Winter 2019

Cutting Pension Rights for Public Workers: Don't Look to the Courts for Help

Ronald H. Rosenberg

Cutting Pension Rights for Public Workers: Don't Look to the Courts for Help

RONALD H. ROSENBERG*

* Chancellor Professor of Law and Associate Dean for Graduate Programs, William and Mary Law School. The author wishes to thank his research assistants, Robert Jones and Daniel Cutler, for their enormously helpful work in support of the preparation of this article. Special thanks are also given to Mr. Frederic W. Dingledy, Senior Reference Librarian, for his extraordinary assistance in locating many sources of information necessary for this project.

ABSTRACT

Every day we rely on public employees to provide us with a broad range of services necessary to daily life. These workers include public school teachers, fire and police, emergency medical technicians, park rangers, nurses just to name a few. As public employees, these people work for local and state government and they are compensated by us for their services through the taxes we pay. In general, these are modestly paid workers who also receive pensions when they retire after many years of work. Following the financial crisis of 2008–2009, government retirement trust funds significantly lost value and their long-term rates of return fell from levels necessary to pay benefits. With a more accurate assessment, the true costs of honoring these longstanding retirement promises became much more clearly in focus and future pension shortfalls appeared imminent. With little political appetite for raising tax rates to cover this shortage, state and local governments adopted "pension reforms" to meet the impending financial challenges.

Pension reforms were carried out in many states and localities through legislative and administrative action. While they followed no uniform pattern, these policy changes had the overall effect of modifying existing public employee retirement rights in a way that reduced benefits, made benefits more difficult to earn or they completely overhauled existing pension systems. Not surprisingly, public employee

and retiree groups found these changes to be harmful to their retirement expectations and they considered them a breach of trust. In over 2/3s of our states litigation followed challenging pension reform policies claiming that they were illegal or unconstitutional in their impairment of pension rights. This struggle is the principal focus of this article.

After reviewing the history of American public employee pensions, describing the current state of pension systems and setting forth their structure, this article considers the last decade of litigation to pension reform policies. In more than 100 state and federal case decisions, workers and retirees have challenged the popularly-supported policy changes to their pension rights using a variety of legal theories and forms of argumentation. The review of these cases analyzes them from a theoretical perspective and it draws conclusions about the effectiveness of using a litigation strategy to overturn democratically-adopted employment policies. The overarching conclusion resulting from this study is that both state and federal courts have overwhelmingly upheld state and local pension reforms and they have refused to find statutory or constitutional rights violations for government workers. The secondary conclusion is that in order to protect their future retirement income, these employees must build better popular support and legislative protection for their contributions to the public welfare in order to avoid future cutbacks in benefits.

INTRODUCTION

Throughout American history, all levels of government have employed people to serve the public in a myriad of ways: teachers, police, fire, and other workers. At the creation of America, private citizens were asked to support the new country by joining as soldiers in the army of the rebellious colonies during the Revolutionary War. In exchange for this dangerous loyalty, these courageous people were to be compensated by their colonies and later, by the Continental Congress. As in modern times, these military "public employees" were offered current wages and, sometimes, future income with pensions or land in order to induce their service and to discourage desertion during the lengthy and dangerous war.[1] Pension incentives were thought to be

1. Revolutionary War Pension and Bounty-Land-Warrant Application Files, National Archives and Records Service, pamphlet describing M804 (1974), https://www.archives.gov/files/research/microfilm/m804.pdf. The practice of offering pensions for soldiers and their widows was a longstanding practice.

crucial for the colonies to attract soldiers willing to risk their lives for this dangerous and uncertain cause. The need for this support was apparent since injured soldiers could spend their elderly years impoverished and disabled by their war injuries. Even then this policy of attempting to mitigate economic dependence of elderly workers recognized a public goal of shifting the main responsibility of supporting older, injured soldiers to the general public and away from the soldiers and their families.[2] Such a policy was thought to be necessary for the public welfare and, at the same time, humane.

However, then as now, such public promises were easy to make and, occasionally, they were found to be difficult to honor. Foreshadowing today, these promised Revolutionary War benefits were either not paid in a timely way or, occasionally, they were not paid at all.[3] Not surprisingly, this resulted in tremendous dissatisfaction among soldiers. Over 200 years ago, reneging on military pensions nearly had catastrophic results and almost triggered a mutiny of colonial officers threatening the impending colonial military victory.[4] In this stark example, denying pensions could have affected the course of American history. These eighteenth century conflicts pitting soldiers against their government employer anticipated a serious, twenty-first century problem that is growing in significance - whether, and to what degree,

For more than a century before the beginning of the Revolutionary War, British colonies in North America provided pensions for disabled soldiers and sailors. During and after the Revolutionary War, three principal types of pensions were provided by the U.S. Government for servicemen and their dependents. "Disability" or "invalid pensions" were awarded to servicemen for physical disabilities incurred in the line of duty; "service pensions," to veterans who served for specified periods of time; and "widows' pensions," to women whose husbands had been killed in the war or were veterans who had served for specified periods of time. *Id.* at 1.

Following the American Revolution, Thomas Paine called for a land inheritance tax that that would pay all citizens reaching the age of fifty an annual pension of ten pounds sterling. Thomas Paine, *Social Insurance History*, U.S. SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/history/paine4.html.

2. *See Historical Background and the Development of Social Security*, U.S. SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/history/briefhistory3.html (last visited July 1, 2018).

3. *See generally* ROBERT L. CLARK ET AL., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES (2003).

4. Even then promises of current wages and future retirement pensions presented fiscal demands on the newly-created government that could not be met. *See generally* EMILY J. TEIPE, AMERICA'S FIRST VETERANS AND THE REVOLUTIONARY WAR PENSIONS (2002). Colonial government defaults actually enraged the Revolutionary officers and soldiers inspiring them to threaten the Continental Congress with a virtual mutiny in 1783. *Id.* This threat was leveled by officers at a meeting in Newburgh, New York in March of 1783 after soldiers had not been paid wages for nearly a year. *Id.* The timely intervention of George Washington quelled this revolt after an emotional speech known as the Newburgh Address of March 15, 1783, promising to use his best efforts to have the soldiers' claims met. *Id.*

public employers may reduce or change earlier retirement promises made to their workers.

This article considers the current legal and policy changes that have been mandated at the state level of government affecting nearly twenty million American workers and millions of current retirees. New state policies have far-reaching consequences affecting a surprisingly large component of the American workforce representing almost 1-in-8 American employees.[5] These are the teachers, police officers, firefighters, emergency technicians, and other state and local government workers we are familiar with and upon whom we rely every day. Having been promised benefits by prior politicians whose successors would now determine those promises to be too generous, these workers find themselves facing a less financially secure retirement future than they expected.

