DECLARING AN END TO "FINANCIAL EXIGENCY"? CHANGES IN HIGHER EDUCATION LAW, LABOR, AND FINANCE, 1971–2011

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INTRODUCTION

The recession that began in December 2007 and officially ended in June 2009 was one of the longest and most devastating economic downturns in the United States since the end of World War II,[1] and has been called the "Great Recession."[2] By comparison, the recession of 1973–1975 was shorter and had lower unemployment.[3] Several colleges and universities declared a "financial exigency" around the time of the 1973–1975 recession, and subsequently faced lawsuits for doing so,[4] while few institutions have followed such a path during the Great Recession and its aftermath.[5] This article explains the legal meaning and significance of "financial exigency," and it explores the reasons why institutions chose alternatives—such as implementing furloughs and plugging budget holes with federal stimulus funds—instead of declaring financial exigency during the recent economic downturn. This article also examines considerations for institutional bond ratings and changes in federal labor law that may have also influenced colleges and universities not to declare financial exigency during the Great Recession.

II. COMPARING RECESSIONS: 2007-2009 VS. 1973-1975

A. 2007-2009

The eighteen-month recession between December 2007 and June 2009 surpassed the two previous longest recessions since World War II, the

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1. *See* Andrew Sum et al., The Economic Recession of 2007-2009: A Comparative Perspective on Its Duration and the Severity of Its Labor Market Impacts 1 (Apr. 1, 2009) (unpublished manuscript) (on file with the Northeastern University Center for Labor Market Studies), http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1019&context=clms_pub; *see also* Catherine Rampell, *Recession May Be Over, But Joblessness Remains*, N.Y. TIMES, Sept. 21, 2010, at B1.

2. *See* Catherine Rampell, *'Great Recession': A Brief Etymology*, N.Y. TIMES ECONOMIX BLOG (Mar. 11, 2009, 5:39 PM), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/. Although used to describe other recessions in the U.S., the phrase "the Great Recession" was increasingly applied in December 2008 to the economic downturn that began in 2007. *Id.*

3. Donald A. Walker, *The 1973-1975 Recession in the United States of America*, ECON. NOTES (1975).

4. *See* Geoffrey Caston, *Academic Tenure and Retrenchment: The US Experience*, 8 OXFORD REV. OF EDUC. 299, 302-03 (1982).

5. *See* Scott Jaschik, *Layoffs Without 'Financial Exigency'*, INSIDE HIGHER EDUC. (Mar. 2, 2010), http://www.insidehighered.com/news/2010/03/02/exigency.

sixteen-month recessions of 1973–1975 and 1981–1982.[6] The recession was as severe as it was long. It has been called "a different breed of recession, with disconcerting similarities to the Great Depression of the 1930s," such as bank failings, shuttered retail businesses, and stalled investment projects.[7] The nation's unemployment statistics reflect the severity of the recession.[8] Between December 2007 and December 2009, the U.S. lost 7.2 million jobs,[9] which was the largest loss ever experienced during any recession in the post-World War II era.[10] The unemployment rate increased from 4.7% in November 2007 to 10.2% in October 2009.[11] This was the highest percentage-point increase in the unemployment rate of any recession since World War II.[12]

The recession hit public and private colleges and universities alike.[13] At the beginning of the recession, all colleges and universities were victims of a credit crisis, with higher interest rates on their debt and restricted access to short-term funds for payroll, debt payments, and construction projects.[14] In the public sector, at least forty-one states cut funding for their public institutions of higher education between the spring of 2008 and the spring of 2010.[15] Across the fifty states, state tax appropriations for higher education decreased 6.7% between 2007-2008 and 2009-2010.[16] In the private sector, at the end of fiscal year 2009, the four largest university

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6. Justin Lahart, *The Great Recession: A Downturn Sized Up*, WALL ST. J., July 28, 2009, at A12.

7. *See* David Breneman, *Recessions Past and Present*, NAT'L CROSSTALK, Mar. 2009, at 11.

8. *See United States Unemployment Rate*, TRADING ECON. (Feb. 3, 2012), http://www.tradingeconomics.com/united-states/unemployment-rate.

9. Justin Lahart, *Economy Still Bleeds Jobs*, WALL ST. J., Jan. 9, 2010, at A1.

10. Sum, *supra* note 1, at 3.

11. *See* Peter S. Goodman, *U.S. Unemployment Rate Hits 10.2%, Highest in 26 Years*, N.Y. TIMES, Nov. 7, 2009, at B1.

12. Sum, *supra* note 1, at 4.

13. *See Universities and the Recession*, ECONOMIST (Apr. 23, 2009), http://www.economist.com/node/13527458.

14. *See* William Zumeta, *State Support of Higher Education: The Roller Coaster Plunges Downward Yet Again*, *in* NEA 2009 ALMANAC OF HIGHER EDUC. 29, 33 (Harold Wechsler ed., 2009).

15. *See* Nicholas Johnson, Phil Oliff & Erica Williams, *An Update on State Budget Cuts*, CTR. ON BUDGET AND POLICY PRIORITIES 3 (May 25, 2010), http://www.cbpp.org/files/3-13-08sfp.pdf.

16. *One-Year (FY09-FY10), Two-Year (FY08-FY10), and Five-Year (FY05-FY10) Percent Changes in State Fiscal Support for Higher Education, by Source of Fiscal Support*, GRAPEVINE (2010), http://www.grapevine.ilstu.edu/tables/FY10/Revised_Feb10/GPV10_Table2_revised_pdf.pdf.

endowments lost about one-quarter of their value.[17] Harvard's endowment lost $11 billion, or 27.3%;[18] Yale's endowment shrank by $6.6 billion, or 25%;[19] Stanford lost $4.6 billion, or 27%, of its endowment;[20] and Princeton's endowment lost $3.7 billion, or 23%.[21]

Despite the constraints throughout the national economy and within academe during the Great Recession, colleges and universities rarely declared financial exigency when eliminating tenured jobs or considering doing so between 2009 and early 2010.[22] Institutions, particularly public colleges and universities, sought flexible budget-balancing options that they could implement quickly in the face of state appropriations cuts that were deep but not necessarily a threat to their "financial survival."[23]

A search of federal and state cases between 2005 and early 2012 did not reveal any lawsuits filed based on "financial exigency." The American Association of University Professors (AAUP), which investigates "extreme cases" of violations of academic freedom, governance, and tenure, issued only two investigative reports between 2007 and 2010 involving issues of financial exigency related to the Great Recession.[24] The AAUP reported on Bethune-Cookman University in Daytona Beach, Florida, which dismissed thirty-four faculty and staff on May 15, 2009 after a mandate by the board of trustees "to drastically reduce . . . expenses and overhead in

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17. *See* LUCIE LAPOVSKY, COMMONFUND INST., ENDOWMENT SPENDING: EXTERNAL PERCEPTIONS AND INTERNAL PRACTICES (Mar. 2009), *available at* http://www.commonfund.org/InvestorResources/Publications/White%20Papers/Endowment%20WhitePaper_Spending%20-%20External%20Perceptions%20and%20Internal%20Practices.pdf.

18. Geraldine Fabrikant, *Harvard and Yale Report Losses in Endowments*, N.Y. TIMES, Sept. 10, 2009, at B3.

19. John Hechinger, *Yale Endowment Posts a 25% Loss*, WALL ST. J., Sept. 23, 2009, at C3.

20. Andrew Ross Sorkin, *Investment Indigestion at Stanford*, N.Y. TIMES, Oct. 6, 2009, at B1.

21. John Hechinger, *Princeton Endowment Fell 23%*, WALL ST. J., Sept. 30, 2009, at C3.

22. Jaschik, *supra* note 5.

23. *Id*.

24. AM. ASS'N OF UNIV. PROFESSORS, Academic Freedom: Investigative Reports (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/default.htm (last visited March 26, 2012). The AAUP also issued an investigative report on the University of Texas Medical Branch in Galveston, which declared a financial exigency on November 12, 2008 after being devastated by Hurricane Ike two months earlier. *See Academic Freedom and Tenure: The University of Texas Medical Branch (Galveston)*, AM. ASS'N OF UNIV. PROFESSORS (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/2010/Galveston.htm.

light of the recent economic downturn."[25] University officials explained that the call to reduce expenses was caused by a financial exigency brought on by endowment losses and reduced state appropriations.[26] In the other report issued by the AAUP involving the effect of the Great Recession, Clark Atlanta University laid off faculty without declaring a financial exigency.[27] Clark Atlanta University cited an "enrollment emergency"—while insisting that its "financial posture . . . remains strong"—when, in February 2009, it eliminated fifty-five faculty, including twenty who had tenure.[28] The AAUP conducted an investigation "into issues of academic freedom, tenure, and due process posed by the release of numerous tenured professors on grounds of financial exigency" at the San Francisco Art Institute.[29] The Art Institute, after facing tightening credit, a drop in its endowment, and cash-flow challenges, laid off nine tenured faculty members in April 2009.[30]

B. 1973–1975

Compared to the Great Recession of 2007–2009, the recession that began in November 1973 and ended in March 1975 was relatively mild.[31] Although the recession began during the fourth quarter of 1973, total employment rose from 85.8 million in January 1974 to 86.4 million in July 1974.[32] It was not until after September 1974 that a declining trend in employment appeared.[33] Between 1973 and 1975, the number of

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25. *Academic Freedom and Tenure: Bethune-Cookman University*, AM. ASS'N OF UNIV. PROFESSORS *(Florida)* 6 (2010), http://www.aaup.org/NR/rdonlyres/B776AEB7-3DF5-4AEE-BEF9-82408582BF1E/0/BethCook.pdf.

26. *Id*. at 13. *See infra* text accompanying notes 245-249.

27. *See Academic Freedom and Tenure: Clark Atlanta University,* AM. ASS'N OF UNIV. PROFESSORS (2010), http://www.aaup.org/AAUP/programs/academicfreedom/investrep/2010/clarkatlanta.htm.

28. *Id*. at 1, 3- 4; *See infra* text accompanying notes 283-304.

29. *Investigation at San Francisco Art Institute*, AM. ASS'N OF UNIV. PROFESSORS (Oct. 19, 2009), http://www.aaup.org/AAUP/newsroom/highlightsarchive/2009/SFAI.htm.

30. Steve Kolowich, *9 Tenured Faculty Members Are Laid Off at San Francisco Art Institute*, CHRON. HIGHER EDUC. (Apr. 17, 2009), http://chronicle.com/article/9-Tenured-Faculty-Members-A/42767/.

31. *See* Martin Curtsinger, *Revisions Show Deeper 2007-2009 Recession*, REDDING (July 29, 2011), http://www.redding.com/news/2011/jul/29/revisions-show-deeper-2007-2009-recession/.

32. Walker, *supra* note 3, at 14.

33. *Id*.

unemployed people in the U.S. increased by 3.56 million,[34] which is less than half the number of jobs lost during the Great Recession.[35] The unemployment rate increased from 4.5% in October 1973 to a peak of 9.2% in May 1975.[36]

Public colleges and universities fared much better during the recession of 1973–1975 than they did during the Great Recession, while private institutions did not.[37] Across all fifty states in 1974–1975, appropriations of state tax funds for operating expenses of all higher education was nearly $11 billion, an increase of 25% from 1973–1974 and up 29% from 1972–1973.[38] Private institutions, however, faced "a hostile environment for university endowments" caused by "[t]he high inflation and poor investment environment of the 1970s."[39] At Yale, for example, "[t]he combined effect of double-digit inflation, poor investment returns, and high levels of spending devastated [e]ndowment funds."[40] Between 1968 and 1979, the market value of Yale's endowment remained virtually unchanged, while the endowment's real value declined by 46[%]."[41]

While the 1973–1975 recession was shorter and less severe than the Great Recession, it led several colleges and universities to declare a financial exigency in court cases.[42] "The early 1970s saw a number of cases before the courts in which dismissed faculty members challenged either the genuineness of the 'financial exigency' itself or the procedures by which individuals had been selected to go."[43] A list of the cases triggered by declarations of financial exigency or termination notices issued within a year before or soon after the official duration of the 1973-1975 recession, and those that followed their legal precedents, appears below:

34. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1940 TO DATE(2010), *available at* http://www.bls.gov/cps/cpsaat1.pdf.

35. *See supra* text accompanying note 9.

36. Walker, *supra* note 3, at 18.

37. Goldie Blumenstyk, *More Than 100 Colleges Fail Education Department's Test of Financial Strength*, CHRON. HIGHER EDUC. (June 4, 2009), http://chronicle.com/article/More-Than-100-Colleges-Fail/47492/.

38. M. M. CHAMBERS, APPROPRIATIONS OF STATE TAX FUNDS FOR OPERATING EXPENSES OF HIGHER EDUCATION 1974-75, 6 (1974), *available at* http://www.grapevine.ilstu.edu//historical/Appropriations1974-75.pdf.

39. YALE UNIV. INVS. OFFICE, THE YALE ENDOWMENT 2000 44 (2001), *available at* http://www.yale.edu/investments/Yale_Endowment_00.pdf.

40. *Id*.

41. *Id*.

42. *See* Caston, *supra* note 4.

43. *Id.* at 302–03.

Institution (State)	**"Financial Exigency" Declared or Termination Notice Provided**
North Idaho College	November 1972[44]
Southern Colorado State College	December 14, 1972[45]
Bloomfield College (New Jersey)	June 21, 1973[46]
Peru State College (Nebraska)	June 18, 1973[47]
University of Wisconsin	April 4, 1973[48]
Goucher College (Maryland)	June 1975[49]
Elmhurst College (Illinois)	June 1975[50]
Creighton University (Nebraska)	November 25, 1975[51]

Through the 1970s and 1980s, colleges and universities continued to declare a financial exigency before laying off tenured faculty.[52] These cases include:

Institution (State)	**"Financial Exigency" Declared or Termination Notice Provided**
City University of New York	Financial exigency declared May 1976; notices of discontinuance mailed July 1976[53]
University of Idaho	April 1981[54]
Boise State University	June 1982[55]

Before examining the reasons why institutions declared a financial exigency less frequently during the Great Recession compared to the

44. Bignall v. North Idaho Coll., 538 F.2d 243, 244 (9th Cir. 1976).

45. *SCSC Hit with $100,000 Law Suit*, TODAY AT S. COLO. STATE COLLEGE, Sept. 12, 1974, at 1.

46. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 848 (N.J. Super. Ct. Ch. Div. 1974); *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

47. Levitt v. Bd. of Trustees of Neb. State Colls., 376 F. Supp. 945, 947 (D. Neb. 1974).

48. Graney v. Bd. of Regents, 286 N.W.2d 138, 140 (Wis. Ct. App. 1979). *See also* Johnson v. Bd. of Regents, 377 F. Supp. 227, 231 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

49. Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1975).

