A HYPOTHETICAL CASE STUDY ANALYSIS OF CALIFORNIA’S POTENTIAL IMPLIED CONTRACTUAL OBLIGATION TO PROVIDE THE STATE’S CITIZENS AFFORDABLE ACCESS TO POSTSECONDARY EDUCATION

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by
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Abstract

This dissertation considers two separate but related research questions. The first question asks what factors would create an implied contractual relationship between states and their postsecondary institutions. The second question asks what factors could provide students third-party beneficiary status under that implied contract, if one exists. The recent cuts in public postsecondary funding and trends toward institutional performance accountability were the impetuous for this research. As state fiscal support for public higher education has dropped, student cost and debt has risen. These research questions examine whether students have a legal remedy that could force states to provide enough resources to make postsecondary education affordable and accessible.

A case study methodology is used to study these research questions. The state of California serves as the single state case study for this research. California was chosen for a number of reasons. First, the state’s tripartite public postsecondary system provides clear insights into the unique considerations that face different types of postsecondary institutions. Second, the relevant facts and circumstances surrounding California’s higher education sector are vast. This allows for a depth of analysis that other states simply could not provide. Lastly, California’s previous fiscal commitment to postsecondary education has been unmatched by other states. The state’s recent cuts have also been as severe as any other state in the country. These fiscal considerations bring additional insights to the analysis. All told, these traits made California an ideal case study for this research.

The research reveals a few interesting considerations. First, a number of factors influence the answer to the research questions. These factors can be analyzed within a historical, legal, administrative, and fiscal framework. Second, given the right
circumstances, a particularly generous court may find that students are third-party beneficiaries to an implied contract between California and its postsecondary institutions. However, students may have an easier time proving that California directly promised to provide them affordable access to high-quality postsecondary education. If this is true, students may be a principal party to implied contract with California. All told, proving either claim would be difficult. However, states and their postsecondary institutions would likely benefit from treating their relationship in a contractual manner so that each party understands their rights and accepts their responsibilities before accountability or funding disputes arise.
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Chapter 1: Introduction

State fiscal support for public higher education has dropped on a per student basis since 1990 (Quinterno, 2012). Real-dollar funding reductions reached unprecedented levels in the wake of the “Great Recession” (Palmer, 2012; State Higher Education Executive Officers, 2012). More recently, state funding for public higher education dropped $2.1 trillion dollars between 2007 and 2012 (Zumeta, 2012). The impact of these cuts was tempered in Fiscal Years (FY) 2009-2010 and 2010-2011 by the $9 billion of “Federal Stabilization Funds” provided to the states under the American Recovery and Reinvestment Act (de Vise, 2010; Kelderman, 2011b; Palmer, 2012; State Higher Education Executive Officers, 2012). Despite this federal stimulus funding, state support for public postsecondary education generally continued to decline through FY 2011-2012 (Bewley, 2010; Kelderman, 2011b; Palmer, 2012, 2013; State Higher Education Executive Officers, 2012).

Given the severity of the Great Recession, a reduction in state aid should have been expected. Funding for public higher education fluctuates over time in response to overall economic conditions (Delaney & Doyle, 2011; Hovey, 1999). Simply put, state allocations for public postsecondary institutions increase during prosperous economic times and fall during recessionary periods (Delaney & Doyle, 2011; Hovey, 1999).

This general pattern seems logical given the discretionary nature of most state support for postsecondary education. If we accept that this trend will continue in the wake of the Great Recession, higher education funding should grow as the economy strengthens. However, many fear that states will use this opportunity to establish a “new
normal” for public higher education funding (Delaney & Doyle, 2011; Lumina Foundation for Education, 2010; Pattison & Eckl, 2011; Yakoobski, 2010).

State disinvestment in higher education extends across the country (Kelderman, 2011a). Over the last six years, public higher education appropriations have been reduced in about 90% of the states (Palmer, 2013; State Higher Education Executive Officers, 2012). The nadir of higher education’s fiscal crisis was reached between 2010 and 2012. The University of North Carolina System, for example, lost $414 million in state aid for FY 2011-2012 after already absorbing $620 million in cuts over the previous four years (Ferreri & Price, 2011; Stancill, 2011). Pennsylvania reduced funding for the state’s higher education institutions over $200 million in FY 2011-12 (Gammage, 2011; Olson & Mauriello, 2011; Singer & Moran, 2011). Nevada’s public postsecondary institutions implemented program cuts, layoffs, and tuition increases in response to reduced state aid (Kelderman, 2011c). Colorado nearly eliminated direct state support of public postsecondary institutions completely (Kelderman, 2013b; Love, 2012).

Public higher education cuts have been particularly severe in California. The state reduced fiscal support for its public postsecondary institutions in FY 2011-2012 by more than $1.5 billion (Medina, 2011). Between 2008 and 2013, state higher education appropriations have dropped 23.9% (Palmer, 2013). Glantz and Hays (2012) found that UC student fees would have to increase $11,680 to restore per student resources to 2000-2001 levels. Extensive funding cuts for higher education, however, extend well beyond California (Palmer, 2012, 2013; Quinterno, 2012; State Higher Education Executive Officers, 2012). Across the nation, states reduced funding for their public institutions of higher education by nearly $6 billion in FY 2011-2012 (Ceasar & Watanabe, 2011).
FY 2012-2013 may have brought the new normal that many anticipated. State support for postsecondary education appears to have stabilized in FY 2012-2013 as overall funding fell just .4% compared to a 10.8% drop between FY 2008-2013 (Palmer, 2013). Over 30 states kept funding constant or slightly grew allocations for postsecondary education in FY2012-2013 (Palmer, 2013). FY 2013-2014 saw a 5.7% increase in public higher education funding (Palmer, 2014). This news, while encouraging, must be weighed against the impact of the previous five years because most states have not returned to pre-recession funding levels.

Only high resource/low population states like Wyoming, North Dakota, and Alaska significantly increased funding for public higher education between 2007 and 2012 (Palmer, 2013). In fact, both Wyoming and North Dakota increased funding for public higher education over 30% (Palmer, 2013). Thirty-eight other states, however, decreased support for public higher education between FY2008-2013 (Palmer, 2013). Twelve states cut funding more than 20% during this period, with Oregon and Pennsylvania right behind at 19.8% and 18.3% respectively (Palmer, 2013). These cuts appear to have made a lasting impact on all members of the public higher education sector. States are starting to turn the corner now but funding levels are generally stabilizing but not growing (Palmer, 2014).

Public postsecondary institutions responded to state disinvestment in a number of ways. First, tuition grew rapidly in an effort to recapture the lost revenue (Ceasar & Watanabe, 2011; Ferreri & Price, 2011; Singer & Moran 2011). Institutions also cut academic programs, executed pay freezes, utilized furloughs, and reduced benefits in an effort to control costs (Ceasar & Watanabe, 2011; Kelderman 2011a; St. John, 2011;
Limited state aid has also exacerbated perceived hierarchies between flagship universities and sister institutions within the same state system (Gordon, 2011a; Stripling, 2011). Finally, a number of public postsecondary institutions have been altering their operating models to resemble private colleges (Dillon, 2005; Gordon, 2012a; Lewin, 2011; Morphew & Eckel, 2009; Sullivan, 2009).

In California, the California State System (Cal State) drafted plans for an “all cuts” budget while others proposed a state constitutional amendment to limit tuition and fees (Gordon, 2012b; Rivera, 2011). By late 2012, the state’s community colleges were facing “dire circumstances” because state fiscal support was shrinking rapidly (Gardner, 2012). Even after the passage of Proposition 30 (Prop 30) in 2012, the UC Regents expressed strident concern for the fiscal challenges facing the university (University of California Regents, 2012). Finally, the California Postsecondary Education Commission was shuttered in late 2011 because of a lack of state funds (California Postsecondary Education Commission, 2011). Every aspect of California’s higher education system was forced to respond to the state’s disinvestment in higher education.

Students and the general public have also reacted to the recent cuts in public postsecondary education funding. Protests opposing the funding reductions and tuition increases have been staged across the country (“Cuts in California,” n.d.; Kiley, 2011; McKinley, 2010; Rivera, Santa Cruz, & Gordon, 2010). The funding crisis has led some, both inside and outside of academia, to openly question the value of higher education. The high cost of earning the degree and associated debt load have led many to consider foregoing college enrollment (Kelly, 2012; Singletary, 2011; Steinfeld, 2012). This response is clearly evident in legal education where student enrollments have dropped
precipitously in response to the high cost of the education and a severe contraction in the legal services sector (Bronner, 2013).

Importantly though, overall student enrollment at degree-granting institutions rose 32% between 2001 and 2011 (U.S. Department of Education, National Center for Education Statistics, 2012). During the remainder of the century’s second decade, however, undergraduate education may endure the same fate as legal education if students’ costs rise too high and the benefit of the degree becomes tenuous. This broad concern had reached the public consciousness by November of 2012 when California voters spoke directly on the issue.

Prop 30 passed by popular vote during the 2012 California election (Rosenberg, 2012). Prop 30 provides new funding for California’s public education system by temporarily raising sales taxes and increasing income taxes on affluent California households (California Legislative Analyst’s Office, 2012). Had Prop 30 not passed, the Governor would have sought a $6 billion reduction in education spending for FY 2013-2014 (California Legislative Analyst’s Office, 2012). Governor Brown routinely used this threat to champion support for the proposition during the run up to the election (Rosenberg, 2012). Prop 30’s passage is the clearest indication that some Californians are willing to raise their own taxes to support education.

Now that the institutions, students, and the public have spoken on the issue of higher education funding, some politicians are responding by portraying their public colleges and universities as too expensive and inefficient. Because of this, some states are determined to overhaul their public higher education sector (Hass & Morse, 2011; Kiley, 2013).
Oregon’s relationship with its public postsecondary institutions is being fundamentally reformed (Hass & Morse, 2011). A few states are pursuing what has become known as the “$10,000 degree” (i.e., a bachelors degree that costs less than $10,000) (Kiley, 2012). Many states are renewing calls for performance budgeting and increased institutional accountability (Fain, 2012; National Governors Association, 2012). Michigan legislators, for instance, offered its public postsecondary institutions a 3% funding increase if they agreed to various outcome accountability measures, limited tuition increases, and increased reporting for stem cell research (Kelderman, 2012). Some state legislatures have even used funding cuts in an attempt to advance a broader social agenda (Helderman, 2014).

In California, Governor Brown proposed increasing fiscal support for public education in California by about $3 billion for 2013-14 (Brown, 2013a; Megerian, 2013a). To justify this funding, however, Governor Brown expected institutions to lower costs, improve quality, and subject themselves to higher levels of accountability (California Legislative Analyst’s Office, 2013; Siders, 2013). These restrictions were not implemented, perhaps in large part because California’s real dollar allocation for public postsecondary institutions in FY 2012-2013 was about 24% less than it was in fiscal year 2007-08 (Megerian, 2013b; Palmer, 2013). Ironically, the Governor’s proposed increase in state aid would be partially funded by a reduction in the direct fiscal support provided to students through the Cal Grant program (Brown, 2013a; “Higher education,” 2013).

On January 10, 2013, Governor Brown announced that California was “on the path to long-term fiscal stability” (Brown, 2013b). New revenue from Prop 30 and $12.5 billion in budget cuts the previous two years appear to have balanced the FY 2013-2014
California budget (Brown, 2013b; California Legislative Analyst’s Office, 2013). Indeed, the budget was passed with an expected surplus (Rosenberg & Murphy, 2013). However, the governor originally proposed increasing public higher education funding in exchange for increased institutional accountability. This theme is playing out in many states intent on realizing higher education reform (Fain, 2014b). On January 9, 2014, Governor Brown proposed to increase funding for UC and Cal State by 5% as well as an 11% increase for The California Community College System (CCC) (“California governor seeks more money,” 2014; Megerian, 2014; “Proposed budget detail,” 2014).

Despite this rebound, there is good reason to question whether funding for public higher education will ever return to previous per student levels (Stratford, 2013; Gordon, 2011b). Even with the proposed increase, state fiscal support for California’s public postsecondary institutions would still be 14% less on a gross level than FY 2007-08 (“Higher education,” 2014).

A more pessimistic view may conclude that current levels of support represent the new normal for public higher education funding. First, states will likely deemphasize higher education funding in the future because they are facing, inter alia, growing pension obligations, health care expansion, under-funded primary education systems, and crumbling infrastructures. States are routinely obligated to fund many of these programs while higher education allocations are mainly discretionary. This puts higher education at the back of the “expenditure line.”

Second, a strong anti-tax sentiment among much of the electorate will make raising addition revenue for higher education difficult in the future. Despite the passage of Prop 30, legislators have had and will likely continue to have difficulty gaining broad
political support for tax increases. A stagnant tax base restricts support for and the expansion of all state services including public postsecondary education. Even Prop 30 is a temporary tax increase (California Legislative Analyst’s Office, 2012). The programs and services provided by Prop 30’s revenue will likely expire when the law sunsets. Finally, overall economic growth is tepid (Schwartz & Appelbaum, 2013). Slow economic expansion hinders growth in the tax base. Again, a sluggish tax base restricts the state’s ability to rapidly rebuild its public higher education sector. All of these factors seem to indicate that state fiscal support for higher education will likely remain stagnant, if not decrease in the future.

All told, every component of the public higher education sector has been impacted by years of state disinvestment in postsecondary education. Institutions, students, citizens, and politicians have responded. States and their public postsecondary institutions are now negotiating – as if they were contracting – for funding and institutional autonomy in new ways because of the recent cuts. As state tax revenues rebound, legislators are placing conditions on public postsecondary funding, creating what some have called “compacts” (Kelderman, 2013c). Intriguingly, a state’s desire to link fiscal support to institutional outcomes seems to exacerbate what may be an already existing implied contractual relationship between states and their public postsecondary institutions to provide public higher education services to the state’s citizens.

**Problem Statement**

The current state of affairs in public higher education, described above, serves as the impetus for this work. Broadly stated, this study asks two legal questions. First, do state governments and their postsecondary institutions have an implied-in-fact contractual
obligation to meet their states’ higher education needs? Secondly, if so, are students a third-party beneficiary to that contract? The parties’ historical, fiscal, legal, and administrative dealings influence the answers to these questions. Thus, an interested reader must consider this study’s legal analysis in the context of the individual state and institution at issue.

The rationale for asking the research questions is simple. A legal action may be necessary to ensure state funding for public postsecondary institutions in the future. K-12 school districts and education advocates in over 40 states have sued their state governments for funding (Harrison, 2010). Given the conditions previously outlined, legal action may be the only way to ensure that states provide affordable access to public higher education. The K-12 suits routinely relied on state constitutional provision as the basis for their legal action. This study considers an alternative legal justification (i.e., a contractual obligation) in the context of one state’s higher education system.

I analyze whether California’s relationship with its public postsecondary institutions amounts to a tacit fee-for-service agreement to meet the state’s higher education needs. If such a contractual relationship exists, the institutions’ students could conceivably be third-party beneficiaries to that contract. If they were to be considered third-party beneficiaries, students would have standing to enforce the contract. Students could claim that the contract expressly provides them “affordable access” to public higher education and the state has failed to provide adequate funding to fulfill that obligation. Students could claim that both affordability and access have been denied them as evidenced by tuition increases, a lack of adequate course offerings to meet student demand, and increased nonresident enrollment at the state’s flagship institutions.
Generally speaking, students could claim that their states provide funds to various colleges and universities in exchange for services (e.g., educate the state’s citizens, research, operate medical facilities, job training, etc.) under a unified plan that recognizes the parties’ ability to contract. Students would acknowledge that states retain varying degrees of control over the higher education institutions that they fund (e.g., setting tuition levels, restricting out-of-state enrollment levels, approving program cuts, ordering employee furloughs, etc.). However, the students would argue that the parties are still free to contract outside of and through the legislative process. This dynamic is important because states may have difficulty justifying the oversight “stick” of accountability when the “carrot” of funding is absent from the relationship.

Autonomy disputes between states and their public postsecondary institutions are not new. For years, public colleges and universities have undertaken efforts to create new revenue streams while simultaneously cutting costs (Hern, 2006; Rampell, 2012). Frequently, many of those efforts required state input if not outright approval (Leslie & Berdahl, 2008; McLendon & Ness, 2003). For example, a public university or college’s ability to raise tuition, increase out-of-state enrollment levels, or cut services may be subject to state oversight. Often, as one might expect, disputes arise over the institution’s ability to govern itself.

The dynamics facing public higher education are significant. These dynamics impact the power sharing relationship between states and their public postsecondary institutions. However, two simple points seem clear. First, public postsecondary institutions desire more autonomy and less government involvement as state support drops (Lewin, 2011). Second, states are prepared to protect their interests by linking
oversight and accountability to new fiscal support. This study analyzes this dynamic through the lens of an implied-in-fact contract while considering whether the benefits of that contract extend to students.

A legal action to enforce affordable access to public higher education may be necessary in the future. This study outlines and considers the factors that may establish grounds for a breach of contract suit between the state and its public postsecondary institutions. I use a case study methodology to examine whether students may be beneficiaries to an implied contractual relationship between states and their public postsecondary institutions. This methodology is necessary because the facts of each case are determinative in deciding the parties’ rights and obligations under the contract. One’s motivation for understanding the legal and policy implications of this work will likely vary. Thus, the legal analysis contained in this study attempts to provide an unbiased, comprehensive, and understandable review of the questions at issue.

**Research Questions**

This study asks two related research questions.

1. What factors would give rise to an implied-in-fact contract between a state and its postsecondary institutions?

2. What factors would enable students to claim third-party beneficiary status under that contract?

More specifically, the case study analysis in Chapter 4 and 5 examines these questions in the context of California’s higher education sector. I also add some limited but necessary context by exploring other states’ relationships with their public postsecondary institutions. Chapter 6 provides a court’s potential answer to the legal
questions and the policy implications that arise from this research. The following provides a brief narrative description of the potential legal action that this study considers.

**The Legal Questions at Issue**

This study’s legal analysis considers a hypothetical lawsuit. As a result, a number of legal questions are at issue. The first legal question—whether an implied-in-fact contract exists—is foundational to the second legal question. If states and their public postsecondary institutions do not have an implied-in-fact contractual relationship, the second legal question is moot. The answer to the first question depends on the facts and circumstances of each individual case. In some instances an implied-in-fact contract may exist. If so, the parties could be forced to fulfill their obligations under that contract. Notably, these rights may extend to third parties as an intended beneficiary of the contract. This is the second legal question.

As a beneficiary, third parties could be entitled to specific performance of the contract. This simply means that the third party is petitioning the court to force the principal parties to perform their obligations under the contract so that third party receives his or her intended benefit. The basic terms of a hypothetical implied-in-fact contract between states and their higher education institutions can be broadly described as follows. The state government funds, oversees, and mutually plans for the provision of public higher education with its postsecondary institutions in exchange for, *inter alia*, the public institutions’ promise to provide the state’s citizens and students an accessible, affordable, and meaningful postsecondary educational experience.
Students could claim that the principal parties have failed to provide them affordable access to postsecondary education as promised under an implied-in-fact contract to do so. Students could further claim that the State breached that contract by failing to provide their postsecondary institutions enough funding to (1) prevent excessive tuition and fee increases, (2) meet student demand for classes, and (3) ensure appropriate access for state residents at the state’s public postsecondary institutions. This type of challenge could temper the types of funding cuts that have impacted public higher education between 2008 and 2013.

Prior to any further substantive discussion, however, I must quickly highlight three basic procedural considerations that provide necessary context for the research questions. First, students in a potential contract dispute with the state would almost certainly be able to certify as a class (The Board of Trustees California State University, 2011 WL 5882212 (Cal.Sup.) (Trial Order)). This simply means that students could bring a class-action lawsuit and would be acting as a single plaintiff.

Second, any breach of contract claim would be subject to a statute of limitations (Cal. Code Civ. Pro. §339). This means that the plaintiff (i.e., students) must file suit to enforce their understanding of the contract within a set period of time or forfeit their rights. In California, the statute of limitations for an implied-in-fact contract is two years from the date the contract was broken (Cal. Code Civ. Pro. §339). This is important to note because California is the case study for this work.

Third, the Statute of Frauds must be considered. This legal concept requires certain contracts that cannot be completed within one year to be in writing (Restatement (Second) of Contracts § 110 (1981). This requirement is important for this study’s
analysis because an implied contract is, by its nature, an unwritten understanding. As a result, a plaintiff in this case may need to show that the general terms of the parties’ agreement (i.e., meet the state’s demand for higher education) and the expressed benefit for the third party (i.e., affordable access to higher education) is provided on an annual basis through the state budgetary process and thus, the Statute of Frauds in inapplicable. In addition, the plaintiffs may also need to argue that the essential terms of the contract originally agreed to in 1960 are incorporated into each new agreement. This discussion is provided in the legal analysis.

In this case study, the plaintiffs would be students at UC, Cal State, and CCCs.¹ The state of California would be the defendant. Students—as a class—could make a number of allegations against the state. The following represents the basic foundation of the students’ potential breach of contract claim.

Simply stated, students would claim that California has materially breached an implied-in-fact contract with the state’s public postsecondary institutions to provide the state’s citizens affordable access to high-quality public higher education opportunities. Students would further assert that the legislature has impaired the plaintiffs’ postsecondary institutions’ ability to effectuate the terms of the parties’ implied-in-fact contract by failing to appropriate the funds necessary to adequately support them. Students could then claim that, as a result of that lack of fiscal support, they have been harmed. Students would assert that they have been denied access to affordable higher

¹ A small number of California citizens who have been prevented from enrolling at an open access CCC may also have standing to sue in this hypothetical case. This potential group of citizens would claim that they were harmed because the state failed to provide enough funding to CCC, which in turn, failed to provide enough course sections to accommodate citizen demand. I only briefly refer to this group in this study because this class of people is likely small and the legal analysis is slightly different than that of a currently enrolled public higher education student.
education opportunities and seek standing to sue as an intended third-party beneficiary to the parties’ contract.

Students would have to prove, through a totality of the circumstances test, that California, UC, Cal State, and CCC mutually assented to an ongoing agreement to adequately fund and operate a comprehensive public higher education system that meets the needs of the state’s citizens. The plaintiffs would claim that they are due affordable access to public higher education because the principal parties agreed to provide that benefit to them in the implied-in-fact contract. Finally, students would seek specific performance of the contract and declaratory relief from the court stating, inter alia, that:

1. The course offerings at UC, CSU, and CCC need to be expansive enough to reasonably serve the curricular needs and geographic constraints of students.
2. Nonresident enrollment levels at UC should be managed in a manner that reasonably serves the curricular and geographic needs of California citizens.
3. Tuition and fee increases, if they are necessary, cannot be excessive.
4. California must provide an adequate level of per-student fiscal support to the state’s public postsecondary institutions so that the institutions can provide students access to an affordable high-quality postsecondary education.

An actual claim would seek other declaratory findings and specific performance of other terms. An example of a more detailed student claim is provided in Chapter 4. As you will see, a court would be required to provide a reasonable interpretation of the questions at issue.

In a practical sense, the basic stakes of the case are simple. Students likely have standing to sue if an implied-in-fact contract exists that expressly benefits students. In
California, the facts indicate that the state and its postsecondary institutions may have an implied-in-fact contractual obligation to meet the higher education needs of California’s citizens. In addition, students may be entitled to affordable access to high-quality postsecondary educational opportunities as a result of the contract.

The legal analysis in Chapters 4 and 5 asks two legal questions in the context of the larger research questions. First, do California and its public postsecondary institutions operate under an implied-in-fact contract to meet the higher education needs of California’s citizens? Second, are students entitled to affordable access to public postsecondary education as third-party beneficiaries under that contract? A brief set of facts and circumstances from other states will provide a comparative component to the legal analysis. Chapter 6 contains my assessment of the claim as well as highlighting some policy considerations raised by the research.

The foundational knowledge necessary to understand the legal analysis and policy discussion is provided in Chapter 2’s Review of Literature. The study’s Conceptual Framework, Methodology, and Limitations are provided in Chapter 3.
Chapter 2: Review of Literature

This study asks two separate but related research questions. First, what factors would give rise to an implied-in-fact contract between states and their public postsecondary institutions? Second, what factors would enable students to claim third-party beneficiary status under that contract? To assess these factors the study considers two open legal questions. The first legal question asks whether California’s postsecondary institutions have an implied-in-fact contract with the State to provide its citizens access to affordable high-quality postsecondary education.

The second legal question asks whether public higher education students in California are third-party beneficiaries to that implied-in-fact contract. As a result, an expansive review of the relevant law is necessary. Before that review, however, the literature review details how the states’ role in governing higher education evolved over time. The literature review’s second component explores the concepts of institutional autonomy and institutional accountability. This approach provides context for the legal overview that completes the Review of Literature.

State Governance of Public Higher Education

While many of the original colony governments provided fiscal support to their local colleges through taxes and fees, public higher education began to take shape after the country’s formal founding (Cohen, 1998; Thelin, 2004). A tangible distinction between public and private postsecondary institutions only became apparent after Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) was decided. In that case, a challenge to the New Hampshire legislature’s vote to void Dartmouth’s original
charter and re-chartered the institution as a state-owned corporation was brought before the United States Supreme Court (Dartmouth College, p. 554).

The New Hampshire legislature shifted administrative control of Dartmouth, the college seal, and the college’s property to the state (Dartmouth College, p. 554-555) through statute. When deciding if this action was constitutional, the Court determined that Dartmouth’s original charter was a contract between the college trustees, donors, and the King of England (Dartmouth College, p. 643-644). Based on this determination, the Court held, *inter alia*, that the legislature’s attempt to alter Dartmouth’s charter was unconstitutional under Article I Section 10 of the United States Constitution (i.e., “Contract Clause”) because the legislation impaired the parties’ ability to privately contract (Dartmouth College, p. 650).

As one might expect, the character and mission of public universities evolved slowly in the wake of Dartmouth College (Geiger, 2000b). While the concept of a private college had been created, states did not necessarily recognize this new institutional form. Nonetheless, Dartmouth College ultimately forced states to more clearly define the power sharing relationship between themselves and their public postsecondary institutions (Brubacher & Rudy, 2004). In fact, state legislatures began to expand control over public postsecondary institutions soon after the Dartmouth College case (Trow, 1993). However, those controls were limited because Dartmouth College restricted the state government’s ability to govern the existing colonial colleges (Trow, 1993).

Interestingly, around the same time Dartmouth College was decided, many states chartered—but sporadically funded—what we now know as public universities (Sugrue, 2000; Thelin, 2004). By 1869, 17 states had formally established public postsecondary
institutions (Cohen, 1998). Between 1870 and 1920, the foundation for the modern research university had been established (Geiger, 2008). Many universities developed their organizational structure, curriculum, resources, and research capabilities during this time (Veysey, 1965).

These new universities, while similar in nature, grew from different circumstances (Geiger, 2008). Some institutions, like the Universities of Michigan and California were state chartered and supported. Private foundations and wealthy benefactors established other institutions like Johns Hopkins, Stanford, and the University of Chicago. Finally, some of America’s earliest postsecondary institutions like Harvard, Yale, and Princeton evolved from their humble beginnings to become sophisticated research universities. (Geiger, 2008). Ultimately, the character of the modern public research university developed in the decades after the passage of the Morrill Act of 1862 (“Morrill Act”; see Geiger, 2000a; Trow, 1993).

States quickly exerted their power to charter and oversee postsecondary institutions after the passage of the Morrill Act (Douglass, 2000). The Morrill Act apportioned federal land to the states so that they could establish and fund colleges to teach the agricultural and mechanical arts (7 U.S.C. §§301-304). While the federal government provided the framework and resources for the creation of these mainly public universities, the states would soon have the responsibility of ensuring their longevity. By 1875, 40 “land-grant institutions” had been established pursuant to the Morrill Act (Geiger, 2000b). Only 15 years later, the funds generated by the Morrill Act had mostly been exhausted (Douglass, 2000). Ultimately, a second Morrill Act was passed in 1890 to
provide cash support as the transition to state funded public higher education occurred (Brubacher & Rudy, 2004).

The public higher education sector continued to expand in the early twentieth century. Research universities strengthened their scientific pursuits while the social capital associated with a college degree was becoming readily apparent. (Geiger, 2008; Thelin, 2011). Public higher education became the avenue for training the work force necessary to support the nation’s growing economy (Douglass, 2000). States had an interest in providing the resources necessary to expand higher education to the masses because that support yielded broad economic benefits (Douglass, 2000). Interestingly, however, there was an absence of comprehensive planning that would help the institutions adjust for the growth in student enrollment (Thelin, 2011).

California exemplified these dynamics as well as any state in the union. However, California addressed the challenges of a growing student population and the accompanying costs in a unique way. University of California Professor John Aubrey Douglass details the state’s actions in his book, *The California Idea and American Higher Education*. Around the turn of the twentieth century, California’s progressive reform movement developed a three-part strategy to shape the future of public higher education in the state (Douglass, 2000). The primary goal of the new strategy was to ensure every high school student access to postsecondary education (Douglass, 2000). The strategy called upon the state to fund public higher education expansion in California. The proposed expansion was to focus on the state’s population centers. Finally, the progressives advocated for innovative programs that would directly serve the
social and economic needs of a burgeoning state. Within two decades, California’s governmental leaders had acted on these recommendations (Thelin, 2011).

By 1920, California had created a public higher education system that was unlike any other in the nation (Douglass, 2000; Thelin, 2011). A comprehensive tripartite higher education system was established to serve all of California’s high school students (Douglass, 2000; Thelin, 2011). As part of that three-tiered system, the state created the country’s first and largest public community/junior college system (Douglass, 2000). In addition, the University of California enrolled more students than any other postsecondary institution in the nation (Douglass, 2000). Furthermore, the University of California (“UC”) became the first multi-campus university (Douglass, 2000). UC also became the first university in the country to receive research funding (Douglass, 2000). Finally, California transformed a group of disparate teacher’s colleges into the original California State system, thus completing the state’s tripartite public system of higher education (Cohen & Kisker, 2010; Thelin, 2011).

The expanding role of the state government in public higher education was not limited to California. In the first two decades of the twentieth century, states began providing consistent annual fiscal allocations to public postsecondary institutions in an effort to help meet the growing demand for higher education (Thelin, 2004). Despite this support, states still maintained a relatively limited role in the administrative oversight of higher education until World War II (Loss, 2012; Zumeta & Kinne, 2011). States took this path even as student enrollment grew fivefold between 1920 and 1945 (Thelin, 2011). Most states generally ceded governance and fiduciary responsibility of their public higher education institutions to a citizen board of trustees (Zumeta & Kinne, 2011).
With the advent of the G.I. Bill, the higher education sector quickly expanded and so did state oversight of public postsecondary institutions (McGuinness, 2011; Thelin, 2011; Zumeta & Kinne, 2011). States recognized the need to plan, rationally organize, and help fund public higher education’s prompt expansion resulting from rapidly increasing enrollments (Cohen & Kisker, 2010; McGuinness, 2011; Zumeta & Kinne, 2011). In addition, state oversight increased because institutional competition bred statewide inefficiency in the public higher education sector (McLendon, 2003a). States also increased oversight of public postsecondary education because they viewed public higher education as an investment in their citizenry (Alexander, 2000). Finally, state officials demanded increased accountability from public colleges and universities because state funding for these institutions was growing quickly (Zumeta & Kinne, 2011).

In the wake of the post war expansion of higher education, an important measure grew from the federal Higher Education Act of 1965 that impacted the relationship between states and their public postsecondary institutions. That act required all states to operate a higher education coordinating agency (Cohen, 1998; Pub.L. 89–329, Nov. 8, 1965). Berdahl (1971) found that these agencies operated as pseudo-mediators between over-reaching state legislatures and public postsecondary institutions seeking autonomy.

As the country entered the 1970s, 12 states passed laws that brought greater centralized planning to their higher education systems (Marcus, 1997). Twelve more states implemented similar reforms in the 1980s while many others ordered formal studies of their public higher education sector (Marcus, 1997). Fiscal support for public higher education also generally grew throughout the 1970s and 1980s (Palmer, 2012).
short, states were, in many cases, extending the reach of their involvement in the affairs of their postsecondary institutions (Cohen & Kisker, 2010).

States continued to increase oversight of the public postsecondary sector in the 1990s (Zumeta, 2001). A recession, an interest in academic decision-making, and efficiency concerns drove this increase in institutional accountability (Zumeta, 2001). However, one must take note that funding for public higher education has consistently dropped on a per student basis since 1990 (Quinterno, 2012). Interestingly, by the early 2000s, some states softened their oversight of public higher education (McLendon, 2003a).

This pull back in state oversight appears to be a consequence of the states’ disinvestment in higher education (Cohen & Kisker, 2010). In fact, at least one state—Virginia—has now directly linked state funding with the institution’s level of autonomy (Leslie & Berdahl, 2008). That is, more institutional autonomy comes with less state fiscal support (Leslie & Berdahl, 2008). This dynamic highlights the nexus between state funding levels and institutional accountability.