Honoring these retirement promises has become a serious problem across the nation becoming a hotly contested political issue in many states.[6] Since the financial crisis of 2009, legal and policy changes have been adopted in the face of some extremely alarming financial predictions about the long-term financial solvency of state retirement systems.[7] Accurate actuarial projections have given more precision to the extent of this problem with recent estimates of the current unfunded liabilities of most state and local government pension ranging from nearly $4 trillion[8] to more than $6 trillion.[9] These

5. In 2017, the American civilian, non-institutional workforce numbered approximately 155.5 million workers with state and local government employees comprising 19.54 million or 12.6% of the total. Public teachers and other workers counted for 53% of the state and governmental workers or nearly 7% of the American civilian workforce. *Labor Force Statistics from the Current Population Survey*, U.S DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, https://www.bls.gov/cps/cpsaat18b.htm (last updated Jan. 19, 2018).

6. *See, e.g.*, Joel Fox, *Is a Battle Brewing Over Prop. 13?* L.A. TIMES (Nov. 17, 2016); Tina Sfondeles & Fran Spielman, *Pension Battle Between 'Gov. Gridlock' and 'Madigan's Mayor'?* Chi. Sun-Times (Jan. 10, 2017), https://chicago.suntimes.com/news/city-hall-dubs-rauner-gov-gridlock-for-pension-bill-stance/; Tom Loftus, *Bevin Warns Tax Reform Will be Tough*, THE COURIER-JOURNAL, Feb. 8, 2017, at A2; Tina Sfondeles, *'Frustrated' Rauner to Push for 'Grand Bargain' in Budget Address*, CHI. SUN-TIMES(Feb. 14, 2017), https://chicago.suntimes.com/news/frustrated-rauner-to-push-for-grand-bargain-in-budget-address/.

7. The issue of state retirement cutbacks has arisen at the same time when the solvency of the major federal social benefit programs of Social Security and Medicare affecting millions of retirees and other recipients has also been questioned. However, this looming federal issue which currently is unaddressed by our political leaders is beyond the scope of this article.

8. Joshua D. Rauh, *Hidden Debt, Hidden Deficits: 2017 Edition: How Pension Promises Are Consuming State and Local Government Budgets 1*, HOOVER INSTITUTION 1, 1 (2017), https://www.hoover.org/research/hidden-debt-hidden-deficits-2017-edition.

9. Thurston Powers et al., *Unaccountable and Unaffordable: Unfunded Pension Liabilities Exceed $6 Trillion*, American Legal Exchange Council 1, 3 (2017), https://www.alec.org/app/uploads/2017/12/2017-Unaccountable-and-Unaffordable-FINAL_DEC_WEB.pdf.

staggering sums have grown year to year and they currently represent twice the general revenues collected by these state and local governments.[10] Put into another perspective, this unfunded pension liability dwarfs all of the outstanding bonds of these jurisdictions forming an "off-the-books" debt that governments have refused to recognize.[11]

The realization that state pension plans have offered retirees benefits that may be financially impossible to honor has led numerous state legislatures to make policy changes and to enact new laws altering the existing array of public retirement benefits for public workers and retirees. Justified by limited state and local revenues, by more compelling public spending priorities, and by an aversion to increasing taxes, state after state has attempted to rein in these benefits. These new policies have been highly controversial and have been intensely resisted by employee groups and retirees.[12] The cutbacks on employee pensions have been the subject of numerous court challenges in at least 70% of the states.[13] This high level of court challenge reflects the deep dissatisfaction of government workers with these new policies as well as the belief that their trust in their government employer had been violated.

This article analyzes pension reform challenges occurring over the past decade in both the state and federal courts. It categorizes the patterns of legal attack employed to challenge these new policies and it evaluates the actual legal and constitutional constraints faced by policymakers in reforming their state's policies. The central questions presented here are "what are the legal boundaries for public policy making in this area" and "how does law limit public policy choices?" This analysis also assesses the litigation outcomes to determine the relative success of workers resisting lawfully-adopted pension policy changes. The general conclusion reached from this analysis is that although the law in this area follows no uniform pattern, state governments have been overwhelmingly successful in defending the changes even when they have negative effects on workers. Such a conclusion

10. *See* Rauh, *supra* note 8, at 3.

11. *See* Rauh, *infra* note 43.

12. *See* Chris Butera, *Kentucky Judge Deems Governor's Pension Law Unconstitutional*, Chief Investment Officer, (June 22, 2018), https://www.ai-cio.com/news/kentucky-judge-pension-law-unconstitutional/louisville-kentucky-usa-2//(describing the challenge to legislation passed in 2018 in Kentucky's pension reform efforts with intense resistance from school teachers to benefit cuts).

13. Marcia Robiou, *How States Have Tried to Close their Pension Funding Gaps*, FRONTLINE (Oct. 23, 2018), https://www.pbs.org/wgbh/frontline/article/how-states-have-tried-to-close-their-pension-funding-gaps/.

runs counter to the commonly-held beliefs of public employees who think that they have stable and secure pension rights that are free from subsequent legislative claw back. Such beliefs are incorrect and unfounded and government pension policy may be adjusted to reduce benefits when the popular will supports the cutbacks. Employee and retiree "rights" are truly subject to the changing winds of public opinion and political support.

I. PROVIDING A RETIREMENT INCOME FOR AMERICAN GOVERNMENT WORKERS

A. Pensions in American History

Post-employment compensation has been an American tradition for public workers since the founding of our nation. Following the Revolutionary period, military pensions in some format were provided to soldiers and sailors throughout the 19th and 20th centuries and continues to this day.[14] The American government and the services it provided slowly expanded throughout the 19th century tracking the growth of population, the economy and the changing needs of the nation.[15] During this time, the number of public workers expanded and, over time, their functions became familiar and expected parts of both urban and rural life. As part of this expansion of governmental services, public employers slowly began to provide pensions first for disability and later for service as a part of employee compensation.[16]

In contrast, private industrial employers adopted retirement benefits much more slowly than did the public sector. Large companies began to offer pensions first in 1875 by the American Express Company and later by railroad companies.[17] Private employers in non-railway fields were slower to adopt worker pensions but by 1920 many large employers had started plans.[18] These large employers saw pen-

14. Congress recognized the purposes of offering military pensions as providing replacement income for injured or disabled soldiers, encouraging retirements of older soldiers, and to attract new recruits into the military service. *See generally* Robert L. Clark, et al., A History of Public Sector Pensions in the United States 43–62, 122–153 (2003).

15. *Id.*at 128–29.

16. *Id.*

17. Murray Webb Latimer, Industrial Pension Systems in the United States and Canada 21–22 (1933). The Baltimore and Ohio Railroad Company established the second private sector retirement plan in 1880 but over the next twenty-five years only twelve more railroad companies joined in the practice. *Id.* at 25.

18. Following the railroads, a small number of banks and urban trolley systems offered pensions as did a small number of manufacturing firms and later large steel and oil & gas compa-

sions, along with mandatory retirement ages, as methods of removing older workers who they believed had reduced productivity without alienating their remaining employees. Finally, federal government workers were the last employee group to be covered by a comprehensive pension system, only gaining that benefit in 1920.[19] Gradually, over the 20th century, the concept of employers making specific provision for workers' post-employment income became a common industrial practice of large employers and a broadly-accepted popular ideal.

