggesting that chapter 11 was intended to contribute to an overall increase in social welfare).
To help illustrate why institutions of higher education should be allowed to reorganize, this Article compares the treatment of colleges and universities to that of healthcare enterprises. Although the analogy is not perfect, there are some “striking” parallels between the two industries. Both industries involve an unusual mix of for-profit, private nonprofit and public enterprises. This mix of provider types exists in very few other industries. In addition, the federal government is the dominant source of financing in both industries. Finally, both industries are under tremendous strain, with many hospitals, nursing homes, colleges and universities expected to shut down in coming years. Yet colleges cannot reorganize in bankruptcy and healthcare enterprises (like almost every other type of entity) may.

The rest of this Article proceeds as follows. In the next section, this Article discusses the financial strain experienced by both industries and the reasons for that strain. It also explains the

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27 My previous article, Bankrupting Higher Education, similarly argued that colleges and universities should be allowed to reorganize in bankruptcy. See Bruckner, Bankrupting Higher Education, supra note 20.

28 Roger Roots, The Student Loan Debt Crisis: A Lesson in Unintended Consequences, 29 Sw. U. L. REV. 501, 508-09 (2000) (noting that the federal government’s involvement in both industries “was born under defense measure auspices, expanded under the policies of the Great Society in the 1960s, and saw rapid escalation of expenses as increasing numbers of Americans took advantage of government programs in the latter twentieth century.”)

29 See Jill R. Horowitz & Austin Nichols, What Do Nonprofits Maximize? Nonprofit Hospital Service Provision and Market Ownership Mix, NAT’L BUREAU OF ECON. RESEARCH (July 2007), http://www.nber.org/papers/w13246 (“some industries, such as health and education, support government [public, nonprofit], for-profit, and nonprofit [private, nonprofit] production, while other industries exhibit only one or two types of producers.”).

30 In 2014, the federal government spent over $1 trillion on medical services provided through Medicare and Medicaid. See Samuel Maizel, et al., Corporate Bankruptcy Panel: The Healthcare Industry Post-Affordable Care Act: A Bankruptcy Perspective, 31 EMORY BANKRUPTCY DEV’S. J. 249, 257 (2015). For the median hospital, federal funding accounts for approximately forty-four percent of its revenue. See infra, note 215. Many colleges, particularly for-profit colleges, derive more than ninety percent of their revenue from federal funds. See Michael Stratford, New Fodder for 90/10 Debate, INSIDE HIGHER ED., (Oct. 13, 2014), https://www.insidehighered.com/news/2014/10/13/more-profit-colleges-would-fail-9010-rule-if-veterans-benefits-are-included-analysis (noting that, in 2013, 162 colleges received more than ninety percent of their revenue from federal funds, when certain military benefits are included, and 292 additional colleges received at least eighty-five percent of their revenue from federal sources).

31 See infra, Sections 1(A) and 1(B).
tools available in bankruptcy that were custom-built to resolve these types of financial issues. Finally, it offers Auburn as an example of how a healthcare enterprise used these tools to reorganize in bankruptcy. This example also illustrates how bankruptcy reorganization, if it were available, could also benefit some colleges and universities. Section two provides an overview of the federal government’s involvement in both the higher education and healthcare industries vis-à-vis Title IV of the Higher Education Act of 1965 (the “HEA”) and Medicare.32 Finally, section three addresses the sole reason given for the disparate treatment of higher education and healthcare enterprises in bankruptcy—that it is necessary to prevent fraud and abuse—and provides four arguments why preventing colleges from using chapter 11 fails to achieve this goal. This section also addresses two possible counter-arguments, but argues that, on balance, precluding colleges from reorganizing condemns some colleges to an unnecessary demise and the law should be changed.33

Section One – Financial Strain and Bankruptcy’s Tools

The healthcare and higher education sectors are both experiencing financial strain.34 This section explores the reasons for that strain, which normally arises because of a mismatch between revenue and expenses. Available evidence suggests this mismatch exists in the higher education sector because of the sector’s predominant staffing model, physical plant costs, and lower than expected revenue due to increased competition for students and decreased state support. Available evidence also suggests that the healthcare sector’s problems arise because of mandates to implement expensive new technologies, rising medical supply


33 This Article seeks to avoid making normative claims about which colleges deserve to be saved and limits itself to making the normative argument that all colleges should have the opportunity to reorganize.

costs, and declining reimbursements. Finally, this section highlights several tools available in a bankruptcy reorganization proceeding, explains how Auburn successfully used these tools to execute its financial turn-around, and suggests how institutions of higher education could also use them for the same purposes.

A. Higher Education’s “Looming Crisis”

Many American institutions of higher education are either financially troubled or likely to be so soon. For example, Bain & Co.—a global management consulting firm—found that one-third of all colleges and universities had “significantly weaker” financial

35 Not every healthcare enterprise fits this mold, as there are always idiosyncratic reasons why particular institutions experience financial distress.


statements in 2012 than they had only a few years earlier. In addition, Moody’s Investors Service—the bond credit rating business of Moody’s Corporation—has recently issued a series of reports highlighting trouble in the higher education sector. For example, one recent report noted that revenue growth (predominantly tuition) at the majority of small colleges is not keeping pace with inflation. Most higher education experts agree that the higher education industry is in trouble, and few college and university business officers are confident in the sustainability of their business model in the medium term. With a weakened financial position, some colleges—particularly small, nonprofit colleges—are expected to be forced to close or merge.

As is common with distressed entities, many colleges are likely to encounter financial trouble because their expenses are rising faster than their revenue. This is particularly problematic where colleges have borrowed money anticipating future revenue growth. These two issues—expense growth and the lack of structure—put pressure on the sustainability of the business model for higher education institutions.

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39 Denneen & Dretler, supra note 38; see also Cariello, supra note 37 (noting reports that most colleges have or will encounter financial trouble).

40 Dennis Gephardt, et al., Small College Closures Poised to Increase, Moody’s Inv’r Serv. (Sept. 25, 2015), http://www.chronicle.com/items/biz/pdf/Small%20College%20Closures%20Poised%20to%20Increase%5B6%5D.pdf (defining small, private nonprofit colleges as those with FY2014 operating revenue below $100 million, and, for public colleges, with operating revenue below $200 million); see also Frank H. Wu, The End(s) of Legal Education, 66 J. OF LEGAL ED. 18, 19 (2016) (noting that law school “is generated primarily from students. . . . Income may also come from an endowment, annual giving, a state subsidy, and perhaps auxiliary enterprises. Most law schools are ‘embedded’ within a structure greater than themselves, and they also may receive a subvention from a central administration.”)

41 “According to the latest poll of college and university chief financial officers (CFOs) by Inside Higher Ed and Gallup, fewer than a quarter are strongly confident in the sustainability of their business model for the next five years. Even fewer—only 13 percent of the 438 CFOs who responded— are strongly confident in their model over the next 10 years.” Mark Toner, The Highly Endangered Higher Education Business Model (and How to Fix It), AM. COUNCIL ON EDUC. (June 12, 2015), www.acenet.edu/the-presidency/columns-and-features/Pages/The-Highly-Endangered-Higher-Education-Business-Model.aspx; see also Gold, supra note 36 (discussing the factors that have “essentially mandated what was an unsustainable business plan” for law schools).

42 Gephart, et al., supra note 40.

43 Mason, supra note 38 (describing several high-risk colleges and the reasons why they may default).

44 See Charlie Eaton, et al., DEBT & SOCIETY, BORROWING AGAINST THE FUTURE: THE HIDDEN COSTS OF FINANCING U.S. HIGHER EDUCATION (May 22,
revenue growth—will be addressed serially. First, expense increases have multiple drivers. One of the largest expenses for colleges is personnel.\textsuperscript{45} On average, personnel expenses, including benefits, represents approximately three quarters of a college’s operating budget.\textsuperscript{46} Personnel costs have been on the rise, with “ballooning administrative budgets,” and salaries for full professors rising “12 percent in excess of inflation since 2000.”\textsuperscript{47} Such costs, particularly those related to tenured faculty, are difficult to quickly reduce if enrollment (and corresponding tuition) suddenly decline.\textsuperscript{48} Another substantial expense for colleges is the purchase and maintenance of its physical facilities.\textsuperscript{49} These facilities

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\textsuperscript{46} Robert C. Dickeson, \textit{Frequently Asked Questions About College Costs in A NATIONAL DIALOGUE: THE SECRETARY OF EDUCATION’S COMMISSION ON THE FUTURE OF HIGHER EDUCATION}, http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/dickeson2; see also Gold, supra note 36; Wu, \textit{The End(s) of Legal Education}, supra note 40, at 20 (“law school spending is primarily on payroll”).


\textsuperscript{48} See Gold, supra note 36.

\textsuperscript{49} Id. (describing the two primary expenses of law schools as tenured faculty salaries, and buildings without a clear alternative use). Although unlikely to be a major cost center, numerous politicians have pointed out that colleges are busily installing lazy rivers and climbing walls in a bid to attract students. See, e.g., Kellie Woodhouse, \textit{Lazy Rivers and Student Debt}, INSIDE HIGHER ED. (June 15, 2015), https://www.insidehighered.com/news/2015/06/15/are-lazy-rivers-and-climbing-walls-driving-cost-college (quoting recent speeches by Gov. Chris Christie and Sen. Elizabeth Warren, both knocking colleges for, in Christie’s words, being “‘drunk on cash and embarking on crazy spending binges,’ including the building of amenities like climbing walls.’”). These seemingly frivolous amenities may be a rational response to attract students who are opting out of the traditional college experience. See Scott Jaschik, \textit{Food Fight}, INSIDE HIGHER ED. (July 18, 2016), https://www.insidehighered.com/news/2016/07/18/malcolm-gladwell-sets-debate-over-whether-good-campus-food-prevents-more-aid-low (noting evidence that fancy amenities can drive enrollment growth, at least at schools with a highly competitive admissions process.) But, if these bets do not pay off,
often lack a clear alternate use, stymieing attempts to quickly reduce a college’s overhead expenses by repurposing these buildings.\textsuperscript{50} Finally, accreditation standards and other regulatory burdens, though often aimed at making education better, can create upward pressure on costs.\textsuperscript{51}

Institutions of higher education are not generally considered to be financially nimble institutions.\textsuperscript{52} They are also rarely managed with efficiency as their primary goal.\textsuperscript{53} As a result, even slowly accreting problems can cripple a college. And problems in the higher education sector have been piling up recently. In particular, revenue growth at colleges has been stagnant.\textsuperscript{54}

Revenue growth has been stagnant at many colleges because of, among other things: (i) growing competition for students;\textsuperscript{55} (ii) declining state revenues devoted to higher education;\textsuperscript{56} and (iii) because colleges may be approaching the maximum rates of tuition colleges will have incurred debt without new revenue streams to satisfy those debt burdens.

\textsuperscript{50} Gold, supra note 36.

\textsuperscript{51} Id. (discussing mandates that law schools add more clinical education, which tends to be more expensive than other types of legal education) (citing Brian Z. Tamanaha, Failing Law Schools 173-77 (2012)); see also Dickeson, supra note 46 (noting that colleges bear “significant expenses in administering federal financial aid,” among other things); Bales, supra note 45.

\textsuperscript{52} Gold, supra note 36; cf. Horowitz & Nichols, supra note 29 (discussing inertia in nonprofit hospitals and their general lack of responsiveness to market forces).

\textsuperscript{53} See also Dickeson, supra note 46.

\textsuperscript{54} Gephardt, et al., supra note 40. (noting that revenue growth (predominantly tuition) at most small colleges is not keeping pace with inflation).

\textsuperscript{55} College enrollment hit its peak in 2011, adding to the competition for students. See John W. Schoen, Why Does a College Degree Cost So Much?, CNBC.COM (June 16, 2015), http://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html. Competition is particularly stiff for schools with a particularized mission, such as HBCUs and single gender institutions. See Gephardt, et al., supra note 40 (noting that competitive pressures are particularly acute for small colleges, who are losing market share to larger colleges); see also Bettis, et al., supra note 34, at 49; Butler, supra note 37 (“If colleges were businesses, they would be ripe for hostile takeovers, complete with serious-cost-cutting and painful reorganizations.”).