**Institutional Accountability and State Funding**

Institutional accountability—in the context of public higher education—cannot be separated from institutional autonomy or state fiscal support. Public postsecondary institutions are, on some level, accountable to the states from which they receive funding. However, a tension arises because the institutions need high levels of autonomy to effectively operate and honor their missions (Berdahl, 1971). The public also plays an important role because it both delegates authority to the state officials through elections and benefits from services provided by public postsecondary institutions (Burke, 2005a).
These factors create a fluid dynamic between institutional autonomy, state funding, and institutional accountability. Given this dynamic, states have changed how they measure institutional accountability over time.

Throughout the last half of the twentieth century, public postsecondary institutions generally provided their state government officials with accountings of how state allocations were used (Zumeta & Kinne, 2011). Most of these accountability metrics measured what we now consider higher education “inputs” (Zumeta & Kinne, 2011). For example, enrollment levels, library volumes, faculty members, facilities, and more were used to assess whether public colleges and universities were good stewards of the state funds that they received (Zumeta & Kinne, 2011). A relatively recent trend reveals that states are now looking to “output” measures (Zumeta & Kinne, 2011). Higher education output metrics include graduation rates, student debt upon graduation, student grade point average, job placement rates, and more. This focus on outputs ties funding to institutional “performance.”

Generally, three types of performance-based systems exist in American public higher education (Zumeta & Kinne, 2011). Two of these systems expressly link funding with output performance. First, *performance funding* couples state funding with institutional outputs through a formula (Zumeta & Kinne, 2011). Second, *performance budgeting* does not use a formula but does look to institutional outputs to determine funding levels (Zumeta & Kinne, 2011). Finally, *performance reporting* looks to outputs without overtly coupling funding with those measures (Zumeta & Kinne, 2011). Interestingly, states embraced performance funding and budgeting systems in the 1990s but quickly turned to performance reporting after the recession in the early 2000s.
States, in essence, wanted institutional accountability without any cost (Burke, 2005b).

While the states’ desire to assess institutional outcomes now appears to be commonplace, they seemingly lack the willingness to provide guaranteed funding for acceptable performance (Zumeta & Kinne, 2011). State funding for public higher education has dropped significantly in the wake of the “Great Recession” (Palmer, 2012, 2013, 2014; State Higher Education Executive Officers, 2012). In fact, only seven states increased state allocations on a per-student basis between 2006 and 2011 (State Higher Education Executive Officers, 2012). Currently then, one can reasonably conclude that states desire institutional accountability in public higher education but appear unwillingly to pay for it. This supposition then could lead public postsecondary institutions to seek more autonomy as their state allocations are reduced.

### Institutional Autonomy

The concept of *institutional autonomy* stems from the power sharing relationship between states and their public postsecondary institutions. The dynamics of that relationship create pertinent facts for this study’s legal analysis. As a result, a theoretical and legal review of the concept is necessary. Institutional autonomy can be described as the control that postsecondary institutions have to govern their own affairs—both administrative and academic (Hutchens, 2007). Conflict between states and their public postsecondary institutions can occur because state oversight is balanced against institutional autonomy (Hutchens, 2007; McGuinness, 2011). At issue, is the authority to manage and operate the public colleges and universities in that state (Kaplin & Lee, 2006).
Institutional autonomy can be categorized as both substantive and procedural (Berdahl, 1971; Berdahl, Altbach, & Gumport, 2011). Substantive autonomy encompasses the institution’s ability to define its mission, offer programs, admit students, and more (Berdahl, 1971; Berdahl, Altbach, & Gumport, 2011; McLendon, 2003b). Procedural autonomy relates to the process by which institutions accomplish their substantive goals (Berdahl, 1971; Berdahl, Altbach, & Gumport, 2011; McLendon, 2003b). This includes, for example, the power to allocate resources within the institution, undertake capital improvements, and discipline students (Berdahl, 1971; Berdahl, Altbach, & Gumport, 2011; McLendon, 2003b).

Berdahl (1971) asserts that a state must play a flexible role in substantive autonomy so that the state’s interests are protected without infringing on the core mission of the institution. Berdahl sees state infringement on procedural autonomy as unwieldy and ineffective in protecting the interest of the state’s citizens. Importantly, state law generally defines the power sharing relationship between a state and its public postsecondary institutions (Kaplin & Lee, 2006).

**Legal Foundations of Institutional Autonomy**

State oversight of higher education grows from the powers provided to states under the Tenth Amendment of the Constitution (Kaplin & Lee, 2006; U.S. Const. amend. X). Multiple agencies effectuate the relationship between states, their public postsecondary institutions and their students (Kaplin & Lee, 2006). Virtually every state has a standing higher education commission or board (Kaplin & Lee, 2006). Based on their purpose, these boards can be classified in one of two ways. Governing boards are
legally required to operate their public postsecondary institutions. Coordinating boards generally serve a planning and/or advisory role (Kaplin & Lee, 2006).

The legal foundation for the relationship between states and their public higher education institutions is found in the states’ statutory codes, constitutions, and the institutional charters (15A Am. Jur. 2d Colleges and Universities §3, 5). The level of state involvement in higher education varies both between states and institutions within states (Kaplin & Lee, 2006). The extent of control exercised over the postsecondary institutions largely depends on the constitutional and/or statute provisions of the particular state (Kaplin & Lee, 2006).

Postsecondary institutions and their trustees generally acquire their power and corporate status through the same documents that created the college or university (Kaplin & Lee, 2006). The level of institutional autonomy that an institution enjoys largely depends on whether that institution was created by statute or constitutional decree (Hutchens, 2007; Kaplin & Lee, 2006). Those documents and their accompanying regulations broadly outline the authority that public colleges or universities enjoy (Brown, 1990; Hutchens, 2007; Kaplin & Lee, 2006).

Institutions founded by statute generally enjoy less autonomy than colleges and universities established as part of a state constitution (Kaplin & Lee, 2006). As one might expect, states and their public postsecondary institutions often have autonomy disputes because the governing statutes and/or constitutional provisions are imprecise (Kaplin & Lee, 2006). Courts have been forced to resolve these types of disagreements in two basic scenarios. The first example involves disputes over the formation or termination of a
postsecondary institution. The second addresses quarrels that encompass the operation and/or management of the institution (Kaplin & Lee, 2006).

As Kaplin and Lee (2006) explain, a state constitutional amendment is required to close constitutionally established postsecondary institutions. These institutions also enjoy high levels of autonomy because their constitutional status shields them from extensive legislative control. The University of California System is an example of this type of institution. Public postsecondary institutions established by statute are subject to legislative authority and can be closed by statute at any time. The California State University System is such a school. The California Community College System (CCC) is governed by state statute in addition to various local actors (see Kaplin & Lee, 2006, for a discussion of local governments; Cal. Educ. Code §§ 70900-70902)

**Defining the Scope of Institutional Autonomy Enjoyed by a Statutory Created Institution**

Postsecondary institutions created by statute are commonly—and legally—referred to as state agencies, public corporations, or political subdivisions (Kaplin & Lee, 2006). Statutorily created higher education institutions are subject to significant state oversight. However, the language of the statute can provide the institutions greater levels of autonomy. Myriad types of disputes involving institutional control and management have been litigated (Kaplin & Lee, 2006).

In 1985, the case of *Kanaly v. State of South Dakota*, 368 N.W.2d 819 (S.D. 1985) brought some clarity to the power sharing relationship between states and their public postsecondary institutions. South Dakota’s legislature decided to close a campus of the University of South Dakota and transfer its assets to the state prison system. The
The institution was statutorily established. Taxpayers brought suit claiming that the legislature violated the state constitutional provision that granted the campus operational autonomy.

The South Dakota Supreme Court ruled that the legislature maintained its legislative power under the statute to use those assets in any manner. However, the legislature had also established a perpetual fund to support higher education in the state. As a result, the court forced the state prison system to remunerate the value of the resources back to the university. The court distinguished the power to operate and control state postsecondary institutions from the legislative “power of the purse.” (368 N.W.2d at 825). Those state powers included setting education policy for the state or winding down an institution if “efficiency and economy so direct” (368 N.W.2d at 825).

In 1977, a New York court decided one such dispute between a constitutionally created state higher education commission and a statutorily established institution (Moore v. Board of Regents of the University of the State of New York, 390 N.Y.S.2d 582 (N.Y. Sup. Ct. 1977)). The state commissioner shuttered two doctoral programs at a State University of New York campus. In response, the trustees, chancellor, professors, and students at SUNY sought declaratory relief that the university trustees governed the standards, regulations, operational, and organizational aspects of the university. The decision would fundamentally define the parties’ rights. This court ruled that the university’s statutory creation made it part of the state’s education department and thus, subject to the control of the constitutionally created state board of higher education.

While affirming the case on appeal, the New York Court of Appeals stated that the board’s powers were limited when addressing the day-to-day operation of the colleges and universities in the state (Moore v. Board of Regents of the Univ. of State of N. Y., 44
Interestingly though, in Texas, an affiliation agreement between two institutions to expand curricular offerings was enjoined because the state higher education coordinating board had the statutory right to determine the public university’s program offerings (*South Texas College of Law v. Texas Higher Education Coordinating Board*, 40 S.W.3d 130 (Tex. App. 2000); Kaplin & Lee, 2006).

One important case involving a statutorily founded institution enabled a third-party to bring suit against the state. Several Alabama citizens, students, and faculty members challenged a state board decision involving the decertification of a program (*US. v. State of Alabama*, 791F.2d 1450 (11th Cir. 1986)). The 11th Circuit determined that the plaintiff’s could bring a claim as individuals under federal civil rights law. Importantly for this analysis, the Court also determined that the institution had no standing to sue as a statutory creation. In sum, the states enjoy significant control over their statutorily established public higher education institutions. That power dynamic shifts when the institution is constitutionally chartered.

**Institutional Autonomy and Constitutionally Created Public Higher Education Institutions**

Constitutionally chartered postsecondary institutions are referred to as “public trusts,” “constitutional universities,” “autonomous universities,” and more (Kaplin & Lee, 2006). These types of institutions are not subject to same legislative oversight as statutorily created institutions. The state’s constitution generally provides these schools the authority to govern and operate their institutions (see, e.g., Hutchens, 2007). Interestingly, if an institution is considered a “public trust,” the trustees have a fiduciary duty to administer the trust for the public’s benefit (Kaplin & Lee, 2006).
A number of cases from various states exhibit the scope of a legal autonomy dispute between a state and a constitutionally chartered public higher education institution. In 1975, three universities in Michigan contested assorted provisions of an appropriations act claiming that the acts infringed on their constitutional autonomy (*Regents of University of Michigan v. State*, 395 Mich. 52 (Mich. 1975)). The type of autonomy at issue included the universities’ ability to set tuition levels, increase nonresident enrollment, start new construction, and operate their institutions.

The court found that the legislature could place conditions on postsecondary allocations for public universities but only before the universities accepted the funds under those conditions. The universities must use the funds of an accepted legislative appropriation for the intended purpose. The court also found that the State Board of Education only served an advisor role to the constitutionally protected universities. Importantly, the court also determined that a legislative restriction may not “interfere with the management and control of those institutions” (395 Mich. 52, 83).

Under this rule, the court determined that an allocation is unconstitutional if the conditions of that allocation interfered with an institution’s autonomy. Unfortunately, this case does not provide guidance on what conditions would make an allocation unconstitutional. While the court provided the requested declaratory judgment on some aspects of the case, most of the conditions governing the allocations in the case had expired. As a result, the court did not need to determine the constitutionality of any legislature conditions imposed on funds allocated to postsecondary institutions chartered under a state constitution.
Interestingly, the court referenced basic contractual elements in its judgment when explaining the scope of the parties’ relationship as “co-equal branches of government” (395 Mich. 52, 94-95). The court’s understanding of the state appropriation process in the higher education context is revealing.

A prohibitory condition is unacceptable because it does not give the universities the option to refuse the appropriation and avoid the condition or to accept the appropriation and accept the condition. The latter leaves the management decision to the University. The former unconstitutionally substitutes Legislative management. (395 Mich. 52, 96)

In striking down unconstitutionally expansive legislative action, the court used the concepts of offer, acceptance, and consideration as a rationale. Without mutual assent to the condition and the agreed upon consideration, the legislative restriction on the allocation is unconstitutional. The consideration in this case is represented by the bargained for exchange of state funds for the universities’ agreement to provide educational and other services to the state’s citizens. Mutual assent and equally positioned parties are also required elements of a contact. This case supports the general idea that constitutionally charted postsecondary institutions enjoy a great deal of institutional autonomy.

Other cases have done the same. In Oklahoma, a legislatively created commission had no jurisdiction to govern grievances by employees at Oklahoma State University (State ex rel. Bd. of Regents of Oklahoma State University v. Oklahoma Merit Protection Com’n, 19 P.3d 865 (Okla. 2001)). A Michigan statute that limited the university’s investment opportunities was found unconstitutional as an infringement on the

One exception to the general rule of deference to constitutionally chartered postsecondary institutions does exist, although not in every state. State employment laws and regulations often govern employees at constitutionally chartered institutions (Kaplin & Lee, 2006). For example, the Colorado’s Civil Rights Commission was allowed to hear a university employee’s grievance because the state constitution provided that the university’s powers may, at times, be subject to legislative oversight (*Colorado Civil Rights Com’n ex rel. Ramos v. The Regents of the University of Colorado*, 759 P.2d 726 (Colo. 1988)). The Minnesota Supreme Court, however, exempted a constitutionally based university from a veteran’s preference state employment law because the legislature failed to identify the university in the statute and the university was not a “political subdivision” of the state (*Winberg v. University of Minnesota*, 499 N.W.2d 799, 803 (Minn. 1993)).

Courts have ordinarily exempted the University of California—the state’s only constitutionally created institution—from some state employment laws. UC and its regents have used their constitutional autonomy to successfully defend against various types of state overtime wage regulations, prevailing wage statutes, and whistleblower laws (*Kim v. Regents of University of California*, 80 Cal.App.4th 160 (Cal. Ct. App. 2000); *Regents of University of California v. Aubry*, 42 Cal.App.4th 579 (Cal. Ct. App. 1996); *Miklosy v. Regents of University of California*, 44 Cal.4th 876 (Cal. 2008)).

A 1980 California case highlights the extensive autonomy enjoyed by UC. In *San Francisco Labor Council v. Regents of the University of California*, 608 P2d 277 (Cal.
1980), the local labor council claimed that the UC Regents ignored a regional wage-analysis requirement in the state education code. UC argued that the university was exempt from that requirement because of their state constitutional protections. The California Supreme Court agreed. In doing so, the court reviewed the state constitution to help to clarify the statutory limitations that may be placed on UC constitutional autonomy.

Article IX of the California constitution outlines UC’s rights. The court identified three areas within that Article that would allow the Legislature to restrict UC’s constitutional autonomy. Otherwise, the court found that the university enjoys expansive organizational and governing power. Legislative control was limited to (1) appropriations, (2) general police powers, and (3) matters of statewide concern that do not impact “internal university affairs” (608 P2d 277, 279).

The court determined that the law at issue in this case did not grow from one of these three legislative powers. As a result, UC was exempt from a particular requirement of the state’s education code. Importantly, the court also made clear that state agencies are subject to state authority and that Cal State and the California Community College System are subject to greater levels of legislative control than UC. However, language in California’s education code may actually provide Cal State more autonomy than previously determined (Slivkoff v. Board of Trustees, 69 Cal.App.3d 394 (Cal. Ct. App. 1977)). Ultimately though, the legal mechanism by which the particular institution was established (i.e., statute or constitution) largely determines the extent of legislative oversight that a public postsecondary institution is subjected to.
An underlying issue that this study considers is the public finance of higher education. This topic is a foundational concern for every state in the union. Public universities and colleges across America are impacted by state-level funding decisions. In addition, millions of students and their families are affected by the states’ ability to provide public higher education. Given the potential impact of a hypothetical contract claim, a review of the policy rationales for enforcing promises seems appropriate. The following section briefly outlines various contract theories before reviewing basic contract law.

**Contract Theories**

Several theories attempt to explain the guiding principles of contract law (Berendt, Cochran, Long, Nye, & Scheid, 2009). Many of these theories are grounded in the conventional view that parties enjoy the freedom to contract and that right comes with responsibility (Berendt et al., 2009). For example, Consent Theory suggests that individuals should be legally bound if they exhibited their intention to be bound by the rights and obligations of the contract (Barnett, 1986).

Promise Theory holds that honoring one’s promise is fundamental to ensuring that contract law represents our normative expectations (Fried, 1981). Will Theory is grounded in the idea that Courts should support the intentions of those that freely enter private agreements (Cohen, 1933). Reliance Theory asserts that contract law should protect the promisee that acts under the reasonable expectation that the promisor will meet his or her obligation (Fuller & Perdue, 1936).

A few theories developed in the last 50 years take a broader view of what contract law should accomplish (Berendt et al., 2009). As one might expect, Economic Theory
claims that contract law should maximize the economic benefit of transactions by promoting and protecting voluntary trade in the free market (Ayres & Gertner, 1989; Posner, 1986). Critical Legal Studies Theory holds that contract law should be reshaped to foster just social justice goals and not the corruptible power interests of individual actors (Feinman, 1983).

Relational Contract Theory may be the most applicable to this study’s legal question because it focuses on the parties’ relationships, much like an implied-in-fact contract. Relational Theory focuses on the complex interactions between contracting parties and not on particular agreements or transactions (Fox, 2003; Macneil, 2000). Relational Theory de-emphasizes the traditional contract principles of offer, consideration, and acceptance (Berendt et al., 2009; Fox, 2003).

The relational contract theorist is more concerned about how the parties’ behaviors, previous relationships, and social practices interact to influence transactions (Fox, 2003; Macneil, 2000). These relationships give meaning to the parties’ rights and obligations under the contract (Berendt et al., 2009). Relational Contract Theory is particularly appropriate for this study because the parties’ conduct and associations are the primary considerations when determining whether an implied contract exists.

**Legal Overview of Contract Elements**

“Contract” has been defined in a variety of ways (Restatement (Second) Contracts §1 (1981); 1 Williston on Contracts §1:1 (4th ed.)). Words like agreement, obligation, and promise permeate these definitions (Restatement (Second) Contracts §1 (1981); 1 Williston on Contracts §1:1 (4th ed.)). *Black’s Law Dictionary* defines contract as “[a]n agreement between two or more parties creating obligations that are enforceable or
otherwise recognizable by law” (Garner, 2010, p. 341). This study adheres to this definition because of its clarity and simplicity. This definition also highlights two important points about contracts. Contracts are private agreements between consenting parties and are generally governed by state law (Berendt et al., 2009).

A valid contract requires the basic elements of offer, acceptance, and consideration (Berendt et al., 2009; Kuney & Lloyd, 2006). The parties’ mutual consent to be legally bound by their “bargained for exchange” is necessary for a valid contract to exist (Restatement (Second) Contracts §3 (1981)). Assent to a contract can be gathered from the parties’ conduct. (Restatement (Second) Contracts §19 (1981)). This behavior expression of mutual assent is at question in this work’s case study.

When in dispute, contract construction becomes a question of law (King Fisher Co. v. U.S., 51 Fed.Cl. 94 (Fed. Cl. 2001)). Under a contract based on mutual assent, neither party is subject to the terms of the contract unless both parties consent (Fosson v. Palace (Waterland), Ltd., 78 F.3d 1448 (9th Cir. 2010)). Finally, a valid contract requires each party to agree to the essential terms of the agreement (Restatement (Second) Contracts §5 (1981); 1 Williston on Contracts §6:1 (4th ed.)). These elements are required for every contract, including implied contracts.

**Legal Overview of Implied Contracts**

Contracts can be expressed or implied (Restatement (Second) Contracts §4 (1981); Williston on Contracts §1 (2007)). Parties state the terms of their express contract in written or oral form (Restatement (Second) Contracts §4 (1981); 1 Williston on Contracts §1:5 (4th ed.)). The rights and obligations of an implied contract are inferred from the parties’ conduct and the surrounding circumstances (Restatement (Second)
Thus, the terms of an implied contract are not expressed in words but through action (Restatement (Second) Contracts §4 (1981); 1 Williston on Contracts §4:20 (4th ed.)).

Both express and implied contracts have the same legal effect (1 Williston on Contracts §1:5 (4th ed.)). The key difference between the two types of contracts is the manner in which the parties assent to a mutual obligation (Restatement (Second) Contracts §4 (1981)). A party shows assent to an express contract by communicating agreement to the stated terms (Restatement (Second) Contracts §4 (1981)). On the other hand, the parties’ conduct indicates assent under an implied contract (Restatement (Second) Contracts §4 (1981)). An implied contract cannot be inferred from the same conduct that creates an express contract (17A Am. Jur. 2d Contracts §17 (2001)). Nonetheless, a court may use the parties’ actions to govern conduct not covered by an express contract (1 Williston on Contracts §1:5 (4th ed.)).

The type of implied contract that I have referred to up to this point is called an “implied-in-fact contract. An “implied-in-law” contract, sometimes called a “quasi-contract,” also exists (Restatement (Second) Contracts §4 (1981)). An implied-in-law contract is not a valid contract but a court’s determination that, in the interest of justice, an obligation exists between parties despite the absence of a contractual agreement (Baltimore & O.R. Co. v. U.S., 43 S.Ct. 425 (1923); Hercules Inc. v. U.S., 516 U.S. 417 (1996)).

The practical result of the distinction between implied-in-fact and implied-in-law contracts is important. The harmed party’s ability to enforce a contract, not simply seek equitable relief, raises significant legal considerations. This distinction becomes
particularly important when suing a government body. An implied-in-fact contract will likely withstand a state’s sovereign immunity defense whereas an implied-in-law contract or “quasi contract” would not (516 U.S. 417, 423).

The doctrine of promissory estoppel is also similar to a quasi-contract. Promissory estoppel provides a legal right to enforce a second party’s promise if the promisee acts in reasonable reliance on the representations of the promisor (Kuney & Lloyd, 2006). A promissory estoppel claim would also almost certainly fail in the face of a sovereign immunity defense because no formal contract is created. Thus, this study only considers whether an implied-in-fact contract exists. The following section provides a more comprehensive explanation of implied-in-fact contracts.

**Details of Implied-in-Fact Contracts**

Under an implied-in-fact contract, the parties’ mutual assent and tacit understandings are shown by their actions and the circumstances of each individual case (1 Williston on Contracts §1:5 (4th ed.)). The parties’ intent, past dealings, general course of conduct, statements, and any other relevant circumstances are used to determine whether an implied contract exists (Restatement (Second) Contracts §4 (1981); Williston on Contracts §4 (2007)). Courts also examine whether the essential terms of the contract were agreed upon (Restatement (Second) Contracts §5 (1981)). Finally, one’s good faith reliance on the other’s actions can be a factor in finding the existence of an implied contract (Dixon v. Bhuiyan, 10 P.3d 888, (Okla. 2000). Courts objectively review these facts and circumstances under a reasonable person standard (Phillips v. Marist Soc. of Washington Province, 80 F.3d 274 (8th Cir. 1996) (applying Arkansas and District of Columbia law); Bromer v. Florida Power & Light Co., 45 So. 2d 658, (Fla. 1949)).
Furthermore, a promise to pay reasonable compensation may be inferred if a service provider reasonably relies on a second party’s request (1 Williston on Contracts §1:5 (4th ed.)). One who knowingly receives a valuable service can be ordered to pay reasonable recompense for that service (United Nat. Ins. Co. v. SST Fitness Corp., 309 F.3d 914, (6th Cir. 2002); Cramer v. Clark, 121 Wash. 507 (1922)). Finally, an implied agreement can arise if the concerned parties continue to perform as they have under a previous agreement that has expired (Jurrens v. Lorenz Mfg. Co. of Benson, Minn., 578 N.W.2d 151 (S.D. 1998).

Ultimately, a court must determine whether the parties’ actions and surrounding circumstances creates a legally enforceable contract between them. The principal parties to the contract, in this case, are the state of California and its postsecondary institutions. The second legal question asks whether that contract—if it exists—extends to a third-party beneficiary. In this case, California’s public higher education students represent the beneficiary.

Third-Party Beneficiaries

Contracts require at least two parties (Restatement (Second), Contracts § 9). In some cases, a third person may have rights under an otherwise valid contract despite being a non-signatory to the contract (Restatement (Second), Contracts § 302). A third party may sue the promisor to the contract if the principal parties’ intended to make the third party a direct beneficiary of their agreement (Restatement (Second) Contract §304; Cal. Civ. Code §1559). An incidental or indirect benefit is not enough to confer rights to a third-party (1 Williston on Contracts §37:7, 37:8, 37:19; Restatement (Second) Contract §302).
A party’s right to enforce a contract under the third-party beneficiary rule largely depends on contracting parties’ intentions. The plaintiff must show that the principal parties to the contract expressly or implicitly intended to benefit the third-party (Arbelaez v. U.S., 94 Fed. Cl. 753 (2010); Hammes Co. Healthcare, LLC v. Tri-City Healthcare Dist., 801 F. Supp. 2d 1023 (S.D. Cal. 2011); Restatement (Second) of Contracts §302). Third parties are entitled to bring suit involving government contracts (Zigas v. Superior Court, 120 Cal.App.3d 827 (1981); Martinez v. Socoma Companies, Inc., 11 Cal.3d 394 (1974)).

Interestingly, third-party beneficiaries do not need to be specifically identified in the contract (Sioux Honey Ass’n v. Hartford Fire Ins. Co., 672 F.3d 1041 (Fed. Cir. 2012)). Nor are they obligated to furnish consideration despite enjoying a benefit under a contract (1 Williston on Contracts (4th ed.) § 37:12). A third-party beneficiary may be a member of a sufficiently described class that the contracting parties intended to benefit (Epitech, Inc. v. Kann, 139 Cal. Rptr. 3d 702 (Cal. Ct. App. 2012); Shell v. Schmidt, 126 Cal. App. 2d 279 (Cal. Dist. Ct. App. 1954)).

Contract law is generally governed by the states and thus, may vary slightly among them. A few jurisdictions, for example, will not enforce a third-party beneficiary claim unless the benefit conveyed is immediate or exclusive (Second Nat. Bank v. Grand Lodge, of Missouri of Free & Accepted Ancient Masons, 98 U.S. 123, (1878); Levy v. Daniels’ U-Drive Auto Renting Co., 108 Conn. 333 (Conn. 1928); United Dispatch v. E. J. Albrecht Co., 135 W. Va. 34, (W. Va. 1950)). These distinctions are rare but do seem to help refine the analysis for some courts. Imposing tight restrictions on third-party beneficiary claims appears logical given that the rights conveyed are substantial. Not
surprisingly, a significant evidentiary burden must be met before rights attach under the third-party beneficiary rule. The courts, however, do not dispute that the principal parties can intentionally contract to benefit a third party.

As covered previously, third-party beneficiaries must show that the principal parties intended to expressly benefit them in their contract. The principal parties’ clearest expression of intent occurs when the contract language explicitly extends the benefit of the contract to a third party. Absent this, determining intent and an expression to benefit the third party can be difficult. The question of whether the principal parties to the contract expressed an intent to benefit a third party is one of contract construction (Markowitz v. Fidelity Nat. Title Co., 142 Cal. App. 4th 508 (Cal. Ct. App. 2006); 126 Cal. App. 2d 279). A totality of the circumstances test is used to determine these questions (Restatement (Second) of Contracts § 302 (1981); Cal. Civ. Code § 1559; National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 171 Cal. App. 4th 35, (Cal. Ct. App. 2009)).

The underlying contract must be valid before any third-party claim can be made (Electric Appliance Co. v. U.S. Fidelity & Guaranty Co., 110 Wis. 434 (Wis. 1901); Long Island Sav. Bank v. Savage, 548 N.Y.S.2d 363 (N.Y. Sup. Ct. 1988); Fulmer v. Goldfarb, 171 Tenn. 218, (Tenn. 1937)). All of the basic elements of a contract detailed previously are required. In a suit, the third party is only entitled to the agreed upon terms in the contract (Marina Tenants Assn. v. Deauville Marina Development Co., 181 Cal. App. 3d 122 (Cal. Ct. App. 1986); Kansas City N.O. Nelson Co. v. Mid-Western Const. Co. of Missouri, Inc., 782 S.W.2d 672 (Mo. Ct. App. W.D. 1989)). The third party is also
subject to all contract defenses available to the promisor as defendant including, \textit{inter alia}, a statute of limitations violation (1 Williston on Contracts (4th ed.) §37:55).

All told, the third-party beneficiary rule is relatively straightforward. The plaintiff must show that the principal parties expressed an intent to benefit the third party and entered a contract that would, \textit{inter alia}, accomplish that goal. However, some ambiguity about the extent of the law exists between states. Thus, a case study, found in a single state analysis, is necessary. The following section details California law as it relates to implied-in-fact contracts and third-party beneficiaries.

\textbf{Implied-in-Fact Contracts in California}


Each type of dispute reveals the elements and various factors that a court looks to in determining whether an implied-in-fact contract has been breached. The required elements of an implied-in-fact and express contracts are identical. Thus, mutual assent (i.e., offer and acceptance) and consideration must be present in the parties’ conduct before an implied-in-fact contract can be found (Chandler v. Roach, 156 Cal.App.2d 435 (Cal. Dist. Ct. App. 1957); Weitzenkorn v. Lesser, 40 Cal.2d 778 (Cal. 1953)). The entertainment and employment cases highlight the importance of contextual considerations when determining implied-in-fact contractual obligations.

**Implied-in-fact contracts and “valuable ideas.”** Not surprisingly, California sees its fair share of entertainment industry litigation and often a plaintiff is seeking to enforce a potential implied-in-fact contract. Generally speaking, the plaintiff claims that he/she shared a valuable idea with the defendant but never received the agreed upon compensation. The context for enforcing implied-in-fact contracts involving copyrightable works in California is unique. The plaintiff must show that something more than a copyright interest is at issue in the parties’ agreement (Props. v. Rhodes & Gardner Inc., 820 F.2d 973, 977 (9th Cir. 1987)). The provision of the idea and the corresponding rights are the bargained for exchange, not any intellectual property protected under federal copyright law (Donahue v. Ziv Television Programs, Inc., 245
California common law has established a shorthand reference for these types of claims. A Desny claim details the elements required for a breach of implied-in-fact contract in the copyright context (Cal.2d 715 (1956)). Under Desny, the plaintiff must prove that he/she created the disputed work, offered it for sale to the defendant, and could conclude that the defendant mutually assented to provide reasonable compensation in return (Grosso v. Miramax Film Corp., 383 F.3d 965 (9th Cir. 2005); Faris v. Enberg, 97 Cal.App.3d 309 (Cal. Ct. App. 1979); Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193 (9th Cir. 1986)).

Assent, in these cases, is shown by the facts and circumstances of each case (Chandler v. Roach, Cal.App.2d 435 (Cal. Dist. Ct. App. 1957). Significantly, implied-in-fact contacts between artists and industry executives are considered so personal that no third-party beneficiary claims are allowed (Rokos v. Peck, 182 Cal.App.3d 604 (Cal. Ct. App. 1986)). In California, a unique legal analysis is required to resolve implied-in-fact contract disputes involving “valuable ideas.” The employment context also highlights the distinctive considerations created by various implied-in-fact contractual obligations.

**Implied-in-fact contracts and “at will” employment.** In the employment case context, courts consider whether the employer/employee relationship should be considered “at will” or governed by an implied-in-fact employment agreement, which
requires “good cause” for termination. Courts use a “totality of the circumstances” test to
determine the parties’ understanding of their relationship. The test asks whether that
understanding gives rise to implied contractual rights and obligations (Guz v. Bechtel Nat.
Inc., 24 Cal.4th 317 (Cal. 2000)).

Naturally, the plaintiff’s subjective understanding of the relationship is not
effective to establish an implied-in-fact contract (Pomeroy v. Wal-Mart Stores, Inc., United
States District Court, 834 F.Supp.2d 964 (E.D. Cal. 2011)). The court reviews aspects of
the parties’ conduct to determine mutual assent and consideration. For example,
employee policy manuals, longevity of employment, pay raises, verbal assurances of
continued employment, and favorable employment reviews have all been presented as
reasons for finding an implied-in-fact contract (Guz v. Bechtel Nat. Inc., 24 Cal.4th 317
(Cal. 2000); Demasse v. ITT Corp., 111 F.3d 730 (9th Cir. 2011); Melbye v. Accelerated
Stores, Inc., 834 F.Supp.2d 964 (E.D. Cal. 2011). Nonetheless, overcoming the statutory
presumption of “at will” employment is difficult (Anderson v. Union Pacific R. Co., 359
Fed.Appx. 800 (9th Cir. 2009)).

These scenarios reveal the breadth of the “totality of the circumstances” test for
an implied-in-fact contract. Every case has a unique set of considerations and facts that
will determine whether the parties mutually assented to be bound by an implied-in-fact
contact. The hypothetical action considered by this study would look to the unique
aspects of the relationship between the states and their public postsecondary institutions.

In 2007, California’s First Court of Appeals heard an implied-in-fact contract
claim related to higher education. That case was Kashmiri v. Regents of Univ. of Calif.,
156 Cal.App.4th 809 (Cal. Ct. App. 2007). While Kashmiri examines the relationship between the student and university, the case’s legal analysis provides insight into the factors that courts may look to when deciding whether states and their public higher education institutions entered an implied-in-fact contract.