B. Expanding Public Pensions: Police, Firefighters and Teachers

Cities began to provide retirement income for their employees in the 19th century. Public employee pensions began at the local government encompassing three discrete categories of workers: police, fire fighters and teachers. In 1857 the New York City became the first municipality to provide disability pensions for its police officers injured in the line of duty.[20] Twenty-one years later this benefit was expanded to provide police retirement pensions based on service.[21] Not surprisingly, firefighters, who were increasingly important to the safety of growing American cities, soon began to receive similar compensation to that of police and they were also recruited and compensated with pensions similar to those of police.[22] This phenomenon began in the growing American cities where these public safety workers were necessary to provide a desirable, safe, and orderly urban life.

nies. *Id.* at 39–41 (mentioning Carnegie Steel and Standard Oil). Some large firms including U.S. Steel, General Electric, AT&T, Goodyear Tire and Rubber, Bethlehem Steel, American Can, and Eastman Kodak had pensions by 1930. *See* CHARLES ELLIS ET AL., FALLING SHORT: THE COMING RETIREMENT CRISIS AND WHAT TO DO, 130–31 n. 9 (2014).

19. The Federal Employees Retirement Act, enacted on May 22, 1920, promised minimum pensions that were small by modern standards ($180 to $360 per year) but provided income security even during the Depression. At that time approximately 3 million American private, nonfarm workers (13% of the total) were covered by private pension plans. ROBERT L. CLARK ET AL., *supra* note 3, at 154, 163–64.

20. In 1858 there were over 1400 police covered by a New York City pension plan which was called the Police Life and Health Insurance Fund. The funding of this early pension system was composed of a motley combination of sources including permits for dancing schools, boxing contests, street entertainment, fees for physician and private detective licenses, dog tag fees, unclaimed property, and fines imposed on police officers for disciplinary infractions. *See* ROBERT L. CLARK ET AL., *supra* note 3, at 175.

21. In 1878 New York City's plan began to provide a retirement pension to police officers of one-half of final pay upon completion of twenty-one years of service. *Id.* at 167. After New York City, the cities of Chicago, Detroit, Indianapolis and St. Louis joined in having police pensions. *See* ROBERT L. CLARK ET AL., *supra* note 3, Table 10.1(list of municipal police pensions and their features in 1920). This list substantially grew by the beginning of the 20th century. *Id.* at 176.

22. *Id.* at Table 10.2.

In addition to urban public safety workers, school teachers were also early recipients of pensions. American public education expanded quickly in the late 19th and early 20th centuries with the number of students attending public schools nearly tripling from 1870 to 1920.[23] Not surprisingly, the number of teachers, employed by city or county governments, grew to reach high levels over a relatively short period of time.[24] Funded and organized in local communities, public schools first provided a structured elementary education to American children and later, in the 20th century, expanded to give a high school education to pupils training them as workers for the industrial workforce.[25] Pensions for public school teachers became increasingly common as a component of the employee's compensation package. By the beginning of the 20th century, nearly one-third of all American teachers had pension rights and by 1916, 33 states had some retirement system for their public school teachers.[26] By 1930 at least 12 major cities also had pension plans for their teachers.[27] Today, state and local government educational employment have the largest number of public employees at any level of government constituting nearly 7% of the total American civilian workforce.[28] This pattern of broad pension coverage for public school teachers and continues to the present.

C. Extending Retirement Income to Other Public Workers

During this period other government employees were less fortunate. By 1930 only 6 states had established pension plans for their non-education or public safety workers. Massachusetts led the nation

23. The Statistical Abstract of the United States reported the number of students enrolled in public school students rising from about 7.5 million in 1871 to 20.8 million in 1918- an increase of 277%. *Education No. 73. - Summary of School Population*, Bureau of Educ., Dep't of Interior, (July 15, 2018) https://www2.census.gov/library/publications/1921/compendia/statab/43ed/1920-03.pdf.

24. In the post-Civil War period the1880 Statistical Abstract of the United States registered 220,225 public school teachers for 7.5 million students in 1871. *Id.* By 1900 the number of teachers had grown to 415,660 with an enrolled student population of 15.1 million. This represented a growth of teachers of 89% and pupils of 100%. *Id.* The next 20 years would show a growth in public school teachers to 650,709 (56.5% increase) and public-school students to 20.8 million (38%). *Id.*

25. Claudia Goldin, *A Brief History of Education in the United States* 10-11, National Bureau of Economic Research, (Aug., 1999) www.nber.org/papers/h0119.pdf.

26. William Graebner, A History of Retirement-The Meaning and Function of an American Institution, 1885–1978 at 93 (1980). Professor Graebner noted that "most [of these school systems] were in the Midwest and Northeast, were statewide, and the same number were contributory- supported by both public and private (teacher) contributions." *Id.*

27. Clark et al., *supra* note 3, at 182, Table 10.4, 188; Table 10.5.

28. *See supra* note 5.

by adopting its pension plan for all state workers in 1911.[29] The Massachusetts plan which also required employee contribution served as a model for other states and cities and was considered by Congress when it created the federal Civil Service retirement system in 1920.[30] As the concept of retirement income replacement in the form of pensions became more pervasive in the public sector, states and localities began to offer their workers' pension often in conjunction with the federal Social Security retirement benefit. The economic Depression of the 1930s focused political support behind the idea of a publicly-provided old age pension and in 1935 Congress established the Social Security system providing retirement benefits for workers.[31]

Initially, state and local employees were excluded from Social Security coverage. Following World War II there was a continued expansion of state and local governmental activities resulting in the increase in public workers. The Social Security pension system expanded during these years and by 1960 it reached nearly 80% of the nation's workers.[32] In the decade of the 1950s, Social Security was extended to include state public sector employers and, by 1961, most states had their own public pension plans with most also providing Social Security coverage.[33] At that time a number of states chose to exit Social Security making their state and local plans the exclusive retirement benefit for workers.[34] Recent changes have cut back these

29. The six states were Connecticut, Maine, Massachusetts, New Jersey, New York and Pennsylvania and by 1930 they covered nearly 30,000 state employees who were not school teachers. CLARK ET AL., *supra* note 3, at 201–02, Table 10.6.

30. KATELIN P. ISAACS, CONG. RESEARCH SERV., 98-972, *Federal Employees' Retirement System: Summary of Recent Trends* 1 (2018).

31. Congress passed the Social Security Act (P.L. 74–271, 49 Stat. 620) on August 14, 1935 to provide retirement security for American workers. Social Security Act, 42 U.S.C § 1 (1935). This law was a part of the New Deal legislation during the Depression of the 1930s. Larry DeWitt, *The Development of Social Security in America*, 70 SOCIAL SECURITY BULLETIN No. 3 (2010). In its initial scope, the law only applied to approximately 43% of the American workforce and it was structured much like a private insurance plan paying benefits from a dedicated trust fund. *Id.* Amendments in 1939 significantly changed the program by adding dependent and survivor benefits making Social Security a family economic security program without a clear source of employee contributions supporting the added benefits. *Id.* at Table 2.

32. *See* DORA L. COSTA, THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY 174 (Claudia Goldin ed. 1998).

