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## Higher Ed "Do Not Resuscitate" Orders

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# Higher Ed “Do Not Resuscitate” Orders

*Matthew Adam Bruckner*<sup>1</sup>

## ABSTRACT

*Congress has effectively precluded all institutions of higher education from reorganizing in the bankruptcy courts because it was concerned about exploitative profiteers opening fly-by-night colleges, defrauding students, and then finding refuge in bankruptcy. This choice harms students, employees, creditors, and communities. As such, this Article advocates that Congress should reverse its decision and allow IHEs to reorganize in bankruptcy without losing access to federal student loan and grant programs. To support this argument, this Article contrasts the bankruptcy treatment of healthcare enterprises to that of higher education enterprises. In doing so, this Article builds on my own prior work and contributes to the literature on higher education bankruptcies.*

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## INTRODUCTION

On September 24, 1888, the Saint Paul Normal and Industrial School opened its doors in Lawrenceville, Virginia to fewer than a dozen African American students.<sup>2</sup> Over the next 125 years, St. Paul became a hub for training the region’s educators.<sup>3</sup> The school grew over the years, adding programs and students, but always remaining focused on serving those most in need.<sup>4</sup> St. 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.<sup>5</sup> As a result, St. Paul “lacked a wealthy donor base or strong endowment” with which to weather financial troubles.<sup>6</sup> Due in part to its weak financial condition, St. Paul’s accrediting body stripped the college of its accreditation in June 2012.<sup>7</sup> Approximately one year later, on June 30, 2013, the college closed its doors forever.<sup>8</sup>

Auburn Memorial Hospital (“Auburn”) is a private, nonprofit medical enterprise in New York that admitted its first patient in 1880.<sup>9</sup> 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.”<sup>10</sup> It was the sole provider of certain hospital services to 80,000 Cayuga County residents,<sup>11</sup>

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<sup>2</sup> *Saint Paul’s College (Virginia)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Saint\\_Paul%27s\\_College\\_\(Virginia\)](https://en.wikipedia.org/wiki/Saint_Paul%27s_College_(Virginia)) [<https://perma.cc/73Z4-C2EL>] (last updated June 7, 2017, 2:20 PM); Vanessa LeAnne Patterson, *Saint Paul’s College of Virginia (1888–)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/saint-paul-s-college-virginia-1888> [<https://perma.cc/6R6J-5MUQ>] (last visited Dec. 28, 2017).

<sup>3</sup> Ben Jealous, *St. Paul’s College and the Future of HBCUs*, HUFFPOST: THE BLOG (Sept. 20, 2013, 10:15 AM), [http://www.huffingtonpost.com/benjamin-todd-jealous/st-pauls-college-and-the\\_b\\_3961623.html](http://www.huffingtonpost.com/benjamin-todd-jealous/st-pauls-college-and-the_b_3961623.html) [<https://perma.cc/7AKF-VTJV>].

<sup>4</sup> See Patterson, *supra* note 2.

<sup>5</sup> Jealous, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> St. Paul was accredited by the Southern Association of Colleges and Schools, which terminated St. Paul’s accreditation. Denise B. Hawkins, *After 125 Years of Service, St. Paul’s College Shutting Down June 30*, DIVERSE (May 31, 2013), <http://diverseeducation.com/article/53664/> [<https://perma.cc/6LZR-2AS5>]; Scott Jaschik, *Saint Paul’s Loses Accreditation*, INSIDE HIGHER ED (June 22, 2012), <https://www.insidehighered.com/news/2012/06/22/southern-accreditor-strips-st-pauls-recognition> [<https://perma.cc/R8PW-GRN6>] (reporting that St. Paul’s regulator was concerned about its “financial resources, institutional effectiveness in support services, institutional effectiveness in academics and student services, lack of terminal degrees for too many faculty members, and a lack of financial stability.”).

<sup>8</sup> Hawkins, *supra* note 7.

<sup>9</sup> Aff. of John D. Baran in Supp. of Chapter 11 Petitions and First Day Motions and Pursuant to Local Rule 2015–6 at ¶ 6, *In re Auburn Mem’l Hosp.*, No. 07–31126 (Bankr. N.D.N.Y. Apr. 24, 2007) [hereinafter Baran Aff.].

<sup>10</sup> *Id.* at ¶¶ 6–8.

<sup>11</sup> *Id.* at ¶ 7.

and cared for thousands of patients each year.<sup>12</sup> By 2007, Auburn had become a regional economic engine, contributing approximately \$170 million annually to the local economy.<sup>13</sup> It was also one of its county's largest employers, employing approximately 800 people.<sup>14</sup> But after losing money for several consecutive years, the hospital's poor finances nearly caused it to close.<sup>15</sup> 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.<sup>16</sup>

In some ways, Auburn and St. Paul suffered similar fates. Both were valued in their time, prospering as they served their regions and using federal funds to do so.<sup>17</sup> Although both enterprises were buffeted by market forces, Auburn overcame its financial troubles, hired additional doctors and new staff, and is stronger than ever.<sup>18</sup> By contrast, St. Paul permanently closed its doors after trying, unsuccessfully, to merge with a financially stronger college.<sup>19</sup>

<sup>12</sup> Scott Rapp, *Three Years After Filing for Bankruptcy, Auburn Hospital Posts Record Profits*, POST-STANDARD (Apr. 10, 2010, 6:00 AM), [http://www.syracuse.com/news/index.ssf/2010/04/three\\_years\\_after\\_filing\\_for\\_b.html](http://www.syracuse.com/news/index.ssf/2010/04/three_years_after_filing_for_b.html) [<https://perma.cc/34CG-D4JM>].

<sup>13</sup> See Samantha House, *Auburn Community Hospital's Strategic Plan Includes \$95 Million Worth of Renovations, Construction*, CITIZEN (Mar. 30, 2014), [http://auburnpub.com/news/local/auburn-community-hospital-s-strategic-plan-includes-million-worth-of/article\\_4a26c8f5-b17b-593e-a43a-6bb13e73d000.html](http://auburnpub.com/news/local/auburn-community-hospital-s-strategic-plan-includes-million-worth-of/article_4a26c8f5-b17b-593e-a43a-6bb13e73d000.html) [<https://perma.cc/YW3A-3XPG>].

<sup>14</sup> See Baran Aff., *supra* note 9, at ¶ 10 (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).

<sup>15</sup> See Rapp, *supra* note 12; see also Rachel Fields, *10 Successful Hospital Turnarounds*, BECKER'S HOSP. REV., Jan.–Feb. 2011, at 25, [https://www.beckershospitalreview.com/pdfs/hospital-review/Jan\\_Feb\\_2011\\_HR.pdf](https://www.beckershospitalreview.com/pdfs/hospital-review/Jan_Feb_2011_HR.pdf) [<https://perma.cc/VU3W-5L92>] (“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.”).

<sup>16</sup> Amaris Elliott-Engel, *Hospital Declares Chapter 11 Bankruptcy*, CITIZEN (Apr. 25, 2007), [http://auburnpub.com/news/local/hospital-declares-chapter-bankruptcy/article\\_f506f808-10cd-5bf9-acb3-02b1dd4c2e43.html](http://auburnpub.com/news/local/hospital-declares-chapter-bankruptcy/article_f506f808-10cd-5bf9-acb3-02b1dd4c2e43.html) [<https://perma.cc/UF7C-73KV>] (“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.”). Auburn's use of chapter 11 is not atypical for struggling hospitals. See, e.g., Lawton R. Burns et al., *The Fall of the House of AHERF: The Allegheny Bankruptcy*, HEALTH AFF., Jan.–Feb. 2000, at 7, 8, 33–34, <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.19.1.7> [<https://perma.cc/L84P-NABR>]; Steve Massey, *Introduction: Hear No Evil, See No Evil*, PITT. POST-GAZETTE, <http://old.post-gazette.com/aherf/intro.asp> [<https://perma.cc/JM8Q-MYFJ>] (last visited Dec. 29, 2017) (describing the reorganization of Allegheny Health, Education, and Research Foundation (“AHERF”).

<sup>17</sup> See *infra* note 35 and accompanying text.

<sup>18</sup> Rapp, *supra* note 12 (noting that post-bankruptcy, Auburn added additional doctors).

<sup>19</sup> See Hawkins, *supra* note 7. A year after closing, St. 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,

St. Paul’s failure to overcome its financial woes was exacerbated by its inability to take advantage of the tools available under chapter 11 of the Bankruptcy Code, which contains the bankruptcy reorganization provisions.<sup>20</sup> One solution to St. Paul’s financial difficulties might have been for another college to acquire St. Paul; and supporters did explore a possible acquisition by St. Augustine’s University, another HBCU.<sup>21</sup> But the potential merger was abandoned in May 2013, citing St. Paul’s debt, among other things.<sup>22</sup> Outside of bankruptcy, St. Augustine’s would have needed to assume St. Paul’s debt, which was estimated at between four and five million dollars.<sup>23</sup> In bankruptcy, such debts are eligible to be discharged, which could have paved the way for St. Augustine’s acquisition.<sup>24</sup> But for reasons discussed later in this Article, that option is not available to institutions of higher education (“IHEs”).<sup>25</sup> As a result, St. Paul closed, leaving Lawrenceville, Virginia with a vacant 184-acre campus, forcing students to switch colleges, and costing the local community valuable jobs.<sup>26</sup> By contrast, Auburn used chapter 11 to successfully reorganize, keeping its facilities open for patients and preserving jobs and community resources.<sup>27</sup>

As discussed extensively elsewhere, all IHEs are effectively precluded from reorganizing in bankruptcy.<sup>28</sup> IHEs are economically precluded from reorganizing

*Plans to Use St. Paul’s College for Immigrant Kids on Hold*, CBS 6 (June 16, 2014), <http://wtvr.com/2014/06/16/ex-st-pauls-college-campus-may-be-used-to-house-undocumented-unaccompanied-children/> [<https://perma.cc/FB2K-QF5R>]; see also Karin Kapsidelis, *Plan to Use Saint Paul’s to Shelter Immigrant Children Dropped*, RICHMOND TIMES-DISPATCH (June 20, 2014), [http://www.richmond.com/news/virginia/plan-to-use-saint-paul-s-to-shelter-immigrant-children/article\\_ce549712-f4d3-5721-86ca-4ad76aa1ad8c.html](http://www.richmond.com/news/virginia/plan-to-use-saint-paul-s-to-shelter-immigrant-children/article_ce549712-f4d3-5721-86ca-4ad76aa1ad8c.html) [<https://perma.cc/F7CV-BM4Q>].

<sup>20</sup> See *infra* Section I.B; see also Scott F. Norberg, *Bankruptcy and Higher Education Institutions*, 23 AM. BANKR. INST. L. REV. 385, 385 (2015) (“Whatever the fate of financially distressed colleges and universities, one point is clear: reorganization in bankruptcy is not an option for institutions that receive federal student financial aid funding from the United States Department of Education (‘DOE’) pursuant to title IV of the Higher Education Act.”) (footnote omitted). Although they cannot be reorganized in bankruptcy, they may be liquidated there. See *infra* Section III.B.ii.

<sup>21</sup> See *supra* note 19 and accompanying text.

<sup>22</sup> Hawkins, *supra* note 7.

<sup>23</sup> *Id.*

<sup>24</sup> See 11 U.S.C. § 1141 (2012).

<sup>25</sup> See discussion *infra* Section III; see also Matthew Adam Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697, 698 (2017) (“colleges face ‘an effective death sentence’ if they file [for] bankruptcy”) (footnotes omitted); Norberg, *supra* note 20, at 385, 387–88, 390. This Article will refer to “IHEs” to mean any degree-granting, post-secondary education institution, whether it is a college, university, professional, or technical school.

<sup>26</sup> See Hawkins, *supra* note 7.

<sup>27</sup> See Baran Aff., *supra* note 9, at ¶¶ 14, 19; Rapp, *supra* note 12.

<sup>28</sup> See, e.g., Bruckner, *supra* note 25 (expanding on Norberg’s analysis by examining how for-profit and nonprofit status affect the usefulness of bankruptcy for IHEs); Norberg, *supra* note 20 (discussing the reasons why and mechanisms by which IHEs have been effectively excluded from reorganizing under chapter 11 of the Bankruptcy Code); see also *infra* Section III (suggesting arguments against excluding IHEs); Karen Gross, *Fresh Start for Higher Ed: Can the US Bankruptcy Laws Help?*, ANNUAL REVIEW OF INSOLVENCY LAW (forthcoming, 2018) (on file with author).

in bankruptcy even though they are not legally barred from doing so.<sup>29</sup> As a matter of law, any IHE may seek to voluntarily reorganize in bankruptcy.<sup>30</sup> However, doing so automatically, immediately, and irrevocably, terminates that IHE's eligibility to participate in the federal student loan and grant programs.<sup>31</sup> Therefore, only a school that is willing to give up access to the funds available under Title IV of the Higher Education Act (the "HEA")<sup>32</sup> may reorganize in bankruptcy.<sup>33</sup> Because Title IV funds are critical to most IHE's survival, virtually no IHEs have successfully reorganized in bankruptcy since the law was changed to terminate an IHE's Title IV eligibility upon its bankruptcy filing.<sup>34</sup>

Essentially, Congress has imposed an involuntary "do not resuscitate" order on IHEs, condemning some socially valuable enterprises to an unnecessary death.<sup>35</sup> This treatment is unusual, as IHEs are one of the only types of enterprises that are

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<sup>29</sup> See Matthew Bruckner, Comment to *Enron & IIT Tech*, PRAWFSBLAWG (Sept. 9, 2016, 2:52 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/09/enron-itt-tech.html> [<https://perma.cc/FJ85-53TT>] (explaining the "functional[]" prohibition on bankruptcy reorganization for IHEs); accord Norberg, *supra* note 25; Bruckner, *supra* note 25.

<sup>30</sup> For example, though it was ultimately unsuccessful, Shepherd University recently tried to reorganize in chapter 11. See Chapter 11 Trustee's Motion to Convert Case to Chapter 7; Memorandum of Points and Authorities and Declaration of Bradley D. Sharp in Support Thereof at 3, *In re Shepherd University*, No. 2:17-bk-19964 (Bankr. C.D. Cal. Jan. 8, 2018) ECF No. 151 (noting that the university has ceased operating and seeking to convert the case and liquidate the college's remaining assets).

<sup>31</sup> 20 U.S.C. § 1002(a)(4)(A) (2012) (excluding 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 IHE's Title IV eligibility. See 34 C.F.R. § 600.7(a)(2)(B) (2017) (providing that an educational institution does not qualify to receive Title IV dollars if the institution "has entered against it an order for relief in bankruptcy," which would include involuntary bankruptcies); see also Bruckner, Comment, *supra* note 29 (noting that as a matter of law, IHEs can file for bankruptcy, but as a matter of economics it is generally not feasible).

<sup>32</sup> Higher Education Act of 1965, Pub. L. No. 89-329, Title IV, 79 Stat. 1219, 1232-54 (codified as amended in scattered sections of 20 U.S.C.).

<sup>33</sup> See, e.g. Angela Bronner Helm, *Morris Brown College "Victoriously Emerges" from Bankruptcy*, NEWSONE (Mar. 28, 2015), <https://newsone.com/3102559/morris-brown-college-emerges-from-bankruptcy/> [<https://perma.cc/WB6V-EUPZ>] (describing Morris Brown's "victorious" emergence from chapter 11 with a class of approximately twenty students); 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-bankrup/nkgbvx/> [<https://perma.cc/Y6YV-JKA8>]; see also Bruckner, Comment, *supra* note 29 (suggesting that many IHEs depend on Title IV funding and cannot survive if they file for bankruptcy).

<sup>34</sup> See *infra* notes 192-193 and accompanying text; see also Phyllis Maguire, *Allegheny's Failure Sends Shock Waves Through Academia*, ACP-ASIM OBSERVER, Dec. 1998, [<https://perma.cc/98SE-6LQY>] (noting that the Allegheny University of the Health Sciences was part of the larger reorganization of AHERF). Allegheny's reorganization was made possible because of a custom-designed carve-out from 20 U.S.C. § 1002(a)(4)(A).