50. Rose v. Elmhurst Coll., 379 N.E.2d 791, 793 (Ill. 1978).

51. Scheuer v. Creighton Univ., 260 N.W.2d 595, 596 (Neb. 1977).

52. Caston, *supra* note 4, at 299.

53. Klein v. Board of Higher Educ., 434 F. Supp. 1113, 1115–16 (S.D.N.Y. 1977).

54. Pace v. Hymas, 726 P.2d 693, 695 (D. Idaho 1986).

55. Milbouer v. Keppler, 644 F. Supp. 201, 203 (D. Idaho 1986).

recession of 1973–1975, the legal meaning of "financial exigency" needs to be explored. As explained below, the phrase originated in 1940,[56] but courts refined its meaning in the 1970s and 1980s.[57]

III. THE MEANING OF "FINANCIAL EXIGENCY"

A. AAUP's 1940 Statement on Principles on Academic Freedom and Tenure

When institutions laid off tenured faculty during and soon after the recession of 1973–1975, they typically first declared a "financial exigency."[58] The term originates from the AAUP's *1940 Statement on Principles on Academic Freedom and Tenure*.[59] The *1940 Statement* recommended procedures and conditions for terminating tenured faculty.[60] The *1940 Statement* anticipated two types of termination: termination "for . . . cause," and termination "because of financial exigencies."[61] In cases of financial exigency, institutions have a specific burden of proof: "termination of a continuous appointment because of financial exigency should be demonstrably bona fide."[62]

The AAUP's statements are authoritative when an institution has a contract with the AAUP, or if the institution references the AAUP's guidelines in its policies and procedures.[63] Otherwise, "the guidelines remain a reference point in the search for definitions of terms and due process considerations."[64] Courts have also provided definitions for those terms.[65] In cases involving declarations of financial exigency through the

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56. *See* AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf.

57. Sheila Slaughter, *Retrenchment in the 1980s: The Politics of Prestige and Gender*, 64 J. HIGHER EDUC. 250, 261 (1993).

58. Sheila Slaughter, *Political Action, Faculty Autonomy, and Retrenchment: A Decade of Academic Freedom, 1970–1980*, *in* HIGHER EDUCATION IN AMERICAN SOCIETY 77, 88 (Philip G. Altbach & Robert O. Berdahl eds., rev. ed. 1981) ("In the decade 1970-1980, 85 percent of the faculty who were fired lost their jobs under conditions of financial exigency").

59. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 56.

60. *Id*.

61. *Id*. at 4.

62. *Id*.

63. Donald L. Zekan, *Beyond Financial Exigency: St. Bonaventure's Fiscal Crisis Reflects Economic Realities*, 24 BUS. OFFICER 24, 24 (Dec. 1995).

64. *Id*.

65. *Bloomfield Coll.*, 322 A.2d at 850-51.

1970s and early 1980s,[66] courts balanced the needs of institutions to deal with bona fide financial crises against the contractual and constitutional rights of tenured faculty members.[67]

B. The First "Financial Exigency" Case

The "first major contract case on financial exigency" in the country involved the layoff of tenured faculty at Bloomfield College in New Jersey in 1973.[68] In the early 1970s, Bloomfield College faced shrinking enrollment, a growing budget deficit, a declining endowment, and cuts in federal aid.[69] The college's Faculty Handbook, reflecting language from the AAUP statement, required the college to declare a "financial exigency" before it terminated tenured faculty.[70] Accordingly, Bloomfield College's board of trustees declared a financial exigency on June 21, 1973 and announced that it would lay off thirteen faculty members and place all other faculty, tenured or not, on one-year terminal contracts.[71] Despite these decisions, the college hired twelve new, untenured faculty members between June and September 1973.[72] Bloomfield College claimed that these new faculty members were hired to replace the professors who left the institution due to "normal attrition," not those who were terminated because of the financial exigency.[73] The Bloomfield College chapter of the AAUP sued, alleging that the college had violated the tenure rights of faculty under their contract with the institution.[74]

To determine if a financial exigency existed, the trial court focused on the college's assets.[75] Those assets included tuition income, the college property, the endowment fund, and a 322-acre golf course valued between $5 million and $7 million.[76] The college was considering a long-term plan

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66. *See infra* text accompanying notes 68-232.

67. T. Michael Bolger & David D. Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347, 348-49 (1982).

68. WILLIAM KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 580 (4th ed., 2006); Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846 (N.J. Super. Ct. Ch. Div. 1974); *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

69. *Bloomfield Coll.*, 322 A.2d at 850-51.

70. *Id*. at 848.

71. *Id*.

72. *Id*. at 849.

73. *Id*.

74. *Id*. at 847.

75. *Id*. at 850.

76. *Id*. at 851.

to develop the golf course into a housing complex,[77] but the court encouraged the college to sell the property quickly rather than lay off tenured faculty.[78] The court wrote: "[T]he sale of [the golf course] as an available alternative to the abrogation of tenure is a viable one and fairly to be considered on the meritorious issues."[79] The court's particular—and perhaps peculiar—focus on this one asset has caused higher education law insiders to refer to *Bloomfield College* as the "golf course case."[80]

The trial court held that Bloomfield College did not face a financial exigency.[81] The court found that Bloomfield College's financial problem was "one of liquidity, which, as the evidence demonstrates, has plagued the college for many years."[82] It concluded, "[u]nless we are prepared to say that financial exigency is chronic at Bloomfield College, it is difficult to say how, by any reasonable definition, the circumstances can now be pronounced exigent."[83] Moreover, the court questioned the financial impact of hiring twelve new professors soon after laying off thirteen faculty members.[84] As a result, the court held that the layoffs were not "in good faith related to a condition of financial exigency within the institution."[85] The court ordered the college to reinstate the terminated faculty members and restore tenure to the other affected professors.[86]

The Appellate Division, while upholding the trial court's decision to reinstate the terminated faculty and restore tenure to the others,[87] found the lower court's definition of financial exigency to be too narrow.[88] The court wrote, "[T]he mere fact that this financial strain existed for some period of time does not negate the reality that a 'financial exigency' was a fact of life for the college administration within the meaning of the underlying contract."[89] The Appellate Division suggested that a more "reasonable

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77. *Id*. at 852.

78. *Id*. ("Although its preference is to exploit The Knoll's long-term possibilities, its choices are by no means restricted to this course of action. The option of selling the property now is perhaps more realistic as a survival measure since it would supply immediate liquidity.")

79. *Id*.

80. MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 412 (3rd ed. 2006).

81. *Bloomfield Coll.*, 322 A.2d at 857.

82. *Id*.

83. *Id*.

84. *Id*. at 856.

85. *Id*.

86. *Id*. at 860.

87. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615, 618 (N.J. App. Div. 1975).

88. *Id*. at 617.

89. *Id*.

construction" of "financial exigency" is "the phrase 'state of urgency.'"[90] Under this test, the Appellate Division found adequate evidence—including the absence of liquidity and cash flow—to prove that a financial exigency existed at Bloomfield College.[91]

The Appellate Division criticized the lower court's focus on the assets of the college, specifically the golf course and whether to sell or develop it.[92] The court wrote:

> Whether such a plan of action [to dispose of the property] to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternative is beyond the scope of judicial oversight in the context of this litigation.[93]

The lower court's conclusion that a financial exigency did not exist because of the potential alternative use of the golf course "was unwarranted and should not have been the basis of decision."[94]

In 1976, one year after the *Bloomfield College* decision, the AAUP defined "financial exigency."[95] In its *Recommended Institutional Regulations on Academic Freedom and Tenure*, the AAUP defined financial exigency as "an imminent financial crisis that threatens the survival of the institution as a whole and that cannot be alleviated by less drastic means" than layoffs of tenured faculty.[96] The AAUP revised its recommended institutional regulations six times between 1976 and 2009, but the definition of financial exigency has remained the same.[97]

C. Declarations of Financial Exigency Upheld

Courts have not supported the AAUP's definition of "financial exigency" to mean a threat to the survival of the institution.[98] Like the New Jersey Appellate Division in *Bloomfield College*, courts have generally deferred to institutions' boards of trustees when the boards declared a financial exigency after facing operating deficits, appropriations cuts, and enrollment decreases, provided the "financial crisis is bona fide

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90. *Id*.
91. *Id*.
92. *Id*. at 617.
93. *Id*.
94. *Id*.
95. Ralph S. Brown, Jr., *Financial Exigency*, AAUP BULLETIN 5, 5-6 (Spring 1976).
96. AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (2009), *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm.
97. *Id*.
98. *Id.*

and not used as a pretext for other" violations of employees' contracts.[99] Throughout the 1970s and into the 1980s, courts accepted that financial exigencies existed at many institutions and upheld their decisions to lay off faculty, as described below in roughly chronological order according to the date of decision.[100]

In 1973, the Nebraska legislature adopted a budget that required Peru State College to reduce its number of faculty members.[101] At the direction of the college's board of trustees, the college administration developed a list of sixteen criteria on which to evaluate faculty members for termination, while also considering the most necessary programs to maintain along with the faculty members needed for those programs.[102] Applying those criteria to each member of the faculty, the administration recommended the release of eleven faculty members, at least two of whom were tenured.[103] The administration informed the eleven faculty members that "their employment would terminate at the close of the 1972–73 academic year because of financial exigency."[104] In response to the termination of their employment, James D. Levitt and Darrell Wininger sued, alleging—among other causes of action—that the process used to determine their release was arbitrary and capricious.[105] The court upheld the decision and processes of Peru State's board of trustees.[106] The court wrote:

> It appears to the Court that this [process followed by the college administration] reflects a fair and reasonable approach to the problem. The Board is obligated to provide the best possible education program at the various State Colleges. As a consequence, upon being faced with a shortage of funds, the Board decided it must maintain the most necessary programs at Peru College and this necessitated deciding which faculty members were necessary to maintain those programs.[107]

The court concluded that "the process utilized to select the plaintiffs for termination was fair and reasonable and that the plaintiffs have not carried

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99. Steven Glenn Olswang, *Planning the Unthinkable: Issues in Institutional Reorganization and Faculty Reductions*, 9 J.C. & U.L., 431, 433 (1982).

100. *Id.*

101. Levitt v. Bd. of Trs. of Neb. State Colls., 376 F. Supp. 945, 947 (D. Neb. 1974).

102. *Id*. at 947, 949.

103. *Id*. at 947, 952.

104. *Id*. at 947.

105. *Id*. at 949, 950.

106. *Id*. at 950.

107. *Id*.

the burden of proving that the selection process was either arbitrary or capricious."[108] The court dismissed the complaint.[109]

In 1973, the Wisconsin legislature reduced the University of Wisconsin's biennial budget by 2.5% each year, and it reduced enrollments on several campuses.[110] These reductions caused a loss of instructional funds under a funding formula tying appropriations to student credit hours, resulting in layoffs of some tenured faculty.[111] Thirty-eight tenured faculty members who lost their jobs requested a preliminary injunction in federal court, alleging that the university denied them minimal procedural due process guaranteed by the Fourteenth Amendment.[112] The plaintiffs contended that the university chancellors who made the layoff decisions were not impartial and that the laid-off faculty members did not have a fair opportunity to challenge those decisions.[113]

The court generally agreed with the University of Wisconsin System's contention that the layoff decisions "were precipitated by budgetary decisions by the governor and the legislature, and by the changing sociological or economic currents which have resulted in reduced student enrollment at certain campuses and within certain departments."[114] The court also described these circumstances as a "fiscal exigency."[115] The court denied the plaintiffs' motion for a preliminary injunction.[116] The court ruled that the university had powers under the federal constitution "to assign to the chancellors of the respective campuses the authority both to make the initial decision to lay-off specific tenured faculty members and to make the ultimate decision,"[117] and that the Fourteenth Amendment did not "require adversary proceedings. The information disclosed [by the chancellors] was reasonably adequate to provide each plaintiff the opportunity to make a showing that reduced student enrollments and fiscal exigency were not in fact the precipitating causes for the decisions to lay-off tenured teachers," and that the layoffs were not "arbitrary and unreasonable."[118]

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108. *Id*.

109. *Id*. at 953.

110. Johnson v. Bd. of Regents, 377 F. Supp. 227, 230 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975). *See also* Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979).

111. *Graney*, 286 N.W.2d at 145.

112. *Johnson*, 377 F. Supp. at 230–231.

113. *Id*. at 235-36.

114. *Id*. at 236.

115. *Id*. at 242.

116. *Id*.

117. *Id*. at 240.

118. *Id*. at 242.

After the thirty-eight plaintiffs lost in federal court, seventeen of them sued in state court in Wisconsin.[119] They asserted six causes of action, including breach of contract, violations of rights under the state's tenure law, and violations of due process.[120] The trial court dismissed the plaintiffs' action seeking damages and declaratory and injunctive relief, and a Wisconsin Court of Appeals upheld the order.[121] The Court of Appeals ruled that the plaintiffs were precluded from suing the Board of Regents because of the doctrines of sovereign immunity and public officer civil immunity, and because the plaintiffs failed to exercise their exclusive method of review under state administrative procedures.[122] The court also held that the plaintiffs were precluded from asserting due-process issues because of the doctrine of *res judicata*; the federal courts had already determined those issues.[123] Finally, the court held that the plaintiffs could not sue individual members of the Board of Regents because the plaintiffs failed to prove that the regents acted outside of the scope of their official authority.[124] The court found that the Board of Regents had the authority to lay off tenured faculty because of financial exigency.[125] While the authority was not expressly stated in the tenure statute, the authority was "implied under the general powers of the board for state universities,"[126] the laws of which provide boards with "all . . . powers necessary or convenient to accomplish the objects and perform the duties prescribed by law."[127] The court held that the Board of Regents did not interfere with the protections provided under the tenure statute when it used its discretion to determine that a significant cut in state appropriations required the dismissal of tenured faculty.[128]

Between 1968–1969 and 1973–1974, Goucher College experienced six years of deficits, a diminished endowment, and declining enrollment.[129] The college took several steps to address these fiscal difficulties, including not renewing the contracts of eleven untenured and four tenured faculty members.[130] Hertha Krotkoff, a tenured professor of German, was terminated in part because the college decided to eliminate the Classics department and the German section of the Modern Language department

119. Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979).
120. *Id*. at 141.
121. *Id*. at 140, 149.
122. *Id*. at 141.
123. *Id*. at 142.
124. *Id*. at 144, 149.
125. *Id*. at 148-49.
126. *Id*. at 145.
127. *Id*., (citing WIS. STAT. § 37.02(1) (1971)).
128. *Graney*, 286 N.W.2d at 149.
129. Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1975).
130. *Id*. at 677.

based on enrollment projections.[131] Krotkoff sued the college, alleging violation of the tenure provision of her contract.[132] The jury returned a $180,000 verdict for Krotkoff, but the district judge, perceiving error, granted a new trial and entered judgment for the college notwithstanding the verdict.[133]

The Fourth Circuit Court of Appeals upheld the district court's decision.[134] The key issue on appeal was "whether as a matter of law Krotkoff's contract permitted termination of her tenure by discontinuing her teaching position because of financial exigency."[135] The letter from Goucher to Krotkoff that granted her "indeterminate tenure" did not define the term "indeterminate tenure," and the college's bylaws—which defined "tenure" and the grounds for dismissal—did not mention financial exigency.[136] The court—after reviewing testimony from the American Council on Education, which cited the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*,[137] scholarly works on financial exigency,[138] and cases from other jurisdictions[139]—concluded: "The national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide."[140]

With this national standard in mind, the Fourth Circuit found "no significant evidence that Krotkoff and Goucher contracted with reference to a peculiar understanding of tenure."[141] While some tenured faculty members testified that they understood tenure at Goucher "to preclude

