THE LAWS OF PUBLIC HIGHER EDUCATION RETRENCHMENT

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American states have underinvested in public higher education for decades, spurring tuition increases that have in turn fueled an unprecedented rise in student debt. Most scholars have looked to ideology and partisanship to help explain this trend. However, existing studies have yet to provide a satisfactory account of why states led by both parties have exhibited the same spending patterns. This Article argues that to understand retrenchment, scholars must scrutinize the laws that shape legislators' budget choices. Through comparative histories of California and Virginia, interviews with eighteen state policymakers, and quantitative data, this analysis shows that decreased funding for public colleges and universities can be traced to three legal constructs: competing health, K-12 education, and prison expenditure mandates; outdated and inefficient tax systems; and campaign finance and lobbying rules that have allowed wealthy interests to overwhelm college advocates' voices. These findings should encourage scholars to examine the unintended consequences that legal frameworks governing one policy area can have on another. The results also have important implications for those wishing to revitalize public higher education: reformers should shift their focus from individual elections and budget battles to structural changes, beginning with revisions to state laws guiding appropriations, taxation, and political participation.

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Introduction

American public higher education has become significantly more expensive. Between 1987 and 2017, average tuition and fees at public two-year colleges climbed from $1,441 to $3,156 in real terms.[1] At

1. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Stat., Table 330.10: Average Undergraduate Tuition and Fees and Room and Board Rates Charged for Full-Time Students in Degree-Granting Postsecondary Institutions, by

public four-year institutions, these prices swelled from an average of $3,084 to $8,804.[2] Stagnant wages have magnified the scale of these increases for low-income students. Between 1971 and 2011, the cost of attending a public four-year college rose from 6 percent to 9 percent of the highest quintile family's income.[3] By contrast, this burden nearly tripled for American families in the lowest quintile—from 42 percent to 114 percent of their income.[4]

As prices have soared, access has dwindled. Working-class students pursuing a degree have found it more difficult to graduate.[5] Many low-income Americans have foregone a college education because of their aversion to high prices.[6] Public colleges and universities have traditionally been powerful engines of social mobility, educating nearly 75 percent of American students.[7] The upward trends in price at these institutions have therefore helped stall the national attainment

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LEVEL AND CONTROL OF INSTITUTION: SELECTED YEARS, 1963-64 THROUGH 2016-17 (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_330.10.asp.

2. *Id.*

3. SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 121 (2014).

4. *Id.*

5. *See generally* JEAN JOHNSON, JON ROCHKIND, AMBER N. OTT & SAMANTHA DUPONT, PUBLIC AGENDA, WITH THEIR WHOLE LIVES AHEAD OF THEM: MYTHS AND REALITIES ABOUT WHY SO MANY STUDENTS FAIL TO FINISH COLLEGE (2009), https://www.publicagenda.org/files/theirwholelivesaheadofthem.pdf.

6. *See generally* Donald E. Heller, *Student Price Response in Higher Education: An Update to Leslie and Brinkman*, 68 J. HIGHER EDUC. 624, 650 (1997) (surveying a range of studies and concluding that "every $100 increase in tuition results in a drop in enrollments of 0.5 to 1.0 percentage points across all types of [higher education] institution," and that this effect may become greater as prices rise further); Donald E. Heller, *The Effects of Tuition and State Financial Aid on Public College Enrollment*, 23 REV. HIGHER EDUC. 65 (1999) (showing that prospective students base their enrollment decisions on family resources and a college's net costs); Mark C. Berger & Thomas Kostal, *Financial Resources, Regulation, and Enrollment in US Public Higher Education*, 21 ECON. EDUC. REV. 101 (2002) (showing that tuition and average wage levels significantly affect enrollment demand); PAUL TAYLOR, KIM PARKER, RICHARD FRY, D'VERA COHN, WENDY WANG, GABRIEL VELASCO & DANIEL DOCKTERMAN, PEW RESEARCH CTR., IS COLLEGE WORTH IT? (2011), https://www.pewresearch.org/wp-content/uploads/sites/3/2011/05/higher-ed-report.pdf (emphasizing that three-quarters of Americans view college as unaffordable and that finances are the main barrier to obtaining a higher education among U.S. adults ages 18 to 34 who are not already in school).

7. Sarah Reber, Chenoah Sinclair & Hannah Van Drie, *Public Colleges Are the Workhorses of Middle-Class Mobility*, BROOKINGS INST. (July 22, 2020), https://www.brookings.edu/blog/up-front/2020/07/22/public-colleges-are-the-workhorses-of-middle-class-mobility; U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., TABLE 307:20 FULL-TIME-EQUIVALENT FALL ENROLLMENT IN DEGREE-GRANTING POSTSECONDARY INSTITUTIONS, BY CONTROL AND LEVEL OF INSTITUTION AND STATE OR JURISDICTION: SELECTED YEARS, 2000, 2010, AND 2016 (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_307.20.aspp.

rate.[8] While many advanced countries lifted the proportion of young adults with a bachelor's degree to between 35 percent and 45 percent over the past generation, this figure languished at around 33 percent in the United States (Figure 1).[9]

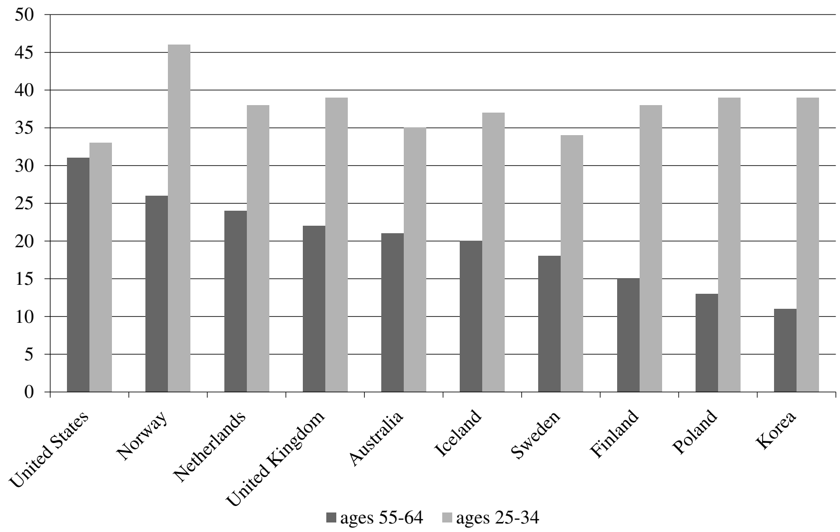

FIGURE 1. PERCENTAGE OF CITIZENS AGES 25-34 AND 55-64 WITH A BACHELOR'S DEGREE OR HIGHER, SELECTED COUNTRIES.

Source: Organisation for Economic Cooperation and Development

Americans fortunate enough to obtain a degree have shouldered a growing debt burden. Between 1989 and 2016, the proportion of young adult households with outstanding student loan debt rose from 15 percent to 46 percent.[10] Their average loan balance also ballooned from \$1,910 to nearly \$17,000 after adjusting for inflation.[11] By the end of 2017, total student loan debt in the United States reached \$1.4 trillion.[12] This debt has diminished young adults' long-term financial prospects, most notably by preventing many from becoming homeowners.[13]

8. *See generally* Mettler, *supra* note 3, at 22; ORG. FOR ECON. COOPERATION AND DEV., EDUCATION AT A GLANCE: OECD INDICATORS, tbl. A1.3a (2012).

9. ORG. FOR ECON. COOPERATION AND DEV., *supra* note 8.

10. *Student Debt Continues to Rise*, PETER G. PETERSON FOUNDATION (Jul. 18, 2018), https://www.pgpf.org/blog/2018/07/the-facts-about-student-debt.

11. *Id*.

12. *Id*.

13. *See generally* Jordan Weissmann, *Student Debt Is Indeed Hurting Homeownership, Federal Reserve Study Finds*, SLATE (Jan. 17, 2019), https://slate.com/business/2019/01/fed-estimates-college-loans-millenials-home-ownership.html.

Although popular debates on the cost of higher education have centered on private colleges' administrative expenses,[14] much of the rise in *public* college and university tuition can be traced to state disinvestment.[15] For decades, U.S. states have reduced funding for tertiary education.[16] Public colleges and universities have made up for the shortfall by raising tuition.[17] Between 1988 and 2013, the average decrease in state spending per full-time-equivalent student actually outpaced the rise in net tuition revenue at public higher education institutions (Figure 2).[18] Scholars probing the roots of the affordability crisis must therefore turn their attention to the state budget process.

14. *See, e.g.*, ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? 5–18 (2010); Glenn Harlan Reynolds, *Beat the Tuition Bloat*, USA TODAY (Feb. 17, 2014), https://www.usatoday.com/story/opinion/2014/02/17/college-tuition-job-students-loan-debt-column/5531461/; Caroline Simon, *Bureaucrats and Buildings: The Case for Why College is So Expensive*, FORBES (Sept. 5, 2017), https://www.forbes.com/sites/carolinesimon/2017/09/05/bureaucrats-and-buildings-the-case-for-why-college-is-so-expensive/#51dd316e456a.

15. *See* STATE HIGHER EDUC. EXEC. OFFICERS ASSOC., STATE HIGHER EDUCATION FINANCE FY 2013 at 19 (2014), https://sheeo.org/wp-content/uploads/2019/03/SHEF_FY13-2.pdf (showing that "net tuition revenue has grown most rapidly as a percentage of total educational revenue in public institutions during periods when constant dollar state support per student has declined"); ROBERT HILTONSMITH, DĒMOS, PULLING UP THE HIGHER-ED LADDER: MYTH AND REALITY IN THE CRISIS OF COLLEGE AFFORDABILITY 1–2 (2015), https://www.demos.org/research/pulling-higher-ed-ladder-myth-and-reality-crisis-college-affordability ("find[ing] that declining state appropriations for higher education is indeed the primary driver of rising tuition, responsible for 79 percent of tuition hikes at public research universities between 2001 and 2011 and 78 percent of tuition hikes at public master's and bachelor's universities over the same decade").

16. STATE HIGHER EDUC. EXEC. OFFICERS ASSOC., *supra* note 15, at 18.

17. *Id.*

18. *Id.*

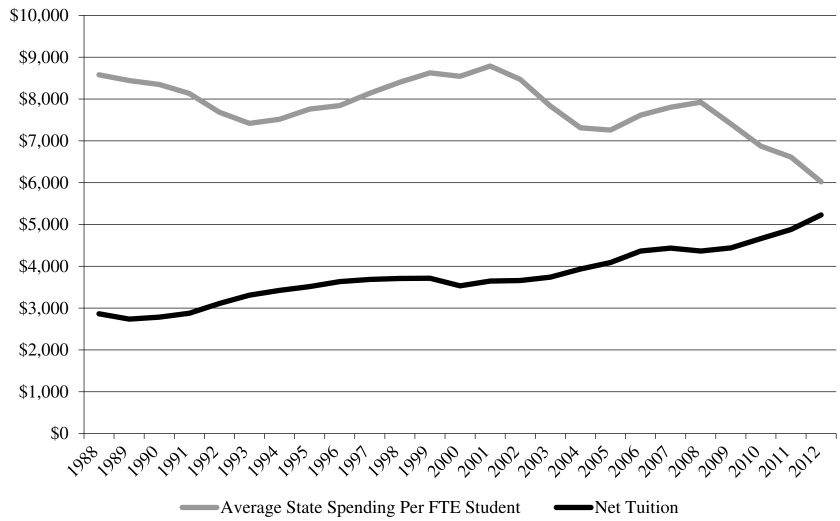

FIGURE 2. AVERAGE NET TUITION REVENUE ACROSS U.S. PUBLIC HIGHER EDUCATION INSTITUTIONS VS. AVERAGE STATE EXPENDITURES PER FULL-TIME EQUIVALENT STUDENT ON PUBLIC HIGHER EDUCATION, ALL U.S. STATES, 1988 TO 2012.

Source: State Higher Education Executive Officers Association

This retrenchment is a fairly recent phenomenon. In the period after World War II, public tertiary instruction systems expanded significantly as states poured money into new campuses and strove to provide their residents with an affordable education.[19] States spent an average of $3.56 in tax revenue per $1,000 of personal income on public higher education in 1961; by 1979, that rate had increased to $10.42 (Figure 3).[20] Accordingly, the number of public four-year colleges climbed from 367 to 464 and the number of community colleges

19. *See* Marvin Lazerson, *The Disappointments of Success: Higher Education After World War II*, 559 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 66–68 (1998) (explaining that "[b]y almost any measure, the half-century since 1945 was good for higher education . . . . Spending on higher education soared . . . . The numbers tell a compelling story: more students, more money, more status.").

20. PELL INST., STATE INVESTMENT AND DISINVESTMENT IN HIGHER EDUCATION, 1961 TO 2015 1 (2015), https://www.starvingthebeast.net/Feb%202015%20PSO%20Newsletter-State%20Investment%20and%20Disinvestment%20in%20Higher%20Education%201961%20to%202015.pdf.

skyrocketed from 328 to 846.[21] This expansion saw the number of students enrolled in public institutions rise by almost 7 million.[22]

Beginning in the late 1970s, however, state support for public higher education began to erode. Although aggregate spending continued to inch upward over the past three and a half decades, it did not keep pace with growing populations or demand for a postsecondary degree.[23] As a result, in 2013, states invested an average of just $5.52 per $1,000 of personal income on public higher education—the lowest level since 1965 (Figure 3).[24] Between just 1990 and 2010, state spending on higher education per full-time equivalent (FTE) student fell from $8,608 to $6,360 in real terms.[25]

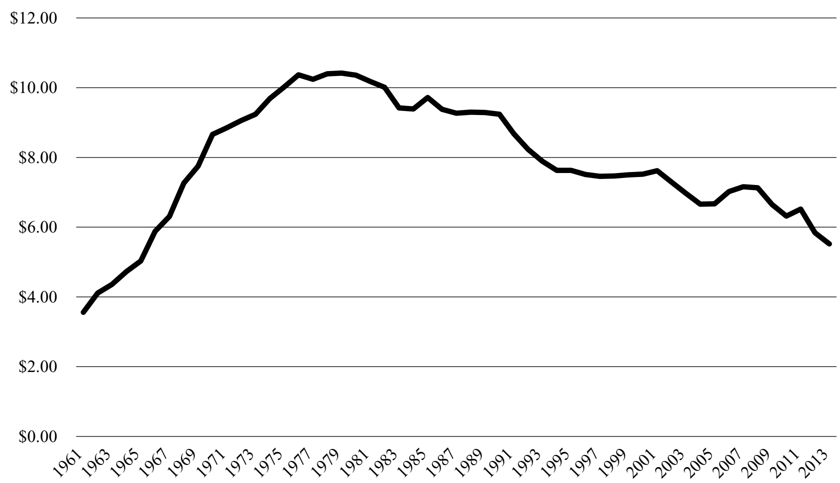

FIGURE 3. AVERAGE STATE SPENDING ON PUBLIC HIGHER EDUCATION PER $1,000 OF STATE PERSONAL INCOME, ALL U.S. STATES, 1961 TO 2014.

Source: Pell Institute for the Study of Higher Education

21. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 2012, at 443 tbl.306 (2013), https://nces.ed.gov/programs/digest/d12/tables/dt12_306.asp.

22. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 2012, at 311 tbl.221(2013), https://nces.ed.gov/programs/digest/d12/tables/dt12_221.asp.

23. *See* JOHN QUINTERNO, DĒMOS, THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE OF THE MIDDLE CLASS 18 (2012), https://www.demos.org/sites/default/files/publications/TheGreatCostShift_Demos.pdf.

24. PELL INST., STATE INVESTMENT AND DISINVESTMENT IN HIGHER EDUCATION, *supra* note 20, at 1.

25. QUINTERNO, *supra* note 23, at 18.

This pronounced retrenchment was the product of budget cuts across nearly every state in the union. From 1990 to 2012, 43 out of 50 states decreased public college and university funding per full-time-equivalent student.[26] Not one state invested additional tax revenue in public higher education per $1,000 of personal income.[27]

This degree of uniformity presents a puzzle. American states' cultural, historical, and political attributes vary widely. In this era of increasingly polarized political parties, the similarity between Democratic-controlled and Republican-controlled states on this issue is especially striking. Why did legislators across such different states repeatedly lower funding for public higher education over the past three decades?

Americans could be forgiven for wanting to pin the blame on officeholders and parties unfriendly to public higher education. The media tends to portray political decisions as the outcome of titanic battles between the parties' standard-bearers.[28] This gives people the impression that the only part of the policy process that matters is which candidates they vote for.[29] Political scientists have also devoted considerable attention to the ways in which partisanship may have driven retrenchment.[30] Relying on theories positing that Democrats are more generous to public colleges than Republicans, they have spent substantial time searching for correlations between Republican legislative and gubernatorial control and decreased funding for public higher education.[31]

This Article argues that this conception of politics is too narrow, and that fully understanding retrenchment requires a study of the *laws* that shape budget choices. Although past research has suggested that states' legal environments have helped determine public postsecondary funding patterns, uncertainty surrounds both the extent of these laws' contributions and the manner in which they have impacted ap-

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26. *Id.* at 16.

27. *Id.*

28. *See generally* JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010). Hacker and Pierson call this "conventional narrative of election-driven change . . . 'politics as electoral spectacle,'" which centers on "the huge shows we call elections, circuses that bring together two broad groups under a red-white-and-blue tent. In the audience sits a fairly inchoate mass of voters. In the ring are the politicians, individual showmen who seek their favor." *Id.* at 100–101.

29. *See id.* at 101 (noting that "[t]his view of politics is . . . reassuring" because it conveys that "[i]f politicians are doing something, it must be because voters want them to.").

30. *See infra*, Section I(A).

31. *Id.*

propriations.[32] State budgeting is a complex and incremental process in which legislators often struggle to discern long-term trends.[33] Existing rules and procedures thereby have the potential to both go unnoticed and have an outsized effect on spending outcomes.[34] Through in-depth interviews with policymakers and comparative historical analysis of two dissimilar states, California and Virginia, this article shows that legal constructs have played the defining role in public higher education disinvestment.[35]

Regardless of party affiliation, most legislators did not actively seek to defund public colleges over the past thirty years. Instead, they found their ability to support the sector progressively constrained by three sets of laws: (1) competing budget mandates, especially for Medicaid; (2) eroding tax systems; and (3) lobbying and campaign finance rules that privilege wealthy interests over higher education proponents.[36] Partisanship continued to matter, just not in the way most scholars have assumed; rather than directly inform lawmakers' stance toward public higher education, ideological forces hardened the laws that restricted year-to-year budget choices.[37] Specifically, conservative activists advanced constitutional changes and legislation that reduced state tax systems' capacity to fund public services.[38] These findings suggest that public higher education supporters should focus not just on individual elections, but on structural reforms as well.

The discussion expands these claims in four parts. Part I surveys existing research on public higher education retrenchment and highlights the need to advance a legal policy analysis. Part II describes this study's comparative methodology. Part III scrutinizes the laws that have driven public college and university cuts in California and Virginia. Part IV then considers which reforms are likely needed to reinvest in the sector.

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32. *See infra*, Section I.
33. *See infra*, Section I(B).
34. *Id.*
35. *See infra*, Section III.
36. *Id.*
37. *Id.*
38. *Id.*

I.
WHAT WE KNOW—AND DON'T KNOW—ABOUT PUBLIC HIGHER EDUCATION RETRENCHMENT

Over the past thirty years, political scientists have made major strides in uncovering the determinants of state expenditures on public higher education. Using statistical tools designed to isolate the impact of causal forces on legislators' budget choices, they have honed a list of predictors that significantly correlate with state spending on the sector. Their results have pointed to the importance of lawmakers' partisan tilt and legal constraints on legislative choices.

Nonetheless, serious questions remain. While this literature has suggested that Democrats spend more on public postsecondary education than Republicans, it has not been able to explain why states helmed by both parties have drastically retrenched public higher education funding over the past generation. Furthermore, although scholarly emphasis on policymakers' legal environment has provided clues as to what may have driven convergence, reliance on statistical correlations has precluded close scrutiny of the mechanisms by which law has promoted disinvestment. These are gaps that legal policy analysis is primed to fill.

A. What We Know

Studies have shown that public higher education has been treated like a "balance wheel" during economic downturns.[39] That is, in the wake of recessions, public colleges and universities have experienced disproportionately large cuts relative to other state programs. This dynamic is visible in Figure 4 below (and in Figure 2 in the introduction). Public postsecondary expenditures per $1,000 of personal income have noticeably fallen during difficult economic times. They have also failed to reach their pre-recession peaks during recovery periods, leading to long-term retrenchment.

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39. *See* Harold A. Hovey, *State Spending for Higher Education in the Next Decade: The Battle To Sustain Current Support*, NAT'L CTR. FOR PUB. POL'Y & HIGHER EDUC., at 19 (July 1999), https://eric.ed.gov/?id=ed439633 (observing that "[t]he fluctuations in higher education spending stem from use of higher education as a 'balance wheel in state finance[,]' whereby "budgets in higher education have been cut disproportionately when state fiscal circumstances are weak"); Brad R. Humphreys, *Do Business Cycles Affect State Appropriations to Higher Education?*, 67 S. ECON. J. 398 (2000); Jennifer A. Delaney & William R. Doyle, *State Spending on Higher Education: Testing the Balance Wheel Over Time*, 36 J. EDUC. FIN. 343 (2011).