<sup>35</sup> Matthew Bruckner, *Involuntary Collegiate "Do Not Resuscitate" Orders*, 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> [<https://perma.cc/WU4F-3AVL>]; see also Bruckner, *supra* note 25, at 698 (noting IHEs that file bankruptcy face "an effective death sentence").

not afforded an opportunity to use the tools available in bankruptcy reorganization.<sup>36</sup> 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.<sup>37</sup> Bankruptcy reorganization cannot resuscitate every struggling IHE, but every IHE ought to have the opportunity to reorganize.<sup>38</sup>

To help illustrate why IHEs should be allowed to reorganize, this Article compares the treatment of IHEs to that of healthcare enterprises.<sup>39</sup> Unlike IHEs, healthcare enterprises do not lose access to Medicare or Medicaid when they file bankruptcy, and are sometimes successfully reorganized in bankruptcy proceedings.<sup>40</sup> As a result, they could serve as a model for fixing the issues that plague some struggling IHEs. Although the analogy between higher education and healthcare is imperfect, there are some “striking” parallels between the two industries.<sup>41</sup> Both industries involve an unusual mix of for-profit, private nonprofit, and public enterprises.<sup>42</sup> Both industries are under tremendous strain, with many

<sup>36</sup> Cf. 11 U.S.C. § 109 (2012 & Supp. IV 2012) (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 bankruptcy 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). However, some enterprises are excluded on public policy grounds. For example, marijuana businesses have generally been unable to reorganize in bankruptcy. See, e.g., Vivian Cheng, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013).

<sup>37</sup> Cf. Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. REV. 759, 766 (2013) (suggesting that chapter 11 was intended to contribute to an overall increase in social welfare).

<sup>38</sup> Perhaps it cannot even work to resuscitate most IHEs. But that is 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, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 606, 614–15, 617 (2009) (arguing that chapter 11 quickly sorts the likely-to-successfully-reorganize enterprises from the majority that are “dead on arrival”); see also Harvey R. Miller & Shai Y. Waisman, *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 succeed.’”) (footnote omitted).

<sup>39</sup> My previous article, *Bankrupting Higher Education*, similarly argued that IHEs should be allowed to reorganize in bankruptcy. See Bruckner, *supra* note 25.

<sup>40</sup> See David A. Samole et al., *Health Care Bankruptcy: A Primer of a Provider’s Chapter 11 Case*, A.B.A. HEALTH ESOURCE, June 2017, [https://www.americanbar.org/publications/aba\\_health\\_esource/2016-2017/june2017/bankruptcy.html](https://www.americanbar.org/publications/aba_health_esource/2016-2017/june2017/bankruptcy.html) [<https://perma.cc/9T4Z-J59M>].

<sup>41</sup> 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 1960’s, and saw rapid escalation of expenses as increasing numbers of Americans took advantage of government programs in the latter twentieth century.”) (footnotes omitted). There are also clear differences, including the degree of federal oversight. See, e.g., *infra* notes 248, 251, and 253–256 and accompanying text.

<sup>42</sup> This mix of provider types exists in few other industries. See Jill R. Horwitz & Austin Nichols, *What Do Nonprofits Maximize? Nonprofit Hospital Service Provision and Market Ownership Mix* 6 (Nat’l Bureau of Econ. Research, Working Paper No. 13246, 2007),



hospitals, nursing homes, and IHEs expected to shut down in coming years.<sup>43</sup> But, the most important parallel is that the federal government is the dominant source of financing in both industries, providing more than one trillion dollars annually for healthcare and tens of billions annually for higher education.<sup>44</sup> Yet, IHEs cannot reorganize in bankruptcy, and healthcare enterprises, like almost every other type of entity, may.<sup>45</sup>

The rest of this Article proceeds as follows. In the next section, this Article discusses the financial strain experienced by both the higher education and healthcare industries and the reasons for that strain. It also explains the tools available in bankruptcy that may help 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 benefit some IHEs. 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 HEA and Medicare. 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 three arguments why preventing IHEs from reorganizing in bankruptcy fails to achieve this goal. This section also addresses two possible counter-arguments, but argues that, on balance, precluding IHEs

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<http://www.nber.org/papers/w13246.pdf> [<https://perma.cc/M5TW-76SS>] (“[S]ome 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.”).

<sup>43</sup> See *infra* Sections I.A–B; see also Bruckner, *supra* note 25 (discussing financial distress in the higher education sector).

<sup>44</sup> 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 BANKR. DEV. J. 249, 257 (2015). For the median hospital, federal funding accounts for approximately forty-four percent of its revenue. See *infra* note 211 and accompanying text. Estimates vary on how much the federal government spends each year on higher education, but one 2015 estimate pegged federal higher education spending at \$132.5 billion. See Chris Edwards & Neal McCluskey, *Higher Education Subsidies*, DOWNSIZING FED. GOV'T (Nov. 1, 2015), <http://www.downsizinggovernment.org/education/higher-education-subsidies> [<https://perma.cc/7GSB-YXR9>] (citing U.S. GOV'T PUBL'G OFFICE, FISCAL YEAR 2016: ANALYTICAL PERSPECTIVES OF THE U.S. GOVERNMENT tbl.29–1 (2015), <https://www.gpo.gov/fdsys/pkg/BUDGET-2016-PER/pdf/BUDGET-2016-PER.pdf> [<https://perma.cc/GD3J-HBEP>]). See Kellie Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER ED (June 12, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments> [<https://perma.cc/24Y6-MJ8T>] (noting that state governments contributed approximately \$73 billion). Most other estimates are substantially lower. See *infra* note 19.

<sup>45</sup> See Matthew Bruckner, *Why Can't Colleges Declare Bankruptcy? HBCUs Would Benefit Greatly from Chapter 11 Reorganization*, N.Y. DAILY NEWS (Mar. 30, 2017, 12:19 PM), <http://www.nydailynews.com/opinion/colleges-declare-bankruptcy-article-1.3013855> [<https://perma.cc/R6HV-TJSP>].

from reorganizing condemns some IHEs to an unnecessary demise and the law should be changed.<sup>46</sup>

## I. FINANCIAL STRAIN AND BANKRUPTCY’S TOOLS

The healthcare and higher education sectors are both experiencing financial strain.<sup>47</sup> This section explores the reasons for that strain, which normally arises because of a mismatch between revenue and expenses.<sup>48</sup> Section A reviews the available evidence, which 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.<sup>49</sup> Section B reviews the evidence available in the healthcare sector, which suggests that mandates to implement expensive new technologies, rising drug costs, and declining state and federal support have caused financial strain in the sector.<sup>50</sup> Finally, Section C highlights several tools available in bankruptcy reorganization proceeding, explains how Auburn successfully used these tools to execute its financial turn-around, and suggests how some IHEs could also use them for the same purposes.

### A. Higher Education’s “Looming Crisis”<sup>51</sup>

Many American IHEs are either financially troubled<sup>52</sup> or headed toward financial troubles.<sup>53</sup> For example, Moody’s Investors Service—the bond credit

<sup>46</sup> This Article seeks to avoid making normative claims about which IHEs deserve to be saved and limits itself to making the normative argument that all IHEs should have the opportunity to reorganize.

<sup>47</sup> “[T]he current environment puts financial stress on many providers, increasing the potential for restructurings and bankruptcies” in the healthcare sector. David Deaton et al., *Distressed Healthcare: Significant Considerations for Buyers, Sellers, and Lenders Arising from the Intersection of Healthcare and Bankruptcy Laws*, 3 J. HEALTH & LIFE SCI. L. 1, 4 (2010); see also Bruckner, *supra* note 25, 700–03 (discussing financial distress in the higher education sector).

<sup>48</sup> Of course, not every closed higher education or healthcare enterprise fits the molds described herein as there are always idiosyncratic reasons why particular institutions experience financial distress.

<sup>49</sup> Expenses for higher education enterprises tend to include “employee salaries, costs of instruction, advertising costs, facility costs, capital expenditures, and general overhead and administrative costs.” See Decl. of Sean Harding in Support of the Debtors’ Chapter 11 Petitions and Requests for First Day Relief at 11–12, *In re FCC Holdings, Inc.*, No. 14–11987 (Bankr. D. Del. Aug. 26, 2014) (describing the major expenses of Anthem College, a now-defunct for-profit higher education business).

<sup>50</sup> See *infra* notes 103–110 and accompanying text.

<sup>51</sup> See Victor Gold, *Reducing the Cost of Legal Education: The Profession Hangs Together or Hangs Separately*, 66 SYRACUSE L. REV. 497, 497–505 (2016). This section borrows heavily from my previous article. See Bruckner, *supra* note 25, at 700–05.

<sup>52</sup> This is the growing consensus. See, e.g., Dawn Lyken-Segosebe & Justin Cole Shepherd, *Learning from Closed Institutions: Indicators of Risk for Small Private Colleges and Universities*, TENN. INDEP. COLLS. & UNIVS. ASS’N. (July 2013), [http://www.ticua.org/public\\_policy/sm\\_files/Learning%20from%20Closed%20Institutions.pdf](http://www.ticua.org/public_policy/sm_files/Learning%20from%20Closed%20Institutions.pdf) [<https://perma.cc/HBT7-MS74>]; see also Pamela J. Bettis et al., *Faculty in a Liminal Landscape: A*

rating arm of Moody's Corporation—has recently issued a series of reports highlighting trouble in the higher education sector. One recent report noted that revenue growth (predominantly tuition) at the majority of small colleges is not keeping pace with inflation.<sup>54</sup> With a weakened financial position, some IHEs—particularly small, nonprofit colleges—are expected to be forced to close or merge.<sup>55</sup> As it is, almost 100 IHEs, operating at more than 700 campuses, ceased educating students in 2015-16.<sup>56</sup> And this may only be the beginning. Most higher education experts agree that the higher education industry is in trouble, and few college and

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*Case Study of a College Reorganization*, 11 J. LEADERSHIP & ORGANIZATIONAL STUD. 47, 49–51 (2005) (discussing the “current cris[i]s” in higher education); Stuart M. Butler, *The Coming Higher-Ed Revolution*, 10 NAT'L AFF. 22, 22 (2012), <https://www.nationalaffairs.com/publications/detail/the-coming-higher-ed-revolution> [<https://perma.cc/AS3M-7PY3>] (describing the higher education industry as being on the verge of “a transformative re-alignment”); Dennis Cariello, *Allow Universities to Restructure Themselves Through Bankruptcy*, HILL: CONG. BLOG (Jan. 22, 2015, 1:00 PM), <http://thehill.com/blogs/congress-blog/education/230282-allow-universities-to-restructure-themselves-through-bankruptcy> [<https://perma.cc/MWN5-L4NC>] (suggesting that universities facing financial pressure may need access to bankruptcy to survive).

<sup>53</sup> The financial pressure on the higher education industry is significant and appears to be growing. See, e.g., Jamie Mason, *Nonprofit Colleges Take up a New Subject: Default*, DEAL (July 28, 2015, 9:41 AM), <http://thedealnewsroom.tumblr.com/post/125256714447/nonprofit-colleges-take-up-a-new-subject-default> [<https://perma.cc/3Q3X-YN38>] (quoting “a senior managing director at crisis management firm Conway MacKenzie Inc.,” who predicted that “more defaults [should be expected] in the next five years”); see also Jeff Denneen & Tom Dretler, *The Financially Sustainable University*, BAIN & CO. (July 6, 2012), [http://www.bain.com/Images/BAIN\\_BRIEF\\_The\\_financially\\_sustainable\\_university.pdf](http://www.bain.com/Images/BAIN_BRIEF_The_financially_sustainable_university.pdf) [<https://perma.cc/ZGV5-KCV4>]; Aaron Lacey, *Why Colleges in Bankruptcy Should Have Access to Federal Financial Aid*, THOMPSON COBURN: REGUCATION BLOG (Oct. 7, 2014), <http://www.thompsoncoburn.com/news-and-information/regucation/blog/14-10-07/why-colleges-in-bankruptcy-should-have-access-to-federal-financial-aid.aspx> [<https://perma.cc/8XWQ-Y8L4>]; Norberg, *supra* note 20, at 385 & nn.1–6 (collecting sources of media coverage about IHE's financial struggles and failures).

<sup>54</sup> DENNIS GEPHARDT, MOODY'S INV'RS SERV., U.S. HIGHER EDUCATION: SMALL COLLEGE CLOSURES POISED TO INCREASE 1–5 (Sept. 25, 2015), <http://www.chronicle.com/items/biz/pdf/Small%20College%20Closures%20Poised%20to%20Increase%5B6%5D.pdf> [<https://perma.cc/N5HQ-27QD>] (defining small, private nonprofit colleges as those with FY2014 operating revenue below \$100 million, and public colleges, as those 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).

<sup>55</sup> GEPHARDT, *supra* note 54, at 1–2.

<sup>56</sup> U.S. GOV'T ACCOUNTABILITY OFF., *Education Should Address Oversight and Communication Gaps in Its Monitoring of the Financial Condition of School* (Aug. 2017), <https://www.gao.gov/assets/690/686709.pdf>; see also Michael B. Goldstein & Jay Indyke, *Bankruptcy Benefits*, TRUSTEESHIP MAGAZINE, Sept./Oct. 2016, [www.agb.org/trusteeship/2016/septemberoctober/bankruptcy-benefits](http://www.agb.org/trusteeship/2016/septemberoctober/bankruptcy-benefits) (noting that 162 independent colleges have closed since 2000); Kate Smith, *Here's What Happens to Endowments When Colleges Close*, BLOOMBERG (Mar. 6, 2017), available at <https://www.bloomberg.com/news/articles/2017-03-06/orphan-endowments-of-dead-schools-bedevel-states-across-america> (citing figures from the U.S. Department of Education); Doug Lederman, *The Culling of Higher Ed Begins*, INSIDE HIGHER ED (July 19, 2017), <https://www.insidehighered.com/news/2017/07/19/number-colleges-and-universities-drops-sharply-amid-economic-turmoil> [<https://perma.cc/RKZ2-9PXR/>]

university business officers are “confident in the sustainability of their business model” over the next five-to-ten years.<sup>57</sup>

As is common with distressed entities, many IHEs are likely to encounter financial trouble because their expenses are rising faster than their revenue.<sup>58</sup> An IHE’s failure to increase revenue in line with its projections and difficulty controlling expenses are both important determinants of its financial health. Expense increases have multiple drivers. One of the largest expenses for IHEs is personnel.<sup>59</sup> Personnel expenses, including benefits, are estimated to represent approximately three quarters of an IHE’s operating budget, and are rapidly rising.<sup>60</sup> Another substantial expense for IHEs is the purchase and maintenance of its physical facilities.<sup>61</sup> Finally, accreditation standards and other regulatory burdens,

<sup>57</sup> “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 [thirteen] percent of the 438 CFOs who responded—are strongly confident in their model over the next [ten] 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](http://www.acenet.edu/the-presidency/columns-and-features/Pages/The-Highly-Endangered-Higher-Education-Business-Model.aspx) [https://perma.cc/8LKS-2NV7]; see also Gold, *supra* note 51, at 499–505 (discussing the factors that have “essentially mandated what was an unsustainable business plan” for law schools); Wu, *supra* note 54, at 19–20.

<sup>58</sup> Mason, *supra* note 53 (describing several high-risk colleges and the reasons why they may default).

<sup>59</sup> See Rick Bales, *On the Cost of Legal Education*, LAW DEANS ON LEGAL EDUC. BLOG (Feb. 14, 2016), [http://lawprofessors.typepad.com/law\\_deans/2016/02/on-the-cost-of-legal-education.html](http://lawprofessors.typepad.com/law_deans/2016/02/on-the-cost-of-legal-education.html) [https://perma.cc/W4FD-R66N] (discussing law school faculty and staff salaries).

