RESOLUTION MECHANISMS TO COMBAT FINANCIAL PRESSURES WITHIN COLLEGES AND UNIVERSITIES

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Economic downturns have hit nearly every market in the United States since the 2007 to 2009 Great Recession. Colleges and universities are no different. State funding decreases, technological advancements and increased online course offerings, and lowered revenue from endowment investments are among the various reasons that colleges and universities are having to make tough budgetary decisions.[1] While the financial struggles are often unavoidable, the paths out of financial instability are numerous, and college and university administrators must use rational decision making to choose the right avenue of resolution.

Historically, as colleges and universities faced financial pressures, they filed for financial exigency in order to default on financial obligations and eliminate tenured positions that were no longer sustainable. Financial

1. Kevin Kiley, *Flat-Out Disappointment*, INSIDE HIGHER ED (Feb. 1, 2013), http://www.insidehighered.com/news/2013/02/01/endowments-averaged-small-loss-2012-fiscal-year.

exigency has long been recognized as a financial state of urgency that makes the firing of tenured faculty permissible.[2] While financial exigency is a legitimate solution to financial pressures within colleges and universities, more and more colleges and universities are now choosing different paths towards solvency. Worries of negative reviews from bond-rating agencies and accreditors, and negative responses from students and donors are among the reasons that administrators avoid declaring financial exigency.[3]

In addition to the changes that colleges and universities are implementing in handling their financial difficulties, there are also new hurdles that colleges and universities face to remaining in good financial standing. Due to state budgetary concerns causing drops in funding, and in addition to endowment revenue concerns, colleges and universities must worry about how the technological age is going to affect their enrollment, and as a result, their solvency. As colleges and universities take on these new problems, and continue to face pre-existing financial pressures, they must find a way to cut costs while avoiding a declaration of financial exigency.

In order to reveal the entire scope of reorganization and solvency concerns that financially troubled colleges and universities must assess, this Note will examine the process by which colleges and universities resolve their solvency concerns. This Note will first start with determining why colleges and universities become financially unstable. This Note will then delve into the different options college and university administrators face when trying to resolve insolvency. In order to better understand these options, three case studies will be examined: one involving firing tenured faculty, another involving the merger of colleges and universities, and the last looking at changes in state legislation to grant colleges and universities more freedom in their financial decisions. The decisions college and university administrators make can lead to lawsuits, by both faculty and students, and so must not be made in haste. Finally, this Note will examine which methods are best to employ, and what colleges and universities can do both prospectively and retrospectively in order to avoid lawsuits, and also to ensure that their students are able to be educated and graduate with a degree that is meaningful to them and can help them positively contribute to society. This Note will focus on public sector schools, and leave the financial story of private colleges and universities for another scholar.

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

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

I. FUNDING PROBELEMS FACED BY COLLEGES AND UNIVERSITIES

With the costs of research, facilities, and additional administrative positions consuming the revenue that colleges and universities receive via tuition, government funding, endowment returns, and donations, more and more colleges and universities are having to address dire financial situations within their programs.[4] As the financial climate across the country turned dismal due to the 2007 to 2009 recessions, public colleges and universities also felt financial effects.[5] Endowment gifts contribute to the endowment fund that colleges and universities then invest in order to achieve a return on investment.[6] Even four years after the recession officially ended in 2009, a survey among eight–hundred thirty–one public and private colleges and universities found that for the third time in five years, there was a negative average return on endowments.[7] For example, in 2012, a survey among eight–hundred thirty–one institutions found that on average, the colleges and universities returned .3 percent less than was invested.[8] Colleges and universities with smaller funds saw greater losses than wealthier institutions.[9] Prior to the recession, there were double-digit returns on college and university endowment funds.[10] Not only were colleges and universities seeing poor performance in international equities, hedge funds, and commodities, but decreases in gifts were also adding to the negative income that endowment funds are imposing upon their budgets.[11] Negative returns mean, of course, that institutions are actually losing money on their investments, thus leading to financial instability. In order to continue to spend at the levels colleges and universities have historically spent, an average of 4.5 to five percent of their endowment funds annually, colleges and universities will either need to improve returns on their endowment investments, or make budgetary cuts in order to deal with the loss in revenue if the institutions continue to have years with

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4. Michael Horn, *Yale's Struggles Signal Broader Challenges Ahead for Colleges*, FORBES (Nov. 14, 2013), http://www.forbes.com/sites/michaelhorn/2013/11/14/yales-struggles-signal-broader-challenges-ahead-for-colleges/.

5. Michael W. Klein, *Declaring an End to "Financial Exigency?"? Changes in Higher Education Law, Labor, and Finance, 1971–2011*, 38 J.C. & U.L. 221, 223 (2012).

6. Lucie Lapovsky, *Endowment Spending: External Perceptions and Internal Practices*, COMMONFUND INST. (Mar. 2009), *available at* http://www.commonfund.org/InvestorResources/PublicationsAVhite%20Papers/Endowment% 20WhitePaper_Spending%20-%20External%20Perceptions%C20and%C20Internal% 20Practices.pdf.

7. Kiley, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

negative returns.[12] Thus, while the majority of colleges and universities are financially stable, and have seen positive returns to balance out years of negative income, this is an obstacle that some will have to overcome in order to remain open.

Not only have colleges and universities seen a downturn in their investments, but due to budgetary concerns, state and federal budgets have also lessened the amounts dedicated to higher education.[13] Even with the passage of the 2008 reauthorization of the Higher Education Act[14], which allowed the Department of Education to withhold College Access Challenge Grant funds to states failing to maintain annual gains in their higher education appropriations at least over the average of the past five years, public colleges and universities still faced budgetary concerns with the amount of state funding they receive.[15] With some states reducing their appropriations for operating expenses of colleges and universities by more than twenty percent between 2007 and 2009, many colleges and universities have had to make changes within their budgets in order to compensate for the loss of funding.[16]

As if losses in endowment funds and state funding were not enough, technological advances now threaten to change the structure of colleges and universities by allowing for easy dissemination of information without the high price tag of traditional college and university tuition. Well-respected colleges and universities, such as Harvard and MIT, have already begun to offer online education to those not enrolled in their institutions.[17] If this trend continues, colleges and universities without such prominence may see lowered enrollment, especially when students themselves are experiencing budgetary concerns on an individual level and may decide to pay less tuition by enrolling in a virtual version of a more well-respected college or university than they could otherwise attend.[18] While such an outcome may be far beyond the horizon, online classes are becoming more

12. Kiley, *supra* note 1.

13. William Zumeta, *State Support of Higher Education: The Roller Coaster Plunges Downward Yet Again, in* THE NEA 2009 ALMANAC OF HIGHER EDUC. 29, 30 (Harold Wechsler ed., 2009).

14. Higher Education Opportunity Act of 2008, Pub. L. No. 110-315.

15. Zumeta, *supra* note 13, at 34. College Access Challenge Grant funds were created in order "to foster partnerships among federal, state, and local governments and philanthropic organizations through matching challenge grants that are aimed at increasing the number of low income students who are prepared to enter and succeed in postsecondary education." U.S. DEP'T OF EDUCATION, COLLEGE ACCESS CHALLENGE GRANT PROGRAM (2013), *available at* http://www2.ed.gov/programs/cacg/index.html.

16. Zumeta, *supra* note 13, at 36.

17. Nathan Harden, *The End of the University as We Know It*, AMERICAN INTEREST, (Dec. 11, 2012), *available at* http://www.the-american-interest.com/article .cfm?piece=1352.

18. *Id.*

and more common.[19] Colleges and universities will need to respond accordingly. While raising tuition may be conventional wisdom, due to the inexpensive alternative of online education resulting in certifications, colleges and universities may need to employ other devices to avoid insolvency in order to align themselves with the marketplace.[20] Adaptations available to colleges and universities include offering fewer tenured positions, having a smaller faculty, being more specialized and offering fewer programs and majors, and using more administration-friendly employment contracts that disempower faculty.