\textsuperscript{56} Bettis, et al., supra note 34, at 49; see also Butler, supra note 37 (noting states are enduring an “ongoing fiscal disaster”); Webber, supra note 47 (attributing three-quarters in the rise in college tuition at public schools since 2000 to decreasing state support).
that they can charge.\textsuperscript{57} To the extent that colleges have indebted themselves with the expectation that they could easily attract additional fee-paying students, that cuts to state aid for higher education would be reversed, or because they anticipated significant future tuition hikes, these colleges are finding that their revenue projections are inaccurate.\textsuperscript{58}

Many colleges are (or should be) concerned about their financial viability. A college’s financial strength depends on its ability to generate revenue in excess of its costs.\textsuperscript{59} Financially vulnerable colleges tend to lack the ability to generate additional revenue through, for example, increased alumni giving, major gifts, or future tuition increases. For instance, a college may not be able to raise additional tuition revenue if it already has an open enrollment policy\textsuperscript{60} or if it already significantly discounts its tuition to lure new students.\textsuperscript{61} Some colleges are able to rely on their endowment in

\textsuperscript{57} The assumption of “steadily rising tuition and heavily indebted graduates[] is increasingly at odds with the financial capacities of typical households,” who are balking at the rising cost of college. Butler, supra note 37; see also Mason, supra note 38 (noting that colleges may have thought they “had an everlasting ability to raise the tuition rate” and if they budgeted based on that assumption, colleges could be in trouble); Gephardt, et al., supra note 40; Allie Bidwell, The Rise in Tuition Is Slowing, But College Still Costs More, USNEWS.COM (Oct. 24, 2013), http://www.usnews.com/news/articles/2013/10/24/the-rise-in-tuition-is-slowing-but-college-still-costs-more (noting that the pace of tuition increases has slowed recently); Michael Mitchell, et al., Funding Down, Tuition Up, CENTER ON BUDGET AND POLICY PRIORITIES REPORT (Aug. 15, 2016), http://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up (expecting for families to absorb further tuition increases may be difficult when those families have seen their incomes stagnate or decline).

\textsuperscript{58} See Butler, supra note 37 (describing the “financing vision of traditional higher education” as being increasingly implausible); Cariello, supra note 37 (noting enrollment declines of one million students from 2012 to 2015); Gephardt, et al., supra note 40 (arguing that “the smallest colleges have inefficient cost structures with net tuition revenue funding only three-quarters of educational expenses.”).

\textsuperscript{59} See Webber, supra note 47.

\textsuperscript{60} Arthur Levine, Bradford College: Requiem for a College, 156 NEW DIRECTIONS FOR HIGHER EDUC. 19, 19 (2011) (Colleges that aren’t selective “are more susceptible to declines in the college-aged population and economic downturns than others.”).

\textsuperscript{61} When the ratio of colleges to college-aged population gets smaller, it increases competition among schools, which may respond through tuition discounting even though this will exacerbate their operating deficits. See e.g., Dan Filler, Philadelphia Law School Tuition Price War Escalates; Prices Drop, THE FACULTY LOUNGE (Jan. 22, 2014, 3:56 PM), http://www.thefacultylounge.org/2014/01/philadelphia-law-school-tuition-
lean years, but many colleges only have a small\textsuperscript{62} and/or restricted endowment.\textsuperscript{63} Moreover, although many states have reversed some of their earlier cuts to higher education funding last year, some states continue to decrease their support of higher education.\textsuperscript{64}

Colleges may have relatively more success in cutting their expenses than increasing their revenue streams.\textsuperscript{65} For example, colleges have been trending toward staffing more of their classes with less expensive adjunct and non-tenure track faculty in recent years in lieu of more expensive tenure-track faculty.\textsuperscript{66} Colleges have also sought to save money by increasing faculty-to-student ratios, and by reducing student services, course or program offerings and campus amenities.\textsuperscript{67} For example, the University of Wisconsin-Madison laid off or attrited 400 staff and faculty and

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price-war-escalates-prices-drop.html (describing price wars in the Philadelphia law school market); see also Levine, supra note 60, at 20; Frank Wu, Is Higher Education Headed Toward Disaster?, HUFF. POST EDUC. BLOG (May 27, 2016), http://www.huffingtonpost.com/frank-h-wu/is-higher-education-heade_b_10166996.html (including an interesting graphic showing rising tuition discounting over time).
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Colleges have had some success in shifting their revenue streams from public support to student tuition dollars. Tuition as a percentage of total educational revenue has increased substantially over the last 25 years, rising from approximately twenty-three percent in 1989 to nearly fifty percent in 2015. Mitchell, \textit{et al.}, supra note 57 (finding that “[n]early every state has shifted costs to students over the last 25 years”).

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“Low endowment colleges are highly enrollment dependent and have little in the way of a safety net when interest rates, or the stock market or giving declines.” Levine, supra note 60. Without a large endowment, a small drop in enrollment—itself also an issue—“is a serious financial problem. Having thirty fewer is a disaster.” CHANGING COURSE: REINVENTING COLLEGES, AVOIDING CLOSURE, 23 (Alice W. Brown & Sandra L. Ballard, Eds. 2011). See also Gephardt, \textit{et al.}, supra note 40.
\end{quote}

Restricted endowments create “serious operational repercussions” for colleges because restrictions prevent an enterprise from deploying its assets to critical areas, which can “precipitat[e] financial collapse.” Evelyn Brody, \textit{The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future} (Symposium), 29 SETON HALL LEGIS. J. 471, 528-29 (2005). Restricted endowments can also inhibit a college from borrowing money. \textit{Cf id}.

\begin{quote}
Mitchell, \textit{et al.}, supra note 57 (reporting that 12 states continued to cut their support of postsecondary education, with Illinois’ 37.1% cut leading the list).
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It’s also possible that cost-cutting will only save money in the short-term, but will create long-term competitive disadvantages because they reduce the quality and availability of a college’s academic offerings.
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Webber, supra note 47.
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Mitchell, \textit{et al.}, supra note 57
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held faculty salaries constant in response to large state funding cuts.68

As may be evident, at least two types of colleges appear at greater risk than others. Some of the most vulnerable institutions are small, private, nonprofit, liberal-arts colleges founded to counter race- and gender-based discrimination.69 As racial and gender barriers have diminished, minorities and women have been able to enroll in a wider array of colleges. Competition for students has caused enrollment at some HBCUs and women’s colleges to plunge, forcing some to close and others to redefine their roles.70 For example, approximately twenty percent of all HBCUs have closed since 1980.71 And approximately eighty-five percent of women’s colleges have closed, merged, or begun admitting men.72 While not all of these changes are directly tied to financial strain, some surely are.

The other most vulnerable college type appears to be for-profit colleges, several of which have recently endured very public collapses.73 For-profit colleges tend to have an open enrollment policy, and lack a substantial endowment.74 In addition, for-profit colleges have recently received a great deal of unwanted attention from regulators and the general public.75 Scrutiny has followed “mounting evidence of predatory recruiting practices, low graduation rates, outsized student debt burdens, and poor labor

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68 Id.
69 Barbara R. Hatton, Reinventing Black Colleges in Postethnic America: The Case of Knoxville College, 156 NEW DIRECTIONS FOR HIGHER EDUC. 49, 50 (2011); see also Gephardt, et al., supra note 40.
71 As small, private colleges, HBCUs have seemed particularly vulnerable to financial stress. Hatton, supra note 69, at 50.
72 Peak enrollment for women’s colleges was in 1960, and eighty-five percent have redefined themselves since that time. See Kristen A. Renn, WOMEN’S COLLEGES AND UNIVERSITIES IN A GLOBAL CONTEXT 37 (2014).
73 Matthew Bruckner, Comment to Enron & ITT Tech, supra note 23.
74 However, in contrast to nonprofit colleges, for-profit colleges may be able to raise money from investors.
75 Eaton, et al., supra note 44.
market outcomes." In response to these concerns, Congress and the President have imposed obligations on for-profit colleges that they have not generally imposed on nonprofit institutions, such as the gainful employment rules and the 90/10 rule. These additional burdens have increased volatility in the for-profit education sector, causing several to collapse recently.

There are reasons to believe that the financial strain on colleges will worsen. Some have even argued that a

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76 See Eaton, et al., supra note 44, at 17-18. Many of the industry’s problems seem traceable to the reorientation of for-profit colleges “toward a scale-based business model” that seeks to maximize investor returns by increasing the number of tuition-paying students while minimizing marginal costs. See id. at 19–20 (detailing the transformations of Education Management Corporation and Grand Canyon University), and at 21 (noting that gross profit margins among the publicly traded for-profit colleges averaged approximately fifty-five percent, which is significantly higher than the average gross margin for most major industries).


78 The 90/10 rule appears to have been intended to ensure that a school was of sufficient quality that students were willing to have at least some “skin in the game.” If students were willing to pay at least some costs out of pocket, that supposedly indicated that they thought the school was a good value. Thus, the 90/10 rule could serve as a proxy for institutional quality. See Matthew Bruckner, Accessing Title IV $$: 90/10 or 85/15… Does it Matter?, PRAWFSBLAWG (Sept. 22, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/09/9010-8515-does-it-matter.html [hereinafter, Bruckner, Does it Matter?]. However, because the law refers to 10 percent of revenue rather than 10 percent of students, a school can have more than 90 percent aided students—complying with the letter but not the spirit of the law—by charging more than the total federal aid that is available. In other words, every student gets maximum federal aid but must pay 10 percent above that.


80 Butler, supra note 37; see also Gephardt, et al., supra note 40; Mitchell, et al., supra note 57 (families may be unable to pay higher tuition in the future as, since 1973, tuition at public colleges has already “increased by 274 percent even while median household income has grown by only 7 percent.”).
“transformative re-alignment” is coming to higher education.\textsuperscript{81} After all, colleges, like other enterprises, can only raise their prices so high before students refuse to purchase their services. And evidence suggests that colleges may be reaching that threshold.\textsuperscript{82} Similarly, colleges can only trim their expenses so much before they begin to negatively affect the quality of the service they provide.\textsuperscript{83} As a result, a number of commentators have suggested that we should expect continued distress in the higher education sector, with some institutions closing or merging. \textsuperscript{84} Bankruptcy reorganization cannot resuscitate every struggling college, but every college ought to have the opportunity to reorganize.\textsuperscript{85}

\section*{B. Strain in the Healthcare Sector}

Unlike in the higher education context, there has been a substantial amount of empirical research into understanding why healthcare enterprises close.\textsuperscript{86} This literature suggests that financial distress is more likely to hit hospitals that operate in more competitive environments, have a high cost structure, are unappealing to consumers, or lack “organizational resources.”\textsuperscript{87} Unsurprisingly, studies have also found that a hospital’s assets, the

\begin{itemize}
\item \textsuperscript{81} Butler, supra note 37.
\item \textsuperscript{82} See supra text accompanying note 57.
\item \textsuperscript{83} See supra text accompanying note 65.
\item \textsuperscript{84} Gephardt, \textit{et al.}, supra note 40.
\item \textsuperscript{85} Perhaps it cannot even work to resuscitate most colleges. But that’s generally thought to be the case with business bankruptcies as well. Most businesses that file for chapter 11 do not successfully reorganize. See Elizabeth Warren & Jay Lawrence Westbrook, \textit{The Success of Chapter 11: A Challenge to the Critics}, 107 MICH. L. REV. 603 (2009); see also Harvey R. Miller & Shai Y. Waisman, \textit{Is Chapter 11 Bankrupt?}, 47 B.C. L. REV. 129, 143 (2005) (noting that the Bankruptcy Code “was designed to provide ‘bankrupt businesses another opportunity to survive.’”) (citation omitted).
\item \textsuperscript{86} For purposes of brevity, the text focuses on hospital closures. For more information about nursing home facilities, see, e.g., Martin Kitchener, \textit{et al.}, \textit{Smoke Without Fire: Nursing Facility Closures in California, 1997-2001}, 41 INQUIRY 189, 196 (2004) (finding nursing home closure to be correlated with facilities that were: (i) attached to hospitals, (ii) smaller in size, and (iii) less profitable); John R. Bowblis, \textit{Ownership Conversion and Closure in the Nursing Home Industry}, 20 HEALTH ECON. 631 (2011) (collecting citations).
\item \textsuperscript{87} Gloria Bazzoli & Steven Andes, \textit{Consequences of Hospital Financial Distress}, 40 HOSP. & HEALTH SERVS. ADMIN. 472, 484 (1995) (hospitals are more likely to close if they are (i) without substantial “organizational resources (i.e., hospitals that are for-profit, nonteaching, offer few specialized services, and/or have few beds”); (ii) that have low occupancy and/or high staff-to-patient ratios; and (iii) that operate in “[h]arsher environments (e.g., more rivals, poorer payer mix, declining populations).”)
\end{itemize}
quality of its accounts receivable, and its debt to income ratio are all correlated with financial distress.88

In each decade since the 1930s, the U.S. has lost between eleven and twenty percent of its urban hospitals.89 That closure rate may be accelerating, with one study finding that 20.6 percent of acute care hospitals closed in the half decade between 2000 and 2005.90 Hospital closings have followed a “predictable and consistent” pattern with larger and teaching hospitals more likely to remain open, and hospitals in black neighborhoods, or that serve greater numbers of minority and Medicaid patients, being much more likely to close.91 As in higher education, institutions that have historically served the neediest members of our society are at the greatest risk of closing.