<sup>60</sup> ROBERT C. DICKESON, A NAT’L DIALOGUE: THE SEC’Y OF EDUC.’S COMM’N ON THE FUTURE OF HIGHER EDUC., ISSUE PAPER: FREQUENTLY ASKED QUESTIONS ABOUT COLLEGE COSTS 1 (2006), <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/dickeson2.pdf> [https://perma.cc/P4UV-7X7E]; see also Gold, *supra* note 51, at 500–01 (discussing the importance of investing in faculty in legal education); Wu, *supra* note 54, at 20 (“law school spending is primarily on payroll”).

<sup>61</sup> These facilities often lack a clear alternate use, stymieing attempts to quickly reduce an IHE’s overhead expenses by repurposing these buildings. See Gold, *supra* note 51 at 500, 505 (describing the two primary expenses of law schools as tenured faculty salaries, and buildings without a clear alternative use). For example, when St. Paul closed down, HHS proposed housing hundreds of “undocumented and unaccompanied children” in the former college’s facilities, which is a somewhat unique repurposing plan. See Dutton & St. George, *supra* note 19. Although unlikely to be a major cost center, numerous politicians have pointed out that IHEs are busily installing lazy rivers and climbing walls in a bid to attract students. See, e.g., Kellie Woodhouse, *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> [https://perma.cc/SJ5U-K725] (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, *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> [https://perma.cc/5PWC-LX3Z] (noting evidence that fancy amenities can drive enrollment growth, at least at schools with a highly competitive admissions process.)

though often aimed at making education better, can create upward pressure on costs.<sup>62</sup>

IHEs are not generally considered to be “financially nimble institutions.”<sup>63</sup> They are also rarely “managed with efficiency as the[ir] primary [goal].”<sup>64</sup> As a result, even slowly accreting problems can cripple an IHEs, and problems in the higher education sector have been accumulating recently. In particular, revenue growth at colleges has been stagnant.<sup>65</sup>

Revenue growth has been stagnant at many IHEs because of, among other things: (i) growing competition for students,<sup>66</sup> (ii) declining state revenues devoted to higher education,<sup>67</sup> and (iii) IHEs approaching the maximum rates of tuition that they can charge.<sup>68</sup> Yet IHEs may have budgeted based on anticipated growth

But, if these bets do not pay off, IHEs will have incurred debt without sufficient revenue to satisfy those debt burdens.

<sup>62</sup> Gold, *supra* note 51, at 506 (citing BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 173–77 (2012)); *see id.* at 501, 506 (discussing mandates that law schools add more clinical education, which tends to be more expensive than other types of legal education); *see also* DICKESON, *supra* note 60, at 2 (noting that IHEs bear “significant expenses in administering federal financial aid,” among other things); Bales, *supra* note 59.

<sup>63</sup> *See* Gold, *supra* note 51, at 507 (discussing law schools).

<sup>64</sup> *See also* DICKESON, *supra* note 60, at 2.

<sup>65</sup> GEPHARDT, *supra* note 54, at 1–3 (noting that revenue growth (predominantly tuition) at most small colleges is not keeping pace with inflation).

<sup>66</sup> *See* John W. Schoen, *Why Does a College Degree Cost So Much?*, CNBC (June 16, 2015), <http://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html>

[<https://perma.cc/4MML-ZGN3>] (noting that enrollment at IHEs hit its peak in 2011, adding to the competition for students among schools). Competition is particularly stiff for IHEs with a particularized mission, such as HBCUs and single gender institutions. *See* GEPHARDT, *supra* note 54 (noting that competitive pressures are particularly acute for small colleges, which are losing market share to larger colleges); *see also* Bettis et al., *supra* note 52, at 49.

<sup>67</sup> Bettis et al., *supra* note 52, at 49–50; Doug Webber, *Fancy Dorms Aren't the Main Reason Tuition Is Skyrocketing*, FIFETHIRTYEIGHT (Sept. 13, 2016, 11:03 AM), <http://fivethirtyeight.com/features/fancy-dorms-arent-the-main-reason-tuition-is-skyrocketing/>

[<https://perma.cc/SGA5-XW55>]. (attributing three-quarters of the rise in tuition at public IHEs since 2000 to decreasing state support); *see also* Butler, *supra* note 52, at 37 (noting states are enduring an “ongoing fiscal disaster”). *But see* Preston Cooper, *Pennies on the Dollar: The Surprisingly Weak Relationship Between State Subsidies and College Tuition*, AM. ENTER. INST. 2–3, 14, 18 (June 7, 2017), <http://www.aei.org/wp-content/uploads/2017/06/Pennies-on-the-Dollar.pdf>

[<https://perma.cc/YC8K-SY7H>] (attributing only five percent of recent tuition growth at IHEs to cuts in state subsidies).

<sup>68</sup> *See* Michael Mitchell et al., *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET & POLY PRIORITIES 16, 16 fig.8 (Aug. 15, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/5-19-16sf.pdf> [<https://perma.cc/K55S-NAJC>] (“[A]bsorbing additional [tuition] expenses has been difficult for many families because their incomes have been stagnant or declining.”); Butler, *supra* note 52, at 25 (“The financing vision of traditional higher education, which assumes steadily rising tuition and heavily indebted graduates, is increasingly at odds with the financial capacities of typical households.”); *see* Allie Bidwell, *The Rise in Tuition Is Slowing, But College Still Costs More*, U.S. NEWS & WORLD REP. (Oct. 24, 2013, 3:27 PM), <http://www.usnews.com/news/articles/2013/10/24/the-rise-in-tuition-is-slowing-but-college-still-costs-more> [<http://perma.cc/8X64-CCLA>] (noting that the pace of tuition

in tuition revenue (through some combination of enrollment growth and tuition hikes) or with the expectation that previous cuts to state aid for higher education would be restored.<sup>69</sup> These inaccurate projections threaten IHEs’ financial stability, particularly when they have borrowed heavily based on these projections.

Many IHEs are (or should be) concerned about their financial viability.<sup>70</sup> An IHE’s financial strength depends on its ability to generate revenue in excess of its costs.<sup>71</sup> Financially vulnerable IHEs tend to lack the ability to generate additional revenue through, for example, increased alumni giving, major gifts, or future tuition increases.<sup>72</sup> For instance, an IHE may not be able to raise additional tuition revenue if it already has an open enrollment policy<sup>73</sup> or if it already significantly discounts its tuition to lure new students.<sup>74</sup> Some IHEs are able to rely on their endowment in lean years, but many IHEs only have a small<sup>75</sup> and/or restricted endowment.<sup>76</sup> Moreover, although many states have reversed some of their earlier

increases has slowed recently); *see also* GEPHARDT, *supra* note 54 (explaining the revenue and expense pressures felt by small colleges); Mason, *supra* note 53 (noting that IHEs who budgeted based on the assumption that they “had an everlasting ability to raise the tuition rate” could be in trouble).

<sup>69</sup> *See* Butler, *supra* note 52, at 25 (describing the “financing vision of traditional higher education” as being increasingly implausible); Cariello, *supra* note 52 (noting enrollment declines of one million students from 2012 to 2015); GEPHARDT, *supra* note 54, at 1 (“The smallest colleges have inefficient cost structures with net tuition revenue funding only three-quarters of educational expenses.”).

<sup>70</sup> *See* Toner, *supra* note 57.

<sup>71</sup> *See id.*; Webber, *supra* note 67.

<sup>72</sup> *See generally* GEPHARDT, *supra* note 54 (explaining the revenue and expense pressures associated with small colleges).

<sup>73</sup> *See* Arthur Levine, *Bradford College: Requiem for a College*, NEW DIRECTIONS FOR HIGHER EDUC., Winter 2011, at 19, 19 (pointing out that IHEs that are “not selective in admissions. . . . are more susceptible to declines in the college-aged population and economic downturns than others”).

<sup>74</sup> 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*, FACULTY LOUNGE (Jan. 22, 2014, 3:56 PM), <http://www.thefacultyounge.org/2014/01/philadelphia-law-school-tuition-price-war-escalates-prices-drop.html> [<https://perma.cc/G8J3-ZQLR>] (describing price wars in the Philadelphia law school market); *see also* Levine, *supra* note 73, at 19–20 (explaining that, in competition against comparable institutions, IHEs offer tuition discounts with the hope of attracting students); Frank H. Wu, *Is Higher Education Headed Toward Disaster?*, HUFF POST: THE BLOG (May 27, 2016, 1:29 PM), [http://www.huffingtonpost.com/frank-h-wu/is-higher-education-head\\_e\\_b\\_10166996.html](http://www.huffingtonpost.com/frank-h-wu/is-higher-education-head_e_b_10166996.html) [<https://perma.cc/R8SN-TWR4>]. IHEs 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 twenty-five years, rising from approximately twenty-three percent in 1989 to nearly fifty percent in 2015. Mitchell et al., *supra* note 68, at 15–16, 15 fig.7 (“Nearly every state has shifted costs to students over the last 25 years.”). *But see* Cooper, *supra* note 67, at 6–10, 13–18, 20 (finding an increase in “aggregate revenues from net tuition” from 2004 to 2015, but that the rise in revenue from tuition was not necessarily attributable to a decrease in state subsidies).

<sup>75</sup> Levine, *supra* note 73, at 19 (“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.”); *id.* at 23; GEPHARDT, *supra* note 54, at 5.

<sup>76</sup> Restricted endowments create “serious operational repercussions” for IHEs because restrictions prevent an enterprise from deploying its assets to critical areas, which can “precipitat[e] financial

cuts to higher education funding recently, some states continue to decrease their support of higher education.<sup>77</sup>

IHEs may have relatively more success in cutting their expenses than increasing their revenue.<sup>78</sup> For example, IHEs have been trending toward staffing more of their classes with less expensive adjunct and non-tenure track faculty in lieu of more expensive tenure-track faculty.<sup>79</sup> IHEs have also sought to save money by decreasing faculty-to-student ratios, and by reducing student services, course or program offerings, and campus amenities.<sup>80</sup> For example, the University of Wisconsin-Madison laid off or eliminated 400 staff and faculty and held faculty salaries constant in response to large state funding cuts.<sup>81</sup>

At least two types of IHEs are at greater risk than others of encountering financial distress. Both typically lack a substantial endowment, and have had enrollment issues. Some of the most vulnerable institutions are “[s]mall, private, [nonprofit], liberal arts colleges” founded to counter race- and gender-based discrimination.<sup>82</sup> 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.<sup>83</sup> Approximately eighty-five percent of women’s colleges have closed, merged, or begun admitting men.<sup>84</sup> While not all of these changes are directly tied to financial strain, some surely are.

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collapse.” See Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 528 (2005). Restricted endowments can also inhibit an IHE from borrowing money. *Cf. id.* at 528–29 (discussing why narrowly held assets may lead to financial collapse in the context of churches and other charities).

<sup>77</sup> Mitchell et al., *supra* note 68, at 7 & n.12, 8 fig.3 (reporting that twelve states continued to offer less financial support to IHEs, with Illinois’s 37.1% cut leading the list).

<sup>78</sup> It is 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 an IHE’s academic offerings.

<sup>79</sup> Webber, *supra* note 67.

<sup>80</sup> Mitchell et al., *supra* note 68, at 14–15.

<sup>81</sup> *Id.* at 14 & n.28.

<sup>82</sup> Barbara R. Hatton, *Reinventing Black Colleges in Postethnic America: The Case of Knoxville College*, NEW DIRECTIONS FOR HIGHER EDUC., Winter 2011, at 49, 50; see also GEPHARDT, *supra* note 54 (discussing the financial struggles of small colleges generally).

<sup>83</sup> See Hatton, *supra* note 82, at 50–51, 53–56, 60–61; see also Bruckner, *supra* note 45. But see Valerie Strauss, *Enrollments Surge at Historically Black Colleges Amid Rise in Racial Tensions*, WASH. POST (Sept. 11, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/09/11/enrollments-surge-at-historically-black-colleges-amid-rise-in-racial-tensions/> [<https://perma.cc/YV6K-AMSR>].

<sup>84</sup> KRISTEN A. RENN, *WOMEN’S COLLEGES & UNIVERSITIES IN A GLOBAL CONTEXT* 37 (2014). Peak enrollment for women’s colleges was in 1960, and eighty-five percent have redefined themselves since that time. See *id.* (noting that women’s colleges decreased from approximately 300 in 1960 to less than forty-four in 2014).

For-profit IHEs, several of which have recently endured very public collapses, also face a high risk of encountering financial distress.<sup>85</sup> In addition to lacking a substantial endowment and generally having an open enrollment policy,<sup>86</sup> for-profit IHEs have recently received a great deal of unwanted attention from regulators and the general public.<sup>87</sup> Scrutiny has followed “mounting evidence of predatory recruiting practices, low graduation rates, outsized student debt burdens, and poor labor market outcomes.”<sup>88</sup> In response to these concerns, Congress and President Obama imposed obligations on for-profit IHEs that they have not generally imposed on nonprofit institutions, such as the gainful employment rules<sup>89</sup> and the 90/10 rule.<sup>90</sup> These additional burdens have increased volatility in the for-profit education sector, causing several for-profit IHEs to collapse recently.<sup>91</sup>

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<sup>85</sup> See Matthew Bruckner, *Enron & ITT Tech*, PRAWFSBLAWG (Sept. 8, 2016, 9:48 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/09/enron-itt-tech.html> [<https://perma.cc/FJ85-53TT>].

<sup>86</sup> In contrast to nonprofit IHEs, however, for-profit IHEs may be able to raise money from investors.

<sup>87</sup> CHARLIE EATON, ET AL., *DEBT & SOCIETY, BORROWING AGAINST THE FUTURE: THE HIDDEN COSTS OF FINANCING U.S. HIGHER EDUCATION* 1, 4–8 (May 22, 2014), [http://debtandsociety.org/wp-content/uploads/2014/05/Borrowing\\_Against\\_the\\_Future\\_052214.pdf](http://debtandsociety.org/wp-content/uploads/2014/05/Borrowing_Against_the_Future_052214.pdf) [<https://perma.cc/Z7CL-LGKK>]. There is some evidence that President Trump’s administration will reduce the regulatory burden on for-profit IHEs, including rolling back the gainful employment rules. See Andrew Kreighbaum, *DeVos Allows Career Programs to Delay Disclosure to Students*, INSIDE HIGHER ED (July 3, 2017), <https://www.insidehighered.com/news/2017/07/03/education-department-announces-new-delays-gainful-employment> [<https://perma.cc/ALK2-V35Z>].

<sup>88</sup> EATON ET AL., *supra* note 87, at 17–18. Many of the industry’s problems seem traceable to the reorientation of for-profit IHEs “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); see also *id.* at 21 (noting that gross profit margins among the publicly traded for-profit IHEs averaged approximately fifty-five percent, which is significantly higher than the average gross margin for most major industries).

<sup>89</sup> See Chadwick Matlin, *The Reform of For-Profit Colleges: Can They Give Up Their Predatory Ways?*, ATLANTIC (Sept. 20, 2013), <http://www.theatlantic.com/business/archive/2013/09/the-reform-of-for-profit-colleges-can-they-give-up-their-predatory-ways/279850/> [<https://perma.cc/T9MZ-KWUF>].

<sup>90</sup> 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.” Matthew Bruckner, *Assessing 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> [<https://perma.cc/DV2W-WZ3K>]. If at least some students were willing to pay tuition out of pocket, it supposedly indicated that they thought the school was a good value. *Id.* Thus, the 90/10 rule could serve as a proxy for institutional quality. *Id.*

However, because the law refers to [ten] percent of revenue rather than [ten] percent of students, a school can have more than [ninety] 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 [ten] percent above that.



There are reasons to believe that the financial strain on IHEs will worsen.<sup>92</sup> Some have even argued that a “transformative re-alignment” is coming to higher education.<sup>93</sup> After all, IHEs, like other enterprises, can only raise their prices so high before students refuse to purchase their services, and evidence suggests that IHEs may be reaching that threshold.<sup>94</sup> Similarly, IHEs can only trim their expenses so much before they begin to negatively affect the quality of the service they provide.<sup>95</sup> 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.<sup>96</sup>

### B. Strain in the Healthcare Sector

In every decade since the 1930s, the U.S. has lost between eleven to twenty percent of its urban hospitals.<sup>97</sup> 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 those that serve greater numbers of minority and Medicaid patients, more likely to close.<sup>98</sup> As in higher education,

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ROBERT SHIREMAN, CTR. FOR AM. PROGRESS, PERILS IN THE PROVISION OF TRUST GOODS: CONSUMER PROTECTION AND THE PUBLIC INTEREST IN HIGHER EDUCATION 17 (May 2014), <https://www.americanprogress.org/wp-content/uploads/2014/05/ConsumerProtection.pdf> [<https://perma.cc/M6PY-HPWB>]. Moreover, it is not clear that students are well-positioned to evaluate an IHE’s institutional competency.