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131. *Id*. at 677-78.
132. *Id*. at 676.
133. *Id*.
134. *Id*.
135. *Id*. at 678.
136. *Id*.
137. *Id*. at 679.
138. *Id*. (citing Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J. LAW & EDUC. 279 (1977); Marjorie C. Mix, TENURE AND TERMINATION IN FINANCIAL EXIGENCY (1978); Clark Byse, *Academic Freedom, Tenure, and the Law: A Comment on* Worzella v. Board of Regents, 73 HARV. L. REV. 304 (1959)).
139. *Krotkoff*, 585 F.2d at 679 (citing *inter alia Am. Ass'n of Univ. Professors, Bloomfield Coll.Chapter v. Bloomfield Coll.*, 322 A.2d 846 (N.J. Sup. Ct. Ch. Div. 1974), *aff'd*, 346 A.2d 615 (N.J. Sup. Ct. App. Div. 1975); *Scheuer v. Creighton Univ.*, 260 N.W.2d 595 (Neb. 1977); *Johnson v. Bd. of Regents of Univ. of Wis. Sys.*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); *Levitt v. Bd. of Trs. of Neb. State Colls.*, 376 F. Supp. 945 (D. Neb. 1974)).
140. *Krotkoff*, 585 F.2d at 678.
141. *Id*. at 680.

dismissal for financial reasons . . . [f]our other tenured faculty members testified to a contrary understanding."[142] Moreover, Goucher introduced evidence that, in the past, it had terminated the appointments of tenured professors because of "its precarious financial condition."[143] The Fourth Circuit agreed with the district court that, as a matter of law, Goucher did not breach Krotkoff's contract.[144] The evidence overwhelmingly demonstrated "that the college was confronted by pressing financial need. As a result of the large annual deficits aggregating more than $1,500,000 over an extended period and the steady decline in enrollment, the college's financial position was precarious. Action undoubtedly was required to secure the institution's future."[145]

In November 1972, North Idaho College's Board of Trustees ordered the president to cut two full-time teaching positions from the faculty after a decline in enrollment.[146] By letter on January 10, 1973, the president notified Annette Bignall that she was one of the two professors not rehired for the coming year.[147] The letter stated no reasons for her termination.[148] Bignall taught at the college from 1961 to 1973, as a part-time instructor until 1969, and then as a full-time instructor.[149] She sued the college in federal district court, claiming that the college had denied her procedural and substantive due process.[150] The district court held that Bignall had improperly terminated a hearing of the Board of Trustees regarding her dismissal, thereby waiving her right to further procedural due process, and in any case, the college used "valid, nondiscriminatory reasons" to decline to renew her contract.[151]

On appeal, Bignall claimed she was denied procedural due process because she did not receive proper notice and a proper hearing prior to the president's decision, and because the Board of Trustees was a biased panel.[152] Bignall also contended that the college violated its tenure policy

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142. *Id*.

143. *Id*.

144. *Id.* at 681.

145. *Id*.

146. Bignall v. N. Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).

147.*Id*. at 245.

148. *Id*.

149. *Id*.

150. *Id*. at 244–45. Bignall's husband, Bliss Bignall, was also a plaintiff. Mrs. Bignall claimed she was denied due process in retaliation for the activities of her husband, who was a lawyer, in behalf of minority students at the college. The Bignalls claimed these activities were protected under the First Amendment. *Id*. at 245. The district court found no First Amendment violation, and the Bignalls did not appeal this part of the decision. *Id*.

151. *Id*. at 245.

152. *Id*.

by not showing a "demonstrable financial exigency" when it dismissed her.[153] The Ninth Circuit Court of Appeals held that Bignall was not denied procedural due process because "adequate procedures remain[ed] to challenge and forestall the non-retention" after the president's decision, and because Bignall chose to withdraw prematurely from a hearing afforded by the college.[154]

Bignall's claims regarding substantive due process depended in part on whether she had tenure that created a property right.[155] North Idaho College did not adopt a formal tenure policy until the spring of 1972.[156] The district court held, however, that Bignall had "*de facto* tenure," and the Circuit Court of Appeals agreed.[157] Faculty members can establish *de facto* tenure after a long period of service and legitimate reliance upon guidelines promulgated by their university.[158] Bignall had served North Idaho College for twelve years, and she relied on a general statement by the college's president when she was hired in 1961 that she would have tenure after three years.[159] The college's handbook declared that faculty who taught continuously for three years would have their contracts automatically renewed unless the college fired them for cause.[160]

In 1966, Bignall signed a report as a member of a committee on academic freedom and tenure that stated "that no further statement is necessary beyond the AAUP 1940 Statement on Academic Freedom and Tenure," under which tenured faculty may be laid off "because of financial exigencies."[161] Under this standard of protection of Bignall's *de facto* tenure, the college bore the burden of proving that there was a financial exigency, and that the president adopted and used a uniform set of procedures for all faculty.[162] The Circuit Court of Appeals upheld the district court's ruling that the college "met its burden of proof" that a financial exigency existed.[163] "[N]ot only had projected increases in enrollment not materialized, but enrollment had fallen so that the College . . . was overstaffed" after hiring new faculty in 1973, all of whom were aboard before Bignall's non-retention.[164] "In the absence of any evidence

153. *Id*.
154. *Id*. at 246.
155. *Id.* at 245.
156. *Id*. at 248 n. 5.
157. *Id*. at 245, 246, 247.
158. Perry v. Sindermann, 408 U.S. 593, 600-01 (1972).
159. *Bignall*, 538 F.2d at 249.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*.

that a cut was not required," the court wrote, "the College demonstrated its financial plight."[165]

In 1976–1977, the City University of New York (CUNY) suffered a 13% cut to its budget after trying to achieve savings of $54.8 million through administrative and service cuts the previous year.[166] On May 24, 1976, the New York City Board of Higher Education (BHE), which governs CUNY, implemented a retrenchment plan that directed each branch president to determine which academic and non-academic programs or activities to scale back or terminate.[167] The retrenchment plan had to set forth criteria to determine which individuals would be discontinued, and it also had to include a review process.[168] Tenured faculty with the longest full-time, continuous service were the last employees to be considered for retrenchment,[169] but they remained vulnerable.[170] CUNY laid off about 1,050 faculty members, including some with tenure.[171]

Eight of the laid-off faculty members—including faculty who were either tenured, had received letters of reappointment for the 1976–1977 academic year, or were "certificated," meaning they were granted administrative certificates of continuous employment that guaranteed reappointment, subject to certain conditions[172]—sued the BHE.[173] They claimed that their terminations were arbitrary or capricious and that they did not receive adequate procedural due process.[174] The plaintiffs alleged that their dismissals were arbitrary and capricious "because the system managed by defendants was allegedly rife with wasteful practices and defendants knew of the impending budgetary problems yet did nothing to consult, plan ahead or save money and simply made 'wholesale' reductions in the instructional staff at the last moment instead of cutting administrative costs."[175] The court disagreed and upheld the retrenchments.[176] The court wrote:

> All of the BHE and CUNY branch plans submitted . . . reflect strenuous efforts to minimize reductions in the instructional staff

165. *Id*.

166. Klein v. Bd. of Higher Educ., 434 F. Supp. 1113, 1115–16 (S.D.N.Y. 1977).

167. *Id*. at 1116.

168. *Id*.

169. *Id*.

170. *Id.*

171. Arnold H. Lubasch, *A Suit Challenges Ouster of 1,050 City U. Teachers*, N.Y. TIMES, Sept. 3, 1976, at B2.

172. *Id.*

173. *Klein*, 434 F. Supp. at 1114, 1115 n4.

174. *Id*. at 1114.

175. *Id*. at 1114, 1116.

176. *Id.* at 1119.

> and to allocate budget cuts rationally and in the best interests of the CUNY community. The budget cuts imposed on BHE leave no room to doubt that spending reductions were required, and defendants fairly and reasonably implemented the requisite reductions upon due consideration and on well-reasoned grounds.[177]

The court concluded, "Defendants have satisfied the Court that a bona fide financial emergency existed and that they adopted and applied a uniform set of procedures for meeting that emergency."[178]

In a case against Southern Colorado State College,[179] the question whether the institution had a financial exigency was not even contested.[180] In upholding the dismissal of Lyle Brenna, a tenured professor, the Tenth Circuit Court of Appeals wrote, "Because of bona fide budgetary exigencies it became necessary for the college to reduce its full time faculty from 340 to 308."[181] In reviewing the tenure rules applicable in the case, the court stated, "The tenure policy provided that termination of tenured faculty was permissible in the event of a 'bona fide budgetary exigency,' which it is agreed existed in this case."[182] With the question of financial exigency off the table, Brenna claimed that "the decision to remove him instead of the nontenured professor [in the same department] was so arbitrary or capricious as to violate the concept of 'substantive' due process."[183] Rejecting this argument, the Tenth Circuit Court of Appeals wrote:

> It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was arbitrary or capricious. Likewise, their decision as to which currently employed faculty member least met the needs of the department was based on substantial evidence and was made in good faith, which would preclude a finding that it was arbitrary or capricious.[184]

At Boise State University, the State Board of Education, which governs the university, made a declaration of financial exigency in June 1982.[185]

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177. *Id*. at 1117–18.
178. *Id*. at 1118.
179. Brenna v. S. Colo. State Coll., 589 F.2d 475 (10th Cir. 1978).
180. *Id.* at 476.
181. *Id*.
182. *Id*. at 477.
183. *Id*. at 476.
184. *Id*. at 477.
185. Milbouer v. Keppler, 644 F. Supp. 201, 203 (D. Idaho 1986).

Henrietta Milbouer, a tenured professor who was dismissed, sued the university, charging that a financial exigency "did not in fact exist."[186] To decide this issue, the court looked to the Idaho State Board of Education's Policy Manual for Higher Education Institutions, which defined financial exigency as "[a] demonstrably bona fide, imminent financial crisis which threatens the viability of an agency, institution, office or department as a whole, or one or more of its programs, or other distinct units, and which cannot be adequately alleviated by means other than a reduction in the employment force."[187]

The court reviewed state budget cuts and how the university reacted to them to see if the university's declaration of financial exigency met the State Board of Education's definition.[188] The institution had suffered significant budget reductions after the governor ordered budget holdbacks in fiscal years 1980–1982, and the governor ordered another 9% cut in fiscal year 1983.[189] The university's president was directed to retain surplus funds in anticipation of further holdbacks, which materialized in October 1982, leaving insufficient funds "to solve the severe and long-standing budgetary problems facing the University."[190] The court concluded that "[t]he preponderance of the evidence shows that a genuine financial exigency existed at BSU in June of 1982."[191]

In addition to the cases discussed above, it should be noted that, under AAUP policy, program discontinuance may lead to the termination of tenured faculty appointments.[192] The AAUP's *Recommended Institutional Regulations on Academic Freedom & Tenure* states: "Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction."[193] Under this AAUP policy, "[t]he decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations," which "do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."[194]

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186. *Id*. at 203.
187. *Id*.
188. *Id.*
189. *Id*. at 204.
190. *Id*.
191. *Id*.
192. AM. ASS'N. OF UNIV. PROFESSORS, *supra* note 96, at §4.d.
193. *Id.*
194. *Id*.

The first major case to interpret this policy was *Browzin v. Catholic University of America*.[195] In 1969, Catholic University faced a bona fide financial exigency, as stipulated by the parties.[196] The university's School of Engineering and Architecture "was faced with a severe budget reduction" and decided to eliminate its programs in Soil Mechanics and Hydrology, which "had no great strength and could not hope to achieve strength under the new budgetary limitations."[197] The university laid off Boris Browzin, the professor who was responsible for those programs, and he sued the university for breach of contract.[198] The case was tried without a jury, and the district court granted the university's motion to dismiss on the grounds that on the facts and the law presented, Browzin showed no right to relief.[199] The Court of Appeals for the District of Columbia Circuit upheld the decision.[200] Focused on the termination of tenured positions for abandonment of a program of instruction, the Court of Appeals wrote:

> Catholic University, as the parties stipulated, was indeed faced with *bona fide* financial difficulties, but it chose to meet its problems by discontinuing its courses in Soil Mechanics and Hydrology. This discontinuance was, according to the University's own version of the events, the immediate reason why Browzin lost his job. There really is no dispute that there was an abandonment of Browzin's program of instruction.[201]

Courts have distinguished *Browzin* and the elimination of an academic program from layoffs within a school or department, holding that a financial exigency need only exist in one school or department—not the entire university—to justify faculty layoffs within that school.[202] For example, it was "undisputed that Creighton University as a whole was not in a real state of financial exigency" in the 1970s,[203] but its School of Pharmacy had an operating deficit between fiscal years 1971-1972 to 1975-1976.[204] The school anticipated another deficit in 1976-1977,[205] even after

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195. 527 F.2d 843 (D.D.C. 1975).

196. *Id*. at 845.

197. *Id*. at 844–845.

198. *Id*. at 845.

199. *Id*.

200. *Id*. at 851.

201. *Id*. at 848. The Court of Appeals also found that the university made sufficient effort to place Browzin in another suitable position. *Id*. at 849.

202. *See* Scheuer v. Creighton Univ., 260 N.W.2d 595, 597 (Neb. 1977); *see also* Rose v. Elmhurst Coll., 379 N.E.2d 791 (Ill. 1978).

203. *Scheuer*, 260 N.W.2d at 597.

204. *Id*. at 596.

205. *Id*. *See also id*., at 601 ("The deficit faced for 1976–1977 was in excess of $200,000. This deficit would be more than three times greater than any previous deficit.").

adopting remedial measures such as cutting costs for equipment and travel, freezing faculty salaries, and terminating some non-faculty positions.[206] In 1975, the school decided to terminate four faculty members.[207] Edwin Scheuer, a tenured assistant professor at the School of Pharmacy, was terminated because the medicinal chemistry program was reduced to a one-semester, three-hour freshman course.[208] Scheuer sued the university, claiming that financial exigency must apply to the university as a whole, not just his program, to terminate his contract.[209]

To decide the case, the Nebraska Supreme Court interpreted the Creighton faculty handbook's provisions regarding "financial exigency" and the discontinuance of academic programs.[210] The handbook provided for "termination of appointment . . . based upon financial exigency, which may be considered to include bona fide discontinuance of a program or department of instruction or the reduction in size thereof."[211] The court rejected the argument that the financial exigency had to apply to the university as a whole because otherwise, the university would be required "to continue programs running up large deficits so long as the institution as a whole had financial resources available to it," which would inevitably "spread the financial exigency in one school or department to the entire University. This could . . . result in the closing of the entire institution."[212] Upholding the termination, the court wrote, "[w]e specifically hold the term 'financial exigency' as used in the contract of employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole."[213] Deciding otherwise would mean "no tenured employee in any college may be released until the institution exhausts its total assets or at the very least reaches the point where its very survival as an institution is in jeopardy."[214]

The following year, 1978, the Appellate Court of Illinois upheld Elmhurst College's decision to release Ashley Rose, a tenured professor from the college's religion department.[215] In June 1975, the college sent Rose a letter that terminated his employment effective August 31, 1976, as part of the college's curtailment of the religion department due to declining enrollment.[216] The faculty manual in place when Rose was hired in 1969

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206. *Id*. at 596.
207. *Id*.
208. *Id*. at 600.
209. *Id*. at 599.
210. *Id*. at 600–01.
211. *Id*. at 597.
212. *Id*. at 600.
213. *Id*. at 601.
214. *Id*.
215. Rose v. Elmhurst Coll., 379 N.E.2d 791, 792, 794 (Ill. 1978).
216. *Id*.

permitted the university to release tenured faculty "because of decline in enrollment or lack of funds,"[217] and an update in the handbook in 1974 allowed "termination due to financial exigency or elimination or curtailment of an academic program."[218] Rose asserted he could be terminated only under terms of the 1969 contract.[219] His suit resulted in a summary judgment for the college, and Rose appealed.[220]

The Appellate Court of Illinois considered whether "any genuine issue of material fact exists on the record which would preclude summary judgment."[221] The court held that the dismissal was permitted no matter which contract was considered.[222] The court wrote, "[T]he plaintiff is no better off by reliance upon the provisions of the 1969 Manual. A decline in enrollment, which is a stated ground for termination set forth in the 1969 Manual, was established . . . [by the evidence,] leaving no genuine or material question of fact."[223] The court concluded, "The uncontradicted evidence indicates that the college's curtailment of the department of religion as well as other departments was a direct consequence of declining enrollment,"[224] justifying the dismissal.[225]

Whether the financial exigency exists university-wide or within one school, it is important that institutions meet their burden of proof.[226] In 1982, the University of Idaho laid off Lois Pace, a tenured professor of home economics in the research and extension division of the College of Agriculture, after the State Board of Education declared a financial exigency.[227] Prior to laying off Pace, the university had not considered any cost-saving alternatives to reductions in personnel, including freezing or reducing salaries, travel, capital outlays, supplies, or equipment.[228] Ruling against the university, the Supreme Court of Idaho wrote, "The evidence . . . clearly shows that the defendants did not satisfy the requirements for proving a financial exigency; they did not demonstrate a 'bona fide, imminent financial crisis . . . *which cannot be adequately alleviated by means other than a reduction in the employment force*.'"[229]

217. *Id*. at 792.
218. *Id*.
219. *Id*. at 793.
220. *Id*. at 792–93.
221. *Id*. at 793.
222. *Id.*
223. *Id*. at 794.
224. *Id*.
225. *Id.*
226. *See* Pace v. Hymas, 726 P.2d 693 (Idaho 1986).
227. *Id.* at 694.
228. *Id*. at 702.
229. *Id*. (emphasis in original).