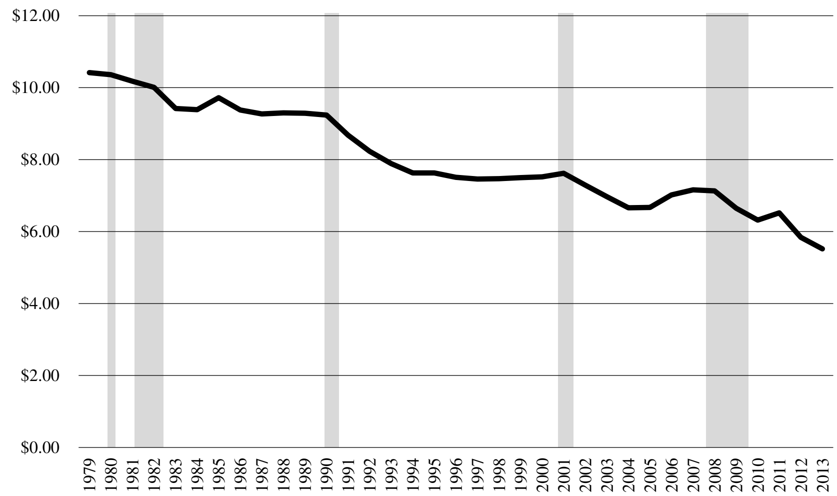

FIGURE 4. AVERAGE STATE SPENDING ON PUBLIC HIGHER EDUCATION PER $1,000 OF STATE PERSONAL INCOME, ALL U.S. STATES, 1979 TO 2013 (WITH RECESSIONS HIGHLIGHTED).

Source: Pell Institute for the Study of Higher Education

This pattern has pushed scholars to investigate the forces that influence states' spending decisions. A large body of research has examined whether lawmakers' party affiliations have driven them to deprioritize public higher education.[40] This research rests on theories

40. *See, e.g.*, THOMAS J. KANE, PETER R. ORSZAG & DAVID GUNTER, BROOKINGS INST., STATE FISCAL CONSTRAINTS AND HIGHER EDUCATION SPENDING (2003), http://webarchive.urban.org/UploadedPDF/310787_TPC_DP11.pdf [hereinafter Kane, Orszag, & Gunter, *State Fiscal Constraints and Higher Education Spending*] (examining a range of potential political, economic, and social predictors of state higher education spending, including partisanship); Thomas J. Kane, Peter R. Orszag, Emil Apostolov, Robert P. Inman & Andrew Reschovsky, *Higher Education Appropriations and Public Universities: Role of Medicaid and the Business Cycle*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 99 (2005) [hereinafter Kane et al., *Higher Education Appropriations and Public Universities*] (same); Robert B. Archibald & David H. Feldman, *State Higher Education Spending and the Tax Revolt*, 77 J. HIGHER EDUC. 618 (2006) (same); David Weerts & Justin Ronca, *Determinants of State Appropriations for Higher Education from 1985–2005: An Organizational Theory Analysis,* 30 (Wis. Ctr. for the Advancement of Postsecondary Educ., Working Paper No. 013, 2008), https://minds.wisconsin.edu/bitstream/handle/1793/43605/WP013.pdf [hereinafter Weerts & Ronca, *Determinants of State Appropriations for Higher Education from 1985–2005*] (same); Michael K. McLendon, James C. Hearn & Christine G. Mokher, *Partisans, Professionals, and Power: The Role of Political Factors in State Higher Education Funding*, 80 J. HIGHER EDUC. 686 (2009) (same); David A. Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, 51 RES. HIGHER EDUC. 416 (2010) (same); David A. Tandberg, *Interest Groups and Governmental Institutions: The Politics of State Funding of Public Higher Education*, 24 EDUC. POL'Y 735 (2010) [hereinafter Tandberg, *Interest Groups and Governmental Institutions*] (same); David Weerts & Justin Ronca, *Understanding Differences in*

positing that left-leaning parties are more generous toward public education because it benefits their low-income constituents, while right-leaning parties shy away from the sector because it costs their wealthy voters too much in taxes.[41] Most studies have indeed found that Democratic legislatures have awarded more funding to public postsecondary education than their Republican counterparts.[42]

Yet this finding cannot adequately account for widespread retrenchment. First, it is not a unanimous result—several studies have concluded that Republicans, not Democrats, have apportioned more funds to the sector.[43] Some of the most recent entries in this literature have found no statistically significant relationship between partisanship and public higher education expenditures.[44] Second, the statistical

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State Support for Higher Education Across States, Sectors, and Institutions: A Longitudinal Study, 83 J. HIGHER EDUC. 155 (2012) (same); Luciana Dar, *The Political Dynamics of Higher Education Policy*, 83 J. HIGHER EDUC. 769 (2012) (same); Erik C. Ness & David A. Tandberg, *The Determinants of State Spending on Higher Education: How Capital Project Funding Differs from General Fund Appropriations*, 83 J. Higher Educ. 769 (2012) (same); David A. Tandberg, *The Conditioning Role of State Higher Education Governance Structures*, 84 J. HIGHER EDUC. 506 (2013) (same); Michael K. McLendon, David A. Tandberg & Nicholas W. Hillman, *Financing College Opportunity: Factors Influencing State Spending on Student Financial Aid and Campus Appropriations, 1990 Through 2010*, 655 ANNALS AM. ACAD. POL. & SOC. SCI. 143 (2014) (same).

41. *See generally* Douglas A. Hibbs, *Political Parties and Macroeconomic Policy*, 71 AM. POL. SCI. REV. 1467 (1977); DOUGLAS A. HIBBS, THE POLITICAL ECONOMY OF INDUSTRIAL DEMOCRACIES (1987); Douglas A. Hibbs, *Partisan Theory After Fifteen Years*, 8 EUR. J. POL. ECON. 361 (1992); Francis G. Castles, *Explaining Public Education Expenditure in OECD Nations*, 17 EUR. J. POL. RES. 431 (1989); Carles Boix, *Political Parties and the Supply Side of the Economy: The Provision of Physical and Human Capital in Advanced Economies, 1960-90*, 41 AM. J. POL. SCI. 814 (1997); Marius R. Busemeyer, *Social Democrats and the New Partisan Politics of Public Investment in Education*, 16 J. EUR. PUB. POL'Y 107 (2009).

42. *See, e.g.*, Kane, Orszag, & Gunter, *State Fiscal Constraints and Higher Education Spending* at 11; Archibald & Feldman, *supra* note 40, at 635; McLendon et. al., *Partisans, Professionals, and Power: The Role of Political Factors in State Higher Education Funding*, *supra* note 40, at 690; Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, *supra* note 40, at 424; Tandberg, *Interest Groups and Governmental Institutions: The Politics of State Funding of Public Higher Education*, *supra* note 40, at 764; Tandberg, *The Conditioning Role of State Higher Education Governance Structures*, *supra* note 40, at 513; McLendon et al., *Financing College Opportunity: Factors Influencing State Spending on Student Financial Aid and Campus Appropriations, 1990 Through 2010*, *supra* note 40, at 158.

43. Weerts & Ronca, *Determinants of State Appropriations for Higher Education from 1985–2005* (2008), *supra* note 40, at 29; Weerts & Ronca, *Understanding Differences in State Support for Higher Education Across States, Sectors, and Institutions: A Longitudinal Study*, *supra* note 40, at 168; Dar, *supra* note 40, at 786; Ness & Tandberg, *supra* note 40, at 350.

44. *See* Robert C. Lowry, *Subsidizing Institutions vs. Outputs vs. Individuals: States' Choices for Financing Public Postsecondary Education*, 26 J. PUB. ADMIN. RES. & THEORY 197, 203 (2016); David A. Tandberg, Jacob T. Fowles & Michael K.

correlations these studies have relied on have only accounted for funding differences *at the margins*. Regressions are designed to isolate how certain variables drive distinctions between cases while holding other predictors constant, not to explore how general causal forces might interact to promote similar outcomes. Even taking as true that Democrats have cut public postsecondary education budgets less severely than Republicans, regression-based analyses have not explained why most states have dramatically retrenched the sector regardless of which party has held power.

The fact that both Republicans and Democrats have overseen significant cuts to public higher education suggests that forces beyond party politics or ideology are at work. Here, the literature provides an especially useful baseline. Over time, researchers have examined how the parameters of the state budget process have shaped legislators' spending choices. Political scientists refer to these arrangements as "institutions."[45] Legal scholars will know many of them as laws—namely constitutional amendments, legislation, court decisions, and regulations.

Scholars have unearthed five potentially significant categories of such laws. First, studies have suggested that laws mandating spending in particular areas reduce funds available for discretionary programs such as public higher education. These include Medicaid,[46] which provides healthcare coverage for low-income Americans; prison outlays inflated by minimum sentencing laws;[47] and K-12 expenditures locked

McLendon, *The Governor and the State Higher Education Executive Officer: How the Relationship Shapes State Financial Support for Higher Education*, 88 J. Higher Educ. 110, 126 (2017); Amy Y. Li, *Dramatic Declines in Higher Education Appropriations: State Conditions for Budget Punctuations*, 58 Res. Higher Educ. 395, 416 (2017).

45. *See* Tandberg, *Interest Groups and Governmental Institutions*, *supra* note 40, at 738–741.

46. *See* Kane, Orszag, & Gunter, *State Fiscal Constraints and Higher Education Spending*, *supra* note 40 at 11; Albert A. Okunade, *What Factors Influence State Appropriations for Public Higher Education in the United States?*, 30 J. Educ. Fin. 123, 124 (2004); Michael J. Rizzo, *State Preferences for Higher Education Spending: A Panel Data Analysis*, 1977–2001, at 6 (Nov. 14, 2004), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.556.711&rep=rep1&type=pdf; Kane et al., *Higher Education Appropriations and Public Universities*, *supra* note 40 at 103–07; Weerts & Ronca, *Determinants of State Appropriations for Higher Education from 1985–2005*, *supra* note 40, at 30; McLendon et al., *supra* note 40, at 687; Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, *supra* note 40, at 427; Tandberg, *Interest Groups and Governmental Institutions: The Politics of State Funding of Public Higher Education*, *supra* note 40, at 756–59, 768; Ness & Tandberg, *supra* note 40, at 347.

47. *See* Okunade, *supra* note 46, at 128; Weerts & Ronca, *Determinants of State Appropriations for Higher Education from 1985–2005*, *supra* note 40, at 30; Weerts

in by state constitutions and court decisions that set a budgetary floor for elementary and secondary schools.[48]

Second, studies have shown that laws restricting state tax revenue negatively correlate with spending on public higher education. These include Tax and Expenditure Limitations (or TELs), which limit state revenue and/or spending growth to a fixed target, and legislative Super-Majority Requirements (or SMRs) to increase taxes.[49] These laws also comprise tax arrangements that have been allowed to fall out of step with changes in the economy, such as sales taxes and levies on corporate income.[50]

Third, studies have suggested that the very ways in which legislatures are organized affect their ability to support public higher education. Some scholars have unearthed a positive correlation between how "professionalized" a state legislature is and how much funding it accords public colleges and universities.[51] Political scientists deem a legislature more professionalized the more it resembles the U.S. Congress—which is to say the better resourced it is, the more its staff is paid, and the longer its legislative sessions last.[52]

Fourth, studies have found a positive link between how centralized a state's public college coordinating board is and spending on public higher education.[53] Many states have such coordinating boards,

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& Ronca, *Understanding Differences in State Support for Higher Education Across States, Sectors, and Institutions: A Longitudinal Study*, *supra* note 40, at 167.

48. *See* Rizzo, *supra* note 46, at 53; David Weerts & Justin Ronca, *Examining Differences in State Support for Higher Education: A Comparative Study of State Appropriations for Research Universities*, 77 J. HIGHER EDUC. 935, 956–58 (2006).

49. *See generally* Archibald & Feldman, *supra* note 40, at 618; Gabriel R. Serna & Gretchen Harris, *Higher Education Expenditures and State Balanced Budget Requirements: Is There a Relationship?*, 39 J. EDUC. FIN. 175 (2014); Gabriel R. Serna, *Do Tax Revolt Provisions Influence Tuition and Fee Levels? Evidence from the States using Recent Panel Data*, 41 J. EDUC. FIN. 48 (2015).

50. *See* Jeremy Pilaar, *Starving the Statehouse: The Hidden Tax Policies Behind States' Long-Run Fiscal Crises*, 37 YALE L. & POL'Y REV. 345, 368–78 (2018).

51. *See* David A. Tandberg, *The Politics of State Higher Education Funding*, 5 HIGHER EDUC. REV. 1, 24 (2008); McLendon, Hearn, & Mokher, *supra* note 40, at 700; Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, *supra* note 40, at 437; Tandberg, *Interest Groups and Governmental Institutions: The Politics of State Funding of Public Higher Education*, *supra* note 40, at 761; Ness & Tandberg, *supra* note 40, at 349; McLendon, Tandberg, & Hillman, *supra* note 40, at 158; Tandberg, et al., *supra* note 44, at 127.

52. *See* Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211 (2007).

53. *See* Robert C. Lowry, *The Effects of State Political Interests and Campus Outputs on Public University Revenues*, 20 ECON. EDUC. REV. 105, 117 (2001); Jack H. Knott & A. Abigail Payne, *The Impact of State Governance Structures on Management and Performance of Public Organizations: A Study of Higher Education Institutions*, 23 J. POL'Y ANALYSIS & MANAGEMENT 13, 22 (2004).

which are agencies that help manage their public postsecondary education systems.[54] Depending on how these boards are structured, decision-making power can be more or less dispersed.[55]

Fifth, a small number of studies has suggested that the rules structuring interest groups' access to politicians have impacted public higher education appropriations.[56] These studies have found that states in which pro-higher education organizations make up a relatively large share of the total number of interest groups also tend to spend more on public colleges.[57]

B. Gaps to Fill

Despite significantly advancing knowledge in this arena, the foregoing research has not provided a full picture of retrenchment. Considerable disagreement persists with respect to the importance of each legal construct. Though small in number, some studies have questioned whether prison[58] and K–12[59] spending mandates have affected public higher education expenditures. Others have undermined the notion that more professionalized legislatures,[60] centralized coordinating boards,[61] and sizeable higher education lobbies[62] positively correlate with support for public colleges and universities. Research on tax law's role in driving disinvestment, meanwhile, has remained scarce.[63]

Just as importantly, because these studies have employed high-level statistical correlations, their authors have only been able to hy-

54. *See* Robert O. Berdahl, *Problems in Evaluating Statewide Boards*, NEW DIRECTIONS FOR INSTITUTIONAL RES. 1, 3 (1975); Aims C. McGuinness, Jr., *The Functions and Evolution of State Coordination and Governance in Postsecondary Education*, *in* STATE POSTSECONDARY EDUCATION STRUCTURES SOURCEBOOK 2 (Educ. Comm'n of the States ed., 1997).

55. *Id.*

56. *See, e.g.*, Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, *supra* note 40, at 434; Tandberg, *Interest Groups and Governmental Institutions: The Politics of State Funding of Public Higher Education*, *supra* note 40, at 760; Tandberg, *The Conditioning Role of State Higher Education Governance Structures*, *supra* note 40, at 530–31.

57. *Id.*

58. *See, e.g.*, Kane, Orszag, & Gunter, *supra* note 40, at 11.

59. *See, e.g.*, Marvin A. Titus, *The Production of Bachelor's Degrees and Financial Aspects of State Higher Education Policy: A Dynamic Analysis*, 80 J. HIGHER EDUC. 439, 457 (2009).

60. *See, e.g.*, Ness & Tandberg, *supra* note 40, at 349; Li, *supra* note 44, at 416.

61. *See, e.g.*, Lowry, *supra* note 44, at 204, 206–07 (finding that American public college governance structures had no statistically significant impact on total state government support for public postsecondary education between 1998 and 2009); Li, *supra* note 44, at 416.

62. *See, e.g.*, Tandberg et al., *supra* note 44, at 126.

63. *See* Pilaar, *supra* note 50, at 365–68.

pothesize the mechanisms by which these legal arrangements have shaped public higher education expenditures.[64] They have not investigated these forces or their relationships in depth.[65] As mentioned above, regression analyses have also left unclear how, if at all, legal constructs have interacted with partisanship to promote retrenchment. More qualitative studies—relying on historical data and interviews with policymakers who affected budget decisions—are necessary to uncover how law has influenced decisions to defund the sector and where partisanship fits in.

This more granular approach is especially important because state budgeting is an incremental process.[66] Lawmakers possess limited time each session to make appropriations decisions.[67] The complex nature of agencies' outlays also prevents lawmakers from critically evaluating the entire budget.[68] This pushes many elected officials to focus on year-to-year funding changes to the programs they cherish.[69] In this context, laws that restrict the initial size of annual budgets can easily go unnoticed—and adversely affect other sectors long before legislators realize it. Closely examining these legal constructs is vital to isolating and identifying such effects.

In short, while political scientists have made significant progress in uncovering the roots of public higher education retrenchment, completing the image they have sketched requires a legal perspective. It demands an explicit focus on the emergence, evolution, and interaction of the laws that have constrained legislators' ability to support public postsecondary institutions over the past three decades. The following section explains the methodology this study employs to advance that objective.

II. HOW COMPARATIVE ANALYSIS CAN SHED LIGHT ON RETRENCHMENT

To explain why dissimilar states have defunded public colleges and universities, this study contrasted the cases of California and Vir-

64. *See* Jeremy Pilaar, Race to the Bottom: Why U.S. States Reduced Higher Education Funding in the Past Three Decades 39–41 (May 2015) (unpublished M.Phil. dissertation, University of Oxford) (on file with author).

65. *Id.*

66. *See generally* AARON WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964).

67. *See* DONALD F. KETTL, POLITICS OF THE ADMINISTRATIVE PROCESS 561 (7th Ed., 2018).

68. *Id.*

69. *Id.*

ginia using a Most Different Systems Design (MDSD). An MDSD homes in on the forces driving retrenchment by identifying commonalities between disparate states that feature the same spending patterns.[70] The idea is that the sheer differences between the cases will act as a form of control. Dissimilar polities do not generally display parallel social dynamics or policy outcomes. If a researcher identifies common forces in distinct places that have been acting the same way, it is reasonable to assume that those forces have produced or at least contributed to the converging behavior.[71]

California's and Virginia's shared national culture and analogous higher education sectors facilitated their comparison. In part as a result of a nationwide push to expand and consolidate public higher education in the mid-twentieth century,[72] both states exhibit tiered provision systems. California counts 112 community colleges that grant two-year credentials. It also comprises 23 California State University (CSU) and 10 University of California (UC) campuses that award four-year degrees.[73] Virginia's public postsecondary education system similarly has 23 community colleges and 15 four-year institutions.[74]

Both states inflicted severe austerity on these systems between 1990 and 2013. On a per full-time-enrolled (FTE) student basis, California's spending declined by nearly $2,200 and Virginia's appropriations dropped over $3,300.[75] Similarly, California's spending on public higher education per $1,000 of state personal income fell by

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70. *See* ADAM PRZEWORSKI AND HENRY TEUNE, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY 34–39 (1970); Arend Lijphart, *Comparative Politics and The Comparative Method*, 65 AM. POL. SCI. REV. 682, 687–88 (1971); DANIELE CARAMANI, INTRODUCTION TO THE COMPARATIVE METHOD WITH BOOLEAN ALGEBRA 37 (2009).

71. *See id.*

72. *See generally* ARTHUR M. COHEN & CARRIE B. KISKER, THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM 187–306 (2009) (explaining that during the era of "mass higher education" in the United States, ranging from approximately 1945 to 1975, public research universities, regional universities, comprehensive colleges, and community colleges all grew notably and were increasingly organized by system type).

73. JONI E. FINNEY, CHRISTINA RISO, KATA OROSZ & WILLIAM BOLAND, INST. FOR RES. ON HIGHER EDUC., FROM MASTER PLAN TO MEDIOCRITY: HIGHER EDUCATION PERFORMANCE & POLICY IN CALIFORNIA 6, 10 (2014).

74. TERANCE J. REPHANN, WELDON COOPER CTR. FOR PUB. SERV., STUDY OF THE GROWING ECONOMIC IMPACT OF VIRGINIA PUBLIC HIGHER EDUCATION 3 (2017), https://growth4va.com/wp-content/uploads/2017/08/Higher_ed_report_FINAL.pdf.

75. STEPHANIE STULLICH, IVY MORGAN & OLIVER SCHAK, U.S. DEP'T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 28 (2016), https://files.eric.ed.gov/fulltext/ED571899.pdf (showing state higher education appropriations per FTE student for the 1989–90 and 2012–13 academic years in constant 2013 dollars).

nearly $4 during this period, from $9.99 to $6.00.[76] Virginia's investment per $1,000 of personal income fell by over $5, from $9.55 to $4.51.[77]

From there, however, the resemblances end. California and Virginia differ considerably along most of the parameters identified by the American public higher education finance literature. First, while California's legislature remained in the hands of Democrats between 1990 and 2012, Virginia's generally swung in a more conservative direction.[78] Second, whereas California boasts one of the most professionalized legislatures in the country, Virginia is home to one of the nation's least professionalized assemblies.[79] Third, while California's colleges and universities were governed by a weak Advisory Coordinating Board throughout most of the foregoing period (it was dissolved in 2011), Virginia's institutions of higher learning respond to a more centralized Regulatory Coordinating Board.[80] Fourth, though California lawmakers find themselves bound both by TELs and SMRs when crafting fiscal policy, their counterparts in Virginia face no such restrictions.[81] Finally, California and Virginia developed at geographic extremes and remain as culturally dissimilar as any two states in the nation.[82]

In order to make sense of these states' decisions to defund public higher education, this study looked to the actors who worked in and around their legislatures from the mid-1980s to the mid-2010s. The analysis relied on eighteen expert interviews conducted over the

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76. PELL INST., *supra* note 20, at 13.