33. OLIVIA S. MITCHELL & GARY ANDERSON, THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 9–10 (2009).

34. In 1991, Congress made Social Security coverage mandatory for state and local government employees except those participating in a public retirement system. As a result, some states with these systems opted out of Social Security making the state retirement benefit the primary source of retirement income. It has been estimated that 25% of state and local government workers do not have Social Security coverage but must rely on state pensions with teachers faring even worse. In 2013 a study noted,

state and local pensions have made these workers even more vulnerable since they do not also have Social Security. It is this cutting back of state and local retirement benefits that are the subject of this article.

II. MODERN STATE AND LOCAL RETIREMENT PENSION SYSTEMS

A. State Autonomy in Pension Policy Making

States are largely free to fashion the terms and conditions of employment for their workers. Labor market conditions and longstanding payment practices guide the government employers in formulating their compensation policies. Each state determines the legal structure and the funding mechanism of its own employee pension plan and they maintain near-total autonomy in devising their state policy. Not surprisingly, there is no uniform federal law driving the policy discussion and, importantly, there is no federal mandate requiring any state-level retirement benefits or any kind of benefit protection.[35] When Congress enacted the Employee Retirement Security Act of 1974 (ERISA)[36] it was responding to failures of private sector pension

---

> Teachers constitute one of the largest groups of uncovered workers. Nationwide, approximately 1.2 million teachers (about 40 percent of all public K–12 teachers) are not covered. Those teachers are concentrated in 15 states— Alaska, California, Colorado, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nevada, Ohio, Rhode Island, and Texas—and the District of Columbia, where many or all public school teachers neither pay into nor receive benefits from the system.

See Leslie Kan & Chad Alderman, *Uncovered: Social Security, Retirement Uncertainty and 1 Million Teachers*, Teacher Pensions, 1 (2014), https://www.teacherpensions.org/sites/default/files/UncoveredReportFinal.pdf. Not only is the absence of Social Security a major problem for teachers but also those working in states having teacher pension programs receive little or no benefits due to worker mobility, vesting rules and policies favoring ultra-long term employees. *Id.* at 7.

35. In fact, the main federal law governing retirement policy- ERISA- does not apply to state and local government retirement benefits. Employee Retirement Income Security Act, 29 U.S.C. § 1003(b)(1) (1974). Section 4(b)(1) of ERISA provides that Title I of ERISA does not apply to an employee benefit plan that is a "governmental plan" as defined in ERISA §3(32). *Id.* ERISA §3(32) defines a governmental plan as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." *Id.* at § 3(32).

36. The U.S. Department of Labor describes the general scope of ERISA in the following terms:

> ERISA is a Federal law that sets standards of protection for individuals in most voluntarily established, private-sector retirement plans. ERISA requires plans to provide participants with plan information, including important facts about plan features and funding; sets minimum standards for participation, vesting, benefit accrual, and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a claims and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and if a defined benefit plan is terminated, guarantees payment of certain

plans and not public plans.[37] The law required private-sector retirement plans to satisfy minimum coverage, participation, vesting, funding, and fiduciary requirements as a means of improving retirement income security for employees. However, ERISA intentionally excluded government pension plans from important sections of the statute.[38] Concerns about federalism values and the limits of federal legislative authority persuaded Congress not to extend ERISA to the states.[39] As a result, even after ERISA was enacted there has been no nationally-consistent rule structure for sub-federal governmental retirement plans.[40] Without the discipline of uniform federal pension program rules imposing uniform standards, state and local pension plans have been structured and administered under state law following state and local political direction.[41] This autonomy has had highly varied results: benefitting some state and local government workers

> benefits through a Federally chartered corporation, the Pension Benefit Guaranty Corporation (PBGC).

Employee Retirement Income Security Act, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/erisa (last visited on July 14, 2018).

37. In 1963 bankrupt carmaker Studebaker Motors closed its South Bend, Indiana plant. James A. Wooten, 'The Most Glorious Story of Failure in the Business:' The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683, 683–84 (2001). It took Congress eleven years to enact ERISA establishing private sector pension rules and creating the Pension Benefit Guaranty Corporation, which provided insurance to protect worker benefits should a pension plan end with insufficient assets. *See id.* at 684.

38. 29 U.S.C. §1003(b)(1) ("The provisions of this [title] shall not apply to any employee benefit plan if—such plan is a governmental plan (as defined in §1002(32). . ..."). Additionally, ERISA § 1002(32) provides that, "The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." *Id.* § 1002(32).

39. In *Rose v. Long Island R.R. Pension Plan,* the Second Circuit added 3 other reasons:

> The governmental plan exemption [to ERISA] was included for several reasons. First, it was generally believed that public plans were more generous than private plans with respect to their vesting provisions. Second, it was believed that "the ability of the governmental entities to fulfill their obligations to employees through their taxing powers" was an adequate substitute for both minimum funding standards and plan termination insurance. Finally, there was concern that imposition of the minimum funding and other standards would entail unacceptable cost implications to governmental entities.

Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 914 (2d Cir. 1987).

40. Paul M. Secunda, *Litigating for the Future of Public Pensions,* MICH. ST. L. REV. 1353, 1363–64 (2014) (author noting that "Federalism concerns also played a dispositive role as far as Congress not trying to assume power over public plans.").

41. Noting this difference, two observers have written that a pension plan subject to ERISA "must design, structure, and fund its plan in accordance with federal rules," whereas public pension plans "are largely free to structure their pension plans as they see fit and are not subject to any funding requirements other than what state law might impose." Amy B. Monahan & Renita K. Thukral, *Federal Regulation of State Pension Plans: The Governmental Plan Exemption Revisited,* 28 A.B.A. J. LAB.& EMP. L. 291, 292 (2013). *See also* Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions,* 2015 U. ILL. L. REV. 117, 127–28 ("state and local plans are exempt from [ERISA]. . ., and therefore it is entirely up to a state or city to determine how it will fund its pension plans").

with well-run and sufficiently-funded plans while employees in other jurisdictions facing substantial uncertainty about their post-retirement future due to poor plan design and funding. Some commentators have even recommended the extension of ERISA or ERISA-like rules to apply to these governmental retirement systems,[42] but as of now, none of these recommendations has been implemented.

This decentralized state control over pension design and funding, as well as the absence of uniform plan requirements, has had widely disparate effects on the sustainability of state pension plans and their ability to meet future pension payments. Some states have consistently funded their retirement systems adequately to provide a high degree of coverage for future pension costs.[43] Others have made inadequate annual payments or have even completely skipped making yearly contributions when it was expedient to do so.[44] This state autonomy has provided each state with the independence to fashion its own response to the financial aspects of operating their retirement systems. These responses have run the gamut of being courageous, well-designed, ill-informed, and in some cases truly dishonest. All have been highly controversial.[45]

The recent state legal and policy changes have been adopted in the face of some alarming financial predictions. In 2017, state and local government retirement systems controlled $3.96 trillion in financial assets in trust funds for workers' pensions.[46] However as sizable as these funds appear, the Federal Reserve calculated that these pension entitlements were underfunded by 32% in 2017.[47] Analysts fear

42. Paul M. Secunda, *supra* note 40, at 1402–04.

43. Powers, *supra* note 9, at 3; Six states have reported exemplary pension funding ratios exceeding 90%. These include: South Dakota (100%); Wisconsin (100%); Tennessee (99%); New York (95%); North Carolina (94%); and Nebraska (91%). *Id.* at 12. These high coverage ratios fell considerably when future pension liabilities were assessed using risk free discount rates. *Id.*

44. *Id.* at 3. Five states demonstrated weak pension fund coverage ratios of less than 50%. These include: Kentucky (44%); Connecticut (47%); Illinois (47%); Mississippi (54%); and Hawaii (55%). *Id.* at 8.