Based on the court decisions deciding the financial exigency cases from the 1970s and 1980s, some experts have asserted that "[i]t is rare for colleges to lose exigency cases, as the *Bloomfield* and *Pace* cases are well known to college attorneys."[230] College and university counsel are careful to advise their clients to avoid the pitfalls described in those cases in the event layoffs are needed.[231] Based on a review of the cases described above, institutions need to show evidence of significant fiscal difficulty, need to consider alternatives to laying off faculty members, and cannot hire faculty to replace those they have fired for the bona fide reason of a financial exigency.[232]

IV. "FINANCIAL EXIGENCY" AND THE GREAT RECESSION OF 2007–2009

Despite the fiscal crisis caused by the Great Recession of 2007–2009, few universities declared a financial exigency between 2007 and 2011.[233] Colleges and universities demonstrated their awareness of the legal requirements for declaring a financial exigency.[234] Institutions that have enrolled more students throughout their programs over the years and have hired more faculty to serve them would find it difficult prove a "bona fide" financial crisis.[235] Institutions that determined it necessary to impose layoffs or achieve savings on personnel costs often did so without declaring financial exigency.[236] Those that lost enrollment in a particular program followed the lessons in *Browzin v. Catholic University*[237] and *Scheuer v. Creighton University*[238] by laying off faculty through the elimination of entire programs.[239] Colleges and universities considered other alternatives

230. OLIVAS, *supra* note 80, at 417. Institutions continued to prevail in financial exigency cases in the 1990s. *See*, *e.g*., Johnston-Taylor v. Gannon, No. 91-2398, 1992 U.S. App. LEXIS 22052, at *5–6, *10 (6th Cir. 1992), *cert. denied*, 507 U.S. 986 (1993).

231. *See* OLIVAS, *supra* note 80.

232. *See also* Steven G. Olswang, Ellen M. Babbitt, Cheryl A. Cameron, & Edmund K. Kamai, *Retrenchment*, 30 J.C. & U.L. 47, 61 (2003): "Factors usually considered in determining whether a financial exigency is bona fide include: (1) the Board's motivation for its action; (2) the adequacy of the institution's operating funds; (3) the overall financial condition of the institution; (4) the use of other cost-cutting or money-saving measures before the institution is forced to terminate faculty; and (5) the efforts to find alternative employment for faculty."

233. *See infra* text accompanying notes 241-53.

234. *Id.*

235. See *infra* text accompanying notes 254-73.

236. *See infra* text accompanying notes 283-404.

237. 527 F.2d 843 (D.D.C. 1975).

238. 260 N.W.2d 595 (Neb. 1977).

239. See *infra* text accompanying notes 305-40.

to declaring a financial exigency, such as implementing furloughs, using federal stimulus funds, and reducing staff instead of faculty.[240]

A. Declarations of "Financial Exigency" in 2007–2011

The Washington State Board for Community and Technical Colleges declared a state of financial emergency on June 11, 2009, citing sufficient cuts in state funding to trigger the statutory ability to make such a declaration.[241] By statute, the State Board for Community and Technical Colleges "may declare a financial emergency under the following conditions: (1) Reduction of allotments by the governor pursuant to [expenditure laws], or (2) reduction by the legislature from one biennium to the next or within a biennium of appropriated funds based on constant dollars using the implicit price deflator."[242] Bates Technical College was the system's only college that laid off full-time faculty members under this authority, dismissing six instructors.[243] In September 2011, the Washington State Board for Community and Technical Colleges again declared a financial emergency, this one covering the 2011–2013 biennium, citing overall state budget cuts of $165 million since 2009, and the governor's request to state agencies for 5% and 10% budget-reduction scenarios.[244]

Bethune-Cookman University, a historically black institution in Daytona Beach, Florida, notified thirty-four faculty and staff on May 15, 2009, that their positions were terminated, effective immediately, after a mandate by the Board of Trustees "to drastically reduce . . . expenses and overhead in light of the recent economic downturn."[245] In the AAUP's investigation of these layoffs, the university's general counsel and others explained that the mandate was "due to financial exigency."[246] The university's executive vice president of finance and administration indicated that a diminishing endowment and cuts in appropriations from the State of Florida caused the

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240. See *infra* text accompanying notes 341-84.

241. Regular Meeting Agenda Item, WASH. STATE BD. FOR CMTY. AND TECH. COLLS. (June 11, 2009), http://www.sbctc.edu/docs/board/agendas/2009/10-11june2009/2009_june_meeting_agenda-complete.pdf.

242. WASH. REV. CODE § 28B.50.873 (2010).

243. Paul Fain, *Faculty Fears in Washington*, INSIDE HIGHER EDUC. (Oct. 17, 2011), http://www.insidehighered.com/news/2011/10/17/financial_emergency_in_washington_state_could_lead_to_layoffs_of_tenured_faculty.

244. Press Release, Wash. State Bd. for Cmty. and Tech. Colls., Community and Technical College Board Declares Financial Emergency (September 2011), http://www.sbctc.ctc.edu/general/documents/SBCTC_Board_Meeting_Action_9-15-11.pdf.

245. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 25.

246. *Id*. at 13.

financial exigency and the need for layoffs.[247] Bethune-Cookman's Board of Trustees approved a reduction in the university's budget in early 2009, and then engaged a consulting firm for advice on how to achieve savings.[248] The AAUP concluded that Bethune-Cookman disregarded the financial exigency provisions in the *1940 Statement of Principles* by not formally declaring an exigency and not offering to reinstate faculty in positions for which they were qualified.[249]

In October 2011, Southern University's Board of Supervisors declared a financial exigency on its main campus in Baton Rouge.[250] Southern faced a $10 million budget shortfall resulting from state budget cuts, enrollment declines, and other financial losses.[251] Spending reductions, staff layoffs, and a voluntary furlough program did not achieve sufficient savings to balance the budget before the declaration of financial exigency.[252] With the declaration in place, all Southern employees—including tenured faculty—who earned more than $30,000 a year received furloughs without pay in the 2011–2012 academic year that amounted to 10% of their leave time.[253]

B. Enrollment, "Bona Fide" Declarations of Financial Exigency, and Program Closures

A key contributing factor to a declaration of financial exigency is often a decline in enrollment throughout the institution.[254] "A significant decline in enrollment creates a surplus of teachers," and one could argue "it would be unreasonable to require a university to retain faculty not needed to meet student course demand."[255] A major difference between the recession of 1973–1975 and the Great Recession of 2007–2009 was the projected enrollment of college and university students.[256] In the 1970s, experts

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247. *Id*.

248. *Id*.

249. *Id*. at 14, 16.

250. Jordan Blum, *Southern Board OKs Exigency*, THE ADVOCATE (Oct. 30, 2011), http://theadvocate.com/home/1193443-125/su-board-oks-exigency.html.

251. *Id*.

252. *Id*.

253. *Id*.

254. Am. Ass'n of Coll. Professors, Bloomfield Coll. Chapter v. Bloomfield Coll., 322 A.2d, 846, 849 (N.J. Sup. Ct. 1974), *aff'd* 346 A.2d 615 (N.J. App. Div. 1975); Graney v. Bd. of Regents of Univ. of Wis. Sys., 286 N.W.2d 138, 145 (Wis. Ct. App. 1979); Krotkoff v. Goucher Coll., 585 F.2d 675, 677 (4th Cir. 1978); Bignall v. N. Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).

255. James L. Petersen, Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417, 424 (1976).

256. *See infra* text accompanying notes 260-82.

projected the growth rate of enrollment to decrease,[257] whereas the college- or university-bound population through the year 2018 is anticipated to remain steady.[258] For those institutions with consistent enrollment throughout their programs, laying off tenured faculty would not only diminish their capacity to meet student demand, but would likely fail the "bona fide" test.[259]

i. Enrollment Projections for the 1970s

A study by the Carnegie Commission on Higher Education in 1971 found that 71% of the colleges and universities in its study were in, or headed for, financial trouble.[260] The study found that institutions' expenditures outstripped income: institutions expanded their services, thereby increasing their expenditures, while income shrank from inflation and increased competition for funds.[261] Institutions routinely compete for funds as they jockey for prestige, engaging "in an 'arms race' of spending to make [themselves] look more attractive to potential students and thus in a quest for ever increasing resources."[262] These resources include state appropriations, research grants, donations from industries and philanthropies, and tuition and fees from students.[263]

In the 1970s, colleges fought fiercely for students as their enrollments shrank or leveled out.[264] According to statistics available in 1971, total degree-credit enrollments in all institutions of higher education expanded 116% between 1959 and 1969 (from 3,377,273 to 7,299,000), but were projected to grow 51.7%, to 11,075,000, between 1969 and 1979.[265] Actual enrollment in 1979 in degree-granting institutions wound up higher than projected, reaching 11,570,000 students,[266] a 58.5% increase over ten years, about half of the growth in the previous decade.

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257. *See infra* text accompanying notes 260-73.

258. *See infra* text accompanying notes 274-82.

259. *See Bloomfield Coll.*, 322 A.2d at 856.

260. EARL F. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION: A STUDY OF FINANCIAL CONDITIONS AT 41 COLLEGES AND UNIVERSITIES 139 (1971).

261. *Id*. at 7-12.

262. Ronald G. Ehrenberg, *Econometric Studies of Higher Education*, J. ECONOMETRICS 19, 26 (2004).

263. BURTON R. CLARK, CREATING ENTREPRENEURIAL UNIVERSITIES: ORGANIZATIONAL PATHWAYS OF TRANSFORMATION 6 (1998).

264. EARL F. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION: TWO YEARS LATER 17 (1973).

265. KENNETH A. SIMON & MARIE G. FULLAM, DEP'T OF HEALTH AND HUMAN SERVS., PROJECTIONS OF EDUCATIONAL STATISTICS TO 1979-80 23 (1971).

266. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2009 279 (2010).

The explosive growth of community colleges largely fueled the expansion in enrollment in the 1960s and 1970s.[267] States built 497 two-year colleges between 1961 and 1970, and built 149 more between 1971 and 1980.[268] Total fall enrollment at public two-year colleges increased from 739,811 students in 1963 to 2.2 million students in 1970 to 4.3 million students in 1980.[269]

After the boom of the 1960s at four-year colleges and universities, however, "the situation ha[d] changed and with it the admissions marketplace."[270] Private institutions in particular increasingly competed for students, and the tuition, fees, and financial aid they brought with them. "The problem ha[d] expanded from one of tight money to a distressing paucity of students . . . ."[271]

As early as 1972, colleges and universities were feeling the effects of the decline in the rate of enrollment growth. At Central Michigan University, "the student enrollment pressure ha[d] lessened, depriving the university of the money that would normally be produced by an expanding student population."[272] Allegheny College had three consecutive decreases in admissions applications, and Pomona College also had a reduced applicant pool.[273]

ii. Enrollment Projections for the 2010s

By contrast, a consistent rate of enrollment in the first two decades of the 21st century is likely to keep institutions that enjoy steady enrollments throughout their programs from having a bona fide reason to declare a financial exigency and lay off faculty. Between 1999 and 2009, total enrollment in degree-granting institutions increased 38%, from 14.8 million to 20.4 million.[274] The National Center for Education Statistics projects continual growth over the next decade, estimating total enrollment to expand 13% between 2009 and 2020.[275] An increasing number of these students will attend private, for-profit institutions. Between 2006 and

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267. Am. Ass'n of Cmty. Colls., *CC Growth Over Past 100 Years* (2011), http://www.aacc.nche.edu/AboutCC/history/Pages/ccgrowth.aspx.

268. *Id.*

269. SNYDER & DILLOW, *supra* note 266, at 280.

270. Stephen J. Trachtenberg & Lawrence C. Levy, *In Search of Warm Bodies*, CHANGE, Summer 1973, at 52.

271. *Id.*

272. CHEIT, *supra* note 264, at 33.

273. *See id.* at 29, 32.

274. WILLIAM J. HUSSAR & TABITHA M. BAILEY, NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2020 58–59 (Sept. 2011).

275. *Id.* at 20.

2009, the total number of students at private, for-profit institutions increased 68%, from 1.38 million to 2.24 million.[276]

The Great Recession drove even more students to colleges and universities. "[T]he pace of growth [of college and university enrollment] accelerated when the Great Recession began in 2007. Historically high levels of unemployment, especially for young adults, appear[ed] to have served as a stimulant to . . . . enrollment."[277] According to a Pew Research Center analysis of census data, the share of eighteen- to twenty-four-year-olds attending college in the U.S. hit an all-time high in October 2010: 12.2 million students, or 41.2% of young adults ages eighteen to twenty-four.[278]

Some institutions have said that, because of the number of students they serve, they will not impose layoffs. Taylor Reveley, president of the College of William and Mary, said layoffs "are enormously destructive of the fabric of the school, and we don't have enough people to begin with" to serve the university's 7,625 students.[279] Montclair State University President Susan Cole, in her address to the community on April 21, 2010, said that the university "will continue to recruit highly qualified faculty in response to enrollment growth."[280] She assured the audience that "no matter what happens with the [State] budget, there will be no layoffs at Montclair State University."[281]

The statements from the presidents at William and Mary and Montclair State reflect legal requirements established by *Bloomfield College* and subsequent cases involving layoffs resulting from declarations of institution-wide financial exigency. By hiring new faculty in the past few years, Montclair State—particularly because it is located in New Jersey, the jurisdiction where *Bloomfield College* was decided—would have a difficult

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276. *See* LAURA G. KNAPP ET AT., NAT'L CTR. FOR EDUC. STATISTICS, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2006; GRADUATION RATES, 2000 & 2003 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2006 4 (2008); LAURA G. KNAPP ET AT., NAT'L CTR. FOR EDUC. STATISTICS, ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2009; GRADUATION RATES, 2003 & 2006 COHORTS; AND FINANCIAL STATISTICS, FISCAL YEAR 2009 7 (2011).