77. *Id.* at 23.

78. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, PARTISAN COMPOSITION OF STATE LEGISLATURES 1990–2000 (2015), http://www.ncsl.org/documents/statevote/legiscontrol_1990_2000.pdf; NAT'L CONFERENCE OF STATE LEGISLATURES, PARTISAN COMPOSITION OF STATE LEGISLATURES 2002–2014 (2015), https://www.ncsl.org/documents/statevote/legiscontrol_2002_2014.pdf.

79. *See* Squire, *supra* note 52, at 220 (showing that California had a Squire Index ranking of 3 in 1986 and 1 in both 1996 and 2003, while Virginia had a ranking of 29 in 1986, 27 in 1996, and 32 in 2003).

80. *See* McGuinness, *supra* note 54, at 58; Paul Warren, *A Coordinating Council for Higher Education*, PUB. POLICY INST. OF CAL. (Mar. 14, 2019), https://www.ppic.org/blog/a-coordinating-council-for-higher-education (noting that California has been without a coordinating board for public higher education since 2011).

81. *See* Archibald & Feldman, *supra* note 40, at 622.

82. *See generally* COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA (2011) (classifying Virginia as a member of the "Tidewater" region and California as divided between the "Left Coast", "Far West", and "El Norte" regions).

course of four months. Eleven interviews focused on California.[83] The other seven centered on Virginia. In total, these discussions produced nearly 245 single-spaced pages of raw transcription data.

Several steps were undertaken to bolster these interviews' reliability. Social scientists divide this process into seven stages: thematization, design, interviewing, transcription, analysis, verification, and reporting.[84] The previous section elaborated the primary themes and variables of interest to this study. With respect to design, participants were selected on the basis of their sectorial expertise and degree of policy engagement over the past three decades. In order to verify and strengthen the results, this investigation consulted both state legislators and the advocates who lobbied them. Across the two states, this group included high-ranking and long-serving members of both legislative houses' education and appropriations committees; legislative consultants; senior state executive branch members; top college and university lobbyists; and the leaders of higher education interest organizations. Because confidentiality is critical to getting elite subjects to divulge sensitive information,[85] the author guaranteed respondents anonymity through a consent form.

Upon entering the interview phase, this study employed a semi-structured topic guide. This type of guide serves as a "script that structures the course of the interview."[86] Contrary to standardized questions, which tend to elicit more narrow answers, a semi-structured guide allows a researcher to systematize discussions while leaving respondents space to develop ideas and broach unexpected themes.[87] A well-constructed guide "include[s] an outline of topics to be covered, with suggested questions."[88] While this study's guide remained rooted in the framework presented in the last section, it incorporated ample opportunities for interviewees to pursue new lines of thought.[89] This combination of direction and flexibility lends itself especially well to interviews with experts accustomed to spearheading discussions; with elite subjects, "the interviewer should be prepared to adapt to the sce-

83. In the interest of respondents' anonymity, they are referred to by the state they represent and the order in which they were interviewed (e.g. the first interviewee from California is denoted as "California Interviewee No. 1").

84. *See* STEINAR KVALE, DOING INTERVIEWS 33–50 (2008).

85. *See* Teresa Odendahl & Aileen M. Shaw, *Interviewing Elites*, *in* HANDBOOK OF INTERVIEW RESEARCH: CONTEXT AND METHOD 299–317 (Jaber F. Gubrium & James A. Holstein, eds., 2001).

86. KVALE, *supra* note 84, at 56.

87. *See* Daniel W. Turner, *Qualitative Interview Design: A Practical Guide for Novice Investigators*, 15 QUALITATIVE REP. 754, 755–56 (2010).

88. *See* KVALE, *supra* note 84, at 57.

89. A copy of this guide is available upon request.

nario and personality at hand, rather than determined to stick robotlike to an established script."[90]

After the interview recordings were transcribed, data for each state were analyzed using a mixed coding scheme. Coding "is a way of indexing or categorizing the text in order to establish a framework of thematic ideas about it."[91] Much like its semi-structured guide, this study's coding scheme at once leveraged the previous section's baseline concepts and allowed new ones to arise from the data. Its design therefore lay between a grounded approach, which seeks to "identify categories and concepts that emerge from text and link these concepts into . . . formal theories,"[92] and classic content or framework analysis, which "assumes that codes of interest have already been discovered"[93] and "involves a systematic process of sifting, charting and sorting material according to key issues and themes."[94]

Finally, prior to reporting the findings, this study verified the themes and intersections discovered by consulting a broad array of primary and secondary sources, including newly calculated descriptive statistics based on data from the National Association of State Budget Officers (NASBO); state government documents; non-partisan research reports; scholarly histories; and newspaper articles. Where appropriate, this evidence supplements and enhances the interview data presented in the next section.

III.
RETRENCHMENT AS A CONSEQUENCE OF LAW

This section presents the study's empirical results. It shows that laws constraining legislators' ability to maneuver within the state budget played the dominant role in public higher education retrenchment. Ideology also played a part in the disinvestment process, though not a direct one; conservative anti-tax crusaders weakened both states' revenue systems, making it more difficult for lawmakers to adequately fund government services, including public postsecondary education.

Neither California nor Virginia reduced support for public higher education overnight. Rather, in line with the observation that the sec-

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90. Odendahl & Shaw, *supra* note 85, at 311.
91. GRAHAM R. GIBBS, ANALYZING QUALITATIVE DATA 38 (2007).
92. Gery W. Ryan & H. Russell Bernard, *Data Management and Analysis Methods*, *in* COLLECTING AND INTERPRETING QUALITATIVE MATERIALS 278–79 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2003).
93. *Id.* at 282–83.
94. *See* Jane Ritchie & Liz Spencer, *Qualitative Data Analysis for Applied Policy Research*, *in* THE QUALITATIVE RESEARCHER'S COMPANION 310 (A. Michael Huberman & Matthew B. Miles eds., 2002).

tor has acted as a "balance wheel" during recessions, retrenchment occurred gradually over the course of many years. Figures 5 and 6 confirm that each state's investment in the sector fell during and immediately following recessionary periods and recovered slowly thereafter.[95] However, upswings took more and more time to arrive. Each successive peak also remained lower than the last, producing the sustained funding decline visible today.

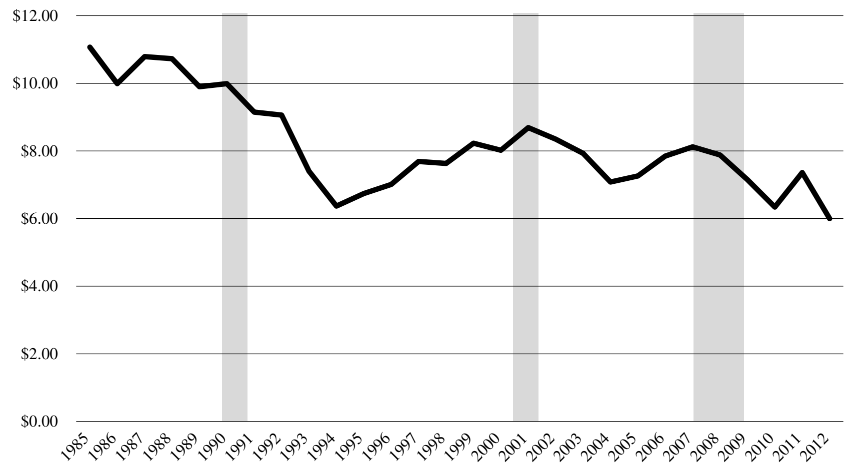

FIGURE 5. CALIFORNIA'S SPENDING ON PUBLIC HIGHER EDUCATION PER $1,000 OF STATE PERSONAL INCOME, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: Pell Institute for the Study of Higher Education

95. PELL INST., *supra* note 20, at 13, 23. These trends are also visible on a per-FTE-student basis. For California, *see* HANS JOHNSON, KEVIN COOK, PATRICK MURPHY & MARGARET WESTON, PUB. POLICY INST. OF CAL., HIGHER EDUCATION IN CALIFORNIA: INSTITUTIONAL COSTS 2 (2014), https://www.ppic.org/content/pubs/report/R_1114HJR.pdf. For Virginia, *see* STATE COUNCIL OF HIGHER EDUC. FOR VA., THE EROSION OF STATE FUNDING FOR VIRGINIA'S PUBLIC HIGHER EDUCATION INSTITUTIONS app. B–C (2009), https://www.schev.edu/docs/default-source/Reports-and-Studies/2009/erosionhighereducationfunding.pdf.

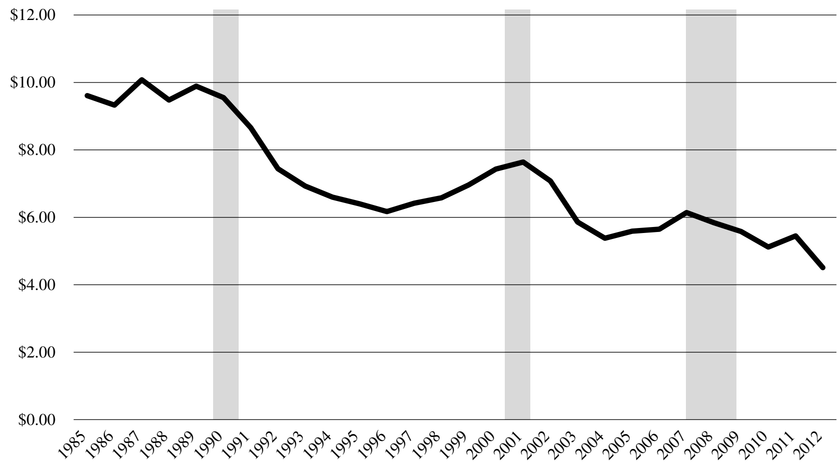

FIGURE 6. VIRGINIA'S SPENDING ON PUBLIC HIGHER EDUCATION PER $1,000 OF STATE PERSONAL INCOME, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: Pell Institute for the Study of Higher Education

Disinvestment was not driven by malicious intent. Most interviewees stressed that attitudes toward the sector hardly shifted during this period.[96] Regardless of party affiliation, most legislators did not actively seek to defund public higher education.[97] Although lawmakers tried to bolster colleges' transparency and accountability to taxpayers, respect for the sector remained strong.[98]

Both states' public higher education systems instead fell victim to a triad of legal constraints: (1) competing Medicaid, corrections, and K–12 education spending mandates, (2) eroding tax arrangements, and (3) lobbying and campaign finance rules that disfavored public college and university advocates.

Competing obligations crowded out funds for public tertiary instruction on two fronts. First, spending mandates for Medicaid, corrections, and K–12 schools left policymakers few discretionary items to slash during recessions. Second, the rising cost of the Medicaid program and, to a lesser extent, corrections continually escalated pressure to limit spending in other areas—impeding public higher education budgets' revival even during recovery periods.

Had lawmakers been equipped with sufficient revenue, stiff mandates and rising expenses might not have posed as much of a problem.

96. California Interviewee Nos. 2, 3, 4, 6, 7, 8, and 11; Virginia Interviewee Nos. 1, 2, 3, 4, 5, 7.
97. *Id.*
98. *Id.*

Unfortunately, both states' general funds also experienced decelerating growth as a result of eroding tax systems. Here, ideology played a decisive role. While Democrats in California tried to increase taxes to protect tertiary instruction during recessions, a conservative-backed constitutional amendment requiring a two-thirds majority to raise taxes repeatedly thwarted their efforts. In Virginia, Republican legislators pressured by anti-tax activists degraded already outdated revenue laws by refusing to raise taxes.

Public higher education might still have avoided some of the worst cuts if it had benefited from organizations capable of elevating its place on the policy agenda. However, a dissociated advocacy community lost ground to rival interests in a legislative arena driven by costly lobbying and campaign donations. These competing interests proved more effective than higher education advocates at protecting funding for their respective programs and, in the case of the business lobby, thwarting tax reform efforts. Legislators thereby encountered little pressure to prioritize public colleges when confronted with the requirement to balance their budgets.[99]

A. *The California Idea Slips Away*

Though most states invested heavily in public higher education in the 1960s and 1970s, none pursued the task more enthusiastically than California. Historian John Aubrey Douglass has explained that state leaders fostered a unique combination of extensive access and high academic quality during these decades.[100] They did so by fashioning a tiered educational system that could accommodate the full range of attainment opportunities, from community college instruction to world-class research.[101] This blueprint, which Douglass has termed the "California Idea," served as a model for states across the country.[102] As a result of its success, the system's public research tier remains composed of some of the most prestigious institutions on earth.[103]

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99. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (2010), http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf (noting that "[t]he National Conference of State Legislatures (NCSL) has traditionally reported that 49 states must balance their budgets, with Vermont being the exception").

100. *See generally* JOHN AUBREY DOUGLASS, THE CALIFORNIA IDEA AND AMERICAN HIGHER EDUCATION: 1850 TO THE 1960 MASTER PLAN (2007).

101. *Id.*

102. *Id.*

103. *See UC Campuses Ranked as World's Best*, UNIV. OF CAL. (Oct. 22, 2019), https://www.universityofcalifornia.edu/news/uc-campuses-ranked-worlds-best.

In the last quarter of the twentieth century, however, the California Idea began to slip away. Between 1990 and 2013, spending per full-time-equivalent (FTE) student declined from $9,620 to $7,446.[104] Investment in public higher education as a proportion of state resources also dropped sharply. Spending per $1,000 of personal income fell by more than $7 between 1980 to 2012, from $12.76 to $5.68—the lowest level since 1962.[105] As investment in the system declined, so too did the broad access and excellence that it underpinned: fees and class sizes rose, students shouldered greater debt to pay for education, and many young adults forewent a tertiary education altogether.[106]

Historical data and expert interviews show that lawmakers did not deliberately abandon public higher education. Instead, Democratic legislators gradually and reluctantly retrenched the sector to cope with the three legal constraints outlined above: competing budget pressures fueled by K–12, corrections, and especially Medicaid mandates; tax revenues constricted by TELs and SMRs; and a relative absence of grassroots support from public higher education advocates in a lobbying and campaign finance arena titled toward wealthy interests.

1. *Competing Obligations Crowd Out Higher Education*

Over the past three decades, K-12, corrections, and Medicaid expenditures steadily crowded out higher education budgets (Figure 7).[107] K-12 outlays helped place a ceiling on university funding by consistently claiming more than a third of the General Fund.[108] Meanwhile, Medicaid and corrections appropriations gradually siphoned funds away from tertiary education and welfare programs.[109] Whereas higher education made up about 15.9 percent of the state's General Fund spending in 1985, this proportion dwindled to 10.2 percent by

104. STULLICH, MORGAN & SCHAK, *supra* note 75, at 28.
105. PELL INST., *supra* note 20, at 13.
106. *See generally* Phaelen Parker, CAL. BUDGET PROJ., FROM STATE TO STUDENT: HOW STATE DISINVESTMENT HAS SHIFTED HIGHER EDUCATION COSTS TO STUDENTS AND FAMILIES (2014), http://calbudgetcenter.org/wp-content/uploads/140506_From_State_to_Student_BB.pdf. *See* JOHNSON ET AL., *supra* note 5, at 7.
107. Author's own calculations based on raw data in: NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1987); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1991); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1996); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2001); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2006); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2013).
108. *Id.*
109. *Id.*

2012.[110] By contrast, prison outlays rose from around 4.1 percent to nearly 9 percent of General Fund spending.[111] Medicaid funding grew even more dramatically, from about 7.9 percent to nearly 18 percent of total expenditures.[112]

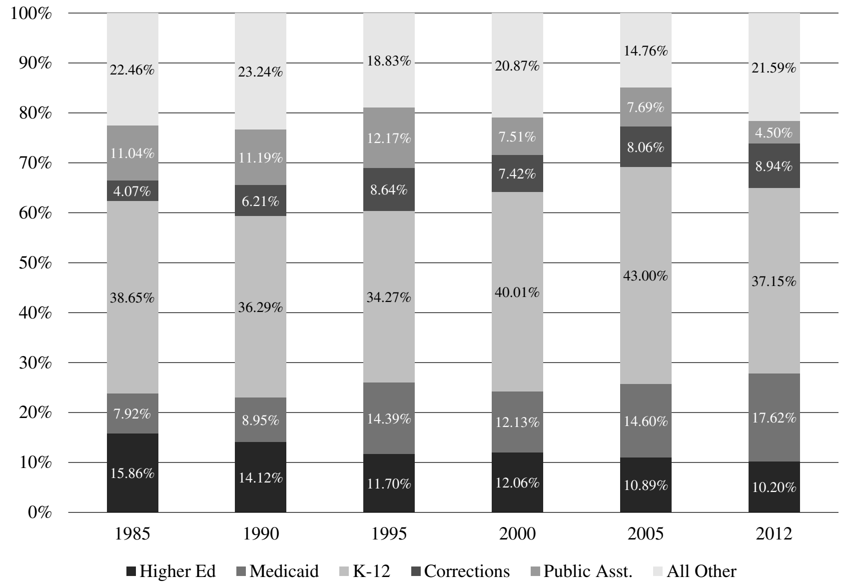

FIGURE 7. PERCENTAGE COMPOSITION OF CALIFORNIA'S GENERAL FUND, SELECTED YEARS, 1985 TO 2012.

Source: National Association of State Budget Officers

Two dynamics propelled these shifts. First, these programs' mandatory nature forced legislators to diminish a handful of discretionary programs to balance budgets during recessions.[113] In the words of one former State Assembly Member and Budget Committee Chair, public colleges "could do okay in a good economy, [but] in a bad economy, an overwhelming majority of the budget was protected . . . and disproportionate cuts had to fall on higher education."[114] Second, over time, growing costs for Medicaid and, to a smaller extent, corrections exacerbated these limits. These expenses reduced discretionary funds for public colleges and universities more severely with each downturn. They similarly left less and less room for public higher edu-

110. *Id.*
111. *Id.*
112. *Id.*
113. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
114. California Interviewee No. 10.

cation budgets' return to health during recovery periods.[115] As one university Vice President dryly noted, "something has to give when you have major portions of the budget continuing to rise as a percentage of total spending over time—something has to decline as a percentage, and it's been higher ed."[116]

Both budget mandates' stability during recessions and their long-term cost expansion were the products of legal changes adopted years before the worst higher education cuts set in. First, in 1988, K-12 advocates passed a measure that guaranteed minimum funding for elementary and secondary schools, removing over one-third of the state budget from legislators' control. Second, mandatory sentencing laws enacted in the 1990s unleashed a rise in the state's prison population that drew resources away from public colleges. Third, and most importantly, federally-mandated program expansions and recession-driven enrollment increases fused with rising medical costs to inflate Medicaid's proportion of the General Fund.

a. K-12 Obligations

The state's role in school financing began changing in the 1970s. Before then, schools received the majority of their funds from local property taxes. This relationship withered after voters approved a 1978 ballot amendment that capped property tax rates.[117] The measure, known as Proposition 13 (to which this analysis will return in the next section), substantially decreased school districts' budgets: while California's per pupil spending had surpassed the national average for more than a decade, it dipped below this level beginning in 1979 and failed to recover throughout the 1980s.[118]

Alarmed by the decline, K-12 advocates mobilized to shield schools' finances.[119] In 1988, the California Teachers Association, the Association of California School Administrators, and the California State PTA gathered the signatures to place a constitutional amendment on the ballot guaranteeing minimum funding for K-14 education.[120] The measure, titled Proposition 98, passed with 50.7 percent of the vote.[121] It stipulated that the Legislature allocate K-14 the higher of

115. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
116. California Interviewee No. 4.
117. *See* Nirupama Jayaraman, Cal. Budget Project, School Finance in California and the Proposition 98 Guarantee 2 (2006), https://calbudgetcenter.org/wp-content/uploads/0604_prop98.pdf.
118. *Id.* Proposition 13 is discussed at length in Section III(A)(2), *infra*.
119. *Id.*
120. *Id.*
121. *Id.*

either 40 percent of General Fund revenues ('Test 1') or the previous year's subsidy adjusted for inflation and enrollments ('Test 2').[122]

As the state fell into recession in 1990, the Legislature moved to amend the proposition to soften its mandate in a poor economy.[123] Lawmakers quietly packaged the reform alongside another proposal on the June 1990 ballot, which voters approved by 52.4 percent.[124] The measure, known as Proposition 111, introduced a third test allowing the state to appropriate less to K-14 when revenues underperformed ('Test 3').[125] Notably, the law also added a "maintenance factor" to the constitution, which required the Legislature to return the difference between Test 2 and Test 3 funding levels to K-14 when the economy recovered.[126]

Combined, Propositions 98 and 111 profoundly altered the higher education budgeting landscape. First, by creating an appropriations floor for elementary and secondary schools and removing legislators' authority over more than one-third of the General Fund budget, Proposition 98 diminished the discretionary resources available for public universities during recessions.[127] One senior Senate staffer emphasized that "the automatic commitment of 40 percent of your budget to K-14 certainly affect[ed] everything else" in times of economic distress.[128] A former Assembly Member and State Senator, who chaired education committees in both bodies, agreed that Proposition 98 "remove[d] about half of the budget from consideration" before negotiations began, forcing lawmakers to find savings elsewhere.[129] Figure 8 shows that spending on K-12 education was generally between 35 percent and 40 percent of the General Fund from the mid-1980s to 2012.[130] By contrast, as a former Assembly Budget Committee Chair

122. *Proposition 98 Maintenance Factor: An Analysis of the Governor's Treatment*, CAL. LEGISLATIVE ANALYST'S OFFICE (May 31, 2012), https://lao.ca.gov/analysis/2012/education/prop-98-maintenance-053112.aspx.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
128. California Interviewee No. 6.
129. California Interviewee No. 8.
130. Author's own calculations based on raw data in: NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1987); NATIONAL ASSOCIATION OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1989); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1991); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1993); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1995); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1997); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (1999); NAT'L ASS'N OF

noted, "UC and CSU have never been given any type of guarantee within the state budget for protection for their funding."[131] School financing mandates hence made tertiary education a greater target for reductions in depressed fiscal years.