45. *See* K.C. Becker, *Putting PERA on a Path to Prosperity*, DENVER POST (June 15, 2018, 12:13 PM), https://www.denverpost.com/2018/06/15/putting-pera-on-a-path-to-prosperity/.; Blake Brickman, *AG Andy Beshear's Lawsuit Threatens Future of Kentucky Teachers' Pensions*, KY. (June 13, 2018, 6:36 PM), https://www.kentucky.com/opinion/op-ed/article213057319.html.

46. BOARD OF GOVERNORS OF THE FED. RES. SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED MACROECONOMIC ACCOUNTS, FIRST QUARTER 9 (2017), https://www.federalreserve.gov/releases/z1/20170608/z1.pdf.

47. *Id.* The Society of Actuaries analyzed 130 state and large city public pension plans covering 27 million workers and retirees and concluded that the unfunded liability in this sample was 27% in 2014. SOC'Y OF ACTUARIES, U.S. PUBLIC PENSION PLAN CONTRIBUTION INDICES, 2006-2014, (2017), https://www.soa.org/research-reports/2017/public-pension-indices.

that existing retirement trust funds in some states may be so seriously underfunded that they may not be able to provide the retirement payments promised to workers.[48] Although the health of these plans is unevenly distributed across the nation, the overall shortfall is truly astounding reaching trillions of dollars.[49] So large are these shortfalls, in some states, that the financial health of the entire state and major localities has also been called into question.[50] Some analysts have predicted catastrophic effects without changes in current policies,[51] while others have concluded that sizable shortfalls will be avoidable with careful pension plan management and judicious modifications.[52] With pension expenses growing so quickly, legislators view pension costs as crowding out other budget priorities.[53] This realization has motivated the recent policy changes.

Regarding pension reforms, states and local governments have sorted themselves into three broad categories. Group One jurisdictions are those that have invested in expert assessments of the pension funds current condition and future glide path. These places are well-

48. State and local government pensions represent a huge future liability. Recent estimates have estimated the future unfunded liability of state and local government pensions to be $4 trillion and some think that these liabilities have been greatly underestimated. Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. Fin. 1207, 1207–08 (2010). Viewing these governmental pension promises as deferred compensation and a debt of governmental employers, this number dwarfs all existing state and local bond liability by a 4 to 1 ratio.

49. *See* Pew Charitable Trust, *The State Pensions Funding Gap: Challenges Persist* 8 (2015), https://www.pewtrusts.org/~/media/assets/2015/07/pewstates_statepensiondebt brief_final.pdf; Powers, *supra* note 9, at 12.

50. The State of Illinois presents the most vivid current conflict between a state's governor and legislature with its employee unions and its Supreme Court. *See* Bruce J. McNeil & Jack E. Karns, *Illinois Supreme Court Deal Says to the Government: The Price is Right for the Pension Prize*, J. Pension Planning & Comp. 35–65 (2015); David R. Godofsky & Emily Hootkins, *Illinois Supreme Court Affirms Constitutional Protection of State Pensions*, 28 Benefits L.J. 79 (2015).

51. George F. Will, *America's Utterly Predictable Tsunami of Pension Problems*, Wash. Post (Feb. 22, 2017), https://www.washingtonpost.com/Opinions/americas-utterly-predictable-tsunami-of-pension-problems/2017/02/22/1e5de00e-f869-11e6-9845-576c69081518_story.html (claiming that each American household is responsible for $19,000 government pension debt).

52. One recent analysis concluded that the total costs for the long term commitments of pensions, other post-employment benefits and government debt service "appear under control in many jurisdictions." A number of states, counties and cities are facing a much more extreme future where they must raise taxes, cut spending significantly or hope for much higher investment returns. Alicia H. Munnell & Jean-Pierre Aubry, *Will Pensions and OPEBs Break State and Local Budgets* at 6, Ctr. for Retirement Res. (Oct. 2016), http://crr.bc.edu/wp-content/uploads/2016/10/slp_51.pdf (pension costs >30% of state revenue in Illinois and only 1% in Wisconsin).

53. *See e.g.,* Joe Nation, *Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030*, Stanford Inst. for Econ. Pol'y Res. (Oct. 2, 2017), https://siepr.stanford.edu/sites/default/files/publications/17-023_1.pdf.

informed and have taken financially responsible action. They have attempted to shore up the financial underpinnings of their existing retirement systems with increased employer and employee contributions to their pension fund,[54] and they have made necessary administrative changes to their fund management that will likely keep them well positioned.[55] Some have even issued long term pension bonds to shore up their pension funds.[56]

Group Two jurisdictions are well-informed but they are not financially responsible. These places have received clear actuarial information about necessary financial steps that they should take to provide for timely pension payments, but they have not taken the hard steps to add to pension reserves. Unfortunately, in these states' policies, autonomy has permitted short-term political judgments to ignore the clear path dictated by actuarial projections requiring increased current contributions to return to the proper financial path.[57] Through this non-action, these states have delayed the difficult, yet necessary, steps needed to be taken to solidify their public pension plans enabling them to perform as promised for workers.[58] The promises made so

54. In Great Britain, the Bank of England, a governmental entity, was forced to pay 55% of its payroll in 2016 on pension costs to offset unfunded liability caused by falling bond interest rates and the drop in stock prices following the nation's Brexit vote. *Pensions: Fade to Grey,* The Economist Working Paper No. 17-023, (Sept. 24, 2016), https://www.economist.com/briefing/2016/09/24/fade-to-grey.

55. In New Jersey, the 2018 budget contained a $2.5 billion contribution to the state's pension fund representing a 35% increase from the prior year and added the New Jersey State Lottery as a pension system asset going forward. The state's treasurer estimated that the lottery would add $37 billion to the pension system over the next 30 years and improve the pension fund's funding ratio by 14%. *See* Robert Steyer, *New Jersey Approves Budget, Shifting State Lottery Pension Fund*, Pensions & Investments (July 5, 2017), https://www.pionline.com/article/20170705/ONLINE/170709972/new-jersey-approves-budget-shifting-state-lottery-to-pension-fund.

56. Houston, Texas was one jurisdiction to issue $1 billion in pension obligation bonds after receiving voter approval in late 2017. *See* Newsmakers, *Houston issues $1 Billion in Pension Obligation Bonds*, Chief Investment Officer (Jan. 3, 2018), https://www.ai-cio.com/news/houston-issues-1-billion-pension-obligation-bonds/.