277. RICHARD FRY, PEW RESEARCH CTR, HISPANIC COLLEGE ENROLLMENT SPIKES, NARROWING GAPS WITH OTHER GROUPS 5 (2011), *available at* http://www.pewhispanic.org/files/2011/08/146.pdf.

278. *Id.* at 3, 20.

279. Jon Marcus, *Hard Times: Tuitions Rise, Services Cut, as University Officials Try To Ride Out a Severe Economic Downturn*, NAT'L CROSSTALK, Mar. 2009, at 5, 7.

280. Susan A. Cole, President, Montclair State Univ., President's Address to the University Community (Apr. 21, 2010) (transcript available at https://www.montclair.edu/president/news/article.php?ArticleID=5531&ChannelID=32).

281. *Id.*

time proving a "bona fide" reason for laying off previously hired faculty under the standard established in *Bloomfield College*.[282]

iii. University-Wide Enrollment Losses

Clark Atlanta University (CAU) laid off tenured faculty precisely because of loss of enrollment, yet adamantly—and controversially—did not declare financial exigency.[283] Saying it was responding to "declining student enrollments that have been persisting for several years, compounded by the nation's deepening economic recession," Clark Atlanta announced on February 5, 2009 that it would reduce its workforce by at least seventy full-time faculty and about thirty full-time staff.[284] After some positions were quickly reinstated, fifty-five faculty members were terminated, twenty of whom had tenure.[285]

In the same announcement, Clark Atlanta stated in a series of bullet points:

- CLARK ATLANTA UNIVERSITY IS NOT DECLARING FINANCIAL EXIGENCY.
- Clark Atlanta University is not in financial trouble. There is absolutely no financial emergency at CAU, and the University is not in a cash-marginal position.
- CAU remains a viable institution and is fiscally sound.
- CAU is still committed to long-term growth and forward progress.[286]

Clark Atlanta's enrollment fell from more than 5,000 students in the fall of 2000[287] to 4,068 in the fall of 2008,[288] and about 200 students cited

282. *See supra* text accompanying notes 68–97 (discussing the layoff of tenured faculty members at Bloomfield College, an early "financial exigency" case).

283. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27, at § II.

284. CLARK ATLANTA UNIV., Clark Atlanta University to Respond to Nation's Economic Condition: CAU Re-Engineering and Positioning for Future Growth 1–2 (Feb. 5, 2009), *available at* http://www.cau.edu/CMFiles/Docs/StatementOnCAURestructuring.pdf.

285. *See* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27, at § II.

286. CLARK ATLANTA UNIV., *supra* note 284, at 4.

287. THOMAS D. SNYDER & CHARLENE M. HOFFMAN, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2002 270 (2003).

288. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010 368 (2010).

financial difficulties and did not enroll in the spring of 2009.[289] In January 2009, the university reported that some students had experienced trouble accessing student loans, and some donors of university scholarships had experienced "loss of revenue and . . . indicated that their previous level of financial support [was] not possible" at that time.[290] The university said that it would "realign its workforce with the University's current enrollment and anticipated enrollment over the next several years."[291]

Under Clark Atlanta's faculty handbook, declaring an "enrollment emergency" is easier than declaring a "financial exigency."[292] An "enrollment emergency" is defined "as either a sudden or unplanned progressive decline in student enrollment the detrimental financial effects of which are too great or too rapid to be offset by normal procedures outlined in the Handbook."[293] Procedurally, "[t]he president, after consultation with the University Senate Executive Committee and the Executive Committee of the Board of Trustees, will make the policy declaration of a state of enrollment emergency to the university."[294]

Clark Atlanta's faculty handbook defines financial exigency as "a rare and serious institutional crisis which is defined as the critical, urgent need of the university to reorder its current fund monetary expenditures in such a way as to remedy and relieve its inability to meet the projected annual monetary expenditures with sufficient revenue."[295] The multi-step procedure for declaring a financial exigency involves the Board of Trustees, the President, the University Senate, and the faculty:

> The Board of Trustees, upon recommendation of the President, who will have consulted with the University Senate, decides a) whether a financial crisis meets the criteria; and b) whether a financial exigency should be declared. The University Senate participates in the decision that financial exigency exists through

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289. Scott Jaschik, *Turmoil Over 70 Faculty Layoffs at Clark Atlanta*, INSIDE HIGHER EDUC. (Feb. 9, 2009), http://www.insidehighered.com/news/2009/02/09/cau.

290. CLARK ATLANTA UNIV., *supra* note 284, at 1. About 98% of Clark Atlanta's students qualify for financial aid, higher than the national average of 70%. Shaila Dewan, *Economy Hits Hard on Black Campuses*, N.Y. TIMES, Feb. 19, 2009, at A13.

291. CLARK ATLANTA UNIV., *supra* note 284, at 2.

292. *See* CLARK ATLANTA UNIV., Faculty Handbook §§ 2.8.5, 2.8.5.2, 2.8.5.3 (Oct. 2004), *available at* http://www.cau.edu/CMFiles/Docs/FacultyHandbook.pdf. Under the faculty handbook, the university can lay off faculty without cause in three circumstances: major changes in curricular requirements, academic programs, or departments; an enrollment emergency; and financial exigency. *Id.*

293. *Id.* at § 2.8.5.2.

294. *Id.*

295. *Id.* at § 2.8.5.3.

> its Executive Committee and other committees as deemed appropriate by the University Senate, which advises the president.
>
> Subsequently, the faculty shall be represented in administrative processes relating to program reorganization or the curtailment or termination of instructional programs because of financial exigency through the Academic Council's Curriculum Committee, and the Academic Council. Faculty, however, shall not necessarily be represented in individual personnel decisions; the president and the Board of Trustees shall have final authority in all matters related to financial exigency.[296]

Clark Atlanta laid off faculty under an enrollment emergency in order to avoid declaring a financial exigency.[297] In an interview with the student newspaper, President Carlton E. Brown said that, without the layoffs, the university would have faced a budget shortfall of $6 million, jeopardizing its ability to meet costs through the summer of 2009 and the start of the fall 2009 semester.[298] He said, "[w]e would then have to declare financial exigency, which is the most dangerous condition to enter."[299] President Brown said the university avoided declaring financial exigency "to protect the financial position of the university and preserve its accreditation and capability."[300]

The AAUP investigated the circumstances surrounding Clark Atlanta's layoffs.[301] The AAUP's investigative committee found that enrollment in the spring of 2009 was just under 4,000 students and down less than 2% from the previous fall's enrollment of 4,063.[302] Finding no precipitate drop in enrollment, the AAUP wrote, "[t]he university may well have been in a difficult financial condition, but if that condition was serious enough genuinely to necessitate the large-scale layoff of faculty and staff in midsemester, then there was de facto a state of financial exigency."[303] The AAUP concluded that the "declaration of an enrollment emergency was

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296. *Id.*

297. *President Brown Responds to Panther's Front Page Questions*, THE PANTHER, Apr. 7, 2009, *available at* http://web.archive.org/web/20090515114541/http://media.www.thecaupanther.com/media/storage/paper292/news/2009/04/07/News/President.Brown.Responds.To.The.Panthers.Front.Page.Questions-3700982.shtml?

298. *Id.*

299. *Id.*

300. *Id.*

301. *See generally* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 27 (reporting the findings of the AAUP investigating committee regarding the termination of fifty-five faculty members by Clark Atlanta University).

302. *See id.* at § III(A).

303. *Id.*

unwarranted and was in fact a pretext, a convenient means to avoid faculty handbook requirements for meaningful academic due process in the termination of faculty appointments."[304]

iv. Program-Specific Enrollment Losses and Closures

Programs with low enrollment are vulnerable to elimination, particularly under the judicial rulings that allowed institutions to declare "financial exigency" in an individual college or program.[305] Institutions may close programs and lay off tenured faculty without declaring financial exigency if the decision is "based essentially upon educational considerations," which "do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."[306] During the 2007–2009 recession, institutions chose the latter course. For example, the University of Southern Mississippi's technical and occupational education major suffered dwindling numbers of majors and non-degree students in the fall of 2009.[307] Denise Von Herrmann, Dean of the College of Arts and Letters, said the technical and occupational education program had become obsolete because of a change in licensure requirements for vocational teachers in Mississippi.[308] Southern Mississippi formally "suspended enrollment" in the program in the spring of 2010, meaning no new students could enroll but current students could earn their degrees.[309] Three tenured faculty members in the program were laid off.[310] The university had three academic years to request that the Mississippi Board of Trustees of State Institutions of Higher Learning either delete the program

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304. *Id.* at § III(B).

305. *See, e.g.*, Scheuer v. Creighton Univ., 260 N.W.2d 595, 601 (Neb. 1977) (holding that "financial exigency" as used in professor's employment contract may refer to financial exigency in department or college of university and that the term is not restricted to a financial exigency existing in the institution as a whole).

306. AM. ASS'N OF UNIV. PROFESSORS, *supra* note 96, at 3.

307. *See* David Glenn, *When Tenured Professors Are Laid Off, What Recourse?*, CHRON. HIGHER EDUC., Sept. 28, 2009, *available at* http://chronicle.com/article/When-Tenured-Professors-Are/48606.

308. *See* Merlyn Dakin, *Professors Dropped in Cut*, THE STUDENT PRINTZ (Sept. 1, 2009), http://www.studentprintz.com/news/professors-dropped-in-cut-1.347608#.T2NtesWPWM0TxG5rIHfXwQ.

309. *See* MISSISSIPPI BD. OF TRS. OF STATE INSTS. OF HIGHER LEARNING, MINUTES OF THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING 21–23 (Apr. 14–15, 2010), http://www.ihl.state.ms.us/board/downloads/BdApril2010.pdf.

310. *See* Dakin, *supra* note 308.

or remove it from suspension.[311] Absent such a request, the Board of Trustees' Office of Academic and Student Affairs must delete the program.[312]

Several public universities in Florida eliminated entire programs, with Florida State described as "ground zero" for the clash between the economic decision to cut programs and the principles of shared governance.[313] In June 2009, Florida State's board of trustees voted to suspend or terminate ten undergraduate majors and three graduate-level programs.[314] The university identified programs with low enrollment, such as Science Education, Math Education, and Scenic Design; programs with low quality, such as Physical Education; and programs within the College of Arts and Sciences with low enrollments and high cost, such as Physics.[315] Termination notices effective May 2010 were sent to sixty-two faculty members, twenty-one of whom had tenure.[316] Florida State's faculty union filed a grievance against the layoffs, arguing the university violated more than twelve articles of their collective bargaining agreement by failing to provide proper layoff notice, failing to specify the layoff unit, failing to apply layoff criteria properly, and improperly enacting layoffs as nonappointments.[317]

The grievance proceeded to arbitration, and the arbitrator supported two of the faculty union's four grievances. First, the arbitrator found that the university provided proper notice to the union of the layoffs, because notice was provided well within the thirty-day period required by the collective bargaining agreement.[318]

With regard to the layoff units, the arbitrator found that the layoff units selected by the university were academic-degree programs and not stand-alone organization levels such as schools, colleges, and departments as required under the contract.[319] Moreover, the selection process used by the Dean of Arts and Sciences allowed him to protect "favored faculty" and appeared "to have been a subterfuge to avoid having to comply with [the

311. *See* MISSISSIPPI BD. OF TRS. OF STATE INSTS. OF HIGHER LEARNING, *supra* note 309, at 23.

312. *Id.*

313. *See* David Glenn & Peter Schmidt, *Disappearing Disciplines: Degree Programs Fight for Their Lives*, CHRON. HIGHER EDUC., Mar. 28, 2010, *available at* http://chronicle.com/article/Disappearing-Disciplines-D/64850/.

314. *Id.*

315. *See* Fla. St. Univ. Bd. of Trs. v. United Faculty of Fla., 30, 37, 38 (2010) (Sergent, Arb.) (unpublished opinion and award), http://www.uf-ffsu.org/art/ArbitrationAwardHighRes.pdf.

316. *See* Glenn & Schmidt, *supra* note 313.

317. *See Fla. St. Univ. Bd. of Trs.*, *supra* note 315, at 2–3.

318. *Id.* at 43–45.

319. *Id.* at 47–50.

article in the collective bargaining agreement], which requires that tenured faculty be laid off last."[320]

The most significant layoff criterion noted by the arbitrator was the university's requirement to consider an employee's "length of continuous service . . . ."[321] The arbitrator criticized Florida State several times over its application of this criterion, finding that the Dean of Arts and Sciences "completely ignored" it,[322] the Provost favored shorter-serving faculty in a teaching program he supported,[323] and the university's exercise of its discretion under this article was "arbitrary, capricious, and unreasonable."[324]

With regard to the layoffs in the Anthropology department, the Dean of Arts and Sciences "used the discretion afforded him by [the collective bargaining agreement's article regarding layoffs] to manipulate the layoff units to allow him to arbitrarily select who got laid off, based on his personal judgment and relationships . . . ."[325]

Finally, the arbitrator found that the university did not improperly use the layoff provision rather than the non-reappointment provision of the contract when it eliminated the position of a non-tenured art professor.[326] The arbitrator ordered the university to reinstate the twelve tenured faculty members who filed grievances,[327] and the university agreed to rescind the layoffs of all tenured faculty, whether or not they were part of the grievance.[328]

The University of Florida, after cutting $47 million across the board and letting individual colleges decide what to cut based on academic and strategic reasons, closed several programs and laid off eight faculty members in 2008.[329] The faculty members were not tenured.[330] The College of Liberal Arts and Sciences merged zoology and botany, as well as criminology and sociology, and put Spanish into a stand-alone

320. *Id.* at 56.
321. *Id.* at 56–57.
322. *Id.* at 57.
323. *Id.* at 60–61.
324. *Id.* at 71.
325. *Id.* at 77–78.
326. *Id.* at 80.
327. *Id.* at 82.
328. *See* Doug Blackburn, *FSU Tenured Faculty Reinstated*, TALLAHASSEE DEMOCRAT, Nov. 6, 2010, *available at* http://www.uff-fsu.org/art/tdo2010 1106.pdf.
329. *See* Nathan Crabbe, *UF Faculty Protest Layoffs and Raise*, GAINESVILLE SUN, *reprinted in* SARASOTA HERALD-TRIB., July 31, 2008, at BM8.
330. *See UF Reduces Spending by $47 Million in Response to State Budget Reductions*, UNIV. OF FLA. NEWS, May 5, 2008, *available at* http://news.ufl.edu/ 2008/05/05/ budget-cuts-2.

department after merging other languages into a separate department.[331] The university also closed the College of Journalism and Communications' Documentary Institute in 2010.[332] The institute's two tenured full professors and two non-tenure-track instructors received layoff notices. The university rescinded the layoff notice to the institute's director, and the other tenured professor and the two instructors accepted positions at Wake Forest University's Documentary Film Program.[333]

The University of Central Florida laid off thirty-three faculty, some of whom were tenured,[334] and four staff after eliminating four academic programs and suspending a fifth program between 2009 and 2010.[335] The closed programs were cardiopulmonary sciences and radiologic sciences in the College of Health and Public Affairs; engineering technology in the College of Engineering and Computer Science; and management information systems in the College of Business Administration.[336] The College of Science suspended its actuarial program, leaving the possibility for it to be reopened, but its faculty and staff were still laid off.[337]

The University of Nevada at Reno also eliminated several programs and suspended one program after the state cut $11 million from the university's budget.[338] On June 2, 2010, the Nevada Board of Regents voted to eliminate the Department of Animal Biotechnology, its bachelor's degree in animal biotechnology, and its bachelor's and master's degrees in animal science; the Department of Resource Economics and its bachelor's degree in agricultural and applied economics, its bachelor's degree in environmental and resource economics, and its master's degree in resource and applied economics; the Center for Nutrition and Metabolism; German

331. *See* Crabbe, *supra* note 329.