**Implied-in-fact contracts in the higher education context—Kashmiri.** The plaintiffs in Kashmiri were a subset of University of California students. The students claimed that UC violated an implied-in-fact with them by raising various fees after previously promising not to do so. To enforce that promise, students needed to establish that they had an implied-in-fact contract with UC. The students sought more than $40 million in damages. The court carefully explored whether the parties’ conduct created an implied-in-fact contract in this case.

The Kashmiri court first examined the long history of case law that views the relationship between private postsecondary institutions and their students as contractual. The court acknowledged that certain aspects of the student/university relationship are contractual. Matriculation, tuition payments, and attendance are all aspects of the parties’ contractual relationship. Nonetheless, universities retain the flexibility to govern certain academic and disciplinary decisions. The university argued that it should enjoyed this flexibility when setting student fees.

The court ruled that the “fee dispute” was an objective inquiry that required no special knowledge of higher education (156 Cal App. 4th 809, 826). The judicial deference normally granted in the higher education context is only necessary when the judiciary lacks the expertise to appropriately review the dispute. As a result, the court was free to determine whether the fee dispute was governed by an implied-in-fact contractual
relationship. The court then explained that an implied-in-fact contract grew from the parties’ conduct, not from a formal agreement between them. From here, the court explained that it would use a totality of the circumstances test to determine the reasonable intent, expectations, and obligations of the parties.

The court then turned to the distinction between specific promises and general provisions. In *Kashmiri*, the court found that specific promises carry more legal weight than general disclaimers because a specific promise is a better and more reasonable representation of the parties’ true intent. In the case, UC promised not to raise fees for a particular set of students but subsequently did so despite that promise. UC asserted that a general disclaimer stating that fee changes could occur at any time justified the fee hike. The court cited general rules of contract construction—favoring specific over general terms—to summarily resolve this question in favor of the students. The court found that the specific promise to keep fees fixed for various students held greater legal weight than a broad disclaimer stating that fees could change without notice.

Specific promises, the court found, can include the promise of equipment, classes, qualified instructors, facilities, and more. These promises are enforceable under an implied-in-fact contract (156 Cal App. 4th 809). The *Kashmiri* court highlighted that course catalogues, registration materials, and other core documents can include terms of the implied contract between students and their universities. However, not all of the materials contained in those documents are enforceable contract terms. Importantly, the court noted the long line of case law providing contract protections to students that failed to receive educational services after the school made a specific promise to provide that benefit.
Specific promises—as determined under a reasonable person standard—are enforceable if the parties’ conduct indicates an intention to be bound by those promises (156 Cal App. 4th 809). Ultimately, the court determined that an implied-in-fact contract was created when the student accepted UC’s offer of enrollment. The terms of an implied-in-fact contract are to be determined by, *inter alia*, the parties’ conduct, publications, and communications. Importantly for this study, the court stated that, “A breach of contract action regarding a specific promise about the fee to be charged is similar to a breach of contract action based on the failure to provide a specifically promised educational service” (156 Cal App. 4th 809, 826). The hypothetical case in this study alleges that a specific promise to provide an educational service was breached.

The *Kashmiri* court went on to further highlight the legal fortitude of a specific promise in another context. UC argued that various statements were expressions of university policy and not individual promises to students. UC also suggested that students could not reasonably expect fees to remain stagnant when the university informed them that institutional funding is subject to legislative and gubernatorial approval. The court was not persuaded by these arguments because the specific promise that kept fees fixed was clearly stated and not conditioned on any exigent circumstances. The court went on to declare that no emergency exception to life or property would make performance of the promise impossible. The court also found that an “*economic crisis*” (italics added) does not excuse performance under a contract (156 Cal App. 4th 809, 839).

As these various cases indicate, an implied-in-fact analysis requires a close examination of the particular circumstances of each case. *Kashmiri* is valuable for this study for a number of reasons. First, the case addresses the implied contractual
relationship between students and their postsecondary institutions and is analogous to the hypothetical case. Second, specific promises are strong proof of an implied-in-fact contractual relationship. The student plaintiffs in the hypothetical case would be seeking enforcement of an alleged specific promise. Lastly, the defenses raised in Kashmiri are similar to the defenses that California would raise in the hypothetical case. As a result, this study identifies the specific promise that students in the hypothetical case are seeking to enforce as a term of the implied-in-fact contract. Simply put, students would argue that the state specifically promised to provide them affordable access to higher education in the state’s education code.

**California, legislative intent, and implied contractual rights growing from a statute.** One important component of this study’s hypothetical case that distinguishes it from the other implied-in-fact contract cases considered so far is the state’s role as a party to the contract. This distinction becomes important when determining the parties’ intent to be bound by the terms of an implied-in-fact contract. In California, legislative intent to provide contractual rights can be implied from a state statute, like the education code *(California Teachers Association v. Cory, 155 C.A. 3d 494 (Cal. Ct. App. 1981)).* The Cory court found that the statute, however, must contain an unambiguous exchange of consideration by a private party for consideration offered by the state. Nonetheless, explicit statutory acknowledgment is not necessary to show a clear intent by the state to contract.

In 1903, the Supreme Court of California made clear that the state is free to enter an implied-in-fact contract in *San Luis Obispo County v. Gage, Supreme Court of California, 139 Cal. 398* (Cal. 1903). The court ruled that the state may evidence an
intent to contract in a statute, through the state’s actions in response to a statute, or “other means or evidence” (139 Cal. 398, 406)). In the case, a California county was seeking state appropriations that California legislatively promised to provide counties that operated a program to support orphans. The court determined that California entered into an implied-in-fact contract to compensate counties that provided such services.

Importantly, the court explained how contractual obligations could arise from a statute. The court stated that an implied-in-fact contractual obligation could be created when a private party acts in response to the conditions set forth in chaptered legislation. The court found that the statute at issue was a contractual offer that California counties could accept by providing the type of support the legislation contemplated. Once the counties accepted the offer by operating a facility and program to support orphans, the contract became enforceable against the state. As a result, the state was required to provide the allocations promised to the county in the legislation.

The Gage decision provided the foundation for the California Court of Appeal’s opinion in the 1984 case of California Teachers Assn. v. Cory, 155 Cal.App.3d 494 (Cal. Ct. App. 1984). In this case, the state teachers’ association was seeking payment of the state’s legislatively mandated contribution to the association’s retirement fund. In 1979, California—in response to Proposition 13, which significantly reduced property tax revenue—passed legislation that modified the state’s mandatory contribution to the teacher’s retirement fund.

In 1980, when the new contributions were to begin, California’s Legislature suspended the mandatory contribution and instead provided a reduced annual allocation in the state’s budget act. The reduced annual allocations made “in lieu” of the mandated
allocations continued for two more years until the Governor finally lower the “in lieu” of annual allocation to one dollar in 1983 (155 Cal.App.3d 494, 503). The governor stated that the money could better serve other educational purposes even though an unfunded mandate still existed in the state teachers’ retirement fund.

Before providing its analysis, the court pointed out that neither party disputed that California is free to contract with a private party. In addition, both parties agreed that, in those situations, the Legislature may not impair the performance of a contract through subsequent legislative action because of the protections provided under the Federal Constitution’s Contract Clause. The court then quickly pointed out that the state can create an implied contractual obligation through the “particular texts and context” of the statutes at issue in the case (155 Cal.App.3d 494, 505).

The Cory court affirmed that a statute can create a contractual obligation if a bargained for exchange of consideration between the state and a private party is present in the statute. In this case, a statutory offer of pension rights in return for employee services amounted to a bargained for exchange and thereby implied contractual rights were found to be present. In addition, the court made clear that explicit statutory promises were not the only way to show clear legislative intent to be bound by implied contractual obligations. Other cases establish the distinction between when a contractual right is found and when one is not.

In 2008, two California counties brought suit against the state seeking reimbursement for providing mandated services (County of San Diego v. State, 164 Cal.App.4th 580 (Cal. Ct. App. 2008)). The California Court of Appeal heard the case on appeal from both parties. The counties claimed that, under provisions in California’s
constitution and their implementing statutes, they were due recompense for providing state mandated services to their residents under, *inter alia*, an implied-in-fact contact. The court determined that, unlike the previously discussed cases, the state did not grant contractual rights through the provisions at issue in this case.

The court found that the constitutional provision and the implementing statutes that provided the funding mandates at issue were actually the state’s way of ensuring that California meets its own constitutional obligations to reimburse counties for state obligations. No contract was formed because there was no promise of funding in exchange for a valuable service provided by a private party. There was no bargained for exchange nor did the state make an offer that could be accepted by a private party. Thus, each party had an obligation under the law to perform the mandates at issue but not a contractual obligation to perform them.

These three cases establish the two foundational elements necessary to establish an implied-in-fact claim against the state. First, the state must show an intent to be bound by the implied-in-fact contract at issue. Legislative intent can be exhibited through both text and context. However, statutory declaration or mandate is the strongest evidence of intent. Second, the basic elements of a contract must be met. That is, the state must have engaged in a bargained for exchange with a separate party. This can occur in at least three ways.

The state can mutually negotiate with a party to effectuate contractual obligations through statute. Next, the state may make an offer to an indeterminate class of persons that are free to accept that offer at any time. Lastly, the state may broadly exhibit an intent to contract by its actions outside of a statutory framework. Interestingly, a totality
of the circumstances test—like “text and context”—is also used to determine whether principal parties to a contract intend to benefit a third party as part of their agreement.

**Third-Party Beneficiaries in California**

Third-party beneficiary contractual rights are codified in California (Cal. Civ. Code §1559). The state’s common law, however, gives substance to that statutory framework. Like implied-in-fact contracts, California common law governing third-party beneficiaries aligns with the general rules already profiled. Third parties are entitled to the benefit of the terms contained in an otherwise, valid underlying contract (*Conrad v. Thompson*, 137 Cal. App. 2d 73, (Cal. Ct. App. 1955)).


Porter Co., 193 Cal. 197 (Cal. 1924)). Ultimately, courts use a totality of circumstances test to determine whether a third party enjoys rights under a contract (Sepulveda v. Pacific Maritime Ass’n, 878 F.2d 1137 (9th Cir. 1989)).

**Students as a Third-Party Beneficiary**

Fortunately, case law exists that considers when a college student can be considered a third-party beneficiary (Bloom v. National Collegiate Athletic Ass’n, 93 P.3d 621 (Colo. App. 2004); Oliver v. Natl. Collegiate Athletic Assn., 155 Ohio Misc.2d 8 (Ohio Misc. 2008); Grossmont Union High School Dist. v. Ca. Dept. of Education, 169 Cal.App.4th 869 (Cal. Ct. App. 2008)). In these cases, students sued to ensure that they receive an alleged benefit due them under a contract between their postsecondary institution and a second principal party. The second principal party to the contract was the promisor and thus, that party was potentially liable to the third-party beneficiary. The plaintiffs must show that they are more than incidental beneficiaries and in fact, are an intended third-party beneficiary to the contract (Nitro Distributing, Inc. v. Dunn, 194 S.W.3d 339 (Mo. En. banc 2006)).

Often, courts find that students are not third-party beneficiaries. A student injured by flying debris was not an intended beneficiary of the contract between the student’s college and an independent company that provided maintenance and housekeeping services to the school (Radosevic v. Virginia Intermont College, 651 F.Supp. 1037 (W.D. Va. 1987)). One court found that students are not third-party beneficiaries to the employment contract between the college and a professor (Verni v. Cleveland Chiropractic College, 212 S.W.3d 150 (Mo. En. banc 2007)). Students have also been prevented from enjoying third-party status under a contract between their colleges and the

Students were, however, found to be third-party beneficiaries to the articulation and transfer agreement between their former community college and their new university (*Prince v. Kent State Univ.*, 2012 WL 831013 (Ohio Ct. App. 2012)). Nonetheless, the court in that case found that the harm was so minimal that the agreement was not breached. An intriguing set of cases is developing that asks whether college student-athletes have rights as third-party beneficiaries to a contract between their school and the National Collegiate Athletic Association (NCAA).

These cases have analogous value to this study because the NCAA’s relationship with its member institutions is contractual in nature. The NCAA is governing body that requires its member institutions to abide by self-imposed quasi-legislative guidelines. As you will see, there is ambiguity present in the rules between vague declarations and specific promises. Finally, enough cases exist to provide some guidance on the factors that determine a student’s third-party beneficiary rights in the general higher education context.

In 2004, a University of Colorado football player, Jeremy Bloom, sought injunctive relief to prevent enforcement of various NCAA bylaws (*Bloom v. National Collegiate Athletic Ass’n*, 93 P.3d 621 (Colo. App. 2004)). Bloom hoped that he could earn endorsement revenue as a professional skier while remaining NCAA eligible as an amateur football player. The court found that Bloom was a third-party beneficiary to a contract between the NCAA and its member universities and colleges. The court determined that Bloom was entitled to the covenant of good faith and fair dealing implied
in every contract. Nonetheless, Bloom was denied injunctive relief because he failed to show that his challenges would reasonably succeed on the merits.

In 2008, an Ohio court determined that Andrew Oliver, a college baseball player, stood to benefit from the contract between the NCAA and his university (Oliver v. Natl. Collegiate Athletic Assn., 155 Ohio Misc.2d 8, 13 (2008)). Like the plaintiff in Bloom, Oliver hoped to enjoin enforcement of certain NCAA rules governing his eligibility. The court determined that Oliver would benefit from the contract’s performance and thus, was an intended beneficiary. Unlike Bloom, the plaintiff was able to show that a genuine issue of material fact was present in his case and therefore he was able to withstand a defense motion for summary judgment. The case quickly settled.

In late 2012, a Vermont court expressed skepticism regarding the extent of a student-athlete’s rights under the third-party beneficiary rule. A former college hockey player sought injunctive relief under the “fairness” provisions broadly stated in the NCAA bylaws Knelman v. Middlebury College, 898 F. Supp.2d 697, 707 (D. Vt. 2012)). Parts of those bylaws can be incorporated into the contractual relationship between the NCAA and its member institutions. The court expressed doubt, however, about the plaintiff’s potential third-party beneficiary rights. Despite some analysis, the court failed to reach a conclusion on this issue. Instead, the court found that the plaintiff would have been unable to prove that his college breached “specific and concrete” promises made in the NCAA bylaws (898 F. Supp.2d 697, 712). No such promises were ever made to the former student-athlete.

The court’s reliance on expressed promises was noted by the 9th Circuit in a similar case, Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996). In
Hairston, college football players claimed that they were a third-party beneficiary to the contract between their university and the athletic conference that university was a member of. The plaintiffs claimed that they were denied the benefits of that contract because the penalties imposed on their university by the athletic conference denied them meaningful competitive opportunities.

The judges agreed with the lower court, in finding that “vague, hortatory pronouncements,” alone, are not sufficient to show that the players were intended third-party beneficiaries to the contract (101 F.3d 1315, 1320). The lower court also found that the contract between the conference and the plaintiffs’ university contained these types of equivocal declarations and nothing more (Hairston v. Pacific-10 Conference, 893 F.Supp. 1485 (W.D. Wash. 1994)). The 9th Circuit affirmed the lower court’s ruling and denied third-party beneficiary status to the plaintiffs.

All of these “student as third-party beneficiary” cases are instructive for a few reasons. First, each case examines third-party beneficiaries in a higher education context. This adds insight for this study’s legal analysis because students are the plaintiffs in the hypothetical case. Second, the cases emphasize the high burden that plaintiffs must meet before establishing rights as a third-party beneficiary. The plaintiff must show that the principal parties intended to benefit the students and expressly did so in the contract. The plaintiff can meet this burden by providing evidence that the principal parties made specific promises to benefit the plaintiff as a third party. Broad and nebulous declarations may be included in the contract but they are not enough to confer a direct benefit to a third party.

**Review of Literature Conclusion**
The research questions posed in this study are complicated. Multiple areas of contract law are considered in the context of public higher education. The relationship between states and their public postsecondary institutions is fundamental to the analysis. The basic foundation for that relationship took hold in the nineteenth century and has advanced since. Throughout that time, states demanded various levels of accountability while public colleges and universities sought the necessary autonomy and funding to fulfill their institutional mission. This dynamic remains and this study grows, in part, from that dynamic.

State funding for higher education appears to have reached the “new normal.” That is, states no longer appear willing to increase per student funding for public postsecondary education as they did until the early 1990s. This work uses California as a case study to examine a possible legal challenge designed to temper the effects of future funding cuts to the state’s public higher education system. In the end, this study examines two legal questions. First, does an implied-in-fact contract exist between California and its postsecondary institutions? Second, are students third-party beneficiaries to that contract? However, the analysis has broader policy implications for understanding the public finance of higher education and the relationship between the states and their public postsecondary institutions.
Chapter 3: Conceptual Framework and Methodology

This work blends a comparative framework with a single state case study methodology. While seemingly counterintuitive, this approach is necessary to answer both the research and legal questions at issue. There are comparative legal distinctions between states and postsecondary institutional types that must be explored in the analysis. However, a case study approach is more suited for the state-specific nature of contract and education law. A single state case study enables me to explore the state law governing contracts and higher education in great detail. Simply put, the comparative framework provides breadth to the analysis while the case study methodology provides depth. The analysis is framed as a hypothetical suit. This approach exposes the factors that this work’s research questions seek to identify.

Conceptual Framework

I utilize a comparative legal analysis as the conceptual framework for this study. This approach enables me to highlight the parameters of the open legal questions at issue in an efficient manner. Comparative law is a well-respected analytical framework (Frankenberg, 1995, 1997; Juenger, 1998; Kahn-Freund, 1966). In fact, the comparative framework is considered a fundamental method of legal analysis (Lomio & Spang-Hanssen, 2008).

A comparative framework analyzes a legal question in the context of variant legal systems (De Cruz, 2007; Schlesinger, Baade, Herzog, & Wise, 1998). Most comparative legal research reviews questions by juxtaposing foreign legal systems (Lomio & Spang-Hanssen, 2008). In that context, a comparative legal analysis is used to provide insight into the distinctions between different countries’ legal structures (Schlesinger et al.,...
1998). In addition, a comparative framework can be used to objectively and systematically analyze a legal issue from multiple perspectives (De Cruz, 2007).

This study follows the second of these approaches. I use a comparative framework to explore the legal questions in multiple contexts (i.e., between states and various types of postsecondary institutions). As a result, the analysis is more helpful and comprehensive because a broader variety of factors influencing the legal questions are considered. Some would not consider this “problem-based” approach a true comparative legal analysis because the focus is not on the distinctions in the legal systems (De Cruz, 2007). However, as a conceptual framework, this alternative approach allows me to effectively analyze the open questions of law that this study considers.

A comparative legal analysis can simultaneously refine and expand how we understand the law (Grosswald Curran, 1998). To that end, the comparative approach utilized in this study provides broad guidance to states, public institutions of higher education, and students on the legal questions at issue. This aspect of the study is designed to help all parties better understand their own potential rights and/or obligations under an implied-in-fact contract theory for the provision of public higher education.

The complexity of the considerations raised by the legal questions prevents me from doing an expansive comparative analysis. As a result, I augment a single state case study with brief examples from other states. By focusing on one state—California—I am able to consider the variance between all types of public postsecondary institutions because of their presence in the state. In addition, I am able to juxtaposing unique examples from other states against the facts in California. Integrating a single state case
study methodology within a comparative framework enables me to ask the broad research and legal questions in the context of one set of facts.

**Methodology**

**Case study methodology**—generally. A case study methodology serves as the necessary foundation for operationalizing this study’s comparative legal framework. Case study analysis is fundamental to legal methodology but also provides additional benefits in the context of social inquiry (Hammersley & Gomm, 2000, as cited in Gomm, Hammersley, & Foster, 2000; Yin, 2009). From a social science and qualitative perspective, case studies are a respected research tool (Hammersley & Gomm, 2000; Yin, 2009). Yin (2009) highlights the value of case study research for various types of exploratory “how” and “why” questions that are used in qualitative research. Empirical quantitative research best suits many “what,” “where,” and “who” questions in addition to questions like “how many” or “how much” (Yin, 2009).

Social inquiry case studies allow the researcher to investigate a few cases in great detail (Hammersley & Gomm, 2000, as cited in Gomm, Hammersley, & Foster, 2000). Case studies capture events and facts that reveal an important story (Hammersley & Gomm, 2000, as cited in Gomm, Hammersley, & Foster, 2000). In fact, the primary concern of social inquiry case studies is usually to understand the case itself (Hammersley & Gomm, 2000, as cited in Gomm, Hammersley, & Foster, 2000). This approach sounds very similar to legal case study methodology. The law—in the form of attorneys and judges—methodically reviews, presents, and adjudicates individual cases in great detail. In addition, the arguments supporting the legal claims and eventual determination of law are supported by analogous cases (Walton, 2002). This precedential
reliance indicates that legal cases capture events and facts that are important to understand. However, there is at least one important distinction between social science and legal case study methodology. In contrast to Yin’s (2009) “how” and “why” questions for social inquiry, the law asks “should” questions.

This study, in one sense, considers whether California should be required to make high-quality public higher education affordable and accessible to its citizens based on an implied-in-fact contractual obligation to do so. Social science case study methodology cannot answer this question. Legal case study methodology can because of the precedential value of analogous cases.

Case-based legal reasoning is fundamental to our legal system (Skalak & Rissland, 1992). Precedent justifies legal decisions in America’s common law system (Wasserstrom, 1961). The basis for an analogous legal argument depends on the context (Weinreb, 2005). Strong analogies—found in legal case study methodology—result because the facts in one case closely correspond to a previously decided case (Wienreb, 2005). As a result, this study looks to analogous case law in addition to the facts and circumstances of the case study to answer the legal questions.

The American legal system requires judges and attorneys to take a critical step that social scientists will not. Legal actors will and must analogize from one particular case to another (Wasserstrom, 1961). Judges and attorneys use previous cases to help understand a person’s rights and obligations under a similar but unique set of circumstances. Thus, a case study methodology is necessary to provide a useful legal analysis. California’s laws and its higher education sector serve as the case study for this work. The unique case law relating to state liability for implied-in-fact contracts in
California will serve as the foundation for the legal analysis because of its precedential value.

**Case study methodology—operationalized.** This work considers the specific facts and circumstances of a hypothetical single-state case study. Hypothetical case study analysis or problem-based learning is fundamental to the study of law (Moens, 2007). This study’s hypothetical case provides answers to the research questions by addressing the legal questions in the analysis. The various legal questions are largely state based questions of law and thus, a single state case study is required.

California and its higher education system will serve as the subject of this case study. I have chosen to use California because the history surrounding the state’s relationship with its public postsecondary institutions is ripe with facts that inform this work. First, the state operates a higher education system that is based on institutional type. California’s state higher education system clearly delineates between institutional types similar to that of the Carnegie system (Cal.Educ.Code. §§66000-67400; Master Plan Survey Team, 1960). In addition, a substantial body of legal opinions exists that address issues of institutional autonomy related to UC, Cal State, and CCC. As should be expected, those opinions fundamentally influence the analysis.

Third, *The Master Plan for Higher Education in California, 1960-1975* (“Master Plan”; Master Plan Survey Team, 1960), the history surrounding its creation, subsequent reviews of the plan, and formal legislative declarations supporting the plan provide substantial factual content that impacts this study’s analysis. Finally, California funded its public higher education institutions at significantly high levels for most of the last century (Palmer, 2012). This fiscal and temporal commitment is an important
consideration in the context of the open legal questions at issue in this study. Equally important is the severity of the current funding reductions facing California’s public institutions of higher education.

By virtually all accounts, California helped create the greatest postsecondary educational system in the world through its fiscal commitment to public higher education. State support for public higher education in California is at risk. California’s recent deficits, balanced budget requirements, and public higher education’s discretionary funding status may mean that California continues to disinvest in postsecondary education. The University of California System, California State System, and California’s Community Colleges all work to meet the higher education needs of the state. Meeting this goal has proven difficult given the recent funding cuts and continued enrollment growth. Thus, California represents a state where this study’s analysis is pertinent.

Unfortunately, a single-state case study cannot account for the comparative legal distinctions between states. This study strives to provide insight into those broader considerations as well the detailed legal analysis contained in the case study. To accomplish this goal, I provide informational insights into other states when appropriate. These include, *inter alia*, differences in state constitutions, statutes, and case law. These additional insights help clarify the scope of the legal considerations at issue and generally inform the legal analysis. These state variances are only discussed briefly but they do bring important considerations to the discussion.

The remainder of this section details how the legal analysis in Chapters 4 and 5 is structured. California case law governing implied-in-fact contracts between the state and private parties serves as the foundation for the structure. I chose this approach because
the hypothetical case proposed in this work must be argued from analogy and the state is a defendant in both. The California case law governing implied-in-fact contracts involving the state is limited. Nonetheless, these cases establish the elements that a court would consider in this work’s hypothetical case. For the same reasons, the California case law governing third-party beneficiaries serves as the basis for that component of the legal analysis. In short, this work considers a hypothetical lawsuit and thus, must consider the questions presented as a court would. Those legal questions expose the factors that answer the research questions.

The general structure of the legal analysis is simple. I assess two distinct legal questions independently in Chapters Four and Five respectively. First, I consider whether California and its postsecondary institutions have an implied-in-fact contractual obligation to meet the state’s higher education needs. In the hypothetical suit, the plaintiff must show that the parties intended to be bound by the contract term italicized above. If the answer is yes, then the students could bring a third-party beneficiary suit. This second legal question considers whether California’s citizens are entitled access to affordable high quality postsecondary education under the implied-in-fact contract. The analysis for this question comprises Chapter 5. The components of the legal analysis, while relatively straightforward, are not as simple as the general structure may indicate.

The legal analysis initially considers the broad elements required to prove that an implied-in-fact contract exists between California and its postsecondary institutions. Initially, the fundamental elements required to establish a contract must be shown (i.e., two parties and a bargained for exchange). Second, the court will only enforce specific promises, not equivocal declarations. Thus, a specific promise must be identified. Third,
the defendant must have shown an intent to be bound by the specific promise which represents an implied contractual term. Finally, procedural limitations (i.e., statute of frauds and statute of limitations) must be accounted for.

An important aspect of this study’s hypothetical case is the state’s role as the defendant. This feature of the case requires the legal analysis to determine whether California’s Legislature intended to contract with its postsecondary institutions. State case law requires the use of “text and context” to determine legislative intent in implied-in-fact contract cases involving California (155 Cal.App.3d 494, 505). As a result, this test is used to review California’s higher education system and the effectuation of the Master Plan, in particular, as context for the formation of an implied-in-fact contract.

Statutes, legislative declarations, committee reports, chaptered legislative intent, and more are reviewed to determine if the state intended to be bound by a specific promise to provide California’s citizens affordable access to postsecondary education. In this case, the promise is a mutual one between the state, UC, CSU, CCC, and possibly California’s private postsecondary institutions to meet the state’s higher education needs. In addition, the parties’ historical, fiscal, legal, and administrative relationships are reviewed for evidence of intent to be bound by that contract term. All of these legislative materials and relational factors are also used to determine if a bargained for exchange occurred between the state and a private party.

The historical factors that I review set context for the legal questions. A rich and informative history surrounds the development of public higher education in California. This background actually serves to help explain how the alleged contract arose and why it may continue to this day. The parties’ fiscal dealings must also be examined as part of the
analysis. In particular, annual state funding shows, *inter alia*, that a bargained for exchange may have occurred between the state and California’s postsecondary institutions.

Administrative dealings generally focus on institutional autonomy and legislative oversight. These factors inform the question of whether a private party has contracted with the state. The legal factors, like case law, the state constitution, and statutes ultimately determine how the case should be decided. However, all of the foregoing factors intersect and inform the legal questions put forth in the hypothetical case.

Predictably, these factors are inextricably intertwined. The legal relationship provides the foundation for the analysis. However, the fiscal considerations tell a unique story about the state’s commitment to higher education and the parties’ relationship. The review of the administrative dealings provides germane insights into the practical operational concerns that stem from the legal questions in addition to directly impacting the analysis. Finally, the historical review provides guidance into the parties’ long-term relationship and their mindset when forming the Master Plan. All of these factors are used to argue that all of the necessary elements to form an implied-in-fact contract with the state are present.

The hypothetical case also considers whether a third-party beneficiary has the right to bring this suit. The third parties in this case are students at California’s public postsecondary institutions. Students must show that a contract between the state and their institutions exists before seeking any relief under that contract. Once a contract is present, however, students may be able to bring a claim as an intended third-party beneficiary.
Students would claim that they are entitled *access to an affordable high-quality higher education* at California’s public postsecondary institutions under the implied-in-fact contract between the state and its postsecondary institutions to meet the higher education needs of the state. To show this claim, the plaintiff must prove that the principal parties intended to expressly benefit the third party in the contract. Again, only specific promises are enforceable, not “vague, hortatory pronouncements” (101 F.3d 1315, 1320). Like with implied-in-fact contracts, a court will look to the parties’ intent to determine whether a third-party beneficiary right is present in the contract. Given that California is the hypothetical defendant, the legal analysis for third-party beneficiaries must again look to statutory text and context for the principal parties’ intent.

Many of the same factors that informed the contractual analysis are used to examine the third-party beneficiary claim. The distinction in the third-party beneficiary analysis relates to the elements that need to be shown and the specific promise that the plaintiff hopes to have enforced. Otherwise, the test to determine whether the necessary legal elements are present is virtually identical. A totality of the circumstances test is used to determine the intent of the parties in both implied-in-fact contract disputes and third-party beneficiary cases. In this case, the same set of circumstances may give rise to both an implied-if-fact contract and a third-party beneficiary claim.

The language present in California’s constitution, education code, joint resolutions, and more are used to determine whether the principal parties intended to provide an expressed benefit to a third party and made a specific promise to do so. The history surrounding the Master Plan and the language contained in the multiple committee reports reviewing the plan are also factors in assessing third-party beneficiary
status. California’s fiscal support also serves as a factor in determining whether an expressed benefit was present in the implied-in-fact contract. All told, the methodology used for both legal questions is indistinguishable. I address the required legal elements in succession and present both sides of the case at each point. While this practice is sound legal analysis, certain limitations are still present.

**Limitations**

There are limitations to this study’s methodology and legal analysis. First, the research only briefly considers particulars from other states. A comprehensive review of the facts and circumstances from each state is impossible in this study. However, this work’s case study provides the framework for analyzing the question in other jurisdictions. As a result, an interested reader outside of California must analogize this work’s case study to his or her own state and institution.

Second, the fact specific nature of an implied contract creates methodological limitations. I analyze numerous factors that look to the parties’ intent to be bound by a contract that benefit a third party. In an actual suit, however, there would likely be a multitude of documents, communications, and other dealings between a state and public institution that may be relevant to this legal question. This study simply cannot reach that level of detail. Nonetheless, I provide an expansive legal analysis that appropriately answers the research questions based on the primary factors at issue. The final limitation of this analysis is a product of the United States legal system.

The research questions consider a legal action brought in response to a worst-case scenario involving the funding of state public higher education. Litigating this suit could be extremely expensive and contentious. Given today’s political environment and the
state’s involvement in the suit, battles may be fought along ideological lines. A fundamental political debate about higher education as a public or private good may surround the suit. This dynamic could raise legal realism concerns if a judge with a particular ideology considered this case. Thus, legal action to enforce state funding for higher education should be a last resort because such an action may be unsuccessful and politically unproductive.
Chapter 4: Implied-in-Fact Contractual Analysis

Introduction and Hypothetical Claim

**Introduction.** This study examines the various factors that may create an implied-in-fact contractual obligation between a state and its postsecondary institutions. In addition, I explore the factors that may provide students third-party beneficiary status under that contract. The state of California serves as the case study for the work. This case study approach provides the depth necessary to assess the research questions. I also briefly compare various facts from other states to broaden the analysis and highlight the procedural considerations at issue.

A hypothetical implied-in-fact contract claim lies at the foundation of the legal analysis. The “text and context” that helps determine the principal parties’ intent exposes the factors necessary to resolve the hypothetical contract claim. A third-party beneficiary claim also requires an examination the parties’ intent under a totality of the circumstances test.

This study’s hypothetical case asks two legal questions within the context of the research questions. The first question considers whether California and its postsecondary institutions operate under an implied-in-fact contract to meet the higher education needs of the state. The second question asks whether students are entitled to affordable access to postsecondary education under that implied-in-fact contract. I have set forth a brief example of what the plaintiff’s claim may allege.
Hypothetical claim. The following represents a potential claim in this hypothetical case.

1. Starting in 1959, with the passage of California Assembly Resolution No. 88, California’s Legislature expressed a clear intent to contract with the state’s higher education institutions to meet the postsecondary needs of the state.

2. Since the passage of the Donahoe Act in 1960 and the 1960 California Senate Concurrent Resolution No. 16, the California Legislature, California’s governor, the University of California Regents, California State University Trustees, California’s Community Colleges, and California’s independent postsecondary institutions have agreed on an annual basis to be bound by an implied-in-fact contract to meet California’s public higher education needs.

3. The defendants’ intent under the Contract is to provide California’s citizens affordable access to high-quality postsecondary educational opportunities at the defendants’ institutions.