<sup>92</sup> Joseph H. Smolinsky, *For-Profit Education Institutions Face a Volatile and Uncertain Future*, WEIL: BANKR. BLOG (Dec. 7, 2015), <https://business-finance-restructuring.weil.com/contributors-corner/for-profit-education-institutions-face-a-volatile-and-uncertain-future/> [<https://perma.cc/KQP8-PYYJ>] (discussing for-profit IHEs). *But see* Kreighbaum, *supra* note 87.

<sup>93</sup> *See generally* Butler, *supra* note 52 (discussing the volatility of the higher education industry’s current path); GEPHARDT, *supra* note 54 (discussing increasing financial pressures on small colleges).

<sup>94</sup> Butler, *supra* note 52, at 22–23; *see also* Doug Lederman, *Clay Christensen, Doubling Down*, INSIDE HIGHER ED (Apr. 28, 2017), <https://www.insidehighered.com/digital-learning/article/2017/04/28/clay-christensen-sticks-predictions-massive-college-closures> (reporting on Harvard Business School professor Clayton Christensen’s view that “[h]alf of the colleges and universities in the United States are in danger of bankruptcy” over the next 10–15 years).

<sup>95</sup> *See supra* note 68 and accompanying text; *see also* Butler *supra* note 52, at 25–26 (noting that the higher education industry is “edg[ing] toward a pricing tipping point”). Families may be unable to pay higher tuition in the future as, since 1973, tuition at public IHEs has already “increased by 274 percent while median household income has grown by only [seven] percent.” *See* Mitchell et al., *supra* note 68, at 16.

<sup>96</sup> *See supra* notes 72–80 and accompanying text.

<sup>97</sup> *See* Lederman, *supra* note 55; *see also* GEPHARDT, *supra* note 54, at 1–2.

<sup>98</sup> *See, e.g.*, Alan Sager, *Hospital Closings—Causes, Consequences, and Responses*, BOSTON OCCUPIER at 1 (Feb. 21, 2012), <http://www.bu.edu/sph/files/2010/10/Alan-Sager-The-Meaning-of-Hosp-Closings-Occupier.pdf> [<https://perma.cc/E8T2-BV8K>]; *see also* Neil A. Halpern & Stephen M. Pastores, *Critical Care Medicine in the United States 2000–2005: An Analysis of Bed Numbers, Occupancy Rates, Payer Mix, and Costs*, 38 CRITICAL CARE MED. 65, 66 (2010) (finding that 20.6 percent of acute care hospitals closed between 2000 and 2005).

<sup>99</sup> Sager, *supra* note 97, at 1.

institutions that have historically served the neediest members of our society are at the greatest risk of closing.<sup>99</sup>

Healthcare enterprises, like IHEs, 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.”<sup>100</sup> In other words, these hospitals are struggling financially.

On the expense side of the ledger, hospitals are spending more caring for patients.<sup>101</sup> Although granular data is hard to come by,<sup>102</sup> one major driver of the increased cost of patient care appears to be advanced technology,<sup>103</sup> such as the mandate that healthcare providers become “meaningful use[rs]” of electronic medical records.<sup>104</sup> Additional cost-drivers include drugs, with the average monthly price for certain cancer drugs having nearly sextupled from 2000 to 2014.<sup>105</sup>

<sup>99</sup> See *supra* notes 82–84 and accompanying text.

<sup>100</sup> *Hospitals Hit a Revenue Crunch*, HEALTHCARE FIN. (Apr. 25, 2014), <http://www.healthcarefinancenews.com/news/hospitals-hit-revenue-crunch> [<https://perma.cc/WDA2-W8Z4>] (“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.”).

<sup>101</sup> See Vivian Ho et al., *Why Are Hospital Prices Rising?*, HEALTH MGMT., POL’Y & INNOVATION, Sept. 2013, at 1, 7–8, <http://hmpi.org/wp-content/uploads/2017/02/HMPI-Ho-Dugan-Ku-Goto-Why-are-Hospital-Prices-Rising-revise.pdf> [<https://perma.cc/K8WR-NJUT>] (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 [privately insured] patients.”)

<sup>102</sup> A classic model of the major “cost-influencing variables” that determine the cost of providing hospital care includes the “number of cases treated, length-of-stay, complexity of case-mix, intensity of service, scope of services, amenity level, quality level, efficiency, input prices, investments in human and plant resources, and teaching programs.” See John L. Ashby, Jr., & Craig K. Lisk, *Why Do Hospital Costs Continue to Increase?*, HEALTH AFF., Summer 1992, at 134, 134, <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.11.2.134> [<https://perma.cc/Z2DC-Y3C4>] (citing William L. Dowling, *Prospective Reimbursement of Hospitals*, 11 INQUIRY 163, 165–66 (1974)).

<sup>103</sup> See Ho et al., *supra* note 101, at 4 (describing the rising cost of hospital care as likely reflecting the “greater use of advanced technology in medical care”); see also *Snapshots: How Changes in Medical Technology Affect Health Care Costs*, KAISER FAMILY FOUND. (Mar. 2, 2007), <https://www.kff.org/health-costs/issue-brief/snapshots-how-changes-in-medical-technology-affect/> [<https://perma.cc/NG3Z-5L7P>].

<sup>104</sup> See Electronic Health Records (EHR) Incentive Program, CMS.GOV, <https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/> [<https://perma.cc/YE2F-47J6>] (last updated Sept. 11, 2017); see also Walker Ray & Tim Norbeck, *Who’s to Blame for Our Rising Healthcare Costs?*, Opinion, FORBES (Oct. 3, 2013, 7:30 PM), <http://www.forbes.com/sites/physiciansfoundation/2013/10/03/whos-to-blame-for-our-rising-healthcare-costs/#60bb43f75671> [<https://perma.cc/D3P8-AUJJ>] (noting the “consensus among [healthcare] experts that technology is the most important driver of healthcare spending increases over time”).

<sup>105</sup> See Stacie B. Dusetzina, *Drug Pricing Trends for Orally Administered Anticancer Medications Reimbursed by Commercial Health Plans, 2000–2014*, Research Letter, 2 JAMA ONCOLOGY 960, 960–61 (2016) (stating that the rate increased from approximately \$1,869 per month in 2000 to approximately \$11,325 per month in 2014).

Another possible driver of increased costs for hospitals are minimum patient-to-staff ratios.<sup>106</sup>

On the revenue side of the ledger, hospitals have been squeezed by changes to Medicare reimbursements,<sup>107</sup> holdbacks from the sequester, the rise of “value-based purchasing” arrangements imposed by the Affordable Care Act (the “ACA”),<sup>108</sup> and cuts to Medicaid because of state budget constraints.<sup>109</sup> In addition, many

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<sup>106</sup> For example, in 2005, California imposed minimum patient-to-nurse ratios for hospitals, which may have increased the cost of care. See John M. Welton, *Mandatory Hospital Nurse to Patient Staffing Ratios: Time to Take a Different Approach*, ONLINE J. OF ISSUES IN NURSING (Sept. 30, 2007), <http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/Tables/Contents/Volume122007/No3Sept07/MandatoryNurseToPatientRatios.html> [<https://perma.cc/9KXW-YQUQ>] (expressing concern that mandatory staffing ratios could result in increased costs of care without any offsetting benefits).

<sup>107</sup> The rate of growth in healthcare spending recently hit its lowest level since 1965, the year Medicare was signed into law. Derek Thompson, *How America Reduced Its Healthcare Spending by \$2 Trillion*, ATLANTIC (Apr. 17, 2015), <http://www.theatlantic.com/business/archive/2015/04/how-america-reduced-health-care-spending-by-2-trillion/390771/>. 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. See, e.g., MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY (Mar. 2013), [http://www.medpac.gov/docs/default-source/reports/mar13\\_entirereport.pdf?sfvrsn=0](http://www.medpac.gov/docs/default-source/reports/mar13_entirereport.pdf?sfvrsn=0) [hereinafter MEDPAC REPORT] (noting that sequestration mandated a two percent payment reduction in most Medicare payments for services on or after April 1, 2013). Although Medicare has long reimbursed 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. Congressional Budget Office, *Estimated Impact of Automatic Budget Enforcement Procedures Specified in the Budget Control Act*, (Sept. 12, 2011), <https://www.cbo.gov/publication/42754> [<https://perma.cc/3HFL-B5WK>].

<sup>108</sup> The ACA hurts hospital revenue in two ways. First, it has “permanently reduce[d] the Medicare payments hospitals would otherwise receive” by imposing an approximately one percent per year reduction in Medicare payments based on hypothetical productivity gains, whether or not hospitals actually achieve these gains. Austin B. Frakt, *The End of Hospital Cost Shifting and the Quest for Hospital Productivity*, 49 HEALTH SERVS. RESEARCH 1, 1 (2013) (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.) Second, 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. See also *Linking Quality to Payment*, MEDICARE.GOV, <https://www.medicare.gov/hospitalcompare/linking-quality-to-payment.html> [<https://perma.cc/FYY9-LJX9>] (last visited Jan. 2, 2018); see also Memorandum from the Medicare Learning Network on Mandatory Payment Reductions in the Medicare Fee-for-Service (FFS) Program – “Sequestration” to Health Care Professionals, Providers, and Suppliers (Mar. 8, 2013), <https://www.cms.gov/Outreach-and-Education/Outreach/FFSProvPartProg/Downloads/2013-03-08-standalone.pdf> [<https://perma.cc/7FP2-ZM6P>].

<sup>109</sup> For example, Illinois cut Medicaid payments in 2012 by approximately \$1.6 billion. *Illinois Medicaid Cuts: Legislators Shave \$1.6 Billion from Budget*, HUFFPOST (May 26, 2012, 10:24 AM), [https://www.huffingtonpost.com/2012/05/25/illinois-medicare-cuts-le\\_n\\_1546668.html](https://www.huffingtonpost.com/2012/05/25/illinois-medicare-cuts-le_n_1546668.html) [<https://perma.cc/KPE6-HHBY>].

healthcare enterprises are suffering from “declining inpatient volumes” and the corresponding revenue losses because margins are generally lower for outpatient services.<sup>110</sup> But, many hospitals and healthcare systems—like many IHEs—have significant amounts of long-term debt that they may have incurred with the expectation of stable (or even increasing) revenue.<sup>111</sup> As a result, many healthcare enterprises are likely to encounter financial troubles or even “to edge toward bankruptcy.”<sup>112</sup> These changes help explain the troubled state of many healthcare enterprises.

### C. Bankruptcy Reorganization’s Advantages

Bankruptcy reorganization was intended to provide enterprises with an opportunity for reinvention.<sup>113</sup> It is a generally applicable method of preserving value for creditors, jobs for employees, and stability for communities.<sup>114</sup> IHEs are effectively precluded from reorganizing in bankruptcy because of financial disincentives created by Congress.<sup>115</sup> Yet, almost every other type of enterprise—including healthcare enterprises—can use bankruptcy reorganization for the benefit of its stakeholders.

This section discusses how IHEs would benefit from being permitted to reorganize in bankruptcy and proceeds as follows. It explains how one healthcare enterprise used the tools available in a chapter 11 bankruptcy reorganization to repay creditors, preserve enterprise value, retain jobs, and keep healthy the community in which it is located. It then argues that some IHEs could reorganize in bankruptcy to achieve similar results, and that all should be allowed to try.

Although many bankruptcy scholars disagree on the appropriate goals of a bankruptcy system,<sup>116</sup> they generally agree that enterprises should be reorganized when doing so is value-enhancing.<sup>117</sup> Liquidating enterprises unnecessarily or too

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<sup>110</sup> See Maizel et al., *supra* note 44, at 252. This is particularly true for certain types of diseases, where there has been a “major shift toward less invasive treatments,” and shorter hospital stays. Halpern & Pastores, *supra* note 97, at 65.

<sup>111</sup> Cf. Martin Kitchener et al., *Smoke Without Fire: Nursing Facility Closures in California, 1997–2001*, 41 *INQUIRY* 189, 189–90 (2004) (discussing the vulnerability of the U.S. nursing home industry and findings from studies conducted in 2000 that determined that much of the industry was “heavily in debt, understaffed, and losing money”).

<sup>112</sup> See Burns et al., *supra* note 16, at 33–34; see also Maizel et al., *supra* note 44, at 252.

<sup>113</sup> See Bruckner, *supra* note 25, at 698–99 (suggesting that “chapter 11 nurtures [the] inner phoenix” of distressed enterprises, “allowing them to rise from the flames as reorganized entities”); see also Miller & Waisman, *supra* note 38, at 143.

<sup>114</sup> See Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, PENN ST. J.L. & INT’L AFF. 445, 455 (2015).

<sup>115</sup> See *supra* notes 28–34 and accompanying text.

<sup>116</sup> See Matthew Bruckner, *The Virtue in Bankruptcy*, 45 *LOY. U. CHI. L.J.* 233, 237–38, 237 n.14 (2013).

<sup>117</sup> See *id.* at 238 nn.16–17.

quickly is thought to result in “fire sale” pricing.<sup>118</sup> 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 the bankruptcy reorganization toolkit. But it *is* surprising that IHEs are strongly disincentivized from doing so.<sup>119</sup> Given the financial strain many are experiencing, bankruptcy reorganization might be put to good use by IHEs, if only they could do so without losing Title IV eligibility.<sup>120</sup>

Bankruptcy reorganization helps enterprises preserve value by granting access to a variety of tools that are otherwise unavailable. These tools include, among other things: (i) the automatic stay, which causes an immediate halt to nearly all creditor collection activities;<sup>121</sup> (ii) the ability to renegotiate, assume, assign, or reject certain pre-bankruptcy contracts, including unexpired leases and collective bargaining agreements;<sup>122</sup> and (iii) deleveraging an entity’s balance sheet through the discharge available at the confirmation of a bankruptcy case.<sup>123</sup> Bankruptcy courts also have a convening power that encourages creditors to renegotiate various obligations.<sup>124</sup>

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<sup>118</sup> See generally Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007) (presenting “empirical evidence that reorganization” is more valuable than selling a “distressed” company).

<sup>119</sup> For a good discussion of how IHEs are effectively precluded from bankruptcy reorganization, see Norberg, *supra* note 20. For an argument why this is inappropriate, see Bruckner, *supra* note 25; see also *supra* text accompanying notes 31–33; *infra* text accompanying note 195.

<sup>120</sup> See Bruckner, *supra* note 25, at 705–15, (discussing how IHEs might use the bankruptcy reorganization toolkit to restructure); see also Bruckner, *supra* note 116, at 269–83 (discussing the advantages of bankruptcy reorganization generally).

<sup>121</sup> 11 U.S.C. § 362 (2012); see also 11 U.S.C. §§ 362(b)(14)–(16) (providing exceptions to the automatic stay for certain actions related to an IHE’s licensing, accreditation, and Title IV eligibility); Douglas G. Baird & Edward R. 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.”) (footnotes omitted); Mark G. Douglas, *Not-for-Profit Bankruptcies: Eleemosynary Corporations on the Brink*, JONES DAY (Oct./Nov. 2004), [http://www.jonesday.com/files/Publication/3c832831-b679-4d36-a1d5-205b7ed23988/Presentation/PublicationAttachment/fde3251a-3eb8-42f5-aac8-aaae8eca07f0/NYI\\_2168911\\_v1\\_NonprofitBRRArticleOctNov204.pdf](http://www.jonesday.com/files/Publication/3c832831-b679-4d36-a1d5-205b7ed23988/Presentation/PublicationAttachment/fde3251a-3eb8-42f5-aac8-aaae8eca07f0/NYI_2168911_v1_NonprofitBRRArticleOctNov204.pdf) (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”).