332. *See* Nathan Crabbe, *UF Documentary Institute May Close, But Films Will Go On*, GAINESVILLE SUN (May 19, 2010), *available at* http://www.gainesville.com/article/20100519/COLUMNISTS/5191005; Andy Guess, *Dead Programs Walking*, INSIDE HIGHER EDUC., (Apr. 30, 2009) http://www.insidehighered.com/news/2009/04/ 30/programs.

333. *See* E-mail message from Churchill Roberts, Professor, Department of Telecommunications, University of Florida, to Michael W. Klein (Jan. 15, 2012) (on file with author). *See also* Crabbe, *supra* note 332.

334. *See* E-mail message from Ida Cook, Chair, Faculty Senate, University of Central Florida, to Michael W. Klein (Jan. 16, 2012) (on file with author).

335. *See* Luis Zaragoza, *Majors, Faculty On the Way Out*, ORLANDO SENTINEL, Jul. 23, 2009, at B1.

336. *Id.*

337. *Id.*

338. *See* Lenita Powers, *UNR Budget Cuts Passed*, RENO GAZETTE-J., June 3, 2010, available at http://www.rgj.com/article/20100603/NEWS02/100603064/ 1321/news.

studies; interior design; and supply chain management.[339] Moreover, the master's degree program in speech communications was suspended for five years.[340]

C. Need for Alternatives

Some university and state officials may be reluctant to declare a financial exigency and take action against tenured faculty because of the legal requirement to consider other options first. For example, Idaho's legislature imposed across-the-board pay cuts for state employees in 2009, but tenured faculty at public colleges and universities were spared because Idaho's State Board of Education did not want to declare a financial exigency.[341] Alluding to the *Pace* case, the Executive Director of the State Board of Education said, "Where we have lost the court cases is where the employee can demonstrate the university had another option."[342]

The San Francisco Art Institute (SFAI) took several steps before laying off nine tenured faculty members in April 2009.[343] It temporarily reduced salaries of administration and staff on a sliding scale, ranging from 25% for the three senior administrators to 0% for those making less than $40,000.[344] It temporarily suspended institutional contributions to its 403(b) retirement plan,[345] a rare action by a university.[346] And between the Fall 2008 and Spring 2009 semesters, it closed its campus from mid-December to mid-January, placing all nonessential faculty and staff on furlough during that time.[347] The recession caused SFAI's $10 million endowment to lose one-third of its value, and the President, Chris Bratton, resigned in May 2010 to become the Deputy Director of the Museum of Fine Arts as well as the President of the School of the Museum of Fine Arts in Boston.[348] With an

339. *Id.*

340. *Id.*

341. *See* Kathleen Kreller, *JFAC Chairs Called on the Carpet*, IDAHO STATESMAN, Mar. 26, 2009, at 6. The article misidentifies the Board of Education as the Board of Higher Education.

342. *Id.*

343. *See* Kolowich, *supra* note 30.

344. *See* Chris Bratton, DIALOGUE: NOTES FROM THE PRESIDENT'S OFFICE, Mar. 5, 2009 (on file with the San Francisco Art Institute).

345. *Id.*

346. *See id. See also* Tamar Lewin, *Brandeis Halts Retirement Payments*, N.Y. TIMES, May 22, 2009, at A15 (explaining that "[w]hile universities across the country have taken a wide range of actions to confront their financial problems, including layoffs and the suspension of capital projects, freezing contributions to retirement accounts is rare").

347. *See* Bratton, *supra* note 344.

348. *See* Kenneth Baker, *S.F. Art Institute President Bratton Resigning*, S.F. CHRON., May 10, 2010, at C3.

interim president in place starting in July 2010, SFAI conducted a national search and appointed Charles Desmarais, the Deputy Director for art at the Brooklyn Museum, as President in May 2011.[349]

Institutions that did not declare a financial exigency and lay off faculty chose to implement some of the same measures seen at the San Francisco Art Institute.[350] Furloughs and salary reductions were the most prominent.[351]

i. Furloughs

During fiscal year 2010, more than twenty states considered imposing furloughs, i.e., unpaid days off, on state employees.[352] Some public colleges and universities imposed furloughs, too. The University of California (UC), for example, aimed to achieve pay cuts ranging from 4% to 10% by furloughing state-funded workers between eleven and twenty-six days, depending on employees' salary levels, for one year beginning September 1, 2009.[353] The furloughs were projected to save the university more than $200 million and cover roughly a quarter of the university's $813 million deficit.[354] After the Board of Regents approved the plan, the university had to negotiate the furloughs with more than a dozen labor unions that represent UC workers.[355] The University of California's faculty, who are not unionized,[356] were also required to take furlough days, but not on days they were scheduled to teach.[357] In July of 2009, the union representing California State University (CSU) faculty members agreed to accept two furlough days per month over the 2009–2010 academic year, reducing their compensation by approximately 10%.[358] California State

349. *See* Kenneth Baker, *Institute Appoints New Chief*, S.F. CHRON., May 20, 2011, at E6.

350. These institutions included the University of California, California State University, state colleges in New Jersey, Georgia, and Maryland, and the University of Idaho. *See infra* text accompanying notes 352–374.

351. *See infra* text accompanying notes 352–374.

352. *See* Leslie Eaton, Ryan Knutson, & Philip Shishkin, *States Shut Down to Save Cash*, WALL ST. J., Sept. 4, 2009, at A1.

353. *See* Laurel Rosenhall, *Plan Furlough Proposal is Redone by UC*, SACRAMENTO BEE, July 11, 2009, at A3.

354. *Id.* at A3-A4.

355. *Id.* at A4.

356. *Id.*

357. *See* Cynthia Lee, *Faculty Get Answers on Furloughs, Other Consequences of Budget*, UCLA TODAY (Aug. 27, 2009), *available at* http://www.today.ucla.edu/portal/ut/faculty-get-answers-on-furloughs-100496.aspx.

358. *See Union Accepts Furloughs at California Universities*, N.Y. TIMES, July 26, 2009, *available at* http://www.nytimes.com/2009/07/26/us/26california.html.

University, after suffering a 20% cut in state appropriations, faced a $584 million deficit, and it aimed to save $275 million from the furlough plan.[359] Chancellor Charles B. Reed estimated that the deal helped to prevent the elimination of roughly 6,000 jobs.[360] Faculty did not face furloughs in California after the 2009–2010 academic year,[361] even though California cut $650 million each from UC and CSU in the fiscal year 2012 budget, representing a 20% reduction in operating support for each system.[362] The universities responded by sharply raising tuition, intensifying recruitment of out-of-state students—who pay higher rates than California residents—leaving faculty vacancies unfilled; and scaling back enrollment increases.[363]

New Jersey also negotiated a furlough deal with its state college and university faculty. In July of 2009, the faculty union at the nine state colleges and universities agreed to take seven furlough days and defer a 3.5% cost-of-living adjustment until January 2011 in exchange for a no-layoff pledge from the institutions.[364] Furloughs were also part of cost-saving plans in Georgia and Maryland. In August 2009, Georgia's Board of Regents required the thirty-five state colleges and universities to furlough employees, including faculty, at least six days in the 2009–2010 academic year, and the presidents complied immediately.[365] Employees took at least three days by the end of December of 2009, and the remainder by the end of June of 2010.[366] Institutions could not cancel classes as a way of implementing the furloughs.[367] For three years in a row, between fiscal years 2008 and 2011, Maryland's state government required the twelve-campus University System of Maryland to achieve budget savings

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359. *Id.*

360. *Cal State Faculty Accepts Furloughs*, INSIDE HIGHER EDUC., July 27, 2009, http://www.insidehighered.com/quicktakes/2009/07/27/cal-state-faculty-accepts-furloughs.

361. *See* Kaustuv Basu, *Fighting Against Furloughs*, INSIDE HIGHER EDUC., Nov. 11, 2011, http://www.insidehighered.com/news/2011/11/11/furlough-discussions-become-more-common-contract-talks.

362. *See* Jennifer Medina, *California Cuts Weight Heavily on Its Colleges*, N.Y. TIMES, July 9, 2011, at A12.

363. *Id.*

364. *See* Trish G. Graber, *Deal Sets Furloughs at Rowan, Other New Jersey Colleges*, GLOUCESTER COUNTY TIMES, July 10, 2009, http://www.nj.com/gloucester/index.ssf?/base/news-4/124720713273550.xml&coll=8.

365. *See* Laura Diamond, *Unpaid Days Off Set at Colleges*, ATLANTA J.-CONSTITUTION, Aug. 13, 2009, at 1A.

366. *Id.*

367. *Id.*

through furloughs.[368] In fiscal year 2011, the lowest-paid employees took at least one furlough day, and the highest-paid employees took as many as ten furlough days.[369]

In Idaho, the State Board of Education adopted a new rule in February 2010 that authorized chief executive officers of institutions to take certain employment actions—including imposing furloughs—without a declaration of financial exigency by the board.[370] The new policy states:

> [T]he authority delegated to each chief executive officer includes the authority, in the chief executive officer's discretion, to reduce expenditures to respond to financial challenges (without a financial exigency declaration by the Board) and to maintain sound fiscal management. In such cases, the chief executive officer may take employment actions which are uniform across the entire institution, or uniform across institution budgetary units, but may not include actions requiring a financial exigency declaration by the Board. Such actions may include work hour adjustments such as furloughs or other unpaid leave as long as such are uniform across budgetary units or uniformly tiered as applied to certain salary levels or classifications. Work hour adjustments may be pro-rated based on annual salary levels to equitably reduce the financial hardship of the adjustments on lower level employees. Institutions shall adopt internal policies for implementing the employment actions in a manner consistent with the Board's policies and procedures, and furnish these policies to the Board.[371]

With the new authority in place, the University of Idaho implemented furloughs in March 2010 for the remainder of the academic year.[372] The furloughs affected 2,600 faculty and staff.[373] Furlough time varied

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368. *See* UNIVERSITY SYSTEM OF MARYLAND (USM) FURLOUGH/SALARY REDUCTION GUIDELINES: FISCAL YEAR 2011, http://www.umaryland.edu/president/TSR1/FY11-Furlough-Guidelines.

369. *See id;* Jennifer R. Ballengee, *State Faculty Treated Unfairly*, BALT. SUN, Nov. 4, 2010, http://articles.baltimoresun.com/2010-11-04/news/bs-ed-university-faculty-20101104_1_furlough-days-usm-state-faculty.

370. *See* Eric Kelderman, *Idaho Faculty Members Fear That New State Policies Will Undermine Tenure*, CHRON. HIGHER EDUC., Feb. 22, 2010, http://chronicle.com/ article/Idaho-Faculty-Members-Fear-/64333.

371. Idaho State Board of Education Governing Policies and Procedures § II.B.2.c, *available at* http://www.boardofed.idaho.gov/policies/documents/policies/ii/ii_b_appointment_authority_and_procedures_06-11.pdf.

372. *See* Charles Huckabee, *U. of Idaho President Orders Furloughs in Next Months*, CHRON. HIGHER EDUC., Mar. 2, 2010, *available at* http://chronicle.com/article/U-of-Idaho-President-Orders/64450.

373. *Id.*

according to salary, with the highest compensated employees taking the most unpaid leave.[374]

In states with unionized faculty, state officials are wise not to impose furloughs through legislation. In New York in May 2010, the legislature and governor agreed on an emergency appropriation bill that implemented unpaid furloughs on several groups of state employees that had collective bargaining agreements with the state, including workers at the State University of New York (SUNY) and CUNY.[375] The unions sued, charging that the legislated furloughs violated the contracts clause of the U.S. Constitution.[376] The court granted a temporary restraining order against the furloughs.[377] The court found that the union members would suffer irreparable harm from the state's "failure to pay the contracted-for increases in salaries and wages, which were negotiated years prior to the challenged extender bill, and upon which the affected employees have surely relied."[378] The court also held that the unions were likely to win on the merits of the case.[379] The court found that the legislation would cause substantial contractual impairment by reducing salaries by 20% and holding back negotiated raises.[380] The court questioned the legitimate public purpose of the furloughs because "the contested terms were abruptly placed within a weekly emergency appropriations bill by the Governor after communications with state employee unions did not lead to desired results," precluding legislative deliberation.[381] Finally, the court found that implementing furloughs through legislation was not a reasonable and necessary means to accomplish a public purpose.[382] The economic crisis at the time was not "sufficient justification for a drastic impairment of

374. *Id.*

375. *See* Smith v. Paterson, No. 1:10-CV-00546 (LEK/DRH), slip op. 7 (N.D.N.Y. May 28, 2010); Bowen v. New York, No. 1:10-CV-00549 (LEK/DRH), slip op. 7 (N.D.N.Y. May 28, 2010).

376. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 7; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 7. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . [L]aw impairing the Obligation of Contracts . . . .").

377. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 27; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 27.

378. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 12; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 12.

379. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 24; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 24.

380. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 16; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 16.

381. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 19; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 19.

382. *See Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 22; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 22.

contracts to which the State is a party. Without any showing of a substantial record of considered alternatives the reasonableness and necessity of the challenged provisions are cast in serious doubt."[383] The court noted "the conspicuous absence of a record showing that options were actually considered and compared, and that the conclusion was then reached that only the enacted provisions would suffice to fulfill a specified public purpose."[384]

ii. Federal Stimulus Funds

In 2009–2010, public colleges had access to federal stimulus funds that provided a significant alternative to laying off tenured faculty.[385] The American Recovery and Reinvestment Act of 2009 (ARRA), enacted on February 17, 2009,[386] infused the American economy with $787 billion in stimulus funds.[387] Within the ARRA, the State Fiscal Stabilization Fund (SFSF) provided $48.3 billion to states to support K-12 and higher education, with each state's allocation based on its population.[388]

The SFSF consisted of two components: the Education Stabilization Fund (81.8% of the SFSF) and the Government Services Funds (18.2% of the SFSF).[389] The ARRA required states to use their Education Stabilization funds to restore state aid to school districts under the state's K-12 funding formula to the greater of the FY2008 or FY2009 level in each of fiscal years 2009, 2010, and 2011; and state support to "public institutions of higher education in the State" to the greater of the FY2008 or FY2009 level in each of fiscal years 2009, 2010, and 2011.[390] A state was required to restore support for both K-12 education and public institutions of higher education—it could not choose to restore support for only elementary and secondary education or for only postsecondary education.[391] Across fiscal years 2009 to 2011, nearly $9 billion of these

383. *Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 22; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 22.