And, as with postsecondary educational institutions, healthcare enterprises are being squeezed on both sides of their balance sheets. A 2013 survey of nonprofit hospitals found that their “median expenses grew faster than median revenue, for the second year in a row, while both median operating margins and operating cash flow margins dropped.”92 In other words, these hospitals are losing money.

On the expense side of the ledger, hospitals are spending more caring for each of their patients.93 Although granular data is

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88 See id., at 478 and 473 (finding that hospitals in poor financial condition were more likely to close).
89 See e.g., Alan Sager, Hospital Closings – Causes, Consequences, and Responses, BOSTON OCCUPIER, (Feb. 2012) at 7.
91 Sager, supra note 89.
92 Healthcare Finance Staff, Hospitals Hit a Revenue Crunch, HEALTHCARE FINANCE (Apr. 25, 2014), http://www.healthcarefinancenews.com/news/hospitals-hit-revenue-crunch (“Annual expenses grew at a rate of 4.6 percent last year, half a percent more than revenue, which increased at a median rate of 4.1 percent, while median operating margins hit a three year low of 2.2 percent, and median operating cash flow margins fell to 9.3 percent, from 9.5 percent the previous two years.”).
93 See Vivian Ho, et al., Why are Hospital Prices Rising?, 1 HEALTH MANAGEMENT, POLICY AND INNOVATION 1, 8 (2013) (studying Texas hospitals and finding that “at least two-thirds of the price increase that occurred between 2000 and 2007 can be explained by the higher costs of caring for these patients.”)
hard to come by,\textsuperscript{94} one major driver of the increased cost of patient care appears to be advanced technology,\textsuperscript{95} such as the mandate that healthcare providers become “meaningful users” of electronic medical records.\textsuperscript{96} Another cost-driver are drugs, and medical supplies and devices. In the early-to-mid-2000s, the cost of medical supplies and devices was one of the “leading contributors” to the rising cost of healthcare services.\textsuperscript{97} While the cost of many implantable medical devices has decreased, as hospitals have managed to negotiate better deals with device suppliers, hospitals now find themselves being squeezed by drug suppliers.\textsuperscript{98} For example, the average monthly price for cancer drugs has nearly sextupled from 2000 to 2014.\textsuperscript{99} Another possible driver of increased costs for hospitals are minimum patient-to-staff ratios. For example,


\textsuperscript{95} See Vivian Ho, \textit{et al.}, \textit{supra} note 93, at 4 (describing the rising cost of hospital care as likely reflecting the “greater use of advanced technology in medical care.”); \textit{see also “The Facts About Rising Health Care Costs, AETNA.COM}, \textit{http://www.aetna.com/health-reform-connection/aetnas-vision/facts-about-costs.html} (describing medical technology as a “significant contributor to higher healthcare spending, [and noting that] [t]he implementation of new medical technology accounts for between 38 percent and 65 percent of health care spending increases.”)

\textsuperscript{96} See “Meaningful Use”, CMS.GOV, \textit{https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/}; \textit{see also Walker Ray, M.D. \& Tim Norbeck, Who’s To Blame For Our Rising Healthcare Costs?, FORBES} (Oct. 3, 2013: 7.30PM), \textit{http://www.forbes.com/sites/physiciansfoundation/2013/10/03/whos-to-blame-for-our-rising-healthcare-costs/#60bb43f75671} (noting the “consensus” among healthcare experts “that technology is the most important driver of healthcare spending increases over time.”)

\textsuperscript{97} Jared Lane K. Maeda, \textit{et al}, \textit{What Hospital Inpatient Services Contributed the Most to the 2001 to 2006 Growth in the Cost Per Case?}, 47 \textit{HEALTH SERVS. RESEARCH} 1814, 1814 (2012).

\textsuperscript{98} Michael Sandler, \textit{Device Prices Fall as Hospitals’ Leverage Grows}, \textit{MODERN HEALTHCARE} (Feb. 28, 2015), \textit{http://www.modernhealthcare.com/article/20150228/MAGAZINE/302289969}.

in 2005 California imposed minimum patient-to-nurse ratios for hospitals, which may have increased the cost of care.100

On the revenue side of the ledger, hospitals have been squeezed by changes to Medicare reimbursements, holdbacks from the sequester, the rise of “value-based purchasing” arrangements imposed by the Affordable Care Act (the “ACA”), and cuts to Medicaid because of state budget constraints.101 In addition, many healthcare enterprises are suffering from “declining inpatient volumes” and the corresponding revenue losses because outpatient care is generally less lucrative for providers.102 However, many hospitals and healthcare systems—like many institutions of higher education—have significant amounts of long-term debt that they may have incurred with the expectation of stable (or even increasing) revenue streams.103 As a result, many healthcare enterprises are likely to encounter financial troubles or even “to edge toward bankruptcy.”104

The rate of growth in healthcare spending recently hit its lowest level since 1965, the year Medicare was signed into law.105 This slowed rate of growth is the result of many factors, including the Great Recession, the sequester, and pressure to constrain costs created by the ACA.106 Although Medicare has long reimbursed

100 See John W. Welton, Mandatory Hospital Nurse to Patient Staffing Ratios: Time to Take a Different Approach, 12 ONLINE J. OF ISSUES IN NURSING (2007) (expressing concern that mandatory staffing ratios could resulted in increased costs of care without any offsetting benefits).


102 See Maizel, et al., supra note 30, at 252.

103 Kitchener, supra note 86, at 189 (The U.S. nursing home industry is also vulnerable, with a 2000 study finding that much of it was “heavily in debt, understaffed, and losing money.”)

104 Burns, et al., supra note 14, at 33; see also Maizel, et al., supra note 30, at 252.


many hospitals for less than their cost of care, the sequester has exacerbated hospitals’ revenue woes by mandating a two percent reduction in most Medicare reimbursements.

Moreover, the ACA has also squeezed hospital margins, as it was intended to “permanently reduce the Medicare payments hospitals would otherwise receive.” It did so by imposing an approximately one percent per year reduction in Medicare payments based on anticipated productivity gains, whether or not hospitals actually achieved these such gains. The ACA has also sped the shift toward value-based healthcare provision, whereby healthcare enterprises are financially rewarded for their patients’ positive healthcare outcomes and penalized for their negative ones. This shift is intended to allow the Centers for Medicare and Medicaid Services (“CMS”) to withhold Medicare payments based on the hospitals’ quality of care, as measured by patient health outcomes. In other words, CMS is attempting to shift from a fee-for-service model to a pay-for-performance model.

In addition, hospitals are finding that their revenues are drying up as patients shift from more expensive inpatient care to less expensive outpatient care. In the late 1980s and early 1990s, a massive “shift from inpatient to outpatient medicine”

(noting that sequestration mandated a two percent payment reduction in most Medicare payments for services on or after April 1, 2013).

107 Id. (“The overall hospital Medicare margin declined from –4.5 percent in 2010 to –5.8 percent in 2011.”)


109 Austin B. Frakt, The End of Hospital Cost Shifting and the Quest for Hospital Productivity, 49 HEALTH SERVS. RESEARCH 1, 1 (2013).

110 See id. (noting that this “productivity adjustment” is “larger than historical, annual hospital productivity gains” meaning that hospitals will need to become more productive than ever or find some alternative way to address slower growth in Medicare payments.)

111 The predominant previous model was fee for service, which meant the more services a patient received, the more money the healthcare provider made.

112 This shift is the result of “capitating” payments to healthcare providers, which means to pay them a fixed amount per patient regardless of that person’s actual healthcare utilization. See Maizel, et al., supra note 30, at 253.

113 However, what is most relevant is how revenue compares to projections. To the extent that hospitals are borrowing money based on overly optimistic revenue projections, they are likely to encounter financial distress.
commenced. This is particularly true for certain types of diseases, where there has been a “major shift toward less invasive treatments,” and shorter hospital stays. The shift toward outpatient services appears to be related to, among other things, changes in Medicare payment policies. The changes in Medicare reimbursements, designed to constrain expensive hospital admissions, appears to have resulted in fewer inpatient hospital admissions and greater use of “observation” status. In other words, patients are being monitored in hospital settings but not actually admitted to those hospitals.

Traditionally, reimbursement rates for inpatient care at a hospital have been higher than for similar care provided on an outpatient basis. Not only are reimbursement rates lower for outpatient care, but hospitals also have a smaller margin on such

114 Halpern & Pastores, supra note 90, at 65.
115 Patrice L. Anderson, et al., Understanding Trends in Inpatient Surgical Volume: Vascular Interventions, 1980-2000, 39 J. OF VASCULAR SURGERY 1200 (2004) (discussing “vascular procedures” performed in the United States between 1980 and 2000 and finding a fifty percent per capita increase in the number of procedures but a forty-one percent decrease in the number of long more than seven days) hospital stays and a fifteen percent increase in the number of short (less than 24 hours) ones.)
116 The author of one study suggested “that there may be a substitution of outpatient observation services for inpatient admissions” because of Medicare policies. Zhanlian Feng, Sharp Rise in Medicare Enrollees Being Held in Hospitals for Observation Raises Concerns About Causes and Consequences, 31 HEALTH AFF. 1251 (2012). Other important factors in the drop in inpatient care are: (i) consumer price sensitivity, (ii) government and insurer efforts to control the cost of healthcare, and (iii) technological progress. See Jennifer Zaino, Changing Priorities Shift Hospital Focus to Outpatient Strategies, HEALTHCAREFINANCE.ORG (Aug 25, 2014), http://www.healthcarefinancenews.com/news/changing-priorities-shift-hospital-focus-outpatient-strategies; see also Beth Kutscher & Melanie Evans, The New Normal? Shift to Outpatient Care, Payer Pressure Hit Hospitals, MODERN HEALTHCARE (Aug. 10, 2013), http://www.modernhealthcare.com/article/20130810/MAGAZINE/308109974 (noting the “healthcare system’s success stories, such as treating heart patients effectively without hospitalization.”)
117 See Feng, supra note 116. (finding that observation stays “rose from an average of 2.3 per 1,000 beneficiaries per month in 2007 to 2.9 in 2009” while ‘inpatient admission per 1,000 beneficiaries declined slightly over the same period, from an average 23.9 per 1,000 beneficiaries in 2007 to 22.5 in 2009.”)
118 This shift toward outpatient care appears to have been caused, in part, by a concern about costs. Inpatient hospital care, which accounted for nearly one quarter of all Medicare spending in 2011, has become a primary focus of cost control for CMS. See Christopher W. Baugh & Jeremiah D. Schuur, Observation Care – High Value Care or a Cost-Shifting Loophole?, 369 NEW ENG. J. MED. 302 (2013).
As a result, as outpatient care has grown at the expense of inpatient care, this shift has contributed to the slowed rate of growth in American healthcare spending and to the strain felt by hospitals. The healthcare industry, driven by changes in Medicare reimbursements, has focused on bolstering outpatient services and reducing long-term hospital stays, but healthcare enterprises are not always nimble institutions and these changes have been detrimental to hospitals’ bottom lines.

These changes help explain the troubled state of many enterprises in the healthcare industry. But not all hospitals and healthcare systems are equally strained. Particularly vulnerable are those hospitals that have the “vast majority” of their assets tied up in “endowments and other restricted accounts,” because they are unlikely to have the financial wherewithal to withstand declining revenues. In addition, hospitals that lack consolidation options, such as heavily indebted facilities or rural hospitals, are more likely to require bankruptcy assistance because they are more likely to be left “with expensive, empty space that narrows margins and erodes viability.”


120 Melanie Evans, Hospitals Face Closures as ‘A New Day in Healthcare’ Dawns, MODERN HEALTHCARE (Feb. 21, 2015), http://www.modernhealthcare.com/article/20150221/MAGAZINE/302219988 (“The shift to outpatient care, underway for decades, is accelerating.”); see also MedPAC REPORT 45, tbl. 3-1 (concluding that from 2006 to 2011, reimbursements for outpatient services grew nearly 700 percent faster than reimbursements for inpatients services); see also MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 53, tbl. 3-1 (Mar. 2015), http://www.medpac.gov/docs/default-source/reports/mar2015_entirereport_revised.pdf?sfvrsn=0 (concluding that from 2012-13, reimbursements for outpatient services grew by 5.9 percent but reimbursements for inpatients services declined by 0.9 percent.)