Arguably, public IHEs may not need the automatic stay because the so-called “arm of the state doctrine” may provide them with sovereign immunity. Bruckner, *supra* note 25, at 706 & n.58. 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 UCLA L. REV. 322, 326 & n.12 (2011) (mentioning that quasi-sovereign entities, such as states, may not need the protection of the automatic stay).

<sup>122</sup> See 11 U.S.C. §§ 365, 1113–1114; see also Matthew Adam Bruckner, *Terminating Tenure: Rejecting Tenure Contracts in Bankruptcy*, \_\_ AM. BANKR. L.J. \_\_ (forthcoming, 2018) (on file with author) (focusing on the treatment of tenure contracts by bankrupt IHEs).

<sup>123</sup> See *id.* §§ 944, 1129.

<sup>124</sup> See *id.* §§ 362, 1102.

Although bankruptcy reorganization is not particularly common in the healthcare industry,<sup>125</sup> it may be useful to consider how at least one healthcare enterprise has successfully used chapter 11.<sup>126</sup> Exploring how a healthcare enterprise has used chapter 11 to reorganize can illustrate the advantages (and limitations) of bankruptcy reorganization for IHEs.<sup>127</sup>

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.<sup>128</sup> In the years leading up to its bankruptcy filing, the hospital experienced serious financial problems, ultimately incurring more than \$20 million in unsecured debt, including \$13.8 million owed to its employees' pension system.<sup>129</sup> Auburn's financial struggles precipitated a downward spiral of underinvestment in its facilities, decreased patient volumes, and further underinvestment.<sup>130</sup> More specifically, Auburn's financial difficulties prevented investments in its physical plant, such as operating and patient rooms, or in new technologies, such as imaging scanners and electronic medical record systems.<sup>131</sup> 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 shutter Auburn's maternity ward and

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<sup>125</sup> See Maizel et al., *supra* note 44, at 265–74 (discussing the unique issues raised in healthcare bankruptcy cases); see also Gloria Bazzoli & Steven Andes, *Consequences of Hospital Financial Distress*, 40 HOSP. & HEALTH SERVS. ADMIN. 472, 480–82 (1995) (finding that only 1.2 percent of hospitals in their study filed for bankruptcy protection between 1985 and 1990, and it is unclear whether these hospitals liquidated or reorganized). It is unlikely that reorganization 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 IHEs deserve to be saved. Instead, this Article merely means to suggest that IHEs have been unreasonably cut off from a set of widely available legal tools, and that creditors, students, communities, employees, and the IHEs themselves are worse off for it.

<sup>126</sup> See *infra* notes 128–164 and accompanying text.

<sup>127</sup> This Article builds on a previous article that made the case for allowing IHEs to reorganize in bankruptcy. See Bruckner, *supra* note 25; Norberg, *supra* note 20. As a result, this Article focuses on the comparison to the healthcare industry instead of restating the arguments set forth in prior work.

<sup>128</sup> See Chapter 11 Voluntary Pet., *In re Auburn Memorial Hospital*, No. 07–31126 (Bankr. N.D.N.Y. Apr. 24, 2007); Final Decrees and Order Closing Cases, *In re Auburn Memorial Hospital*, No. 07–31126 (Bankr. N.D.N.Y. June 29, 2010); David Shaw, *Auburn Memorial Hospital Files for Bankruptcy*, SYRACUSE.COM (Apr. 24, 2007, 1:03 PM), [http://www.syracuse.com/news/index.ssf/2007/04/auburn\\_memorial\\_hospital\\_files.html](http://www.syracuse.com/news/index.ssf/2007/04/auburn_memorial_hospital_files.html) [<https://perma.cc/57NZ-7TD7>].

<sup>129</sup> See Shaw, *supra* note 128; see also Baran Aff., *supra* note 9, at ¶¶ 14–16, 39–43; Elliott-Engel, *supra* note 16; Rapp, *supra* note 12 (writing that Auburn was “strapped with \$25 million in unsecured debt that it couldn't repay”).

<sup>130</sup> See Fields, *supra* note 15 (“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.”); see also Rapp, *supra* note 12.

<sup>131</sup> Elliott-Engel, *supra* note 16.

Auburn faced questions from its accrediting body.<sup>132</sup> A bankruptcy filing became Auburn's best option to turn itself around.

Auburn successfully used the tools available in a bankruptcy reorganization to execute a quick and dramatic turn-around, putting it at the "top of the pile for success stories."<sup>133</sup> In bankruptcy, 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.<sup>134</sup> It used the bankruptcy reorganization toolkit 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.<sup>135</sup> Auburn also "streamlin[ed] operations," including reassigning personnel and improving its operational efficiency at core tasks.<sup>136</sup> Finally, Auburn made targeted investments in much-needed areas, such as updating its operating rooms<sup>137</sup> and creating an electronic medical record system.<sup>138</sup> The results were "dramatic financial and clinical turnarounds."<sup>139</sup>

Auburn's dramatic turnaround was only possible because of the bankruptcy reorganization toolkit, which allowed the hospital 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.<sup>140</sup> In turn, the bankruptcy discharge—and Auburn's ability to restructure its operations—may have encouraged local foundations and New York State to contribute resources toward necessary hospital renovations.<sup>141</sup> In any case, it allowed the hospital to spend millions of dollars on necessary capital improvements that would have otherwise gone to repay legacy debts.<sup>142</sup> Restructuring also left Auburn better positioned for the future by allowing it to shift its focus from acute care toward more in-demand medical services, such as "ambulatory, post-acute care and community health operations."<sup>143</sup>

Bankruptcy tools allowed Auburn to remain a vibrant part of Cayuga County and to invest in the county's future. Post-bankruptcy, Auburn continued to employ

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<sup>132</sup> See Rapp, *supra* note 12; see also Fields, *supra* note 15.

<sup>133</sup> Rapp, *supra* note 12 (quoting Syracuse University professor of hospital administration and finances, Tom Dennison).

<sup>134</sup> *Id.* (writing that just three years after filing for bankruptcy, Auburn recorded its most profitable year ever—\$4.2 million on revenues of approximately \$90.2 million).

<sup>135</sup> See Baran Aff., *supra* note 9, at ¶ 19.

<sup>136</sup> Fields, *supra* note 15.

<sup>137</sup> *Id.*

<sup>138</sup> Elliott-Engel, *supra* note 16.

<sup>139</sup> Fields, *supra* note 15.

<sup>140</sup> See Rapp, *supra* note 12.

<sup>141</sup> See *id.* (noting that 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).

<sup>142</sup> See Elliott-Engel, *supra* note 16 (noting that one of Auburn's primary goals in bankruptcy was to reduce its debt service, "freeing up its cash flow for capital investment"); see also Rapp, *supra* note 12.

<sup>143</sup> House, *supra* note 14.

hundreds of workers and contribute approximately \$170 million annually to the local economy.<sup>144</sup> In short, Auburn ran out of cash, and, outside of bankruptcy, could not fix its balance sheet. Comparably, many IHEs face similar issues and would benefit from reorganizing in bankruptcy as Auburn did.

The automatic stay can give an entity that is trying to turn itself around enough time to develop a plan to address its “substantial cash flow issues.”<sup>145</sup> For example, Auburn had failed to make more than thirteen million dollars in contributions to the hospital’s four employee pension funds.<sup>146</sup> In response, the Pension Benefit Guaranty Corporation “filed federal tax liens against the [h]ospital’s real property,” potentially jeopardizing the hospital’s continued operation.<sup>147</sup> Auburn had also apparently defaulted on certain obligations “under its Trust Indenture with U.S. Bank.”<sup>148</sup> As a result, the indenture trustee may have been able to declare an event of default, triggering accelerated payment obligations.<sup>149</sup> 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 allowed Auburn to return its contracts to their pre-default position, thus decelerating its payment obligations.<sup>150</sup>

The automatic stay can also help IHEs address their cash flow issues by giving them the breathing room needed to focus on restructuring their obligations instead of lurching from crisis to crisis. For example, Paine College, a private nonprofit HBCU in Augusta, Georgia has been wrestling with its finances recently.<sup>151</sup> Paine could benefit from the breathing room offered by the automatic stay 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.<sup>152</sup> If individual creditors were able to seize their collateral, it

<sup>144</sup> *Id.*

<sup>145</sup> Baran Aff., *supra* note 9, at ¶ 16. See 11 U.S.C. § 362 (2012). The automatic stay is of less value to bankrupt IHEs than to many other types of entities because of three exceptions related to an IHE’s licensing, accreditation, and Title IV eligibility. See §§ 362(b)(14)–(16). Although these exceptions do not necessarily need to be eliminated to allow IHEs to reorganize in bankruptcy, eliminating these exceptions would aid IHEs if they sought to reorganize in bankruptcy.

<sup>146</sup> Baran Aff., *supra* note 9, at ¶ 14.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at ¶ 15.

<sup>149</sup> See, e.g., 15 U.S.C. § 7700o (2012).

<sup>150</sup> See Rapp, *supra* note 12.

<sup>151</sup> See Taylor Bingham, *Paine College to Spend Another Year on Probation*, WRDW.COM (June 11, 2015, 5:51 PM), <http://www.wrdw.com/home/headlines/Commission-expected-to-rule-on-Paine-Colleges-accreditation-today-306966081.html> [https://perma.cc/942P-JFKP] (describing Paine as being on a probationary accreditation status because of issues related to its financial resources and financial stability); see also Stacey Eidson, *No Paine, No Gain*, METROSPiRiT (Mar. 22, 2017), <http://metrospirit.com/no-paine-no-gain/> [https://perma.cc/R5ZZ-XVPT] (describing Paine’s troubled finances and its litigation with its accrediting body).

<sup>152</sup> See 11 U.S.C. § 362 (2012).



could cause Paine to shut down unexpectedly to the likely detriment of other creditors, students, faculty, staff, and the local community.

Auburn needed to negotiate new work rules with its employees. Most of Auburn's employees were unionized and union work rules can often make it difficult and costly to accomplish substantial operational changes.<sup>153</sup> But, the Bankruptcy Code allows an entity to reject, or refuse to perform, certain contracts, including collective bargaining agreements.<sup>154</sup> If an enterprise is party to an unfavorable contract, it can reject that contract, refuse performance, and redeploy its assets in pursuit of more profitable endeavors.<sup>155</sup> Even where debtors intend to fully perform their contractual obligations, debtors can use the threat of rejection to negotiate a better deal going forward.<sup>156</sup> Auburn's management appeared to have taken a firm position during negotiations, presumably because they knew the Code empowered them to do so.<sup>157</sup>

Although it turned out not to be necessary for Auburn, Auburn could also have abrogated its collective bargaining agreements in chapter 11.<sup>158</sup> Like Auburn, IHEs are likely to have hundreds, if not thousands, of contracts that they would prefer not to perform under, both collective bargaining agreements and otherwise. IHEs are likely party to scores of contracts and 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.<sup>159</sup> If the University of Massachusetts at Amherst needed to reorganize its operations, this tool would likely help it renegotiate those agreements, allowing it to turn around its financial position.

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 systems, including a recommendation that Auburn dramatically reduce its number of hospital beds and entirely discontinue providing

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<sup>153</sup> See Baran Aff., *supra* note 9, at ¶¶ 10, 39.

<sup>154</sup> See 11 U.S.C. § 1113 (2012).

<sup>155</sup> See 11 U.S.C. § 365. Outside of bankruptcy, breaching 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. See *id.*; see also George Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 U. TORONTO L. J. 679, 679 (1993); Bruckner, *supra* note 122.

<sup>156</sup> Effectively 11 U.S.C. § 365(a) allows a debtor to renegotiate executory contracts and unexpired leases, even though this power is not expressly granted by the Bankruptcy Code. See Triantis, *supra* note 155 ("the adjustment of contracts is negotiated against the background of rules governing breach.").

<sup>157</sup> See Rapp, *supra* note 12 (noting that management "was unbending in negotiations" with certain emergency room employees and offered terms that employees thought were "unfair and 'almost laughable'").

<sup>158</sup> Elliott-Engel, *supra* note 16.

<sup>159</sup> *Human Resources: Bargaining Unit Employees*, UMASSAMHERST, <https://www.umass.edu/humres/bargaining-unit-employees> [<http://perma.cc/FR5E-LY9T>] (last visited Jan. 3, 2018).

Ob-Gyn services.<sup>160</sup> 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.<sup>161</sup> Instead, it invested more than two million dollars in renovating its maternity ward.<sup>162</sup> In addition, it modernized its operating and patient rooms and renovated its HVAC systems.<sup>163</sup> Finally, Auburn used chapter 11 to discharge a lot of debt: Auburn paid only fourteen cents to its unsecured creditors for every dollar it owed, making possible many of the aforementioned renovations.<sup>164</sup>

IHEs 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 1141, would likely be very useful.<sup>165</sup> For example, in 2015 Education Management Corporation, a for-profit education company, and other affiliated entities sought to use the bankruptcy system to restructure approximately \$1.5 billion of debt.<sup>166</sup> 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.<sup>167</sup> Similarly, if St. Paul had been able to discharge a substantial portion of its debt, St. Augustine may have acquired the college and helped preserve St. Paul’s legacy.<sup>168</sup>

It is also important to note what chapter 11 did not do for Auburn and would not be able to do for IHEs. Chapter 11 could not increase Auburn’s reimbursements from Medicare. Nor could it force patients to pay Auburn for its care. Similarly, bankruptcy cannot fix every problem faced by IHEs. It cannot force governments to increase their support for higher education or force students to choose certain IHEs. For example, Sweet Briar College’s board of trustees was ousted in 2015 after it sought to shut down the college amidst enrollment problems, including a “rising discount rate (the percentage covered by institutional

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<sup>160</sup> See Baran Aff., *supra* note 9, at ¶ 17.

<sup>161</sup> See *id.* at ¶ 7 (noting that as of April 24, 2007, Auburn’s “acute care division [was] licensed for 191 beds”); Rapp, *supra* note 12 (noting that following bankruptcy, Auburn operated a “99-bed hospital”); see also *id.* (“[Auburn] staved off a state recommendation to shutter its maternity ward.”).

<sup>162</sup> Rapp, *supra* note 12.

<sup>163</sup> Elliott-Engel, *supra* note 16.

<sup>164</sup> Rapp, *supra* note 12 (“Creditors received an average of [fourteen] cents for every dollar they were owed, and the hospital replaced its employees’ pension fund with a government-guaranteed retirement program.”); see also *supra* notes 140–141 and accompanying text.

<sup>165</sup> See 11 U.S.C. §§ 507, 1141(d)(1)(A) (2012). In the bankruptcy proceeding of a public IHE, chapter 9’s section 944 is likely to be the relevant provision.

<sup>166</sup> Jessica Liou, *What Marblegate Can Teach Us About the Protections Available to Minority Noteholders in an Out-of-Court Restructuring*, WEIL: BANKR. BLOG (Aug. 12, 2015), <http://business-finance-restructuring.weil.com/case-overviews/what-education-management-can-teach-us-about-the-protections-available-to-minority-noteholders-in-an-out-of-court-restructuring/> [<https://perma.cc/8JA7-JAKM>].

<sup>167</sup> See *id.*

<sup>168</sup> See *supra* text accompanying notes 20–25.

aid or discounts off sticker price that families pay), a declining yield (the percentage of admitted applicants who enroll)[,] and the difficulty of recruiting applicants to a rural women's liberal arts college.<sup>169</sup> 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,<sup>170</sup> bankruptcy would not be able to resolve the college's enrollment problems.

In addition to its advantages for bankrupt entities, bankruptcy reorganization also has many positive externalities. Bankruptcy can help preserve jobs when an enterprise continues operating.<sup>171</sup> Additionally, by keeping an enterprise's doors open, bankruptcy reorganization can prevent pension losses,<sup>172</sup> and avoid knock-on effects in bond markets.<sup>173</sup> In the healthcare context, avoiding the sudden and unplanned closing of facilities can save lives because "when hospitals die, people die."<sup>174</sup> Although lives are not literally at stake when IHEs close, the economic lives of students, faculty, staff, and communities often are.