II. Approaches to Handle Finances

Among the ways to handle budgetary concerns, administration friendly contracts may be drafted, non-tenured faculty may be let go, tuition may be raised, higher paid non-tenured professors may be replaced with new faculty, and programs and departments may be eliminated. In order to better understand the various solutions and what may be best for various institutions, each one must be examined before applying them to case specific examples.

Contract Drafting

When decisions are being made, an institution must abide by the terms of faculty contracts or else face litigation, and because of this, securing a favorably drafted contract is one of the most powerful protections against adverse action on the part of the institution's administrators that faculty members can have. While contract drafting is not within the skill set of most college professors, unions are able to negotiate for professors, and can draft clauses which are helpful to professors when colleges and universities are making challenging decisions arising out of financial difficulties. Prospective preventive action is almost always better than retrospective reactions, and negotiating favorable employment contracts is a proactive measure faculty may employ prior to any restructuring concerns. In the event that a college or university has unionized faculty, particularly in states that do not restrict public sector union membership, a unionized faculty has increased bargaining power and may therefore be able to negotiate helpful clauses within the employment contracts. Clauses that can be added to employment contracts in order to instill faculty rights during a restructuring phase include notice clauses, shared governance

19. More than three-quarters of colleges and universities in a 2012 Pew Research Survey offered online classes. *College Presidents are Bigger Believers than Public in Online Classes*, Pew Research Center, (Dec. 17, 2012), http://www.pewresearch.org/daily-number/college-presidents-are-bigger-believers-than-public-in-online-classes/.

20. *See id.*

provisions, and precise definitions of financial exigency.[21] Notice clauses require the administration to inform unions of plans that will affect the union's members in the event of reorganization.[22] Shared governance clauses ensure faculty involvement and typically a formal committee or group that can offer recommendations and alternatives to a retrenchment process.[23] Such provisions may also require the administration to share financial information with the appropriate faculty group prior to declaring financial exigency.[24] College and university administrators are less likely to be able to avoid shared governance when employment contracts expressly state what specific situations demand it.[25]

Suits filed by Faculty

Once budgetary concerns become serious, action must be taken, and while these actions must fall in line with the employment contracts previously discussed, they often involve reductions in faculty. This was the case in *Shelton v. Board of Supervisors of Southern University and Agricultural and Mechanical College*, where a board meeting discussing budget concerns led to the dismissal of non-tenured faculty.[26] The board approved a reorganization plan after being presented with two plans at two separate meetings by the interim president of the University. The plan that was approved eliminated Joseph Shelton's position at the University, and the non-tenured employee was fired as a result. Shelton then filed suit against the University, claiming that he was unjustly let go.[27] The trial court found in favor of the University, and dismissed the claims against it.[28] The circuit court affirmed, reasoning that because the dismissal of Shelton was decided after a board meeting that discussed the new reorganization plan for the University, the administration had made a budgetary decision and his firing was bona fide and not one of retaliation.[29]

The firing of non-tenured faculty is the least contentious way to eliminate overhead, but also one of the least efficient in terms of eliminating costs. Non-tenured faculty are at-will employees and as long as they are fired at the end of their contract term and cannot successfully

21. *See* Kristine Anderson Dougherty, Gary Rhoades & Mark Smith, *Bargaining Retrenchment*, *in* THE NEA 2012 ALMANAC OF HIGHER EDUCATION 51 (2012).

22. Rachel Hendrickson, Christine Maitland & Gary Rhoades, *Negotiating Academic Restructuring*, THE NEA 1996 ALMANAC OF HIGHER EDUCATION 54 (1996).

23. *Id.* at 58.

24. *Id.*

25. *Id.*

26. No. 12-30788, 2013 WL 3198765, at *1 (5th Cir. June 25, 2013).

27. *Id*. at *1.

28. *Id.* at *2.

29. *Id*. at *5.

argue they were let go for discriminatory purposes, no lawsuits will be successful upon the faculty members' departure.[30] However, while there is nothing unlawful about firing non-tenured employees, it is often not enough to substantially reduce overhead because they are almost always paid less than tenured faculty.[31] Because of this, other measures are typically necessary in order for the administration to balance their budget.

Raising Tuition

Another option that colleges and universities may choose to employ is to raise tuition. However, because tuition often increases annually regardless of financial pressure,[32] because within public institutions there are various regulations in place as to how much tuition may rise, and because the paying public has begun to resist the upward pressure on tuition, it is often not the most efficient tool for administrators to use when trying to balance a college or university's budget.[33] In fact, despite growing financial concerns, college and university tuition increased by only 2.9 percent in the 2013 to 2014 enrollment stage, and just .9 percent after adjusting for inflation.[34] This was the smallest annual increase in more than three decades.[35] Thus, despite the ability of colleges and universities to generate

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30. *Id.*

31. *Tenured/Tenure-Track Faculty Salaries*, HIGHEREDJOBS, https://www.higheredjobs.com/salary/salaryDisplay.cfm?SurveyID=24 (last visited Mar. 13 2015).

32. *Average Rates of Growth of Published Charges by Decade*, COLLEGEBOARD.COM, http://trends.collegeboard.org/college-pricing/figures-tables/average-rates-growth-tuition-and-fees-over-time (last visited Oct. 24, 2013).

33. Regulation of tuition at public colleges and universities varies by state. While some state legislatures limit the amount a public college or university can raise their tuition each year, the colleges and universities often raise tuition to the maximum limit they're allowed to impose. Some states like Texas are actually deregulating the tuition increases a public college or university can impose, resulting in a 90% tuition increase within 10 years of the law's passage. Reeve Hamilton, *If There's a Way, There's a Will to Regulate Tuition*, TEXAS TRIBUNE, Nov. 19, 2012, http://www.texastribune.org/2012/11/19/if-theres-way-theres-will-regulate-tuition/. Tuition deregulation is largely supported due to decreases in state funding that have led to a need for greater revenues. Those against deregulating tuition fear that by removing state legislative control over public colleges and universities it may lead to steep increases in tuition and fees, which would limit public access to higher education. While it stands unclear which direction state legislatures will move going forward, public colleges and universities must continue to work within the framework their legislatures provide, and is a budgetary concern that is largely out of the hands of the college and university administrators. Lesley McBain, *Tuition-Setting Authority and Deregulation at State Colleges and Universities*, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES (May 2010), *available at* http://www.aascu.org/policy/publications/policy-matters/2010/tuitionsettingauthority.pdf.

34. *Average Rates of Growth of Published Charges by Decade*, *supra* note 32.

35. Mary Beth Marklein, *Colleges see a slowdown in tuition price increases*,

more funds through tuition increases, this does not seem to be the route that many are taking. This leads colleges and universities to seek other alternatives in raising revenues during hard economic times.

Replacing Tenured Faculty with New Hires

When the firing of non-tenured faculty and raising of tuition is not sufficient, some administrators attempt to replace their higher paid tenured faculty with new hires who will start at a lower salary. This was the case in the historic financial exigency case *American Association of University Professors v. Bloomfield College*.[36] In 1973, Bloomfield College, a private college in New Jersey, laid off several faculty members, but decided not to sell a large plot of land the college planned on turning into a golf course. In response, the American Association of University Professors filed suit in state court seeking to vindicate the right of tenured members of the faculty to continuous employment under the contractual undertaking of the College and to set aside the action of the board of trustees in breach of that undertaking.[37] The trial court found that the layoffs were not necessary and that other budget cutting measures such as selling the property could have eliminated the need to lay off faculty members.[38] The appellate court decided, however, that it was within the discretion of the administration to look at short-term as well as long-term budget concerns, and found that the college did not need to sell that property prior to being able to lay off faculty members.[39] While the appellate court held that the College was in a bona fide state of financial exigency, it also held that the College had not exercised good faith when it had terminated tenured faculty.[40] As a result, the appellate court affirmed the trial court's ordering of specific performance of reinstating the laid off faculty members.[41] It is important to note that the appellate court did not dispute that Bloomfield College was in a state of financial exigency, but merely ruled that the financial exigency was not a bona fide cause for the decision to terminate the tenured faculty.[42] The appellate court was therefore able to uphold the ruling of the trial court that good faith was not used in deciding to fire the tenured faculty, while also establishing a victory for colleges and universities

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USA TODAY, Oct. 23, 2013, http://www.usatoday.com/story/news/nation/2013/10/23/college-tuitions-rising-more-slowly/3151897//.