121 See Horowitz & Nichols, supra note 52.


123 Melanie Evans, supra note 120 (“About half the hospitals that closed [in 2014] operated an average of roughly 60 beds.”) Other healthcare providers, such as community-based healthcare providers are also in a tough spot because it’s not clear how they can comply with the ACA’s capital requirements. See Maizel, et al., supra note 30, at 253.
C. Bankruptcy Reorganization’s Advantages

Bankruptcy reorganization was intended to provide enterprises with an opportunity for reinvention.\textsuperscript{124} It is a generally applicable method of preserving value for creditors, jobs for employees and stability for communities. Health care enterprises—like almost every other type of enterprise—can use bankruptcy reorganization for these purposes. Yet institutions of higher education are effectively precluded from reorganizing in bankruptcy.

This section discusses how institutions of higher education would benefit from being permitted to reorganize in bankruptcy, and proceed as follows. It explains how one healthcare enterprise used the tools available in a chapter 11 bankruptcy reorganization to preserve enterprise value, retain jobs and keep healthy the community in which it is located. It then argues that some colleges and universities could use chapter 11 to achieve similar results.

Although many bankruptcy scholars disagree on the appropriate goals of a bankruptcy system,\textsuperscript{125} they generally agree that enterprises should be reorganized when doing so is value-enhancing.\textsuperscript{126} Liquidating enterprises unnecessarily or too quickly is thought to result in “fire sale” pricing.\textsuperscript{127} As a result, the default assumption in the U.S. bankruptcy system is that bankruptcy’s tools (and the possibility of reorganization) should be available to all enterprises. It is unsurprising, therefore, that healthcare organizations may use chapter 11’s tools. But it is surprising that institutions of higher education are effectively precluded from doing so.\textsuperscript{128} Given the strain on colleges, bankruptcy reorganization

\textsuperscript{124}See Bruckner, Bankrupting Higher Education, supra note 20 (suggesting that chapter 11 nurtures the inner phoenix of distressed enterprises, allowing them to be reborn as reorganized entities); see also Miller & Waisman, supra note 85.


\textsuperscript{126}See id., at 238, n.16-17.


\textsuperscript{128}For a good discussion of how colleges are effectively precluded from bankruptcy reorganization, see Norberg, supra note 20. For an argument why this is inappropriate, see Bruckner, Bankrupting Higher Education, supra note 20.
might be put to good use by colleges, if only they were permitted to access chapter 11.129

Chapter 11 helps enterprises preserve value by granting access to a variety of tools generally unavailable outside of bankruptcy. These tools include, among other things: (i) the automatic stay, which causes an immediate halt to nearly all creditor collection activities; 130 (ii) the ability to renegotiate, assume, assign or reject certain pre-bankruptcy contracts, including unexpired leases and collective bargaining agreements; 131 and (iii) deleveraging an entity’s balance sheet through the bankruptcy discharge at the confirmation of a bankruptcy case.132 Bankruptcy courts also have a convening power that encourages creditors to renegotiate various obligations.

Although bankruptcy reorganization is not particularly common in the healthcare industry,133 it may be useful to consider

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129 See generally Bruckner, Virtue, supra note 125, 269-280 (discussing the advantages of bankruptcy reorganization generally).

130 11 U.S.C. § 362 (2012); see also Mark G. Douglas, Not-for-Profit Bankruptcies: Eleemosynary Corporations on the Brink, JONES DAY (Oct./Nov. 2004), http://www.jonesday.com/not-for-profit-bankruptcies-eleemosynary-corporations-on-the-brink-11-05-2004/ (describing the automatic stay as prohibiting “any creditor action against either the debtor or property of its estate to collect on a claim that arose prior to the bankruptcy filing.”); Douglas Baird & Edward Morrison, Serial Entrepreneurs and Small Business Bankruptcies, 105 COLUM. L. REV. 2310, 2355 (2005) (“Thanks to the Bankruptcy Code’s automatic stay and priority rules, a small business can operate in bankruptcy free from creditor collection efforts and is barred from servicing its debt until a plan of reorganization is confirmed.”).

Arguably, public colleges may not need the automatic stay because the so-called “arm of the state doctrine” may provide them with sovereign immunity. Nevertheless, the automatic stay is probably still useful because the mechanism by which it works is well understood, whereas the arm of the state doctrine would likely be litigated. Cf. Steven L. Schwarcz, A Minimalist Approach to State “Bankruptcy,” 59 U.C.L.A. L. REV. 322, 326 (2011) (mentioning that quasi-sovereign entities, such as states, may not need the protection of the automatic stay).


133 It is unlikely that reorganizations would be particularly common in the higher education industry either. The point this Article seeks to make is not that bankruptcy reorganization is the solution to the problems faced by higher education or that all colleges and universities deserve to be saved. Instead, this Article merely means to suggest that institutions of higher education have been unreasonably cut off from a set of widely available legal tools, and that creditors,
how at least one healthcare enterprise has successfully used chapter 11. Exploring how a healthcare enterprise has used chapter 11 to reorganize can serve to illustrate the advantages (and limitations) of chapter 11 for colleges.

On April 24, 2007, Auburn Memorial Hospital, located in upstate New York, filed for bankruptcy under chapter 11 in an ultimately successful attempt to restructure its finances and operations. In the years leading up to its bankruptcy filing, the hospital experienced serious financial problems, ultimately racking up more than $20 million in unsecured debt, including $13.8 million owed to its employees’ pension system. Auburn’s financial struggles precipitated a downward spiral of underinvestment in its facilities, decreased patient volumes, and further underinvestment. Auburn’s financial difficulties had caused it not to invest in upgrading its physical plant—such as operating and patient rooms—or in new technologies—such as imaging scanners and electronic medical record systems. Without upgraded facilities and new technologies, Auburn could not attract patients, leading to lower revenues and exacerbating its inability to invest in the hospital. Eventually, the state attempted to

students, communities, employees and the colleges themselves are worse off for it.

134 Bazzoli & Andes, supra note 87, at 480 (finding that only 1.2 percent of hospitals in their study filed for bankruptcy protection between 1985 and 1990, but it’s unclear whether these hospitals liquidated or reorganized).

135 This article builds on a previous article that made the case for allowing colleges to reorganize in bankruptcy. See Bruckner, Bankrupting Higher Education, supra note 20. As a result, this article focuses on the comparison to the healthcare industry instead of restating the arguments set forth in that article.

136 See In re Auburn Memorial Hospital, et al., Case No. 07-31126 (Bankr. N.D.N.Y., filed Apr. 24, 2007); see also David Shaw, Auburn Memorial Hospital Files for Bankruptcy, SYRACUSE.COM (Apr. 24, 2007, 1:03PM), http://www.syracuse.com/news/index.ssf/2007/04/auburn_memorial_hospital_files.html; see also Rapp, supra note 11 (writing that just three years after filing bankruptcy, Auburn recorded its most profitable year ever—$4.2 million on revenues of approximately $90.2 million).

137 See David Shaw, supra note 136; see also Baran Affidavit, supra note 8; Rapp, supra note 11 (writing that Auburn was “strapped with $25 million in unsecured debt that it couldn’t repay.”).

138 Rapp, supra note 11; see also Fields, supra note 13 (‘Over the course of a decade, Auburn Memorial Hospital experienced a prolonged period of financial contraction due to the departure of physicians, patients and service lines. Cash reserves were reduced, and the hospital found itself unable to invest. The hospital declared bankruptcy in April 2007.’)

139 Elliott-Engel, supra note 14.
shutter Auburn’s maternity ward and Auburn faced questions from its accrediting body. A bankruptcy filing became Auburn’s best option to turn itself around.

Auburn successfully used the tools available in a chapter 11 reorganization to execute a quick and dramatic turn-around, putting it at the “top of the pile for success stories.” In that time, Auburn successfully increased the number of patients it treated, completed an important series of renovations, hired new staff, increased hospital revenue, and recorded its most profitable year ever. It did so by using chapter 11 to (i) reduce operating expenses, (ii) eliminate unpayable pension obligations, (iii) restructure or discharge other unsecured debt, and (iv) restructure operations to focus on financial viability and providing appropriate care for the community. Auburn streamlined operations, including reassigning personnel, and improving its operational efficiency for core tasks. Auburn also targeted its investments in much-needed areas, such as its operating rooms and creating an electronic medical records system. The result were “dramatic financial and clinical turnarounds.”

This dramatic turnaround was only possible because of chapter 11, which allowed Auburn to prevent its creditors from asserting liens against (and possibly foreclosing on its physical plant), and to discharge approximately eighty-six percent of its unsecured debt. In turn, the bankruptcy discharge—and Auburn’s ability to restructure its operations—may have encouraged the state and local foundations to contribute toward necessary hospital renovations. In any case, it allowed the

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140 Rapp, supra note 11; see also Fields, supra note 13.
141 Rapp, supra note 11 (quoting Syracuse University professor of hospital administration and finances, Tom Dennison).
142 Id.
143 Baran Affidavit, supra note 8.
144 Fields, supra note 13.
145 Id.; see also Elliott-Engel, supra note 14 (“Capital investment goals include modernizing the hospital’s operating rooms, instituting an electronic medical record system, renovating the heating and air conditioning system, renovating the Memorial wing into single-bed patient rooms and moving the hospital’s psychiatric ward into the main campus.”)
146 Fields, supra note 13.
147 Rapp, supra note 11.
148 Id. (Auburn received approximately $4.5 million in state support and $2.2 million from local foundations to fund a substantial portion of its $9 million renovation.)
hospital to spend millions of dollars that would have otherwise
gone to repay legacy debts on necessary capital improvements.\textsuperscript{149}
Restructuring also left Auburn better positioned for the future by
allowing it to shift its focus from acute care and toward more
modern medical needs, such as “ambulatory, post-acute care and
community health operations.”\textsuperscript{150}

Chapter 11 allowed Auburn to remain a vibrant part of
Cayuga County and to invest in its future. Post-bankruptcy,
Auburn continued to employ hundreds of workers and contribute
approximately $170 million annually to the local economy.\textsuperscript{151} In
short, Auburn ran out of cash, and, outside of bankruptcy, could
not fix its balance sheet. Comparably, many institutions of higher
education face similar issues and would benefit from using chapter
11 to reorganize.

Chapter 11’s automatic stay can give an entity trying to turn
itself around enough time to work out the kinks.\textsuperscript{152} For example,
Auburn had failed to make more than thirteen million dollars in
contributions to the hospital’s four employee pension funds.\textsuperscript{153} As a
result, the Pension Benefit Guaranty Corporation “filed federal tax
liens against the Hospital’s real property,” forcing the hospital to
freeze two of its pension plans and to attempt to freeze the
others.\textsuperscript{154} Auburn had also apparently defaulted on certain
obligations under “its Trust Indenture with U.S. Bank.”\textsuperscript{155} As a
result, the Indenture Trustee may have been able to declare an
event of default, triggering accelerated payment obligations. For a
cash-strapped organization that is already struggling to stay
current on its obligations, accelerated repayment obligations are
often fatal. But the automatic stay allows an entity such as Auburn
to return its contracts to their pre-default position, thus
decelerating its payment obligations.

Multiple consecutive unprofitable years had also left
Auburn with so much debt that it found itself with little available

\textsuperscript{149} Elliott-Engel, \textit{supra} note 14 (noting that one of Auburn’s primary goals
in bankruptcy was to reduce its debt service, “freeing up its cash flow for capital
investment.”); \textit{see also} Rapp, \textit{supra} note 11.
\textsuperscript{150} House, \textit{supra} note 12.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} 11 U.S.C. § 362.
\textsuperscript{153} Baran Affidavit, \textit{supra} note 8.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
credit and “substantial cash flow issues.” The automatic stay can also help address these sorts of problems, by giving entities the breathing room needed to focus on restructuring their obligations instead of lurching from crisis to crisis. The automatic stay would likely be as useful to college and universities as it was for Auburn. For example, Paine College, a private nonprofit HBCU in Augusta Georgia has been wrestling with its finances recently. Paine could benefit from the breathing room offered by the automatic stay in order to focus on restructuring its operations. Moreover, if Paine were to default on any of its obligations, the automatic stay would prevent its creditors from immediately seizing their collateral, causing Paine to shut down to the potential detriment of other creditors, students, faculty, staff and the local community.