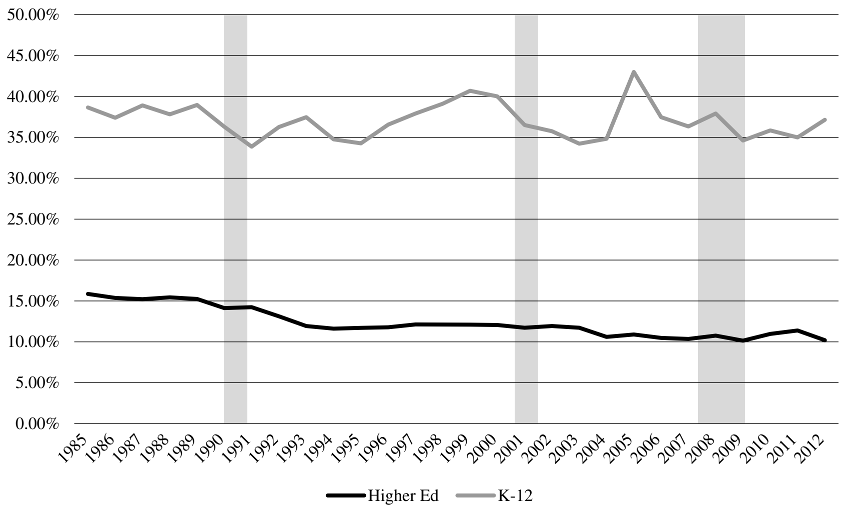

FIGURE 8. PERCENTAGE OF CALIFORNIA'S GENERAL FUND DEDICATED TO K-12 EDUCATION VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

Second, this crowding-out effect usually persisted during upswings due to Proposition 111's "maintenance factor" provision. The early 1990s recession left the state with outstanding K-14 obligations of between $1 billion to $2 billion per year from 1991 to 1995.[132] The 2001 recession generated commitments ranging between $2 billion to $4 billion annually from 2002 to 2005.[133] Most dramatically, the Great Recession left unpaid obligations totaling $8 billion to $15 billion a year between 2009 and 2013.[134] These liabilities remained first

STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2001); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2003); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2005); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2007); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2008); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2010); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2011); NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT (2013).

131. California Interviewee No. 11.

132. CAL. LEGISLATIVE ANALYST'S OFFICE, *supra* note 122.

133. *Id.*

134. *Id.*

in line for new revenue during recoveries.[135] Their presence helps explain why higher education continued to lose ground as K-14 budgets nudged back upward (Figure 8). For instance, as a result of improving revenue in 2015, the state found itself obliged to spend 80 cents of every new dollar on schools—leaving fewer funds to restore public tertiary instruction or welfare services.[136]

b. Prison Spending

Corrections spending also displaced funds for public higher education. Over the past three decades, prison expenditures evaded lawmakers' control during fiscal downturns and occupied an ever-growing share of the General Fund. Both forces stemmed from path-dependent sentencing laws that inflated prison and jail populations.

Beginning in the 1970s, the American criminal justice system became much harsher. Rising offense rates and the search for new forms of racial control produced a paradigm shift that viewed incarceration as the key way to confront crime.[137] Throughout the 1980s, Congress enacted laws requiring lengthy prison sentences for drug abuse and violent offenses.[138] Many states quickly followed suit. More than half passed legislation mandating multi-decade prison sentences for repeat offenders.[139] Several also limited parole opportunities.[140] By preempting judicial discretion and placing people behind bars for longer periods, these reforms spurred a rapid rise in prisoner numbers.[141] While incarceration rates fell in the 1960s, they charted a steady uphill trajectory thereafter, from 161 U.S. residents per 100,000 residents in 1972 to 707 per 100,000 residents in 2012.[142]

This cultural shift deeply affected California. Though statutes remained unchanged in the 1980s, police departments multiplied their

135. *Id.*

136. *See* Jim Miller, *Prop. 98 Makes Schools Budget Winner, but is it Still Fair?* SACRAMENTO BEE (May 15, 2015), https://www.sacbee.com/news/politics-government/article21138279.html ("Of the $6.7 billion in higher-than-expected revenue through June 2016, $5.5 billion would go to K-12 schools and community colleges in Gov. Jerry Brown's revised budget.").

137. *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3 (2014). *See also generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

138. NAT'L RESEARCH COUNCIL, *supra* note 137.

139. *Id.* at 3.

140. *Id.* at 42.

141. *Id.* at 33.

142. *Id.*

number of drug arrests.[143] Judges also increasingly imposed exacting sentences for such offenses.[144] This "tough on crime" mentality became enshrined in state law in 1994, when more than 70 percent of voters approved a ballot measure known as Proposition 184, or the "three-strikes" law.[145] The law required a sentence of 25 years to life for any defendant convicted of a third crime following two prior convictions for serious offenses.[146] Collectively, these changes led California's prison population to surge 514 percent between 1980 and 2006.[147]

By raising incarceration rates and preventing legislators from significantly changing prison spending during and after recessions, unyielding penal mandates limited discretionary funds for public higher education.[148] One leading State Senator and former Assembly Member stressed that "it's hard to put a budget cut there unless you decide[ ] to release" prisoners—a near-impossible task given mandatory sentences.[149] Echoing this sentiment, another former Assembly Member and Higher Education Committee Chair lamented that "costs for prisons are fairly fixed just by the numbers of prisoners we've incarcerated and the number of prisons we've built."[150] A former Chair of the Assembly Budget Committee put it more directly, describing the three-strikes law as a "de facto minimum [funding guarantee] for the prison system."[151] All the while, rising expenditures per inmate exacerbated the cost of imprisoning more people for longer periods.[152] Fig-

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143. *See* Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 British J. Criminology 83, 87–88 (1994).

144. *Id.*

145. Brian Brown & Greg Jolivette, *A Primer: Three Strikes – The Impact After More Than a Decade*, Cal. Legislative Analyst's Office (Oct. 2005), https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm; Cal. Sec'y of State, Supplement to Statement of Vote: November 8, 1994 General Election 102 (1994), https://elections.cdn.sos.ca.gov/sov/1994-general/ssov/ssov-complete.pdf (showing that Proposition 184 passed with 71.8 percent of the vote).

146. Brown & Jolivette, *supra* note 145.

147. Oliver Roeder, Lauren-Brooke Eisen & Julia Bowling, Brennan Ctr. for Justice, What Caused the Crime Decline? 30 (2015), https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline.

148. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

149. California Interviewee No. 11.

150. California Interviewee No. 8.

151. California Interviewee No. 10.

152. California's real cost per inmate rose from under \$33,000 in 1994 to over \$60,000 in 2014. Scott Graves, *Fewer State Prisoners, Higher Cost Per Inmate*, Cal. Budget & Pol'y Ctr. (Aug. 7, 2013), https://calbudgetcenter.org/blog/fewer-state-prisoners-higher-cost-per-inmate. The increase was mainly due to fast-rising staffing levels (despite the number of inmates staying approximately the same), higher salaries for correctional officers, and increased health care spending per inmate. *Id.*

ure 9 leaves little doubt about strict sentencing's cumulative effects: while tertiary education declined from about 16 percent to 10 percent of the General Fund between 1985 and 2012, corrections expenditures ballooned from about 4 percent to almost 10 percent of the General Fund budget.[153]

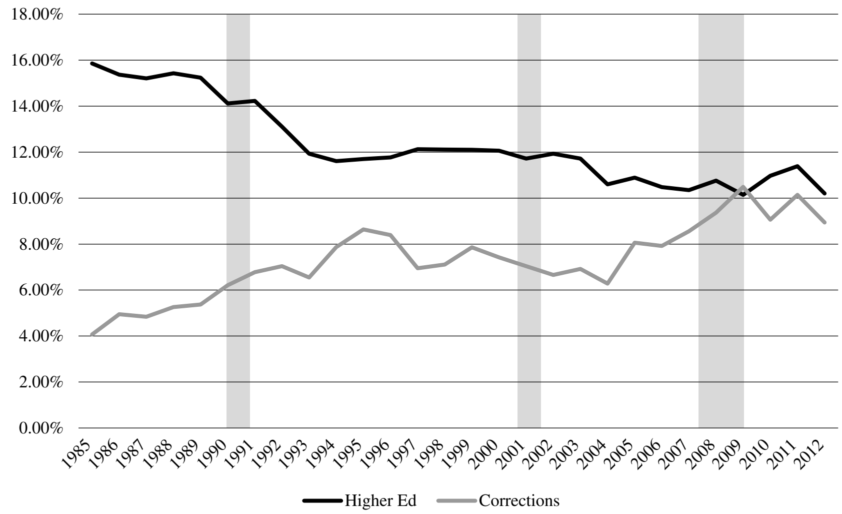

FIGURE 9. PERCENTAGE OF CALIFORNIA'S GENERAL FUND DEDICATED TO CORRECTIONS VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

c. Medicaid Commitments

No spending obligation did more to crowd out funds for public colleges and universities than Medicaid. Established in 1965, Medicaid provides government-financed health coverage for 73 million low-income Americans, including those in need of nursing or long-term community-based care.[154] The program covers 13 million—or one in three—Californians, including 40 percent of the state's children.[155]

Medicaid created pressure to retrench public higher education by mandating increasingly expensive health coverage for a growing number of beneficiaries. While states are free to enhance Medicaid, federal

153. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130.

154. *Medicaid and CHIP: Fast Facts*, ALL. FOR HEALTH POLICY (Aug. 31, 2017), https://www.allhealthpolicy.org/sourcebook/medicaid-chip.

155. CAL. HEALTHCARE FOUND., MEDI-CAL FACTS AND FIGURES 2 (2019), https://www.chcf.org/wp-content/uploads/2019/02/MediCalFactsFiguresAlmanac2019.pdf.

law requires that they finance a minimum set of services for enrollees.[156] The list of eligible beneficiaries continually grew in the years following the program's creation. In 1972, Congress required states to provide Medicaid to Supplemental Security Income recipients, seniors, and the disabled.[157] In 1988, it extended coverage to low-income pregnant women and households with infants.[158] In 1997, it established the State Children's Health Insurance Program to bolster coverage for families with children.[159] Finally, in 2010, the Affordable Care Act required participating states to broaden eligibility to all citizens under 133 percent of the Federal Poverty Level.[160]

These mandates made it increasingly difficult for lawmakers to avoid cutting discretionary programs. Each federally-initiated Medicaid expansion required increased state expenditures as a matter of federal law, effectively imposing a new spending floor that left fewer resources for other services in both good times and bad.[161]

Medicaid's countercyclical nature made these obligations especially pronounced in the wake of recessions.[162] More people enroll in Medicaid during and shortly after economic downturns, as unemployment rises and incomes fall.[163] Medicaid expenditures thereby increased substantially after each financial contraction—contributing to public higher education retrenchment as revenue grew scarce, and im-

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156. *See* Kaiser Comm'n on Medicaid & the Uninsured, Medicaid: A Primer, at 13 (2013), https://www.kff.org/medicaid/issue-brief/medicaid-a-primer/.

157. Cal. Healthcare Found., *supra* note 155, at 8.

158. *Id.*

159. *Id.*

160. *Id.* However, it is important to note that the federal government covered most of the costs of the 2010 reform, leading to only modest Medicaid spending increases in most expansion states. *See* January Angeles, *How Health Reform's Medicaid Expansion Will Impact State Budgets*, Ctr. for Budget & Pol'y Priorities (July 25, 2012), https://www.cbpp.org/research/how-health-reforms-medicaid-expansion-will-impact-state-budgets; Bryce Ward, *The Impact of Medicaid Expansion on States' Budgets*, Commonwealth Fund (May 5, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/may/impact-medicaid-expansion-states-budgets.

161. Cal. Healthcare Found., *supra* note 155, at 8.

162. Kaiser Comm'n on Medicaid & the Uninsured, *supra* note 156, at 32 (explaining that the decreased revenue and increased Medicaid enrollment caused by recessions, combined with an imperfect federal match rate formula, make it difficult for states to afford rising demand for Medicaid during economic downturns); California Interviewee Nos. 2, 3, 5, 7, 10, 11.

163. *See* Tracy Gordon, Brookings Inst., State Budgets in Recession and Recovery 4 (2011), https://www.brookings.edu/research/state-budgets-in-recession-and-recovery.

peding reinvestment in public colleges during recovery periods (Figure 10).[164]

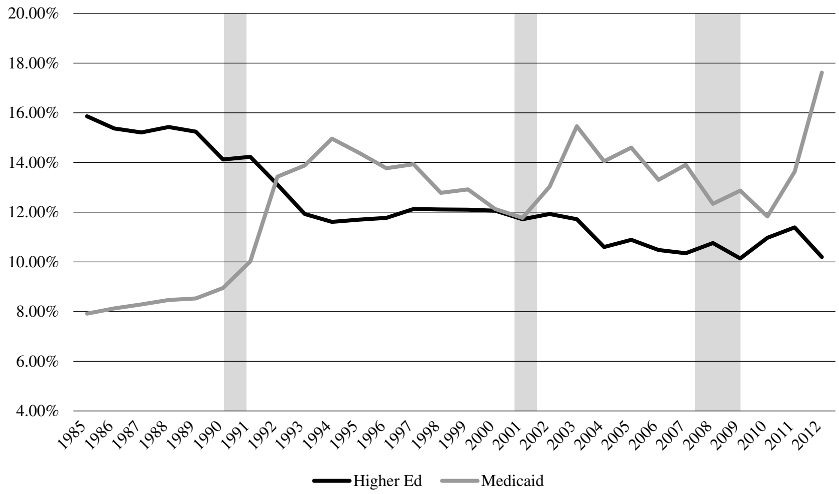

FIGURE 10. PERCENTAGE OF CALIFORNIA'S GENERAL FUND DEDICATED TO MEDICAID VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

Growing healthcare costs significantly exacerbated these trends. In the decades after 1985, the price of medical care rose more than twice as fast as inflation (Figure 11).[165] This increased states' Medicaid obligations because "Medicaid spending per enrollee is very close in most years to the growth in the consumer price index (CPI) for medical care."[166] Though expenditures per Medicaid enrollee remained below those per person with private coverage, they grew approximately 6 percent annually throughout the 1990s and 5 percent per year in the 2000s.[167] These rates led the Congressional Budget Office to conclude that the U.S. health system's outsized price infla-

164. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130; California Interviewee Nos. 2, 3, 5, 7, 10, 11.

165. *See* FED. RESERVE BANK OF ST. LOUIS, U.S. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS (2020), https://fred.stlouisfed.org/graph/?g=vpxZ (price index for medical care rose by 327% between 1985 and 2018, while the price index for all consumer items rose by 133% over the same period).

166. JOHN HOLAHAN, LISA CLEMANS-COPE, EMILY LAWTON & DAVID ROUSSEAU, KAISER COMM'N ON MEDICAID AND THE UNINSURED, MEDICAID SPENDING GROWTH OVER THE LAST DECADE AND THE GREAT RECESSION 1, 17 (2011), https://www.kff.org/wp-content/uploads/2013/01/8152.pdf.

167. *See* KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID ENROLLMENT & SPENDING TRENDS fig. 5 (1999), https://www.kff.org/wp-content/uploads/2013/01/

tion "played a major part in raising the average cost of Medicaid per participant."[168]

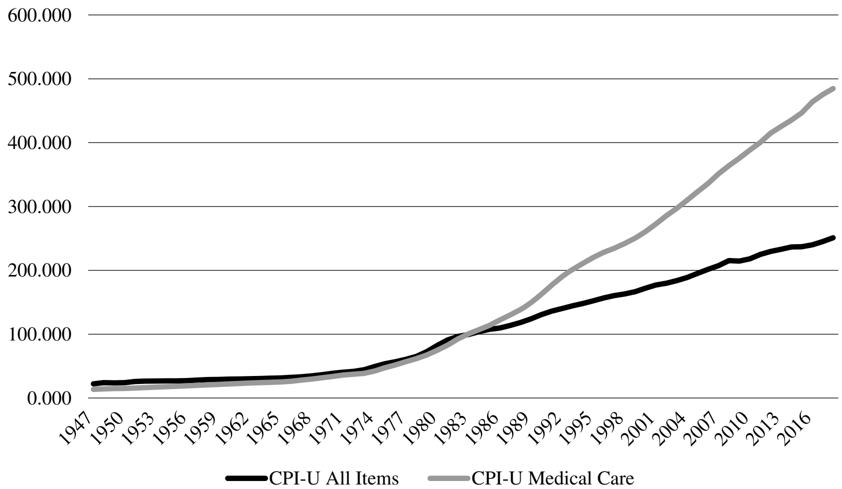

FIGURE 11. CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS, ALL ITEMS (CPIAUCSL) VS. CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS, MEDICAL CARE (CPIMEDSL), 1947 TO 2018, INDEX 1982-1984=100, SEASONALLY ADJUSTED.

Source: Federal Reserve Bank of St. Louis; Bureau of Labor Statistics

Combined with the fact that California's supplemental benefits are more generous than those in other states,[169] these forces vigorously crowded out funds for public higher education: between 1985 and 2012, Medicaid's share of the General Fund more than doubled, from 8 percent to nearly a fifth of total expenditures.[170]

2. *Tax Arrangements Shrink Revenue*

By both insulating a growing portion of the budget from recessionary shocks and limiting state funds during recovery periods, competing mandates reduced the discretionary dollars on which public colleges and universities rely. However, the story does not end there. Though these spending categories benefitted from unusual protections,

medicaid-enrollment-and-spending-trends-fact-sheet-2.pdf; HOLAHAN ET AL., *supra* note 166.

168. CONG. BUDGET OFFICE, GROWTH IN MEANS-TESTED PROGRAMS & TAX CREDITS FOR LOW-INCOME HOUSEHOLDS 7 (2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43934-Means-TestedPrograms.pdf.

169. *See* CAL. HEALTHCARE FOUND., *supra* note 155, at 45.

170. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130.

they hardly represented lavish investments. Proposition 98's minimum funding guarantee quickly morphed into an inadequate ceiling: by 2012, California ranked 49th in the nation in per-pupil spending.[171] While multiplying federal obligations and rising healthcare costs sent Medicaid expenditures soaring, the program remained a safety net of last resort for the state's poorest residents.[172] Even corrections appropriations failed to keep up with basic needs: because the state could not build prisons fast enough to accommodate its rising number of convicts, the U.S. Supreme Court ruled in 2011 that "California prisoners' health and safety were unconstitutionally compromised" by overcrowding.[173]

These shortcomings point to another cause of declining higher education budgets: inadequate tax systems that constricted state resources. Rival programs' mounting costs and crowding-out effects might not have posed as much of a challenge if lawmakers had access to additional revenue to address them. As one high-level executive office holder stressed, "California is notorious for locking in expenses but locking out revenue."[174]

After decades of steady expansion, General Fund receipts slowed from the late 1970s onward (Figure 12).[175] While California's tax revenue grew by an average of 13.3 percent in the 1960s and 14 percent in the 1970s, this rate declined to 9.4 percent in the 1980s, fell to 5 percent in the 1990s, and settled at around 4 percent in the 2000s.[176] This revenue also became less reliable: the Pew Charitable Trusts ranked California's tax receipts as the fifth-most volatile in the country for the period between 1995 and 2014.[177] The state's tax haul thus failed to keep pace with a rising demand for services and fell abruptly during economic downturns, when residents' needs were most acute.

171. *See* John Fensterwald, *California Drops to 49th in School Spending in Annual Ed Week Report*, EDSOURCE (Jan. 14, 2013), https://solanocoe.edublogs.org/2013/01/14/edsource-today-california-drops-to-49th-in-school-spending-in-annual-ed-week-report/.

172. *See* KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 156, at 7, 26.

173. ROEDER, EISEN & BOWLING, *supra* note 147, at 30. The decision is Brown v. Plata, 563 U.S. 493 (2011).

174. California Interviewee No. 5.

175. Author's own calculations based on the data in: CAL. DEP'T OF FIN., CHART A-1: GEN. FUND HISTORY, REVENUES & TRANSFERS VS. EXPENDITURES (2015), http://dof.ca.gov/budget/summary_schedules_charts/documents/July-2020/CHART-A-1.pdf.

176. *Id.*

177. *See* data available for download in Steve Bailey & Brenna Erford, *Revenue Volatility Greater for Some States, Certain Tax Types*, PEW CHARITABLE TRUSTS (June 11, 2015), https://www.pewtrusts.org/en/research-and-analysis/articles/2015/06/11/revenue-volatility-greater-for-some-states-certain-tax-types.