36. 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).
37. *Id.* at 615.
38. *Id.*
39. *Id.*
40. *Id*.
41. *Bloomfield Coll.*, 346 A.2d at 618.
42. *Id.*

facing financial exigency. At least in New Jersey, colleges and universities were granted broad discretion in budgetary decisions, but a check on the institutions remains. The victory for faculty was achieved through the court's decision that good faith was necessary in order to fire tenured faculty during financial exigency. It thus upheld a check on the otherwise unrestrained ability of colleges and universities to make whatever decisions they deemed necessary in order to balance the budget.

After *Bloomfield College*, other state courts have followed suit, granting colleges and universities broad discretion in their business decisions when declaring financial exigency.[43] Institutions are not forced to liquidate their assets prior to laying off even tenured faculty. While the decisions of the boards of trustees of colleges and universities must be made in good faith, firing tenured faculty need not be the last resort available to board of trustees. Cases since *Bloomfield College* have been able to use this decision as support for using various methods, including firing tenured faculty, when trying to avoid insolvency.[44] In order to determine whether the firing of tenured faculty during the time of financial exigency has been done in good faith, the following factors are considered: (1) the board's motivation for its action; (2) the adequacy of the institution's funds; (3) the overall financial condition of the institution; (4) the use of cost or money saving measures before termination of faculty; and (5) the efforts used to find a solution other than terminating faculty.[45] This enables colleges and universities to enjoy freedom in making financial decisions, and allows them to use the firing of tenured faculty as a legitimate approach when made in good faith. Colleges and universities are thus able to avoid employing other cost-saving options that may be less desirable than firing tenured faculty when declaring financial exigency.

Downsizing or Eliminating Programs and Departments

Another route that colleges and universities sometimes employ is to eliminate entire departments and programs, and with it, the faculty who

43. *See, e.g.*, Scheuer v. Creighton Univ., 260 N.W.2d 595 (Neb. 1977) (ruling in favor of the University where an assistant pharmacy professor sought reinstatement after he was terminated on the ground of financial exigency); Refai v. Cent. Wash. Univ., 742 P.2d 137 (Wash. Ct. App. 1987) (refusing to grant a tenured associate professor reinstatement after being terminated, even though the university hired other full-time and part-time faculty during financial exigency).

44. *See, e.g.*, Krotkoff v. Goucher Coll., 585 F.2d 675 (4th Cir. 1978) (ruling that tenure did not protect former professor's employment in the case of a bona fide dismissal if the college is confronted with financial exigency); State Coll. Locals v. State Bd. of Higher Ed., 436 A.2d 1152 (N.J. Super. Ct. App. Div. 1981) (finding that the board was within its rule-making capacity and its decisions to reduce the size of the management staff in the event of financial exigency did not violate tenure statutes).

45. *Krotkoff*, 585 F.2d at 681.

teach within the departments and programs.[46] Colleges and universities can also implement horizontal budget cuts, in which every department faces the same budget cut, in proportion to its share of the institution's budget, in the hopes that there are elements of every program that are unnecessary and could save substantial amounts without the institution needing to single out particular programs.[47] However, because this type of budget cutting does not typically suffice on its own, shutting down entire programs is often necessary for colleges and universities experiencing drastic budgetary concerns.[48]

Particularly once the Great Recession hit, drastic cuts became necessary, but the trend continues even after the economy has begun to rebound. In June 2012, The University of California System consolidated or eliminated more than one hundred eighty programs.[49] The University System of Louisiana likewise cut two hundred seventeen academic programs between 2010 and 2012.[50] Other colleges and universities continue to consider this option. In December 2013, Minnesota State University, Moorhead announced its plan to phase out five low-enrollment majors and also merge some academic departments.[51] In order to save the more profitable departments or programs, a college or university will typically establish a procedure to evaluate its programs before selectively terminating, merging, or downsizing certain programs.[52] Most administrators of colleges and universities agree that in evaluating different programs and departments, the college or university's short- and long-term aspirations should be considered.[53] Program reorganization is often preferred to declaring financial exigency for the entire college, because it allows huge cost reductions while still allowing the programs that remain to have high

46. Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ., 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991).

47. Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155, 162–63 (1998).

48. *Id.* at 163.

49. *Actions to Address Budget Shortfalls*, UNIV. OF CAL. (June 2012), http://budget.universityofcalifornia.edu/wp-content/uploads/2012/07/uc_budget_shortfall_actions.pdf.

50. *Fiscal and Operational Facilities*, UNIV. OF LA. SYS. (Dec. 2010), *available at* http://www.ulsystem.net/assets/docs/searchable/spotlights/UL%20System%20Fiscal%20and%20Operational%20Efficiencies%2012-10.pdf; *Joint Legislative Committee on the Budget*, LA. STATE UNIV. SYS., (Nov. 9, 2012), *available at* http://www.lsusystem.edu/docs/budget/JLCB%20Presentation%2011092012/LSU%20System%20Presentation%20to%20JLCB_11-9-12.pdf.

51. Alex Friedrich, *Administrative Proposal would Eliminate Projected Deficit*, MINN. PUBLIC RADIO (Dec. 5, 2013), http://blogs.mprnews.org/oncampus/2013/12/msu-moorhead-announces-proposed-budget-cuts/.

52. *Id.*

53. Beh, *supra* note 47, at 166.

enrollment and financial support.[54]

III. TYPES OF LAWSUITS FACED

The two most prevalent types of lawsuits that colleges and universities face after making budget cuts center on (1) the firing of faculty, and (2) cutting programs and majors within the college or university. Employment lawsuits by faculty who were fired are the most common, with student grievances after their program or department was eliminated recently becoming more popular.

Courts reviewing faculty terminations due to financial exigency or program discontinuance by colleges and universities have focused on procedural rights, the violation of which has been alleged by the plaintiff faculty members.[55] Faculty terminations due to financial exigency require a four-step analysis. That analysis involves: (1) whether the plaintiff had standing to sue; (2) whether the trial court had subject matter jurisdiction over the suit and personal jurisdiction over the defendant; (3) whether the institution had acted in good faith when it said that financial exigency required plaintiff's termination; and (4) whether the process by means of mean plaintiff was terminated was fair.[56] When deciding faculty cases, the courts look at this four-step analysis in order to find that the college or university acted properly or else that the plaintiff faculty member(s) was wrongfully fired.[57] While the issues of standing and jurisdiction are common to lawsuits generally, the matters of the bona fides of the financial exigency and whether the college or university used a fair process when deciding to fire the plaintiff are unique to financial exigency cases concerning faculty.[58] Public colleges and universities have historically been held to a lower standard by courts than their private counterparts when determining whether or not their actions regarding financial exigency and program and department discontinuance were justified.[59] This effect may be caused by the fact that faculty within a public college or university are granted greater contractual protections once a bona fide finding of financial exigency has been made than their private college and university counterparts.[60]

In *Bloomfield College*, the courts had to evaluate the determinations

54. Rachel Hendrickson et. al., *Negotiating Academic Restructuring*, *in* THE NEA 1996 ALMANAC OF HIGHER EDUC. 51, 56 (1996).

55. Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance*, 63 U. DET. L. REV. 609, 628 (1986).

56. *Id.* at 649.

57. *Id.*

58. *Id.*

59. *Id*. at 633.