Auburn needed to streamline its operations in addition to its finances, including redeploying personnel. Most of Auburn’s employees were unionized and union work rules can often make it difficult and costly to make substantial operational changes. However, the Bankruptcy Code allows an entity to reject certain contracts, including collective bargaining agreements. If an enterprise is party to an unfavorable contract, it can reject that contract and redeploy its assets in pursuit of more profitable endeavors. And even where debtors intend to fully perform under their contracts, debtors can use the threat of rejection to negotiate a better deal going forward. Auburn’s management appeared to have taken a firm negotiating position during some of

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156 Id.
157 See Taylor Bingham, Paine College to Spend Another Year on Probation, WRDW.COM (June 11, 2015), http://www.wrdw.com/home/headlines/Commission-expected-to-rule-on-Paine-Colleges-accreditation-today-306966081.html (describing Paine as being on a probationary accreditation status because of issues related to its financial resources and financial stability.)
158 Baran Affidavit, supra note 8.
159 i.e. to refuse to perform.
161 Outside of bankruptcy, failing to perform one’s contractual obligations can be more expensive than performing. By contrast, a bankrupt entity usually only pays its creditors a small fraction of what they expected to receive at the time of contracting.
its streamlining, presumably because they knew the Code empowered them to do so.\footnote{Rapp, supra note 11 (noting that management “was unbending in negotiations” with certain emergency room employees, and offered terms that employees thought were “unfair and ‘almost laughable.’”)}

Although it turned out not to be necessary for Auburn, Auburn could have also used chapter 11 to void its collective bargaining agreements.\footnote{Elliott-Engel, supra note 14.} Like Auburn, colleges are likely to have hundreds if not thousands, of contracts that they would prefer not to perform under, both collective bargaining agreements and otherwise. Colleges regularly contract with collective bargaining units. For example, the University of Massachusetts at Amherst has contracts with eleven bargaining units, setting forth employees’ hours, wages, sick time, and other employment conditions.\footnote{Bargaining Unit Employees, Univ. of Mass. Amherst, https://www.umass.edu/humres/bargaining-unit-employees (last visited Sept. 20, 2016).} If the University of Massachusetts at Amherst needed to reorganize its operations, this tool would likely help it renegotiate those agreements, allowing the college to turn around its financial position.

As noted above, Auburn also used chapter 11 to restructure both its operations and its finances. In late 2006, the so-called Berger Commission issued a report on the state of New York’s hospitals and healthcare system.\footnote{Baran Affidavit, supra note 8.} The Berger Commission recommended that Auburn dramatically reduce the number of its hospital beds and entirely discontinue providing ob/gyn services.\footnote{Id.} Auburn used the chapter 11 process to reduce its acute care hospital bed count from 191 to 99 but did not close its maternity ward.\footnote{Rapp, supra note 11.} Instead, it invested more than two million dollars in renovating its maternity ward.\footnote{Id.} In addition, it modernized its operating and patient rooms, and renovated its HVAC systems.\footnote{Elliott-Engel, supra note 14.} Finally, Auburn used chapter 11 to discharge a lot of debt. Auburn paid only fourteen cents to its unsecured

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\footnote{Rapp, supra note 11 (noting that management “was unbending in negotiations” with certain emergency room employees, and offered terms that employees thought were “unfair and ‘almost laughable.’”)}
\footnote{Elliott-Engel, supra note 14.}
\footnote{Bargaining Unit Employees, Univ. of Mass. Amherst, https://www.umass.edu/humres/bargaining-unit-employees (last visited Sept. 20, 2016).}
\footnote{Baran Affidavit, supra note 8.}
\footnote{Id.}
\footnote{Rapp, supra note 11.}
\footnote{Id.}
\footnote{Elliott-Engel, supra note 14.}
\end{flushleft}
creditors for every dollar it owed, making possible many of the aforementioned renovations.\textsuperscript{170}

Colleges are also likely to need to restructure their operations and finances in response to changes in student demand. Bankruptcy tools like the ones Auburn used, including the automatic stay and the discharge provisions in section 1129, would likely be very useful. For example, Education Management Corporation,\textsuperscript{171} a for-profit education company, recently sought to use the bankruptcy system to restructure approximately $1.5 billion of debt.\textsuperscript{172} Although “EDMC was effectively precluded from filing for bankruptcy because doing so would have rendered EDMC ineligible for federal funding under Title IV of the Higher Education Act of 1965, depriving it of 80% of its revenue,” it clearly thought it would benefit from bankruptcy reorganization.\textsuperscript{173} Similarly, if St. Paul had been able to discharge a substantial portion of its debt, that would likely have paved the way for St. Augustine’s to acquire it.\textsuperscript{174}

It is also important to note what chapter 11 did not do for Auburn and would not be able to do for colleges. Chapter 11 could not increase Auburn’s reimbursements from Medicare. Nor could it force patients to choose Auburn facilities. Similarly, chapter 11 cannot fix every problem faced by colleges. It cannot force governments to increase their support for higher education or force students to choose certain colleges. For example, Sweet Briar College’s board of trustees were recently ousted after they sought to shut down the college amidst enrollment problems, including a “rising discount rate (the percentage covered by institutional aid or discounts off sticker price that families pay), a declining yield (the percentage of admitted applicants who enroll) and the difficulty of

\textsuperscript{170} Rapp, \textit{supra} note 11 (“Creditors received an average of 14 cents for every dollar they were owed, and the hospital replaced its employees’ pension fund with a government-guaranteed retirement program.”)

\textsuperscript{171} And other affiliated entities.


\textsuperscript{173} Id.

\textsuperscript{174} See \textit{supra} text surrounding notes 17-20.
recruiting applicants to a rural women’s liberal arts college.”175 While the school remains open after alumnae “agreed to raise $12.5 million” and the Virginia attorney general agreed to allow the college to use up to $16 million in previously restricted endowment funds, bankruptcy would not be able to resolve the college’s enrollment problems.176

In addition to its advantages for bankrupt entities, chapter 11 also has many positive externalities. Bankruptcy can help preserve jobs when an enterprise continues operating. 177 Additionally, by keeping an enterprise’s doors open, bankruptcy reorganization can prevent pension loses,178 and avoid knock-on effects in bond markets.179 In the healthcare context, avoiding the sudden and unplanned closing of facilities can save lives because “[w]hen hospitals die, people die.” 180 Although lives are not literally at stake when colleges close, the economic lives of students, faculty, staff and communities are often at stake.

Bankruptcy reorganization under chapter 11 of the US Bankruptcy Code was designed to provide the aforementioned benefits to any entity that seeks to reorganize under its auspices. All the benefits reaped by Auburn could also be reaped by institutions of higher education, if only they were encouraged to file instead of effectively precluded from doing so. To understand why colleges would also benefit from bankruptcy reorganization, it is important to understand the two industries. Thus, section two provides an overview of the higher education and health care industries, emphasizing the similarities between these two industries to highlight why their disparate treatment in bankruptcy is inappropriate, an argument largely addressed in section three.181


176 *Id.*

177 Bruckner, *Virtue*, supra note 125, at 269.


179 *Id.*

180 See Maizel, *et al.*, supra note 30, at 257.

181 Hospitals are an excellent organizational type against which to compare institutions of higher education because of the “striking” parallels between them. *See supra* text surrounding notes 28-31.
Section Two—Federal Involvement in Higher Education and Healthcare

The federal government is as important to the US healthcare and higher education industries as are the doctors and patients, professors and students. Each year, the federal government spends hundreds of billions of dollars each year to increase citizens’ access to both higher education and healthcare. This section provides an overview of both the federal student loan and grant programs (i.e. Title IV) and the Medicare program to help explain the federal government’s role in both industries and why it has chosen to play such a role.

A. Title IV Program Overview

Title IV of the HEA established the modern foundation for federal student aid in higher education. Although the federal government had long supported higher education, “Title IV represented the first generally available aid program” for college students. One of the HEA’s primary goals is to increase student

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182 Federal involvement in higher education has been traced to 1862 with the passage of the first Morrill Acts. See Patricia Somers & James M. Hollis, Student Loan Discharge Through Bankruptcy, 4 AM. BANKR. INST. L. REV. 457, 457 (1996).


access to post-secondary education. Prior to the HEA’s enactment, only a fraction of the population was able to attend college, a fraction that was primarily limited by race, income and gender. Without federal subsidies, “it seems highly unlikely that the nation’s poor would have been able to capitalize on higher education opportunities.” The HEA is generally thought to have succeeded in “making mass American higher education possible” by mitigating the income barrier’s effect on college attendance.

There are numerous reasons why the federal government has sought to increase access to and enrollment in post-secondary education. Increasing college access is thought to increase the U.S.’s international competitiveness, to correct market failures, and to eliminate poverty. Increased college enrollment is thought to benefit American society “by creating a more qualified, higher-paid workforce, ultimately improving the quality of life.” Individuals with a college degree earn greater than a million dollars more in

185 The HEA’s goal was to make higher education more accessible and it has achieved its goal, with college enrollment increasing “from 10.5 million students in 1980 to 17.6 million students in 2009.” Kathleen Negri, Comment, Mortgaging the American Dream: The Misplaced Role of Accreditation in the Federal Student Loan System, 82 FORD. L. REV. 1905, 1905 and 1907 (2014) (through the HEA, President Johnson hoped “to reduce financial barriers and provide equal access to higher education.”); see also Somers & Hollis, supra note 182, at 458.

186 Long, supra note 183, at 6 (in 1960, most Americans failed to complete high school, let alone college, with financial concerns being a “likely cause”).

187 See id., at 19.

188 Id., at 20 (“Enrollment rates have also clearly increased,” going from 33.7 percent to 46.1 percent of 18- to 24-year-old high-school completers between 1967 and 2007. Put differently, just over half of students enrolled in college immediately following high school in 1975, but more than two-thirds did in 2010).

189 See id., at *11; see also Jonathan D. Glater, The Unsupportable Cost of Variable Pricing of Student Loans, 70 WASH. & LEE L. REV. 2137 (2013) (describing “lawmakers’ determination to promote and protect access to education generally, as an end in itself, on the basis of a broad conception of what is in the national interest.” But also to enhance and defend our nation’s defense and economic preeminence.); Michael Simkovic, Risk-Based Student Loans, 70 WASH. & LEE L. REV. 527, 530 (2013) (describing the goals of funding higher education as increasing the supply of skilled labor promoting economic and technological development, and promoting social mobility.); Reid K. Weisbord, Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization, 10 BERKELEY BUS. L.J. 305, 348 n.185 (2013) (suggesting that the public support for colleges is justified because “society is collectively better off when . . . young people are educated”).

190 Negri, supra note 185, at 1913.
their lifetime and have a lower unemployment rate than to [sic]
those with [only] a high school diploma.”

Federal efforts to promote college access through Title IV have not been cheap. The federal government indirectly provides an enormous amount of money to institutions of higher education, including more than $76 billion in 2013, representing a slight majority of all student aid. Federal student aid takes a variety of forms, including well-known programs such as Pell Grants, and Perkins, Grad (PLUS), and Stafford Loans. These latter two loan programs—Stafford and PLUS loans—currently constitute the two largest sources of student aid. Over time, the government has shifted from primarily grant-based aid to primarily loan-based aid. Students have responded by taking out more loans and total student loan indebtedness now tops one trillion dollars.

Title IV’s programs are critically important for institutions of higher education as well as for the students that attend them. Students use Title IV grants and loans to defray the cost of

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191 Gleeson, supra note 183, at 1.
193 Negri, supra note 185, at 1910.
194 Total student loan indebtedness topped 1 trillion dollars in 2012. See Mark Kantrowitz, Why the Student Loan Crisis is Even Worse Than People Think, TIME (Jan. 11, 2016), http://time.com/money/4168510/why-student-loan-crisis-is-worse-than-people-think; see also Gleeson, supra note 183, at 2 (The rise in the number of student loan borrowers and the amount they borrow “is staggering.”); Somers & Hollis, supra note 182, at 459; Roots, supra note 28, at 504.
attending an institution of their choosing.195 Thus, although students are the direct beneficiaries of Title IV programs, institutions of higher education are indirectly supported by Title IV.196 For some institutions, nearly all of their revenue comes from this federal aid.197

Without the ability to accept Title IV dollars, colleges generally cannot survive. For example, Corinthian Colleges shut down its operation in 2015—which formerly consisted of more than 10,000 employees, “operating more than 100 campuses attended by 81,000 students”—because it could not withstand even “a 21-day hold on the company’s access to federal student loan funding.”198 Similarly, ITT Educational Services, Inc. (“ITT”) “abruptly announced that it was immediately closing all of its schools” after the U.S. Department of Education (the “ED”) banned any ITT campus “from enrolling new students that require federal financial aid.”199 In short, terminating a college’s access to Title IV funds is a death sentence for most colleges. As a result, Congress’ decision to terminate a college’s access to Title IV if that colleges files bankruptcy effectively kills most colleges even before they can be resuscitated in a bankruptcy reorganization.200

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195 McGuire, supra note 183, at 125; see also PEW CHARITABLE TRUSTS, supra note 192 (calling the federal government “the nation’s largest student lender [because] it issued $103 billion in loans in 2013.”)