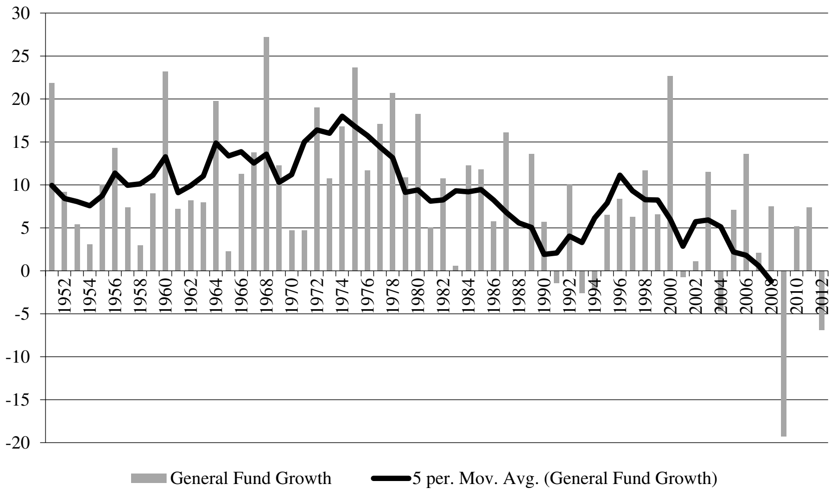

FIGURE 12. PERCENTAGE GROWTH OF CALIFORNIA'S GENERAL FUND, YEAR-TO-YEAR AVERAGE & FIVE-YEAR MOVING AVERAGE, 1952 TO 2012.

Source: California Department of Finance

Although this gradual decline escaped many legislators' gaze until years after it had started,[178] many of the foregoing difficulties were the path-dependent products of a prominent tax law encountered earlier: Proposition 13. By simultaneously enacting TELs and SMRs, this constitutional amendment limited resources used to fund higher education in three ways. First, it lowered aggregate tax receipts available to the Legislature each year. Second, it fueled the volatile revenue patterns that helped make California's recessions so severe. Finally, it prevented Democratic lawmakers from addressing either of these issues by setting a near-impossible threshold to raise taxes.

a. *What Is Proposition 13?*

Proposition 13 was the first major victory in a conservative movement to eliminate taxes on income and wealth.[179] Building on the ideological and organizational foundations of decades-old efforts to repeal the federal income tax, its lead author, Howard Jarvis, seized on growing discontent with property taxes to pass a measure that spawned a self-styled "tax revolt" across the country that continues to

178. California Interviewee Nos. 1, 2, 4, and 5.
179. *See* ISAAC WILLIAM MARTIN, RICH PEOPLE'S MOVEMENTS: GRASSROOTS CAMPAIGNS TO UNTAX THE ONE PERCENT 161–67 (2013).

this day.[180] After failing to qualify the proposition for the ballot on two previous attempts, Jarvis and his collaborators gathered more than a million signatures to place it before voters in 1978. In the wake of re-assessments that looked set to double many homeowners' tax obligations that year, the proposal passed by a margin of 65 to 35 percent.[181]

The measure enshrined two amendments into the state constitution. First, it created a powerful TEL by capping the property tax rate at 1 percent of an asset's value at the moment of purchase, limiting annual rate increases to 2 percent maximum, and transferring revenue allocation authority from local governments to the state legislature.[182] Second, it fashioned a highly restrictive SMR by requiring a two-thirds vote in the Legislature to approve any state tax increase.[183] These provisions' effects were not immediately apparent because the state drew down a more than $4 billion surplus to mitigate them in the late 1970s.[184] However, as time went on, it became clear that Proposition 13 had radically transformed California's revenue landscape.

b. Limited Revenue Availability

The measure first drained California's General Fund of billions of dollars a year. Almost overnight, Proposition 13 eliminated $7 billion (or $25 billion in 2020 dollars) from local government coffers, approximately a quarter of their total anticipated revenue for 1978–79.[185] This loss increased cities' and counties' financial reliance on the State Legislature in the years thereafter.[186] Following a one-time bailout in 1979, lawmakers passed Assembly Bill 8 to provide local governments with block grants to fund schools.[187] Ten years later, when these efforts proved insufficient, school advocates shepherded Proposition 98 to victory, carving aside 40 percent of the

180. *See* ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 98–129 (2008).

181. *See* Martin, *supra* note 179, at 164–65.

182. *See* PUB. POLICY INST. OF CAL., PROPOSITION 13: 30 YEARS LATER (2008), http://www.ppic.org/content/pubs/jtf/JTF_Prop13JTF.pdf; JEFF CUMMINS, BOOM AND BUST: THE POLITICS OF THE CALIFORNIA BUDGET 234 (2015).

183. *See* PUB. POLICY INST. OF CAL., *supra* note 182.

184. *See* ALBERT J. LIPSON & MARVIN LAVIN, RAND CORP., POLITICAL & LEGAL RESPONSES TO PROPOSITION 13 IN CALIFORNIA v, 1–2 (1980), https://www.rand.org/pubs/reports/R2483.html.

185. *Id.* at 6.

186. *See* Jack Citrin, *Proposition 13 and the Transformation of California Government*, 1 CAL. J. POL. & POL'Y 1, 1–9 (2009).

187. *See* LIPSON, *supra* note 184, at v–vi; Jayaraman, *supra* note 117, at 2.

state budget for K-14.[188] By considerably increasing the Legislature's responsibility for school subsidization without providing any accompanying revenue, these shifts decreased general funds available for other public services such as higher education. The California Legislative Analyst's Office estimates that taxing commercial properties alone at their current value would generate $8 billion to $12.5 billion in new revenue a year—about $2 billion to $6 billion more than what the state spent in 2014 on the UC and CSU systems combined.[189]

c. *Heightened Volatility*

Proposition 13 also aggravated recessions' effects on public colleges by limiting revenue dependability. Property tax receipts exhibit far less volatility than income or sales tax revenue.[190] By curtailing the former, Proposition 13 destabilized California's income stream.[191] Rather than rely on property taxes to cushion recessions' impact on school budgets—and hence retain a greater General Fund base for other services—the Legislature found itself forced to turn to sales and income taxes to meet the majority of its program obligations.[192] This resulted in a "boom-and-bust" cycle that exacerbated downturns' effects and further strained discretionary areas like public higher education.[193] As a former Chair of the Assembly Budget Committee explained, "with property taxes being cut substantially away in 1978, the two major revenue sources . . . [became the] sales tax and personal income tax, and they fluctuate wildly with the economy. So in good times, they over-perform the economy, [and] in bad times they under-perform a bad economy."[194] Indeed, while American states averaged a

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188. *Id.* at 2–3.

189. *See* CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 15: INCREASES FUNDING FOR PUBLIC SCHOOLS, COMMUNITY COLLEGES, AND LOCAL GOVERNMENT SERVICES BY CHANGING TAX ASSESSMENT OF COMMERCIAL AND INDUSTRIAL PROPERTY 2 (July 15, 2020), https://lao.ca.gov/ballot/2020/Prop15-110320.pdf ("Beginning in 2025, total property taxes from commercial land and buildings probably would be $8 billion to $12.5 billion higher in most years."); CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, THE 2014-15 BUDGET: CALIFORNIA SPENDING PLAN 21 fig. 7 (2014), http://www.lao.ca.gov/reports/2014/budget/spending-plan/california-spending-plan-080414.pdf (California spent just over $6 billion on both the UC and CSU systems in 2014-15).

190. ELIZABETH G. HILL, CAL. LEGISLATIVE ANALYST'S OFFICE, REVENUE VOLATILITY IN CALIFORNIA 11 (2005), http://lao.ca.gov/2005/rev_vol/rev_volatility_012005.pdf.

191. *See* Citrin, *supra* note 186, at 7.

192. California Interviewee Nos. 4, 5, 10.

193. *Id. See also generally* CUMMINS, *supra* note 182.

194. California Interviewee No. 10.

revenue volatility score of 5 for the period between 1995 and 2013, California earned a score of 8.5—the fifth-highest in the nation.[195]

This proved especially problematic because these fluctuations deepened over time. The personal income tax (PIT) remained more volatile than the sales tax.[196] Yet while the economy shifted away from manufacturing in the last half-century, California's sales tax continued to exclude most service purchases, costing the state between $3 billion and $9 billion a year.[197] By elevating the PIT's importance, Proposition 13 thus doubly compromised California's revenue stability.

d. Tying Legislators' Hands

The measure's most significant legacy may be the SMR it imposed on the Legislature after 1978. The two-thirds vote requirement to raise revenue prevented Democratic lawmakers from addressing the foregoing issues by placing veto authority in the hands of a Republican minority bitterly opposed to taxes.[198] As a Democratic lawmaker's chief of staff put it, "the other side of the aisle refuse[d] to talk about revenues or fees that might mitigate some of the reductions" needed to balance budgets during recessions.[199] One advocate lamented that the Democratic majority thus remained "dependent upon finding one or two Republicans who would go with [it], which [was] extremely difficult."[200] A former Chair of the Assembly Budget Committee concurred that the "two-thirds vote requirement ma[de] almost any new taxes . . . very difficult at least, and impossible in most cases."[201]

Despite repeated Democratic attempts to raise taxes between 1990 and 2012[202]—in the face of no fewer than 14 multi-billion-dollar

195. *See* Bailey & Erford, *supra* note 177.

196. HILL, *supra* note 190, at 6.

197. *Id.* at 14 ("California has not extended the SUT to most services"); JEAN ROSS, CAL. BUDGET PROJECT, SHOULD CALIFORNIA EXTEND THE SALES TAX TO SERVICES? (2011), https://calbudgetcenter.org/wp-content/uploads/111004_Sales_Tax_Services_BB.pdf ("Extending the sales tax to services taxed in at least one other industrial state would raise General Fund revenues by more than $8.7 billion. Extending it to services currently taxed in a large number of states would raise nearly $2.7 billion.").

198. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. *See also generally* MARTIN, *supra* note 180; GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).

199. California Interviewee No. 3.

200. California Interviewee No. 6.

201. California Interviewee No. 8.

202. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 78 (showing that Democrats controlled both houses of the California Legislature throughout this period); Robert W. Cherny, *Direct Democracy and Legislative Dysfunction: California*

year-end deficits[203]—the Legislature only managed to do so twice, in 1991 and 2009.[204] Both efforts also consisted of temporary sales and income tax adjustments rather than major structural reforms.[205] In describing this period, a former senior Democratic Assembly staff member aptly observed that, "in [his] fourteen years in the Legislature . . . it was never an option to raise revenue because the other side . . . would not allow it."[206]

By preventing legislators from addressing California's long-term revenue decline or raising taxes to balance budgets during recessions, the two-thirds requirement powerfully constrained funds for public higher education. An example helps illustrate the latter dynamic. In 2011, then-Governor Jerry Brown proposed decreasing the UC and CSU budgets by $500 million each to meet a multi-billion-dollar shortfall.[207] He also promised to attempt to raise taxes to prevent further cuts.[208] Despite spending nearly six months trying to win over two Republicans in each house of the Legislature, he and other Democratic leaders failed to obtain the votes needed for a supermajority.[209] Lawmakers were thereby forced to pass a budget that relied entirely on austerity. In line with the competing pressures reviewed above, public higher education, like other discretionary programs, dispropor-

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Politics Since 1978, 37 Siècles 1, 7–9 (2013), https://journals.openedition.org/siecles/1130 (noting several instances in which a Republican minority in the Legislature used the supermajority rule to prevent tax increases).

203. *See* Elizabeth G. Hill, California's Fiscal Outlook: The LAO's Economic and Budget Projections 3 (Nov. 1995), https://lao.ca.gov/1995/110195_fiscal_outlook/out1195.pdf; State of California, Office of Governor Gavin Newsom, California State Budget 2019–20 7 (June 2019), http://www.ebudget.ca.gov/2019-20/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf.

204. Christopher Berger & Kellie Jean Hogue, *A Brief History of Major Tax Changes in California, 1979-2015* 1, 8–15 (Oct. 2016), https://www.library.ca.gov/Content/pdf/crb/reports/FinalVersion_kjh_10192016ONLINE_Accessible.pdf.

205. *Id.* at 1, 8–9, 14–15 (noting that "[s]ince 1979, there has not been a major reform of California's tax system . . ."); California Budget Project, *Is California a High-Tax State?* 2 (Apr. 1996), https://www.internationalbudget.org/wp-content/uploads/Is-California-a-High-Tax-State.pdf (clarifying that the 1991 tax increase on top earners expired in 1995).

206. California Interviewee No. 3.

207. Mac Taylor, Legislative Analyst's Office, The 2012-13 Budget: California Spending Plan (2012), http://www.lao.ca.gov/reports/2012/bud/spending_plan/spending-plan-091312.pdf; Jordan Bach-Lombardo, *Brown Proposes Cuts to UC, CSU in State Budget*, Daily Cal. (Jan. 10, 2011, 5:44 PM), https://archive.dailycal.org/article.php?id=111491.

208. *See* Tami Luhby, *California Lawmakers Pass Budget with Deep Cuts*, CNN: CNNMoney (June 29, 2011, 9:44 AM), https://money.cnn.com/2011/06/29/news/economy/california_budget/index.htm.

209. *Id.*; California Interviewee No. 4.

tionately suffered: the UC and CSU budgets were each ultimately cut by $650 million that year.[210]

3. Outmatched Public Higher Education Interest Groups

Public colleges and universities might still have salvaged part of their budgets if they had benefitted from a strong lobby in the state capital. Organizational prowess indeed helped many of their rivals achieve lofty policy goals. Unfortunately, an atomized college interest group community proved little match for challengers able to spend generously on lobbying and electoral campaigns.

California's tertiary education advocacy landscape remained weak and fractured in the past thirty years.[211] While the UC, CSU, and Community College systems each featured student lobbies, these organizations rarely collaborated with one another.[212] Furthermore, rather than organize alongside their institutions' professional advocates, these groups often clashed with administrators over concerns about rising tuition.[213] Though UC, CSU, and Community College lobbyists generally did a better job communicating with one another, they too spent considerable time focusing on separate objectives.[214] Higher education employees' unions, meanwhile, mainly pursued issues related to their members' pay and benefits.[215] As a result, legislators "hear[d] very little from advocates for higher ed."[216] As one top elected official put it, the tertiary education lobby "doesn't really exist."[217]

To the extent that these groups did come together, their resources paled compared to those of well-heeled competitors.[218] As one advocate bemoaned, "we don't have a PAC, [and] we don't have any of the campaign dollars that can sometimes garner the attention of members and really put you on the priority list."[219] Gaining and maintaining political access indeed became more expensive in the last several decades.[220] Between 2000 and 2010, the fifteen largest interest groups in California devoted over $112 million to candidates for office and po-

210. TAYLOR, *supra* note 207.
211. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
212. California Interviewee Nos. 1, 2, 3, 5, 9.
213. California Interviewee Nos. 3, 4, 5, 8, 11.
214. *Id.*
215. California Interviewee Nos. 4, 5, 11.
216. California Interviewee No. 11.
217. California Interviewee No. 5.
218. California Interviewee Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
219. California Interviewee No. 2.
220. California Interviewee Nos. 1, 16. *See also generally* G. Patrick Lynch & Mark J. Rozell, *The "Congressionalization" of State Legislative Races*, 39 SOC. SCI. J. 43 (2002) (explaining that state legislative races have become more expensive as they

litical parties.[221] Lobbying followed a similar course, as these entities expended over $257 million courting lawmakers.[222] These investments helped drown out college advocates' voices. As one Democratic leader explained, "you've got organized special interests that surround almost every part of the budget that are exponentially more powerful in asserting their point of view and addressing their funding needs than . . . the coalition around higher education."[223]

With nearly $68 million in expenditures between 2000 and 2010, the California Teachers Association (CTA) proved one of the more effective groups.[224] The union's spending helped assure K-12 a more generous portion of the Proposition 98 funds shared with Community Colleges.[225] Despite the latter's statutory claim to 10.93 percent of Proposition 98 resources each year, lawmakers regularly suspended that guarantee and afforded Community Colleges a smaller fraction in the 1990s and 2000s (Figure 13).[226] Attempts to enforce this divide stalled in the Legislature for lack of support.[227] Adjusting for infla-

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have come to mimic Congressional campaigns' use of media, polling, and professional consulting).

221. *Author's own calculations based on* CAL. FAIR POLITICAL PRACTICES COMM'N, BIG MONEY TALKS 11–37 (2010), http://www.fppc.ca.gov/content/dam/fppc/documents/Education-External-Division/Big_Money_Talks.pdf.

222. *Id.*

223. California Interviewee No. 5.

224. *See* CAL. FAIR POLITICAL PRACTICES COMM'N, *supra* note 221, at 11 (showing that the CTA invested $16.7 million on candidates' campaigns, $6.6 million in donations to political parties, $5.9 million on other campaign committees, and $38.5 million on lobbying during that period).

225. California Interviewee Nos. 4, 9. *See also* Chuck Spence, *Proposition 98 & California Community Colleges: A History of Broken Promises*, CONTRA COSTA CMTY. COLL. DIST. 5 (2002), https://files.eric.ed.gov/fulltext/ED469656.pdf (specifying that "[w]ith the passage of Proposition 13, local tax funding for K-12 schools dried up, and money intended for community colleges has been shifted to the K-12 area. This approach unfortunately pits two important educational systems—K-12 and community colleges—against each other in the budget planning process.").

226. *See* Spence, *supra* note 225, at 4–5 (explaining that Community Colleges were consistently underfunded between 1992 and 2002 despite the fact that "Education Code 43201.1 . . . was written to guarantee community colleges 10.93 percent of all Proposition 98 funds"); PATRICK J. MURPHY, FINANCING CALIFORNIA'S COMMUNITY COLLEGES 21 (PUB. POL'Y INST. OF CAL. 2004), https://www.ppic.org/content/pubs/report/R_104PMR.pdf (noting that Community Colleges' share of Proposition 98 funds "fluctuat[ed] between 9.4 and 10.3 percent of the total" between 1992 and 2002); CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, FISCAL PROFILES 2010 13 (Dec. 2010), https://files.eric.ed.gov/fulltext/ED516151.pdf (showing that the percentage of Proposition 98 funds provided to the Community College system remained below 10.93 percent in all but one year between 1991–92 and 2008–09, as illustrated in Figure 13 and Display 12).

227. *See Community College Funding: Hearing on AB-633 Before the Assembly Committee on Higher Education*, 2001 Leg. Reg. Sess. (Cal. Apr. 17, 2001), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB633#.

tion, this discrepancy cost Community Colleges approximately $3 billion between 1992 and 2002 alone.[228]

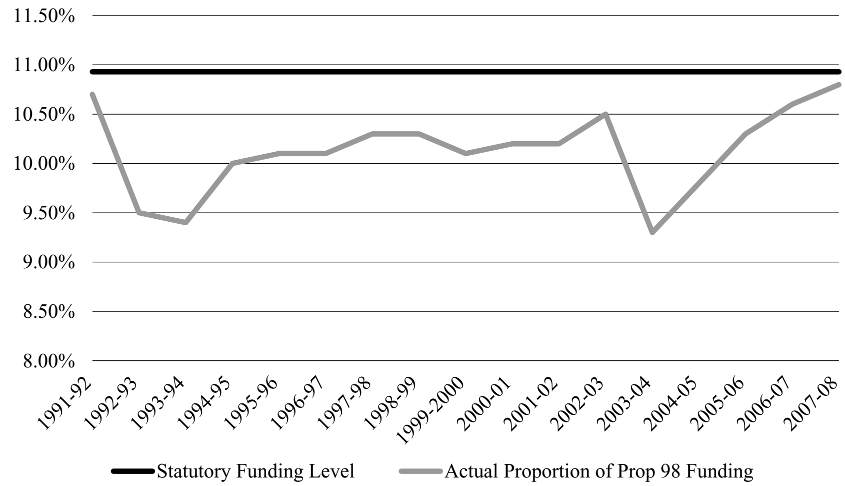

FIGURE 13. PROPORTION OF PROPOSITION 98 FUNDS ALLOTTED TO COMMUNITY COLLEGES, 1991-92 TO 2007-08.

Source: California Postsecondary Education Commission

Wealthy interests also outmuscled higher education in broader general fund battles. For example, the state's prison guard union, the CCPOA, leveraged growing membership dues to reinforce tough sentencing laws and secure some of the highest salaries in the nation, contributing to correctional budgets' crowding-out effect.[229]

Perhaps most importantly, rival organizations curtailed General Fund revenue. As one former public university government relations director explained, "whenever you try to go after massive tax reform . . . somebody's going to be a loser in that equation, and they're going to organize to defend their turf."[230] California's business lobby aggressively mobilized to avoid paying higher taxes. Beginning in 1997, the California Chamber of Commerce published an annual list of bills it deemed "job killers," most often because the legislation proposed tax increases.[231] By deploying a war chest of more than $35 million,

228. *See* Murphy, *supra* note 226, at 22.
229. California Interviewee No. 4. *See also* JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011); Sagar Jethani, *Union of the Snake: How California's Prison Guards Subvert Democracy*, MIC (May 14, 2013), https://www.mic.com/articles/41531/union-of-the-snake-how-california-s-prison-guards-subvert-democracy.
230. California Interviewee No. 1.
231. California Interviewee No. 5; *Cal Chamber Releases 2020 Job Killer List*, CAL. CHAMBER OF COMMERCE, https://advocacy.calchamber.com/2020/05/12/calchamber-

the group helped defeat 583 of 631 such bills between 1997 and 2014—a 92 percent victory rate.[232] An advocacy arena increasingly tilted toward wealthy interests therefore helped cement higher education cuts propelled by the interaction of competing mandates and constitutional revenue limits.