4. Under the Contract, California provides fiscal support to the defendant institutions in exchange for the institutions’ agreement to meet the state’s public higher education needs in a strategically efficient, purposeful, and mutually beneficial manner.

5. Since the formation of the first annual contract, the defendants’ have expressed an intention to remain bound to the Contract through their general course of conduct, dealings, statements, legislation, and other relevant ways as expressed in the Donahoe Act’s chaptered legislative declarations and intent.
6. The essential terms of the first contract have been implied in every subsequent annual contract.

7. A totality of the circumstances including, *inter alia*, various state constitutional provisions, parts of California’s Education Code, chaptered legislative intent, concurrent legislative resolutions, joint committee reports, the Master Plan, over 50 years of shared governance, and substantial state fiscal support shows that the defendants’ expressed an intent to provide California’s citizens affordable access to high-quality postsecondary educational opportunities at the defendant institutions.

8. Students at the defendant institutions have accepted the defendants’ offer of affordable and accessible higher education opportunities by enrolling at the defendant institutions.

9. State has breached the Contract by failing to adequately fund defendant institutions in a manner that meets the state’s higher education needs.

10. As a result, students are being denied affordable access to high-quality public higher education in California as promised under the Contract.

11. The rapid rise of student tuition and fees at defendant institutions, limited access to classes, and excessive nonresident enrollment at the University of California, *inter alia*, deny students access to affordable high-quality higher education.

12. Students are seeking declaratory relief confirming the Contract’s existence and validity.
13. Students seek declaratory relief stating that California must adequately fund defendant institutions in a manner that reasonably effectuates the promises made under the Contract.

14. In addition, students seek specific performance of the Contract under the understanding that the defendants have an implied-in-fact contractual obligation to meet the higher educational needs of California.

15. Students seek specific performance of the Contract under the understanding that California has a contractual obligation to support affordable access to high-quality postsecondary education opportunities for them as third parties to the Contract.

16. Students seek specific performance of the Contract under the understanding that California will rectify the breach that caused plaintiff’s harm by providing adequate fiscal support.

17. Students seek specific performance of the Contract under the understanding that the defendants continue to operate under the Contract in a manner that honors the spirit of the Master Plan and makes high-quality postsecondary education affordable and accessible for every Californian.

The preceding serves as exemplar of the potential implied-in-fact claim that could rise from this study’s research questions. The analysis that follows generally contemplates this hypothetical claim. This inquiry does not take a position on the legal question. The analysis does, however, examine the factors that this study’s research questions seek to highlight.
Does an Implied-in-Fact Contract Exist?

Introduction. Student plaintiffs, in this hypothetical case, hope to show that California and the state’s postsecondary institutions contracted to meet the higher education needs of the state. Once that is established, plaintiffs could then argue that they are intended third-party beneficiaries to that contract. In California, courts look to “text and context” to determine whether the state has entered an implied-in-fact contract (California Teachers Association v. Cory, 155 C.A. 3d 494 (Cal. Ct. App. 1984)). Courts resolve this issue by first using text and context to assess whether the basic elements of the contract are met (i.e., are two or more parties are present and whether a bargained for exchange occurred). Second, text and context are used to examine whether the parties intended to be bound by specific promises made pursuant to an implied-in-fact contract. Finally, the court must also determine whether all of the procedural requirements necessary for a contract’s formation (e.g., statute of frauds and statute of limitations) are met.

The first component of this study’s contractual analysis considers whether two parties were present at the formation of the alleged contract. If this element is not met, no contract of any kind can be formed. While this question may seem superfluous, the question of whether UC, Cal State, or CCCs are “arms of the state” is an important one. The legal analysis assesses the text and context to expose the factors that a court would use to help resolve this question. Two key factors that would be used to answer this question include California’s Constitution, as it relates to UC, as well as the statutes that govern Cal State and CCCs. The case law surrounding the scope of the autonomy enjoyed by UC, Cal State, and CCC is another important factor.
I consider second, whether California and its postsecondary institutions intended to enter a contract to meet the higher education needs of the state. Text and context are used to assess whether the parties exhibited the intent to enter such a contract. I use a chronological account of California’s public higher education sector development to highlight the historical, administrative, legal, and fiscal factors for consideration. The history leading up to the Master Plan, the Master Plan’s language, subsequent legislative reviews of the plan, California’s Constitution, California’s Education Code, and the state’s fiscal commitment to postsecondary education generally represent the factors the would be used to determine if the state intended to contract with its postsecondary institutions. Importantly, the chaptered legislative declarations and intent contained in California’s current Education Code appear to be the primary factors that a court would use to determine whether an implied-in-fact contract exists.

The third component of the contractual analysis considers what specific contractual promises the plaintiffs are hoping to enforce. Kashmiri shows that specific promises that are made under an implied-in-fact contract are enforceable in California. In addition, these specific promises are also enforceable against the state despite general disclaimers designed to limit California’s obligations. In addition, the Kashmiri court found that the Legislature’s power of purse is limited against specific promises found in an implied-in-fact contract. In addition, Cory limited the Legislature’s power to rescind statutorily promised allocations because of the Contract Clause in the federal Constitution.

The promise that I consider in this study appears relatively simple. Plaintiffs, in this work’s hypothetical case, could assert that the Legislature and California’s
postsecondary institutions specifically promised to provide the state’s citizens affordable access to high-quality postsecondary education. The plaintiffs could claim that California also promised to provide the fiscal support necessary to fulfill this obligation while the state’s colleges and universities would provide the educational services. Again, text and context are used to show whether these claims are enforceable promises. The parties’ actions, statutory language in the Education Code, fiscal allocations, and chaptered legislative intent, *inter alia*, are the relevant factors that court may use to determine if a specific promise was made. Lastly, I review whether all of the procedural requirements for the formation of a contract have been met.

Providing a detailed argument and counterargument for each particular legal point in this analysis would be cumbersome and unwieldy. Furthermore, the purpose of this study is to highlight the factors that would be used to determine if an implied-in-fact contract exists between a state and its postsecondary institutions and whether students have rights under that contract. As a result, the analysis identifies the factors that would likely be considered at each legal question and, at points, suggests ways in which each party could use those factors to their advantage. I am not, however, attempting to detail each party’s argument for every legal question. My goal is to expose the necessary factors and some of the potential legal arguments that the litigants may use if they were party to this work’s hypothetical case. Accepting this limitation, I now turn to the text and context to assess whether more than one party was present to enter the alleged contract.

**Are at least two parties present to form a contract?** This question may seem superfluous on first glance. However, a public postsecondary institution and its home
state may be considered a single entity and thus, no contract between them could be formed. The answer to this question appears to hinge on the level of an institution’s autonomy separate from the state. Both constitutionally and statutorily founded institutions (and their trustees) may or may not be considered arms of the state in this context. An institution’s history, the relevant case law, education statutes, and the constitution present in each state are likely the determinative factors that a court would look to when addressing this question. The following considers the question in the context of California.

The plaintiffs—in this work’s hypothetical case—must show that at least two parties entered the implied-in-fact contract that allegedly exists. The state of California clearly represents one party because it holds sovereign rights under the United State’s Constitution. Neither party would dispute this assertion. Cory also shows that California is capable of entering into an implied-in-fact contract. As a result, no legal analysis is necessary to prove that California, through statute, its actions, or other means, can enter an implied-in-fact contract (155 C.A. 3d, 509; 139 Cal. 398).

Whether the public postsecondary institutions in California are separate entities from the state is debatable. The University of California may be considered a distinct party from the state because of its protected status under the California Constitution. California State University may or may not be considered an arm of the state. California’s Community Colleges would likely be considered an arm of the state. California’s independent colleges and universities are certainly a distinct party from the state.
Student plaintiffs would need to show that one of these higher education systems is distinct from the state and was party to the alleged contract. Again, the presence of two distinct legal entities is a necessary but not sufficient condition for the formation of any contract. A court would look to text and context to determine whether California’s public postsecondary institutions should be considered separate entities from the state because this is the test that California courts apply when the state is an alleged party to an implied-in-fact contract.

The text and context reveals the pertinent factors that a court would use to answer the legal question. In short, the history surrounding the creation, operation, and legal foundation for each postsecondary system in California seems determinative on the issue. These factors are found in California’s Constitution, California’s Education Code, and relevant case law.

In the hypothetical suit, students would claim that California, UC, Cal State, CCC, and the state’s private postsecondary institutions have, since the creation of the Master Plan and passage of the Donahoe Act (which codified many of the Master Plan’s initial recommendations), operated under an implied-in-fact contract to meet the higher education needs of the state. Students would also assert that the involvement of the state’s private postsecondary institutions in the ongoing master planning process makes them party to the implied-in-fact contract. Students would further claim that all of these parties actively engaged in the contract negotiations and at least one of them is a distinct party from the state, which, as a result, is enough to meet the two party element required in every contract.
The state would assert that UC, Cal State, and CCC are all arms of the state. The state would also claim that California’s private postsecondary institutions were, at most, acting in an advisory role during the Master Plan negotiations and in no way intended to contract with them for educational services. As a result, the state would argue that a contract could not be formed because only one party engaged in the activity the allegedly gave rise to the implied-in-fact contract.

**Is the University of California a state actor in this context?** The state, to prove that UC is a state actor, may begin by highlighting California’s constitutional mandate that establishes the Governor, Lieutenant Governor, and Speaker of the Assembly as UC Regents, albeit as ex-officio members. Their presence on the board may bolster the idea that UC is, on some level, a state actor. Other factors seem to support the state’s position as well.

Article IX Section 9 of California’s constitution establishes the basic scope of UC’s rights. First, UC is considered a “public trust.” The state could argue that this language makes UC an arm of the state because of its public nature. Students could counter, however, by arguing that this language requires the state to provide adequate support to meet UC’s mission. The Regents, the state could claim, only administer the operation of UC and were acting as an arm of the state during the master planning process.

Student plaintiffs could argue that the constitutional language providing the Regents full organization and governing powers shows that UC is independent from the state and was so during the Master Plan negotiations. Accepting this, students could contend that UC—through its Regents—is an independent corporation capable of
contracting with California for the provision of higher education services. In addition, students may argue that legislative control of UC is limited to insuring the security of UC’s funds, as indicated in Article 9 Section 9(a) of California’s constitution.

While the California constitution provides the foundation for UC’s autonomy, other relevant text would likely be used to help resolve whether UC is a separate party from the state. In California’s Education Code, UC is referred to as a “state-supported academic agency” (Cal. Educ. Code §22550). Defendants could argue that state-supported agency implies state oversight in UC’s affairs and thus, the university is a state actor. Students could claim that the “state-supported” language simply highlights the Legislature’s intent to fund UC, not control the institution.

Finally, the university’s broad curricular responsibilities are also set out in California’s Education Code. The curricular components of the statute may show that state enjoys fundamental control over UC’s mission. Plaintiffs, however, could claim that these curricular responsibilities were the byproduct of a bargained for exchange that occurred during the Master Plan negotiations. That is, UC, Cal State, and CCC all agreed to fulfill a role within California’s higher education sector so that the state could make efficient use of its limited resources. Intriguingly, California case law provides additional context to this question. However, that case law may not resolve the issue in the hypothetical context.

The case law surrounding UC’s autonomy is generally ambiguous as to whether UC may act independently of the state. In San Francisco Labor Council v. Regents of University of California, 26 Cal.3d 785 (Cal. 1980), California’s Supreme Court identified three areas where the Legislature can restrict UC’s constitutional autonomy.
Otherwise, the court found that the university enjoys expansive organizational and governing power. Legislative control, according to *San Francisco Labor Council*, was limited to (1) appropriations, (2) general police powers, and (3) matters of statewide concern that do not impact “internal university affairs” (26 Cal.3d 785, 789).

Interestingly, California, as defendant, could claim that the comprehensive planning, coordination, and provision of public higher education in California is a matter of statewide concern. The state would suggest that a lack of coordination would have resulted in an inefficient, expensive, and unworkable system of public colleges that would have failed to meet the state’s higher education needs. Thus, the state would claim, comprehensive higher education planning is a statewide concern. This assertion, if accepted, may establish that UC is a state actor because California’s Legislature is free to impinge on UC’s autonomy in this context.

Students could argue that UC’s role in that planning process fundamentally impacts “internal university affairs” and thus, is beyond legislative control. Students would likely argue that UC’s role in this context is similar to case law in which UC was granted exceptions from state control. First, students would highlight that UC is supposed to operate independently of the state whenever possible and that UC is different to other state agencies in some contexts (*Regents of the University of California v. Superior Court of Alameda County*, 131 Cal.Rptr. 228 (Cal. 1976)).

Furthermore, students could argue that the efficient use and delivery of university resources is an internal university affair because UC has been granted broad administrative powers to provide educational services (26 Cal. 3d 785 (1980); *Ishimatsu v. The Regents of the University of California*, 266 Cal.App.2d 854 (Cal. Ct. App.).
1968); *Cal. State Employees’ Assn. v. The Regents of the University of California*, 267 Cal.App.2d 667 (Cal. Ct. App. 1968)). Ultimately, a court considering the hypothetical case may need to determine whether the provision of public postsecondary education in California is a matter of statewide concern.

The state may look to other case law to show that UC is a state actor in this context. In *Regents of University of California v. City of Santa Monica*, 77 Cal.App.3d 130, 135 (Cal. Ct. App. 1978) the court refers to UC as a “constitutionally created arm of the state.” Other cases have referred to UC as a governmental institution, instrumentality of the state, public corporation, and a statewide administrative agency (*Estate of Royer*, 123 Cal. 614 (Cal. 1899); 266 Cal.App.2d 854 (Cal. Ct. App. 1968); *Goldbaum v. The Regents of the University of California*, 191 Cal.App.4th 703 (Cal. Ct. App. 2011)). The state would also point to the cases where UC itself claimed to be a state actor for sovereign immunity purposes (*The Regents of the University of California v. The Superior Court of Alameda County*, 131 Cal.Rptr. 228 (Cal. 1976); 17 Cal.3d 533; 191 Cal.App.4th 703; 156 Cal.App.4th 809). These factors appear to support the idea that UC should be considered a state entity in the hypothetical case.

*California’s independent postsecondary institutions as private actors.* Ironically, students may not need to prove that UC is distinct from California in this context because representatives from California’s private postsecondary schools participated in the Master Plan negotiations. No party would dispute that California’s private higher education institutions are independent from the state. Thus, even if UC, Cal State, and CCC were all determined to be state entities, the presence of California’s private postsecondary
institutions during comprehensive planning process may establish that two parties were present during the formation of the alleged contract.

A court could reasonably conclude that at least two parties were present because California’s private postsecondary institutions helped develop the Master Plan. Student plaintiffs would also point to the legislative consideration shown for the state’s independent postsecondary sector in the state’s Education Code. For example, the code often contains acknowledgment for the “mission and function of California’s public and independent segments” (Cal. Educ. Code §66010.4). Interestingly, the Master Plan, subsequent reviews of the plan, and the chaptered legislative intent in the Education Code also seem to show that the Legislature considers California’s independent postsecondary institutions an integral part of the state’s higher education sector.

Neither party, in this work’s hypothetical case, could dispute that California’s private postsecondary institutions were represented and/or considered during the Master Plan’s negotiations. In fact, the President of Occidental College at the time, Arthur G. Coons, was chairman of the survey team for the Master Plan (Master Plan Survey Team, 1960). In addition, the current chaptered legislative intent in § 66014.5 of the state’s Education Code finds and declares:

Statewide planning, policy coordination, and review of postsecondary education shall include attention to the contributions of the independent institutions in meeting the state’s goals of access, quality, educational equity, economic development, and student aid.

This language could reasonably be interpreted to show that the state’s independent postsecondary institutions were a party to the alleged contract to meet
California’s higher education needs. While a court may conclude that two parties were present, this finding alone does not mean that a contract was formed. Before assessing those other elements, I will highlight why Cal State and CCC may or may not be considered state actors in this context.

Is the California State University a state actor in this context? Cal State, as a statutorily created postsecondary institution, is more likely to be considered an arm of the state than UC. However, some unique text and context makes the question debatable. Public postsecondary institutions created by state statute are generally characterized as state agencies, public corporations, or state political subdivisions (Kaplin & Lee, 2006). These types of references in case law could reasonably be interpreted to mean that statutorily created institutions are de facto arms of the state and therefore, not capable of entering a contract with their home state. Interestingly, in California, the Legislature has granted Cal State some unique powers that may prevent that conclusion in this case.

First, California’s Government Code §11000 - (a) declares that “state agency” does not include the California State University unless the section at issue explicitly declares that it does (Cal. Gov. Code §11000). Students would claim that this means that Cal State is not always considered an arm of the state. Students would need to show that the surrounding text and context support this claim. Importantly, however, another section of the code distinguishes between UC and Cal State (Cal. Gov. Code §11011.13). This section, while not particularly helpful to either the plaintiff or defendant, does show that Cal State and UC can be subjected to different levels of state control (Cal. Gov. Code §11011.13).
The second unique aspect of the text and context surrounding Cal State occurred in 1960. That year, California Senate Concurrent Resolution No. 16 declared that the Legislature intended to grant a level of control to Cal State’s Trustees that was similar the powers that UC’s Regents enjoyed (“Statutory laws and amendments,” n.d.). This resolution, students could argue, shows that the Legislature intended to grant Cal State the requisite level of autonomy necessary to enter a contract with the state. The state may suggest that this resolution was simply an aspirational goal with limits as indicated by the conditional nature of the language used in the statute. For example, the Legislature clearly declares that Cal State will succeed to certain powers, not all powers.

Lastly, the discretionary funding status for both Cal State and UC may differentiate them from other state agencies. This, students could argue, forces UC and Cal State to negotiate with the state for fiscal support in exchange for educational services — much like a contract negotiation. This need to bargain for state support, student plaintiffs would suggest, shows that both UC and Cal State are not state agencies in this context because the funding to effectuate their mission is not mandatory. On the other hand, the state could argue that this part of the code only prevents mandatory allocations and in no way speaks to the institutions’ status as a state actor.

Despite these ambiguous considerations, California’s Education Code brings some clarity to the scope of Cal State’s autonomy. The Education Code first establishes that the Governor, Lieutenant Governor, and Assembly Speaker as ex-officio members of the Cal State Trustees (Cal. Educ. Code §22601; California State University, 2012). The Governor also holds the power to appoint the Cal State trustees (Cal. Educ. Code §22601; California State University, 2012). These factors indicate that Cal State could reasonably
be considered a state actor in this case. More importantly, however, the Donahoe Act was the foundation for the creation of the Cal State system. California’s Legislature, by using this approach, shifted administrative control of Cal State to the trustees and away from the state (Cal. Educ. Code §22604).

Prior to the passage of the Donahoe Act, all of the schools in the Cal State system were independent colleges governed by the state board of education. The Donahoe Act called for the newly established Cal State Trustees to “succeed to the powers, duties and functions with respect to the management, administration and control of the state colleges” (Cal. Educ. Code §22604). This statutory shift in power could indicate that California’s Legislature intended to create a distinction between California and the entity that governs the state’s colleges. The state could claim that the power shift simply transferred control from one state actor to a newly created one. In essence, the state would claim that the change was one of form and not function. All told, a court may or may not determine that Cal State is a separate party capable of contracting with, among others, California to meet the higher education needs of the state’s citizens.

*Are California’s community colleges state actors in this context?* California’s Community Colleges are likely considered an arm of the state. First, CCC was originally created by statute in 1907 and remains a legislatively created institution today (Cal. Educ. Code §70900; Little Hoover Commission, 2012). CCC’s fundamental mission and curriculum is spelled out in statute (Cal. Educ. Code §§70900-88650.5). In addition CCC has been subject to greater statutory mandates than either UC or Cal State (Joint Committee for Review of the Master Plan for Higher Education, 1989). As stated
previously, there is a general acceptance that statutorily created institutions are state actors. CCC seems to meet this standard.

Second, CCC receives a formula-based state allocation each year because of Proposition 98 (Taylor, 2013). This voter-driven mandate for state funding draws a bright distinction between CCC and the other segments of California’s tripartite postsecondary system, which receive discretionary funding. In addition, a mandated allocation makes CCC seem more like other vital state agencies. Finally, a guaranteed appropriation seems to suggest that CCC is more like K-12 schools in California. As a result, the state would claim these factors show that CCC is a purely public entity in this hypothetical context.

Students could argue that CCC’s local control and oversight is enough to make them separate parties in this context. However, the plaintiffs would only need to show that one distinct party was present to form the implied-in-fact contract with the state. CCC would be the least likely candidate of the potential parties (i.e., UC, Cal State, California’s independent colleges & universities). In this case, if UC and Cal State are not considered separate parties from the state, then CCC will not be. CA’s private postsecondary institutions are private parties but a court would need to determine if their involvement in the master planning process was, and still is, enough to form an implied-in-fact contract between the state and its postsecondary institutions to meet this higher education need of the state.

A few comparative facts from other states helps to highlight the extent of the factors that a court may look to when considering whether a public postsecondary institution is a state actor in this context. Oregon, for instance, used the state’s department of justice to represent their public universities until recent reforms removed that power
Pennsylvania and Colorado have quasi state-actor status for some of their public universities and thus, may seem more like a separate party able to contract with their home state (C.R.S.A. §23-5-101.7; Pennsylvania Department of Education, 2014). Virginia’s tiered statutory higher education system ties funding allocates to institutional autonomy (Leslie & Berdahl, 2008).

These examples highlight how the parties’ actions, surrounding laws, and chaptered legislative intent—as text and context—impact the analysis. The facts and circumstances surrounding the parties’ intent may be an important factor in determining if the parties contracted. The state’s case law defining the scope of the various institutions’ autonomy would be an important factor in determining if two parties were present to contract. The determinative factor, however, may well be whether the postsecondary institution at issue was constitutionally or statutorily created. Once a court establishes that two parties are present, it would then turn to whether the parties exhibited an intent to contract by engaging in a bargained for exchange.

**Did California intend to contract with the state’s postsecondary institutions to meet the higher education needs of the state?** As detailed in the literature review, a state must exhibit an intent to convey contractual rights before it can be subjected to an implied-in-fact contract. *Cory* shows that text and context are used to assess whether the state has shown that intent in California. *Cory* also holds that a state statute that details a bargained for exchange is the clearest expression of an intent to contract. However, California’s government can also enter an implied-in-fact contract through its “actions or other means.” (139 Cal. 398, 406). State actions that amount to a bargained for exchange can be considered intent to contract (*Chandler v. Roach*, 156 Cal.App.2d 435 (Cal. Ct.)
App. 1957); *Weitzenkorn v. Lesser*, 40 Cal.2d 778 (Cal. 1953)). A bargained for exchange—a basic element of every contract—includes an offer, acceptance, and consideration.

There is an important distinction between a statute that conveys an implied-in-fact contractual right and a statute that establishes a statewide policy. In California, “legislative intent to grant contractual rights can be implied from a statute if it contains an unambiguous element of exchange of consideration by a private party for consideration offered by the state” (155 Cal. App. 3d 494, 505). However, “legislation which merely declares a state policy and directs a subordinate body to carry it into effect is subject to revision or repeal at the discretion of the Legislature” (155 Cal. App. 3d 494, 504). This distinction could be a primary point of contention in this work’s hypothetical case.

Student plaintiffs may argue that California exhibited an intent to contract with UC, Cal State, CCC, and California’s private postsecondary institutions to meet the higher education needs of the state through its actions during the master planning process and language expressed in the state’s Education Code. Plaintiffs could also argue that California engaged in a bargained for exchange with the state’s postsecondary institutions by codifying much of the Master Plan and continually funding the tripartite postsecondary system that was established. The state would argue that legislative implementation and continued pursuit of the state’s comprehensive postsecondary system was an effectuation of statewide policy implemented by subordinate bodies (i.e., UC, Cal State, CCC).

The following analysis highlights the factors that a court would use to resolve this legal question by evaluating the text and context surrounding the development of
California’s higher education sector. These facts and circumstances help reveal whether California intended to contract with the state’s postsecondary institutions to meet the state’s higher education needs. In a real case, a court would likely first look to the relevant chaptered legislative intent to determine whether the state intended to contract with its postsecondary institutions. Interestingly, California’s Education Code profiles the history surrounding the Master Plan as background in the chaptered legislative declarations and intent. As a result, this study’s analysis details that historical context as well, in greater detail. I take this approach because that historical context contains myriad of factors that a court may use in determining whether an implied-in-fact contract to meet the state’s higher education needs was formed. This account reviews a number of historical, legal, administrative, and fiscal considerations.

In addition to the history surrounding the development of the Master Plan, the language of the Master Plan, the statutory implementation of the Master Plan, legislative reviews of the Master Plan, and California’s current Education Code are all important factors in determining whether the parties intended to contract. These factors would also be used to determine if the parties’ actions amounted to a bargained for exchange to meet the postsecondary needs of the state. California’s fiscal investment in the public higher education sector is another key factor. Thus, the following analysis profiles all these factors within a chronological account and then considers the current chaptered intent.

That operative language to “meet the higher education needs of the state” comes from California Assembly Resolution No. 88 (Resolution No. 88), which was the 1959 legislative directive that ordered the development of the Master Plan. Remember that the hypothetical plaintiffs must show that a contract between California and its
postsecondary institutions exists if they are to enjoy third-party beneficiary status under that contract. In addition, the state’s intent to contract must be present in the text and context surrounding the alleged implied-in-fact contract. Resolution No. 88, as a joint resolution, seems to reasonably represent legislative intent under the text and context inquiry. The passage of a joint resolution, by default, is a formal and public expression of legislative intent. Strikingly, however, the impetus for Resolution No. 88 took nearly three decades to cultivate.

The history leading up to the Master Plan is vital to understanding why California and its postsecondary institutions choose to operate the state’s higher education system in a strategically efficient, purposeful, and mutually beneficial manner. As a result, the history leading to the Master Plan negotiations would likely be considered “context” when a court looks to determine if an implied-in-fact contract exists. The following profiles that history and context to determine whether the parties intended to meet the higher education needs of the state through an implied-in-fact contractual relationship.

The history and relevant factors leading up to the Master Plan. In late May of 1931, California’s governor signed Senate Bill Number 895 (Commission of Seven, 1932, p. 6). That bill authorized the Governor to retain an educational research foundation to study, *inter alia*, the organization, operation, and efficiency of California’s Higher Education system. The governor selected the Carnegie Foundation for the Advancement of Teaching (“Carnegie Foundation”) to undertake the study. The resulting report (“Suzzallo Report”—named after the Carnegie Foundation President) found that California’s higher education system was in a state of “unrest” (Commission of Seven, 1932, p. 16).
The Carnegie Foundation’s recommendations were designed to streamline the organization and efficiency of California’s tripartite system (Commission of Seven, 1932). Subsequent to the report’s completion, California’s Legislature failed to enact virtually all of the Suzzallo Report’s 47 recommendations. The one key recommendation that was enacted—a centralized planning board—eventually failed (Douglass, 2000). However, the report highlighted an important aspect of California’s higher education system that the Legislature would inevitably have to address.

The Suzzallo Report stressed that rising enrollments would require the state and its postsecondary institution to—”as a whole”—define a role for each of California’s higher education institutions (Commission of Seven, 1932, p. 17). To accomplish this goal, the Carnegie Foundation recommended a centralized planning process for the formation of higher education policy in California. The recommendation stemmed from a concern that state legislators could “shamefully waste” California’s fiscal resources if they pursue individual political goals as opposed to focusing on the efficient state-wide delivery and expansion of higher education (Commission of Seven, 1932, pp. 31-34). The centralized planning board failed, in large part, because of these political motivations. Nearly three decades passed before California’s power politic was broken.

California, like most states, had to accommodate rapid student enrollment growth after World War II. The state and UC, having recognized this need, created a “Liaison Committee” to develop a plan that would accommodate the expansion of California’s higher education sector (Douglass, 2000). A 1948 report, *A Survey of Needs of California Higher Education*, was the first of the Liaison Committee’s three post-World War II attempts to remake California’s higher education system (Douglass, 2000; Legislative
The subsequent reports—*A Restudy of the Needs of California in Higher Education* and *A Study of the Need for Additional Centers of Public Higher Education in California*—came in 1955 and 1957, respectively (Liaison Committee of the Regents of the University of California and the State Board of Education, 1955, 1957). All three reports articulated a strategy to accommodate California’s rapid postsecondary enrollment growth in a fiscally efficient and sensible manner (Douglass, 2000). That strategy included mission delineation for each segment of California’s tripartite higher education system and logically justified new campus expansions (e.g., based on population centers).

Despite the recognition of this need, fragmented political motivations among the state’s legislators prevented comprehensive reform of California’s higher education system throughout the 1940s and 1950s (Douglass, 2000). Many legislators sought new campuses for their districts as economic and political prizes (Douglass, 2000). This piecemeal approach failed to address the comprehensive postsecondary needs facing California and would have resulted in fiscal chaos. Thus, by the late 1950s, one could reasonably conclude that California and its postsecondary institutions had not acted collectively to pursue a comprehensive higher education policy in the state. However, amid this disorder, a group of government actors, educators, and policy makers emerged with hopes of creating a statewide focus on higher education planning (Douglass, 2000). The result of their efforts was the Master Plan as first expressed in Resolution No. 88.
The legislative impetus for the Master Plan’s creation. In 1959, California’s Legislature requested the State Board of Education and the UC Regents to prepare a “Master Plan” for the state’s higher education system through passage of Resolution No. 88 (see Master Plan Survey Team, 1960, pp. iii-v). The resolution was introduced by State Assemblywomen Dorothy Donahoe and effectuated by a Survey Team—through the Liaison Committee structure. The Legislature sought a plan that would coordinate the development and expansion of California public higher education sector (Assembly Concurrent Resolution No. 88, (1959)). In fact, Resolution No. 88 proclaimed that California’s Legislature and the state’s postsecondary institutions would collectively “…prepare a Master Plan for the development, expansion, and integration of the facilities, curriculum, and standards of higher education, in junior colleges, state colleges, the University of California, and other institutions of higher education of the State, to meet the needs of the State during the next ten years and thereafter…” (Assembly Concurrent Resolution No. 88, (1959)).

Resolution No. 88 as an expression of legislative intent. A legislative declaration or resolution, like Resolution No. 88, seems to be a reasonable indication of the Legislature’s intent. Resolution 88 seems to indicate that the Legislature was seeking a plan to operate the state’s postsecondary sector in a comprehensive and cost efficient manner. The Legislature, in retrospect, clearly turned the corner on comprehensive higher education policy planning with Resolution No. 88 and indicated as much in the Donahoe Act’s chaptered legislative intent. Given this, a court would likely use the previously profiled history and Resolution No. 88 to help assess whether the Legislature intended to actually contract with California’s postsecondary institutions to “meet the higher
education needs of the state.” However, Resolution No. 88 does not appear to be a contractual offer but a request for a plan.

The historical lead up to the Master Plan and the legislative declaration made in Resolution No. 88 seem to show that California’s Legislature intended to cooperate with the state’s postsecondary institutions to meet the higher education needs of the state. The Legislature, in Resolution No. 88, clearly requested a plan that would help the state create a strategically efficient and purposeful higher education system. The resulting Master Plan, legislative implementation of that plan, subsequent reviews of the plan, California’s current Education Code, and state fiscal allocations for higher education—as text and context—also support that conclusion. Given this, Plaintiffs could argue that the Master Plan, as requested by Resolution No. 88, is an offer made by California’s postsecondary institutions to meet the higher education needs of the state. The legislative implementation of the plan, plaintiffs would argue, is acceptance of their offer by the state. Lastly, student plaintiffs would claim that consideration is exchanged between the parties in the form of state funding and the provision of educational services.

_Why the Master Plan and the passage of the Donahoe Act may represent an implied-in-fact contract._ Resolution No. 88 was the first indication that California’s Legislature collectively intended to manage the growth and cost of the state’s higher education sector. In 1960, the Master Plan—as requested by the Legislature in Resolution No. 88—was presented to California’s Legislature for review (Master Plan Survey Team, 1960). From this point, the Legislature took another step toward creating a comprehensive state higher education sector. That action was to codify portions of the Master Plan—albeit with modifications—in the Donahoe Education Act (“Donahoe
Act”). One key component of the Master Plan that was passed into law at that time was the creation of a coordinating council for the higher education in the state. The chaptered legislative intent contained in the original Donahoe Act regarding this issue is telling.

The Legislature’s original chaptered intent and legislative implementation of the Master Plan as factors. The Legislature expressed a desire to temper—if not eliminate—the regional political influences shaping higher education policy in California. The Donahoe Act required the newly created Coordinating Council for Higher Education (“Coordinating Council”) to recommend sites for campus expansions. This limitation appears to be a response to previous legislative efforts to capture campus expansion projects as political prizes. Plaintiffs in this work’s hypothetical case may suggest that California’s Legislature—by preventing decentralized planning of campus expansions—sought a cohesive strategy for managing the state’s rapidly expanding higher education sector.