60. Ludolph *supra* note 55.

made by a planning commission composed of trustees, faculty, students and staff, which resulted in the laying off of tenured faculty members.[61] As previously discussed, the appellate court found that there was substantial and credible evidence to support the trial court's finding that the College did not use good faith in the process of laying off tenured faculty, and so the laid off faculty were reinstated.[62]

In *Wise v. Ohio State University*, the matter at issue was whether or not the employee's firing constituted age discrimination or if it was merely a decision regarding the financial stability of his program when his position was eliminated.[63] In August of 2003, Kenneth Wise, an agricultural technician within the dairy unit at The Ohio State University, was notified that his position was being abolished due to a lack of funds and to the reorganization of the unit in which he worked.[64] Wise was notified that he could displace another employee within a different department who held the same job classification with fewer retention points, but Wise declined.[65] The administration then put Wise on a layoff list and notified him that if another position in his job classification became available, they would notify him.[66] Ultimately, Wise was not re-employed or reinstated, so his employment with the university ended.[67] Wise subsequently filed a suit against the University, alleging age discrimination, disability discrimination, retaliation, and wrongful discharge in violation of public policy.[68] At trial, the chair of the University's Department of Animal Sciences testified that in response to budget reductions, the department had to restructure its dairy programs.[69] After the department chair consulted with a professor within the department, Wise's position was identified as one of the three that could be eliminated because other positions within the unit could perform those duties in addition to their current obligations.[70] Wise argued that because his duties were distributed to other employees, these younger employees effectually replaced him.[71]

The trial court, however, found that a person is not replaced when another employee is assigned to perform the person's duties in addition to

61. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).
62. *Id.*
63. No. 11AP-383, 2011 WL 6649079, at *2 (Ct. App. Ohio Dec. 20, 2011).
64. *Id.* at *1.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Wise*, 2011 WL 6649079 at *1.
69. *Id.* at *3.
70. *Id.* at *3.
71. *Id.*

the employee's current duties.[72] Likewise, the trial court found that other employees hired after Wise were not hired to complete the same job function as Wise so the University was within its rights in hiring new employees and assigning Wise's duties to others.[73] The appellate court held that because determinations of Wise's position were based upon budget cuts, and because Wise was unable to prove any sort of age discrimination, the University was justified in eliminating his position.[74] This case therefore upholds the ability of colleges and universities, in Ohio, at least, to merge positions as a cost-saving measure where discrimination cannot be proven.

The second type of lawsuit that colleges and universities face after making large budgetary cuts that results in the downsizing or elimination of a program or department is that filed by their students. In determining these cases, courts have used a two part test: (1) whether the college or university used good faith to determine the program closure, and (2) whether the college or university dealt fairly with the students in light of the decision to close the program.[75] The landmark case that follows this two-part test is *Beukas v. Board of Trustees of Fairleigh Dickinson University*, in which dental students filed suit after the private dental college was closed.[76] The trial court held that in the absence of showing arbitrariness, bad faith, or lack of prompt notice by university officials of their intention to close the dental college, the students failed to state a claim.[77] In the dental college bulletin, the University had posted that the administration reserves "the right in its sole judgment to make changes of any nature in the college's academic program, courses, schedule, or calendar whenever in its sole judgment it is deemed desirable to do so."[78] After accepting a new class of dental students in the summer of 1989 and proceeding with its current ones, the University had been notified that the governor's budget had appropriated approximately twenty–five percent less funds to the dental college than in the previous year.[79] Due to this loss in state funds, the university incurred a deficit for the dental college.[80] The president of the dental college recommended that there be faculty consultations regarding the closing of the school, that the freshman class be suspended, that the search for a new dean be suspended, that the dental college remain open an additional two years so that current juniors could

72. *Id.* at *4.
73. *Wise*, 2011 WL 6649079 at *4.
74. *Id.*
75. Beh, *supra* note 47, at 192.
76. 605 A.2d 776 (N.J. Super. Ct. 1991).
77. *Id.* at 777.
78. *Id*. at 778.
79. *Id.*
80. *Id.*

still graduate, and that after those subsequent two years, the dental college would close.[81] Dental students were told of the decisions about a year in advance of when the university planned to close and were also offered additional clinical and academic instruction so as to facilitate their transfer to other dental schools.[82] The college also coordinated with the State Dental Accreditation Society to ensure that the dental college retained its accreditation up until it was closed.[83]

The students argued that upon their being accepted into the dental college, a contractual obligation came into existence.[84] They argued that by paying their first year's tuition, a complete and binding contract arose for the entire educational program culminating in a D.M.D. degree.[85] The students claimed that the college breached its contract with those students and that notwithstanding any claims of financial exigency by the University, the University was not able to argue impossibility of performance of their contractual obligation.[86]

The trial court stated the issue as whether, in determining to permanently close the dental college, the University infringed upon any legal rights of the students, which would entitle them to redress their grievances through an award of damages.[87] It cited *In re Antioch University* where that court refused to interfere with a university's autonomy where the relief sought was equitable in nature.[88] The trial court identified the obligations owed by a university to its students under circumstances in which the university has unilaterally determined to terminate an entire college for financial reasons.[89] The trial court also discussed whether a conflict should be resolved under classic contract doctrine where the relevant obligations are contractual in nature.[90] The court sought to determine what legal theory would best apply to the situation if contractual doctrine should not be followed.[91] The trial court decided that the university-student contract is an implied contract of mutual obligations.[92] It is a quasi-contract, which is

81. *Beukas*, 605 A.2d at 778–79.

82. *Id.* at 779.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Beukas*, 605 A.2d at 779.

87. *Id.*

88. 418 *A.*2d 105, 113 (D.C. Ct. App. 1980).

89. *Beukas*, 605 A.2d at 781–82. The court held that a college or university has an obligation to allow the student to continue his or her studies until graduation if the student is willing and eligible to continue.

90. *Id.* The court discussed different jurisdictions' understanding of whether or not a contractual nature was present between colleges and universities and their students, but did not make its own determination on the issue.

91. *Id.* at 783.

92. *Id.*

created by law for reasons of justice without regard to expressions of assent on the part of either party by either words or acts.[93] The trial court concluded that applying this quasi-contract theory to resolve university-student conflicts over an administrative decision to terminate a college or program for financial reasons is the most effective way to avoid injustice to both the university and its students.[94] Because of this, the court said the judicial inquiry should be directed toward whether the decision-making is bona fide and whether the college or university acted in good faith and dealt fairly with the students while implementing their decision.[95] Since the trial court found that the University acted in a bona fide manner in its dealings with the students, the students were not successful in a suit against the University.[96] The appellate court affirmed the decision of the trial court and added only that the students relied on the dental college catalog, but that the bulletin contained a significant reservation of rights that reinforced the actions of the University.[97]

IV. CURRENT CASE STUDIES

Against this sparse precedential background regarding colleges and universities making budget cuts through either eliminating faculty or departments and programs, a formal discussion of how colleges and universities are currently handling their budgetary struggles is an important element of the analysis of college and university reorganization. In order to get a proper understanding of the difficulties involved when facing financial strain, this Note will look at the University System of Georgia's consolidation and closure of colleges and universities in its system through mergers, Florida State University's firing of twenty one tenured faculty members as well as the consequent reinstatement of these faculty members, and lastly, the Virginia legislature's changing of the climate for reorganization within its public colleges and universities.

University System of Georgia

Looking first at the University System of Georgia, in January 2013, the Board of Regents of the University System of Georgia announced that it was going to consolidate eight of the system's thirty–five colleges and universities in order to meet budget demands.[98] Of the eight campuses

93. *Id.*

94. *Id.*

95. *Beukas*, 605 A.2d at 784.