196 McGuire, supra note 183, at 125; see also Long, supra note 183, at *13 (the federal approach to financing higher education has, generally, been to lend directly to individual students); see also PEW CHARITABLE TRUSTS, supra note 192 (noting that the federal government also provided $31 billion in tax credits, deductions, and exclusions in 2013, which “are similar to direct government spending.”).

197 Presumably, it would constitute all of the revenue of some colleges if the government did not set a maximum limit of 90 percent federal funding. See McGuire, supra note 183, at 121; see also Stratford, supra note 30; see also Bruckner, Does it Matter?, supra note 78.


200 Id. 20 U.S.C. § 1002(a)(4)(a) excludes an institution from the definition of “institution of higher education”—and therefore from Title IV eligibility—if that institution “has filed for bankruptcy.” Involuntary bankruptcies also appear to terminate an institution of higher education’s Title IV eligibility. 34 C.F.R. § 600.7(a)(2)(B) (providing that an educational institution does not qualify to
B. The Medicare Program

On July 30, 1965 President Lyndon Johnson signed the Medicare program into law. Although the federal government’s involvement with the American healthcare system predates this program, Medicare’s passage began a massive expansion of that involvement. Medicare is a federal health insurance program for the elderly that reimburses qualified healthcare enterprises for the care they provide to Medicare program beneficiaries.

HHS administers the Medicare program through CMS.

One of Medicare’s primary goals is to increase access to healthcare for the elderly. Prior to Medicare’s enactment, the elderly were particularly unlikely to have insurance coverage for the “potentially catastrophic burdens of hospital and doctors’ bills.” For some, the elderly population’s lack of health care

receive Title IV dollars if the institution “has entered against it an order for relief in bankruptcy,” which would include involuntary bankruptcies).

What follows relates directly to hospitals, but, with some limited exceptions, for purposes of this Article’s thesis, it relates to most healthcare enterprises.

See supra, note 32.


American healthcare “was already a massive enterprise” in the early 1960s, with hospital employment exceeding that of the steel, automobile and railroad industries. See id., at 11 (citing H.M. Somers & A.R. Somers, Doctors, Patients, and Health Insurance. The Organization and Financing of Medical Care, Brookings Institution (1961)).


Medicare has also been described as bridging the gap between the Johnson’s vision of a Great Society and the reality of the American 1960s by using Medicare to transform the “elderly into paying consumers of hospital services.” Stevens, supra note 203, at 14.

Id., at 14; see also Louis Jacobson, Were the Early 1960s a Golden Age for Health Care?, POLITIFACT.COM (Jan. 20, 2012), http://www.politifact.com/truth-o-meter/article/2012/jan/20/was-early-1960s-golden-age-health-care/ (citing the 1963 “Survey of the Aged” conducted by the Social Security Administration that found that “eight out of 10 elderly individuals ‘assumed responsibility for their own costs without help from government sources or private voluntary agencies.’”).
 access was viewed as a market failure, justifying government intervention.\(^{209}\) In this regard, Medicare has been a success. In 2015, Medicare served approximately 55 million beneficiaries nationwide, and provided access to healthcare coverage for tens of millions more, “many of who would otherwise have lacked access to any kind of health care.”\(^{210}\) Just as the federal government finances higher education to improve access to education, the federal government uses Medicare\(^{211}\) to improve access to healthcare. In both cases, the government intervenes to provide funds that students and patients otherwise lack to facilitate their access to education and healthcare services.

Medicare has successfully expanded access to healthcare for the elderly,\(^{212}\) but it has done so at a tremendous cost. The federal government is now the “primary purchaser” of healthcare in the United States.\(^{213}\) In 2014, the federal government spent approximately $618.7 billion for Medicare coverage.\(^{214}\) Hospitals are heavily dependent on Medicare revenue, with one survey finding that the median hospital received nearly forty-five percent of its patient revenue from that source.\(^{215}\)

\(^{209}\) Stevens, supra note 203, at 14 (describing Medicare as a solution to the market’s failure to provide affordable medical care to the elderly).


\(^{211}\) And Medicaid.

\(^{212}\) Jacobson, supra note 208 (Prior to Medicare and Medicaid’s enactment, “‘[m]any people in the U.S. [] had very limited access to medical care’”).

\(^{213}\) Roots, supra note 28, at 522.


\(^{215}\) Healthcare Finance Staff, supra note 92 (surveying 203 nonprofit hospitals and finding that “a median of 44.3 percent came from Medicare (up from 44.1 percent in 2012), 12.9 percent came from Medicaid, (two-tenths of a percent less than the year before), 32.1 percent came from commercial payers (down from 33.4 percent) and 7.6 percent came from self-pay, the same as in 2012.”); see also Hospital Finance: 101, THE CENTER FOR HEALTH AFF. (Mar. 2013)
Section Three – Why Colleges Should Not Be Effectively Precluded From Reorganizing

This section has three purposes. First, it addresses Congress’ sole justification for precluding colleges from using a widely available legal provision designed to resuscitate financially troubled enterprises, which is that it will deter or prevent fraud and abuse. Second, it offers four arguments why precluding colleges from bankruptcy reorganization is not (and never was) an appropriate solution to this problem, including: (i) that bankruptcy reorganization is more likely to prevent fraud than non-bankruptcy alternatives; (ii) that precluding voluntary bankruptcy reorganizations but not comparable state and federal alternatives is not sensible; (iii) that precluding voluntary bankruptcy reorganizations may exacerbate fraud by distracting regulators from developing more focused solutions; and (iv) given the relative amounts of taxpayer dollars at risk, it is irrational to allow healthcare but not higher education enterprises to reorganize. Finally, this section discusses two counter-arguments. First, fraud may be more likely to occur in the higher education sector than the healthcare sector. And, second, healthcare enterprises serve more vulnerable clients than colleges, making reorganization more

(claiming that, in 2010, 39.1 percent of hospital costs were paid by Medicare and 16.1 percent were paid by Medicaid).

216 See Abuses in Fed. Student Aid Programs: Hearings Before the Permanent Subcommittee on Investigations of the Comm. on Gov. Aff., U.S. Senate, 101st Cong. 90 (Sept. 12-13, Oct. 5, 1990), at *22 (Statement of Kim Wherry, Counsel, Permanent Subcommittee on Investigations) (discussing her view that the bankruptcy system is abused by colleges); see also Abuses in Fed. Student Aid Programs: Hearings Before the Permanent Subcommittee on Investigations of the Comm. on Gov. Aff., U.S. Senate, 101st Cong. 90 (Sept. 12-13, Oct. 5, 1990), at *22 (Statement of James B. Thomas, Jr., Inspector General, U.S. Dept. of Ed.) (describing the inspector general’s investigation into “fraud, waste, and abuse” in federal student aid programs); cf. Letter from the Office of the Inspector General, 140 Cong. Rec. 5327,5328 (1994) (describing “abuse” as when schools set tuition at prices that bear little or no relation to the quality of the program, future employment prospects or likely future salaries.); Quality in Higher Education: Hearing Before the Subcommittee on Education, Arts, and the Humanities of the Comm. on Labor and Human Resources, U.S. Senate, 99th Cong. (Jan. 28, 1986), at 16-17 (Statement of William J. Bennett) (“Institutions are defrauding students, and in many cases they are ripping off the American public, when they admit individuals who are manifestly unprepared for the work that will be required of them, or when they graduate students who cannot satisfy minimum standards in their field of study.”)
important for the former. This section concludes that, on balance, the arguments for allowing colleges to reorganize are more persuasive than the arguments against. Therefore, colleges should not be effectively precluded from reorganizing.

A. The Congressional Justification for Treating Healthcare and Higher Education Enterprises Dissimilarly

Congress has only offered one reason for denying economically strangling colleges and universities access to bankruptcy reorganization, which is the prevalence of fraud and abuse in the higher education sector. The view that the higher education sector is rife with fraud and abuse is best summarized by a 1992 Senate Report on higher education. The Senate Report expressed concerns about fly-by-night colleges fleecing students and avoiding their obligations by filing for bankruptcy protection. The Senate Report also suggested that colleges “that

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217 Although the legislative history accompanying the 1992 Amendments to the Higher Education Act “contains no specific explanation of the anti-bankruptcy provision,” the concern repeatedly expressed in this history is that Title IV’s programs are “[plagued by fraud and abuse at every level . . . lack[] meaningful oversight and management controls, [and, as a result] has become inefficient, ineffective, and far too costly.” See S. Rep. 102-5; Norberg, supra note 20, at 390 (citing Senate Report); Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448. Cf. Ensuring Quality Education From Proprietary Institutions: Hearing Before the Subcomm. On Human Resources and Intergovernmental Relations, at *1 (statement of Cornelia M. Blanchette, Associate Director, Education and Employment Issues, Health, Education, and Human Services Division, General Accounting Office) (expressing concern about the integrity of Title IV programs because of investigations by the Department’s Office of Inspector General, Congress, and the GAO that all found extensive fraud and abuse in those programs.) [hereinafter, Blanchette Testimony].


219 See id.; see also Aaron Lacey, supra note 38 (Congress’ anti-reorganization amendments passed in the early 1990s were explicitly intended to, among other things, “eliminate fly-by-night institutions from the [Title IV] programs.”); 2 William L. Norton III & William L. Norton, Jr., NORTON BANKRUPTCY LAW & PRACTICE § 43:30 (3d ed. 2011) (noting that all three of the higher education-related exceptions to the automatic stay were added by the Omnibus Budget Reconciliation Act of 1990); Rebecca R. Skinner, Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and Its Current Status, CONGRESSIONAL RES. SERV. (Jan. 19, 2005), http://www.policyarchive.org/handle/10207/1904 (“Supporters of the 85/15 rule argued that the rule was necessary to stem fraudulent and abusive practices
cannot make loan refund payments to former students may continue to admit new students who in turn incur student loan obligations [even though that] * * * school may well close or otherwise cut back its educational program.”

By precluding colleges from reorganizing in bankruptcy, Congress apparently thought it could prevent “unscrupulous profiteers” from using “their fraudulent schools” to take advantage of “hundreds of thousands of young people, many of whom come from backgrounds with already limited opportunities” and who would be left with “neither the training nor skills they hoped to acquire” but would instead be “left burdened with debts they cannot repay.” But precluding colleges from using the tools available in a bankruptcy reorganization was never an appropriate solution to this problem. Unsurprisingly, therefore, it has not solved it. As recently noted by Ted Mitchell, the undersecretary of education, “[u]nfortunately, in recent years, we’ve seen far too many schools maintain their institutional accreditation even while defrauding and misleading students, providing poor quality education, or closing without recourse for students. This is inexcusable.”

B. Four Arguments Against Precluding Bankruptcy Reorganization as a Fraud-Prevention Tool

that had been identified at proprietary institutions.”); Blanchette Testimony, supra note 217.

220 Norberg, supra note 20, at 390 (asterisks in original) (citing Senate Report).

221 Id. at 391 (quoting S. Rep. No. 102-58, at 33-34 (1993)); see also BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katie Porter ed., 2012) (inquiring educational debt without earning a degree can lead to bankruptcy); see 140 Cong. Rec. H5327-H5328, supra note 216 (describing “victimized” students).

222 Frankly, allowing students to discharge their educational debts without demonstrating an “undue hardship” might be a more sensible solution. See 11 U.S.C. § 523(a)(8); see also Aaron N. Taylor, Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy, 38 J. OF LEGIS. 185 (2012) (advocating the elimination of the “undue hardship” standard).

223 Neither have other solutions. The “triad” of accreditation, state licensure and ED certification do not, generally, appear to provide sufficient oversight over colleges. Skinner, supra note 219 (referring to three-part regulatory structure of accreditation, licensure and institutional eligibility as the “triad.”).

I. Bankruptcy Court Supervision Prevents Fraud

Preventing colleges and universities from using chapter 11 to deter or prevent fraud may result from a poor understanding of how chapter 11 works. In chapter 11, enterprises are supervised by bankruptcy courts, the United States Trustee, official committees of creditors or equity-holders, and others. An explicitly stated goal of the U.S. court system is to provide oversight mechanisms that “deter and prevent fraud, waste, and abuse, and address mistakes should they occur.” Utilizing a system specifically focused on the problem that Congress is concerned about seems more likely to be effective than eliminating the “intrusive oversight” provided by the bankruptcy system.