Bankruptcy reorganization was designed to provide the aforementioned benefits to any entity that may reorganize under its auspices. All the benefits reaped by Auburn could also be reaped by IHEs, if only they were encouraged to file instead of financially precluded from doing so. To understand why IHEs 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.<sup>175</sup>

## II. FEDERAL INVOLVEMENT IN HIGHER EDUCATION AND HEALTHCARE

The federal government is as important to the U.S. 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 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

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<sup>169</sup> Scott Jaschik, *Sweet Briar Survives*, INSIDE HIGHER ED (June 22, 2015), <https://www.insidehighered.com/news/2015/06/22/deal-will-save-sweet-briar-college> [<https://perma.cc/ZF46-J3QW>].

<sup>170</sup> *Id.*

<sup>171</sup> Bruckner, *supra* note 116, at 269–75 (discussing chapter 11's ability to preserve jobs).

<sup>172</sup> See Burns et al., *supra* note 16, at 36.

<sup>173</sup> See Bruckner, *supra* note 25, at 735–36; Burns et al., *supra* note 16, at 36.

<sup>174</sup> See Maizel et al., *supra* note 44, at 257.

<sup>175</sup> Despite the numerous differences between hospitals and IHEs, hospitals are a reasonable point of comparison for IHEs for the reasons set forth in the text surrounding notes 39–43, *supra*. For a summary of some of their differences and the reasons why the comparison may be inapt, see *infra* notes 248, 251, and 253–256 and accompanying text.

and why it has chosen to play such a role. This background information will help explain why it is perplexing that IHEs cannot reorganize in bankruptcy.

### A. Title IV Program Overview

Title IV of the HEA established the modern “foundation for federal student aid in higher education.”<sup>176</sup> Although the federal government had long supported higher education, “Title IV represented the first generally available aid program” for college students.<sup>177</sup> One of the HEA’s primary goals is to increase student access to post-secondary education.<sup>178</sup> 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.<sup>179</sup> Without federal subsidies, “it seems highly unlikely that the nation’s poor would have been able to capitalize on higher education opportunities.”<sup>180</sup> The HEA is generally thought to have succeeded in “making

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<sup>176</sup> See Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 119 (2012). Arguably, land grants represented the first government involvement in the U.S. higher education system. See Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 457 (1996) (tracing federal involvement in higher education to 1862 with the passage of the first Morrill Acts); see also McGuire, *supra*, at 122. But the modern system appears to have begun in 1944 with the Servicemen’s Readjustment Act of 1944 (a.k.a. the G.I. Bill). See *id.* at 122–23. Then came the “emergency” National Defense Education Act of 1958. See Michael Gleeson, *Student Loan Debt and the Effects on the Broader Economy 7–8* (Apr. 2016) (unpublished M.A. capstone, Johns Hopkins University) (on file with the Johns Hopkins University Library), <https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/38646/Michael%20Gleeson.pdf> [<https://perma.cc/1C3X-WT2N>]; see also Bridget Terry Long, *Supporting Access to Higher Education*, in LEGACIES OF THE WAR ON POVERTY 93, 98–99 (Martha J. Bailey & Sheldon Danziger eds., 2013) (describing the HEA and the Economic Opportunity Act of 1964 as “establish[ing] the foundation of the federal financial aid system that exists today”). But see Sarah Molinero, Comment, *Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education*, 51 DUQ. L. REV. 833, 841 (2013) (identifying the National Youth Administration as “the first federal program that assisted individual students in gaining access to institutions of higher education”).

<sup>177</sup> Long, *supra* note 176, at 101 (quoting Angelica Cervantes et al., TG RESEARCH & ANALYTICAL SERVS., *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later* 20 (Nov. 2005), [https://www.tgslc.org/pdf/HEA\\_History.pdf](https://www.tgslc.org/pdf/HEA_History.pdf) [<https://perma.cc/UPS4-XS2C>]).

<sup>178</sup> The HEA’s goal was to “mak[e] 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, Note, *Mortgaging the American Dream: The Misplaced Role of Accreditation in the Federal Student Loan System*, 82 FORDHAM L. REV. 1905, 1905 (2014). See *id.* at 1907 (stating that, by signing the HEA into law, President Johnson “hop[ed] to reduce financial barriers and provide equal access to higher education”); see also Somers & Hollis, *supra* note 176, at 458.

<sup>179</sup> Long, *supra* note 176, at 94; see also *id.* 96–97 (stating that, by 1960, most Americans had failed to complete high school, let alone college, with financial concerns being a likely cause).

<sup>180</sup> *Id.* at 106.

mass American higher education possible” by mitigating the income barrier’s effect on college attendance.<sup>181</sup>

There are numerous reasons why the federal government has sought to increase college enrollment. Increasing college access is thought to increase the U.S.’s international competitiveness, to correct market failures, and to eliminate poverty.<sup>182</sup> Increased college enrollment is thought to benefit American society “by creating a more qualified, higher-paid workforce, ultimately improving the quality of life.”<sup>183</sup> Additionally, “[i]ndividuals with a college degree earn greater than a million dollars more in their lifetime and have a lower unemployment rate than to [sic] those with [only] a high school diploma.”<sup>184</sup>

Federal efforts to promote college access through Title IV have not been cheap. The federal government indirectly provides an enormous amount of money to IHEs, including more than \$76 billion in 2013, representing a slight majority of all student aid.<sup>185</sup> Federal student aid takes a variety of forms, including well-known programs such as Pell Grants,<sup>186</sup> Perkins, Grad (PLUS), and Stafford Loans.<sup>187</sup>

<sup>181</sup> *Id.* at 93; *see also id.* at 106–07 (highlighting that enrollment rates increased “since the War on Poverty,” with just over half of students enrolling at an IHE immediately following high school in 1975, but more than two-thirds enrolling in 2010).

<sup>182</sup> *See id.* at 100–01; *see also* Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137, 2168 (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”); *see also id.* (noting that members of Congress also wanted to enhance and defend our “national 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 “increas[ing] the supply of skilled labor, promot[ing] 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, 310 (2013) (suggesting that “society is collectively better off when . . . young people are educated”).

<sup>183</sup> Negri, *supra* note 178, at 1913.

<sup>184</sup> Gleeson, *supra* note 176, at 1.

<sup>185</sup> Woodhouse, *supra* note 43; *see also* THE PEW CHARITABLE TRUSTS, *Federal and State Funding of Higher Education: A Changing Landscape* 1 (June 11, 2015), [http://www.pewtrusts.org/~media/assets/2015/06/federal\\_state\\_funding\\_higher\\_education\\_final.pdf](http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf) [<https://perma.cc/5CCJ-SBG8>] (noting that “[h]istorically, states . . . provided a [much] greater amount of [financial] assistance to postsecondary institutions” relative to the federal government); Negri, *supra* note 178, at 1909 (“[G]overnment loans dominate the student loan market.”); *cf.* EATON ET AL., *supra* note 87, at 1, 32 n.1 (calculating 2012 total U.S. higher education spending, including interest spent on student loans, at \$525 billion). *But see* Edwards & McCluskey, *supra* note 44 and accompanying text.

<sup>186</sup> *See* Somers & Hollis, *supra* note 176, at 459; *see also* *Types of Aid: Grants and Scholarships*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/grants-scholarships> [<https://perma.cc/GD3J-HBEP>] (last visited Jan. 3, 2018).

<sup>187</sup> *See* Somers & Hollis, *supra* note 176, at 459–60; *see also* *Types of Aid: Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans> [<https://perma.cc/V3CS-GXEZ>] (last visited Jan. 3, 2018). Stafford Loans are also referred to as Direct Subsidized or Unsubsidized Loans. *See* *Types of Aid: Subsidized and Unsubsidized Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/subsidized-unsubsidized> [<https://perma.cc/5P63-CJ7A>].

Total student loan indebtedness now tops one trillion dollars,<sup>188</sup> almost all of it backed by federal government guarantees.<sup>189</sup>

Title IV’s programs are critically important to IHEs, as well as the students that attend them. Students use Title IV grants and loans to defray the cost of attending an institution of their choosing.<sup>190</sup> Thus, although students are the direct beneficiaries of Title IV programs, IHEs are indirectly supported by Title IV.<sup>191</sup> Some IHEs obtain nearly all of their revenue from Title IV.<sup>192</sup>

Without the ability to accept Title IV dollars, IHEs generally cannot survive. For example, Corinthian Colleges shut down its operation in 2015—which formerly consisted of more than ten thousand 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.”<sup>193</sup> 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[d]

<sup>188</sup> See Mark Kantrowitz, *Why the Student Loan Crisis Is Even Worse than People Think*, TIME: MONEY (Jan. 11, 2016), <http://time.com/money/4168510/why-student-loan-crisis-is-worse-than-people-think> [https://perma.cc/8DCB-FF2C]; see also Gleeson, *supra* note 176, at 2 (describing the rise in the number of student loan borrowers and the amount they borrow as “staggering”).

<sup>189</sup> See Susan M. Dynarski, *The RNC Wants to Make Student Loans Competitive Again. They Never Were.*, BROOKINGS INSTITUTION (July 21, 2016), <https://www.brookings.edu/research/the-rnc-wants-to-make-student-loans-competitive-again-they-never-were/> [https://perma.cc/JZ3L-C8W4] (discussing the federal government’s long-standing, central role in the student loan market); see also Roots, *supra* note 41, at 504–06 (discussing the evolution of “[b]orrowing under federal loan programs”); Somers & Hollis, *supra* note 176, at 459–60.

<sup>190</sup> See McGuire, *supra* note 176, at 125; see also THE PEW CHARITABLE TRUSTS, *supra* note 185, at 7 fig.6 (calling the federal government “the nation’s largest student lender” because “it issued \$103 billion in loans in 2013”).

<sup>191</sup> See McGuire, *supra* note 176, at 125, 139–40; Long, *supra* note 176, at 101–02 (finding that the federal approach to financing higher education has, generally, been to support lending directly to individual students); see also THE PEW CHARITABLE TRUSTS, *supra* note 185, at 8 fig.7 (noting that the federal government also “provided \$31 billion in tax credits, deductions, . . . and exclusions” in 2013, which are “similar to direct government spending”).

<sup>192</sup> McGuire, *supra* note 176, at 121 (“[F]ederal aid constitutes nearly all of the revenue of many of the most prominent for-profit institutions.”). Presumably, federal aid would constitute all of the revenue of some for-profit IHEs if the government did not set a maximum limit of ninety percent federal funding. 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> [https://perma.cc/8EAN-9XGK] (finding that many for-profit institutions exceed the 90/10 rule, “which prohibits for-profit colleges from deriving more than [ninety] percent of their operating revenue from federal student aid money[.]” and that many more would exceed the threshold if veteran education program dollars were included in the calculation); see also Bruckner, *supra* note 90 (pointing out the loophole in the 90/10 rule for veterans’ programs and the need to address it).

<sup>193</sup> Stephanie Gleason, *Corinthian Colleges Files for Chapter 11 Bankruptcy*, WALL ST. J. (May 4, 2015, 3:17 PM), <http://www.wsj.com/articles/corinthian-colleges-files-for-chapter-11-bankruptcy-1430746291> [https://perma.cc/G95N-6QXP].

federal financial aid.<sup>194</sup> In short, terminating access to Title IV funds is a death sentence for most IHEs. As a result, Congress's decision to terminate an IHE's access to Title IV if it files bankruptcy effectively eliminates most IHEs' opportunity to be resuscitated in a bankruptcy reorganization.<sup>195</sup>

### B. *The Medicare Program*<sup>196</sup>

On July 30, 1965, President Lyndon Johnson signed the Medicare program into law.<sup>197</sup> Medicare is a federal health insurance program for the elderly that reimburses qualified healthcare enterprises for the care they provide to Medicare program beneficiaries.<sup>198</sup> The United States Department of Health and Human Services ("HHS") administers the Medicare program through CMS.<sup>199</sup> Although the federal government's involvement with the American healthcare system predates this program,<sup>200</sup> Medicare's passage began a massive expansion of that involvement.<sup>201</sup>

One of Medicare's primary goals is to increase access to healthcare for the elderly.<sup>202</sup> Prior to Medicare's enactment, elderly folks were particularly unlikely to have insurance coverage "for the potentially catastrophic burdens of hospital and doctors' bills."<sup>203</sup> Some viewed the elderly population's lack of healthcare access as a

<sup>194</sup> Bruckner, *supra* note 85.

<sup>195</sup> See *supra* note 31 and accompanying text.

<sup>196</sup> The following material relates directly to hospitals, but, with some limited exceptions for purposes of this Article's thesis, it relates to most other healthcare enterprises.

<sup>197</sup> *History*, CMS.GOV, <https://www.cms.gov/About-CMS/Agency-information/History/> [<https://perma.cc/3VYZ-HZC2>] (last updated Sept. 14, 2017).

<sup>198</sup> Nathaniel M. Lacktman & Keith C. Owens, *Health Care Providers and the Automatic Stay: Is Medicare Termination Different than Exclusion?*, AM. BANKR. INST. J., Nov. 1, 2006, <https://www.abi.org/abi-journal/health-care-providers-and-the-automatic-stay-is-medicare-termination-different-than> [<https://perma.cc/9U3H-P8BH>].

<sup>199</sup> Bobby Guy, *Acquiring the Distressed Health Care Business*, 33 AM. BANKR. INST. J., Feb. 2014, at 40; *About CMS*, CMS.GOV, <https://www.cms.gov/About-CMS/About-CMS.html> [<https://perma.cc/9V4C-E37U>] (last visited Jan. 4, 2018).

<sup>200</sup> For instance, the Kerr-Mills Act of 1960 provided federal funds to cover the care of the elderly. See Rosemary A. Stevens, *Health Care in the Early 1960s*, 18 HEALTH CARE FINANCING REV. 11, 12 (1996), <https://www.ssa.gov/history/pdf/HealthCareEarly1960s.pdf> [<https://perma.cc/RZ47-A9ZL>].

<sup>201</sup> 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)).

<sup>202</sup> See Stevens, *supra* note 200, at 11–12, 14 (discussing the elderly's lack of health insurance at the time Medicare was passed); see also *In re Vitalsigns Homecare, Inc.*, 396 B.R. 232, 240 (Bankr. D. Mass. 2008) (noting that Medicare's fundamental goal is "providing health care to the elderly and disabled while protecting the public fisc"). Medicare has also been described as bridging the gap between Johnson's vision of a Great Society and the reality of America in the 1960s by using Medicare to "transform[] the elderly into paying consumers of hospital services." Stevens, *supra* note 200, at 14.

<sup>203</sup> Stevens, *supra* note 200, at 12; see also Louis Jacobson, *Were the Early 1960s a Golden Age for Health Care?*, POLITIFACT (Jan. 20, 2012, 5:58 PM), <http://www.politifact.com/truth-o->

market failure justifying government intervention.<sup>204</sup> In this regard, Medicare has been a success. In 2015, Medicare served approximately 55 million beneficiaries nationwide,<sup>205</sup> and provided access to healthcare coverage for tens of millions more, “many of whom who would otherwise have lacked access to any kind of health care.”<sup>206</sup> Just as the federal government finances higher education to improve access to education, the federal government uses Medicare 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 respectively.<sup>207</sup>

Medicare has successfully expanded access to healthcare for the elderly,<sup>208</sup> but has done so at a tremendous cost. The federal government is the primary purchaser of healthcare in the United States.<sup>209</sup> In 2016, the federal government spent approximately \$672.1 billion on Medicare coverage.<sup>210</sup> Hospitals are heavily dependent on Medicare revenue, with one survey finding that the median hospital received nearly forty-four percent of its patient revenue from Medicaid alone.<sup>211</sup>

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meter/article/2012/jan/20/was-early-1960s-golden-age-health-care/ [https://perma.cc/AM9B-XZZV] (citing the 1963 “Survey of the Aged” conducted by the Social Security Administration that found “eight out of [ten] elderly individuals[] ‘assumed responsibility for their own costs without help from government sources or private voluntary agencies’”).