In addition, plaintiffs could argue that this limitation is indicative of a bargained for exchange because UC, Cal State, and CCCs would need to work with the Coordinating Council when planning campus expansions. The Legislature, by taking this action, appears to have pursued the Master Plan’s strategy for managing the rapid cost and enrollment growth that was occurring in the state’s postsecondary sector. The Master Plan made clear to the Legislature that California’s elected officials “must guard the state and state funds against unwarranted expansion and unhealthy competition among the segments of public higher education” (Master Plan Survey Team, 1960, p. 27). The Legislature responded by centralizing the planning process with the Coordinating Council
and delineating the mission of the Community Colleges, Cal State, and UC in the plain language of the Donahoe Act.

For example, UC became the “primary state-supported academic agency for research” as well as the only state-supported postsecondary institution to offer professional instruction in law, medicine, dentistry, veterinary medicine, and architecture (Cal. Educ. Code §66010.4). Cal State was to provide instruction for undergraduate and graduate students while placing certain limits on its ability to offer two-year programs (Cal. Educ. Code §66010.4). CCCs were prevented from offering courses beyond grade fourteen and were directed to offer courses that (1) could transfer to other postsecondary institutions, (2) were part of a vocational and/or technical field, and (3) led to a associates degree (Cal. Educ. Code §66010.4).

By codifying institutional mission in the Donahoe Act, the Legislature appears to show collective support for a more efficient and cost effective higher education system because each institutional type serves a specific purpose within the larger statewide higher education system. This statutory delineation of each segments’ missions, plaintiffs could argue, is representative of the state’s acceptance of the offer to do so in the Master Plan. Plaintiffs would argue that these actions, coupled with an exchange of state fiscal support for the provision of educational services, amounts to a bargained for exchange. The state would counter by claiming that the Master Plan was merely a recommendation and the Donahoe Act was an implementation of the state’s higher education policy, not a bargained for exchange.

The omission of various Master Plan recommendations as a factor. While the Master Plan recommended a “scrupulous” higher education policy that would “maximum
value from the tax dollar,” some of the Master Plan’s key fiscal recommendations were not enacted by the Legislature (Master Plan Survey Team, 1960, p. 146). For example, the Master Plan recommended that students pay periodic fee increases to support operating costs associated with non-instructional services (e.g., health services, student organizations, and athletics). The Legislature did not codify any periodic or steady fee increases in the Donahoe Act. In addition, the Master Plan called for all student instructional costs to be borne by the state. This recommendation was not codified in the Donahoe Act. In the end, there was no language in the Donahoe Act that addressed how student fees could be used to offset the fiscal concerns facing California’s public higher education sector or how California would pay for the rapidly expanding sector.

The exclusion of these fiscal commitments in the Donahoe Act could be indicative of the Legislature’s desire to use the annual allocation process to meet the state’s higher education needs. The state may argue that it recognized the need to adjust their fiscal commitment on an annual basis because of normal fluctuations in tax revenue. Student plaintiffs could argue that the Legislature had the chance to pass costs onto the students but chose not to, which indicates their intent to fund a comprehensive statewide postsecondary system. Regardless, a court would have to resolve whether the Legislature’s failure to codify a recommendation found in the Master Plan amounts to expression of intent or a simple desire not to act on a particular matter at that time.

*The Master Plan’s fiscal analysis and state fiscal appropriations for public higher as factors*. Despite the omissions in the Donahoe Act, neither party could reasonably dispute that the Legislature was well aware of the costs required to fund California’s public higher education system. This was clear from the sheer amount of analysis devoted
to the topic in the Master Plan. The Master Plan dedicated 50 pages (i.e., 25% of the report) to assessing the costs and California’s ability to finance public higher education in the state (Master Plan Survey Team, 1960). The Master Plan reviewed (1) the costs associated with each segment of California’s tripartite system, (2) the state’s projected revenue, and (3) whether California should fund public higher education.

The Master Plan makes clear to the Legislature—in those three chapters—that a well-reasoned cost analysis and financing scheme were absolutely necessary before a comprehensive higher education plan could work in California. The Master Plan also conveyed a tremendous amount of information about the long-term costs associated with operating a comprehensive public higher education sector in California. The following provides a few examples.

First, the Master Plan performed a financial assessment of California’s higher education sector by tracking historical costs, current unit costs, and estimated future costs. Second, the report made clear that expenditures were rising substantially and rapidly. The report thirdly delineated the costs by institutional segment and on a per student basis. Fourth, the Master Plan also provided detailed cost estimates for new campuses across all three institutional types in California’s higher education sector. Lastly, the Master Plan reaffirmed support for tuition-free higher education for California residents but suggested that student’s should share in the fiscal burden associated with non-instructional costs.

After the cost analysis was undertaken, the Master Plan assessed California’s ability to meet these costs. Two basic considerations were addressed in this analysis. First, the plan estimated how much of the state’s annual fiscal resources would be
available to support higher education. Second, three variables were used to assess California’s “effort to support public higher education” (Master Plan Survey Team, 1960, pp. 182-187). These metrics included the amount of tax revenue the state can generate, the efficacy of the state’s taxing scheme, and, lastly, the will of California’s citizens to allocate funds to support public higher education. This section of the Master Plan highlighted for the Legislature the corollary growth between the state’s population and tax revenues. The financial analysis also determined the amount of state allocations that would be necessary to maintain steady support for public higher education in California.²

The final part of the Master Plan’s fiscal analysis asks whether California would provide the financial support necessary to maintain the recommended system. This section has three main parts. First, estimated costs are compared against estimated revenues. Second, the final chapter makes clear that effective higher education planning must reach beyond simple economic analysis. Lastly, the Master Plan’s fiscal analysis considered whether California was capable of supporting the state’s higher education needs.

The Master Plan’s fiscal analysis was extensive and in fact, designed to inform the Legislature about the costs of operating a comprehensive system. Given this, the Legislature’s actions and response to the Master Plan may indicate that they accepted responsibility to fund the system. The scope of the Master Plan’s fiscal analysis, if nothing else, highlights that all parties knew that the cost to develop a comprehensive higher education system would be significant.

² This level of support did not include recommended improvements for access, program expansion, salary increases, and more. The estimates were calculated to maintain the level of support for higher education at the time.
A court, reviewing the hypothetical case, would likely use general fund allocations to CCC, Cal State and UC as a reasonable indication of the Legislature’s intention to support the state’s tripartite system. The Master Plan predicted that state appropriations for public higher education support in California would require about $400 million by 1965 and $700 million by 1975. California’s Legislature responded by allocating $413 million to higher education in 1965 and over $1.5 billion in 1975 (Palmer, n.d.). The state’s annual appropriations immediately exceeded the Master Plan’s expectations.

*How the parties would use these factors to their advantage.* These affirmative actions and the gradual growth of state allocations appear to indicate that California’s Legislature was committed to expanding the public higher education sector in California. Importantly, the general fund allocations were in addition to necessary capital allocations designed to build new campuses and expand facilities on existing campuses. Thus, one could reasonably conclude that the Legislature’s annual decision to allocate funds in an effort to grow the state’s higher education sector was an indication of the Legislature’s intent to support the tripartite system. However, these actions are not necessarily indicative of an intent to contract.

Student plaintiffs would argue, however, that the state was well aware of the costs of operating a comprehensive postsecondary system before passing the Donahoe Act because of the Master Plan’s fiscal analysis. Furthermore, plaintiffs would point to the state’s greater than recommended levels of support to bolster their argument. The provision of funds, plaintiffs would suggest is the consideration provided by the state to UC, Cal State, and CCC under the implied-in-fact contract. The consideration exchanged
by the state’s postsecondary institutions, on the other hand, is the provision of educational services to the state’s citizens.

Student plaintiffs could also argue that the curricular restrictions placed on the state’s postsecondary institutions represents a key component of the parties’ bargained for exchange. These restrictions, plaintiffs would argue, are part of the consideration paid to the state in exchange for an efficient public higher education sector. Thus, plaintiffs would conclude that a bargained for exchange occurred because an offer to meet the higher education needs of the state was made, accepted, and both parties provided consideration. The state could simply argue that the entire process was an implementation of California’s statewide higher education policy and no intent to contract was present.

Interestingly, neither party could dispute that the Legislature asked its postsecondary institutions to work collaboratively with the state’s Coordinating Council to develop a comprehensive plan for meeting the state’s higher education needs. That request was made in Resolution No. 88. Furthermore, the historical facts previously detailed and the actions taken would not be in dispute. In fact, the current Education Code briefly profiles the history and purpose of the Master Plan. Nonetheless, a plaintiff could argue that the state’s actions and codification of parts of the Master Plan amounts to an implied-in-fact contractual agreement. California, despite agreeing on the facts, would dispute that claim and rely on their policy-making duties as the rationale.

California, as defendant, would argue that Resolution No. 88, the Master Plan, and Coordinating Council’s involvement in the planning process indicate that a statewide higher education policy was being statutorily implemented through its subordinate agencies (i.e., UC, Cal State, CCC, and the Coordinating Council). California would also
argue that it ordered the planning process to occur and simply chose to codify various recommendations as needed to effectuate statewide higher education policy. The implementation of certain Master Plan recommendations and the omission of others, the state would argue, were indicative of its authority to implement statewide higher education policy, not an example of a bargain for exchange.

Finally, California would certainly suggest that the state retains the power to fund the state’s postsecondary system as the state budget allows. This argument is based on well-established case law (San Francisco Labor Council v. Regents of the University of California, 608 P2d 277 (Cal. 1980). In fact, both parties would likely not dispute that the Legislature retains the power of the purse. Interestingly though, one non-fiscal aspect of the Master Plan that was not codified in the Donahoe Act may have amounted to a mutual agreement between the parties.

Admissions standards and enrollment regulation as a factor. The Master Plan called on the state to mandate admissions standard for each segment of California’s public higher education sector (Master Plan Survey Team, 1960). UC would only enroll students from the top one-eighth of all California public high schools while Cal State would admit students from the top third. CCC would maintain an open access policy so that every person could benefit from affordable postsecondary education opportunities (Master Plan Survey Team, 1960). The Donahoe Act, however, did not include this recommendation. Nonetheless, the schools generally operated in this manner in the wake of the Donahoe Act’s passage.

These self-imposed admission restrictions, a plaintiff may argue, saves the state significant resources because there is limited competition between UC and Cal State for
the state’s best students. A plaintiff could suggest that UC and Cal State changed their admissions policies in exchange for the state funding necessary to fulfill a collectively agreed upon educational mission. Again, however, a court may not find that an intent to contract was exhibited by the state’s failure to codify all of the Master Plan’s recommendations. Nonetheless, UC, Cal State, and CCC, by self-regulating their admissions, may have acted in a manner that benefits the state as part of an implied-in-fact contract.

Summary of the rationale for the Master Plan and the Master Plan’s statutory implementation. The history leading up to the Master Plan, the plan itself, and legislative implementation of the plan would certainly be pertinent factors in determining whether California showed an intent to contract with the state’s postsecondary institutions to meet the higher education needs of the state. The Legislature’s fiscal commitment to the public higher education sector would be another factor to consider. Lastly, the parties’ “unspoken” admission agreement may be a factor in determining whether an implied-in-fact contract was made. Importantly, the Legislature continued to assess the Master Plan and California’s higher education sector into the 1970s. That history and the parties’ continued pursuit of the master planning process would likely be considered factors as well.

The relevant factors at issue between the Donahoe Act’s passage and 1975. The first decade and a half after the Master Plan’s passage included the Legislature’s first review of the plan. Those fifteen years proved to be instrumental for the state as the Master Plan took hold and in retrospect, ensured that comprehensive postsecondary planning became the order of the day in California.

Broadly stated, the committee addressed a number of issues in the report. The structure of the state’s postsecondary sector was analyzed while special consideration was paid to student access and financing. The key recommendation that was passed into law was the reorganization of the Coordinating Council into the California Postsecondary Education Commission—a commission that was in service until November 18, 2011 (Cal. Educ. Code §§ 66900-66906; California Postsecondary Education Commission, 2011).

In an apparent effort to further temper political motivations, the 1973 Joint Committee Report also encouraged the Legislature to restructure the governing boards at UC, Cal State, and CCC (Joint Committee on the Master Plan for Higher Education, 1973). Despite this recommendation, the legal foundation for the Boards’ make-up did not change. Interestingly though, a seemingly innocuous component of the 1973 Joint Committee Report’s first recommendation may have bearing on the hypothetical case. The 1973 Joint Committee Report Recommendation #1 reads as follows:
Recommendation #1. The Legislature shall adopt a statement of legislative intent articulating broad statewide goals for California postsecondary education for the next decade, to include:

A. ...

J. Accountability throughout postsecondary education including:

1) accountability of institutions to the individual (for instruction and related services),

2) accountability of institutions to the public and its representatives,

3) accountability of the individual (faculty, student, staff) to the institutions, and

4) accountability of the public and its leaders to the institutions (for support and development).

(Joint Committee on the Master Plan for Higher Education, 1973, pp. 1-2)

The Recommendation’s accountability language could be interpreted as contractual obligations. The accountability language, student plaintiffs could argue, is representative of a bargained for exchange between the state and its postsecondary institutions. That is, the state provides fiscal support to UC, Cal State, and CCC in exchange for their promise to deliver educational services to students. All parties are held accountable, plaintiffs would suggest, to the agreement as indicated by the language in the 1973 Joint Committee Report.

A plaintiff may further argue that the state’s fiscal support obligation is explicitly stated in the recommendation. That language (contained in Recommendation #1 Section J.(4)), plaintiffs would suggest, is the state’s acknowledgment that their obligation—
under an implied-in-fact contract—is to provide enough fiscal support to meet the broad statewide goals expressed in the Donahoe Act. Again, California would argue that these recommendations are simply indicative of the state’s public higher education policy and lack any legal obligation, as they are only committee recommendations.

Furthermore, Recommendation #22 of the 1973 Joint Committee Report stated that “[t]he Legislature shall reaffirm the commitment of the State of California to provide an appropriate place in California public higher education for every student willing and able to benefit from attendance.” This language seems to be an affirmative declaration that the state has a responsibility to provide postsecondary education opportunities to any willing and able citizen. Implicit in that declaration, student plaintiffs would suggest, is the state’s acknowledgment to fund those opportunities.

Importantly, Chapter IX of the 1973 Joint Committee Report assessed the public finance of postsecondary education in California. The 1973 Joint Committee Report noted a lingering uncertainty with the state’s ability and willingness to support public higher education in California. Primarily, the Legislature was unclear as to whether the “funding equalization” mandate in the 1971 California Supreme Court decision in *Serrano v. Priest*, 5 Cal. 3d 584 (1971) applied to community colleges. This confusion was resolved in 1990 as we will subsequently see. Nonetheless, at the time, questions about federal support, the use of a family income as a metric for aid eligibility, and the legality of charging non-resident tuition to students claiming residence were considered.

What was clear to the Legislature in 1973 was that California spent more on public higher education than any other state and that over 13% of the state’s general fund revenues were being allocated to higher education. The 1973 Joint Committee Report
also made clear that inflation and enrollment increases were stressing the public postsecondary system in California. Student plaintiffs would attempt to show that funding decreases over time are representative of the state’s breach to support the state’s postsecondary sector. Using a metric like a percentage of the state’s general revenue may be a way for a court to quantify the harm, if any is found.

All told, the 1973 Joint Committee Report, resulting legislation, and fiscal support for public higher education appear to indicate that the Legislature intended to continue the master planning process. That effort required the state to work with UC, Cal State, and CCC. Their mutual goal was to operate an efficient and comprehensive postsecondary education system in California. The continued pursuit of the master planning process, hypothetical plaintiffs may argue, shows that the state and its postsecondary institutions chose to continue operating under the implied-in-fact contract that was formed with the passage of the Donahoe Act.

The 1973 Joint Committee Report and the state’s actions appear quite telling. California’s Legislature, by this point, was clearly aware of the high cost of operating a comprehensive public postsecondary system in the state. Nonetheless, the Legislature continued to provide support and further refine the state’s tripartite system. A plaintiff would suggest that these actions represented the ongoing negotiations and development of a sophisticated contract to meet the higher education needs of the state. That refinement continued into the next decade.

*The relevant factors that arose between 1975 and 1990.* California’s Legislature continued to assess and support the state’s tripartite higher education system through the 1970s and 1980s. The Legislature tinkered with the governance structure into the late
1970s but then focused on community colleges and student access throughout the 1980s. The structure and mission of each higher education segment (i.e., CCC, Cal State, UC) was again assessed and many of the Master Plan’s recommendations were reasserted in a 1989 Joint Committee Review of the Master Plan, *California Faces...California’s Future: Education for Citizenship in a Multicultural Democracy* (“1989 Joint Committee Report”; Joint Committee for Review of the Master Plan for Higher Education, 1989).

Tellingly, California’s general fund allocations for public higher education nearly quadrupled between FY1975 and FY1990.

*Continued state fiscal support and increased fiscal support for public postsecondary education as an indication of intent.* A plaintiff could reasonably contend that the best gauge of legislative intent to contract for the provision of public higher education is the allocation of funds to support public postsecondary institutions. Given this, California may have shown an intent to operate under the implied-in-fact contract to meet the state’s higher education needs throughout the late 1970s and 1980s. Each year between 1975 and 1990, state allocations for public higher education grew with the exception of two years during a recession (Palmer, n.d.). Total allocations rose from about $1.5 billion in FY 1975 to over $5.75 billion in 1990. For FY 1990, 14% of California’s general fund allocations went to support public higher education (California Department of Finance, 2014). This level of support sustained California’s position as the national leader in supporting public higher education (Palmer, n.d.).

*Periodic review and continued statutory revision of the Master Plan as an indication of intent.* Plaintiffs could argue that continued reassessment and statutory revision that altered the state’s public higher education system in the spirit of the Master
Plan are representative of an ongoing contractual relationship. For example, by the mid-1980s, California’s Legislature decided to implement a formal periodic review of the Master Plan. This recommendation was presented in the 1973 Joint Committee Report (Joint Committee on the Master Plan for Higher Education, 1973; “Post-1960 studies,” n.d.).

The resulting review shifted the legislative focus to community colleges, institutional cooperation, and student access. The concern with access, community colleges, and mutual cooperation between California higher education segments was also present in the Master Plan and the 1973 Joint Committee Report. The eventual codification of a previous recommendation and continued considerations of others may show that the Legislature intended to contract with the state’s postsecondary institutions to meet California’s higher education needs because there appeared to be an ongoing negotiation between the parties.

Further planning (or negotiations) occurred in 1984. At that time, the Legislature ordered a Master Plan commission to study California’s community college system (“Post-1960 studies,” n.d.). This was a shift away from previous legislative action that addressed the general structure of California’s tripartite higher education system. Senate Bills 1570 and 2064 (SB 1570 and SB 2064) created the commission to study CCC and defined the study’s mission (“Statutory laws and amendments,” n.d.). Importantly, the Legislature also chaptered its collective intent towards the state’s higher education sector in these two bills. That chaptered intent seems to show that California’s Legislature was aware of the state’s continually expanding higher education needs. The language may
also express the Legislature’s desire to meet that need. The chaptered legislative intent contained in SB 2064 read as follows:

Chapter 1506

An act relating to community colleges, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Section 1

1. (a) The Legislature finds and declares that the community colleges are a large and important segment of California’s system of public higher education. In the last 20 years, community colleges have not only experienced tremendous growth in the numbers of students enrolled, but have undergone a major transition in the types of students served and the types of programs and courses offered. Community colleges have also experienced an unacceptable degree of uncertainty and instability in their revenues over the last decade.

2. (b) The Legislature further finds and declares that legislative actions regarding community colleges have not been based on comprehensive policy on the role that community colleges should play in public education. Community colleges have been reacting and responding to narrow changes in state policy that have shaped the functions of the colleges by default, rather than by design.

3. (c) It is, therefore, the intent of the Legislature to require the Commission for the Review of the Master Plan for Higher Education established pursuant to Senate Bill 1570 of the 1983-84 Regular Session to set the
reassessment of the mission of the community colleges as its first and highest priority.

California’s Legislature made clear that community colleges had been neglected despite previous calls in 1960 and 1973 for comprehensive planning. This acknowledgment may undermine the state’s potential argument that the master planning process was simply the implementation of statewide higher education policy because of the Legislature’s failure to account for the needs of CCC. The Legislature also acknowledged that appropriate allocations were necessary to support the sector. This recognition may show that the Legislature felt obliged to fund the postsecondary system and had failed to adequately do so. In short, student plaintiffs would claim that this language is an example of the evolving nature of the parties’ contractual relationship.

Continued state fiscal support for public higher education in California as an indication of intent. As highlighted previously, the Legislature coupled this renewed call of support for CCC with steady and significant general fund allocations. Plaintiffs would argue that these actions, in the aggregate, amount to a bargained for exchange to meet the higher education needs of the state. The state recognized that it had failed to support the system that the parties agreed to under the Master Plan and quickly rectified the alleged breach.

The state may suggest that fluctuation in the annual allocation process is normal when supporting discretionary programs. The state would suggest that this behavior never amounted to a contractual obligation because the actions fall purely within the ordinary legislative process. Nonetheless, SB 1570 and SB 2064 called for a substantial overhaul
of the community college sector in California. By 1988, the Legislature decisively responded—helped in part by the actions of California citizens.

*Voter participation, Proposition 98, and the Legislature’s response as factors indicating an intent to contract.* California voters passed Proposition 98 (“Prop 98”) as a ballot measure in 1988 and as a result, amended California’s Constitution (California Legislative Analyst’s Office, 2005). The amendment mandated minimum levels of funding for K-14 schools (i.e., K-12 and community colleges). While Prop 98 was largely driven by concern for K-12 public education, California’s community colleges were, in essence, guaranteed a percentage of state general funds each year as a result. Interestingly, the Legislature had already been focusing on CCCs for a number of years prior to Prop 98’s passage. As a result, the Legislature was able to act quickly and pass Assembly Bill 1725 (AB 1725)—an omnibus community college reform act—in the same year (“Post-1960 studies,” n.d.).

AB 1725 addressed many of the recommendations made in the study ordered by the Legislature in 1984. The bill refined the structure of the community college system and established a shared governance consultation process (“Post-1960 studies,” n.d.). Again, these actions are factors that a plaintiff could look to in the hypothetical case. In this instance, a plaintiff may suggest that the consultation process is another example of the bargained for exchange between the parties to meet the higher education needs of the state. Interestingly, the chaptered legislative intent in AB 1725 may be informative for the hypothetical case. AB 1725’s chaptered legislative intent included the following provisions.
The Legislature stated in AB1725 that California’s community colleges were fundamental to meeting the educational needs of the state’s changing demographics. Specifically, the community colleges were necessary to support the state’s economy, educate the state’s workforce, and serve the state’s students. Furthermore, the Legislature asserted that the state, educators, and higher education administrators must be committed to the provision of postsecondary education in California. The Legislature also codified its intent to provide the necessary funds to support California’s community colleges. This commitment, a plaintiff could argue, extends beyond the mandated funding requirements established by Prop 98 because of the Legislature’s stated intention to provide support for the state’s entire postsecondary sector.

For example, plaintiffs could point to one particularly revealing expression of legislative intent in AB1725.

*AB 1725 Section 1, Clause (l): “It is the intent of the Legislature in enacting this act, to strengthen the capacity of the community colleges to meet the emerging needs of our state...”*

This broad statement of support, in this context, may show that California recognized an ongoing need to provide its citizens adequate access to public higher education. In addition, the statement may establish an underlying legislative intent to provide the fiscal support necessary to fund a stronger public higher education system in California. Interestingly, the legislative declarations and statutory mandates contained in AB1725 effectuated some of the Master Plan’s and the 1973 Joint Committee Report’s recommendations. Not surprisingly though, the 1989 Joint Committee Report revisited many of the recommendations that had not been realized.
Continued formal legislative review of the Master Plan and transfer regulations as factors indicating an intent to contract. The 1989 Joint Committee Report addressed a number of key topics related to the provision of public higher education in California and made 57 distinct recommendations (Joint Committee for Review of the Master Plan for Higher Education, 1989). Like previous reports, some areas of focus included accessibility, transfer admissions, postsecondary sector expansion, governance, educational equity, educational quality, and the role higher education plays in California’s economic development. The report also recommended refining the role that UC, Cal State, and CCCs served in California’s higher education sector. Importantly, the 1989 Joint Committee Report stressed the need for UC, Cal State, CCC, and California to cooperate as they work to meet the higher education needs of the state.

Like the Master Plan, the 1989 Joint Committee Report also recommended a higher education expansion strategy that was based on actual needs and not political motivations. The joint committee made clear that the state must maintain an efficient higher education system that aptly serves students and the state. The report called for a return to the Master Plan ratio of 40 percent lower division and 60 percent upper division enrollment for UC. This recommendation was part of a broader plan to ensure that community college transfers have adequate opportunity to graduate from a UC or a Cal State institution.

That plan—called the “dual entitlement” program—sought to guarantee successful CCC transfers a place at UC or Cal State as upperclassman. This program was part of a larger desire to refine the mission and purpose of each segment of California’s tripartite postsecondary education system—a recommendation first suggested in the
Suzzallo Report, reiterated in the Master Plan, and codified in the Donahoe Act. Student plaintiffs, would again claim, that these recommendations are terms that the parties are negotiating as part of an ongoing implied-in-fact contractual relationship.

Lastly, much like the 1973 Joint Committee Report, the 1989 Joint Committee Report recommended that enrollment demographics should align with that of the state’s population. Also like the 1973 Joint Committee Report, some of the recommendations in the 1989 Joint Committee Report were codified following the report’s publication. However, unlike the 1970s, the Legislature acted quickly to implement various recommendations from the 1989 Joint Committee Report.

A plaintiff in this work’s hypothetical case would argue that these recommendations, made by a legislative committee, show that California’s relationship with UC, Cal State, and CCCs was a constantly evolving relationship and contractual in nature. Plaintiffs would claim that the parties’ actions show that they worked collaboratively to meet the higher education needs of the state while routinely refining the relationship to achieve greater economic and educational efficiency. This, plaintiffs would suggest, is clearly a course of action that resembles a contract negation and a bargained for exchange because each postsecondary institution gives something of value (i.e., educational services) or refrains from action (i.e., curricular restrictions) in exchange for state funding.

Student plaintiffs would likely argue that an offer to meet the state’s higher education needs was made through the presentation of the Master Plan and subsequent reports. Second, that offer was accepted through legislation (i.e., Donahoe Act and subsequent amendments/additions). Third, consideration was exchanged through funding
and the provision of educational services. In addition, negotiating enrollment requirements, transfer expectations, and curricular limitations on the postsecondary institutions may be a bargained for exchange because these conditions grew from the master planning process (i.e., negotiations—according to the plaintiffs).

**Summary of the factors present between 1975 and 1990.** In sum, a court may conclude that the collective legislative intent exhibited by 1990 was one of support for a comprehensive and efficient public higher education sector in California. The Legislature expressed such general support for such a system in the 1989 Joint Committee Report, the chaptered intent in the relevant 1980’s legislation, and by the provision of significant fiscal support to California’s public postsecondary institutions. Many of the issues facing California’s higher education sector in 1960 had been addressed by 1990. Plaintiffs would argue that these actions show that the parties had been operating under an ongoing implied-in-fact contract to meet the higher education needs of the state. Plaintiffs would also point to the Legislature’s continued fiscal support of California’s tripartite higher education system into the next millennium as evidence of a contractual relationship.

**The relevant factors that arose between 1990 and 2005.** As the Master Plan turned thirty, a number of important factors occurred. First, fiscal constraints began to limit California’s ability to support their public higher education sector. Additional legislative action was taken in the late 1990s, which also could influence this work’s hypothetical case. Lastly, as the new century turned, the Legislature once again reviewed the effectiveness of the Master Plan and made recommendations that further enhanced the state’s commitment to comprehensive postsecondary planning.
Continued fiscal support as an indication of an intent to contract. Gross levels of general fund allocations for public higher education in California nearly doubled between 1990 and 2005 (Palmer, n.d.). California allocated over $9 billion for public higher education in FY 2005, up from the $5.75 billion in 1990. Again like the early 1980s, a recession in the early 1990s resulted in a funding reduction for public higher education in the state. Unlike the 1980s, however, the early 1990s cuts were more severe. The 1980s’ reductions were only about $100 million while total cuts in the 1990s amounted to about $1.3 billion.

Despite this significant pullback, allocations rebounded and began eclipsing FY 1990 levels by FY 1996 (Palmer, n.d.). General fund allocations grew until an economic recession occurred in the early 2000s. Cuts were made in two consecutive years for a total reduction of about $1 billion. Nonetheless, by FY 2005, California’s gross allocations for public higher education were greater than ever.

A couple of conclusions could be drawn from these trends. First, funding for public higher education in California is inextricably intertwined with the overall health of the state’s economy. This may lead a court to find that California’s Legislature needs some flexibility when determining annual fiscal allocations because the state’s tax revenue fluctuates with the economy. In addition, the state could argue (likely successfully) that it also holds complete autonomy when making discretionary funding allocations.

Plaintiffs, however, would suggest that the state has always provided support and increased support over time for the state’s public higher education sector and must continue to do so. The annual fiscal support that the state provides, plaintiffs would
argue, is representative of their obligation under the contract because that fiscal support is the state’s consideration under the implied-in-fact contract. Interestingly, well into the 2000s, the Legislature had always returned funding for public postsecondary education to previous levels once the state’s economy recovered. However, simply looking at gross allocations does not tell the entire story.

\textit{Gross allocations, per student funding levels, and inflation-adjusted dollars as factors.} A court may consider the number of students served as well as the value of the dollar over time when determining the state’s level of “support” for postsecondary education. In 1960, California’s public higher education sector served just over 200,000 students (Callan, 2009). By 2005, nearly 1.7 million students were enrolled in California’s public postsecondary institutions. In addition, the total number of public postsecondary campuses in California grew from 86 in 1960 to 141 by 2005. Naturally, most of the campus growth occurred in CCC but UC added 4 campuses while Cal State added 7 campuses between 1960 and 2005.

California’s Legislature appears to have embraced the rapid growth of the state’s public higher education sector from 1960 to 1990. The state seems to have both planned for and funding the expansion. Callan (2009) also shows that California’s general fund allocations for postsecondary institutions consistently grew even using inflation-adjusted dollars. The greatest increase in allocations happened between 1960 and 1980 during the sector’s most rapid structural expansion. In inflation-adjusted dollars, California spent about six times as much on public higher education in 1980 as it did in 1960 (Callan, 2009).
By 1990, California’s inflation-adjusted general fund appropriations for public higher education were nearly eight times greater than the allocations made in 1960 (Callan, 2009). However, 1990 now appears to be the high water mark for fiscal support of public higher education in California. Using inflation-adjusted dollars, FY 2005 is virtually identical to the FY 1990 general fund appropriations. Thus, California’s public postsecondary institutions were serving over 500,000 more students in 2005 than they were in 1990 with essentially the same level of state fiscal support as they received in 1990.

This fiscal reality reveals a few key considerations. First, California unquestionably supported the massive expansion of the public higher education sector that took place between 1960 and 1990. The state provided the legal framework and fiscal resources necessary to create and fund an impressive expansion of the state’s higher education sector. Second, the relative stagnation of funding between 1990 and 2005 highlights the fiscal realities of the state faced with dwindling tax revenue because of Prop 13. These two factors may lead a court to conclude that the Legislature established a base level of “adequate” per student funding in 1990.

Not surprisingly, after the state’s community college system had been remodeled, the legislature turned its focus to UC and Cal State in the 1990s (“Post-1960 studies,” n.d.). As the 1989 Joint Committee Report suggested, a comprehensive plan to refine the transfer function and cooperation between the three higher education systems became a legislative priority. In 1991, two key pieces of legislation were passed that accomplished these goals. In addition, other components of the 1989 Joint Committee Report were added to the Education Code.
Continued legislative revisions to the Education Code as an indication of an intent to contract. Senate Bill 121 (SB 121) addressed the mechanics of the transfer function while Assembly Bill 617 (AB 617) was an omnibus higher education legislative package that enacted many of the 1989 Joint Committee Report’s recommendations. AB 617 was also used, inter alia, to refine the scope of the mission for each segment of California’s higher education system.

Collectively, AB 617 and SB 121 appear to show that the Legislature continued working with all three segments to refine the effectiveness of the state’s higher education system. The focus of SB 121 was to prioritize the transfer process for each segment of California’s higher education sector. The legislation sought to improve transfer opportunities between the institutions as well as restore UC’s 60:40 ration of upper division to lower division students. SB 121 also contained language ensuring that adequate resources would be made available to support California’s expanding public higher education sector.

Further recommendations from the 1989 Joint Committee Report were also formalized. Some examples included setting transfer admission priorities, requiring transfer agreements between the higher education segments, and articulation agreements for the transfer of general education credits and major classes. Student plaintiffs would claim that this relatively quick response to codify many of the 1989 Joint Committee Report’s recommendations is another example of the ongoing contractual negotiations between the state and its postsecondary institutions. Hypothetical plaintiffs would likely claim that AB 617 also supports this conclusion.
AB 617 was an omnibus legislative package that enacted a number of the 1989 Joint Committee Report’s recommendations. AB 617 added a comprehensive mission statement for each higher education segment that included a responsibility to serve the public interest. Interestingly, the legislation continued to focus on the substance of public higher education and not on structure. The new law included program reviews, statements of educational equity, formal assessments, and increased accountability measures. Additional provisions further defined the role that California and the institutions play in effectuating the Master Plan.