57. The most common tactic employed by retirement fund managers to understate the degree of their plan's underfunding is to calculate the present value of future benefits while using a discount rate that is higher than private plans and higher than might be reasonably obtainable with investments over future fund growth. *See* Jeffrey R. Brown & David W. Wilcox, *Discounting State and Local Pension Liabilities*, 99 Am. Econ. Rev. 538, 539–542 (2009); Donald J. Boyd & Peter J. Kiernan, The Blinken Report: *Strengthening the Security of Public Sector Defined Benefit Plans 2–23*, The Nelson Rockefeller Inst. of Government (Jan. 2014), http://rockinst.org/wp-content/uploads/2018/02/2014-01-Blinken_Report_One.pdf.

58. *See* Michael Martz, *With Investment Income Key- Richmond Retirement System Faces Funding Challenges*, Richmond Times Dispatch (Aug. 20, 2016), http://www.richmond.com/news/local/city-of-richmond/article_9caa46a8-288e-50bb-b5da-0f972ba13e62.html) (noting unfunded liabilities and poor investment returns over two years much below assumed discount rate of 7.5%).

easily in the past are not dealt with and the financial obligation is treated as a future problem.[59]

Group Three jurisdictions have received the same actuarial predictions of needed change to their employee retirement benefit problems. However, these places have taken another approach to the problem: they have taken legislative steps to reduce the state's future retirement benefit liability by making significant pension for new and, sometimes, existing workers through pension plan and retirement benefit changes.[60] It is the litigation challenging these recent legal and policy changes that constitute the main focus of this article.

B. Governmental Retirement Pensions Formats

At present, about 69% of all American workers have access to some form of employer-sponsored retirement system with only 28% having the defined benefit option.[61] In the private sector, defined benefit pensions have definitely become much less common. In comparison, approximately 90% of state and local government employees receive retirement benefits with 84% having the defined benefit option.[62] This striking difference reflects the departure of the private sector away from the defined benefit (DB) format and its gradual shift towards the defined contribution (DC) method like the popular 401(k) accounts where any pension would be offered.[63] Fluctuating employer contributions and the relatively higher employer costs were

59. In *Booth v. Sims*, the West Virginia Supreme Court identified the central political problem with the public pensions when it wrote, "[i]t is a recurrent problem of government that today's elected officials curry favor with constituents by promising benefits that must be delivered by tomorrow's elected officials." In reality these "promised benefits" must be paid for by future tax paying residents, not the future elected officials. Booth v. Sims, 456 S.E.2d 167, 183 (W. Va. 1994).

60. *See infra* pp. 36–42.

61. Thomas E. Perez, *National Compensation Survey: Employee Benefits in the United States, March 2015*, Bureau of Labor Stat., tbl.2 (Sept. 2015), https://www.bls.gov/ncs/ebs/benefits/2015/ebbl0057.pdf.

62. Government employees do not receive this retirement benefit for free; rather, on average, they must contribute 6.9% of their annual earnings to their pension plan. Higher paid workers and teachers, on average, contribute even more at 7.4% and 7.7% respectively. *Id.* at tbl.4.

63. Karen Steffen, *State Employee Pension Plans in* Pensions in the Public Sector (Olivia S. Mitchell & Edwin C. Hustead eds.) (2001); *See also Workers with Pension Coverage by Type of Plan, 1983, 1992, 2001, 2013*, Ctr for Ret. Res. at Boston Col. (Sept. 2014), http://crr.bc.edu/wp-content/uploads/1012/01/figure-15.pdf.; In the private sector defined benefit pension plans provides benefits to significantly fewer private employees over the last two decades (35% to17%) with only 10% of private employers offering it. *See The Last Private Industry Pension Plans*, Bureau of Labor Stat. (Jan. 3, 2013), https://www.bls.gov/opub/ted/2013/ted_20130103.htm.

the driving forces behind this shift towards defined contribution pensions.[64] Running contrary to the private sector, it became the 20th century practice to bundle defined benefit retirement income into government workers' compensation packages primarily to attract and retain higher-quality workers.[65] It was also thought that public employment compensation should contain retirement income in order to avoid the earlier social ill of having impoverished elderly citizens. However, in recent times these governments have begun to follow the private sector practice by significantly shifting away from defined benefit pensions and moving towards the defined contribution or hybrid models for new workers.

C. Comparing the Features of Defined Benefit and Defined Contribution Pension Plans

In order to fully appreciate the extent of the serious financial problem confronting American states and localities, it is necessary to understand the structural design of most governmental pension systems. As a general matter, retirement income is provided through two major forms of pension plans: 1) Defined Benefit (DB) plans and 2) Defined Contribution (DC) plans.[66] The basic differences between these two pension formats are straightforward and easily understood.[67] The following chart summarizes the differences:

1. Defined Benefit Pension Plans

a. Representing a traditional pension format offered by employers.

b. Guarantees a specific pension amount based on a formula considering longevity of service and average final salary.

64. *Beyond the Numbers: Retirement Costs for Defined Benefit Plans Higher Than for Defined Contribution Plans*, BUREAU OF LABOR STAT. (Dec. 2012), https://www.bls.gov/opub/btn/volume-1/pdf/retirement-costs-for-defined-benefit-plans-higher-than-for-defined-contribution-plans.pdf (defined benefit/defined contribution plans compared at $2.53/$1.46 per employee hour).

65. Alice H. Munnell et al., *Recruiting and Retaining High-Quality Workers: Do Pensions Matter?* Ctr. for Ret. Res. at Boston Coll., Working Paper 2015-1 (2015) (explaining that reductions in benefits could lead to a reduction in the maintenance of a high quality work force).

66. *See generally* Erik Carter, *Choosing Between A Defined Benefit and Defined Contribution Retirement Plan*, FORBES (Sept. 16, 2018, 10:00 AM), https://www.forbes.com/sites/financialfinesse/2018/09/16/should-you-choose-a-defined-benefit-or-defined-contribution-plan/#742d64c567ca.

67. *See* Barbara A. Butrica et al., *The Disappearing Defined Benefit Pension and its Potential Impact on the Incomes of Baby Boomers*, SOC. SECURITY ADMIN., https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html (last visited July 2, 2018).

c. The employer and the employee contribute to the plan during the period of employment.

d. An employer-managed fund for paying future retirement benefits is established with contributions to pre-fund future pension payments.

e. The employer manages the pension fund investing the fund assets to grow them over time in order to reach a level sufficient to pay future promised pension benefits.

f. Employer assumes the risk that contributed fund assets and their investment growth will be adequate to pay future pension liabilities when they must be paid.

2. Defined Contribution Retirement Plan

a. This format represents the modern trend in private and public retirement benefit plans and is found in § 401(k), § 403(b), and § 457 plans.

b. The employer and the employee make annual contributions to the employee's retirement fund often set as a fixed percentage of the employee's annual salary.

c. The retirement fund investment decisions are made by the employee without control or responsibility of the employer.

d. The employee generally has a portable retirement account that follows the employee's employment and may be combined other with similar accounts.

e. The employee's retirement income is determined by the amounts contributed over time, the retirement fund investment choices, the length of pre-retirement employment and the long-term growth of the retirement fund investments.

f. Once annual contributions have been funded by the employer, there is no continuing employer obligation to guaranty any retirement benefit amount and no employer responsibility for providing future retirement income.