<sup>204</sup> Stevens, *supra* note 200, at 14 (describing Medicare as a solution to the market’s failure to provide affordable medical care to the elderly).

<sup>205</sup> Press Release, CMS, On Its 50th Anniversary, More than 55 Million Americans Covered by Medicare (July 28, 2015), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-07-28.html> [https://perma.cc/L6ZM-P4ZC]

<sup>206</sup> *Medicare Waste, Fraud, and Abuse: A Regional Perspective: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Commerce*, 105th Cong. 8 (1998) [hereinafter *Medicare Waste, Fraud, and Abuse Hearing*] (prepared statement of Nancy-Ann Min DeParle, Administrator, Health Care Financing Administration); *see also id.* (highlighting that in 1998, Medicare served “more than 39 million beneficiaries nationwide” and had “provided access to health care coverage for almost 80 million Americans” over its thirty-two-year life).

<sup>207</sup> The federal government also provides access to health care through Medicaid. See Access to Care, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/access-to-care/index.html> [https://perma.cc/8Z6W-YRC9] (last visited Jan. 4, 2018).

<sup>208</sup> Jacobson, *supra* note 203 (explaining that prior to Medicare and Medicaid’s enactment, “[m]any people in the U.S. . . . had very limited access to medical care”) (quoting Ronald Andersen, emeritus professor of health services and sociology at UCLA School of Public Health).

<sup>209</sup> Kerry Young, *Federal Government Emerges as Top Health Buyer in New Analysis*, WASH. HEALTH POL’Y WK. REV. (The Commonwealth Fund, New York, N.Y.), Dec. 5, 2016, <http://www.commonwealthfund.org/publications/newsletters/washington-health-policy-in-review/2016/dec/december-5-2016/federal-government-emerges-as-top-health-buyer> [https://perma.cc/972H-27M3].

<sup>210</sup> *National Health Expenditures Fact Sheet*, CMS.GOV, <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> [https://perma.cc/4G2N-N4RX] (last updated Dec. 6, 2017).

<sup>211</sup> *Hospitals Hit a Revenue Crunch*, *supra* note 100 (surveying revenue sources of 203 nonprofit hospitals and finding that “a median of 44.3 percent came from Medicare . . . , 12.9 percent came from Medicaid, . . . , 32.1 percent came from commercial payers . . . [,] and 7.6 percent came from self-pay, . . .”); *see also Hospital Finance: 101*, CTR. FOR HEALTH AFF. (Mar. 2013),



### III. WHY IHES SHOULD NOT BE EFFECTIVELY PRECLUDED FROM BANKRUPTCY REORGANIZATION

This section has three purposes. Section A addresses Congress's sole justification for precluding IHES from using a widely available legal provision designed to resuscitate financially troubled enterprises: the hope that it will deter or prevent fraud and abuse.<sup>212</sup> Section B offers three arguments why precluding IHES 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 peculiar; and (iii) given the relative amounts of taxpayer dollars at risk, it is not sensible to allow healthcare but not higher education enterprises to reorganize. Section C discusses two counter-arguments. First, fraud may be more likely to occur in the higher education sector than the healthcare sector. Second, healthcare enterprises serve more vulnerable clients than IHES, making reorganization more important for the former. This section concludes that, on balance, the arguments for allowing IHES to reorganize in bankruptcy are more persuasive than the arguments against. Therefore, IHES should not be effectively precluded from reorganizing.

#### *A. The Congressional Justification for Denying IHES Access to the Bankruptcy Reorganization Toolkit*

Congress has only offered one reason for denying economically struggling IHES access to bankruptcy reorganization, which is the perceived prevalence of fraud and

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<http://www.neohospitals.org/TheCenterForHealthAffairs/MediaCenter/NewsReleases/2013/April/~media/08FDE88949E24BA5BAE9650B6534A1DE.ashx> [<https://perma.cc/6HAY-3PYL>] (claiming that, in 2010, 39.1 percent of hospital costs were paid by Medicare and 16.1 percent were paid by Medicaid).

<sup>212</sup> See *Abuses in Federal Student Aid Programs: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 101st Cong. 22 (1990) [hereinafter *Hearings Before Permanent Subcomm.*] (statement of Kim Wherry, Counsel, Permanent Subcomm. on Investigations) (discussing her view that IHES abuse the bankruptcy system); see also *id.* at 39–40 (statement of James B. Thomas, Jr., Inspector General, U.S. Department of Education) (describing the Inspector General's investigation into "fraud, waste, and abuse" in federal student aid programs); cf. 140 CONG. REC. 20,174–175 (1994) (Letter from James B. Thomas, Jr., Office of Inspector Gen., to Sen. Claiborne Pell, Chairman, Subcomm. on Educ. & Humanities, S. Comm. on Labor & Human Res. (June 24, 2014)) (calling it "abuse" when "schools set tuition prices that bear little or no relation to the quality" of the program, future employment prospects[,] or likely future salaries of students); *Quality in Higher Education: Hearing Before the Subcomm. on Educ., Arts, & Humanities of the S. Comm. on Labor & Human Res.*, 99th Cong. 16–17 (1986) (statement of William J. Bennett, Secretary of Education, U.S. Department of Education) ("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.").

abuse in the higher education sector.<sup>213</sup> The view that the higher education sector is rife with fraud and abuse is best summarized by a 1991 Senate Report on higher education.<sup>214</sup> The Senate Report expressed concerns about fly-by-night colleges fleecing students and avoiding their obligations by filing for bankruptcy protection.<sup>215</sup> The Senate Report also suggested that IHEs “that 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.”<sup>216</sup>

By precluding IHEs 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 the skills they hoped to acquire[,]” but would instead be “left burdened with debts they [could not] repay.”<sup>217</sup> But, precluding

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<sup>213</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-HEHS-96-158, HIGHER EDUCATION: ENSURING QUALITY EDUCATION FROM PROPRIETARY INSTITUTIONS, *Testimony Before the Subcomm. on Human Res. & Intergovernmental Relations of the H. Comm. on Gov't Reform and Oversight* 1 (1996), <https://www.gao.gov/archive/1996/he96158t.pdf> [<https://perma.cc/9S8R-YRDF>] (statement of Cornelia M. Blanchette, Associate Director Education & Employment Issues, Health, Education, and Human Services Division) (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 student aid programs”). Although “[t]he Senate Report accompanying the [1992 amendments to the HEA] contains no specific explanation of the anti-bankruptcy provision[,]” see Norberg, *supra* note 20, at 390, the concern repeatedly expressed is that Title IV’s programs are “[p]lagued by fraud and abuse at every level[,] . . . lack[] meaningful oversight and management controls, [and, as a result have] become inefficient, ineffective, and far too costly.” S. REP. NO. 102–58, at 33 (1991); see generally Higher Education Amendments of 1992, Pub. L. No. 102–325, 106 Stat. 448 (1992).

<sup>214</sup> See generally S. REP. NO. 102–58 (discussing the pervasive reports of “waste, fraud, and abuse” in the Guaranteed Student Loan Program, “one of seven major student financial aid programs” authorized by Title IV of the HEA).

<sup>215</sup> See *id.* at 10–13 (discussing schools’ fraudulent practices); *id.* at 19, 26, 34 (discussing schools’ ability to “secur[e] the protection of the bankruptcy court”); Lacey, *supra* note 53 (explaining that Congress’s 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”); see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 213, at 1 (explaining that for-profit institutions have “enriched themselves at the expense of economically disadvantaged students while providing little or no education in return”); REBECCA R. SKINNER, CONG. RESEARCH SERV., RL32182, INSTITUTIONAL ELIGIBILITY AND THE HIGHER EDUCATION ACT: LEGISLATIVE HISTORY OF THE 90/10 RULE AND ITS CURRENT STATUS, at Summary Page (Jan. 19, 2005), <http://www.policyarchive.org/handle/10207/1904> [<https://perma.cc/8HL3-TZ2G>] (follow “View Publication” hyperlink) (“Supporters of the 85/15 rule argued that the rule was necessary to stem fraudulent and abusive practices that had been identified at proprietary institutions.”).

<sup>216</sup> S. REP. NO. 102–58, at 19 (quoting the Inspector General’s testimony).

<sup>217</sup> *Id.* at 33; see also 140 CONG. REC. 20,174 (1994) (describing “victimized” students); Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS, 85–100 (Katherine Porter ed.) (2012) (explaining that incurring educational debt without earning a degree can lead to bankruptcy).

IHEs from using the tools available in bankruptcy reorganization was never an appropriate solution to this problem.<sup>218</sup> Unsurprisingly, therefore, Congress has not solved it.<sup>219</sup> Ted Mitchell, the then-Undersecretary of education, recently noted, “[U]nfortunately, in recent years, [we have] 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[ . . . ]”<sup>220</sup>

### *B. Three Arguments Against Precluding Bankruptcy Reorganization as a Fraud-Prevention Tool*

#### *i. Bankruptcy Court Supervision Prevents Fraud*

Congress’s decision to economically preclude nearly all IHEs from reorganizing in bankruptcy in an attempt to deter or prevent fraud may result from a poor understanding of how bankruptcy works.<sup>221</sup> Bankrupt enterprises are supervised by bankruptcy courts, the United States Trustee, official committees of creditors or equity-holders, and others.<sup>222</sup> 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.”<sup>223</sup> 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.<sup>224</sup>

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<sup>218</sup> 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) (2012); see also Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 NOTRE DAME J. LEGIS. 185, 187–90 (2012) (advocating for the elimination of the “undue hardship” standard).

<sup>219</sup> Neither Congress nor other governmental entities have come up with a solution. The “triad” of accreditation, state licensure, and ED certification do not, generally, appear to provide sufficient oversight over IHEs. SKINNER, CONG. RESEARCH SERV., RL32182, at 4 (referring to three-part regulatory structure of accreditation, licensure, and institutional eligibility as the “triad”).

<sup>220</sup> Collin Binkley, *Feds Consider Whether to Shut For-Profit College Watchdog*, AP NEWS (June 11, 2016), <http://www.bigstory.ap.org/article/21f8481883144f4b85edd03337def233/feds-consider-whether-shut-profit-college-watchdog> [<https://perma.cc/Y8XH-3FGD>].

<sup>221</sup> Norberg, *supra* note 20, at 392 (“[T]he rationale that unscrupulous or fraudulent institutions found refuge in bankruptcy to the detriment of the [Department of Education] and students is misplaced.”); see also *Hearings Before Permanent Subcomm.*, *supra* note 212, at 14 (testifying inaccurately that the automatic stay prevents any actions from being taken against an IHE during the lifetime of the bankruptcy proceeding). Cf. *In re Vitalsigns Homecare, Inc.*, 396 B.R. 232, 239–41 (Bankr. D. Mass. 2008) (noting that the bankruptcy of medical enterprises can protect both taxpayers and patients).

<sup>222</sup> See *infra* notes 225–228 and accompanying text.

<sup>223</sup> *Administrative Oversight and Accountability*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability> [<https://perma.cc/5HXH-ARPE>] (last visited Jan. 4, 2018).

<sup>224</sup> 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).

Most notably, when fraud has occurred, bankruptcy courts are empowered to appoint a trustee to manage the bankrupt entity (thereby displacing the debtor’s existing management).<sup>225</sup> If fraud is merely suspected, bankruptcy courts may appoint an examiner to investigate potential improprieties.<sup>226</sup> 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.”<sup>227</sup> Section 1104 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 . . . .”<sup>228</sup> Although a debtor’s existing management typically remains in control of the enterprise, the power to displace existing management or to investigate potential shenanigans should reduce (rather than exacerbate) fraudulent conduct by bankrupt enterprises.

The 1991 Senate Report noted above expressed a particular concern with IHEs retaining students’ undisbursed Title IV funds.<sup>229</sup> Yet, a debtor may not retain such funds simply because it has filed for bankruptcy any more than a debtor may retain funds owed to any other creditors.<sup>230</sup> In fact, bankruptcy provides a debtor<sup>231</sup> with certain rights to recover the debtor’s property that are unavailable outside of bankruptcy.<sup>232</sup> For example, § 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.<sup>233</sup> These Bankruptcy Code provisions aim to prevent debtors from making payments that benefit some creditors at the expense of others (such as students) in the months leading up to a bankruptcy filing, or, if such payments were made, to recover them for the creditors’ benefit. In other words, bankruptcy oversight should make it less (rather than more) likely for an IHE to unlawfully retain and use students’ undisbursed Title IV funds.

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<sup>225</sup> See 11 U.S.C. § 1104 (2012) (discussing the appointment of a trustee or examiner); see also Bruckner, *supra* note 116, at 267–68 (discussing trustee appointments).

<sup>226</sup> See 11 U.S.C. § 1104; see also Bruckner, *supra* note 116, at 280–83 (discussing examiner appointments).

<sup>227</sup> 11 U.S.C. § 1104(a) (*emphasis added*).

<sup>228</sup> *Id.* § 1104(c) (*emphasis added*).

<sup>229</sup> See S. REP. NO. 102–58, at 1–2, 6–7, 10, 17, 33–44 (1991) (discussing the lack of oversight over Title IV funds). Congress eventually addressed this concern in 34 C.F.R. § 668.22(a) (1992) (setting standards regarding an IHE’s ability to retain Title IV funds when students withdraw from school).

<sup>230</sup> See Skeel, *supra* note 224, at 2235–36.

<sup>231</sup> Or, if a debtor will not bring such actions, it may empower an official committee to act in the debtor’s stead. See 11 U.S.C. §§ 1102–1103.

<sup>232</sup> See *id.* §§ 542, 544, 547–548, 550; see also Norberg, *supra* note 20, at 392–93 (discussing the right to recoup certain preferential payments or fraudulent conveyances that might not be available under state law).

<sup>233</sup> 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. *Id.*

Although there might appear to be a facial connection between failing to return Title IV funds and filing bankruptcy, other factors are more likely to explain an IHE's decision not to make anticipated loan refund payments to students. More likely culprits include that the debtor lacks sufficient assets, or that other creditors have a higher repayment priority, a priority set by Congress.<sup>234</sup> As Scott Norberg made clear, "[T]he 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 . . . oversight [by the ED] and insufficient debtor assets, not from the act of filing for bankruptcy."<sup>235</sup> Although fraudulent intent could explain an IHE's decision not to make refund payments, judicial oversight is much more likely to deter or prevent fraud.<sup>236</sup>

## ii. Bankruptcy Reorganization Alternatives Are Not Precluded

Even assuming it was appropriate to effectively preclude IHEs from using the tools available in bankruptcy reorganization, doing so would not be sufficient by itself. IHEs may still be able to use state law alternatives, such as assignment for the benefit of creditors (an "ABC")<sup>237</sup> to accomplish something akin to a voluntary bankruptcy reorganization without losing access to Title IV funds.<sup>238</sup> Assuming that a voluntary bankruptcy reorganization increases the likelihood of fraud, it is not clear why an IHE should be allowed to take an alternative path 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."<sup>239</sup> An institution that makes an ABC has plainly not filed for bankruptcy. Instead, it has initiated an ABC, which is not at all the same thing. Thus, a plain reading of the statutory language would appear to exclude an ABC from terminating an IHE's Title IV eligibility. This strategy could offer something of a work-around for IHEs.<sup>240</sup>

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<sup>234</sup> See *id.* § 507 (setting forth the repayment priority scheme for distributions in bankruptcy cases); see also Norberg, *supra* note 20, at 392–93, 398–99.

<sup>235</sup> Norberg, *supra* note 20, at 392.

<sup>236</sup> See *id.* at 391–93.

<sup>237</sup> For more information about assignments for the benefit of creditors, see Andrew B. Dawson, *Better Than Bankruptcy?*, 69 RUTGERS U.L. REV. 137, 145–49 (2016) (describing the procedures followed in an assignment for the benefit of creditors, with an emphasis on how it is different from chapter 7 of the Bankruptcy Code).

<sup>238</sup> ABCs may be a viable alternative to chapter 11 reorganization for some IHEs. See *id.* at 150 (reporting that Florida's ABC laws are being used as a "viable alternative to federal bankruptcy relief"). But see *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016) (suggestion that most bankruptcy-like, state-level action on behalf of public entities may be preempted by § 903(1) of the Bankruptcy Code). This does not appear to have been the case at the time Title IV was amended to effectively preclude the bankruptcy reorganizations of IHEs.