Most notably, when fraud has occurred bankruptcy courts are empowered to appoint a trustee to manage a bankrupt entity (thereby displacing a debtor’s existing management). And if fraud is merely suspected, bankruptcy courts may appoint an examiner to investigate potential improprieties. Section 1104 of the Bankruptcy Code mandates the appointment of a trustee “for cause, including fraud, dishonesty, incompetence, or gross mismanagement. . .” and permits appointment of a trustee whenever such appointment would benefit creditors, shareholders, or “other interests of the estate.” That section also permits an examiner to be appointed to investigate “any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor. . .” Although a debtor’s existing management typically remains in control of the enterprise, the power to displace existing

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225 Norberg, supra note 20, at 391 (“[T]he rationale that unscrupulous or fraudulent institutions found refuge in bankruptcy to the detriment of the DOE and students is misplaced.”); see also Wherry Testimony (inaccurately testifying that the automatic stay prevents any and all actions from being taken against a college during the lifetime of the bankruptcy proceeding).


227 David A. Skeel, Jr., When Should Bankruptcy be an Option (for People, Places, or Things)?, 55 WM. & MARY L. REV. 2217, 2248 (2014) (noting the “intrusive oversight” that occurs in bankruptcy).

228 See 11 U.S.C. §1104 (appointment of a trustee or examiner).

229 See id.

230 Id. (emphasis added).

231 Id. (emphasis added).
management or to investigate potential shenanigans should reduce (rather than exacerbate) fraudulent conduct by bankrupt companies.

The 1992 Senate Report noted above expressed a particular concern with colleges retaining students’ undisbursed Title IV funds. Yet chapter 11 no more allows a debtor to retain such funds than it allows a debtor to retain funds owed to any other creditors. In fact, bankruptcy provides a debtor with certain rights to recover the debtor’s property that are unavailable outside of bankruptcy. For example, section 547 allows a debtor to recover certain payments made to creditors in the period immediately preceding a bankruptcy filing, even when the payment was lawfully made and the debtor owes the creditor a valid debt. In other words, bankruptcy oversight should make it less (rather than more) likely that a college can unlawfully retain students’ undisbursed Title IV funds.

Although there might appear to be a facial connection between failing to return Title IV funds and filing bankruptcy, the true causes of a colleges’ decision not to make anticipated loan refund payments to students is much more likely to be caused by other factors. More likely culprits include that the debtor lacks sufficient assets, or that other creditors have a higher repayment priority, a priority set by Congress. As Scott Norberg made clear, “the concern that bankruptcy permitted bankrupt higher education institutions to avoid loan refund and security bond obligations is misplaced. These problems arise from the lack of adequate DOE oversight and insufficient debtor assets, not from the act of filing for bankruptcy.”

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232 This concern was eventually codified in 34 C.F.R. § 668.22 (setting standards regarding a college’s ability to retain Title IV funds when students withdraw).

233 See Skeel, supra note 227.

234 Or, if the debtor won’t bring such actions, it may empower an official committee to act in the debtors’ stead.

235 See 11 U.S.C. §§ 542, 544, 547, & 548; see also Norberg, supra note 20, at 391 (discussing the right to recoup certain preferential payments or fraudulent conveyances that might not be available under state law).

236 See 11 U.S.C. § 547 (preference actions focus on whether the creditor would end up with better treatment than other creditors because of the allegedly preferential payment).

237 See 11 U.S.C. § 507 (setting forth the repayment priority scheme for distributions in bankruptcy cases); see also Norberg, supra note 20, at 392.

238 Norberg, supra note 20, at 392.
college’s decision not to make such payments, bankruptcy court oversight is much more likely to deter or prevent such fraud than without such oversight.239

II. Bankruptcy Reorganization Alternatives Are Not Precluded

Even assuming it was appropriate to effectively preclude colleges from using the tools available in a bankruptcy reorganization, doing so would not be sufficient by itself. Institutions of higher education may still be able to use state law alternatives, such as receiverships or assignments for the benefit of creditors to accomplish something akin to a voluntary chapter 11 reorganization without losing access to Title IV funds.240 Assuming that a voluntary bankruptcy reorganization increases the likelihood of fraud, it’s not clear why a college should be allowed to take one of these alternative paths to the same end and retain its Title IV eligibility. Yet, Title IV eligibility is cut off only when “the institution . . . has filed for bankruptcy.”241 An institution that initiates a receivership has plainly not filed for bankruptcy. Instead, it has initiated a receivership, which is not at all the same thing. Similarly, an assignment for the benefit of creditors is not a bankruptcy filing. Thus, a plain reading of the statutory language would appear to exclude a voluntarily commenced receivership or assignment for the benefit of creditors from terminating a college’s Title IV eligibility. Both strategies could offer something of a work-around for colleges.242

In addition, colleges can use the bankruptcy system to liquidate. Apparently, Congress was not concerned about the possibility of profiteers opening fly-by-night schools to defraud

239 Id. at 391.


242 Still, both strategies remain risky because the ED, state licensing agencies, or accrediting agencies may take actions that would negatively affect a college’s ability to access Title IV funds. See text accompanying note 219. In addition, non-bankruptcy restructuring options are generally thought to be less vibrant than a chapter 11 restructuring. But see Dawson, supra note 240.
students and then liquidating in bankruptcy, even though students would be left with little recourse in that case. Although a college will lose its Title IV eligibility by filing a voluntary bankruptcy liquidation, that hardly matters in a liquidation proceeding.  

Liquidations, typically done under chapter 7, offer an orderly way to cease operations and wind down an entity’s affairs. Thus, continued Title IV eligibility is unlikely to be particularly important. More importantly, it does not matter to students that have been defrauded. Given that a college can use chapter 11 if Title IV eligibility is not relevant, and can use state law restructuring alternatives if it is, precluding colleges only from voluntary reorganizations is an oddity. It’s also apparently divorced from the end it purports to achieve.

III. Banning Voluntary Reorganizations May Exacerbate Fraud

Another problem with effectively precluding access to the tools available in a bankruptcy reorganization is its potential to exacerbate (rather than solve) problems of fraud and abuse because the promise of a false solution can distract administrators from focusing on truly effective solutions. A comparison to the healthcare industry might be instructive here because Congress, CMS and others have also expressed concern about fraud and abuse in the healthcare sector. Improper payments in the healthcare sector are estimated to be approximately $70 billion per year. In other words, the amount of waste, fraud and abuse in healthcare is approximately equal to the federal government’s annual yearly expenditure on higher education. Moreover, there have also been concerns that healthcare enterprises would collect

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243 Jim Christie, ITT Educational Services Files for Bankruptcy to Start Liquidation, REUTERS (Sept. 16, 2016, 10:39PM), http://www.reuters.com/article/us-itt-education-bankruptcy-idUSKCN11N01U (noting that ITT, a for-profit college chain, had begun a bankruptcy liquidation after it lost access to Title IV already).

244 CMS has historically “permitted the enrollment of providers and suppliers whose qualifications for meeting all of [the] enrollment standards were sometimes questionable.” However, easy access facilitated the entry of fraudsters and abusers into the system. Adrienne Dresevic & Donald H. Romano, The Medicare Enrollment Process – CMS’s Most Potent Program Integrity Tool, 23 THE HEALTH LAWYER 1 (2011) (citing 75 Fed. Reg. 24437, 24438 (May 5, 2010)).

improper Medicare payments and then declare bankruptcy, leaving patients in the lurch and taxpayers on the hook.\textsuperscript{246}

Despite those shared concerns about fraud, healthcare enterprises can reorganize in bankruptcy and retain access to Medicare, but colleges cannot reorganize and retain access to Title IV. Yet, because they are free of the false belief that precluding bankruptcy reorganization will solve any problems in the healthcare sector, CMS, HHS and state-level actors have developed innovative solutions to detect and prevent fraud and abuse. For example, some Medicare suppliers are: (i) required to engage in competitive bidding;\textsuperscript{247} (ii) required to post bonds;\textsuperscript{248} (iii) barred from participating in Medicare if they are felons; and (iv) penalized if they contract with excluded providers. In addition, Medicare has worked to monitor the billing practices of home health agencies and to better identify the owners of healthcare enterprises to prevent fly-by-night operators opening and shutting multiple locations.\textsuperscript{249} In short, the Medicare program takes advantage of multiple solutions to prevent fraud and abuse instead of cutting healthcare enterprises off from Medicare funding if they seek to reorganize in bankruptcy.\textsuperscript{250} And these solutions are tailored to the

\textsuperscript{246} For example, a 2011 article claimed that, “in the past, certain providers or suppliers would collect significant [Medicare] overpayments and declare bankruptcy; the owners would then simply form a new entity and enroll it in Medicare.” Dresovic & Romano, supra note 244, at 13. Florida’s durable medical equipment provider industry has been thought to be particularly likely to involve “fly-by-night” providers running fraudulent schemes. See Dept. of Justice Office of Public Affairs Press Release, Eight Miami-Area Residents Charged in $22 Million Medicare Fraud Scheme Involving Home Health Care Agencies (June 26, 2009), https://www.justice.gov/opa/pr/eight-miami-area-residents-charged-22-million-medicare-fraud-scheme-involving-home-health; see also Merrill Goozner, New Medicare Rule Aims to Curb Waste and Fraud in Medical Equipment Business, WASH. POST (Mar. 24, 2012), https://www.washingtonpost.com/new-medicare-rule-aims-to-curb-waste-and-fraud-in-medical-equipment-business/2012/03/20/6Qa0IYS_story.html (durable medical equipment sales are “one of the most vilified programs in Medicare” because of the “frequency of fraud”).

\textsuperscript{247} Goozner, supra note 246.

\textsuperscript{248} DeParle Testimony, supra note 210 ($50,000 surety bond required of certain providers).

\textsuperscript{249} Id. (discussing the disclosures required).

\textsuperscript{250} Another novel program is the Medicare Recovery Audit and Recoupments process, which was designed to identify and recover improper payments. During fiscal year 2013, these audits collected approximately $2.33 billion in overpayments and underpayments. See Mark Taylor, Whacked by RAC,
problems they seek to solve. Precluding bankruptcy reorganization is simply an ineffective tool for the job Congress gave it, and could be responsible for the lack of a similar fraud-prevention policies in the higher education sector.

IV. Far Fewer Taxpayer Dollars are at Risk of Being Misappropriated in Higher Education Cases

Finally, Congress might rationally restrict access to bankruptcy reorganization if doing so would protect taxpayer dollars, but far fewer taxpayer dollars are at stake in the higher education industry than in the healthcare industry. In 2014, the federal government spent approximately $618.7 billion for Medicare and $495.8 billion for Medicaid. In other words, more than one trillion dollars per year. In 2013, the federal government spent approximately $76 billion on higher education. In short, the federal government spends approximately fourteen times more on healthcare than on higher education each year. Even the total of all outstanding student loan debt, most of it either government-guaranteed or lent directly by the government, is only approximately equivalent to the government’s annual healthcare expenditures. Finally, as noted above, the estimated amount of waste, fraud and abuse in healthcare ($70 billion) is approximately equal to the federal government’s annual yearly expenditure on higher education ($76 billion).

If bankruptcy reorganization somehow increased the risk of fraud upon taxpayers, we would expect access to chapter 11 would be more limited for the industries that enjoyed greater federal subsidies than for entities that enjoyed smaller ones. But the opposite is true. Healthcare enterprises receive far larger amounts of taxpayer dollars and enjoy greater access to bankruptcy reorganization. It is unclear, therefore, how taxpayers are adequately protected in healthcare reorganizations but not higher education reorganizations. Though it ought to be otherwise if bankruptcy encourages fraud, the degree of federal financing alone

251 NHE Fact Sheet, supra note 214.
252 See supra, note Error! Bookmark not defined.
253 See supra, note 245.
254 In addition, the federal government should understand it is often likely to recover more in a reorganization than in a liquidation. See LoPucki & Doherty, supra note 127.
seems unrelated to whether bankruptcy reorganization is available or not.