A plaintiff could argue that this text and context shows that California intended to contract with UC, Cal State, and CCCs to meet the higher education needs of the state. First, the mission for each segment was refined through a process of study and mutual agreement between the parties. Second, the state sought and achieved better transfer opportunities and a different student profile at UC. Each segment altered its operations in response to meet the state’s needs. These actions could be construed as a bargained for exchange. Naturally, the state would argue that the entire master planning process was an effectuation of the state’s higher education policy by subordinate agencies (i.e., UC, Cal State, CCC).

Plaintiffs in the hypothetical case, however, would suggest that the state assumed responsibility for providing the fiscal support necessary to meet the educational goals of the state through language in the legislation. Student plaintiffs would also point to greater accountability measures as an example of a bargained for exchange. Most tellingly, however, the chaptered legislative intent in both SB 121 and AB 617 contained language
that may lead a court to find that the state intended to contract with UC, Cal State, and CCC for educational services.

AB 617, in particular, reiterated California’s commitment to the Master Plan and subsequent legislation enacting the plan. Furthermore, one provision expresses the scope of the Legislature’s responsibility in regard to providing public higher education opportunities to the citizens of California. The first section of AB 617 stated the following:

_The Legislature finds and declares all of the following:_

... *California must support an educational system which prepares all Californians for responsible citizenship and meaningful careers in a multicultural society; this requires a commitment from all to make quality education available and affordable for every Californian._ (AB 617 Section 1 Chapter 1.5 66002 (e)(3))

How a court interprets this language could be vital for the plaintiffs in the hypothetical case. Student plaintiffs would argue that this chaptered intent shows that the Legislature acknowledged that it was responsible for providing the fiscal support necessary to make quality postsecondary opportunities accessible and affordable to the state’s citizens. They would further argue the UC, Cal State, and CCC were the parties responsible for providing the quality education. The language, “California must support…” is the operative language in the chaptered intent. Plaintiffs would suggest that this language, as text and context, shows that the Legislature intended to contract with the state’s postsecondary institutions to meet the higher education needs of the state through a bargained for exchange of fiscal support for the provision of educational services.
Continued formal legislative review of the Master Plan as a factor. By the early 1990s, California’s Legislature appeared to be fully committed to comprehensive planning for and support of public higher education in California. A much different stance than the Legislature took in the first half of the twentieth century. However, a significant economic recession soon followed the passage of AB617. In response, California’s Assembly Committee on Higher Education reassessed the Master Plan yet again. The draft report that resulted was titled “Master Plan in Focus” (“1993 Assembly Report”). This report, unlike the previous Joint Committee Reports, was only undertaken by California’s Assembly and thus, would likely have less value in expressing true legislative intent. Nonetheless, there is use in reviewing the content of the report because it gives some insights into the research questions.

As previously indicated, the economic recession in the early 1990s resulted in significant reduction in state allocations to California’s public higher education sector (California Assembly Committee on Higher Education, 1993). The Assembly Committee on Higher Education viewed this funding decline as dangerous. The 1993 Assembly Report—a draft report—stated that the Master Plan was a “social compact” between California and its citizens that was being jeopardized by the new fiscal realities of the state. The 1993 Assembly Report criticized the “policy paralysis” that was harming the “visionary covenant between California and its future.” (California Assembly Committee on Higher Education, p. 3, 1993). Importantly, California’s Senate did not participate in this review and eventually the Committee adopted a “wait and see” approach while encouraging more input from each public higher education segment (“Post-1960 studies,”
n.d.). As a result, the only publication was the draft report, as no final report was ever published.

The Assembly was clearly concerned about the state’s fiscal commitment to California’s public postsecondary institutions. This concern grew from the steep fiscal reductions that the state’s public higher education sector endured in the early 1990s. The Senate’s absence from the reassessment likely troubled the Assembly. The draft report expressed the Legislature’s support for the Master Plan, its statutory progeny, and comprehensive public higher education planning. The Assembly was concerned that support was waning and seemed to feel that the state was violating a “social compact” to meet the higher education needs of the state’s citizens.

Student plaintiffs could suggest that the social compact language is an indication that the Assembly Committee recognized that the master planning process was something different than standard policy making. They would argue, in fact, that the social compact is actually an implied-in-fact contract to meet the higher education needs of the state. The state, on this point, could argue that an Assembly Committee report is not expressive of legislative intent because the Senate was excluded. Plaintiffs may also suggest that the Assembly report acknowledges the state’s fiscal commitment to support California’s postsecondary sector.

Importantly, in the wake of the recession that prompted the Assembly Report, the gross amount of state fiscal support generally rebounded (Palmer, n.d.). Nonetheless, by the end of the 1990s, a joint resolution was passed that ordered not only a comprehensive reassessment of the Master Plan but a new master plan (Joint Committee to Develop a Master Plan for Education-Kindergarten through University, 2002). Legislators had to
grapple with an expanding higher education sector while enduring a general reduction in tax revenue. The resulting joint committee report was titled *The California Master Plan for Education* (“2002 Joint Committee Report”).

*The legislative creation of a “new” Master Plan as an indication of an intent to contract.* The 2002 report of the Joint Committee Report to Develop a Master Plan for Education-Kindergarten through University was an extensive 242-page report and was almost exclusively focused on substantive concerns like student access, student achievement, institutional accountability, and affordability (Joint Committee to Develop a Master Plan for Education-Kindergarten through University, 2002). The report’s thorough approach would be expected given the mandate to draft a new Master Plan. The Legislature’s desire to author a new master plan, a plaintiff would argue, is indicative of its continued intent to renegotiate the contract with UC, Cal State, and CCC to meet the higher education needs of the state. The state, however, would again suggest that this process is merely the implementation of statewide education policy.

The 2002 Joint Committee Report’s opening sentence, “[p]ublic education is a vital interest of our state…” may indicate that the Legislature was genuinely concerned about the state’s higher education sector (Joint Committee to Develop a Master Plan, 2002, p. 1). However, the report quickly pointed out that California’s fiscal difficulties were incongruent with increased student enrollment. The 2002 Joint Committee Report suggested that the state was reaching a fiscal breaking point. California, the 2002 Joint Committee Report suggested, could no longer provide the fiscal resources necessary to meet the postsecondary needs of California’s citizens.
In response, the 2002 Joint Committee Report offered a plan to thwart that possibility and to meet that need. Nonetheless, the political realities of the state and continuing economic difficulties made it difficult to effectuate any of the 2002 Joint Committee Report recommendations. As noted previously, the state reduced support for public higher education during that recession. As the decade reached its mid-point, a general disinvestment in public higher education—on a per student basis—seemed to be taking hold. In the late 2000s, this disinvestment reached a nadir in the wake of the Great Recession.

*The relevant factors at issue between 2005 and the present.* California’s support for public postsecondary education began to suffer tremendously by 2005. The state was faced with serious deficits and rapidly increasing costs caused by an overcrowded corrections system and an expensive state pension system. Couple these state specific challenges with a global economic crisis and fiscal support for the state’s higher education sector stalled.

*Stagnant fiscal support as a factor.* Despite some mild fluctuation, gross allocations for public higher education in California have basically remained stagnant since 2005 (Palmer, n.d.). The total allocations in 2005 were just under $10 billion. FY 2012 allocations reached just over $10 billion after a slight rise prior to the start of the recession in 2008. After these sharp declines in the wake of the Great Recession, state allocations seem to have leveled off in FY 2014. Nonetheless, FY 2014 allocations are basically equal to the gross allocations made in FY 2005 (Palmer, 2013, 2014). The Governor’s current proposal may increase support for public postsecondary education, particularly CCCs (Taylor, 2013).
How that proposal plays out in the Legislature would likely be another factor in determining whether the state, through its ongoing actions, intends to contract with UC, Cal State, and CCC for the provision of postsecondary services. A number of other factors would be considered as well.

*Student enrollment fluctuation as a factor.* Student enrollment at UC and Cal State, interestingly, has fallen off since 2009 while CCC enrollment has risen (Johnson, 2012). The Public Policy Institute of California states that an increase in state funding would likely reverse this trend (Johnson, 2012). California’s Postsecondary Education Commission was a victim of budget cuts and was eventually shuttered in 2011 (California Postsecondary Education Commission, 2011). Lastly, a compact for funding that was negotiated between UC, Cal State and California’s Governor in 2005 was abandoned as state coffers shrank (Lederman, 2009).

These types of factors may lead a court to find that a lack of state support prevented UC, Cal State, and CCC from meeting the state’s higher education need. These actions may also indicate a new legislative attitude toward public higher education in California. However, the more likely rationale has more to do with the fiscal reality of the state and less to do with any waning legislative commitment to higher education. Given the recent past and the most recent review of the Master Plan, however, legislative interest in supporting the state’s postsecondary sector may be waning.

*The latest legislative review of the Master Plan as a factor indicating an intent to contract.* In 2010, California’s Legislature recognized the dire fiscal straits facing the state’s public higher education system. The result was yet another joint committee study. The resulting report was a sparse document titled *Appreciating Our Past, Ensuring Our*
Future (“2010 Joint Committee Report”; Joint Committee on the Master Plan for Higher Education, 2010). While all the previous joint committee reports were full of recommendations and stretched well past 100 pages, the 2010 Joint Committee Report made one recommendation and was only five pages long. The report’s sole recommendation to continue to study the situation in 2011 was ignored.

The brevity of the report may have been an indication of the Legislature’s frustration with or acceptance of California’s fiscal realities. The 2010 Joint Committee Report affirmed that the study was undertaken because of concern for the stability of California’s public higher education system. In addition, the Legislature stated that California’s public higher education system required the Legislature’s “attention, commitment, and support” (Joint Committee on the Master Plan for Higher Education, 2010, p.1). Thus, the Legislature appears to acknowledge the importance of public higher education. However, the Legislature has not restored appropriations to previous per student funding levels.

Plaintiffs would argue that the expressed legislative intent in the 2010 Joint Committee Report supports the idea that the Legislature accepts a key role in funding the state’s public postsecondary system. Furthermore, the Legislature’s desire to place outcome accountability measures on UC, Cal State, and CCCs only increases the likelihood that a bargained for exchange has occurred. Students would argue that the state, after more than five decades of operating under an implied-in-fact contract, has breached its contractual promise to meet the higher education needs of the state by failing to provide adequate fiscal support. Other recent factors may support that assertion.
Legislative failure to meet Prop 98 funding requirements as a factor. While there was an expressed show of concern in the 2010 Joint Committee Report, the Legislature has used its power to circumvent CCC’s minimum guarantee of funding in both FY 2004-2005 and FY 2010-2011 (Taylor, 2013). The Legislature, through a supermajority vote, may suspend the mandatory minimum allocation in any given year. However, such an action triggers a future obligation on the state, known as the maintenance factor (Taylor, 2013). The state is obligated to pay down the maintenance factor as state revenues show meaningful growth (Taylor, 2013).

For the near future, California appears poised to pay down its current maintenance factor obligation because of Prop 30. In addition, the minimum guarantee appears primed to grow as new tax revenue from Prop 30 is generated. However, once those tax increases sunset at the end of the decade, growth in the minimum guarantee may slow. The failure to meet the obligation may lead a court to conclude that the state has failed to meet its fiscal obligation under an implied-in-fact contract as well. The state would likely benefit in the hypothetical case by adequately servicing the debt created through the maintenance factor.

Interestingly, the constitutional and statutory structure of Prop 98 may be the clearest representation of a bargained for exchange between California, its citizens, and one of the state’s postsecondary segments. Despite this, CCC’s likely status as a state actor would prevent the formation of an implied-in-fact contract. Nonetheless, a review of why Prop 98 resembles a bargained for exchange expands this study’s analysis in a meaningful way. The following assessment provides a more detailed legal argument from analogy. I do this so that the reader can gain a sense of how the text and context of the
hypothetical case would be analogized to case law as the parties would have to do in an actual suit.

Why Prop 98 resembles a bargained for exchange. Prop 98, like the statute at issue in *San Luis Obispo v. Gage*, requires a minimum appropriation in return for services. In that case, the court also found that acceptance was exhibited when a private party accepts mandatory allocations and performs a service in response. Plaintiffs could argue that, like the county orphanages in *Gage*, CCC is a similar type of nonprofit organization. However, California would distinguish the two by pointing to CCC’s state actor status. Student plaintiffs would further claim that CCC accepted fiscal resources from the state and provided a service in return, like the orphanages in *Gage*. Thus, acceptance of the state’s offer had occurred and a bargained for exchange exists. The distinguishing aspect of the hypothetical case, as compared to *Gage*, appears to be the legal foundation for the mandatory funding.

In *Gage*, the state created an implied-in-fact contract through legislation. Prop 98’s mandatory funding grew from a voter proposition. This difference seems to extend to the presence of a third party as well (i.e., California’s citizens), which plaintiffs may try to capitalize on. I suspect, though, that the state would have an easier time arguing that their obligation under Prop 98 only extends to the limits expressed in the state constitution and relevant statutes.

In *California Teachers Assn. v. Cory*, the Legislature violated the U.S. Constitution by suspending statutory obligations that had actually created a implied-in-fact contract. Plaintiffs, in the hypothetical may argue that the state’s failure to provide adequate resources to meet the state’s higher education needs is like the Legislature’s
failure to fund the teacher’s pension in *Cory*. Interestingly, the *Cory* court acknowledged its own ability to order appropriations was limited but rather chose to exercise its power to “void a legislative impairment of a valid contractual obligation” (155 Cal.App.3d 494, 513).

California could argue that Prop 98’s fiscal mandates are more like the funding obligations in *County of San Diego v. State*. In that case the court found that some constitutional and statutory funding obligations are merely self-imposed obligations designed to ensure that the state meets its own obligations. As a result, those mandates are not contractual in nature because no private party engaged with the state in a bargain for exchange. The state would likely argue that Prop 98’s constitutional and statutory obligations are self-imposed through the ballot measure process in a similar manner to that of the legislative process in *County of San Diego*. However, plaintiffs could claim that the citizen’s role—as voter—distinguishes the case because more than one party is present to contract.

These types of cases may have been on legislators’ minds when they crafted Prop 98’s statutory structure. While the constitutional and statutory obligations appear to provide funding in exchange for educational services, the Legislature holds the ability to suspend mandatory obligations in exchange for a future obligation. The state would argue that this provision resembles a self-imposed obligation like the one found in *County of San Diego*. Nonetheless, both parties would need to analogize the factors highlighted in this study to the facts of the relevant case law to support their legal positions.

Time will reveal whether California will reaffirm its commitment to the Master Plan and comprehensive public higher education planning. The Governor’s current
proposal calls for an increase in fiscal support for California’s public postsecondary sector. Whatever the result, a court would likely look at discretionary and mandatory funding obligations as relevant factors in the hypothetical case. The historical context and corresponding legislative action regarding the state’s postsecondary sector are also vital factors in determining whether an implied-in-fact contract to meet the state’s higher education needs exists. Nonetheless, the likely place that a court would first look for the state’s intent to contract is the pertinent findings, declarations, and legislative intent chaptered in the state’s Education Code.

**The relevance of the current chaptered legislative intent contained in California’s Education Code.** The chaptered legislative findings, declarations, and intent contained in the current Donahoe Act would likely be a fundamental factor in determining whether an implied-in-fact contract exists between California and its postsecondary institutions because the legal question is resolved by examining the parties’ intent. This “text and context” could help determine whether an intent to contract was exhibited by the Legislature. The relevant chaptered intent is contained in Cal. Educ. Code §§66002-66003. Those sections detail the Legislature’s intent as it relates to the Master Plan and the delivery of higher education services in California. Importantly, the Legislative findings first provide a brief history of the Master Plan’s role in shaping postsecondary education in California.

A telling component of the legislative findings contained in the Donahoe Act follows and is important to see verbatim.

§ 66002. Legislative findings, declarations, and intent

*The Legislature finds and declares all of the following:*
(a) The Master Plan for Higher Education in California, 1960-75, was originally prepared in 1959, and its recommendations were approved in principle by the affected governing boards of the higher education segments. Subsequently, legislation necessary to implement certain of the master plan’s provisions was enacted, including this part. A need to differentiate the functions of the segments of higher education and rapidly increasing enrollments were primary factors that motivated the creation of the master plan.

Neither party in the hypothetical case would dispute the facts surrounding the Master Plan, its statutory implementation, and subsequent revisions. The hypothetical conflict hinges on whether the Master Plan and its statutory progeny amount to a contract or are simply an effectuation of state public higher education policy (155 Cal.App.3d 494). In that context, this chaptered intent is intriguing.

The language clearly indicates the importance of each higher education segment to success of the plan. The chaptered declaration also acknowledges that the legislative process was used to implement part of the Master Plan. Plaintiffs, again, would allege that the Master Plan was a contractual offer and the legislative response amounts to contractual acceptance. They may further claim that the statewide planning process had failed as evidenced by the dysfunctional postsecondary planning that led to the Master Plan. Student plaintiffs would argue that the Master Plan—as a contract—was necessary to effectuate a comprehensive approach to meeting the state’s higher education needs. California could claim that it requested feedback from the state’s public postsecondary institutions because they were best prepared to help develop a statewide higher education policy.
Plaintiffs may further suggest that the Legislature, through this language, acknowledges that all segments of the state’s postsecondary sector would have to work collectively with the state to save resources. As a result, student plaintiffs may claim, this recognition is an admission that the parties exchanged consideration pursuant to a negotiated agreement. That agreement, plaintiffs would suggest is simple. The colleges and universities provide efficient educational services in an agreed upon manner in exchange for state funding.

The legislative recognition of the importance of the Master Plan is further highlighted later in the chaptered findings. The statute goes on to document the subsequent reviews of the Master Plan and the legislative responses. In that review, the Legislature expressed a commitment to the principles of the Master Plan and declared a need for improved access, education equity, coordination, planning, governance, and diversity. The statute acknowledges the success of the Master Plan’s basic structure but states that new challenges require all parties to view the Master Plan as a living document. A document that, the Legislature declares, should honor the “essential tenets” of the original Master Plan (Cal. Educ. Code §66002(2)(d)).

Those tenets, plaintiffs may argue, include the state’s promise to support affordable access to high-quality postsecondary education. This assertion grows from the chaptered declarations as well. The chaptered declarations state that universal access to affordable high-quality postsecondary opportunities should be available to the state’s citizens. Interestingly, however, the statute also declares the need for an overarching “policy framework” to shape the postsecondary sector that is based on required
outcomes, increased accountability, and more effective coordination (Cal. Educ. Code §66002(2)(d)).

Plaintiffs would argue that these declarations show that the Legislature acknowledges that the Master Plan was a negotiation and is in fact an ongoing agreement to meet the higher education needs of the state. California, not being able to dispute the facts, would again argue that these actions amount to policymaking. The state would continue by claiming that the statute even recognizes that the master planning process occurs as part of a policy framework and in no way, did the Legislature ever intend to contract with UC, Cal State, CCC or the state’s independent postsecondary institutions.

The plaintiffs would also contend that the declaration to provide affordable access to high-quality postsecondary opportunities is a contractual promise. The state may claim that language is an aspirational goal. Plaintiffs would retort by pointing to the legislative declaration establishing the Master Plan’s essential tenets as perpetual. The Legislature also declared that both fiscal and programmatic accountability are necessary. This language, plaintiffs would argue, establishes that a bargained for exchange for the provision of higher education services has and will continue to occur in California. Simply put, accountability measures crafted within a statutory scheme are analogous to accountability measures contained in contracts.

The Legislature, in Cal. Educ. Code § 66002, declares that California’s “future economic, social, and culture development” is dependent upon providing citizens “an educational system that prepares all Californians for responsible citizenship and meaningful careers in a multicultural society.” The Legislature also acknowledged that meeting that goal is difficult. Nonetheless, the Legislature states that California “must
support” such an educational system (AB 617 Section 1 Chapter 1.5 66002 (e)(3)). In addition, the chaptered declaration requires all parties to commit to making “high-quality education available and affordable for every Californian” (Cal. Educ. Code §66002). To conclude the section, however, the Legislature plainly states that the work of the Master Plan review committees guides the state’s higher education policy.

The operative language in that clause may identify a benefit (e.g., educated citizenry, talented workforce, etc.) for the state and an obligation on all segments of the state’s postsecondary sector to collaborate. These actions and statements, taken together, may represent parts of a bargained for exchange. Furthermore, the purpose of the alleged agreement seems to be a responsibility to support affordable access to high-quality postsecondary education. This language, which will be addressed subsequently, may be a contractual promise that extends to a third-party beneficiary.

The Legislature continues to make other expressions of intent in Cal. Educ. Code §66003. The Legislature states, in that section, that it intends to “outline in statute the broad policy and programmatic goals of the [M]aster [P]lan and… expect[s]… the higher education segments to be accountable for attaining those goals” (Cal. Educ. Code §66003). This statement could cut both ways in the hypothetical case. The Legislature appears to establish the foundation for a broad policy, which could prevent the formation of a contract by statute. However, the Legislature also appears to demand institutional accountability which may be indicative of a bargained for exchange. The Legislature clearly ceded ample discretion to the state’s postsecondary institutions to implement policies and programs necessary to attain the original goals of the Master Plan (Cal. Educ. Code §66003). This may also show that a bargained for exchange took place.
The chaptered findings, declarations, and intent establish some facts as indisputable. For example, CCC, Cal State, UC, and California’s private postsecondary institutions agreed to operate under the tripartite system and legislative action was necessary to help implement that system (Cal. Educ. Code §66002). More subjective intentions seem to be present in the statute as well. For example, postsecondary systems are to be accountable for achieving the educational goals of the Master Plan (Cal. Educ. Code §66002). Furthermore, the Legislature declared, that “California must support” a postsecondary educational system that makes “high-quality education available and affordable for every Californian” (Cal. Educ. Code §66002).

Student plaintiffs would argue that the undisputable facts and the subjective intentions expressed in the Education Code shows that Legislature intended to contract with the state’s postsecondary institutions to meet the California’s higher education needs. Interestingly though, the chaptered legislative intent also calls for the Master Plan to guide California’s higher education policy on an ongoing basis. The state would argue, in the hypothetical case, that the statute makes clear that their intent is to advance higher education policy, not enter a contract.

Student plaintiffs may continue by asserting that the Legislature showed unequivocal intent to provide affordable access to high-quality postsecondary educational opportunities with language in the chaptered intent. Again, though, the state would argue—as stated in the chaptered intent—that the Master Plan was a guide for statewide higher education policy. The goal of that policy, the state would argue, is to provide affordable access. However, state tax revenue and the Legislature’s appropriation authority reasonably limit that goal. Without question though, the Donahoe Act’s current
chaptered legislative findings, declarations, and intent are key factors in determining whether an implied-in-fact contract exists.

**Current accountability trends as factors in the analysis.** An important factor to consider for this study is currently at issue in many states. That factor is the legislative trend to link funding for postsecondary education to institutional performance. Some states are controlling tuition increases at public postsecondary institutions as well as scrutinizing the fiscal operations (Kelderman, 2014). As of this writing, 20 states have legislation in place that ties appropriations with institutional performance standards. In addition, over 12 states have capped tuition increases or frozen tuition all together. These types of laws appear to exhibit legislative control over public higher education. However, these accountability measures may help create an implied-in-fact contractual obligation.

In *California Teachers Association v. Cory*, a statute that guaranteed funding in exchange for services amounted to an implied-in-fact contract. The statute in that case allocated resources to a pension fund in exchange for the state employees’ services. The court determined that this behavior was a bargained for exchange. Much like the pension agreement in *Cory*, current accountability measures directly link funding to educational outcomes. In addition, the funding amounts may be specified as a percentage of state revenue or a gross amount. A specific offer of funding for services may be present in some performance accountability statutes. Importantly, though, the institutions are often only entitled to the funding if they fulfill their end of that bargain by meeting the statutory metrics. The key in many states, nonetheless, would still rest on whether the institutions are state actors and whether two parties are present to form a contract.
Applying relevant factors in the context of other states. States other than California and their postsecondary institutions provide additional examples of factors that a court may look to when considering whether a state intended to contract for postsecondary educational services. In Arizona, for instance, Article 11, Section 10 of the Arizona Constitution states:

… the legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all state educational institutions, and shall make such special appropriations as shall provide for their development and improvement.

Section 5 of the Arizona constitution, however, grants the governor power to appoint all state university trustees with the consent of the state senate. Taken together, these clauses may suggest that Arizona’s legislature has a constitutional obligation to “insure the proper maintenance” of its public universities but those institutions are likely state actors. As a result, an implied-in-fact contract case in Arizona would likely fail because only one party is present. However, the state may have a self-imposed constitutional obligation to meet a proper maintenance standard.

The University of Minnesota has broad institutional autonomy and case law supports the university’s ability to self govern (Minn. Const. art. XIII, §3; State v. Chase, 220 N.W. 951 (Minn. 1928). This may lead a court to find that the University of Minnesota is a distinct party from the state. In Missouri, the courts have interpreted similar constitutional provisions in a more limited fashion (Curators of the University of Missouri v. Public Service Employees Local No. 45, Columbia, 520 S.W.2d54 (Mo. 1975)). In Utah, courts have found that the University of Utah is “not above the power of
the Legislature to control, and is subject to the laws of this State from time to time
enacted relating to its purposes and government” (University of Utah v. Board of
Examiners, 295 P.2d 348, 371 (Utah 1956)). These types of constitutional clauses and
relevant case law interpreting the language are unique factors in each particular state and
at each individual public postsecondary institution.

In Texas, the state education code places controls on a public postsecondary
institution’s ability to, inter alia, increase salaries (V.T.C.A., Educ. Code §51.006) and
raise tuition (V.T.C.A., Educ. Code §54.051). The education code even dictates when the
school must provide students required textbook information (V.T.C.A., Educ. Code §
51.452). Texas requires public postsecondary institutions to prepare budgets for the state
that are within the limits of the legislative appropriations (V.T.C.A., Educ. Code
§51.0051). This type of control seems to indicate that Texas’ public higher education
institutions have little autonomy. Thus, an implied-in-fact contract between Texas and its
public institutions of higher education would likely not exist. The outcome may be
different in another state because relevant case law may show that exchanging funding
for statutory control amounts to a bargained for exchange.

Florida’s legislature clarifies the role of the state’s public higher education
institutions in the education code. In Florida Statutes Annotated §1001.705(1)(d), the
legislature makes clear that “state universities” are state agencies that “belong to and are
part of the executive branch of state government.” This language would likely be a clear
indication that all publically supported universities in Florida are state actors. Again, as a
result, no implied-in-fact contract could be found between the state and their
postsecondary institutions because only one party is present. Florida’s legislature,
however, also codified recognition of its own constitutional responsibility to make adequate provision for the establishment, maintenance, and operation of public postsecondary institutions (F.S.A. §1001.705 (3)).

Constitutional and statutory declarations may be enforceable terms under an implied-in-fact contract given the right circumstances. How those circumstances are interpreted largely depends on the particular state’s implied-in-fact contact case law. In New Mexico, for instance, courts have been skeptical of extending implied-in-fact contract rights against the state beyond the employment context because of governmental immunity (Campos de Suenos, Ltd. v. County of Bernalillo, 130 N.M. 563 (N.M. Ct. App. 2001)). In Pennsylvania, the City of Philadelphia was not required to pay for medical services provided to inmates under an implied-in-fact contract claim. The court determined that the hospital was statutorily obligated to provide those services and thus, no contractual consideration was exchanged (Temple University Hosp., Inc. v. City of Philadelphia, 2006 WL 51206 (Court of Common Pleas of Pennsylvania, Philadelphia County)).

Understanding the relevant factors that a court would use to assess whether an implied-in-fact contract was entered in this context. These examples exemplify how the state-specific nature of postsecondary institutions and contract law influence the answer to this study’s research questions. Any implied-in-fact contract between a higher education institution and a state is dependent on the facts and circumstances surrounding their relationship. The factors used to assess that relationship include state constitutional provision addressing education, the state’s education code, relevant case law, chaptered
legislative intent on the topic, legislative committee reports addressing the state’s higher education sector, state funding for education, and more.

In fact, the laws surrounding implied-in-fact contracts require the court to look at a totality of the circumstances to determine if the parties intended to contract with each other. Thus, almost any relevant action could be used to support or dispute the presence of an implied-in-fact contract between a state and its public postsecondary institutions. Given this, the particular circumstances present in each state and at each institution determine whether an implied-in-fact contract for postsecondary funding exists.

A plaintiff in this study’s hypothetical case would argue that the text and context show that the parties intended to enter an implied-in-fact contract. California would argue that the master planning process was simply an implementation of the state’s higher education policy and that CCC, Cal State, and UC are subordinate state agencies charged with implementing that policy.

Plaintiffs would likely further allege that the Master Plan amounted to an offer by California’s postsecondary institutions to meet the state’s higher education needs. The Legislature’s passage of the Donahoe Act and continued revisions to that statute amounted to acceptance. Consideration, plaintiffs would argue, is represented by California’s fiscal support of the state’s tripartite higher education system while CCC, Cal State, UC and private postsecondary institutions provide educational services to the state’s citizens pursuant to the Master Plan’s essential terms. Within that context, student plaintiffs would also need to identify which of the contract’s specific promises they are seeking to enforce.
What are the specific promises that plaintiffs are seeking to enforce and why? As detailed previously, plaintiffs in this study’s hypothetical case would allege that California and its postsecondary institutions mutually agreed and expressed an intent to be bound by a contract to “meet the higher education needs of the state”. That language, contained in Resolution No. 88, is not a promise but the alleged purpose of the implied-in-fact contractual relationship. The promises made to effectuate that purpose likely need to be considered “specific promises” by the court before they would be enforced in this hypothetical case (Kashmiri v. Regents of the University of California, 156 Cal.App.4th 809 (2007)). A specific promise requirement is present in the third-party beneficiary analysis as well. However, I must first detail why the specific promises that become implied contractual obligations have a profound legal effect.

In the broadest sense, specific promises made under implied-in-fact contractual relationships carry a significant amount of legal weight. Again, the facts of Kashmiri and the court’s decision in that case support this assertion. First, specific promises provide a reasonable representation of the parties’ intent (Kashmiri v. Regents of the University of California, 156 Cal.App.4th 809 (2007)). Second, specific promises made in an implied-in-fact contract overcome a sovereign immunity challenge in California (156 Cal.App.4th 809). Third, courts are prone to enforcing specific promises for the provision of educational services under an implied-in-fact contractual relationship between students and postsecondary providers (156 Cal.App.4th 809).

Next, specific promises are legally powerful because they overcome general disclaimers that may contradict the specific promise (156 Cal.App.4th 809). Lastly, a state cannot generally absolve itself of a fiscal obligation resulting from an implied-in-
fact contract. The *Kashmiri* court did not accept limited state resources as a defense for failing to meet a specific fiscal promise made under an implied-in-fact contract. In other words, if the state promised to provide fiscal support, it must provide those resources even if meeting that obligation requires California to engage in deficit spending.

Ultimately, the presence of a specific promise to benefit students may have a profound legal impact on this study’s hypothetical case. As a result, student plaintiffs would seek enforcement of various specific promises. The one addressed in this study is an alleged promise to provide the state’s citizens affordable access to high-quality postsecondary education.

In *Kashmiri*, the California Court of Appeals held that specific promises are enforceable under an implied-in-fact contract between students and their postsecondary institution. These specific promises represent the terms of the agreement. In an ordinary implied-in-fact contract dispute, one principal party would be seeking enforcement of a promise made by the other principal party. Unique to this work’s hypothetical case is the presence of a third-party as the plaintiff.

As third parties, student plaintiffs would need to show that a specific promise was made between the principal parties to benefit them under the implied-in-fact contract. Thus, I will further explore whether the statutory language at issue amounts to a specific promise as part of the third-party beneficiary legal analysis. However, prior to that, I will quickly address the procedural hurdles that must be overcome in the hypothetical case because those requirements are relevant factors.

**Are the procedural requirements for an implied-in-fact contract met?**

Plaintiffs in this work’s hypothetical case would have to overcome a few procedural
hurdles to be successful. First, as stated previously, the state would almost certainly raise a sovereign immunity defense. Nonetheless, California case law, including *Kashmiri* and *Cory*, support enforcement of promises made under an implied-in-fact contract despite sovereign immunity claims. Other states may have a more generous approach to the use of sovereign immunity defense. Next, the plaintiffs may need to show that the implied-in-fact contract they are seeking to enforce meets the statute of frauds.

The California Statute of Frauds provides, *inter alia*, that contracts that take longer than a year to perform must be memorialized in writing (Cal. Civ. Code §1624(a)). Plaintiffs would assert that the essential terms of the contract are documented in the legislative intent contained in the Donahoe Act, the Master Plan, Resolution No. 88, and more. Furthermore, students may claim that the basic tenets and essential terms of the implied in-fact contract renew annually in conjunction with the budget allocation process. Interestingly though, contracts of indefinite duration are exempt from the statute of frauds (Williston on Contracts §§ 24:1 to 24:14 (4th ed.)).