<sup>239</sup> 20 U.S.C. § 1002(a)(4)(A) (2012); see also *supra* note 31 and accompanying text (indicating that involuntary bankruptcies may also terminate a school's Title IV eligibility).

<sup>240</sup> Still, this strategy is risky because the ED, state licensing agencies, or accrediting agencies may take actions that would negatively affect an IHE's ability to access Title IV funds. Cf. §§ 362(b)(14)–

In addition, IHEs can use the bankruptcy system or state law receiverships to liquidate.<sup>241</sup> Apparently, Congress was not concerned about the possibility of profiteers opening fly-by-night schools to defraud students and then liquidating in bankruptcy or state court, even though students would be left with little recourse in those instances. Although an IHE will lose its Title IV eligibility by filing a voluntary bankruptcy liquidation, that hardly matters in a liquidation proceeding.<sup>242</sup> Bankruptcy liquidations, typically done under chapter 7, and state law receiverships 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 to the point, it does not matter to students that have been defrauded. Given that an IHE can reorganize in bankruptcy if Title IV eligibility is not relevant, and may be able to use state law restructuring alternatives if it is, precluding IHEs only from voluntary reorganizations is peculiar. It is also apparently divorced from the end it purports to achieve.

### iii. 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 2016, the federal government spent approximately one trillion dollars on healthcare.<sup>243</sup> By contrast, the federal government spent approximately \$76 billion on higher education in 2013.<sup>244</sup> Put differently, 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.<sup>245</sup> Finally, the estimated amount of

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(16) In addition, non-bankruptcy restructuring options are generally thought to be less vibrant than chapter 11 restructuring. See Dawson, *supra* note 237, at 141–42. It is also worth noting that they may no longer be available for public IHEs. See *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1942.

<sup>241</sup> For more information about receiverships, see Edward S. Adams, *Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results*, 73 B.U. L. REV. 581, 584–87 (1993) (describing the procedures followed in equity receiverships, which are described as “the historical antecedent to the present Chapter 11”).

<sup>242</sup> See Jim Christie, *ITT Educational Services Files for Bankruptcy to Start Liquidation*, REUTERS (Sept. 16, 2016, 10:40 PM), <http://www.reuters.com/article/us-itt-education-bankruptcy-idUSKCN11N01U> [<https://perma.cc/WD4H-8RND>] (noting that ITT, a for-profit college chain, had begun a bankruptcy liquidation soon after it lost access to Title IV).

<sup>243</sup> *National Health Expenditures Fact Sheet*, *supra* note 210 (\$618.7 billion for Medicare and \$495.8 billion for Medicaid); see also Maizel, *et al.*, *supra* note 44, at 257.

<sup>244</sup> See Woodhouse, *supra* note 185.

<sup>245</sup> See *supra* text accompanying note 188; see also *Student Loan Debt Statistics 2017*, STUDENT LOAN REP., <https://studentloans.net/student-loan-debt-statistics/> [<https://perma.cc/9W9X-NRSX>] (last visited Jan. 5, 2018) (estimating national student loan debt was approximately \$1.41 trillion in

waste, fraud, and abuse in healthcare (\$70 billion) is approximately equal to the federal government's annual yearly expenditure on higher education (\$76 billion).<sup>246</sup>

If bankruptcy reorganization somehow increased the risk of fraud upon taxpayers, we would expect access to bankruptcy would be more limited for the industries that enjoyed greater federal subsidies than for entities that enjoyed smaller ones.<sup>247</sup> But the opposite is true. Healthcare enterprises receive far larger amounts of taxpayer dollars but enjoy greater access to bankruptcy reorganization. It is unclear, therefore, how taxpayers are adequately protected in healthcare reorganizations but would not be in higher education reorganizations. Though it ought to be otherwise if bankruptcy encourages fraud, the degree of federal financing alone seems unrelated to whether bankruptcy reorganization is available or not. Unless IHEs 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 misappropriated suggests that it is irrational to allow healthcare enterprises to reorganize but not higher education enterprises.<sup>248</sup>

### *C. Two Counter-arguments in Favor of Treating Higher Education and Healthcare Enterprises Differently*

But, there are at least two counter-arguments why IHEs should not be allowed to reorganize even though healthcare enterprises can reorganize.<sup>249</sup> The first

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2017); CDC, U.S. DEPT OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2016: WITH CHARTBOOK ON LONG-TERM TRENDS IN HEALTH 3, 318–20 tbl.95 (2017), [https://www.cdc.gov/nchs/data/16.pdf](https://www.cdc.gov/nchs/data/hus/16.pdf) [<https://perma.cc/MPR7-AJNE>] (estimating federal spending on personal health care was approximately \$1.3 trillion in 2016).

<sup>246</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-475, FRAUD DETECTION SYSTEMS: CENTERS FOR MEDICARE AND MEDICAID SERVICES NEEDS TO ENSURE MORE WIDESPREAD USE 1 (June 2011), <https://www.gao.gov/assets/330/320854.pdf> [<https://perma.cc/95GH-EYPH>] (discussing the approximate amount of improper Medicare and Medicaid payments made in 2010); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-842T, IMPROPER PAYMENTS: REPORTED MEDICARE ESTIMATES AND KEY REMEDIATION STRATEGIES, *Testimony Before the Subcomm. on Gov't Org., Efficiency & Fin. Mgmt. of the H. Comm. on Oversight & Gov't Reform* 4–5 (July 2011), <https://www.gao.gov/assets/130/126770.pdf> [<https://perma.cc/CM7X-32GG>] (finding that improper Medicare payments alone were approximately \$48 billion); *supra* note 244 and accompanying text.

<sup>247</sup> 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 118, at 3–4, 24 (“[D]ebtors who reorganize have substantially higher recovery ratios than debtors who sell.”).

<sup>248</sup> There may be a greater risk of fraud in the higher education industry than in the healthcare industry. In contrast to higher education, in the healthcare industry, the federal government imposes some price controls in an attempt “to avoid abuse and self-dealing.” See CBR, Comment to *Involuntary Collegiate “Do Not Resuscitate” Orders*, *supra* note 35 (Sept. 14, 2016, 3:26 PM).

<sup>249</sup> 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. See 11 U.S.C. § 525(a) (2012). In the healthcare context, courts have not allowed HHS or CMS to terminate a healthcare provider's Medicare eligibility because of its bankruptcy filing.

counter-argument is that fraud is more likely to occur in the higher education sector because there are fewer anti-fraud measures in place.<sup>250</sup> For example, the accreditation process for healthcare enterprises appears to be more robust than the accreditation process for IHEs.<sup>251</sup> Second, healthcare enterprises serve a more

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See Samuel R. Maizel & Rachel Caplan, *Chicken Little Comes to Roost in Bankruptcy*, AM. BANKR. INST. J., July 1, 2006, <https://www.abi.org/abi-journal/chicken-little-comes-to-roost-in-bankruptcy-why-362b28-doesnt-mean-the-sky-is-falling> [<https://perma.cc/3LMZ-FT54>]; see also Lactman & Owens, *supra* note 198. By contrast, courts have allowed the ED to terminate an IHE’s Title IV eligibility because of its bankruptcy filing. See, e.g., U.S. Dep’t of Educ. v. Betty Owen Sch., Inc. (*In re Betty Owen Sch., Inc.*), 195 B.R. 23, 27–28, 31–34 (Bankr. S.D.N.Y. 1996). 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 *id.* at 33 (stating that 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”) (quoting *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 an IHE access to Title IV programs if it files 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: BANKR. BLOG (Apr. 9, 2013), <http://business-finance-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/> [<https://perma.cc/YR6E-4TNN>]. 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 11 U.S.C. § 362(b)(16) (2012); see also *In re Betty Owen Schools, Inc.*, 195 B.R. at 32–33 (noting in addition that the legislative history makes clear Congress’s 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 Secretary of HHS to exclude a debtor from Medicare. See *id.* § 362(b)(28). But, 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*; Lactman & Owens, *supra* note 198. 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.

<sup>250</sup> See *supra* note 248.

<sup>251</sup> Some allege that higher education accreditors merely rubber-stamp the accreditation requests of IHEs, calling them “the ‘watchdogs that don’t bark.’” See Paul Fain, *Getting Tough with a Gatekeeper*, INSIDE HIGHER ED (June 16, 2016), <https://www.insidehighered.com/news/2016/06/15/education-department-recommends-eliminating-national-accreditor-many-profit-colleges> [<https://perma.cc/4YM5-BPZT>] (quoting Arne Duncan, former federal Secretary of Education). In one recent high-profile example, Corinthian Colleges’s accreditor, ACICS, found “few if any quality issues” at the chain’s [fifty-nine] campuses despite the flurry of state and federal investigations Corinthian was facing” and even though Corinthian was shut down soon after it was re-accredited. See *id.* At one time, the healthcare accreditation process appeared to have been similar to the higher education 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 HEALTH CARE 255, 255–57 (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.* at 256. 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



vulnerable population than IHEs. Therefore, Congress may allow healthcare enterprises to reorganize—despite the risk of fraud—because patient lives are at stake, but choose not to allow IHEs to reorganize because students will not literally die if IHEs are effectively precluded from bankruptcy reorganization. On balance, this Article argues that these counter-arguments are insufficient to justify denying IHE's access to bankruptcy reorganization. Nevertheless, they bear discussing.<sup>252</sup>

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 the healthcare industry.<sup>253</sup> Greater oversight of healthcare enterprises appears to come in the form of stricter accreditation standards and more regular and intrusive inspections.<sup>254</sup> In addition, it appears 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.<sup>255</sup> Finally, the

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care settings, it established standards for home care, laboratories, ambulatory surgery centers, and hospices”).

<sup>252</sup> There are surely other potential counter-arguments that could be raised too, including a moral hazard argument. 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, *supra* note 25, at 722–23, 726–27 (discussing the effects of bankruptcy reorganization on the risk of moral hazard); see also *supra* note 174 and accompanying text (“[W]hen hospitals die, people die.”); *supra* notes 193–195 and accompanying text (highlighting the immediate detrimental impact of IHEs’ loss of federal funding).

<sup>253</sup> 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* notes 248, 250 and accompanying text.

<sup>254</sup> See *supra* note 251 and accompanying text; Lactman & Owens, *supra* note 198 (describing the Medicare inspection process as a periodic survey “to verify substantial compliance with [Medicare] Program requirements”).

<sup>255</sup> For example, in 1998, nearly one-third of revenue generated by nursing homes was paid out-of-pocket. See U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-HEHS-00-192, NURSING HOMES: AGGREGATE MEDICARE PAYMENTS ARE ADEQUATE DESPITE BANKRUPTCIES, *Testimony Before the Special S. Comm. on Aging* 2–3 (2000), <https://www.gao.gov/assets/110/108613.pdf> [<https://perma.cc/MET5-8P5J>] (stating that “Medicaid accounted for [forty-six] percent of total nursing home expenditures” in 1998, with Medicare (twelve percent), out of pocket (thirty-three percent), and private insurance (five 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 IHEs 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 G.I. Bill, count toward the ten percent. See *supra* notes 90, 192 and accompanying text; see also 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/> [<https://perma.cc/BWF8-LJC9>]. In addition, the ten percent of non-Title IV dollars does not require out-of-pocket expenditures but can represent loans by an IHE itself. See, e.g., Bruckner, *supra* note 90. Some IHEs 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 *id.*

government has a price-setting role in the healthcare context that they do not have in the higher education context.<sup>256</sup>

While all of this is true, it is not relevant to the question of whether allowing IHEs to reorganize in bankruptcy would increase the risk of fraud *in that industry*. In this case, the appropriate comparison is not between IHEs and healthcare enterprises, but between IHEs 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 reorganization than outside of one—rather the opposite would seem to be true.<sup>257</sup>

The second possible rationale for allowing healthcare enterprises to reorganize in bankruptcy but not IHEs 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. But, 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 an IHE closes, existing students may choose to finish their degree elsewhere or students can apply to have any federal student loans related to attending that IHE discharged.<sup>258</sup> And both former students and students who would have attended had the school remained open may choose to attend a different IHE.<sup>259</sup> The effect on students appears limited to a disruption in their education.<sup>260</sup> Similarly, when a healthcare facility closes, existing patients must be transferred to another facility and future patients must choose a different facility,

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<sup>256</sup> See *supra* note 248.

<sup>257</sup> See *supra* notes 221–236 and accompanying text.

<sup>258</sup> See *Closed School Discharge*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/closed-school#benefits> [<https://perma.cc/BQL7-LN3K>] (last visited Jan. 5, 2018).

<sup>259</sup> 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. See Porter, *supra* note 217, at 85–89 (stating that incurring educational debt without earning a degree can lead to bankruptcy).

<sup>260</sup> This is not meant to downplay the effects of failing to complete one's education, including the resultant limited employment prospects. Moreover, it remains disruptive to a student's education, even if the now-closed school implements a so-called “teach out” plan. See 34 C.F.R. § 668.14(b)(31); see also Alexandra Hegji, *The Closure of Institutions of Higher Education: Student Options, Borrower Relief, and Implications*, CONG. RESEARCH. SRVC. (Jan. 12, 2017) (“To participate in the Title IV federal student aid programs, an IHE must, among other requirements, agree to submit a teach-out plan to its accrediting agency, if it intends to close a location that provides 100% of at least one educational program offered by the IHE or if it intends to otherwise cease operations.”).

often one that is further away.<sup>261</sup> Thus, at first glance, the effects on both patients and students appear similar. But, when a healthcare facility closes, it can also place patients' lives at risk. Educational disruptions seem more appropriately described as an inconvenience when compared to the increased risk of a patient's dying because that patient had to travel further to receive medical care.<sup>262</sup>

Thus, there may be a stronger case for allowing healthcare enterprises to reorganize than for allowing IHEs to reorganize. But, that students do not die when IHEs close, does not suggest that IHEs should not be precluded from the opportunity to be resuscitated in a bankruptcy proceeding, and for the reasons stated above, there is still a strong case for allowing IHEs to reorganize.

### CONCLUSION

This Article has compared the higher education and healthcare industries to highlight the incongruence of allowing virtually every type of enterprise to use the tools available in bankruptcy reorganization except for IHEs. As argued above, effectively precluding the bankruptcy reorganization of IHEs is ill-conceived and deprives IHEs of access to an important set of tools available to virtually every other type of entity—both for-profit and nonprofit. Moreover, precluding the bankruptcy reorganization of IHEs has been ineffective at protecting students from fraudulent higher education operators, which was Congress's sole apparent justification.<sup>263</sup> Effectively precluding higher education reorganization cases condemns many IHEs to an unnecessary death.<sup>264</sup> And, given the similarities between higher education and healthcare enterprises, precluding the former from reorganizing in bankruptcy appears particularly senseless.<sup>265</sup>

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<sup>261</sup> This is particularly true in rural areas rather than urban ones. *See, e.g.*, Jayne O'Donnell & Laura Ungar, *Rural Hospitals in Critical Condition*, USA TODAY (Nov. 12, 2014), <https://www.usatoday.com/story/news/nation/2014/11/12/rural-hospital-closings-federal-reimbursement-medicare-aca/18532471/> [<https://perma.cc/F6XT-X47D>].

<sup>262</sup> Trauma patients are more likely to survive if they receive medical care more quickly. *See* Charlie Eisele, *The Golden Hour*, J. EMERGENCY MED. SERVICES (Aug. 31, 2008), <http://www.jems.com/articles/2008/08/golden-hour.html> [<https://perma.cc/YJ73-MYT9>].

<sup>263</sup> *See* Norberg, *supra* note 20, at 390–92; *supra* note 220 and accompanying text; *see also* Bruckner, *supra* note 85 (noting that ITT Tech—a for-profit chain of colleges—was accused of fraud before it closed its campuses in late 2016).

<sup>264</sup> *See supra* text accompanying notes 17–21, 35.

<sup>265</sup> *See supra* text accompanying notes 35–45.