96. *Id.*

97. Beukas v. Bd. of Trs. of Farleigh Dickinson Univ., 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

98. Paul Fain, *Major Mergers in Georgia*, INSIDE HIGHER ED (Jan. 6, 2012), http://www.insidehighered.com/news/2012/01/06/georgia-university-system-proposes-

sought to be merged in pairs, only two campuses were in the same city, with the other three merged institutions some thirty miles away from each other.[99] Physical separation was not the only cause for concern among those hearing of the plan, however, and university officials cited the need to maintain each campus's individual culture despite the mergers.[100] With a significant cut in state tax revenues, however, officials saw no other choice; in fact Richard Staisloff, an expert on college finances, has stated that by implementing consolidations such as those that Georgia is effecting, colleges and universities can save money on shared courses, insurance, audit functions, as well as other areas, all while maintaining the academic quality of the programs that the college or university provides.[101] While this plan was initially doubted in terms of the ability to actually merge campuses that are so far apart from one another,[102] not only is the University System of Georgia merging the eight schools it initially announced, but additional mergers have also been proposed, and implementation has begun.[103]

With regard to the latest merger that has been announced, that of Kennesaw State University and Southern Polytechnic State University, the details of the merger were largely kept secret until the announcement was made that the two institutions would be merged.[104] Under the proposal, all campuses will remain open until 2015, when the merged institution starts admitting new students.[105] There were less than the fifteen days between the announcement of the plan to merge and the regents' vote on the merger. While students protested, they were unable to voice an opinion at the meeting due to a fifteen-day notice requirement for public speech at regents' meetings.[106] The regents were under scrutiny due to their lack of

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consolidation-8-campuses. In merging the colleges and universities, the University System of Georgia follows six principles for consolidation: (1) increase opportunities to raise education attainment levels (2) improve accessibility, regional identity, and compatibility, (3) avoid duplication of academic programs while optimizing access to instruction, (4) create significant potential for economies of scale and scope, (5) enhance regional economic development, and (6) streamline administrative services while maintaining or improving service level and quality. *Regents Approve Principles for Consolidation of Institutions*, UNIV. SYS. OF GA. (Nov. 8 2011), http://www.usg.edu/news/release/regents_approve_principles_for_consolidation_of_institutions.

99. Fain, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Id.*

103. Ry Rivard, *Merging Into Controversy*, INSIDE HIGHER ED (Nov. 6, 2013), http://www.insidehighered.com/news/2013/11/06/secret-merger-now-public-meets-opposition-georgia.

104. *Id.*

105. *Id.*

106. *Id.* Due to a restriction in the bylaws, there must be 15 days notice by

advance notice, but this latest merger is going more smoothly than the four previous mergers went, with some credit to the fact that the name, Kennesaw State University, was decided upon at the time of the announcement.[107] With the previous mergers, a source of significant contention among the colleges and universities was what name the new merged institution would adopt.[108]

Although the regents have already consolidated eight universities, the realized savings as of November 2013 were less than one percent of the total operating budget.[109] The system expects that the first round of mergers will save between 5 million and 7.5 million dollars in 2014, which is about .1 percent of the total 7.4 billion dollar operating budget for the Georgia University System, which now has thirty–one colleges in it.[110] State funding contributes about 1.9 billion dollars into the budget.[111] In addition to saving just .1 percent of the operating budget, most of the savings that have been projected will be for only the first year of the consolidation; it is unknown what the system expects to save in the years following.[112] Within these first year consolidation savings, however, few layoffs have occurred, and none of the campuses had been closed.[113] Within the University System of Georgia, it seems that while the back door meetings have been scrutinized, the mergers and cost saving decisions have not caused the system to break contracts or to layoff many members of the

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outsiders prior to any meeting in order for outside participation. *Id.* Because the administration announced the merger with less than 15 days before the meeting in which it would be voted on, student, faculty, and community members were unable to voice their opinions within the meeting, in accordance with the bylaw provision requiring notice to attend. *Id.*

107. *Id.* In an interview, associate vice chancellor of the Georgia University System Shelley Nickel stated that system officials have learned it is difficult for campus officials to settle on a new name. *Id.* In naming the institution prior to implementation of the merger, it bypasses the process being held up by officials negotiating over what to name the institution. *Id.* Though agreeing upon the name of an institution may seem like a menial decision, when two institutions are being merged there is often contention in determining what name will live on not only on behalf of the administrations, but also students who may have a different institution on their diploma than otherwise planned on. *Id.*

108. *See Augusta Commission Considers College Name*, GA. PUB. BROAD. (Aug. 20, 2012), http://www.gpb.org/news/2012/08/20/augusta-commission-considers-college-name (reporting continued controversy over deciding the name of the merged institution); *cf.* Lesley McBain, *College and University Mergers: An Update on Recent Trends*, AM. ASS'N OF STATE COLL. & UNIV. (May 2012) (explaining the outrage felt when Rutgers-Camden was told it would lose its name in a merger with Rowan University).

109. Rivard, *supra* note 103.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

staff and faculty.[114]

In order to uphold some sense of transparency in the University System of Georgia case, the actual implementation of the mergers has been more collaborative than the initial decision to merge the colleges and universities was.[115] The first steps of a merger include creating implementation groups consisting of faculty, staff, students, alumni, foundation, and community leaders.[116] A president is then designated among those in the group, and a reporting format with key indicators is established.[117] The tasks of the implementation groups include academic, student, external, and operations duties.[118] The academic tasks range from coordinating with program-based accreditation to addressing program differences between the two schools and consolidating tenure and promotion process.[119] The student tasks include combining athletic programs, determining a strategy for tuition, merging information systems, and revising bylaws and student handbooks.[120] The external tasks include developing legislative relationships of the colleges, naming and branding the institution, and addressing alumni and foundation group issues and endowment restrictions.[121] Operations tasks include merging the financial systems, updating contractual and rental agreements, analyzing the impact of the merger on bonds, ensuring adequate audit coverage, consolidating risk management, and transitioning legal agreements and IT security.[122]

In addition to the mergers between colleges within the University System of Georgia, the Georgia Institute of Technology, a university within the system, has also admitted its first four hundred and one students to its new low-cost online master's degree program in computer science.[123] The spring of 2014 was the pilot season. It is a small version of what the school

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114. Rivard, *supra* note 103.

115. *Recommended Consolidations*, BD. OF REGENTS OF THE UNIV. SYS. OF GA. (2012), *available at* http://www.usg.edu/docs/consolidations.pdf (PowerPoint presentation). In order to maintain transparency, along with collaborating with students, staff, alumni, faculty, and community members, the University System of Georgia has also posted resources online that list the profiles of each college, along with the opportunities gained and challenges that will be faced in going through with the merger. Profiles for all 5 mergers are currently available through their website.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Recommended Consolidations*, *supra* note 115.

121. *Id.*

122. *Id.*

123. Carl Straumshein, *The First Cohort*, INSIDE HIGHER ED (Dec. 13, 2013), http://www.insidehighered.com/news/2013/12/13/georgia-tech-admits-first-cohort-ahead-online-masters-degree-program-launch.

hopes to become a ten thousand student program by its third year.[124] In a joint venture with AT&T, which invested two million dollars to subsidize the program, the school will split a projected 4.7 million dollars in revenue with AT&T, with the school taking in sixty percent and AT&T forty percent.[125] This program allows those not geographically near the program to enroll, and earn a graduate degree without ever stepping foot on campus.[126] With this innovative educational tool, and in addition to the consolidations, the University System of Georgia is raising the bar for other college and university systems in order to reduce costs and expand revenue.

Florida State University

Turning now to tenured faculty layoffs, this Note will now discuss the arbitration proceeding brought by faculty members when Florida State University laid off twenty–one tenured faculty members in 2010 without declaring financial exigency. The collective bargaining agreement between Florida State University and the faculty and staff employed by the University provided for final and binding arbitration as the mechanism to be used to resolve any disputes or grievances with employment contracts.[127] Because of this, the proceeding stayed out of the courts, and the ruling by the arbitrator was binding on both parties. The arbitrator's decision to side with the faculty resulted in the University's reinstatement of each of the tenured faculty affected.[128]

In an eighty–three page opinion, the arbitrator found that the layoffs executed by Florida State University were arbitrary, capricious, and unreasonable.[129] However, the arbitrator did not accept all of the grievances filed by the tenured faculty's unions.[130] He largely found that the University was within its rights to eliminate various non-tenure track positions, but that in the case of tenured faculty, there were multiple violations of the rights of the tenured faculty members.[131] The arbitrator also concluded that the decision-making process used by the University unjustly favored some professors over others, with a disregard for the

124. *Id.*

125. *Id.*

126. *Id.*

127. Fla. St. Univ. Bd. of Trustees v. United Faculty of Fla. (2010) (Sergent, Arb.), *available at* http://www.uff-fsu.org/art/ArbitrationAwardHighRes.pdf.