B. Virginia Slowly Abandons Public Higher Education

On the other side of the country, a politically distant state pursued a similar degree of higher education retrenchment. After increasing appropriations on public colleges and universities by nearly $8 per $1,000 of personal income in the 1960s and 1970s, Virginia steadily reduced its contribution from almost $10 per $1,000 of personal income in 1980 to less than $5 per $1,000 of personal income in 2014.[233] On a per FTE-student basis, the state diminished spending on public tertiary instruction by more than $3,300 from 1990 to 2013.[234]

Like in California, a partisan-institutional dynamic rooted in competing mandates, inadequate revenue, and outflanked college interests fueled this decline. First, K-12 schools, corrections, and Medicaid benefited from legal protections that displaced funds for higher education. Medicaid again played the most critical role: the program's rising costs forced increasingly severe cuts to public colleges both during and after recessions. Second, while Virginia remained free of TELs or SMRs, a state Republican Party molded by the same forces that sparked Proposition 13 weakened revenue by refusing to raise taxes. Third, while a centralized coordinating agency worsened matters slightly by capitulating to politicians' insistence on austerity, public colleges and universities generally found few allies in the capital because of a comparatively resource-poor lobby.

releases-2020-job-killer-list-2/ (last visited Jan. 3, 2021); Marc Lifsher, *Chamber of Commerce Successful Against Most 'Job Killer' Bills*, L.A. TIMES (Sept. 22, 2013), https://www.latimes.com/business/la-xpm-2013-sep-22-la-fi-capitol-business-beat-20130923-story.html; Dan Walters, *All but Three CalChamber 'Job Killers' Died*, SACRAMENTO BEE (Sept. 18, 2015), https://www.sacbee.com/news/politics-government/capitol-alert/article35714718.html.

232. *See* CAL. FAIR POLITICAL PRACTICES COMM'N, *supra* note 221, at 34–35 (showing that between 2000 and 2010, the California Chamber of Commerce spent approximately $7.1 million on candidates' campaigns for office, two-thirds of a million dollars on political parties and other campaign committees, and $26.8 million on lobbying); CAL. CHAMBER OF COMMERCE, *supra* note 231 (providing a list of "job killer" bills identified and signed into law since 1997).

233. PELL INST., *supra* note 20, at 23.

234. STULLICH, MORGAN & SCHAK, *supra* note 75, at 28.

1. Competing Obligations Crowd Out Higher Education

From the 1980s onward, Virginia's K-12, corrections, and Medicaid obligations crowded out funds for public higher education.[235] These shifts mirrored their analogues in California. Until the Great Recession forced cuts across nearly all sectors (with the notable exception of Medicaid), school and prison appropriations kept a tight discretionary funds ceiling in place: the former retained approximately one third of the General Fund each year, while the latter absorbed around 8 percent.[236] Meanwhile, Medicaid expenditures grew at an astonishing pace, from 6.3 percent of Virginia's General Fund in 1985 to 21 percent in 2012.[237] Unsurprisingly, these pressures strained discretionary budget items, including higher education. Public colleges' and universities' share of the General Fund fell from 17.5 percent to 8.7 percent in that same time period (Figure 14).[238]

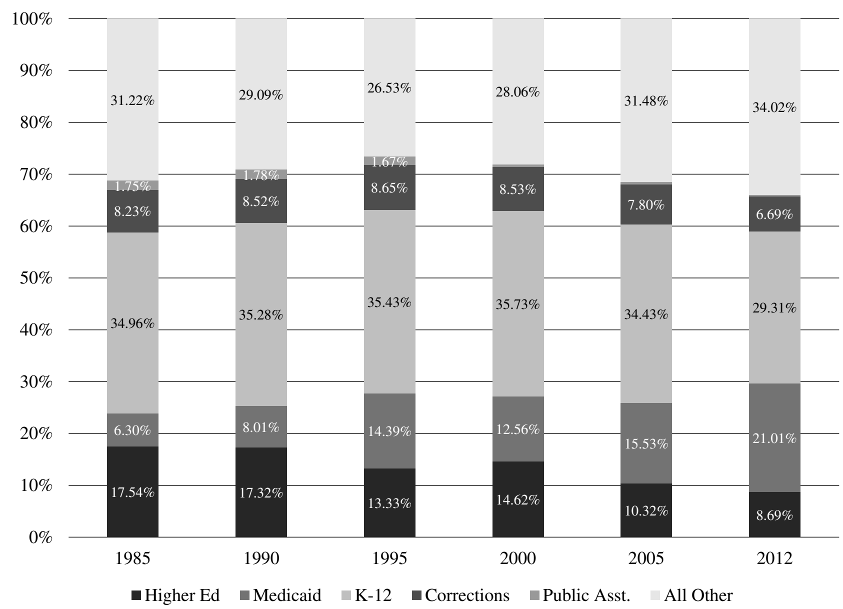

FIGURE 14. PERCENTAGE COMPOSITION OF VIRGINIA'S GENERAL FUND, SELECTED YEARS, 1985–2012.

Source: National Association of State Budget Officers

235. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.
236. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 107.
237. *Id.*
238. NAT'L ASS'N OF STATE BUDGET OFFICERS (1987), *supra* note 107, at 22; NAT'L ASS'N OF STATE BUDGET OFFICERS (2013), *supra* note 107, at 27.

Like in California, these forces tied legislators' hands because they arose from path-dependent legal restraints.[239] First, though not as strong as those in the Golden State, constitutional protections for school funding helped set a budgetary floor for K-12 beginning in 1971. Second, the introduction of so-called "truth-in-sentencing" laws in the 1980s and 1990s sheltered penal budgets by keeping prisoners behind bars for longer periods. Most importantly, federal eligibility expansions, recession-induced enrollment increases, and rising health costs set Virginia's Medicaid obligations on a steep incline, steering expenditures away from public higher education.

a. K-12 Obligations

School funding guarantees limited university budgets by removing approximately one-third of the General Fund from lawmakers' control (Figure 15).[240] Though unsuccessful in the immediate term, a 1968 lawsuit that challenged disparities across Virginia school districts pushed the authors of a new constitution to address the issue in 1971.[241] The final version of the text mandated minimum school support levels under a system dubbed the "Standards of Quality" (SOQ).[242] The SOQ scheme relies on a complex Local Composite Index (LCI), which determines the state's funding responsibility as a function of localities' resources.[243] "This index accounts for each district's aggregate property wealth, adjusted gross income, and taxable retail sales per capita relative to the per capita figures for these metrics statewide. The statewide split between state funding and required local funding is pegged at 45 percent . . . ."[244]

This mandate shielded K-12 schools' share of the state budget during recessions and prioritized them for new funding in recovery periods. As a leading member of the Virginia House of Delegates explained, the "state constitution guarantees every citizen a free, high-quality public education, and so K-12, by necessity, gets a higher priority than higher ed" when funds are scarce.[245] A senior Virginia Sen-

239. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.
240. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7; author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130.
241. *See* Richard G. Salmon, *The Evolution of Virginia Public School Finance: From the Beginnings to Today's Difficulties*, 36 J. EDUC. FIN. 143, 150 (2010).
242. *Id.*
243. *Id.* at 151.
244. Cary Lou & Kristin Blagg, *School District Funding in Virginia: Computing the Effects of Changes to the Standards of Quality Funding Formula*, URBAN INST. 6 (Dec. 20, 2018), https://www.urban.org/sites/default/files/publication/99540/school_district_funding_in_virginia_3.pdf.
245. Virginia Interviewee No. 5.

ate Finance Committee analyst concurred that "there's really no constitutional requirement for the Governor or the Legislature to provide any money at all to public higher education . . . . [T]hat contrasts pretty starkly with K-12." The analyst further emphasized that "[i]f there is any new money, it is going to go to K-12" first.[246]

This dynamic is visible in Figure 15. It shows that school funding as a proportion of the General Fund remained essentially constant after the 1990-91 and 2001 recessions, hovering between 35 and 38 percent. By contrast, public higher education expenditures fell from 17.5 percent of the General Fund in 1989 to 13.3 percent in 1995, and from 14.7 percent in 2001 to 10.8 percent in 2006. School funding obligations hence limited discretionary resources available for tertiary instruction in both good and bad times.[247]

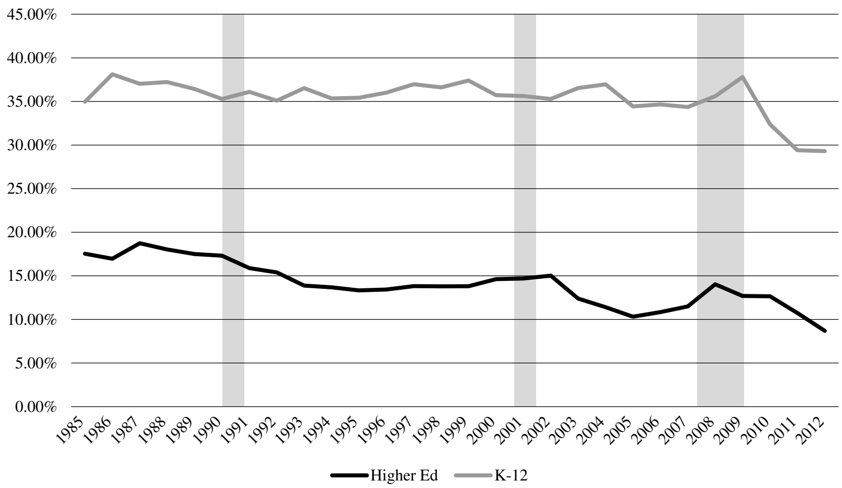

FIGURE 15. PERCENTAGE OF VIRGINIA'S GENERAL FUND DEDICATED TO K-12 EDUCATION VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

246. Virginia Interviewee No. 1.

247. The Great Recession proved more of an exception to this trend in Virginia than in California because Virginia's constitutional mandate is weaker. Unlike Proposition 98's funding guarantee, Virginia's constitution does not commit a specific proportion of the state budget to K-12 schools or provide for additional spending after economic downturns. *See supra* text accompanying notes 119–126. While the SOQ formula is based on district enrollments, lawmakers retain the ability to define what constitutes a "high quality" education, as well as "determine the manner in which funds are to be provided . . . ." VA. CONST. ART. VIII, §§ 1–2. After the Great Recession reduced state revenue on an unprecedented scale, this flexibility allowed legislators to cut K-12 investment by "capping the number of support positions funded by the state, only partially accounting for inflation increases, increasing the assumed life span of buses,

b. Prison Spending

Corrections mandates added to this ceiling.[248] Virginia lost little time replicating the federal government's push for strict sentencing laws. The state amassed thirty-six mandatory minimum statutes covering eighty-two separate offenses between 1968 and 2007.[249] In the mid-1990s, it also eliminated discretionary parole eligibility and reduced the amount of time that could be removed from an individual's sentence for good behavior.[250] Together, these reforms helped inflate the incarceration rate by more than 205 percent between 1982 and 2007.[251]

By increasing both the number of prisoners and the time they spent behind bars, these changes created a rigid floor for state corrections budgets. Though prison expenditures did not consume a growing share of state resources over time—no doubt because of Virginia's ability to maintain relatively low costs per inmate[252]—they consistently retained around 8 percent of the General Fund until the Great Recession (Figure 16).[253] Like K-12 mandates, strict penal codes thus constricted funds available for higher education.

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and eliminating selected district expenditures from calculations of the costs of providing public education." Lou & Blagg, *supra* note 244, at 3.

248. Virginia Interviewee Nos. 1, 2.

249. *Billion Dollar Divide: Virginia's Sentencing, Corrections and Criminal Justice Challenge*, JUSTICE POLICY INST. 9 (Apr. 2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/billiondollardivide.pdf.

250. *Id.*

251. *Id.* at 2.

252. Virginia's real operating costs per inmate stayed fairly steady over the past thirty years, rising from about $25,000 in 1995 to $28,000 in 2015. AMES V. KOCH, VINOD AGARWAL, CHRISTOPHER B. COLBURN, VICKY CURTIS, STEVE DANIEL, LARRY "CHIP" FILER, TIMOTHY KOMAREK, FENG LIAN, SHARON LOMAX, WOLFGANG MAIRINGER, ALICE MCADORY, ROBERT MCNAB, JANET MOLINARO & LISA SUHAY, *Prisons and Prisoners: The Virginia Way and the Alternatives*, *in* THE STATE OF THE REGION: HAMPTON ROADS 2016 77, 84 (2016). By contrast, California's real costs per inmate skyrocketed: while the state spent just short of $33,000 per inmate in 1994, it spent over $60,000 per inmate in 2014. Graves, *supra* note 152, at 1.

253. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130. While it is not entirely clear why prison spending has declined as a proportion of the General Fund since the Great Recession, the recent decrease in Virginia's jail and prison populations is a likely driver. Between 2006 and 2016, jail admissions fell 20 percent and the jail sentenced population remained constant. VERA INST. FOR JUSTICE, INCARCERATION TRENDS IN VIRGINIA: INCARCERATION IN LOCAL JAILS AND STATE PRISONS 4 (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf. Similarly, prison admissions decreased by 10 percent and the prison population fell by 6 percent. *Id.* These trends are consistent with the significant drop in crime rates over the past two decades. *See generally* ROEDER, EISEN & BOWLING, *supra* note 147. If they persist, they may permanently lessen prison mandates' impact on funding for competing state programs, including public higher education.

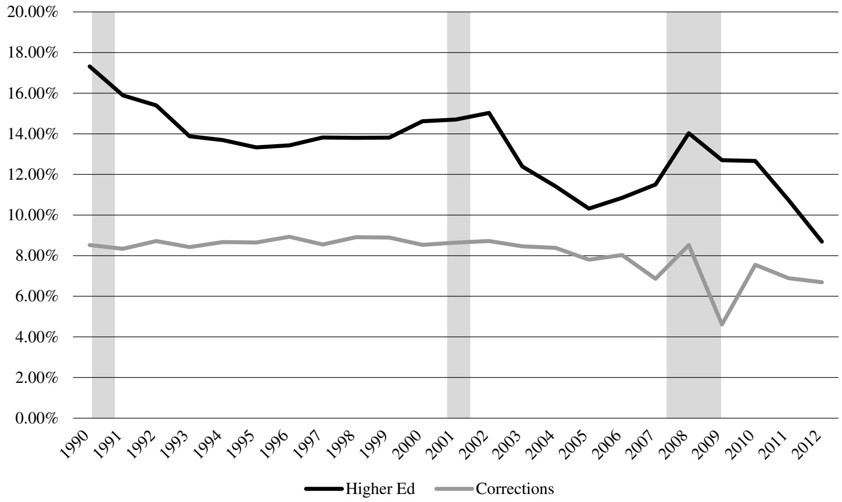

FIGURE 16. PERCENTAGE OF VIRGINIA'S GENERAL FUND DEDICATED TO CORRECTIONS VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

c. *Medicaid Commitments*

If K-12 and corrections helped fasten a ceiling on discretionary funds, Medicaid pushed that ceiling steadily downward.[254] As one leading higher education advocate put it, "healthcare costs are eating Virginia's budget alive."[255] Though the state did not participate in the Affordable Care Act's optional Medicaid expansion until 2019,[256] it witnessed enrollment gains following each of the other Congressional extensions reviewed earlier.[257] Along with the impacts of medical cost inflation, these mandates caused the program to consume gradually larger shares of the state budget.[258] While the Legislature allotted 6.3 percent of the General Fund to Medicaid in 1985, this commitment grew to more than one-fifth of the total by 2014 (Figure 17).[259]

254. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.
255. Virginia Interviewee No. 4.
256. *See* VA. DEP'T OF MED. ASSISTANCE SERVS., 2020 MEDICAID AT A GLANCE (2020), https://www.dmas.virginia.gov/files/links/221/2019%20MAG%20Draft%20(01.07.2019).pdf.
257. COMMONWEALTH OF VA. JOINT LEGISLATIVE AUDIT & REVIEW COMM'N, REVIEW OF THE IMPACT OF MEDICAID RATES ON ACCESS TO HEALTHCARE IN VIRGINIA, S. 158-8, 2014 Reg. Sess. (Nov. 2013), https://rga.lis.virginia.gov/Published/2014/SD8/PDF; *see supra* notes 154–160 and accompanying text.
258. Author's own calculations based on raw data in NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 130.
259. *Id.*

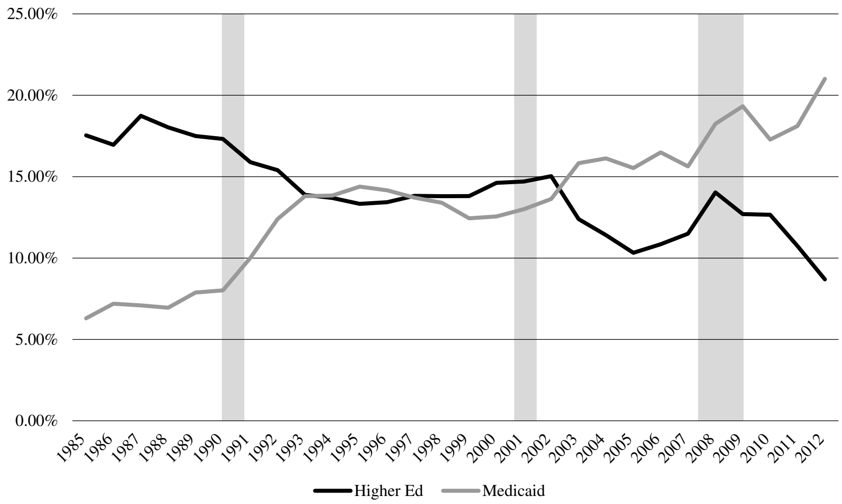

FIGURE 17. PERCENTAGE OF VIRGINIA'S GENERAL FUND DEDICATED TO MEDICAID VS. HIGHER EDUCATION, 1985 TO 2012 (WITH RECESSIONS HIGHLIGHTED).

Source: National Association of State Budget Officers

Like in California, the program's compulsory nature left legislators few options but to trim discretionary funds to balance the books.[260] First, the program joined K-12 and prisons to progressively constrain resources during downturns. In the words of one senior Senate staffer, "when a recession hits . . . we're not required to do certain things . . . for higher ed in the same way that we might for . . . Medicaid. So for that reason, higher ed has been . . . this place that [legislators] feel they can go to do budget reductions."[261] Second, Medicaid's growing costs suppressed tertiary education funds' recovery when the economy improved. As noted in the last section, the program was plagued by rapid healthcare price inflation.[262] Medicaid's countercyclical nature also meant that costs spiked during and in the years following recessions, as more people fell into poverty and enrolled in coverage.[263] These forces drew funds away from discretionary programs like public higher education. One lawmaker put it bluntly: "the largest growing part of our budget has been Medicaid and healthcare costs . . . [but because] Medicaid is a mandated federal-state program, we don't have a whole lot of choice in funding [it]."[264]

260. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.
261. Virginia Interviewee No. 7.
262. *See supra* notes 165–168 and accompanying text.
263. *Id.*; GORDON, *supra* note 163, at 4.
264. Virginia Interviewee No. 5.

2. Tax Arrangements Shrink Revenues

Like on the West Coast, competing mandates assumed outsized importance because of inadequate tax laws.[265] Virginia witnessed a slowdown in General Fund growth similar to that of California over the past several decades: while tax revenues increased by more than 15 percent in the 1960s and by nearly 12 percent in the 1970s, this rate of increase fell to 10 percent in the 1980s, declined to 6 percent in the 1990s, and settled just above 4 percent in the 2000s (Figure 18).[266] Legislators thus had fewer resources to meet the obligations that displaced higher education than they would have had if revenue growth had remained constant. As a senior State Senate Finance Committee staff member put it, "you are not seeing revenue growth the way you did previously. . . [T]he amount of revenue growth is relatively small and not keeping up with the growing needs of the budget."[267]

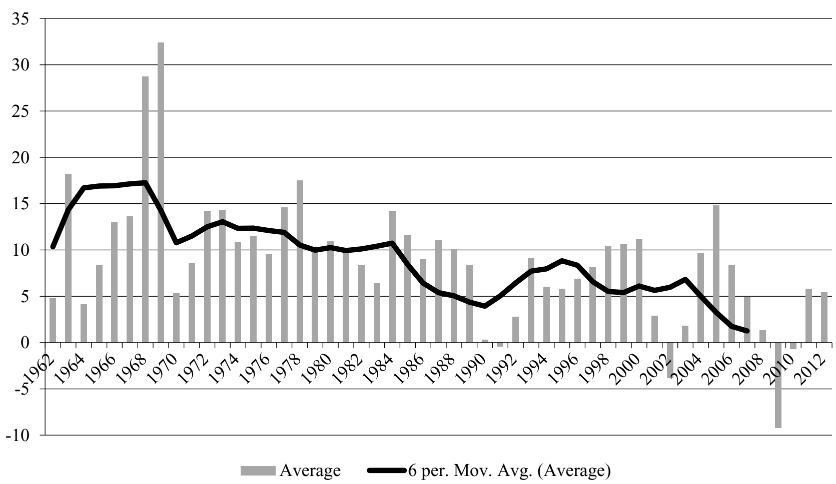

FIGURE 18. PERCENTAGE GROWTH OF VIRGINIA'S GENERAL FUND, YEAR-TO-YEAR AVERAGE & SIX-YEAR MOVING AVERAGE, 1962 TO 2012.