384. *Smith*, No. 1:10-CV-00546 (LEK/DRH), slip op. 23; *Bowen*, No. 1:10-CV-00549 (LEK/DRH), slip op. 23.

385. *See generally* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (appropriating funds for economic stabilization and recovery).

386. *Id.*

387. Sheryl Gay Stolberg & Adam Nagourney, *As Recovery Measure Becomes Law, the Partisan Fight Over It Endures*, N.Y. TIMES, Feb. 18, 2009, at A17.

388. *See* American Recovery and Reinvestment Act, *supra* note 385, §§ 14001–14002.

389. *Id.* at § 14002.

390. *Id.*

391. *See* U.S. Dep't of Educ., GUIDANCE ON THE STATE FISCAL STABILIZATION FUND PROGRAM § III-B-8 (Apr. 2009).

federal stimulus funds went through state budgets to higher education, representing 4% of total state support for higher education during that period.[392]

Some state governments specifically used their share of federal stimulus funds to prevent layoffs at their public colleges and universities. The University of Iowa's president, Sally Mason, said that the $80.3 million in federal stimulus money received by the Iowa state Board of Regents helped the university prevent "inevitable layoffs and furloughs."[393] Arizona's public universities used federal stimulus funds and tuition surcharges to prevent significant layoffs.[394] The University of Wisconsin estimated that it created or saved 137 jobs for research faculty members, research assistants, graduate assistants, and laboratory assistants with the $5.2 million in federal stimulus funds it spent through September 2009.[395]

iii. Layoffs of Staff and Elimination of Vacant Positions

While tenured faculty were largely immune from layoffs during the Great Recession, staff members were not. Harvard laid off 275 staff in June 2009 after the decline in the value of its endowment contributed to a projected budget deficit of $220 million over two years.[396] Stanford University laid off 412 staff members between January and August 2009 in response to an anticipated 30% decline in the university's endowment.[397] In April of 2009, the University of Toledo laid off about 100 staff and eliminated 200 vacant positions to close a $16 million budget gap.[398] In

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392. *See* Eric Kelderman, *State Spending on Higher Education Edges Down, as Deficits Loom*, CHRON. HIGHER EDUC., Jan. 24, 2011, *available at* http://chronicle.com/article/State-Spending-on-Colleges/126020.

393. B.A. Morelli, *Regents to Avoid Major Cuts Next Year,* IOWA CITY PRESS-CITIZEN, Apr. 30, 2009, *available at* http://www.presscitizen.com/article/20090430/NEWS01/ 90430003/1079.

394. *See* Anne Ryman, *Arizona University Tuition Surcharges Approved*, ARIZ. REPUBLIC, Apr. 30, 2009, *available at* http://www.azcentral.com/news/articles/2009/04/30/20090430tuitionhikes0430-ON.html.

395. *See What One University Got for $5-million in Stimulus Funds: 137 Jobs*, CHRON. HIGHER EDUC., Oct. 15, 2009, http://chronicle.com/blogPost/What-One-University-Got-for/8482.

396. *See* Robert Tomsho, *Harvard, Hit by Recession, Lays Off 275*, WALL ST. J., June 24, 2009, at A4; Peter Zhu, *Staff, Activists Protest Layoffs*, HARVARD CRIMSON, June 25, 2009, *available at* http://www.thecrimson.com/article/2009/6/25/staff-activists-protest-layoffs-dozens-of.

397. *As Fiscal Year Closes, Impact of Downturn Felt Across Campus*, STANFORD REPORT, Sept. 1, 2009, *available at* http://news.stanford.edu/news/2009/august31/the-budget-090209.html.

398. *See* Meghan Gilbert, *University of Toledo Will Lay Off 87 to Help Eliminate $16M Shortfall*. TOLEDO BLADE, Apr. 29, 2009, *available at*

June of 2009, the flagship campus of the University of Colorado in Boulder cut $12.9 million from its budget by eliminating forty-two full-time staff positions and thirty-three full-time faculty positions.[399] Most of the positions were left vacant after employees retired or quit.[400] In June of 2009, Temple University also laid off staff, dismissing at least eighteen union-affiliated administrative assistants and other staff, nine of whom were rehired to fill vacant jobs.[401]

In January of 2009, Dartmouth College, as part of a plan to address a projected budget gap of $100 million, laid off seventy-six employees but specified why it did not lay off any faculty members.[402] The majority of the eliminated positions were administrative or managerial, with the rest coming from among hourly workers.[403] President Jim Yong Kim explained that Dartmouth did not lay off any professors because the college had frozen some vacant faculty positions, and it had concerns about protecting academic quality.[404]

iv. Other Options: Suspend Searches, Sell Art, Raise Tuition

Some institutions suspended faculty searches and sharply reduced their number of new tenure-track positions.[405] In July of 2009, the University of California's campuses deferred at least half of their planned faculty hirings, with Berkeley expected to reduce faculty recruitment from the usual 100 positions a year to ten.[406] At the same time, Stanford froze fifty faculty positions.[407] Harvard put faculty hiring for the Arts & Sciences in a "pause

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http://www.toledoblade.com/local/2009/04/29/University-of-Toledo-will-lay-off-87-to-help-eliminate-a-16M-shortfall.html.

399. *See* Brittany Anas, *CU Campus Cutting $12.9 Million*, DAILY CAMERA, June 3, 2009, *available at* http://www.dailycamera.com/archivesearch/ci_13123463.

400. *Id.*

401. *See* Zoe Tillman, *Protest Over Layoffs at Temple University*, PHILA. INQUIRER, June 3, 2009, at B07.

402. *See* Paul Fain & Beckie Supiano, *Dartmouth Resumes Layoffs and Loans in Face of $100-Million Budget Gap*, CHRON. HIGHER EDUC., Feb. 8, 2010, *available at* http://chronicle.com/article/Dartmouth-Resumes-Layoffs-and/64071.

403. *Id.*

404. *Id.*

405. *See* Breneman, *supra* note 7.

406. *See* Tamar Lewin, *University of California Makes Cuts After Reduction in State Financing*, N.Y. TIMES, July 11, 2009, at A11.

407. *See As Fiscal Year Closes*, *supra* note 397.

period" in April 2008 and formally postponed almost all tenure-track and tenured searches in December 2008.[408]

Brandeis University faced a firestorm over its proposal in January 2009 to close its Rose Art Museum and sell the museum's 6,000-piece collection, estimated to be worth between $350 million and $400 million.[409] After outcry from the Rose family, which donated money to establish the museum in 1961, and other donors, the university said it would sell only a limited number of pieces and keep the museum open as a teaching and exhibition gallery.[410] Despite this announcement, three members of the museum's board of overseers sued to prevent Brandeis from closing the museum and selling the artwork.[411] The Massachusetts attorney general announced it would examine any sales to determine if they were consistent with the terms of the original gifts.[412] The overseers' lawsuit was settled in early 2011, with Brandeis promising not to sell the collection.[413] The university found budget reductions in other areas, and by October of 2011, Brandeis' endowment gained back nearly all the losses it suffered during the recession.[414] The museum was renovated and reopened on October 27, 2011, with new exhibitions to help celebrate the museum's fiftieth anniversary.[415] Museum and university leaders moved to integrate the museum more fully into the curriculum and life of the university.[416]

Finally, institutions imposed higher tuition and fees on their students as an alternative to faculty layoffs. California State University raised its fees twice in 2009 for a total increase of 32%,[417] and cut enrollment by over

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408. *See* Christian B. Flow & Esther I. Yi, *FAS Freezes All Faculty Salaries, Cuts Searches*, HARVARD CRIMSON, Dec. 9, 2008, http://www.thecrimson.com/article/2008/12/9/fas-freezes-all-faculty-salaries-cuts/.

409. *See* Randy Kennedy & Carol Vogel, *Outcry Over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 28, 2009, at C5.

410. *See* John Hechinger, *New Unrest on Campus as Donors Rebel*, WALL ST. J., Apr. 23, 2009, at A1.

411. *See Brandeis Agrees to Delay Sale of Artwork*, BOSTON GLOBE, Oct. 14, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/10/14/brandeis_agrees_to_delay_sale_of_artwork.

412. *See* Kennedy & Vogel, *supra* note 409.

413. *See* Geoff Edgarse, *Rose Art Museum Revival*, BOSTON GLOBE, Oct. 23, 2011, at B1.

414. *Id.*

415. *Id.*

416. *See id.*; Sebastian Smee, *Rose Art Museum Shines at 50*, BOSTON GLOBE, Nov. 6, 2011, at N1.

417. *See* Lisa M. Krieger, *CSU Proposes 20 Percent Fee Hike*, SAN JOSE MERCURY NEWS, July 16, 2009, http://www.mercurynews.com/politics/ci_12856053?nclick _check=1.

29,000 students between 2008–2009 and 2010–2011.[418] University of California Regents assessed a 9.3% student fee increase to prevent layoffs.[419] Tuition at the four-year institutions within the State University of New York rose 15% in 2009–2010.[420] The Iowa state Board of Regents imposed a $100 surcharge for the spring 2010 semester on students at the University of Iowa, Iowa State University, and the University of Northern Iowa.[421]

D. Preserving Institutional Bond Ratings

When considering whether to declare financial exigency during the Great Recession, institutions weighed the long-term consequences of such a declaration on their ability to borrow money in the marketplace, which has become an increasingly important source of revenue for colleges and universities. Colleges and universities added "massive amounts of debt to their balance sheets" in the 1980s and 1990s.[422] Institutions faced growing facilities needs, including construction of science and technology buildings, modernization of their physical plant, and long-ignored deferred maintenance.[423] With donations and other sources of revenue difficult to obtain, institutions borrowed what they needed, permitting them to "build now and pay later."[424]

To borrow funds, colleges and universities typically sell debt securities.[425] The major bond-rating agencies, such as Moody's and Standard & Poor's, research the financial strength of colleges and universities and then rate the institutions.[426] The better the rating, the lower an institution's borrowing costs.[427] A lower bond rating resulting from a declaration of financial exigency could lead an institution to be perceived as economically weakened for decades. "Declaration of financial exigency

418. *See* California State University, *2011–12 State Appropriations Equal 1998-–99 Levels, But Enrollment Has Increased by 58,000 FTEs* (2011), http://www.calstate.edu/pa/BudgetCentral/JulyStateSupport.pdf.

419. Larry Gordon, *UC Regents to Seek 9.3% Fee Hike*, L.A. TIMES, Apr. 30, 2009, http://www.latimes.com/news/local/la-me-uc30-2009apr30,0,4681556.story; Larry Gordon, *UC Students Face Increased Fees*, L.A. TIMES, Sept. 11, 2009, http://www.latimes.com/news/local/la-me-ucfees11-2009sep11,0,5783183.story.

420. *See* Linda Saslow, *Suffolk County College is Raising Tuition*, N.Y. TIMES, Apr. 26, 2009, at LI2.

421. Morelli, *supra* note 393.

422. William F. Massy, *Optimizing Capital Decisions*, *in* RESOURCE ALLOCATION IN HIGHER EDUCATION 115, 122 (William F. Massy ed., 1996).

423. *Id.*

424. *Id.*

425. *Id.* at 126

426. *Id.*

427. *Id.*

is seen as a declaration of bankruptcy," which could diminish the benefits of a declaration of financial exigency.[428]

Bond ratings were a consideration when Idaho decided not to declare a financial exigency in 2009. In defending the Idaho State Board of Education's proposal to expand presidential authority over campus salaries without needing a declaration of financial exigency, University of Idaho general counsel Kent Nelson indicated that the proposal avoided problems that a declaration of financial exigency could cause, such as a lower bond rating.[429]

Maintaining a positive bond rating became more important as the effects of the Great Recession wore on.[430] Moody's Investment Service issued a "negative outlook" for the U.S. higher education sector in January 2010, indicating challenges in fundamental credit conditions.[431] Higher education institutions faced "greater uncertainty, reduced financial flexibility, and increased competitive pressures."[432] Whether institutions relied on endowment income or tuition, Moody's warned them that "revenues may decline faster than expenses can be adjusted."[433]

Moody's issued a statement in March 2011 that signaled that declarations of financial exigency might not harm institutional bond ratings. The statement said:

> On balance . . . declaring financial exigency is likely to be a positive step in terms of credit standing because it empowers management to take aggressive cost-cutting steps to preserve cash flow to pay debt service. Such a declaration would have little or no negative impact on a university's bond rating if Moody's expects the actions will improve future financial position.[434]

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428. Roger Benjamin & Steve Carroll, *The Implications of the Changed Environment for Governance in Higher Education*, *in* THE RESPONSIVE UNIVERSITY: RESTRUCTURING FOR HIGH PERFORMANCE 92, 108 (William G. Tierney ed., 1998).

429. *See* Marcus Kellis, *SBOE Proposal Incurs Faculty Questions*, UNIV. OF IDAHO ARGONAUT, Oct. 12, 2009.

430. *Id.*

431. *See* Laura C. Sander, Roger Goodman, & John C. Nelson, MOODY'S INVESTORS SERVICE, ANNUAL SECTOR OUTLOOK FOR U.S. HIGHER EDUCATION FOR 2010, at 1 (Jan. 2010).

432. *Id.* at 2.

433. *Id.*

434. Edith Behr, *Announcement: Moody's: public universities may declare financial exigency to trim faculty, reduce operating costs*, MOODY'S INVESTORS SERVICE ANNOUNCEMENT (Mar. 7, 2011).

Moody's acknowledged "the competitive risks to reputation" faced by institutions that declare a financial exigency.[435] Investors, lenders, donors, students, and prominent faculty might avoid institutions that declare a financial exigency.[436]

E. Decline in Faculty Union Membership

The absence of declarations of financial exigency during the Great Recession compared to the 1970s could be related to the decline in membership in faculty unions at four-year institutions. The number of organized faculty at four-year institutions—principally represented by the AAUP, the National Education Association, and the American Federation of Teachers—decreased from 138,254 in 1994 to 120,713 in 2006.[437] The AAUP lost almost 57% of its membership over 35 years: the AAUP had 90,000 members in 1971, and it had 38,785 members in 2006.[438] In 1979, the AAUP had 1,362 chapters.[439] In 2011, it had 148 chapters.[440]

With fewer faculty members represented by the AAUP and a decreased number of campus chapters, fewer institutions are likely to have contracts and policies referencing the AAUP's statements. AAUP statements—such as the *1940 Statement on Principles on Academic Freedom and Tenure*, which contains the procedures to be followed in cases of terminations due to financial exigency—[441]are binding on institutions only when they have a contract with the AAUP, or when they reference the AAUP's guidelines in their policies and procedures.[442]

Part of the reason for the decline in membership in faculty unions, especially at private institutions, is the U.S. Supreme Court decision in *National Labor Relations Board v. Yeshiva University*.[443] The Court held in that case that faculty at private colleges and universities are "managerial" personnel and therefore ineligible to form unions under the National Labor

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435. *Id.*

436. *Id.*

437. FRANK R. ANNUNZIATO, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUC. v (1995); JOAN MORIARTY & MICHELLE SAVARESE, DIRECTORY OF FACULTY CONTRACTS AND BARGAINING AGENTS IN INSTITUTIONS OF HIGHER EDUC. vii (2006).

438. Robin Wilson, *The AAUP, 92, and Ailing*, CHRON. HIGHER EDUC., June 8, 2007, at A8; MORIARTY & SAVARESE, *supra* note 437, at ix.