128. Richard Kerr, *Fired Tenured Faculty Members Reinstated at Florida State*, SCIENCE INSIDER (Nov. 8, 2010), http://news.sciencemag.org/funding/2010/11/fired-tenured-faculty-members-reinstated-florida-state.

129. Scott Jaschik, *Tenured Jobs Saved*, INSIDE HIGHER ED (Nov. 8, 2010), http://www.insidehighered.com/news/2010/11/08/florida_state.

130. *Id.*

131. Fla. St. Univ. Bd. of Trustees, *supra* note 127, at 56.

collective bargaining agreement that the University was bound to uphold.[132] Under that agreement, the University was supposed to consider length of service in deciding which faculty members to lay off.[133] The arbitrator found that, had the University considered this element, its decision regarding who to layoff would have been different from its actual decision, as many of the laid off faculty members had much more experience than others whose jobs were protected after the layoffs.[134] While it was not in dispute that Florida State University faced deep budget cuts, the arbitrator found that university officials used arbitrary means in order to select who would be let go.[135] The finding by the arbitrator is consistent with the result in *Bloomfield College* in holding Florida State University to the standard of good faith judicially required of it, even when it was facing financial pressures.[136]

The arbitrator did not find solely for the faculty, however, and his finding actually has raised new questions about the practice of making budget cuts. The arbitrator identified certain departments as more subject to budget cuts than others.[137] He looked at the cost per degree of each program and found that the University's goal of focusing cuts on departments with high costs should have allowed some programs to escape those cuts.[138] In the Department of Anthropology, for example, net tuition exceeded that of fourteen of the seventeen departments in the College of Arts and Sciences, yet it had been subject to deep cuts.[139] Meteorology, however, was one of the departments with low tuition revenues, yet the University chose not to impose many cuts on it.[140] The arbitrator thus found that, from a budget perspective, not all of the cuts made sense.[141]

Virginia Legislation

Lastly within the case studies, this Note will look at the Virginia legislature, and the legislation it has enacted in order to allow public colleges and universities more freedom when avoiding declaring financial exigency while experiencing budget problems. Virginia first sought to grant greater college and university autonomy in restructuring with the

132. Jaschik, *supra* note 129. Collective bargaining agreements can be an extremely useful tool for faculty to employ prior to any employment disputes.
133. *Id.*
134. *Id.*
135. Jaschik, *supra* note 129.
136. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).
137. Jaschik, *supra* note 129.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

Restructured Higher Education Financial and Administrative Operations Act of 2005.[142] In 2011, the Virginia legislature passed a bill that was signed into law by the governor and amended the 2005 Act.[143] It affords Virginia's public colleges and universities more restructuring abilities than that state's colleges and universities had previously enjoyed.[144] Some of these abilities affect tenured faculty.[145] In exchange for committing to twelve state goals, state colleges and universities in Virginia are given opportunities for greater institutional autonomy, while tuition and fee responsibility reside solely with the institution's Board of Visitors.[146] Institutions are located somewhere on three tiers and have greater autonomy within the higher tiers.[147] The 2011 legislation also allows for greater financial incentives by meeting more performance measures in connection with it.[148]

The Virginia legislation classifies its public colleges and universities into one of three levels pertaining to financial and administrative operational authority.[149] All Virginia public colleges and universities enjoy at least level I authority, which grants minimum operational authority to the institution.[150] By entering into a memorandum of understanding with the governor and corresponding cabinet secretaries, colleges and universities may earn level II authority.[151] Level II status grants Virginia public colleges and universities additional authority in two of the following three areas: (1) capital outlay; (2) information technology; and (3)

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142. VA. CODE. ANN. § 23-38.88 (2014). The Governor worked with the legislature in order to outline a public agenda of 11 performance goals for public colleges and universities, which led to the passage of the Restructured Higher Education Financial and Administrative Operations Act of 2005. The 2005 Act required each public college and university's board of visitors to pass a formal resolution that year agreeing to meet the state's goals, and making the boards responsible for ensuring that the state goals were actually met. The State Council of Education for Virginia performs an annual review of the colleges and universities and provides written certification with the results of the review. *Higher Education Opportunity Act (Restructuring)*, STATE COUNCIL OF HIGHER EDUC. FOR VA., http://www.schev.edu/restructuring/restructuring .asp (last visited Feb. 13, 2015).

143. Virginia Higher Education Opportunity Act, V.A. CODE ANN. § 23-38.87:10 (2014).

144. VA. CODE ANN. § 23-9.2:3.02 (2014).

145. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.

146. *Id.* The state goals set forth the following priorities: (1) access; (2) affordability; (3) academic offerings; (4) academic standards; (5) student progress and success; (6) articulation and dual enrollment; (7) economic development; (8) research; (9) enhancing K-12; (10) six-year plans; (11) finance and administrative; and (12) campus safety and security.

147. *Id.*

148. *Id.*

149. *Id.*

150. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.

151. *Id.*

procurement.[152] The highest level, level III, is granted to a select group of institutions through a management agreement among the college or university's board of visitors, the governor, and the general assembly. Level III colleges and universities are given operational authority in the areas of capital outlay, information technology, procurement, human resources (including faculty employment issues), and finance.[153]

Allowing autonomy so long as the institutions are still accountable to the government of Virginia, and increasing this autonomy based upon the amount of accountability, ensures that while Virginia public colleges and universities are able to make decisions based on human resources without answering for their decisions, they still must operate within the confines of the agreement they have established with their government. Thus, although those colleges or universities may be able to make decisions that would otherwise be adverse to their employees, they ultimately must answer to the government and assure that the decision was in accordance with the agreed upon commitment to the initiatives required by the state. While this may not be the best move from the faculty perspective, the statute seeks to provide student benefits, and not merely provide unguarded authority to the schools' administration. The law seeks to help students with limited financial resources to get into college by increasing access, affordability, and academic offerings and standards.[154] From an administrative view, the law also calls for six-year plans, finance and administrative efficiencies, and campus safety and security.[155] Because of all these positive goals, it can plausibly be argued that the law works to the benefit of current students at the institutions while also allowing the college or university to remain sustainable.[156]

V. HOW BEST TO PROCEED

Budgetary concerns cannot be ignored or avoided. With the advancement of new educational technology, ups and downs in the economy, and state budgetary concerns, those concerns are becoming more and more commonplace. Because declaring financial exigency is a drastic step for any college or university and because state law usually requires administrators to follow a legally prescribed path in considering other options prior to declaring financial exigency, methods in which colleges and universities can manage their budgetary concerns while avoiding this fate are most desirable.[157] Colleges and universities can reduce salaries of

152. *Id.*
153. *Id.*
154. *Id.*
155. STATE COUNCIL OF HIGHER EDUC. FOR VA., *supra* note 142.
156. *Id.*
157. *See* Klein, *supra* note 5, at 258.

administration and staff, temporarily suspend institutional contributions to retirement plans,[158] and also put furloughs in place in order to address grim financial circumstances.[159] When all of these measures prove insufficient, financial exigency is the last option that some colleges or universities may employ.[160] However, another way of avoiding having to declare financial exigency is to put a framework in place prior to the signs of budgetary problems, and to draft contracts with management friendly clauses in case of financial distress. However, the college or university is not the only party that sees contracts as a powerful way to control financial issues; it is also in the best interest of the faculty for it to build strong employment contracts for themselves. A balance must be struck in order to temper both the faculty's and the administrations' self-interest.