Modelled after the early private sector industrial corporation pensions, the public workers have been covered with the defined benefit pension described in the discussion above. Generous provisions obligating the governmental employers to pay lifetime retirement pensions often with health insurance benefits have made the defined benefit pension a costly employment benefit. As indicated, the employer bears all of the financial risk when offering employees defined benefit pensions.

D. A Snapshot of Public Workers

In May 2018 the American civilian labor force numbered approximately 161.5 million people with about 155.5 million in full or part-time employment.[68] Of this number, 153 million were employed as non-agricultural salaried workers in full-time jobs with another 2.3 million agricultural workers.[69] State and local government employees numbered 19.5 million representing about 13% of the 153 million civilian employees;[70] more than half of them worked as educators, school administrators and non-instructional support personnel, reflecting the large employment in K-12 education.[71] Other job categories employed by state and local governments in large numbers ran the gamut of police and corrections officers, firefighters, hospital and public health employees, transportation workers and social workers.[72] In our daily lives we come into contact with many of these government workers who often supply vital services necessary to the normal functioning of modern life.

The main characteristics of this work force differ from those in the private sector in a number of interesting ways. The personal attributes of these government workers paint a picture of an older, more female, more racially and ethnically diverse and more highly educated

68. Bureau of Lab. Stat., U.S. Dep't of Lab., *Employment Situation Summary, tbl.B* (2018), https://www.bls.gov/news.release/empsit.nr0.htm.

69. *Id.* at tbl.A-8.

70. U.S. Bureau of Lab. Stat., The Employment Situation - June, 2018, USDL-18-0916, Establishment Data Table B-1 (2018). Nearly 8 million people worked in local government education while 2.4 million were employed in education at the state level. The U.S. collectively spends $664.7 billion per year on K-12 education with California, New York and Texas leading the way. *See* U.S. Census, 2016 Public Elementary-Secondary Education Finance Data, Table 1. Summary of Public Elementary-Secondary School System Finances by State: Fiscal Year 2016 (last visited on 07/04/18 at https://www.census.gov/data/tables/2016/econ/school-finances/secondary-education-finance.html.; Education, both public and private, is a major employer with nearly 13.8 million workers in 2017 representing almost 9% of the American workforce. *See* U.S. Bureau of Lab. Stat, Labor Force Statistics for the CPS, chart 18b (last visited on 07/04/18 at https://www.bls.gov/cps/cpsaat18b.htm).

71. U.S. Bureau of Lab. Stat., Employment Situation Summary, June 1, 2018, USDL-18-0916, Table A-1, (last visited on 07/04/18) The lion's share of these educational employees work at the local government level (7.9 million) with 2.4 million serving at the state level. *Id. See also "Where do state and local government employees work?" See* U.S. Census Bureau, 2013 Annual Survey of Public Employment & Payroll., (last visited on 07/04/18), https://www.census.gov/content/dam/ Census/library/visualizations/2015/econ/g13-aspep-visual.pdf).

72. *Id.* Educational workers dominate public employment constituting 10 times the number of the next numerous category- workers who work in hospitals.

work force than that which is found in the private employment. In terms of age, 52.1% of local government workers and 49.7% of state workers were between the ages of 45 and 64 while 42.4% of private sector employees were in this age range.[73] Considering public education, the median age of K-12 teachers was 44.7[74] with 25.5% of them being 55 years old or older.[75] By comparison, the overall median age of all American workers was 42.2 years with 23% being 55 years old or older.[76] Public workers are disproportionately female (57.7%), a fact perhaps reflecting the emphasis of public school workers in local employment, while overall 46.9% of American workers are female.[77] As for racial characteristics, full-time public school workers are 82.7% are white, 11.8% are African American, and 13% are Hispanic while overall U.S. employees are 78.4% white, 12.1% African American, and 16.9% Hispanic.[78] In terms of educational attainment, over three quarters of government workers have a college degree or some college education with 50.9% possessing a college degree and an additional 26.7% with at least some college education.[79] As a whole, private sector workers have significantly fewer college degrees with 35% in 2015.[80]

One important difference between the two groups of employees is the comparison in cash compensation where in 2017 state and local government employees had an average salary of $53,352 while private sector workers had an average of $55,338.84.[81] Differences between

73. Gerald Mayer, *Selected Characteristics of Private and Public Sector Workers 8*, FEDERATION OF AMERICAN SCIENTISTS (Mar. 21, 2014), https://fas.org/sgp/crs/misc/R41897.pdf. Female local government workers also were found to have a statistically greater longevity than private sector employees but that was largely attributed to those workers having a higher level of education which is positively correlated to longer life. Alicia H. Munnell, *Does Mortality Differ Between Public and Private Sector Workers*, CTR. FOR RET. RES. AT B.C., fig.2 (2015), http://crr.bc.edu/wp-content/uploads/2015/05/slp_44.pdf.

74. Joshua Franzel, *The State and Local Workforce: Analysis and Forecast*, GOV'T FIN. REV. 46, 47 (June 2015), http://www.gfoa.org/sites/default/files/615GFR46.pdf.

75. *Labor Force Statistics from the Current Population Survey- Household Data Annual Averages*, U.S. BUREAU OF LAB. STAT., tbl.18b (2018), https://www.bls.gov/cps/cpsaat18b.htm.

76. *Id.*

77. John Schmitt, *Wage Penalty for State and Local Government Employees* 3, CTR. FOR ECON. AND POL'Y RES. (May 2010), http://cepr.net/documents/publications/wage-penalty-2010-05.pdf.

78. *Id.*

79. Schmitt, *supra* note 78, at 3.

80. *Comparing the Compensation of Federal and Private Sector Employee 2011–2015* 6, CONGRESSIONAL BUDGET OFFICE (Apr. 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52637-federalprivatepay.pdf.

81. U.S. BUREAU OF LAB. STAT, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES TABLES PRIVATE OWNERSHIP, STATE GOVERNMENT, AND LOCAL GOVERNMENT (2016) available at https://www.bls.gov/cew/cewbultncur.htm. The state and local government annual average repre-

public and private employees continue to be observed when non-cash benefits are considered but the overall balance shifts in favor of the public workers where benefits, including those for retirement, make a noticeable difference.[82] Ninety-one percent of state and local employees have access to pension plans and 80% participate with a large number having access to defined benefit programs and participating.[83] Currently, there are 14.7 million contributing members and 6.3 million current beneficiaries to state and local pension systems.[84] By comparison, in the private sector, only 48% of employers offer any retirement benefits with most defined contribution plans.[85] With these numbers in mind, it is not surprising that current workers, both public and private, have serious concerns about their post-retirement living standards.[86]

---

sents a 40%/60% averaging of state compensation ($57,168) and local compensation ($48,440). U.S. Bureau Of Lab. Stat, Quarterly Census of Employment and Wages Tables Private Ownership, State Government and Local Government (2017) available at https://www.bls.gov/cew/cewbultn17.htm. The state and local government annual average represents a 40%/60% averaging of state compensation ($58,802) with local government compensation ($49,720) in proportion to the number of workers. *Id.*

82. In 2017, full time private sector workers had total hourly compensation of $33.26 per hour worked with state and local government workers earning $48.06 per hour worked. The major differences was in benefit costs earned where the public workers had 37.3% of their compensation in benefits while the private employees had only 30.4% of their compensation benefits. This was a substantial difference resulting in $7.83 per hour more compensation public workers. *See* U.S. Bureau Of Lab. Stat, Employer Costs for Employee Compensation-June, 2017 available at https://www.bls.gov/news.release/archives/ecec_09082017.pdf.