Source: Virginia Secretary of Finance

265. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.
266. Richard D. Brown, *Review of General Fund Revenues and the Virginia Economy for Fiscal Year 2012: A Presentation to the Senate Finance, House Appropriations, and House Finance Committees*, VA SEC. OF FIN. 25, (Appendix Table 4) (Aug. 15, 2012), https://www.finance.virginia.gov/media/governorvirginiagov/secretary-of-finance/pdf/Jointcomte8-15-12-GA.pdf.
267. Virginia Interviewee No. 7.

a. Eroding Tax Institutions Restrain Legislators

Revenue stagnation lay rooted in gradually eroding tax arrangements.[268] First, individual income tax brackets remained fixed at their 1987 levels, generating an essentially flat rate structure that failed to capture much-needed revenue.[269] By 2012, Virginia's state and local tax receipts as a percentage of personal income ranked fourth-lowest in the country.[270] Second, Virginia did not adapt to the shift toward a service economy;[271] a 2012 estimate indicated that service exemptions reduced residents' tax liability by more than $3.5 billion a year.[272] Third, Virginia's corporate income tax lagged firms' earnings by remaining at a flat 6 percent.[273] Between the late 1970s and 2010, corporations' contribution to state tax receipts more than halved as a proportion of total revenues.[274] Fourth, the state multiplied the number of expenditures in its tax code. From 1990 onward, it created or altered more than 60 credits and exemptions, which cost it over $2 billion in foregone revenue per year.[275]

Like in California, many of these changes remained imperceptible to legislators for years due to their incremental and cumulative nature.[276] Nonetheless, like in the Golden State, shortfalls in the

268. *See* Sara C. Okos, *Richmond, We Have a Problem: Modernizing Virginia's Outdated Revenue System*, VA. NEWS LETTER (Weldon Cooper Ctr. for Pub. Serv., U. Va., Charlottesville, Va.), Dec. 2011 at 6, https://vig.coopercenter.org/sites/vig/files/Virginia_News_Letter_2011_Vol._87_No_9.pdf; *see generally* Chris Wodicka & Laura Goren, *A Tax System for Yesterday: Slow Revenue Growth amid Economic Change*, COMMONWEALTH INST. (Nov. 13, 2017), https://www.thecommonwealthinstitute.org/2017/11/13/a-tax-system-for-yesterday-slow-revenue-growth-amid-economic-change (explaining that "Virginia's current revenue system isn't keeping up with changes and growth in the overall economy, . . . putting the future prosperity of families and businesses at risk.").

269. *See* Okos, *supra* note 268, at 6.

270. *New Way to Understand State Fiscal and Revenue Burdens*, FED'N OF TAX ADM'RS (2016) (construing Tracy Gordon, Richard C. Auxier & John Iselin, *Assessing Fiscal Capacities of States: A Representative Revenue System–Representative Expenditure System Approach, Fiscal Year 2012*, URBAN INST. (Mar. 7, 2016), https://www.urban.org/research/publication/assessing-fiscal-capacities-states-representative-revenue-system-representative-expenditure-system-approach-fiscal-year-2012.), https://www.taxadmin.org/index.php?option=com_content&view=article&id=435:rrs&catid=30:research.

271. *See* Okos, *supra* note 268, at 7.

272. COMMONWEALTH OF VA. JOINT LEGISLATIVE AUDIT & REVIEW COMM'N, REVIEW OF THE EFFECTIVENESS OF VIRGINIA TAX PREFERENCES, S. 157-4, 2012 Reg. Sess., at 17, http://jlarc.virginia.gov/pdfs/reports/Rpt425.pdf.

273. *See* Okos, *supra* note 268, at 7.

274. *Id.*

275. *Id.* at 8.

276. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.

tax code traced their roots to a prominent ideological crusade against the goverment's revenue-raising capacity.

b. Right-Partisanship Helps Fuel Erosion

Though Virginia remained free of TELs or SMRs, the spirit behind Proposition 13 helped cement revenue erosion by finding voice in the modern Republican Party. In the late 1970s, Proposition 13's voter appeal convinced national conservative leaders to "elevate[ ] taxes to prominence as an issue of partisan competition."[277] As a result, "many Republican[s] . . . began to define themselves and their party in opposition to taxes."[278] In 1981, Republican President Ronald Reagan harnessed this energy to pass the deepest income tax reductions in U.S. history.[279] Right-wing activists who came of age in this era then extended the movement by asserting even more rigid anti-tax positions in the 1990s and 2000s.[280]

This younger generation of policy entrepreneurs worked hard to align Virginia's legislature with its new philosophy. Most famously, former Reagan administration strategist Grover Norquist organized a multi-decade campaign to pressure political candidates to vow never to raise taxes.[281] This tactic proved largely successful. By 2010, approximately one-third of all Republicans in both the state's lower house and its Senate had signed the pledge.[282] As one senior legislative analyst explained, "particularly [for] the members that [were] Republicans . . . this notion of supporting a tax or a fee increase [was]

277. MARTIN, *supra* note 180, at 127.

278. *Id.* at 128.

279. MARTIN, *supra* note 179, at 177.

280. *Id.* at 183–87.

281. Lisa Sylvester, *Grover Norquist: The Man Who Drew the GOP's 'Line in the Sand'*, CNN (July 14, 2011), http://edition.cnn.com/2011/POLITICS/07/14/norquist.pledge (observing that Norquist's "group, funded through both individual donations and major corporate dollars, has the grass-roots power—and has used it—to raise money, run TV ads and campaign against politicians who violate that pledge. He proudly points to trophies of those who have been brought down, defeated in subsequent elections after voting to raise taxes.").

282. *See ATR Releases 2010 list of Elected Pledge Signers in Virginia*, AMERICANS FOR TAX REFORM, https://www.atr.org/atr-releases-list-elected-pledge-signers-a5601 (showing that 7 sitting state senators and 20 sitting house members had signed the pledge); *Virginia State Senate elections, 2007*, BALLOTPEDIA, https://ballotpedia.org/Virginia_State_Senate_elections,_2007 (showing that there were 19 Republican state Senate candidates elected or re-elected to a 4-year term in 2007, 6 of whom were on ATR's 2010 list of pledge signers); *Virginia House of Delegates elections, 2009*, BALLOTPEDIA, https://ballotpedia.org/Virginia_State_Senate_elections,_2007 (showing that there were 59 Republican House of Delegates candidates elected or re-elected to a 2-year term in 2009, 20 of whom were on ATR's 2010 list of pledge signers).

really, really difficult politically if they want[ed] to get re-elected."[283] Norquist's influence was so pronounced that it extended even to legislators who did not sign the pledge. As one Democratic lawmaker stated, "nobody wants to be the one that gets campaigned against because [they] raised taxes."[284]

As Virginia's Legislature swung right in the 1990s and 2000s, this ethos came to dominate state fiscal policy.[285] One senior legislative analyst remarked that it became "very difficult for . . . Republicans to vote for any kind of tax increase."[286] A leading higher education advocate concurred that there was "no will for [tax reform because] the Republican Party just wouldn't pass it."[287] Between the early 1990s and 2012, the Legislature passed only one significant tax increase, in 2004, under pressure from a Democratic Governor, recurring deficits, and the threat of a downgrade to the state's bond rating.[288] The move so starkly contrasted with the state's anti-tax reputation that it made national headlines that year.[289]

In a similar vein, Republican executive office holders repeatedly called for tax cuts and spearheaded the introduction of new tax expenditures—exclusions, deductions, deferrals, exemptions, credits, and preferential rates afforded to certain taxpayers.[290] Most significantly, Republican Governor James Gilmore led the repeal of an unpopular levy on motor vehicles in 1998, diminishing General Fund receipts by nearly $1 billion a year in the following decades.[291] Right-

283. Virginia Interviewee No. 1.

284. Virginia Interviewee No. 5.

285. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.

286. Virginia Interviewee No. 1.

287. Virginia Interviewee No. 4.

288. H.B. 5018, 153d Gen. Assemb., 1st Spec. Sess. (Va. 2004) (enacted); Pamela Prah, *Virginia Tax Hike Could Lead to Higher Taxes Elsewhere*, PEW CHARITABLE TR. (Apr. 30, 2004), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2004/04/30/virginia-tax-hike-could-lead-to-higher-taxes-elsewhere (noting that the 2004 tax increase was "the first major tax hike in nearly two decades in the Old Dominion"); FISCAL ANALYTICS, LTD., VA. ASS'N OF CTYS., VIRGINIA'S FISCAL SITUATION 27 (2018), https://www.vaco.org/wp-content/uploads/2018/08/FinanceJimRegimbal81618.pdf [https://perma.cc/LP5G-MY3W] (showing that the 2004 reform was the only significant tax increase between 1994 and 2012).

289. *See* James Dao, *Virginia Political Shocker: Republicans for High Taxes*, N.Y. TIMES (Mar. 28, 2004), https://www.nytimes.com/2004/03/28/us/virginia-political-shocker-republicans-for-high-taxes.html.

290. Spencer S. Hsu, *The Transformation of Gov. Allen—And Virginia*, WASH. POST (Jan. 9, 1998), https://www.washingtonpost.com/archive/politics/1998/01/09/the-transformation-of-gov-allen-and-virginia/128f2dcc-771e-4226-b545-731d1d931cc0/.

291. *See* DAVID BRUNORI, STATE TAX POLICY: A PRIMER 43–44 (4th ed. 2016); Michael Cassidy & Sara Okos, *A Drop in the Bucket? Assessing the High Cost of Virginia Tax Expenditures*, COMMONWEALTH INST. 2 (Nov. 2009), http://www.the

party power hence contributed to declining university budgets by facilitating the tax code's gradual deterioration.

3. Weakening Governance Structures and Interest Groups

In the annual battle over limited discretionary funds, weakening university interest groups helped seal the sector's fate.[292] First, Virginia's relatively centralized college coordinating board, the State Council of Higher Education (SCHEV), became subject to political capture.[293] In the 1980s and 1990s, the organization's director, Gordon K. Davies, used his position to publicly rebuke the Legislature when it failed to maintain higher education support.[294] Following heated disagreements between state and university leaders in 1997, Governor George Allen and his allies orchestrated Davies' dismissal—effectively warning SCHEV not to cross elected officials and muting the agency's advocacy in the years thereafter.[295]

More importantly, an already fragile tertiary education community continued to splinter throughout this period.[296] The state's lone student lobby, Virginia21,[297] began coming undone just two years after it was founded in 2002.[298] Like in California, students rarely col-

commonwealthinstitute.org/wp-content/uploads/2011/08/091109_drop_in_the_bucket_REPORT.pdf.

292. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.

293. Virginia Interviewee No. 6 (remarking that while SCHEV began as "a strong and independent organization, . . . Governor [Allen] attempted to take out the State Council because it was objecting to his budget recommendations").

294. *See* Philip Walzer, *Higher Education's Top Gun Agency Under Fire*, VIRGINIAN-PILOT (Jan. 22, 1995), https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp950122/01250664.htm (noting that "Davies has been a thorn in the side of several governors and secretaries of education, most recently with his criticism of budget cuts.").

295. *See* Virginia Interviewee No. 6 (explaining that Governor Allen "removed Gordon Davies, or forced his removal, by manipulating the State Council's board"); Spencer S. Hsu, *Ousted Chief of VA Colleges Calls State Aid Policy Elitist*, WASH. POST (June 17, 1997), https://www.washingtonpost.com/archive/local/1997/06/17/ousted-chief-of-va-colleges-calls-state-aid-policy-elitist/932c794b-117c-4e56-873d-bfc44ebe8c44 (noting that Davies was "fired as executive director of the State Council for Higher Education . . . by Allen appointees"); Jay Paul, *Q&A: Gordon Davies & Peg Miller*, VIRGINIAN-PILOT (June 22, 1997), https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1997/vp970622/06200218.htm (in which Davies characterized his dismissal as ideologically driven); David W. Leslie & Robert O. Berdahl, *The Politics of Restructuring Higher Education in Virginia: A Case Study*, 31 REV. HIGHER EDUC. 309, 317-19 (2008) (observing "that SCHEV's influence was substantially reduced during the terms of Governors Allen and Gilmore (1994–2002).").

296. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7.

297. VIRGINIA21, OUR ACCOMPLISHMENTS (2014), https://web.archive.org/web/20141228142515/http://www.virginia21.org/about-us/accomplishments.

298. Virginia Interviewee Nos. 1, 3, 7.

laborated with their institutional counterparts to pressure lawmakers.[299] Colleges and universities also generally failed to come together to lobby for support, particularly after governance reforms enhanced their managerial autonomy in the mid-2000s.[300] As one legislative analyst remarked, "the bigger, more established [institutions now] lobby more effectively for resources" than the smaller ones.[301]

Though these groups did not have to jostle with organized labor due to the near-complete absence of unions in Virginia, rival interests diminished discretionary funds available for higher education by limiting tax revenue. Like on the West Coast, the state's political arena became increasingly dominated by lobbying and campaign contributions in the 1990s and 2000s.[302] While the top ten donors spent about $5 million on state races in 1996 (adjusted for inflation),[303] they spent nearly $31 million in 2012.[304]

Several of the tax expenditures created in this period arose as a function of certain sectors' efforts to obtain favored treatment.[305] Beginning in 1996, for instance, the energy industry spent $3 million to $5 million per year to maintain preferences such as the Coalfield En-

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299. *Id.*

300. Virginia Interviewee Nos. 1, 2, 3, 4, 5, 6, 7; Leslie & Berdahl, *supra* note 295.

301. Virginia Interviewee No. 1.

302. Dave Ress, *The Virginia Way: Politics, Power and Profit: Part 1: A Part Time Legislature with Full-Time Rewards*, DAILY PRESS (Nov. 18, 2014, 11:12 AM), https://www.dailypress.com/government/dp-nws-virginiaway-overview-20141116-story.html ("Virginia legislators have written themselves some of the loosest laws in the nation about the money their campaigns can accept, about the gifts lobbyists for special interests can shower on them. . ."); Dave Ress, *Part 3: The Big Money in Running – Even Unopposed*, DAILY PRESS (Nov. 18, 2014, 8:57 AM), https://www.dailypress.com/government/dp-nws-virigniaway-campaign-20141118-51-story.html (describing how legislators trade campaign contributions "as a tool for building networks of supporters"). Dave Ress, *Part 5: From Making Law to Influencing It*, DAILY PRESS (Nov. 20, 2014, 3:00 AM), https://www.dailypress.com/government/dp-nws-virginiaway-lobbyist-20141120-story.html (describing how "[l]obbying in state capitols – including Richmond's – hasn't been a bad business" and providing an example of one lobbying company that made $860,000 lobbying on behalf of healthcare, pharmaceutical, and technology companies).

303. List of Top Donors in 1996-1997 for All State Candidates, VA. PUB. ACCESS PROJECT (last visited Oct. 26, 2020, 7:15 PM), https://www.vpap.org/money/top-donors/?year=1996&recip_type=all_state_cands [https://perma.cc/T858-BMJC]. The cumulative rate of inflation in the U.S. between 1996 and 2012 was 46.3%. *See* U.S. Inflation Calculator (last visited Oct. 26, 2020, 7:22 PM), https://www.usinflationcalculator.com/.

304. List of Top Donors in 2012-2013 for All State Candidates, VA. PUB. ACCESS PROJECT (last visited Oct. 26, 2020, 7:27 PM), https://www.vpap.org/money/top-donors/?year=2012&recip_type=all_state_cands [https://perma.cc/3F85-MK4M].

305. Virginia Interviewee Nos. 3, 4, 7.

hancement Tax Credit.[306] Though the state's auditor deemed the $31 million annual handout ineffective in 2011, legislators eagerly renewed it for another ten years in 2012.[307] The growing and unchecked influence of political donations therefore helped affluent rivals draw resources away from a dissociated college lobby.

IV.
WHERE STATES GO FROM HERE

The story of American public higher education retrenchment is fundamentally about the unintended consequences of law. Though they lie at opposite ends of the country, were governed by different political parties, and feature diverging levels of legislative professionalism, both California and Virginia lowered public college funding over the past three decades because lawmakers became constrained by three legal forces: rising expenditure mandates, especially for Medicaid; eroding tax bases; and fading public college advocacy in a lobbying arena geared toward monied interests. Comparative theory indicates that common drivers such as these are likely to be the source of dissimilar states' parallel behavior.[308] Quantitative analyses have indeed confirmed that these factors have played the dominant role in spurring public higher education disinvestment throughout the nation.[309]

Although the voters and policymakers who supported reforms such as expanded health coverage, guaranteed school funding, and property tax relief likely did not intend for these measures to cause a decline in higher education spending, that is precisely the impact these and other legal changes had over time. As Medicaid grew to cover more people and failed to escape the cost inflation that characterizes the U.S. health sector; as states enshrined K-12 funding minimums into their constitutions; and as lawmakers locked in prison spending by locking millions more people behind bars, the discretionary funds used to invest in public higher education dried up. Support for public colleges and universities proved especially scarce during recessions,

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306. Tom Cormons, Glen Besa & Beth Kemler, Dirty Money, Dirty Power: How Virginia's Energy Policy Serves the Interests of Top Campaign Contributors (Oct. 2, 2012), http://appvoices.org/images/uploads/2012/11/Dirty-Energy-Politics.pdf [https://perma.cc/J2K7-LQG4]; List of Donors by Industry between 1996 and 2012 for All State Candidates, Va. Pub. Access Project (2020), https://www.vpap.org/money/donors-sector/?year=2012&recip_type=all_state_cands (select years 1996–2012 in the year bar) [https://perma.cc/M82V-XSWR].

307. Cormons et al., *supra* note 306, at 7.

308. *See* Part II, *supra*.

309. Pilaar, *supra* note 64, at 39–68, 75–98.

when demand for needs-based programs like Medicaid rose. It also consistently failed to reach its pre-recession peaks as the costs of health and prison mandates escalated during recovery periods.

States would not have struggled as badly to cope with these obligations if their tax laws had been designed to efficiently maximize revenue. Unfortunately, the opposite turned out to be true. States' revenue growth fell for decades as their tax codes narrowed and failed to keep pace with economic changes. In California and dozens of states around the country, new limits on legislators' authority to raise taxes made it effectively impossible to procure the revenue needed to address mounting spending obligations. In many states, such as Virginia, voters and lawmakers further drained public budgets by failing to make critical updates to their tax codes and adopting hundreds of poorly-monitored tax expenditures.[310]

Although some of these measures' loudest proponents were anti-tax activists eager to shrink state governance capacity, many voters and legislators who supported public higher education embraced lower tax bills without appreciating that this would bring a decrease in college funding. Ideology and partisanship therefore played an important role in the story of retrenchment, but an indirect one. Anti-tax crusaders like Howard Jarvis, Grover Norquist, and their Republican allies certainly helped pass tax cuts and prevent much-needed fiscal reform in key moments. However, the weakened tax codes they left behind often sapped state coffers in so gradual a manner that lawmakers preoccupied with annual budget changes did not realize dwindling revenue had impacted college funding until it was too late.

Policymakers might have done more to stem disinvestment if they had felt greater pressure from public higher education advocates to protect the sector. However, public college supporters held little clout in a political arena that allowed other interests to advance their agendas by spending millions of dollars a year on lobbying and campaign donations. When it came time to make difficult cuts during recessions and decide where to reinvest during slowed growth periods, under-resourced college supporters inevitably lost to organizations that could sway legislators by providing the funds needed to compete in increasingly expensive elections.

While these findings are cause for concern, they also shed light on structural reforms that could allow states to begin reinvesting in public higher education. This study should not be seen as a call to reduce funds for vital services in favor of public colleges. Although

310. *See, e.g.*, CORMONS ET AL., *supra* note 306, at 7.

rising Medicaid costs have pulled resources away from public higher education, the program provides essential health coverage to millions of the country's most vulnerable children and adults,[311] including many low-income elderly and disabled Americans.[312] Furthermore, although minimum funding guarantees for K-12 systems have limited the discretionary funds available for public tertiary instruction, the United States already invests far too little in its public primary and secondary schools, exacerbating inequality and leading to poor achievement compared to the rest of the world.[313]

Fortunately, reform options exist that would simultaneously advance the interests of justice and generate funds on the scale needed to make up for decades of retrenchment. Because public colleges and university budgets fell victim to long-running structural forces, it will take reforms of an equally important scale to bring them back to health. The foregoing analysis suggests at least four possibilities: creating a fairer tax code, adopting a national single-payer healthcare system, ending mass incarceration, and reducing money's influence in politics.