439. Dick Dashiell, REPORT ON THE 65TH ANNUAL MEETING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 1 (1979).

440. Am. Ass'n of Univ. Professors, *Chapter Web Sites* (2010), http://www.aaup.org/AAUP/about/chaps/.

441. *See generally* AM. ASS'N OF UNIV. PROFESSORS, *supra* note 56.

442. *See* Zekan, *supra* note 63, at 24.

443. 444 U.S. 672 (1980).

Relations Act.[444] The Court based its ruling on faculty members' authority over course offerings, teaching methods, grading policies, admission standards, and graduation decisions.[445]

The National Labor Relations Act does not apply to public-sector employers;[446] as a result, state laws regulate collective bargaining at public institutions of higher education.[447] Unionized faculty are located in thirty-one states and the District of Columbia, with a majority concentrated in three states: California, New York, and New Jersey.[448] 94% of organized faculty are employed in public institutions.[449] Twenty-two states, however, have "right-to-work" laws, which do not require employees to join a union or to pay dues or fees to the union.[450]

The *Yeshiva* decision and the strength of right-to-work states have combined to curb the rate of union membership among college and university faculty.[451] According to Cary Nelson, the national president of the American Association of University Professors, "In the 1980s, the drive toward faculty unionization slowed. . . . Organizing at private universities came to a virtual halt, and the union movement ran out of states with positive legislative environments for public-sector organizing."[452]

F. Rise of Contingent Faculty

Tenure has an important economic influence on institutional decisions regarding layoffs.[453] Therefore, it is important to understand how tenure status compares with tenure-track, non-tenure-track, part-time, and adjunct positions. Faculty not on the tenure track are defined as "contingent

444. *See id.* at 686. The National Labor Relations Act (NLRA), which grants employees the right to form labor organizations and to deal collectively through such organizations, specifically exempts supervisors, who are defined as any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action," if the exercise of this authority "requires the use of independent judgment." 29 U.S.C. § 152(11) (2010).

445. *Yeshiva Univ.*, 444 U.S. at 686.

446. 29 U.S.C. § 152(2) (2010).

447. *See* Kaplin & Lee, *supra* note 68, at 278.

448. MORIARTY & SAVARESE, *supra* note 437, at viii.

449. *Id.*

450. *See Employees in Right to Work States*, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. (2010), http://www.nrtw.org/d/rtwempl.htm.

451. *See* CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM 129 (2010).

452. *Id.* at 130.

453. *See* Scott Jaschik, *Layoffs Without 'Financial Exigency,'* INSIDE HIGHER EDUC., (Mar. 2, 2010), http://www.insidehighered.com/news/2010/03/02/exigency.

faculty," encompassing full-time non-tenure-track faculty, part-time faculty, and adjunct faculty.[454] Tenure represents a contractual relationship between faculty members and their institution, which generally entitles faculty members to continue in their position until they retire or resign.[455] Tenured faculty may also be dismissed for cause.[456] Colleges and universities make their strongest employment commitments to their tenured faculty.[457]

Before they reach tenure status, professors are usually in a tenure-track position.[458] In a tenure-track position, a faculty member has a contract for a stated period of time, usually one to three years.[459] The institution may renew the contract, and by a certain deadline, usually by the sixth year, the institution evaluates the faculty member for tenure.[460] In a non-tenure-track position, a faculty member receives one or more contracts over a set time period.[461] Non-tenure-track positions can be either full-time or part-time.[462] The individual is not reviewed for tenure.[463]

Finally, there are part-time and adjunct faculty. A part-time faculty member usually teaches a course load lower than that of a full-time faculty member and is usually not on a tenure track.[464] The term "adjunct" implies a short-term or casual relationship with the institution.[465] Adjunct faculty may be full-time or part-time and are not on a tenure track; they are typically paid by the hour or by the course.[466]

Between 1995 and 2007, contingent faculty came to outnumber tenured faculty.[467] In 1975, totaling data from all degree-granting institutions, tenure and tenure-track faculty held the majority of positions: 36.5% of faculty were full-time tenured, and 20.3% were full-time tenure-track.[468]

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454. *See, e.g.*, ANN H. FRANKE, AMERICAN COUNCIL ON EDUCATION, FACULTY IN TIMES OF FINANCIAL DISTRESS: EXAMINING GOVERNANCE, EXIGENCY, LAYOFFS, AND ALTERNATIVES 1 (2009).

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 2.

468. *See* Am. Ass'n of Univ. Professors, *Trends in Faculty Status, 1975–2007: All Degree-Granting Institutions; National Totals* (2007), http://www.aaup.org/

Only 30.2% of faculty in 1975 were part-time, and 13% were full-time non-tenure track.[469]

By 2007, the proportion of tenure and non-tenure faculty was reversed.[470] Only 21.3% of faculty were full-time tenured, and 9.9% were full-time tenure-track.[471] Part-time faculty represented over half of the faculty nationally in 2007, 50.3%, and another 18.5% of faculty were full-time non-tenure track.[472]

Colleges and universities are hiring more contingent faculty for two primary reasons. Institutions are looking to reduce personnel costs, and they need more flexibility in staffing.[473] At the same time, this trend raises concerns about the effect on student learning and success; inequities among faculty; and the whittling away of tenure, shared governance, and academic freedom.[474]

Because of the increased reliance on contingent faculty in higher education, some economists caution that focusing on layoffs might not accurately measure the effect of the Great Recession on higher education as it would for other industries.[475] At some institutions, for example, the effects of the recession might be more keenly observed in a decrease in adjunct faculty members and in course offerings.[476] In other words, with fewer tenured professors on their faculty, it would not make economic sense for colleges and universities to declare financial exigency. "With the proliferation of non-tenure-eligible positions, significant savings can be achieved by declining to renew faculty contracts or, if necessary, interrupting contracts during their terms."[477]

V. CONCLUSION

The economic consequences of the 1973–1975 recession, and its reverberations over the next decade, led to several declarations of financial exigency by colleges and universities, which in turn led to law suits over

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NR/rdonlyres/7D01E0C7-C255-41F1-9F11-E27D0028CB2A/0/TrendsinFacultyStatus2007.pdf.

469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.*

473. *See* Alene Russell, *Faculty Trends and Issues*, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES POLICY MATTERS, Apr. 2006, at 3.

474. *Id.*

475. *See* Goldie Blumenstyk, *In a Time of Uncertainty, Colleges Hold Fast to the Status Quo*, CHRON. HIGHER EDUC., Oct. 25, 2009, *available at* http://chronicle.com/article/In-a-Time-of-Uncertainty-C/48911/.

476. *Id.*

477. Franke, *supra* note 454, at 14.

layoffs of tenured faculty.[478] During the more severe recession of 2007–2009, declarations of financial exigency by colleges and universities were less common. Instead, institutions of higher education closed entire programs,[479] imposed furloughs,[480] used federal stimulus funds to plug budget holes and prevent layoffs,[481] and laid off staff instead of tenured faculty.[482] Why did institutions choose these tactics over declaring a financial exigency? The answer lies in the legal standards established in the financial-exigency cases of the 1970s and 1980s, and it lies in the changing nature of the faculty workforce.

The concept of a financial exigency is connected to the principles of academic freedom. The AAUP's *1940 Statement on Principles on Academic Freedom and Tenure* acknowledged the possibility of terminating tenured faculty "because of financial exigency," [483] provided such terminations are based on "demonstrably bona fide economic hardships."[484] State and federal courts have interpreted the phrase and established parameters for its deployment. Institutions successfully proved they faced a financial exigency when they demonstrated they lacked liquidity and cash flow,[485] experienced budget shortfalls,[486] suffered cuts in government appropriations,[487] had enrollment decreases,[488] or lost funds in their endowment.[489] Courts have held that the financial exigency need only exist in one school or department, not the entire university, in order to

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478. *See, e.g.*, Bignall v. N. Idaho Coll., 538 F.2d 243 (9th Cir. 1976); Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846 (N.J. Ch. Div., 1974); *aff'd*, 346 A.2d 615(N.J. App. Div., 1975); Levitt v. Bd. of Trs. of Neb. State Colls., 376 F. Supp. 945 (D. Neb. 1974).; Graney v. Bd. of Regents, 286 N.W.2d 138 (Wis. App. 1979); Johnson v. Bd. of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); Pace v. Hymas, 726 P.2d 693 (1986); Milbouer v. Keppler, 644 F. Supp. 201 (D. Idaho 1986).

479. *See supra* text accompanying notes 305-340.

480. *See supra* text accompanying notes 352–374.

481. *See supra* text accompanying notes 393-395.

482. *See supra* text accompanying notes 396-404.

483. Am. Ass'n of Univ. Professors, *supra* note 56.

484. *Id*.

485. *See* Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615, 617 (N.J. Super. Ct. Ch. Div. 1975).

486. *See* Levitt v. Bd. of Trs. of Neb. State Colls., 376 F.Supp. 945, 950 (D. Neb. 1974).

487. *See* Graney v. Bd. of Regents, 286 N.W.2d 138, 145 (Wis. App. 1979); Klein v. Bd. of Higher Educ., 434 F. Supp. 1113, 1115 (S.D.N.Y. 1977); Milbouer v. Keppler, 644 F. Supp. 201, 204 (D. Idaho 1986).

488. *See* Johnson v. Bd. of Regents, 377 F. Supp. 227, 230 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); Bignall v. North Idaho Coll., 538 F.2d 243, 245 (9th Cir. 1976).

489. *See* Krotkoff v. Goucher Coll., 585 F.2d 675, 677–81 (4th Cir. 1975).

justify faculty layoffs within that school or department.[490] Above all, the declaration must be made in good faith and cannot be a pretext for laying off unwanted faculty.[491] Additionally, institutions must consider cost-saving alternatives to reducing their faculty ranks, including freezing or reducing salaries, travel, capital spending, supplies, or equipment.[492]

Many institutions of higher education experienced fiscal difficulties during the 2007–2009 recession, yet colleges and universities have hesitated to invoke the status of a financial exigency.[493] A few institutions that took this severe step included Bates Technical College in the state of Washington,[494] Bethune-Cookman University,[495] and Southern University.[496]

Rather than declare a financial exigency, several institutions found other ways to lay off tenured faculty, often on grounds of enrollment declines. Clark Atlanta University laid off tenured faculty by declaring a university-wide “enrollment emergency” under the terms of its faculty handbook.[497] Other institutions closed academic programs based on enrollment declines within those programs, including the University of Southern Mississippi,[498] the University of Florida,[499] and the University of Central Florida.[500]

Furloughs saved personnel expenses at several institutions that chose not to declare a financial exigency. The University of California;[501] California State University;[502] state colleges in New Jersey, [503] Georgia,[504] Maryland;[505] and the University of Idaho imposed furloughs on their workforces, including faculty.[506]

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490. *See* Rose v. Elmhurst Coll., 379 N.E.2d 791, 794 (1978); Scheuer v. Creighton Univ., 260 N.W.2d 595, 601 (1977).

491. Am. Ass’n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 856 (N.J. Super. Ct. Ch. Div. 1974).

492. Pace v. Hymas, 726 P.2d 693, 702 (1986).

493. Jaschik, *supra* note 453.

494. Fain, *supra* note 243.

495. ACADEMIC FREEDOM AND TENURE: BETHUNE-COOKMAN UNIV., *supra* note 25.

496. Blum, *supra* note 250.

497. CLARK ATLANTA UNIV., *supra* note 284; CLARK ATLANTA UNIV., Faculty Handbook *supra* note 292, at § 2.8.5.

498. *See* Glenn, *supra* note 307.

499. *Id.*

500. *See* Zaragoza, *supra* note 335.

501. *See* Rosenhall, *supra* note 353.

502. *See Union Accepts Furloughs*, *supra* note 358.

503. *See* Graber, *supra* note 364.

504. *See* Diamond, *supra* note 365.

505. *See* UNIV. SYS. OF MD., *supra* note 368.

506. *See* Huckabee, *supra* note 372.

Federal stimulus funds prevented layoffs at several public institutions, but staff were victims of layoffs at other institutions, particularly at private colleges and universities. The University of Iowa,[507] Arizona's public universities,[508] and the University of Wisconsin specifically used federal stimulus funds to avoid layoffs.[509] Private institutions including Harvard,[510] Stanford,[511] and Dartmouth laid off many staff members to balance their budgets as their endowments fell.[512]

An increased reliance on borrowing since the 1970s influenced decision-making at colleges and universities regarding financial exigency. Colleges and universities took on significant debt to build new facilities,[513] and maintaining a strong credit rating was important to hold down borrowing costs.[514] For example, the University of Idaho purposely insulated its credit rating when it decided not to declare a financial exigency in 2009.[515]

Between the early 1970s and the recession of 2007–2009, fewer faculty members at four-year institutions had protections from unions and from tenure status, giving institutions more flexibility to downsize their faculty without declaring financial exigency. In particular, membership in the AAUP declined from 90,000 in 1971 to 38,785 in 2006.[516] This decline is due in part to *National Labor Relations Board v. Yeshiva University*, the U.S. Supreme Court decision that faculty at private colleges and universities are "managerial" personnel and cannot form unions under the National Labor Relations Act.[517] Moreover, by 2007, only 21.3% of faculty among all institutions were full-time tenured, and 9.9% were full-time tenure track.[518] With contingent faculty outnumbering tenured faculty, institutions did not need to declare a financial exigency to dismiss the majority of their professors.[519]

Is it time to declare the end of "financial exigency"? Some commentators think so.[520] Pronouncements of financial exigency's demise, however—like rumors of Mark Twain's death in 1897—might be an

507. *See* Morelli, *supra* note 393.
508. *See* Ryman, *supra* note 394.
509. *See What One University Got for $5-million*, *supra* note 395.
510. *See* Tomsho, *supra* note 396.
511. *See As Fiscal Year Closes*, *supra* note 397.
512. *See* Fain & Supiano, *supra* note 402.
513. Massy, *supra* note 422.
514. *Id.* at 126.
515. *See* Kellis, *supra* note 429.
516. MORIARTY & SAVARESE, *supra* note 448, at ix.
517. 444 U.S. 672, 686 (1980).
518. Am. Ass'n of Univ. Professors, *Trends in Faculty Status, 1975–2007*, *supra* note 468.
519. *Id.*
520. *See* Jaschik, *supra* note 5.

exaggeration.[521] The recession of 2007–2009 and its aftermath caused at least three institutions to declare a financial exigency,[522] and public institutions in other states considered it.[523] The stigma of declaring a financial exigency may be lifting, with at least one bond-rating agency suggesting the positive aspects of such declarations.[524] What is certain is that since the mid-1980s, institutions have seldom used this tactic. They have other options to help balance their budgets without causing them to appear to be "severely stressed" and ultimately "suffer competitive declines in reputation."[525] And not being able to compete for students—and their tuition dollars—would toll a real death knell.[526]

521. THE OXFORD DICTIONARY OF QUOTATIONS 786 (Knowles ed. 1999).

522. See *supra* text accompanying notes 240–242.

523. *See* Kristina Dell, *State Universities Face Deepening Cuts*, TODAY, Mar. 22, 2011, http://today.msnbc.msn.com/id/42140407/ns/business-your_retirement/#

524. *See* Behr, *supra* note 434, at 1.

525. *Id.*

526. See *supra* notes 432-433.