Plaintiffs may argue, in the alternative, that a promise to provide affordable access to high-quality postsecondary education is one of indefinite duration. If this were true, the Statute of Frauds would have no relevance. However, a state may try to use the Statute of Frauds as a procedural defense to the hypothetical claim. I suspect that this hurdle would be generally easy to overcome because the promise, if accepted as a promise, does seem to be for an indefinite duration. This is particularly true in California given the long history and general success of the master planning process.

The final procedural consideration that a plaintiff may have to address is the Statute of Limitations on contract claims in California (Cal. Code Civ. Pro. §339). A
cause of action based on a contract breach must be made within two years of the breach (Cal. Code Civ. Pro. §339). Thus, students would have to bring a claim relatively soon after access to affordable high-quality education was denied. None of these procedural requirements seem likely to thwart the plaintiff’s claim. Nonetheless, they must be noted as they may be raised as a defense to an implied-in-fact contract claim.

**Summary of the elements required for an implied-in-fact contract claim in this case.** The factors that a court would review to determine if a state has an implied-in-fact contractual obligation to support its public postsecondary institutions are vast. Nonetheless, these factors can generally be classified as administrative, historical, fiscal, and legal in nature. Many of the factors transcend categories. The preceding analysis identifies the most pertinent considerations by examining the legal questions that give rise to the factors. For example, the court would need to first determine if two parties are present. This question requires the court to assess the statutory and constitutional framework surrounding the founding of the colleges and universities in question. Another important factor is the case law interpreting those provisions and the scope of an institution’s autonomy to self-govern.

Next, the court would ask if the parties intended to contract. The factors used to answer this question are drawn from the text and context surrounding the alleged contractual relationship. Chaptered legislative intent addressing the state’s public postsecondary sector is likely the most important factor. The state’s education code, state constitution, committee reports, legislative declarations are also vital factors. Furthermore, the history and context surrounding the development of the state’s higher education sector appears to be a valuable factor for determining contractual intent.
Furthermore, the extent of a state’s funding for higher education is likely another important factor that would be used to determine if a contract was formed. A court would also look to the state’s implied-in-fact contract case law, like Kashmiri and Cory in California. Ultimately, a court may use all of these factors to determine if the parties engaged in a bargain for exchange to meet the higher needs of the state. As with every contract, procedural requirements must be considered as well. The final key factor to consider is the presence of a specific promise to benefit students.

Student plaintiffs in this work’s hypothetical case allege that the state has contracted with their college or university to support affordable access to high-quality postsecondary educational opportunities. Students would likely need to show that specific promise was made by the Legislature. A court would likely look for proof of this promise in the relevant text and context. In fact, a court would likely use the chaptered legislative declaration, findings, and intent in the state’s education code for a specific promise. Other factors that may be assessed for specific promises include published communications, statutes, joint resolutions, state constitutions, committee reports, and more. Specific promises, if shown, can provide plaintiffs with a more viable implied-in-fact contract claim because those promises carry significant legal weight.

All told, a hypothetical plaintiff would appear to have a difficult time showing that an implied-in-fact contract was formed. Meeting that steep hurdle, however, is only the first step in the hypothetical plaintiff’s action. To enjoy a benefit, students would have to prove that they were promised affordable access to high-quality postsecondary educational opportunities as a third-party beneficiary to that contract. The following identifies the factors that would be used to resolve that claim.
Chapter 5: Third-Party Beneficiary Analysis

Are students a third-party beneficiary to the implied-in-fact contact?

This study’s second research question considers the factors that would enable students to claim third-party beneficiary status under an implied-in-fact contract between a state and its public postsecondary institutions. The previous section considered the factors that would give rise to an implied-in-fact contractual relationship between a state and its postsecondary institutions. A court must find that an implied-in-fact contact exists before a third-party benefit could be conveyed. Given this, we will assume for the remainder of the case study that California and its postsecondary institutions contracted to meet the higher education needs of the state.

Accepting this, the court would then turn to the question of whether the principal parties to that contract (i.e., California, UC, Cal State, CCC, California’s Independent Colleges) expressed an intent to benefit student plaintiffs as a third-party beneficiary. The implied-in-fact contract considered in this work’s case study is designed to “meet the higher education needs of the state.” Student plaintiffs in the case study hope to enforce the specific promises designed to effectuate that contract. The fundamental specific promise that student plaintiffs would like enforced is the principal parties’ alleged mutual promise to provide every Californian affordable access to high-quality postsecondary education. All of these questions are analyzed under a totality of the circumstances test.

Again, like the implied-in-fact contractual analysis, the legal questions reveal the factors this study seeks to expose. As a result, the following section first considers whether a specific promise was made. Second, I explore whether that alleged specific promise was an expression of intent to benefit the student plaintiffs. Third, I assess
whether the student plaintiffs accepted the state’s offer to benefit them. Lastly, I examine whether the students were denied the promised benefit.

Interestingly, the factors used to answer these legal questions are identical to those used in the preceding implied-in-fact contractual analysis. This occurs because, in each case, the legal question examines the parties’ intent under some form of a totality of the circumstances test. Thus, “text and context” are examined to determine the state’s intent to provide a third-party benefit in the same manner that they are used to assess whether the state intended to enter into a contractual relationship.

**What specific promises are students attempting to enforce?** Student plaintiffs would likely allege that California and its postsecondary institutions specifically promised to “support affordable access to high-quality postsecondary education for every Californian” in the state’s education code. Plaintiffs, in the hypothetical case, would hope to show that this language amounts to a specific promise similar to the promises made to students in *Kashmiri*. In *Kashmiri*, the court stated that UC’s specific promise not to raise student fees is a clear expression of their intent because UC holds complete control over its communications with students. In addition, UC had the power to make alternative promises or even refrain from making any promise to students at all. As a result, the court determined that a specific promise made in a communication to the students is a reasonable interpretation of UC’s true intent.

Student plaintiffs in the hypothetical case would analogize their facts to *Kashmiri* for a few key reasons. First, *Kashmiri* reinforces the long-standing understanding that implied-in-fact contractual rights can be conveyed to college and university students. In addition, the court highlighted that those rights routinely include access to promised
educational benefits. In Kashmiri, the court awarded students an educational benefit under an implied-in-fact contractual relationship. Student plaintiffs would claim that they are seeking an analogous educational benefit in the case study.

Second, students would claim that the Legislature, like UC, has total control over its communications and is free to refrain from making promises. Furthermore, that control is unequivocal when considering legislative declarations, findings, and chaptered intent. The plaintiff would suggest that a chaptered promise, as a result, is a specific promise. The legislation, like UC’s website and catalogue, is under the complete purview of the promisor. Thus, any promise made in the legislation, students would argue, must represent the Legislature’s true intent like the intent expressed by the published promises in Kashmiri.

Lastly, the specific promise enforced in Kashmiri withstood, inter alia, a general disclaimer denying the benefit and a claim of financial exigency based on insufficient state fiscal support. This is important because, as covered previously, the state in the hypothetical case would argue that many of the alleged promises are broad statements of policy. A specific contractual promise may trump statements of broad policy or disclaimers under Kashmiri. In addition, Kashmiri may also provide student plaintiffs an opportunity to challenge the Legislature’s “power of the purse” because a specific contractual promise contained in statute obligates the state to fulfill that promise.

In addition to Kashmiri, many third-party beneficiary cases require the presence of specific promises before a benefit is conveyed to a student ((Kne)lman v. Middlebury College, 898 F. Supp.2d 697 (D. Vt. 2012)). As an example, the 9th Circuit Court of Appeals, in Hairston, found that “vague, hortatory pronouncements,” alone, are not
sufficient to show that student-athletes were third-party beneficiaries to a contract between their institution and his university’s athletic conference (*Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996)). In the hypothetical case, the state may reasonably claim that the alleged promises are simply vague, hortatory pronouncements.

As a result, student plaintiffs in the case study need to show that the principal parties made a specific promise to benefit students as part of implied-in-fact contract to meet the higher education needs of the state. *Cory* shows that a court would use text and context to assess a state’s intent when an implied-in-fact contractual promise is at issue. *Kashmiri* and *Hairston* show the legal necessity of specific promises. Thus, *Cory*, *Kashmiri*, *Hairston*, highlight how the relevant case law factors into determining whether a specific promise was made in the hypothetical case.

Given this context, a court would likely look to appropriate text and context to determine whether the state made a specific promise to benefit students. Students would likely seek to identify a specific promise made in the state’s education code because that is the most relevant text. In addition, the history surrounding the master planning process seems to provide pertinent context. Nonetheless, the natural place to identify a specific promise is the chaptered legislative declarations, findings, and intent contained in the Donahoe Act. In this study’s hypothetical case, student plaintiffs would argue that California and its postsecondary institutions made a specific promise to support affordable access to high quality postsecondary education because of the language contained in that chaptered intent. The specific language in the Donahoe Act that is at issue is as follows.
In the spirit of the original master plan and the subsequent reviews, the Legislature finds and declares [that] California must support an educational system that prepares all Californians for responsible citizenship and meaningful careers in a multicultural society; this requires a commitment from all to make high-quality education available and affordable for every Californian. (Cal. Educ. Code §66002(f)(3))

Put succinctly, plaintiffs would claim that California promised to support affordable access to high-quality postsecondary education for every Californian. Student plaintiffs would first allege that the promises made in this chaptered intent are analogous to the published promises UC made in its catalogue and on its website. Chaptered legislative declarations and intent are, by default, an expression of the Legislature’s position on an issue. Second, plaintiffs would argue that the chaptered intent in the Donahoe Act is a reasonable representation of the Legislature’s intent to contract in the same manner that UC’s published promises to students amounted to UC’s intent to contract in Kashmiri. The promise, in the hypothetical case, is published in statute in the same way that the specific promises in Kashmiri were communicated to the plaintiff by the defendant through a catalogue and on a website.

The state, in the hypothetical case, would argue that the chaptered intent at issue is analogous to the vague, hortatory pronouncements made to students in Hairston. Thus, like the students in Hairston, no benefit would be due to students as a third-party beneficiary because broad statements of policy do not amount to a specific promise. The state would have difficulty disputing that the chaptered legislative intent is not representative of their intent. However, California could dispute that the relevant
chaptered intent amounts to more than an aspiration or policy and is in no way meant to convey contractual rights. The state would also attempt to distinguish the published communiqués to students in Kashmiri from the chaptered intent cited in the hypothetical case.

Distinguishing the two communications may be a difficult task because each was publically available, affirmatively expressed a benefit, and specifically identifies the party to be benefited. In Kashmiri, UC was forced to honor a specific promise not to raise student fees in large part because the university published that promise in catalogues, on its website, and in other communiqués provided to students. The Kashmiri court also determined that students could reasonably by expected to rely on those promises because UC had control over the promises that it made to students in these publications. California’s Legislature has similar control over the language used in the Donahoe Act’s legislative declarations and intent. Thus, students may have a reasonable expectation, as California citizens, that they are entitled to affordable access to high-quality postsecondary education.

Next, plaintiffs would suggest that the specific promise to “make high-quality education available and affordable to every Californian” is analogous to UC’s promise not to raise fees because each alleged promise provides students an educational benefit. In fact the court in Kashmiri states that “[a] breach of contract action regarding a specific promise about the fee to be charged is similar to a breach of contract action based on the failure to provide a specifically promised educational service” (156 Cal.App.4th 809,826 (2007)). Plaintiffs would further argue, like the plaintiffs successfully did in Kashmiri, that postsecondary education providers routinely provide educational services to their
students as part of an implied-in-fact contract. Given this, students would suggest that they are being denied affordable access to high-quality postsecondary educational opportunities as an educational service that they are contractually entitled to.

Again the state would likely not dispute that students can enjoy implied-in-fact contractual rights for the provision of educational services. The state may, however, argue that a promise to support affordable access to postsecondary education is too broad compared to the specific promises that have been enforced in those cases. This may be a poor strategy for the state because the types of educational services that courts have enforced in the past are analogous to the benefits student plaintiffs seek in this case. For example, courts have found that a failure to provide promised classes or appropriate hours of instruction are enforceable rights under an implied-in-fact contract with students (156 Cal.App.4th 809 (2007)). Plaintiffs in this hypothetical case would likely argue that their access to high-quality education is limited because a lack of class offerings at California’s public postsecondary institutions is preventing their enrollment in college or completion of their degree.

The state would certainly argue, as UC did in Kashmiri, that a lack of legislative funding prevents them from fulfilling a promise to provide affordable access to high-quality postsecondary education. This argument failed in Kashmiri. This aspect of the Kashmiri holding is intriguing because student plaintiffs, in the hypothetical case, would proffer that the phrase “California must support an educational system…” is a specific promise by the Legislature to adequately fund California’s public higher education sector. In addition, student plaintiffs would argue that that funding level must ensure that the
specific promise to provide affordable access to high-quality postsecondary education is met.

Plaintiffs would also claim that Kashmiri requires the state to honor that promise regardless of the state’s fiscal constraints. The state would likely highlight its well-established power to control state fiscal support for postsecondary education. Nonetheless, each party would have to prove these claims through text and context under a totality of the circumstance test. Those arguments are profiled subsequently when I consider whether the principal parties expressly intended to convey a benefit to students.

In sum, student plaintiffs in the hypothetical case would argue that California specifically promised through, *inter alia*, statute to support affordable access to high-quality education for every Californian. Plaintiffs would claim that the state promised to provide the fiscal support necessary to meet that goal while UC, Cal State, and CCC provide students the educational services. The “commitment from all” language contained in the Donahoe Act’s chaptered intent also signifies, plaintiffs would allege, that California and its public postsecondary institutions share a self-imposed responsibility to fulfill the specific promises made to students. This study, however, only examines the factors that would lead to state liability under an implied-in-fact contract with students.

As a result, the following section of this study examines, whether California intended to provide affordable access to postsecondary education to California’s citizens under an implied-in-fact contract with its postsecondary institutions. I do not address whether the “high-quality” education language amounts to a specific promise because the hypothetical plaintiffs would likely not dispute the quality of the education in this
particular case. The following section assess the factors used to determine if California expressed an intent to benefit students as third-party beneficiaries to an implied-in-fact contract with the state’s postsecondary institutions to meet the higher education needs of the state.

**Did the principal parties to the contract express an intent to benefit students?**

As detailed in the literature review, third-party beneficiary status can only attach if the contract’s principal parties expressed an intent to benefit the third-party. A totality of the circumstances test is used to assess whether the principal parties expressed that intent. In the case study, one of the principal parties to the case is the state of California. Thus, the question to consider is whether the state expressed an intent to benefit students by supporting affordable access to high-quality postsecondary education.

In California, *Cory* shows that relevant “text and context” are legally appropriate measures of legislative intent. As a result, I will review the text and context under a totality of the circumstances test. That test, simply looks to all the relevant facts and circumstances as factors in determining whether the principal parties intended to benefit the third party. This approach highlights the factors that the second research question seeks to expose.

Student plaintiffs would argue that the chaptered legislative intent contained in the Donahoe Act is the clearest expression of their intent to benefit the students for at least two reasons. First, chaptered legislative declarations and intent are, by default, an expression of legislative sentiment. Second, the Legislature has total control of what language is published in California’s Education Code and thus, may reasonably be expected to honor any promises made in the statute because of that autonomy.
A similar argument was successful in Kashmiri. The court, in Kashmiri, found that students could reasonably expect various fees to remain fixed because UC specifically made that promise in communiqués with students—communications that the university had total control over. The court determined that UC could have refrained from making the promise or have made an alternative promise but did not. As a result, students can reasonably rely on the expressed promise and have a contractual right to the benefit.

In the case study, California’s Legislature may have expressed an intent to benefit students in a number of ways. First, the chaptered legislative intent states:

*California must support an educational system that prepares all Californians for responsible citizenship and meaningful careers in a multicultural society; this requires a commitment from all to make high-quality education available and affordable for every Californian.*

This legislative declaration may be indicative of the Legislature’s desire to benefit students seeking a postsecondary education because the state appears to self-impose an obligation to support the state’s postsecondary education system. The Legislature may have also expressed an intent to benefit students through another statement in the chaptered intent. Section 66003 states:

*It is the intent of the Legislature to outline in statute the broad policy and programmatic goals of the master plan and clear, concise statewide goals and outcomes for effective implementation of the master plan, attuned to the public interest of the people and State of California, and to expect the system as a whole and the higher education segments to be accountable for attaining those goals.*
This statement seems to declare that the Legislature intends to pursue the goals of the Master Plan in a manner that benefits California’s citizens. In addition, the language includes a self-imposed obligation to be “accountable” for effectuating the broad goals of the Master Plan in an efficient manner. Again, a court may consider this statement a clear expression of the Legislature’s intent to provide Californian’s an efficient and effective higher education system.

In addition, the history surrounding the Master Plan is chaptered in the statute as well. Thus, the context surrounding the Master Plan and subsequent reports assessing the Master Plan are likely relevant factors for determining whether the state expressed an intent to benefit students. For example, The Master Plan itself grew from the state’s need to expand its higher education sector to accommodate growing student enrollment. Multiple chapters in the Master Plan addressed the educational, economic, and geographic needs of students. All of the published statements supporting these facts may be expressions of the principal parties’ intent to benefit students.

Each Committee Report that reviewed the Master Plan appears to express the Legislature’s desire to benefit students. For example, the 1973 Joint Committee Report begins by stating that California’s public higher education sector exists to “respond to the learning needs of our citizens and society.” This statement seems to clearly express the Legislature’s desire to provide the state’s citizens a benefit through the provision of higher education. The 1989 Joint Committee Report stated that Legislature seeks to provide the “full benefits of learning” to all types of Californians. Again, a published statement that explicitly expresses a desire to convey a benefit suggests that students may...
be an intended third-party beneficiaries under an implied-in-fact contract to meet California’s higher education needs.

The 2002 Joint Committee Report (p. 5) states that the fundamental purpose of the Master Plan is to create “an effective and accountable education system” that focuses “first and foremost on the learner.” This appears to be a reasonable expression of the Legislature’s intent to provide students a benefit because the beneficiary (i.e., the learner) and the benefit (i.e., effective and accountable education system) are identified in the statement. In addition, the statement seems to acknowledge that the principal parties are accountable to students.

Even the sparse 2010 Joint Committee Report reaffirmed the basic principles of the Master Plan and the state’s desire to provide affordable access to high-quality postsecondary education. The relevant language in the report seems to corroborate the same promise to benefit students made in the Donahoe Act’s chaptered intent. All told, the Master Plan, subsequent reports, and the Donahoe Act all contain what may be an expression of the state’s desire to provide students the benefit of affordable access to high-quality postsecondary education.

Other factors are also likely to exhibit a legislative intent to benefit students. In regard to the alleged “must support” promise, for instance, significant fiscal investment in the state’s postsecondary sector is likely an expression of the state’s intent to benefit students because the scope of that fiscal benefit can be measured. In this particular case, California’s fiscal investment in postsecondary education has been, by any objective measure, substantial and long lasting. Thus, there may be a presumption that the state has a contractual obligation to provide that benefit on a perpetual basis.
Regardless of how a court may view California’s fiscal investment in public higher education, there appears to be copious amounts of examples where the state and its institutions of higher education expressed an intent to benefit students. The universities and colleges provide educational services, co-curricular, and extra-curricular services to students on a regular basis. I suspect that California, in the case study, would not dispute that the Master Plan negotiations and implementation of the state’s higher education policy does benefit students. The state, however, would dispute the underlying presence of an implied-in-fact contract to meet the higher education needs of California.

While students are not considered third-party beneficiaries in every case, they have been found to enjoy third-party rights to promised educational services (Prince v. Kent State University, Slip Copy2012 -Ohio- 1016 (Ohio Ct. App. 2012); Bloom v. National Collegiate Athletic Ass’n, 93 P.3d 621 (Colo. App. 2004); Oliver v. Natl. Collegiate Athletic Assn., 155 Ohio Misc.2d 8 (Ohio Misc. 2008)). Student plaintiffs in the case study would argue that the promise to support affordable access to high-quality postsecondary education is the basic provision of an education service. Thus, the facts of the case study, plaintiffs would suggest, are analogous to the cases where students enjoyed third-party benefit to an educational service.

Again, I suspect that the state would have difficulty disputing that it intended to benefit students by supporting public postsecondary education in the state. Furthermore, the Legislature has publicly acknowledged its desire to help students, which seems to be an expression of the state’s intent to benefit students. California would likely have an equally challenging time showing that students did not accept the alleged benefit by enrolling at UC, Cal State, or CCC.
Did the students accept the benefit that was allegedly conferred to them in the implied-in-fact contract? Third-party beneficiaries must accept the principal parties’ offer before they gain any rights under the contract (More v. Hutchinson, 187 Cal. 623, (1921)). In the same vein, student plaintiffs likely need to show that they justifiably relied on the principal parties’ promise to provide affordable access to higher education and, in turn, materially changed their position in reliance on the promise (Rest.2d, Contracts §311(3)). In this work’s case study the student plaintiffs would likely claim that they accepted the promise of affordable and accessible higher education by enrolling at one of California’s public postsecondary institutions.

The relevant case law seems to support this argument. Kashmiri shows that students seeking to enforce an implied-in-fact contract for educational services exhibited acceptance by enrolling at the postsecondary institution. Other cases where students seek third-party beneficiary status also acknowledge that acceptance of the offer occurs when students matriculate at their institution (Prince v. Kent State University, Slip Copy2012 - Ohio- 1016 (Ohio Ct. App. 2012). A number of contract cases involving students and their postsecondary institutions acknowledge that a student accepts the contractual offers through enrollment (Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988); Ross v. Creighton, 957 F.2d 410 (7th Cir. 1992)).

Student plaintiffs in this work’s case study would likely be currently enrolled students and thus, would probably have a relatively easy time showing that they accepted an offer by California to support affordable access to high-quality postsecondary education. For, if the alleged contract exists, a significant part of the third-party benefit
conveyed is curricular, co-curricular, and extra-curricular offerings. Currently enrolled students would be enjoying all of these benefits.

Thus, student plaintiffs in the case study would likely only need to be enrolled at one of California’s postsecondary institutions to show acceptance of the state’s offer to support affordable access to high-quality postsecondary education. Enrollment, by default, also seems to show that a student materially changed his or her position by matriculating at a postsecondary institution because there is a fiscal and temporal cost associated with enrollment. Interestingly though, the promise made in the case study may extend to all Californians because of the language used in the Donahoe Act. Again, the relevant language at issue allegedly promises every Californian affordable access to high-quality postsecondary education (Cal. Educ. Code § 66002(f)(3)).

We know that California can make an offer in statute to an indeterminate class of persons that are free to accept that offer at any time (California Teachers Association v. Cory, 155 C.A. 3d 494 (1981); San Luis Obispo County v. Gage, 139 Cal. 398 (1903)). Private parties that act in response to conditions set forth in chaptered legislation likely accepted the offer (139 Cal. 398). Plaintiffs in the case study would go further by suggesting that the state made an offer—in the Donahoe Act—to a determinate class (i.e., every California citizen). In addition, plaintiffs would argue that that every citizen is free to accept the offer of affordable access to high-quality postsecondary education by enrolling at UC, Cal State, or CCC.

Citizens that attempt to enroll at a CCC, for instance, but cannot get the class they are seeking may allege that they accepted the state’s offer by trying to enroll. I suspect that a court would reject this view simply because the logical extension of such a decision
is impractical. If one citizen could allege that he or she has a contractual right to any course of her/his choosing, the state may have to provide every conceivable educational opportunity that a prospective student could imagine. A court could suggest that this result conflicts with the stated goal of operating an efficient public higher education system in California and thus runs counter to public policy.

Nonetheless, the same court may simultaneously conclude that an enrolled student enjoys a contractual right to make satisfactory progress towards a degree as part of the principal parties’ promise to support affordable access to high-quality postsecondary education. Thus, citizens may enjoy rights under the alleged implied-in-fact contract to provide every Californian affordable access to high-quality education. However, a citizen would still likely have to accept that offer by enrolling at a California postsecondary institution.

All told, students would not have great difficulty showing that they accepted the principal parties’ offer to provide every Californian affordable access to high-quality postsecondary education. Case law is a key factor in resolving the question of third-party acceptance. The facts and circumstances at issue in each particular case are also essential factors. In this work’s hypothetical, the case law showing that students accept a contractual offer of educational services through matriculation is vital. Once a court determines that students accepted the principal parties’ offer of a third-party benefit, it would then consider whether students were denied that third-party benefit.

**Are students being denied the promised benefit?** A third-party beneficiary must show that he or she has been denied the promised benefit before a court will act to enforce that promise. In this work’s case study, the student plaintiffs allege that they have
been denied the benefit of affordable access to high-quality postsecondary education. As stated previously, students in this hypothetical are not disputing that they are receiving a high-quality education. As a result, the student plaintiffs must show that they have been denied *affordable access* to high-quality postsecondary education. They would likely claim that the state’s failure to *support* such a system, as it promised to do so in the Donahoe Act’s chaptered legislative intent, is the reason why they are being denied the benefit of affordable access to higher education.

**Is public postsecondary education unaffordable for California’s citizens?**

Quantifying affordability can be difficult task. A court may seek to measure both state “support” and postsecondary education “affordability” against previous levels in California. This approach seems necessary because the students allege that they are being denied a benefit that was once provided under the state’s promise to provide California’s citizens affordable access to higher education. This then seems to require the use of reasonably objective metrics to measure postsecondary education affordability. However, affordability is a difficult concept to measure. As a result, a number of fiscal measures could factor into the “affordability” calculation.

First, a court may examine a student’s overall cost of attendance to assess whether postsecondary education is affordable in California. To accomplish this, the court may review state support for public higher education in California since the passage of the Donahoe Act because that is when the alleged contract was formed. The calculations would likely control for the value of the dollar and account for student population growth. This approach would enable the court to gain an objective measure of per student cost. The court may then look to the per capita income and net worth of the state’s
residence to gain perspective on the citizens’ ability to pay. The court could look to any number of factors including the citizens’ tax obligations, Prop 98 funding, Cal Grant support, and more when determining whether postsecondary education is affordable in California.

Furthermore, a court may consider whether a rapid increase in costs—as opposed to a long-term increase in cost—amounts to a breach. In other words, would a 7% annual increase in student cost breach a promise of affordability while a 15% increase over five years does not? Student plaintiffs could argue that a rapid increase denies them the ability to plan for a cost increase and adjust their behavior accordingly. In addition, plaintiffs may suggest that a large annual increase would require many students to incur additional student debt, which by default, is an increase in cost. However, the state would counter by correctly noting that an increase in cost does not necessarily make postsecondary education unaffordable.

Interestingly, professional students (e.g., law, medicine, business, dentistry) may have a distinct case from undergraduates and other graduate students because the costs of UC’s professional schools are generally on par with private professional schools in the state (e.g., University of Southern California, Stanford University, Santa Clara University, University of San Francisco). Professional students could argue that this high cost indicates that a professional education at UC is generally no more affordable than the state’s independent postsecondary institutions. As a result, professional students may argue, the state has breached a contractual promise to provide affordable postsecondary education to the state’s citizens. Professional students could also argue that their high
costs are a direct result of the state’s failure to support affordable postsecondary education.

The students would suggest that UC’s professional schools operate at a profit because those schools subsidize other academic units within the university. The need for internal subsidies is necessary, professional students would suggest, because the state has failed to provide appropriate fiscal support to UC as a whole. As a result, professional students would conclude that their education is too costly and breaches the state’s promise to support affordable access to postsecondary education. The state’s codified curricular restriction on professional education may also factor in to whether professional students are distinct from other students.

The state clearly limits the provision of legal education, medical training, dentistry, and veterinary medicine to UC in the Donahoe Act (Cal. Educ. Code § 66010.4). Student plaintiffs could suggest that this limitation allows UC to increase student cost at its professional schools because their competition is generally limited to the state’s independent professional schools. As a result, students would argue that the state must provide the support necessary to make UC professional schools as affordable as they were in California’s relatively recent past and in other states.

A court would probably look to an objective measure of student net cost over time and fiscal support in other states to help assess higher education affordability in California. Research assessing higher education costs across states and on average would likely factor into a court’s assessment of the issue. This would allow the court to use real cost figures when making its judgment. In addition, this approach seems to be a generally reasonable—albeit limited—way to objectively measure affordability.
For example, if an objective researcher shows that net cost for tuition, room, board, and fees in the average state is $12,620 but in California the figure is 4% lower, a court may presume that higher education in California is affordable because the per student costs are lower than peer states. Obviously, the opposite would be true as well if the average per student cost is higher. The court may also seek per student costs when assessing overall state fiscal support for public postsecondary education as well. The difficulty, as you may have already recognized is specifying what constitutes affordable.

A specific promise to not increase student fees was enforceable in Kashmiri. The plaintiff’s harm in that case was easy to calculate because the difference between the fees students paid and what was promised was measurable. A court may have difficulty determining affordability because the term is subjective. Objective measures of student cost and ability to pay would only provide a court a reference across states and over time in California. These measures are, at best, guidance for a court charged with determining if higher education is affordable in California. This subjective judgment about affordability may lead the court to question whether the promise itself is specific enough to enforce.

Affordability is a problematic concept also because of the student’s ability to pay. The same net cost may be manageable for some students while proving to be unaffordable for others. Furthermore, the court may look at affordability in the context of California’s tripartite system. In other words, the court could conclude that any student has the opportunity to manage overall net cost for his or her education by first attending a CCC and then transferring to Cal State or UC. In this context, California appears to have provided the state’s citizens affordable postsecondary education opportunities.
Finally, the state would probably point to its investment in the Cal Grant program as an example of how California provides direct fiscal support to low-income students and thus, meets its obligation to make higher education affordable. In essence, the state would challenge the assumption that direct support to California’s postsecondary institutions is the primary vehicle for making higher education affordable in the state. The state would argue that direct student subsidies are a more reasonable way to make education affordable for students with the greatest financial need. Thus, even if the state is contractually obligated to make higher education affordable, California has done so through direct aid to both the schools and students. A court would likely assess all of the factors before determining if California breached an alleged promise to provide its citizens affordable higher education opportunities.

*Is student access to public postsecondary education being denied?* The final allegation made by the plaintiffs in the case study also requires some subjective judgment to resolve. Students would claim that they have been denied *access* to postsecondary education at UC, Cal State, and CCC because the state failed to provide adequate support to meet that promise. To show their case, plaintiffs may analogize their facts to *Kashmiri*.

In the hypothetical case, students are alleging that they have been denied an educational benefit (i.e., access to postsecondary education). The *Kashmiri* court found that the denial of an educational benefit—like postsecondary access—is similar to raising student fees after the institution promised not to. Student’s prevailed in *Kashmiri* by showing that they were denied the benefits of an implied-in-fact contractual promise, as plaintiffs in the hypothetical case are seeking to do. The distinction in this case, however, is that the students are claiming rights as a third-party.
*Kashmiri* and other relevant case law are important factors for this aspect of the analysis. Nonetheless, the facts and circumstances surrounding student access in any given particular case would likely be the primary factors that a court would examine when considering the question. In this case, a court may look for evidence that students were denied a reasonable ability to enroll at a California public postsecondary institution. The following assesses the relevant text and context necessary to answer this question.

Given the foundational reliance on the facts and circumstances of each case, I look to the recent recession and subsequent research for examples of denied access. Using those facts, student plaintiffs would likely claim that budget cuts prevented their access to California’s public postsecondary sector in a number of ways.

Plaintiffs would first suggest that CCC, which is designed to operate open access institutions, has failed to provide enough courses or sections to meet student demand. This in turn, prevents their ability to enroll and make appropriate progress towards a degree. In addition, increased costs at all of California’s public postsecondary institutions are preventing access for students from low socioeconomic backgrounds. Finally, student plaintiffs could claim that growth in nonresident enrollment at UC—particularly at its flagship institutions (i.e., Berkeley and UCLA)—restricts access for every Californian.

Students would further allege that all of these harms have occurred because the state has failed to provide adequate fiscal support to their postsecondary institutions. Additional funding, students may suggest, would allow CCC to offer a curriculum that meets student demand because additional faculty and support staff could be hired. Increased state support would temper escalating student fees because institutions wouldn’t need to replace those fiscal resources (i.e., state aid) with another revenue
stream (i.e., student fees). In the same vein, UC would not need to increase nonresident enrollment if state aid grew because the additional tuition revenue that accompanies nonresident students would be unnecessary. Students would likely point to nonpartisan research, students’ personal accounts, and the state’s postsecondary institutions’ own actions to support these claims.

For example, in September 2012, CCC instituted a plan that prioritized student enrollment in response to budget cuts (California Community Colleges Chancellor’s Office, 2013; Susman, 2012). Students could argue this plan shows that CCC acknowledges that it can’t meet student demand because the school is, in essence, capping enrollment. In addition, thousands of classes were cancelled and student enrollment fell precipitously in the last three years (Keller, 2011; Krupnick, 2012; Public Policy Institute of California, 2013). Students would argue that these factors directly prevent their ability to enjoy access to higher education because they are simply prevented from enrolling when classes reach capacity. CCC’s own chancellor, student plaintiffs would highlight, stated publically that CCC cannot serve everyone seeking enrollment because of cuts in state fiscal aid (Susman, 2012).