A. Updating State Tax Codes

First, states could raise new revenue for public services by reforming their tax codes.[314] They could repeal tax and expenditure limitations and super-majority requirements that unfairly privilege certain taxpayers and make it needlessly difficult to secure money for social policy.[315] Such changes would raise billions of dollars per year. For instance, Californians voted on a measure in November 2020 that, if passed, would have partially repealed Proposition 13 by increasing taxes on commercial and industrial property.[316] This change would

311. KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 156, at 1.
312. Robin Rudowitz, Rachel Garfield & Elizabeth Hinton, *10 Things to Know About Medicaid: Setting the Facts Straight*, KAISER FAM. FOUND. (Mar. 6, 2019), https://www.kff.org/medicaid/issue-brief/10-things-to-know-about-medicaid-setting-the-facts-straight [https://perma.cc/GH2U-QMQ9].
313. Pilaar, *supra* note 50, at 355–57.
314. *Id.* at 368–78.
315. *Id.* at 369–72.
316. *See* CALIFORNIA LEGISLATIVE ANALYST'S OFFICE (2020), *supra* note 189, at 1–2 (specifying that the measure would have "require[d] commercial and industrial . . . land and buildings to be taxed based on how much they could be sold for instead of their original purchase price"); Roland Li, *Proposition 15, California's Sweeping Property Tax Reform, Defeated*, S.F. CHRON. (Nov. 11, 2020) (explaining that "[t]he measure, which would have removed the landmark Proposition 13's property tax protections for commercial properties, was rejected by 51.8% of the voters").

have produced $8 billion to $12.5 billion in new annual revenue by 2025.[317]

As inequality rises to unprecedented levels, states could implement new taxes on wealth. A small fraction of Americans has experienced disproportionate gains over the past four decades. Between the late 1970s and 2018, the top 1 percent of wealth holders went from owning 22 percent to 37 percent of all household wealth.[318] By contrast, the bottom 90 percent saw their share fall from 40 percent to 27 percent.[319] Taxing the ultra-wealthy's assets at even low rates would generate billions of dollars a year with few economic distortions.[320] Tax law scholars David Gamage and Darien Shanske have outlined how states could implement partial wealth taxes by creating a statewide property surtax or a statewide tax on unrealized capital gains.[321] Such measures would likely be particularly effective in large states that host many wealthy families. For instance, California's 150 or so billionaires have combined assets totaling around $600 billion.[322]

States could also modernize their corporate and sales taxes. Many of these levies have failed to keep up with changes in the real economy.[323] Over the past few decades, companies have re-classified themselves as passthrough entities to avoid corporate taxes on their profits.[324] States could close these loopholes or create new Business Value Taxes (BVTs) to ensure that all businesses contribute to the public services and infrastructure from which they benefit.[325] Similarly, as manufacturing's share of the American economy continues to fall, states could infuse billions more dollars into their budgets by revising their sales taxes to include services.[326] In California, for instance, taxing a limited number of services already taxed in a large number of other states would generate close to $2.7 billion a year.[327]

317. California Legislative Analyst's Office (2020), *supra* note 189, at 2.
318. Emmanuel Saez & Gabriel Zucman, The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay 98 (2019).
319. *Id.*
320. Jeremy Pilaar, *Democrats Need to Talk About Taxes As Well As Cuts*, S.F. Examiner (June 3, 2020, 3:30 PM), https://www.sfexaminer.com/opinion/democrats-need-to-talk-about-taxes-as-well-as-cuts/.
321. David Gamage & Darien Shanske, *States Should Consider Partial Wealth Tax Reforms*, 96 Tax Notes State 859 (2020).
322. Pilaar, *supra* note 320.
323. *See* Pilaar, *supra* note 50, at 372–75 (describing how state sales taxes continue to exclude nearly all service purchases and, until recently, excluded online sales).
324. *Id.* at 374–75.
325. *See* Jeremy Pilaar, *Making the Most of a BVT: Lessons from New Hampshire and Michigan*, 93 Tax Notes State 703 (2019).
326. Pilaar, *supra* note 50, at 372–74.
327. Ross, *supra* note 197, at 5.

Taxing a wider array of services would bring in more than $8.7 billion a year.[328]

Policymakers should not shy away from such reforms based on the perception that they are regressive. While a sales tax might seem regressive in isolation, the revenue it generates could fund services that have a net-positive impact on low-income households. As sociologists Isaac Martin and Monica Prasad have observed, "[r]ecent studies have established that tax policy and social spending covary in a surprising way: The most solidaristic welfare states, including those that accomplish the most poverty reduction, also rely the most heavily on regressive taxes."[329] The key, as Harvard Law Professor Roberto Unger has stressed, is "to spend [that revenue] on redistributive public services."[330]

Finally, states could rigorously study the effectiveness of their tax expenditures and phase out those that are failing to help grow the economy.[331] In response to the anti-government sentiments that have defined American politics since the 1970s, policymakers have often enacted social spending through tax preferences rather than direct expenditures.[332] Today, these measures cost the federal and state governments hundreds of billions of dollars a year.[333] Many states enact more than half of their public outlays through tax expenditures.[334] California, for example, foregoes more than $63 billion in revenue every year, an amount equivalent to about 40 percent of its General Fund.[335] Unfortunately, state policymakers know very little about whether such expenditures are effective because state governments

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328. *Id.*
329. Isaac William Martin & Monica Prasad, *Taxes and Fiscal Sociology*, 40 ANN. REV. SOC. 331, 335 (2014).
330. Daniel Steinmetz-Jenkins, *Roberto Mangabeira Unger's Alternative Progressive Vision*, NATION (July 21, 2020), https://www.thenation.com/article/culture/roberto-mangabeira-ungers-alternative-progressive-vision/.
331. *See* Pilaar, *supra* note 50, at 376–77 (describing how both the cost of tax expenditures on state budgets and their economic benefits are poorly understood by legislators).
332. *See generally* CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE (1997). Howard argues that tax expenditures' relative obscurity and political "ambiguity helps conservative Democrats and moderate Republicans to support tax expenditures more strongly than they do direct expenditures." *Id.* at 11.
333. JASON LEVITIS, NICHOLAS JOHNSON & JEREMY KOULISH, CTR. ON BUDGET & POLICY PRIORITIES, PROMOTING STATE BUDGET ACCOUNTABILITY THROUGH TAX EXPENDITURE REPORTING 1 (2009), https://www.cbpp.org/sites/default/files/atoms/files/4-9-09sfp.pdf [https://perma.cc/T3VG-CYSD].
334. *Id*. at 1, appx. 1 (collecting state tax expenditure reports).
335. KAYLA KITSON, CAL. BUDGET & POL'Y CTR., TAX BREAKS: CALIFORNIA'S $60 BILLION LOSS (Jan. 2020), https://calbudgetcenter.org/wp-content/uploads/2020/01/CA_Budget_Center_tax-expenditures-2020.pdf [https://perma.cc/BB89-2Q8M].

rarely evaluate them.[336] States that analyzed how their tax expenditures have performed would no doubt find many that could be discontinued, freeing revenue for other purposes.

B. Reforming A Broken Healthcare System

Second, the United States could lower its healthcare costs by joining other advanced countries and adopting a single-payer system.[337] The United States spends significantly more on healthcare than other major economies. In 2018, U.S. healthcare expenditures totaled 16.9 percent of GDP, compared to just 10.7 percent in Canada and 9.8 percent in the United Kingdom.[338] Per capita expenditures put the difference in even starker perspective. A 2020 study by the Commonwealth Fund showed that while the United States spends $10,207 per capita on healthcare every year, Canada spends $4,974 and the United Kingdom spends just $3,943.[339] If the United States had spent the same amount per person on healthcare in 2018 as the United Kingdom, it would have saved over $2 trillion that year alone.[340]

These differences mainly stem from the way other countries finance and deliver healthcare: through a single-payer system. Like the United States, Canada and the United Kingdom are both developed economies. The cultural differences between them are relatively small. Yet unlike the United States, in which state and federal agencies pay for some health services and private insurers pay for others, Canada and the United Kingdom feature just one payor: the government.[341] In Canada, provinces pay private health providers for services.[342] In the

336. *See* Pilaar, *supra* note 50, at 376–77; LEVITIS, JOHNSON & KOULISH, *supra* note 333.
337. *See* Christopher Cai, Jackson Runte, Isabel Ostrer, Kacey Berry, Ninez Ponce, Michael Rodriguez, Stefano Bertozzi, Justin S. White & James G. Kahn, *Projected Costs of Single-Payer Healthcare Financing in the United States: A Systematic Review of Economic Analyses*, PLOS MEDICINE, Jan. 2020, at 1 (predicting that 86% of the single-payer plans studied would yield net savings in the first year of operation and that "anticipated growth rates would result in long-term net savings for all plans.").
338. Roosa Tikkanen & Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?*, COMMONWEALTH FUND (Jan. 30, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019 [https://perma.cc/63TA-W3SL].
339. *Id.*
340. Author's own calculation using the U.S. population for 2018, 327.2 million people. *See* U.S. CENSUS BUREAU, *2018 National and State Population Estimates* (Dec. 19, 2018), https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html.
341. Sara Kliff, *12 Questions About Single-Payer Health Care*, VOX (May 31, 2015), https://www.vox.com/2014/6/26/18080458/single-payer.
342. *Id.*

United Kingdom, the national government both finances and provides most healthcare.[343]

These systems have two major advantages: they allow the government to bargain down prices and they reduce administrative bloat.[344] Americans pay much higher prices than people in other countries for the same drugs and health services.[345] For example, in 2015, the United States spent $1,011 per capita on prescription drugs, while most other OECD countries spent between $400 and $600.[346] Much of this trend is driven by the private sector; as a 2017 Medicare Payment Advisory Commission report noted, private insurers pay 50 percent more than Medicare for the same services.[347] The reason is straightforward: Medicare—which covers about a fifth of the U.S. population—uses its clout to set reasonable prices, while private insurers—which are smaller and can pass cost increases on to consumers—do not.[348] A single-payer system would expand Medicare's price-setting power to all healthcare provision.

By doing away with the web of insurers that healthcare providers must engage with when seeking payment, a single-payer system would also reduce administrative costs. A 2016 Commonwealth Fund study found that, after adjusting for the cost of living, the United States spends $737 per capita on health insurance administration.[349] This figure towers over that in most other countries, including Canada and the United Kingdom, where it stands at $145 and $94, respectively.[350]

These cost savings would not sacrifice quality. Although some Americans worry that a single-payer system would lead to much

343. *Id.*
344. *Id.*
345. Gerald F. Anderson, Peter Hussey & Varduhi Petrosyan, *It's Still the Prices, Stupid: Why the US Spends So Much on Health Care, and a Tribute to Uwe Reinhardt*, 38 HEALTH AFF. 87 (2019).
346. *Id.* at 89.
347. *Id.*
348. *State Health Facts: Medicare Beneficiaries as a Percent of Total Population*, KAISER FAM. FOUND. (2021), https://www.kff.org/medicare/state-indicator/medicare-beneficiaries-as-of-total-pop (showing that 18 percent of the U.S. population had Medicare coverage in 2018); Kliff, *supra* note 341 (explaining that while Medicare only covers part of the U.S. population—"stop[ping] it from negotiating (or just setting) prices as low as those found in 'real' single-payer systems"—it nonetheless "negotiate[s] prices lower than private health insurers").
349. DANA SARNAK, COMMONWEALTH FUND, MULTINATIONAL COMPARISONS OF HEALTH SYSTEMS DATA, 2016, ATTACH. F, at 6 (2016), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_chartbook_2016_att_fsarnak2016_oecd_data_chartpack_final_pdf.pdf [https://perma.cc/Y28R-7FAU].
350. *Id.*

longer wait times for care, research has shown this to be a myth.[351] To the contrary, people who live in countries with single-payer systems tend to be more satisfied with their healthcare.[352] Despite their more modest spending per capita, the United Kingdom, Canada, and other high-income countries also have higher life expectancy and lower infant mortality rates than the United States.[353]

Support for a single-payer or "Medicare for All" system has steadily grown among the U.S. public and policymakers.[354] Several versions of "Medicare for All" legislation have been proposed by members of Congress.[355] As of late 2019, single-payer bills had 118 co-sponsors in the U.S. House of Representatives.[356]

While any of these bills would likely reduce states' healthcare costs by giving regulators the power to lower prices, one would go a step further: it would eliminate states' health expenditures by having the federal government administer a single-payer system on its own. States collectively spend $222 billion on Medicaid every year.[357] Under H.R. 1384, introduced by U.S. Representative Pramila Jayapal, the federal government would become the country's sole healthcare payor—wiping this sum from states' balance sheets and allowing them to redirect the money elsewhere, including to public higher education.[358] Those savings would translate to $35.3 billion a year in California and $5 billion a year in Virginia, or about 25 percent and 22 percent of their respective annual general fund expenditures.[359] Per-

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351. Kliff, *supra* note 341.
352. *Id.*
353. Irene Papanicolas, Liana R. Woskie & Ashish K. Jha, *Health Care Spending in the United States and Other High-Income Countries*, 319 J. AM. MED. ASS'N 1024 (2018).
354. Micah Johnson, Sanjay Kishore & Donald M. Berwick, *Medicare For All: An Analysis Of Key Policy Issues*, 39 HEALTH AFF. 133, 133 (2020).
355. *Id.*
356. *Id.*
357. JENNIFER TOLBERT, ROBIN RUDOWITZ & MARYBETH MUSUMECI, KAISER FAM. FOUND., HOW WILL MEDICARE-FOR-ALL PROPOSALS AFFECT MEDICAID? 1, 7 (Sept. 2019), http://files.kff.org/attachment/Issue-Brief-How-Will-Medicare-for-all-Proposals-Affect-Medicaid [https://perma.cc/FM8F-SEUL].
358. *See* Medicare for All Act of 2019, H.R. 1384, 116th Cong. § 201 (2019) (proposing to have the federal government pay for comprehensive health coverage for every U.S. resident, while allowing individual states to provide their residents additional benefits); TOLBERT ET AL., *supra* note 357, at 7 (explaining that "under the Jayapal proposal, states could see significant savings relative to current Medicaid spending because Medicaid would be eliminated, and there would be no state financing requirements").
359. *See Federal and State Share of Medicaid Spending: FY 2019*, KAISER FAM. FOUND. (2020), https://www.kff.org/medicaid/state-indicator/federalstate-share-of-spending/ [https://perma.cc/5R58-JAC2]; STATE OF CALIFORNIA, 2018–19 STATE

haps unexpectedly, then, one of the best steps reformers could take to support public colleges would be to lobby for a single-payer health-care system administered by the federal government.

C. Achieving Criminal Justice Reform

Third, states could unlock additional funds by reducing their prison populations. As California and Virginia's histories illustrate, the United States has imprisoned an unprecedented number of people in the past fifty years. The United States makes up less than 5 percent of the world's population but is home to 20 percent of the world's prisoners.[360] Between 1972 and 2012, the proportion of incarcerated Americans rose from 161 to 707 people per 100,000 residents.[361] The vast majority of that increase took place in state prisons and local jails: the state incarceration rate rose from fewer than 100 people per 100,000 residents to nearly 450, while the local incarceration rate climbed from around 60 people per 100,000 residents to nearly 250.[362] Today, 57 percent of incarcerated Americans are in state prison and another 30 percent are confined in local jails.[363]

States have a moral imperative to reform their criminal justice systems. As a growing body of research has shown, mass incarceration was largely the product of racist reforms that imposed strict penalties on drug crimes and petty offenses.[364] In 2018, Black adults were

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BUDGET: SUMMARY CHARTS 18 (2018), http://www.ebudget.ca.gov/2018-19/pdf/Enacted/BudgetSummary/SummaryCharts.pdf [https://perma.cc/F3NB-SQ2J] (showing that total General Fund appropriations for 2018–19 were $138.7 billion); H.B. 1700 (Chapter 854), 160th Gen. Assemb., 2019 Sess. (Va. 2019), https://budget.lis.virginia.gov/get/budget/3929/HB1700 (showing that total General Fund appropriations for the 2018–20 Biennium were $44.2 billion, or $22.1 billion per year).

360. Peter Wagner & Wanda Bertram, *"What Percent of the U.S. is Incarcerated?" (And Other Ways to Measure Mass Incarceration)*, PRISON POL'Y INITIATIVE (Jan. 16, 2020), https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated [https://perma.cc/2S7X-YH5P].

361. NAT'L RESEARCH COUNCIL, DIV. OF BEHAVIORAL SOC. SCI. & EDUC., COMM. ON LAW & JUSTICE & COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *Rising Incarceration Rates*, *in* THE GROWTH OF INCARCERATION IN THE UNITED STATES 33 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

362. Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POL'Y INITIATIVE, at fig.1 (May 28, 2014), https://www.prisonpolicy.org/reports/overtime.html.

363. *Id.*

364. *See, e.g.*, ALEXANDER, *supra* note 137; Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41 (2011); Michael L. Rosino & Matthew W. Hughey, *The War on Drugs, Racial Meanings, and Structural Racism: A Holistic and Reproductive Approach*, 77 AM. J. ECON. & SOC. 849 (2018); *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet [https://perma.cc/YX6D-6WY8] (last visited Sept. 27, 2020).

5.9 times more likely to be incarcerated than white adults.[365] Hispanic adults were 3.1 times more likely to be in jail or prison than their white counterparts.[366]

Mass incarceration has also strained state budgets. As a 2017 Prison Policy Initiative report revealed, existing policies cost the government and the families of incarcerated people approximately $182 billion a year.[367] Of that, $80 billion goes to public corrections agencies, $63 billion goes to policing, and $29 billion goes to the judicial and legal system.[368] State and local government spending makes up almost 90 percent of these expenditures.[369] States could therefore reallocate tens of billions of dollars a year to other services if they made their criminal justice systems less punitive.

Effective criminal justice reform would require solutions tailored to the unique ways in which the "tough on crime" mentality of the 1980s and 1990s was enshrined into law in each state.[370] Fortunately, organizations such as the American Civil Liberties Union,[371] the Urban Institute,[372] the Vera Institute of Justice,[373] and the Brennan Center for Justice[374] have developed blueprints to help states reduce their prison populations, provide meaningful rehabilitation, and end the racial disparities that form the bedrock of the American carceral system.

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365. THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (Mar. 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/N5SJ-JRBM].

366. *Id.*

367. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/B65Q-J65M].

368. *Id.*

369. *Id.* ("[S]tate government spending makes up the majority (57%) of corrections costs, local governments make up almost a third (32%).").

370. *See generally* Udi Ofer & Nicole Zayas Fortier, *Unveiling a State-by-State Plan to End Our Mass Incarceration Crisis*, ACLU (Oct. 18, 2019), https://www.aclu.org/news/smart-justice/unveiling-a-state-by-state-plan-to-end-our-mass-incarceration-crisis [https://perma.cc/R8MH-SBUA] ("[T]he overwhelming majority of people are incarcerated at the state level, [ending mass incarceration] . . . will require changes to hundreds of laws and practices in all states.").

371. *Id.*

372. *Id.*

373. *Ending Mass Incarceration*, VERA INST. FOR JUSTICE, https://www.vera.org/ending-mass-incarceration [https://perma.cc/C6Q4-NEUG] (last visited Sept. 27, 2020).

374. BRENNAN CTR. FOR JUSTICE, ENDING MASS INCARCERATION: IDEAS FROM TODAY'S LEADERS (Inimai Chettiar & Priya Raghavan eds., 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_EndingMassIncarceration_2.pdf [https://perma.cc/6HPC-Y7P4].

D. Reinvigorating Democracy

Finally, states could amplify public higher education advocates' voices by limiting the role that big money plays in politics. Finding workable campaign finance reforms in the era of *Citizens United* is no simple task.[375] Yet even here solutions exist.[376] States could adopt small donor public financing systems that match every small campaign donation made by an in-state resident with public funds.[377] States could also provide each resident with a "democracy voucher"—a sum of $100 to $200 that the resident could donate to candidates or advocacy groups of their choice.[378]

States could also take even more direct steps to loosen wealthy interests' influence over lawmakers. Vanderbilt Law Professor Ganesh Sitaraman has proposed a series of Congressional reforms that could also be applied to state legislatures.[379] First, states could institute a lifetime ban on legislators and their staffs becoming lobbyists.[380] Second, states could ban lobbyists from donating to legislators.[381] Third, states could make their legislatures more professional.[382] Many state legislatures only meet part-time and have low-paid staffs.[383] This

375. *See* Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUSTICE (Dec. 12, 2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained [https://perma.cc/U79W-NDDT] (explaining how reformers can address the consequences of *Citizens United*).

376. *See, e.g.*, Juhem Navarro-Rivera & Emmanuel Caicedo, *Public Funding for Electoral Campaigns: How 27 States, Counties, and Municipalities Empower Small Donors and Curb the Power of Big Money in Politics*, DĒMOS (June 28, 2017), https://www.demos.org/research/public-funding-electoral-campaigns-how-27-states-counties-and-municipalities-empower-small [https://perma.cc/5E33-6EBK] (explaining that there are already 27 public election funding schemes in place across the country, which comprise small-donor matching programs, grant-based programs, voucher programs, and tax credits/refunds).

377. *See* BRENNAN CTR. FOR JUSTICE, THE CASE FOR SMALL DONOR PUBLIC FINANCING IN NEW YORK (Feb. 26, 2019), https://www.brennancenter.org/our-work/policy-solutions/case-small-donor-public-financing-new-york [https://perma.cc/GL5L-BNGC].

378. *See* Scott Castleton, *It's Time for Liberals to Get Over Citizens United*, VOX (May 7, 2018, 9:10 AM), https://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries.

379. For book-length treatment of these reform ideas, *see* GANESH SITARAMAN, THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA (2019).

380. *Id.* at 183.

381. *Id.* at 184.

382. *Id.*

383. *Full- and Part-Time Legislatures*, NAT'L CONF. OF STATE LEGISLATURES (June 14, 2017), https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/46V8-ZP54].

makes them susceptible to the influence of veteran lobbyists.[384] By improving legislator and staff pay, states could make policymakers more independent and decrease their incentives to move on to more lucrative careers.[385] Whatever form change took, states would go a long way toward making it easier for legislators to attend to the needs of less-resourced groups—including public higher education supporters—if they minimized the clouding influence of monied donors.

E. The Road Ahead

Public higher education has undergone severe retrenchment over the past thirty years. However, American states are no strangers to building some of the highest-quality and most accessible public college systems on earth. With sufficiently bold reforms to spending programs, fiscal structures, and political finance, they have the power to do so again.

384. *See* Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 PERSP. ON POL. 582 (2014) (finding that the American Legislative Exchange Council (ALEC) has outsized influence when state legislatures lack the time and resources to develop legislation on their own); Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148 (2012) (finding that less professionalized state legislatures tend to adopt policy congruent with the majority will less often than professionalized legislatures).

385. SITARAMAN, *supra* note 379, at 413.