In summary, preventing colleges from reorganizing in bankruptcy because of concerns about fraud is peculiar for at least four reasons. First, bankruptcy reorganization is a court-supervised process that entails greater oversight than exists under alternative methods for winding down companies. Second, the narrow prohibition on voluntary bankruptcy reorganizations is odd because colleges can voluntarily use the bankruptcy liquidation procedures, and can use state law bankruptcy alternatives such as receivership and assignments for the benefit of creditors. Third, precluding bankruptcy reorganization cases may exacerbate fraud by distracting from developing more focused solutions, like those developed in the healthcare industry. Finally, unless colleges are enormously more likely to commit fraud than healthcare enterprises (and bankruptcy courts could not deter or prevent that fraud), the sheer volume of taxpayer dollars at risk of being stolen suggests that it is irrational to allow healthcare enterprises to reorganize but not higher education enterprises.\footnote{There may be greater risk of fraud in the higher education industry than in the healthcare industry. In the latter, the federal government imposes some price controls in an attempt “to avoid abuse and self-dealing” that’s lacking in the higher education industry. See CBR, Comment to Involuntary Collegiate “Do Not Resuscitate” Orders, \textit{Prawfsblawg} (Sept. 14, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/09/in-an-earlier-post-i-sought-to-analogize-enron-collapse-to-the-recent-failure-of-itt-tech-a-for-profit-chain-of-colleges-i.html.}

\section*{C. Two Counterarguments in Favor of Treating Higher Education and Healthcare Enterprises Differently}

However, there are at least two counter-arguments why institutions of higher education should not be allowed to reorganize even though healthcare enterprises can reorganize.\footnote{Section 525(a) of the Bankruptcy Code may also explain the disparate treatment, but it is an argument grounded in the current law, rather than a normative argument about what the law should be. Section 525(a) protects all debtors against discriminatory treatment by the government because of a bankruptcy filing. In the healthcare context, this prohibition performs as expected and courts have not allowed HHS/CMS to terminate a healthcare provider’s Medicare eligibility because of its bankruptcy filing. See Samuel R. Maizel & Rachel Caplan, \textit{Chicken Little Comes to Roost in Bankruptcy}, 25 \textit{Am. Bankr. Inst. J.} 6 (July/Aug. 2006); Lacktman & Owens, \textit{supra} note 205. By contrast, courts have allowed the ED to terminate a college’s Title IV eligibility
The first counter-argument is that fraud is more likely to occur in the higher education sector because there are fewer anti-fraud measures in place. For example, the accreditation process for healthcare enterprises appears to be more robust than the accreditation process for institutions of higher education. Second,


The reason for the difference in treatment appears to be because of a common maxim of statutory interpretation: that the specific controls the general. See In re Betty Owen Schools, Inc., 195 B.R. at 33 (One of the canons of statutory interpretation is that “courts are bound by Congressional judgments that general bankruptcy policy give way to more specific policy considerations.” citing Johnson v. Edinboro State College, 728 F.2d 163, 164 (3d Cir.1984)). Both courts to consider the 525(a) issue in the higher education context found that Congress made a specific policy choice to deny colleges’ access to Title IV programs if they file for bankruptcy, which “must override the general ‘fresh start’ policy of § 525(a).” Will Hueske, School’s Out Forever: Lon Morris College, Section 525(a), and Revocation of Title IV Eligibility for Institutions of Higher Education in Bankruptcy, WEIL BANKRUPTCY BLOG (Apr. 9, 2013), http://business-restructuring.weil.com/government/schools-out-forever-lon-morris-college-section-525a-and-revocation-of-title-iv-eligibility-for-institutions-of-higher-education-in-bankruptcy/. In other words, courts have found that the general policy of providing debtors with a “fresh start” must be subordinated to the language of section 362(b)(16) allowing the Secretary of Education to take “any action” regarding a debtor’s eligibility to participate in the Title IV programs. See In re Betty Owen Schools, Inc., 195 B.R. at 33 (also noting that the legislative history makes clear Congress’ intention to “curtail the ‘fresh start’ of a debtor school which relies on federal funding.”) By contrast, Congress used much less sweeping language in the healthcare context. Section 362(b)(28) merely grants authority to the HHS Secretary to exclude a debtor from Medicare. However, exclusion is a term of art and a bankruptcy filing is not one of the specifically enumerated reasons for excluding a debtor from Medicare. Cf. Maizel & Caplan, supra note 256; Lackman & Owens, supra note 205; see also Jonathon E. Cohn, Health Care Providers and the Automatic Stay Is Medicare Termination Different than Exclusion, 25 AM. BANKR. INST. J. 32 (Nov. 2006), http://www.abi.org/abi-journal/health-care-providers-and-the-automatic-stay-is-medicare-termination-different-than. Courts have not found that the less expansive language of section 362(b)(28) overrides the general policy of providing debtors with a fresh start.

Some allege that higher education accreditors merely rubber-stamp colleges’ accreditation requests, calling them “the watchdogs that don’t bark.” See Paul Fain, U.S. Recommends Shutting For-Profit Accr...
healthcare enterprises serve a more vulnerable population than institutions of higher education. Therefore, Congress may allow healthcare enterprises to reorganize—despite the risk of fraud—because patient lives are at stake, but chose not to allow institutions of higher education to reorganize because student will not literally die if colleges are effectively precluded from bankruptcy reorganization. On balance, this Article argues that these counter-arguments are insufficient to justify denying colleges access to bankruptcy reorganization. Nevertheless, they bear discussing.259

The first counter-argument is that there is greater oversight of healthcare enterprises than of higher education enterprises, which would make fraud less likely in that industry.260 As noted earlier, greater oversight of healthcare enterprises appears to come in the form of stricter accreditation standards,261 greater state accreditation process. But the healthcare accreditation process has since been partially co-opted by state and federal governments. See Paul M. Schyve, The Evolution of External Quality Evaluation: Observations from the Joint Commission on Accreditation of Healthcare Organizations, 12 INT’L J. FOR QUALITY IN HEALTH CARE, 255, 256 (2000). Since 1982, the most significant healthcare accreditor, the Joint Commission on Accreditation of Healthcare Organizations, has included members of the public on its governing board and on its professional and technical committees. Id. In addition, the federal government has begun to help set the standards that accreditors must use, instead of leaving the standard-setting solely to the accrediting agencies. Id. (“As the federal government began to fund other care settings, it established standards for home care, laboratories, ambulatory surgery centers, and hospices, for which the Joint Commission and other accreditors then received deemed status.”)

259 There are surely other potential counter-arguments that could be raised too. For example, allowing an entity to reorganize in bankruptcy always creates moral hazard. Congress might rationally decline to accept the increased risk of moral hazard in one industry unless there is some off-setting benefit. For example, the increased moral hazard may be an acceptable trade off in the healthcare industry but not the higher education industry, if Congress also believes that patients are at a greater risk of harm without a bankruptcy reorganization option. See Bruckner, Bankrupting Higher Education, supra note 20, text accompanying notes 200-07.

260 Of course, as noted above, there may be fewer fraud-prevention tools in higher education merely because they are effectively precluded from bankruptcy reorganization. See supra section 3(B)(III).

261 Both private and public entities play a role in supervising healthcare providers and institutions of higher education vis-à-vis accreditation requirements. Although accreditation requirements in both contexts are set forth and administered by non-governmental entities, the public has begun to have a more substantial role in setting accreditation standards for healthcare providers than in the past. See Schyve, supra note 258.
oversight in the licensing process, and more regular and intrusive inspections. In addition, it may be that a larger percentage of healthcare expenditures are paid out-of-pocket than higher education expenditures, which may reflect an independent judgment by consumers that a particular enterprise is not a fly-by-night or sham enterprise likely to defraud patients. Finally, the government has a price-setting role in the healthcare context that they do not have in the higher education context. While all of this is true, it is not relevant to the question of whether allowing colleges to reorganize in bankruptcy would increase the risk of fraud in that industry. In this case, the appropriate comparison is not between higher education institutions and healthcare enterprises, but between higher education institutions that can reorganize in bankruptcy and ones that cannot. And, as noted above, there does not seem to be any added risk of fraud on taxpayers in a bankruptcy organization than outside of one—rather the opposite would seem to be true.


263 Lacktman & Owens, supra note 205 (describing the Medicare inspection process as a periodic survey “to verify substantial compliance with [Medicare] Program requirements”).

264 Nearly one-third of revenue generated by nursing homes was paid out-of-pocket. See Aggregate Medicare Payments are Adequate Despite Bankruptcies: Hearing Before the Special Comm. on Aging, U.S. Senate, 108th Cong. 95 (Sept. 5, 2000), at *2-3 (Statement of Laura A. Dummit, Associate Director, Health Financing and Public Health Issues, Health, Education, and Human Services Division, General Accounting Office) [hereinafter Dummit Testimony] (Medicaid accounted for 46 percent of total revenue in 1998, with Medicare (12 percent) out of pocket (33 percent) and private insurance (5 percent) covering the rest). By contrast, the federal government has had to put in place rules requiring that at least ten percent of revenue generated by for-profit colleges is paid out-of-pocket. And even this so-called 90/10 rule can be circumvented because certain government revenue streams, such as those from the GI Bill, count toward the ten percent. See Bruckner, Bankrupting Higher Education, supra note 20, at *23, n. 129 (citing Aaron Glantz, Taxpayer Funds are Lifeline for More Than 100 For-profit Schools, CTR. FOR INVESTIGATIVE REPORTING (Oct. 9, 2014), https://www.revealnews.org/article-legacy/taxpayer-funds-are-lifeline-for-more-than-100-for-profit-schools/). In addition, the ten percent of non-Title IV dollars does not require out-of-pocket expenditures but can represent loans by the colleges themselves. Some colleges have found it worthwhile to issue loans even if those loans are unlikely to be repaid because it enables them to extract additional government dollars. See Bruckner, Does it Matter?, supra note 78.

265 See supra, text surrounding notes 225-239.
The second possible rationale for allowing healthcare enterprises to reorganize in bankruptcy but not institutions of higher education is because the healthcare industry serves a more vulnerable population. If allowing an enterprise the opportunity to reorganize in bankruptcy would increase the risk of harm to consumers, bankruptcy reorganization may be inappropriate. Similarly, if allowing an enterprise the opportunity to reorganize in bankruptcy would decrease the risk of harm to consumers, bankruptcy reorganization may be appropriate. In both the higher education and healthcare sectors, there is a risk of harm to consumers if a facility closes. However, it may be thought that the risk of harm to patients is sufficiently severe to justify allowing healthcare facilities to reorganize, but that the risk of harm to students is not sufficiently severe.

When a college closes, existing students may choose to finish their degree elsewhere or students can apply to have any federal student loans related to attending that college discharged. And both former students and students who would have attended had the school remained open may choose to attend a different college, including one that is further away. The effect on students appears limited to a disruption in their education. Similarly, when a healthcare facility closes, existing patients must be transferred to another facility and future patients must choose a different facility, often one that is further away. Thus, at first glance, the effects on both patients and students appear similar. However, when a healthcare facility closes, it can also place patients’ lives at risk. Traveling further to receive an education is more likely to be an inconvenience when compared to having to travel further to receive medical care, which can increase a patient’s likelihood of dying.


267 Students may also lose credit hours or be unable to transfer to another school. And students who acquire education debt but do not complete their degree are at a higher risk of needing to file a personal bankruptcy case. BROKE: supra note 221 (incurring educational debt without earning a degree can lead to bankruptcy).

268 This is not meant to downplay the effects of failing to complete one’s education, including the resultant limited employment prospects.

269 This is particularly true in rural areas rather than urban ones.

270 Trauma patients are more likely to survive if they receive medical care more quickly. See Charlie Eisele, The Golden Hour, J. OF EMERGENCY MEDICAL
Thus, there may be a stronger case for allowing healthcare enterprises to reorganize than for allowing institutions of higher education to reorganize. But, that students don’t die when colleges close, does not suggest that colleges should not be precluded from the opportunity to be resuscitated in a chapter 11 proceeding. And, for the reasons stated above, there is still a strong case for allowing colleges and universities to reorganize.

Conclusion

This Article has compared the higher education and health care industries to make a case for allowing colleges to reorganize in bankruptcy. The comparison was not made because the parallels between health care and higher education enterprises are exact, but merely to highlight the incongruence of allowing virtually every type of enterprise to use the tools available in a bankruptcy reorganization except for institutions of higher education. As argued above, effectively precluding college bankruptcy reorganizations is ill-conceived and deprives colleges of access to an important set of tools available to virtually every other type of entity—both for-profit and nonprofit. Precluding college reorganizations has been ineffective at protecting students from fraudulent higher education operators, which was its sole justification.271 It has also not been effective at controlling the cost of college and therefore helping to increase college access, one of the government’s other goals.272 Perhaps most importantly, it appears to distract from a focused effort to develop tools for reining in fraud and abuse in higher education.273 Effectively precluding higher education reorganization cases condemns many colleges to


271 See Norberg, supra note 20; see also text accompanying note 224; Bruckner, ITT Tech, supra note 199 (noting that ITT Tech—a for-profit chain of colleges—was accused of fraud before it closed its campuses in late 2016).

272 There are some other tools that are used to try to moderate the growth of college tuition increases, such as requiring colleges to disclose certain information to allow students and their families to comparison shop, creating a “Hall of Shame” highlighting colleges with the highest prices and price increases, political pressure, and proposed value rankings. See Donald E. Heller, College Affordability and the Reauthorization of the Higher Education Act of 1965, SCHOLARS STRATEGY NETWORK (2014), http://www.scholarsstrategynetwork.org/brief/college-affordability-and-reauthorization-higher-education-act-1965.

273 See supra, Section 3(B)(III).
an unnecessary death. 274 And, given the striking similarities between higher education and healthcare enterprises, precluding the former from reorganizing in bankruptcy appears particularly senseless.275