Looking first at the faculty side of employment agreements, there are two different perspectives within it: (1) that of faculty within right-to-work states, and (2) that of faculty in states without such legislation. Right-to-work legislation eliminates the ability of unions and employers to require employees to join a labor union in order to get or keep a job.[161] Because of this, many people in right-to-work states refuse to join the union that represents them, thereby avoiding having to pay union fees. For that reason, membership in, and the resources of, the unions in these states often decline.[162] Public colleges and universities within the twenty-four states that have passed right-to-work legislation have limited force behind their unions because membership tends to decline when it is not mandatory. Furthermore, the state funding colleges and universities receive can be further constrained if the institutions' contracts are not in accordance with their states' right-to-work laws.[163] However, regardless of the actual strength of the union involvement, faculty protections continue to exist, but

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158. *See, e.g.*, Tamar Levin, *Brandeis Halts Retirement Payments*, N.Y. TIMES, May 21, 2009, http://www.nytimes.com/2009/05/22/education/22college.html (where Brandeis University announced it would suspend contributions to retirement funds as a cost saving measure for the university.)

159. Klein, *supra* note 5, at 258.

160. *Id.*

161. *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/rtws.htm (last visited Feb. 13, 2015). *See, e.g.*, Rod Meloni, *Right to Work: Oh the Outrage!*, CLICK ON DETROIT (Mar. 19, 2013), http://www.clickondetroit.com/consumer/4yourmoney/Right-to-Work-Oh-the-Outrage/19385206.

162. Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html.

163. *Right to Work States*, *supra* note 161 (explaining how colleges and universities in Michigan attempted to create long-lasting contracts with unions prior to right to work legislation becoming in effect, and the legislature threatened to withhold funding as punishment).

those protections may be greater where the union has a stronger voice behind it.

Within faculty contracts, there are several types of provisions that can grant protection to tenure-track faculty members in the case of financial exigency, such as provisions including faculty involvement in reorganization by means of shared governance, provisions that address how restructuring affects tenure rights, and provisions for the rights of non-tenure track faculty.[164] It is extremely valuable for faculty to negotiate shared governance (or other forms of faculty involvement) in the reorganization process. Shared governance structures ensure faculty input into the decision-making process. Such structures typically consist of a formal committee, association, or senate in which the college or university is contractually obligated to involve the group in the event of a financial exigency or when program elimination is necessary.[165] The group is given the opportunity to offer advice, recommendations, and alternatives that must be forwarded to the board of trustees or other decision-making authority.[166] Contracts of this sort may mandate involvement of the relevant faculty entity if layoffs are necessary.[167] By ensuring faculty involvement when program eliminations or mergers take place or seem imminent, faculty may be able to create stability and lessen the negative consequences of those actions on the faculty. While layoffs in such a situation may be inevitable, by having faculty involvement throughout the process, decisions can be made that consider things like seniority in order to keep the process from being arbitrary and solely up to the determinations of the college and university administration, and can minimize disruptions to educational programs.[168] Union membership gives additional force to these contract provisions and makes it harder for administrations to ignore or bypass shared governance or neglect to share information about institutional budgets. Unions may file unfair labor practice complaints if an administration acts arbitrarily and ignores shared governance provisions.[169] Grievances may also be filed, which can be subject to binding arbitration, as was the case at Florida State University.[170]

Language in which faculty rights are more protected include clauses that require advance notice to the faculty some specified time before financial exigency can be declared, clauses that mandate sharing with the faculty financial information that the decision to declare financial exigency is

164. Dougherty, *supra* note 21, at 51.
165. *Id.* at 52.
166. *Id.* at 53.
167. *Id.*
168. *Id.*
169. *Id*. at 59.
170. Kerr, *supra* note 128.

being based on, and clauses that require the college or university to provide an opportunity for the faculty group, association, or senate to meet in joint consultation well before financial exigency is declared. It is important for the faculty to include notice clauses within their contracts so that the college or university is required to give the faculty notice of plans that may affect the faculty.[171] Such notice plans would be beneficial for faculty in situations like the University System of Georgia, mentioned above, in which the regents were not required to give advance notice to the students and faculty before declaring a merger.[172] By having notice clauses, the contract mandates some level of transparency between the administration and faculty. This gives the faculty advanced warning when tough questions regarding the budget and their employment must be answered. When layoffs are necessary, contracts may also provide rules such as layoff order, definitions of seniority, and recall rights.[173] Such contracts hold the administration accountable in terms of how they are able to lay off tenured faculty, making it less likely that unfair practices are used.

Rights of tenured faculty are least protected when contracts have strong management rights clauses. These clauses will refrain from defining the conditions that must be present for financial exigency to exist or may mandate the processes that determine layoffs.[174] Such provisions make it very difficult to ensure faculty involvement and allow for more arbitrary decisions to be made by the administration. Vague definitions of financial exigency such as "demonstrable enrollment reduction" in which demonstrable is not defined or "modification of curriculum" are examples of contractual language that grant the administration excessive latitude when making decisions that will inevitably affect its faculty.[175] Within the scope of retrenchment, it is important that faculty ensure that their contracts do not include overly broad management rights clauses that afford the administration of the college or university excessive control over the decisions they make without any form of retribution.[176]

Non-tenure track faculty have less protection available than their tenured counterparts. Because of the protections given to tenured faculty, those not

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171. Hendrickson, *supra* note 22.

172. The success of the mergers within the University System of Georgia have been credited to the absence of a show-stopping fuss that many other attempted mergers have faced. The University System of Georgia has used behind-the-scenes meetings prior to announcing the decision to college and university administrators, faculty, and its students. Paul Fain, *Major Mergers in Georgia*, INSIDE HIGHER ED (Jan. 6, 2012), http://www.insidehighered.com/news/2012/01/06/georgia-university-system-proposes-consolidation-8-campuses.

173. Dougherty, *supra* note 21, at 60.

174. *Id.* at 54.

175. *Id.* at 52.

176. *Id.* at 53.

on track for tenure are usually fired prior to those with tenure. However, within this group of less protected faculty, defensive mechanisms still exist. One method is to have a seniority system in which faculty with greater than a certain number of years cannot be fired before other faculty below that threshold level.[177] Other contracts specify that layoffs musts be based on college-wide or university-wide financial exigency, and that the college or university must attempt to locate subsequent employment for the faculty members they lay off.[178]

Whether financial exigency or restructuring is the route that colleges and universities decide to embark on, there are different strategic methods that faculty can try to employ in order to protect their rights. In financial exigency situations, collective bargaining is the most effective method, but the contracts that emerge out of the collective bargaining process must be carefully drafted. In the case of the Florida State University arbitration proceeding, where binding arbitration was mandated within the employment contract for dispute resolutions, faculty members were reinstated because of the arbitrator's decision.[179] While arbitration proceedings do not guarantee or even make it more likely that faculty will succeed in the event of a dispute, the language agreed upon in employment contracts through collective bargaining will inevitably affect the faculty members. Because of this, much attention and thought should be put into the employment contracts. An action brought by multiple faculty members as either a class-action suit or class arbitration not only requires greater attention by the college or university administration, but also carries more weight as the faculty fight on a united front instead of at an individual level, which is easier to ignore.[180] Functioning as part of a larger group will likely lead to better results because of the power that strength in numbers provides.

College and university administrators or members of a board of regents have a more complicated position than the faculty, because unlike the faculty, board members and administrators are not personally driven to fight for their own best interest financially, but should consider all involved and attempt to make the best decision for the college or university and its students. It is important for contracts to be created with the best interests of the college or university and its students in mind, but due care must also be taken when budgetary concerns arise and legal action becomes inevitable, either in the form of faculty-brought lawsuits or student-initiated ones. While student-driven lawsuits have not been successful thus far after a program or degree has been cut, colleges and universities must use good

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177. *Id.* at 60.
178. Dougherty, *supra* note 21, at 60.
179. Kerr, *supra* note 128.
180. *Id.*

faith in making objective decisions based on reliable information. If it does not act in good faith in response to a financial crisis, a college or university could lose in the subsequent litigation over its response to that crisis. This could cost the institution more than it expected to save by eliminating the program or degree. Students are the primary reason, aside from research, that colleges and universities open their doors. So, even discounting the harm that could come of a successful lawsuit, the students' needs should be considered when making choices that will inevitably affect them.