Students could use research to highlight the scope of the harm in a measurable form. Research may also provide an evidentiary correlation between funding and reduced student access. For example, a 2013 report from the Public Policy Institute of California concludes that a $1.5 billion reduction in state aid to CCC resulted in 600,000 students being denied access to public postsecondary education in California (Bohn, Reyes, & Johnson, 2013). The report found that a 20% drop in course offerings drove this reduction in enrollment and therefore, also reducing access. A court would likely factor this type of
report into its analysis because the research measures the impact on student access in a relatively tangible manner and the authors are neutral parties to the case.

The Center on Budget and Policy Priorities came to the same general conclusion linking funding to student access (Oliff, Palacios, Johnson, & Leachman, 2013). This report provided context by using per-student-funding levels across states. In addition, the report highlights how reduced state aid for higher education leads to fewer courses and increased student cost. These types of metrics could make it easier for a court to measure the alleged harm, which in this case, is problematic because of the inherent difficulty in measuring “access.” Other reports directly address how reductions in state support for postsecondary education lead to increased student cost (Kelderman, 2013a). This research, in turn, suggests that access to postsecondary education is being denied for some students.

In fact, there is a great deal of research that shows a correlation between student cost, access, and state fiscal aid (Hoffert, Jackman, & Ang, 2012). Relevant to the hypothetical case, the College Board found, *inter alia*, that reduced funding for public higher education in California led to the largest student cost increase in the nation (Gordon, 2011c). In fact, it would be difficult for any state to deny that student costs increase as state aid for public higher education is reduced (State Higher Education Executive Officers, 2013). Regardless, a court would almost certainly look to all of these factors when assessing the question of student access in the hypothetical case.

Furthermore, a court may look to similar factors when assessing whether increased nonresident enrollment leads to reduced access (Kingkade, 2012; Vidal, 2013). The court may also review enrollment figures in context of the state’s alleged obligation
to provide postsecondary access to California residents. In other words, what percentage of California citizens must enroll in each entering class at UC Berkeley, for example, to satisfy the state’s alleged obligation to provide postsecondary access to its citizens? The state could argue that citizens still have access to public postsecondary education in California through the state’s other public institutions. This claim may be easily refuted, however, if the court concludes that access at CCC is being denied. Again, the court would likely look for a neutral analysis to help assess if and how resident student access is tempered by increases in nonresident enrollment.

Interestingly, the testimony of college leadership regarding admissions and budgetary strategies would likely carry significant weight in the case because of the courts’ general deference to postsecondary institutions on matters of internal governance. This reliance, however, also provides students the opportunity to use postsecondary leader’s public statements as persuasive evidence. All told, the court would look to the facts and circumstances of each case to determine if students have been denied access to postsecondary education.

One recent example may lead to a significant reduction in student access for California’s citizens. Currently, the City College of San Francisco (CCSF), one of CCC’s largest campuses, is facing closure. The accreditor is seeking to remove the college’s accreditation, which the college claims, is a result of limited resources and a lack of, *inter alia*, state funding (Fain, 2013, 2014a). If the school closes, about 80,000 students would be denied access to CCSF. A court, reviewing a circumstance like this, may indeed find that students are being denied access to postsecondary education. The relevant case law would likely factor into the court’s analysis as well.
Students would likely attempt to show that limited access to postsecondary education is analogous to cases where students were denied a promised educational service. In some of those cases, despite the court’s general deference to postsecondary institutions, students are able to show that they were promised a benefit and have an implied contractual right to enjoy that benefit (Kaplin & Lee, 2006). Furthermore, plaintiffs would likely analogize to cases where third-party beneficiaries were denied a promised benefit because some students enjoy third-party rights to various educational benefits (Prince v. Kent State University, Slip Copy2012 -Ohio- 1016 (Ohio Ct. App. 2012); Bloom v. National Collegiate Athletic Ass’n, 93 P.3d 621 (Colo. App. 2004); Oliver v. Natl. Collegiate Athletic Assn., 155 Ohio Misc.2d 8 (Ohio Misc. 2008); Kaplin & Lee, 2006). However, these cases—as discussed previously—generally do not find that students are a third-party beneficiary to a contract between their institution and another party.

As such, Kashmiri would likely be a foundational case for the hypothetical plaintiffs because the court, in that case, ruled in favor of students seeking to enforce an implied-in-fact contractual benefit. Student plaintiffs would need to show that, like UC’s failure to keep student fees capped in Kashmiri, California failed to provide enough fiscal resources to meet student demand in this case. In addition, student plaintiffs would allege that they were denied the promised benefit of access to postsecondary education like the Kashmiri plaintiffs were denied the promised benefit of capped student fees. Again, the state would simply argue that postsecondary access is available to every Californian even if some classes are capped in a particular semester because those classes are offered on an ongoing basis.
In sum, the court would look to a number of factors when assessing whether students were denied the benefit of affordable access to postsecondary education. Case law, educational research, student accounts, university leadership testimony, and any number of the parties’ actions can be examined under a totality of the circumstances test. Students would likely allege that the denial of access is similar to the denial of any particular educational service or benefit. The state would suggest that the benefit has not been denied because every student still has access to California’s postsecondary sector, albeit with some *de minimis* temporal restrictions.

This question—whether students were denied the benefit of affordable access to postsecondary education—would be the final query for the court. To even reach this question, the court would first have to find that an implied-in-fact contract between California and its postsecondary institutions exists. Furthermore, the court would also have to have already concluded that students were entitled to third-party beneficiary status under the implied-in-fact contract. Thus, the hurdles that a student would have to scale to prove their case are quite high.

**Summary of the factors required to show that an implied-in-fact contract exists and that students enjoy third-party beneficiary status under that contract.**

This study examines the factors that could place an implied-in-fact contractual obligation on a state to support postsecondary education. In addition, I examine the factors that could establish students as third-party beneficiaries under that contract. The legal elements to prove both are similar. As a result, there is overlap in the factors that a court would use to assess the elements in each case.
Three key elements are required to show that an implied-in-fact contract exists in the hypothetical case. First, two parties must be present. This issue in the hypothetical case is debatable because California’s public postsecondary institutions may be considered arms of the state. A court would likely examine factors relating to the institution’s autonomy and founding to resolve this question. The state constitution, education code, and relevant case law may also guide the court’s analysis.

Second, the state must have intended to contract with its postsecondary institutions through its actions or statute. This intent must be shown through some kind of bargained for exchange. That agreement can be shown in statute, through the parties’ actions, or other means. A court would examine the “text and context” of the circumstances surrounding the alleged contract to resolve this question. In the hypothetical, this includes the history of the state’s higher education sector, the education code, case law, legislative committee reports, state support, an ongoing master planning process, and more. The primary factor used to resolve this issue, however, would likely be the chaptered legislative intent, legislative declarations, and legislative action in response to Master Plan.

Third, only specific promises appear to be enforceable under and implied-in-fact contract. Again, a court would look to text and context to reveal the factors necessary to address this question. A statutory promise is the clearest form of expression. In addition, chaptered legislative intent, declarations, and findings are valuable factors in this context. Naturally, case law would be factored into the litigants’ strategies and the court’s analysis. In a similar fashion to the last element, direct statements by the Legislature—
either through statute or other means—appear to be the most persuasive factor when considering this legal question.

Student plaintiffs must prove three additional elements to enjoy status as third-party beneficiaries to the implied-in-fact contract considered in the first research question. A court would only reach this question if it had already determined that the principal parties had actually entered an implied-in-fact contract. A court would use a totality of the circumstances test to resolve this legal question. Thus, relevant text and context reveals the important factors that a court would review when considering students’ potential third-party rights.

First, plaintiffs must show that the principal parties expressed and intent to benefit them as a third-party. Once more, the chaptered legislative intent, statutes, and legislative actions are important factors in resolving this question. State fiscal allocations, the postsecondary institutions’ actions, and public expressions of support from college leadership would also factor into this question. In this case, though, the state and its postsecondary institutions would likely have difficulty denying that their support of California’s postsecondary sector is not an expression of their intent to benefit students. Thus, the state would look to other areas of the case (e.g., the two-party to the contract question) to challenge the student’s overall claim.

Second, Students must accept the offer to enjoy court ordered rights to the alleged benefit. The primary factor used to resolve this question would likely be the case law showing that students accept implied contractual benefits from their postsecondary institutions at enrollment. This would almost certainly be true in this hypothetical case because the alleged promise appears open to every California citizen. Those citizens
would likely need to enroll to show their acceptance of the state’s offer to support affordable access to high-quality postsecondary education.

Lastly, student plaintiffs most show that they were denied the alleged benefit even if a court finds that they enjoy third-party beneficiary status to the implied-in-fact contract. Students in the hypothetical case would attempt to show that the state’s failure to provide adequate support—as promised—has denied students access in a number of ways. Then students would point to, inter alia, limited course offerings, rising costs, and increase nonresident enrollment as examples of how reduced funding limits student access.

Again, the court would use a totality of the circumstances test to assess this question. The difficulty for a court, however, seems to be the need to quantify “affordable access to high-quality postsecondary education.” Thus, educational research and personal testimony may play a significant role during this stage of the inquiry. The particular facts and circumstances of each case also play a vital role in determining whether students were denied a promised benefit.

As you can see, administrative, fiscal, legal, and historical factors dominate this analysis as well. Again, many of these factors don’t fit neatly within these categories. One of the primary factors to consider in both research questions appears to be the Legislature’s intent as expressed through statute, chaptered intent, declarations, joint resolutions, committee reports, and more. The relevant case law and history surrounding the master planning process are also important factors.

All told, the hypothetical plaintiffs face a significant evidentiary burden. California’s master planning process could reasonably be considered an effectuation of
the state’s education policy through a state actor. If this conclusion is accepted, no contract to meet the higher education needs of the state was formed. On the other hand, a plausible argument supporting the hypothetical claim could also be made. The following section applies the factors and provides an assessment of the hypothetical case. I conclude by highlighting a couple of important considerations raised by the analysis.
Chapter 6: Legal Summary, Policy Implications, and Conclusion

Overview of Problem, Research Questions, and Methodology

State fiscal support for public higher education has been dropping steadily on a per student basis since the early 1990s (Quinterno, 2012). In addition, the recent recession resulted in severe funding cuts for public higher education in many states (Palmer, 2012; 2013). While many states have recently tempered those reductions with new support, many within the higher education community feel that a “new normal” for per student support has taken hold (State Higher Education Executive Officers, 2014). This study grew from those concerns and, broadly stated, examines a potential legal remedy that could thwart similar funding reductions in the future.

The first research question examines the factors that could create an implied-in-fact contractual relationship between a state and its postsecondary institutions. The second research question examines the factors that could establish students as third-party beneficiaries to that contract. Each question requires a review of the historical, legal, administrative, and fiscal circumstances surrounding each individual case. For this work, California serves as a case study. The analysis, however, is generally applicable to other states and can be used to help understand the legal relationships between postsecondary institutions, students, and their home states.

As stated previously, the case study analysis is used to highlight the factors that a court would likely examine when answering the legal questions at issue. That legal analysis provides a detailed examination of the factors and how both parties (i.e., students and California) could use them to advance their respective legal positions. In addition, a brief comparative analysis is provided to help broaden the scope of the study. The
particular facts and circumstances that are present in each state and at each institution weigh heavily on whether an implied-in-fact contract was entered and whether students are third-party beneficiaries to that alleged contract.

The Legal Summary

Introduction

A court reviewing this study’s hypothetical claim would undertake a review of the types of factors that have been previously presented. Each potential case would have a unique set of factors to consider because each state has a unique relationship with its public postsecondary institutions and state law governs contract disputes. However, the general framework described in this study would likely be followed. That is, the historical, legal, administrative, and fiscal considerations would drive the analysis. In the hypothetical case, California law governs as was indicated in the case study. The following provides an opinion as to how a California court may decide the legal questions at issue in the hypothetical case. In addition, I use this chapter to highlight a couple of legal considerations raised by this study’s research questions. Following this review, I highlight some broader policy implications that this research helps to expose.

The Impact of Legal Realism

Black’s Law Dictionary (2009) defines legal realism as a “theory that [the] law is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy” (p. 915). Many judicial opinions that deal with politically charged legal controversies are subjected to claims of legal realism. This study’s hypothetical claim may be influenced by legal realism because higher education cost and access have profound political, social, and public policy implications.
Students, parents, and education advocates have made higher education cost front-page news in recent years. Legislators, both state and federal, are exerting their influence on the postsecondary sector as well. We would be naïve to think that a judge facing the hypothetical controversy profiled in this study would be oblivious to these concerns. In fact, as the analysis has shown, much of the policy foundations at play in a particular state may be admissible evidence as text and context. As a result, a judge would almost certainly have to review the policy implications of any decision that he or she makes.

Interestingly, though, the influence of legal realism may stretch even further in the hypothetical case. A judge may view the facts in a manner that is most favorable to the plaintiffs or the defendants based on his or her own political leanings or motivations. A politically charged topic, like higher education access and funding, may lead a more conservative judge to view the facts more favorably for the state because of a general attitude that people need to lift themselves up by their own bootstraps and government support punishes hardworking taxpayers. A more liberal judge may view the facts in a manner that favors the plaintiffs because of a personal view that education is the path to better life and serves to eliminate income inequality. While this overly simplistic view is pure conjecture, one must concede that some judges may allow their own personal and political views to influence their decision.

The threat of legal realism playing a role in how the hypothetical case may be decided cannot be ignored. The legal questions at issue and the totality of the circumstances test to address those questions leave room for judicial interpretation. The facts can also be legitimately read with a general bias towards one party or another. Given this, my findings account for this possibility as I profile how legal realism may
influence the decision. The findings address each legal question separately and in the order in which a court would likely review them.

**How the legal questions may be resolved.**

**Did the parties enter an implied-in-fact contact?**

*Are at least two parties present to contract?* A court faced with this question may find that two parties were not present for a few reasons. First, Cal State and CCC are statutorily established postsecondary institutions and are almost assuredly state actors as a result. Cal State’s broad grant of autonomy only extends to its ability to self-govern, not operate without state oversight. UC is likely a state actor as well because it has, on a number of occasions, held itself out as a state actor for legal purposes. In addition, UC’s constitutional grant of authority does not extend beyond matters of statewide concern. A judge could reasonably conclude that the broad higher education policies spelled out in the Master Plan and its statutory progeny are matters of statewide concern.

Nonetheless, California’s private postsecondary institutions were present during the Master Plan negotiations, which may lead a particularly generous judge to determine that two parties were present to contract. In addition, the legislative declarations, findings, and intent highlight the independents’ involvement in the master planning process and the ongoing importance to California’s postsecondary sector. The presence of these private postsecondary institutions during the Master Plan’s drafting could be interpreted to mean that the statutory implementation of the plan amounts to more than an effectuation of state policy through a state agency. While this interpretation is unlikely, a judge could legally justify this finding with the facts if he or she chose to do so.
The answer to this legal question is paramount in this hypothetical because of the implications for the remaining legal questions. If a judge decides that two parties were not present to contract, all of the remaining legal questions are moot. If a judge decides that two parties were present, the remaining legal questions will be considered. In addition, this question appears to be the most substantial hurdle for the plaintiffs to overcome because UC, Cal State, and CCC are almost unquestionably state actors. In addition, providing public higher education opportunities—through a master planning process—is almost certainly a matter of statewide concern and the statutory implementation of those opportunities is likely a reasonable effectuation of legislative policy. All told, the hypothetical case could be won or lost at this stage because the other legal questions, viewed objectively, generally seem to favor the plaintiffs.

*Did California intend to contract with the state’s postsecondary institutions to meet the higher education needs of the state?* The answer to this legal question must be viewed in context of the first legal question. Assuming that a court finds that two parties were present to contract, the answer to this question may be yes. The historical context surrounding the establishment of the master planning process is telling. First, the state attempted to operate without a comprehensive plan and as a result, failed to meet the higher education needs of the state. Second, Resolution No. 88 clearly states that all of the parties intended to meet the higher education needs of the state through the master planning process. Third, all of the concerned parties (i.e., California, UC, Cal State, CCC) mutually agreed to provide consideration in response to a mutually agreed upon plan. This could reasonably be considered a bargained for exchange. Finally, the Master
Plan has guided the state’s higher education policy for over 50 years, which seems to show that all of the parties intend to be bound by the plan’s basic tenants.

Furthermore, the chaptered legislative intent indicates that California and its postsecondary institutions mutually agreed to operate under the Master Plan and resulting statutory scheme. The chaptered declarations and intent also shows that the Legislature would provide the fiscal support necessary to advance a mutually beneficial public postsecondary sector. In addition, California’s Education Code places a number of restrictions on the state’s public postsecondary institutions (e.g., curricular, transfer opportunities) which resemble a bargained for exchange because those restrictions grew from the master planning process. Lastly, California’s significant fiscal investment in the state’s public postsecondary sector could lead one to conclude that it exchanged this support for the provision of educational services from UC, Cal State, and CCC.

However, a more restrictive view of these facts is not unreasonable. The entire master planning process could be considered an implementation of statewide policy through subordinate agencies because the state’s higher education commission was involved, as were the state’s public postsecondary institutions. The statutory scheme that established the tripartite system could also reasonably be considered an implementation of statewide policy. The goal of the master planning process, after all, was to gain curricular and economic efficiencies for the state while simultaneously providing meaningful postsecondary educational opportunities for California’s citizens. This goal seems to be one that the state would seek to achieve as good policy. Again, legal realism may play a role in answering this question because the facts can be read in a manner that supports a finding for the plaintiff or the defendant.
Is the Legislature’s declaration to support affordable access to postsecondary education a legally enforceable specific promise? While a promise to support affordable access to postsecondary education may sound broad, the ability to quantify support, affordability, and access may lead a court to find that this is a legally enforceable specific promise. The Legislature self-imposed this promise by claiming that California must support affordable access to postsecondary education in the Education Code’s chaptered legislative declarations, findings, and intent.

Fiscal support can be quantified both as gross allocations and on a per student level. Affordability can be quantified against previous attendance costs in the state and compared to the cost of public higher education in sister states. Access is easily quantified by the number of attendees and by the number of citizens that have been unable to attend because of limited class offerings or limited slots available to residents. All told, a judge may find that this statutory language amounts to a specific promise because the scope of the promise can be measured over time in California and compared across states on a gross level. However, yet again, the facts can be interpreted in a manner that reasonable justifies a finding for either the plaintiff or defendant.

Are students a third-party beneficiary to an implied-in-fact contact between California and its postsecondary institutions?

Did the principal parties express an intent to support students as a third party to their contract? This point would likely not even be challenged by the state. California’s Legislature expressed an intent to benefit students in the Education Code’s chaptered declarations, findings, and intent by stating that it must support affordable access to high-quality postsecondary education. The state has also provided significant fiscal support for
students and their postsecondary institutions since the passage of the Donahoe Act. As previously highlighted, the Legislature repeatedly expressed a desire to help students in multiple joint committee reports and legislative declarations. California’s public postsecondary institutions unquestionably work to serve students as indicated by their mission statements and actions. This legal question would likely not be disputed because the state’s key purpose in providing public higher education is to help students.

*Did students accept the offer?* If all of the previous legal questions have been found in the affirmative, the answer to this question is undeniably yes. Case law clearly and undeniably supports the conclusion that enrollment amounts to acceptance to an implied-in-fact contract between students and their postsecondary institutions. The interesting aspect of this hypothetical case involves California citizens that may have attempted to enroll in CCC but were unable to attend because of enrollment caps. Once again, a more generous interpretation of the facts may find that these citizens attempted to accept the benefit but were denied. A more state-centric view may find that citizens are free to enroll in other courses or at a later date and thus, did not accept the state’s offer of affordable access to public postsecondary education.

*Were students denied the benefit of affordable access to postsecondary education under the implied-in-fact contract?* The answer to this legal question, like most of the other legal questions in this hypothetical case, depends on how the court interprets the facts. However, if the answers to all of the other legal questions previous to this one favored the plaintiffs, the answer to this legal question would likely favor them as well. However, students have most likely not been denied affordable postsecondary
opportunities regardless of how the facts are interpreted. Students’ access to postsecondary education, though, may have been denied.

The language contained in the Education Code requiring the Legislature to “support” affordable access to postsecondary education appears unequivocal. However, a court may have difficulty determining what level of support is necessary to meet the affordability prong of this alleged promise. A judge could conclude that every student has the option to attend CCC for two years and thus, California has met its promise to provide affordable access because CCC has campuses throughout the state that are affordable by any reasonable measure. In addition, Cal State and UC are relatively affordable compared to some other state’s public postsecondary institutions. Furthermore, all of California’s public higher education institutions are much more affordable—at least on the surface—compared to private postsecondary institutions in the state. As a result, the state has likely not breached its obligation to provide affordable postsecondary opportunities to the state’s citizens.

The state, however, may have breached its obligation to provide California’s citizens access to postsecondary institutions. Access can easily be quantified in this case because CCC was designed to provide postsecondary opportunities to any citizen capable of benefiting from such an opportunity. The recent recession prevented a number of students from enrolling at CCC because of a lack of available courses. In addition, the City College of San Francisco is on the verge of being shuttered because of accreditation issues. CCSF’s closure would almost assuredly be considered a limitation on access to public higher education in California. Plaintiffs, however, would likely need to show that
increased fiscal support would cure the problems that led to the closure before relief under this hypothetical case could be granted.

Increased non-resident enrollment at UC Berkeley and UCLA may also lead a court to conclude that California’s citizens are being denied access to postsecondary opportunities in the state. However, a plaintiff may have a more difficult time proving that this is a limitation on access because many California citizens still attend both institutions. Again, however, a judge with a broader understanding of what access means in this context may determine that excessive non-resident enrollment is a per se reduction in access for the state’s residence. Interestingly, though, a court that finds that students have been denied the benefit of access may not dictate how to remedy the harm.

A court could reasonably order the defendants to formulate a plan that resolves the current harms that deny access for student plaintiffs. However, neither party could dispute that the Legislature holds the power of the purse. As a result, a court may determine that access has been denied but simultaneously defer to the Legislature and the state’s public postsecondary institutions to cure the problem over a three to five year period. In essence, the court would be saying that every citizen has a reasonable expectation that affordable access to postsecondary education will be available to them but the defendants have the necessary responsibility to determine how that benefit is conveyed.

In sum, a court may find that California has not breached its promise to provide affordable postsecondary opportunities but that the defendants have denied access to some students seeking that promised benefit. Nonetheless, a court would likely defer to the defendants to formulate a plan to remedy the harm over an extended period of time.
The court would likely retain the ability to approve or disapprove that plan but would not take on the responsibility of dictating a specific remedy. The court may, however, simply state that every citizen that could benefit from postsecondary education should have the ability to enroll at CCC at a time of their choosing. As a result, massive online open courses (MOOCs) may proliferate and funding levels may only moderately increase. This result leads to another policy question that I address subsequently.

*Could students challenge whether the education they receive meets the “high-quality” component of the alleged promise?* While the study does not address this aspect of the alleged promise, a potential ruling that results in an increase in MOOCs could implicate the high-quality component of the promise. If a hypothetical ruling does defer to California and its public postsecondary institutions to resolve limited access, MOOCs could appear to be a panacea. The costs are low, much of the content is already delivered in a live classroom setting (videos of the lectures could be made), and every student is able to access the course. However, if UC, Cal State, or CCC relies too heavily upon MOOCs and the quality of the education is compromised, students could potentially claim that the parties have breached their promise to provide high-quality education.

Measuring the quality of postsecondary education, however, is likely more difficult to quantify than affordability or access. For example, students’ perceptions of quality may be considered but a court would likely find that those subjective assessments are not determinative. A court may rely on an objective assessment of the quality of MOOCs as compared to the delivery of in-class courses. However, courts routinely defer to colleges and universities when academic issues are at issue. In this case, a court may
simply accede to the academic judgment of the postsecondary institutions and refuse to consider the quality of any academic program.

*Summary of the legal questions at issue.* The plaintiffs will have a difficult time proving their case. First, they will have trouble showing that more than one party was present to enter the contract. If they do, they may be able to show that the parties contracted to meet the higher education needs of the state. The judge’s own views on the facts would likely have a significant influence on the answer to both of these questions. Legal realism may also play an important role in determining whether the statutory language to support affordable access to postsecondary education is an enforceable specific promise. Students would, however, have an easier time showing that they are third-party beneficiaries under an implied-in-fact contract if a court finds that such a contract exists. While the legal questions are revealing, the research questions raise some important considerations. The following details those considerations.

**Policy Implications of the Research Questions**

**States and their public postsecondary institutions should view all aspects of their relationship as contractual.** There are number of reasons why states and their public postsecondary institutions should approach their relationship as quasi-contractual. First, this approach would foster a pursuit of mutually beneficial agreements through negotiation. California’s ability to move away from district-centric campus expansion to a master planning process is one good example of how negotiation leads to reciprocal benefits because the state’s fiscal and education needs were met for five decades. Second, each party in quasi-contractual negotiations would be well aware of their rights and responsibilities under those agreements long before any dispute could arise. California’s
tripartite system is a fine example of how rights and responsibilities can be allocated among disparate parties. This approach also leads to curricular and economic efficiencies, which also helps define each party’s role in the relationship.

Third, each party can clearly define its level of autonomy in the relationship if states and their postsecondary institutions mutually agree to negotiate those terms either through statute or private agreement. This approach could limit disputes between states and their postsecondary institutions in addition to limiting legal disputes to resolve areas of ambiguity. Finally, current accountability trends could easily be defined and mutually agreed upon if public higher education institutions work with their home states in a manner that resembles a quasi-contractual relationship. All told, both states and their public higher education institutions would benefit if they approach their relationship as a contractual one.

**Students may have a better case alleging that they have an implied-in-fact contract with the state.** This study considers whether students are third-party beneficiaries to an implied-in-fact contract between California and its postsecondary institutions. After careful analysis of the facts, I have concluded that students may have a better chance of proving that they are a principal party to a contract with the state and its public higher education institutions.

Students could allege that they were promised access to affordable high-quality education at UC, Cal State, or CCC under California’s Education Code. Students could then argue that they provide consideration in the form of tuition and accept the offer of affordable access by enrolling at one of the state’s public postsecondary institutions. *Kashmiri* shows that students can and do have a contractual relationship with California’s
public postsecondary institutions and are entitled to enforce promises made to them under that implied contract. In fact, those promises are enforceable regardless of whether the state is facing financial exigency or not.

This approach would lessen the students’ legal burden compared to the hypothetical case addressed in this study because no implied-in-fact contract between the state and its postsecondary institutions would have to be shown. That aspect of the hypothetical case is the most difficult component to prove and failure to show that such a contract exists would prevent a court from considering the relationship between the student and the state. Students, in essence, could leap frog the implied-in-fact contractual hurdle by claiming that both California and its public higher education institutions directly promised them affordable access to high-quality postsecondary education. The facts and analysis would remain the same but the initial burden of proving that an implied-in-fact contract exists between California and its postsecondary institutions would be unnecessary.

**The impact of this research on institutional autonomy and state governance.**

This study’s research questions extend beyond the legal questions that underlie them. As should be apparent from the analysis, the fundamental relationship between states and their postsecondary institutions is implicated by this research. The scope of an institution’s autonomy, the extent of the funding provided to public postsecondary institutions, and states’ governance of postsecondary education are all impacted by this research. In particular, current trends that link funding to institutional outcomes may bolster the idea that state’s and their public postsecondary institutions are subject to an implied-in-fact contract.
**Linking funding to institutional outcomes.** Berdahl (1971) stated that postsecondary institutions need high levels of autonomy to effectively operate and honor their missions. Many within the higher education would still likely agree with that sentiment. Interestingly, as Zumeta and Kinne (2011) show, states demanded more oversight of their public postsecondary institutions as state fiscal support for those institutions increased. States routinely expanded the scope of their oversight and involvement in their public higher education sector well into the 1990s (Cohen & Kisker, 2010; Zumeta, 2001). Furthermore, the trend to link funding to outcomes appears to be on the rise in many states. However, as this research shows, such arrangements could lead courts to reexamine the fundamental relationship between states and their public postsecondary institutions.

As Kaplin and Lee (2006) show, the fundamental component that defines the relationship between a state and its postsecondary institution is the legal framework that created the institution (i.e., constitutional or statutory). However, as performance funding and budgeting initiatives propagate, the legal relationship between states and their public postsecondary institutions may shift. As this study explained, a contractual relationship between states and their postsecondary institutions may be established through the various facts and circumstances surrounding their relationship. Performance funding overtly ties funding to institutional outcomes. This type of arrangement resembles a contractually bargained for exchange in many ways because two parties (i.e., state and postsecondary institutions) mutually agree to exchange fiscal support for education services. As a result, performance-funding agreements may supersede other factors and
lead a court to find that a contractual relationship exists between states and their public institutions.

In fact, the states outline their fiscal commitment to their public institutions up front when using performance-funding programs. The postsecondary institutions also outline their level of accountability at the beginning of the relationship. A court may find that this preconceived expression of mutual assent legally extends beyond the statutory or constitutional provisions, which have traditionally governed the parties’ relationship. In short, a court may conclude that if enough aspects of their parties’ relationship are contractual, then an implied-in-fact contract exists.

While this result is unlikely, states may be less willing to pursue significant accountability measures with their postsecondary institutions for fear of creating an unintended contractual relationship. However, legislators, as highlighted previously, can and often do pursue their own ideological or fiscal agendas. These types of political pursuits have led to both indifference and excessive involvement in higher education. Some have argued that California’s Legislature has become politically indifferent towards higher education (Finney, Riso, Orosz, & Boland, 2014). On the other hand, some states are looking to link funding to social issues and political ideology, which appears to exhibit a level of political gamesmanship that impedes the public good associated with postsecondary education (Weerts, Sanford, & Reinert, 2012).

All told, divided political pursuits will clearly limit any state’s ability to meet its higher education needs. By reducing per student funding for higher education, states may be harming their own economic and societal interests over the long term. Anti-tax policies have unquestionably harmed California’s public higher education sectors in the
last thirty years. Now that the voters have—at least temporarily—reversed that trend, funding for higher education appears to be stabilizing. Nonetheless, there is a meaningful difference between stable funding and adequate funding. If the state fails to provide adequate funding in the future, the citizens of California and its public postsecondary students may have a legal remedy that forces their political leaders to pursue the state’s interest as opposed to their own.

**Conclusion and Future Areas of Research**

The very week that I drafted this conclusion, a new study from the State Higher Education Executive Officers (2014) showed that state funding for public postsecondary education has not recovered from the Great Recession. Many states have stopped cutting year over year funding from the previous year, but only three states spent more in FY 2013 than they did in FY 2008. Per student funding is down and there is no certainty that state support will ever return to pre-recession levels. As a result, students and citizens may look to alternative legal means to seek fiscal support for their postsecondary education. This study considers one of those alternative means.

The use of litigation to force states to support public postsecondary education, however, would be tenuous at best. In some states, the hypothetical approach detailed in the study would be pointless because of strong statutory controls over public postsecondary education. In addition, California’s historical commitment to public postsecondary education has been unmatched by other states. The state’s recent retreat from comprehensive higher education planning is also telling. Those facts matter in this study and are important considerations as this research extends beyond the case study contained in this dissertation.
The historical, fiscal, legal, and administrative underpinnings of California’s postsecondary sector could lead a court to conclude that students are third-party beneficiaries to an implied-in-fact contract between the state and its higher education institutions. For this to happen, however, a court would likely have to view all of the facts in a light most favorable to the plaintiffs. Otherwise, the students’ claim could fail at an early stage of the litigation. If California provides the necessary fiscal support, we may never have to find out whether a legislative promise to provide affordable access to high-quality education is a legally enforceable contractual term. If the state continues to reduce per student funding, students and education advocates may choose to pursue a claim similar to the one that I profiled in this study.

**Future areas of research.** At least six areas of research seem to extend from this study. First, an implied-in-fact contractual analysis can be undertaken for other states besides California. The results may be quite different, particularly in states like Colorado and Pennsylvania where some higher education institutions have quasi-state actor status. Second, one could examine the factors that may lead a court to conclude that online education meets or does not meet the high-quality promise under an implied-in-fact contract theory. This would be important if California or other states attempt to use online education in a manner that usurps traditional classroom instruction as opposed to augmenting those educational services.

Third, as stated previously, examining the factors that could create an implied-in-fact contract between students and their home state for the provision of higher education is warranted. This could be vital for students if costs continue to rise and postsecondary access continues to drop among students from lower socio-economic backgrounds.
Fourth, a review of the states’ and postsecondary institutions’ role as fiduciaries and their duty of care to students may be instructive. Fifth, a serious attempt at quantifying “affordability” would be valuable. However, this has proven to be difficult even for Congress and the Obama administration as they tackle higher education reform (Rodriguez & Kelly, 2014).

Lastly, there may be value in determining what types of inherent advantages and/or disadvantages would be created if states and their public postsecondary institutions contracted to exchange funding for accountability. Again, this could be valuable for all parties involved because clear expectations and responsibilities will be outlined at the beginning of the agreement. All of these considerations would further clarify the rights and responsibilities of students, states, and their public postsecondary institutions—as this study attempts to do.
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