With the overwhelming shift in society towards use of information technology, colleges and universities have followed suit. To some currently unknowable extent, what can be virtually replaced will be.[181] With this being said, it is more important than ever that colleges and universities exhibit financial stability. While online programs are less costly to offer, they also generate less revenue per student enrolled; so colleges and universities cannot merely shift their costs to these new online programs, hoping to have high enrollment trends to counteract the lower tuition rates attached to these programs. Because of this, colleges and universities must exercise even more care when entering into contracts with faculty, and when making spending decisions. As previously discussed, state funding alone is not enough to offset the costs associated with running a college or university, and it is the return on a college's or university's investments that often fund its programs. Because the economy has been improving since the economic downturn that began in 2007, colleges and universities can make smart choices in their investment practices, but that alone will not counteract acting in bad faith when dealing with both faculty and students who challenge retrenchment decisions. As *Beukas* demonstrates, if a college or university does not act in good faith, students may be successful in suing the college or university, and such a defeat in litigation would be sure to harm the financial standing of the college or university.[182] The same can be said of suits brought by faculty members. Some of those suits have already proven successful in an array of cases including *Bloomfield College*.[183] While the Florida State University case

181. In January 2013 the California State University System piloted online courses for credit, at a low rate of $150 per course. Three weeks later, The American Council on Education, a group of around 1,800 accredited colleges and universities announced it was also piloting inexpensive online courses at universities including Duke and University of Pennsylvania. The University of Wisconsin is also offering a college degree with no class time required. Thus, colleges and universities have been open to offering online courses, and there is no evidence to suggest this trend will stop. Gregory Ferenstein, *Online Education is Replacing Physical Colleges at a Crazy Fast Pace*, TECHCRUNCH (Feb. 11 2013), http://techcrunch.com/2013/02/11/a-huge-month-online-education-is-replacing-physical-colleges-at-a-crazy-fast-pace/.

182. Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ., 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991).

183. Am. Ass'n of Univ. Professors v. Bloomfield Coll., 346 A.2d 615, 617 (N.J.

study was resolved by arbitration, that result was also favorable to the faculty members in question.[184]

To ensure that there are fair dealings within faculty relations, it is important for the college or university to first have a contract that is conducive toward making the hard decisions that the institution will be faced with in the reality of tough financial times. Every contract of this sort imposes upon each party a duty of good faith and fair dealing within both the performance and enforcement of the contract.[185] Good faith performance or enforcement emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.[186] Within good faith, the parties are required to act in accordance with the contract and are forbidden intentionally to try to break a contract provision or purposefully to mislead the other party. While college and university administrations should use good faith in their dealings, they need provisions in their contract with the faculty that gives the administration some latitude in making hard decisions in tough financial times.[187] On the other hand, when notice rights and shared governance are built into the contract, faculty members are able to be involved in the reorganization and layoff process when financial exigency and retrenchment loom.[188] If the contract is too favorable to the administration when it comes to handling exigent circumstances, the faculty may be unable to participate meaningfully in the decision-making process. When a contract with the faculty gives the faulty a meaningful role in the resolution of the hard questions generated by exigent financial circumstances, the resulting decisions are likely to be better overall than would be the ones reached by an administration that was able to ignore the faculty as it made decisions of this sort.

In order to ensure fair dealings with students, colleges and universities should at the very least provide methods by which the student can be made whole and have a new alternative if their department is terminated. While student participation is not necessary as a legal matter when retrenchment decisions are being made, using a more transparent process like the one that the University System of Georgia is employing in the implementation of its mergers is also helpful in ensuring that the students' concerns are met.[189] While the Georgia merger decision was made behind closed doors, which generated community outrage, by allowing faculty, students, alumni and

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Super. Ct. App. Div. 1975).

184. Fla. State Univ. Bd. of Trustees, *supra* note 127.

185. RESTATEMENT (SECOND) OF CONTRACTS §205 (1981).

186. *Id.*

187. Dougherty, *supra* note 21, at 52.

188. *See id.*

189. Rivard, *supra* note 103.

others in the actual merging process, the University is not only generating more support, but is more likely to have a resolution that all parties can be happy with.[190] Instead of each side fighting against the others, they can work together in order to arrive at a mutually beneficial solution. This solution can also be cost-effective, and can therefore allow the college or university to proceed in a manner that is best for the students and faculty alike. An approach of this sort may allow institutions to avoid program closures, as well as disputable layoffs that can be detrimental to both the college or university and its students.

VI. CONCLUSION

While budget cuts and layoffs are never a desired outcome, the true purpose of higher education must be maintained: to conduct meaningful research while also educating students who wish to better their own understanding and be able to apply this understanding to their everyday lives. The purpose of colleges and universities is not to create jobs for people in the field of higher education, even though this sort of job creation is a positive side effect of the presence of a college or university in a community. This being said, it is indisputable that there are multiple sides within faculty and college and university relations, and faculty relations must be considered in order to uphold the institution's purpose. Not only must the faculty and administration perspectives be taken into consideration, but the effect on the student population must also be considered in decisions to cut departments, to fire faculty and staff, and to merge current colleges and universities. The mission statements and creeds of various institutions considered in my case studies present those institutions as places that strive to employ individuals who "[take] pride in working at a university that is academically strong, diverse in perspective and allows students to combine activities and classes into a unique, personalized college experience."[191] One of those mission statements describes the ideal student as "someone who sees the value of balancing rigorous study and individual development."[192] Other creeds state that "academic institutions exist, among other reasons, to discover, advance and transmit knowledge and to develop in their students, faculty and staff the capacity for creative and critical thought."[193] These creeds, among numerous others, do not vow to keep budgets low and use as many cost-saving techniques as possible. The mission of colleges and universities, as

190. *Id.*

191. *Wolves Creed*, UNIV. OF WEST GA., http://uwgsports.com/sports/2011/11/17/GEN_1117112622.aspx (last visited July 30, 2014).

192. *Id.*

193. *VCU Creed: Philosophy for an Academic Community*, VA. COMMONWEALTH UNIV., http://www.vcu.edu/vcu/creed.php (last visited July 30, 2014).

told through their creeds and mission statements, focuses on students' needs and on research objectives. Both of those considerations should remain at the forefront when difficult decisions are being made. In deciding the best possible courses of action, the entire spectrum of those affected should be considered. In order to arrive at the best course of action a college or university should take, the perspectives of the faculty, the administration, and the students into account.

The fact that student initiated lawsuits have not been successful is simultaneously encouraging and concerning. It is positive because courts require that colleges and universities exercise good faith during decision-making that may be adverse to students. There have not yet been instances in which a college or university has been proven not to have acted in good faith in its dealings with students. The lack of success of student-initiated lawsuits is somewhat disconcerting in that the lack of success could cause college and university administrators to believe they can get away with some degree of bad faith (e.g., acting arbitrarily or failing to give prompt notice) in their decision-making process. It must also be assessed whether or not the threshold a student plaintiff must surpass to prove bad faith is too demanding, thereby tolerating improper practices in the relationship between college and university administrators and students. If this is the case, then the only remedy for students is to implore their legislators to develop stricter guidelines that public college and university administrators in their state must abide by when deciding which programs, degrees, colleges and universities within their system should be cut and which should continue to receive funds.

Financial instability cannot merely be dismissed and forgotten, but must be dealt with impartially and strategically. Complying with contract clauses from the very inception of employment and using good faith when making tough decisions allows colleges and universities to avoid liability in the event of litigation or arbitration. In any event, no matter what the cure, every side of the argument should be able to have participation on some level. Even the University System of Georgia, which has been criticized for making primary decisions behind closed doors, sought participation from the community, faculty, and students in the actual merger process. Florida State University, because it did not use good faith in its financially driven decisions, had to reinstate their tenured faculty. Virginia's legislature is allowing for more institutional autonomy so long as the decisions are in accordance with the state's demands of those institutions. Thus, within each case study, each side of the argument was taken into consideration. While there is no right or wrong prescription, the heart of the conversation lies with consideration for all sides, and it is important that college and university communities continue to employ devices that do not inhibit involvement. While that involvement can be constructive even when it is available only after the basic decisions have been made, it is much more likely to produce a satisfying result when it is invited at the outset of the decision-making process.