83. U.S. Bureau Of Lab. Stat, Retirement benefits: Access, participation, and take-up rates (Mar. 2017), https://www.bls.gov/ncs/ebs/benefits/2017/ownership/govt/table02a.htm. A large part of the remainder have access to defined contribution programs.

84. Phillip M. Vidal, *Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Brief: 2016*, U.S. Census Bureau 2 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/econ/g16-aspp-sl.pdf. Average teacher pensions vary greatly in both average amount and the number of teachers who collect them. *See* Leslie Kan, *What is the Average Teacher Pension in My State?*, Teacher Pensions Blog, https://www.teacherpensions/org/blog/what-average-teacher-pension-my-state.

85. U.S. Bureau Of Lab. Stat., Benefits Survey (2017), https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table01a.

86. A recent appraisal summarized the problem in these terms:

> The bottom line is that half of today's households will not have enough retirement income to maintain their pre-retirement standard of living, even if they work to age 65 and annuitize all their financial assets, including the receipts from a reverse mortgage on their homes. This analysis clearly confirms that many of today's workers need to save more and/or work longer to achieve a secure retirement.

Alicia H. Munnell, Wenliang Hou, & Geoffrey T. Sanzenbacher, *Nat'l Retirement Risk Index Shows Modest Improvement in 2016*, Ctr. for Retirement Research at Boston College, at 7 (2018), available at http://crr.bc.edu/wp-content/uploads/2017/12/IB_18-1.pdf.

III. THE PERILS OF EMPLOYER OVERPROMISING AND WORKER OVERRELIANCE— THE GROWING ANXIETY

In the struggle between workers and their employers, employer action eliminating or cutting back on pension promises has also been a recognized feature of American labor history in the private sector with industrial corporations. As a result, this has been a serious problem in the private sector over time.[87] The danger of failing pension systems is not only an American problem since this important issue appears to be global in nature affecting workers in many countries of the economically-developed world.[88] The American 20th century public policy response to this problem was to impose national private sector standards and to create federally-managed insurance fund to partially cover the risk of failed company plans. In 1974, Congress responded to these private sector problems by enacting the Employment Retirement and Income Security Act (ERISA), a federal law which regulated, and to a limited extent, insured the payment of private sector pensions.[89] By design, ERISA applied only to the private sector and not to state and local governmental pensions. As a conse-

87. Significant private pension failures had been noted in the early 20th century. A major two volume study of the private sector pension systems in 1932 eerily anticipated the present public pension shortfall situation:

> There can be no doubt concerning the importance of the subject of this study. In no other field of industrial relations has management assumed a financial burden at all comparable with the liabilities of pension systems. Their total, mounting into billions, is even more formidable than the mere figures indicate, for many corporations not fully aware of the cumulative character of pension costs are not establishing adequate reserves against future payments. Not a few have already suffered from this lack of foresight and have been forced to deliberalize their plans . . . .

Bryce M. Stewart, *Foreword* to MURRAY WEBB LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA (1932). Now it is state and local government employers that are attempting to "deliberalize" their plans.

88. In 2016, Citibank estimated that the total value of the unfunded or underfunded government pensions for 20 OECD nations is $78 trillion which is nearly twice the $44 trillion national debt of those same countries. Citi Global Perspectives & Solutions, *The Coming Pensions Crisis* 3 (2016), available at https://www.citivelocity.com/citigps/coming-pensions-crisis/.

89. Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ERISA requires plans to provide participants with plan information including important information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation. U.S. DEPT. OF LABOR, Employee Retirement Income Security Act (ERISA), https://www.dol.gov/general/topic/retirement/erisa (last visited July 14, 2018). In 2018, the PBGC guarantees private pension plans up to a maximum of $65,045 for a single employer plan and $12,870 for multiemployer plans. *See* PENSION BENEFIT GUARANTY CORPORATION, Maximum Monthly Guaranty

quence, this federal law does not protect any pension of these public workers and they are left to whatever state law or constitutional protections that might exist.

Employer-sponsored retirement benefits exist in both the private and the public sectors. However, employers are not legally required to offer pensions and pension coverage in the private sector has declined over the last forty-five years.[90] Public employee pensions have been more stable. Currently, approximately 70% of American workers have access to retirement income plans offered by their employers.[91] However, overall only 54% of these employees actually decide to participate in the plans that are offered.[92] The result is that only 38% of all American civilian workers actually choose to participate in their employer's retirement plans with most workers having access to defined contribution plans.[93] Only 33% of private sector employees participate in these plans, while 73% of state and local government employees participate in their plans.[94] This striking disparity between private and public sector employee behavior is best explained by the fact that public employees have more generous defined benefit pensions that are perceived to be good retirement income sources. Current changes to public pension systems limiting these benefits or making them more difficult to obtain stokes worker anxiety and motivates employee groups to challenge the shifts in policy.

Increasing human longevity extending life expectancy and the need for adequate post-employment income combined with inadequate retirement trust funds build-up has led to numerous discouraging predictions of the sufficiency of pension funds to meet their obligations. Most often the national media highlights the future exhaustion of trust fund assets in the two large federal retirement pro-

Tables, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee (last visited July 02, 2018).

90. Alicia H. Munnell, Rebecca Cannon Fraenkel, & Josh Hurwitz, *The Pension Coverage Problem in the Private Sector*, Center for Retirement Research 2 (2012), http://crr.bc.edu/wp-content/uploads/2012/09/IB_12-16-508.pdf (noting the decline in participation from 50% in 1979 to 42% in 2010).

91. U.S. Bureau of Labor Statistics, Employee Benefits in the United States – March 2017, (2017), https://www.bls.gov/news.release/archives/ebs2_07212017.pdf.

92. *Id.* at 2.

93. *Id.* at Table A.

94. U.S. Bureau of Labor Statistics, Economics News Release, Table 1. Retirement Benefits: Access, Participation, and Take Up Rates (March, 2017), https://www.bls.gov/news.release/ebs2.t01.html.

grams: Social Security and Medicare.[95] Resolution of this national retirement policy has yet to be resolved. As part of the growing concerns about income inequality, the possibility of inadequate retirement income for large groups of Americans is increasingly a source of anxiety. Confidence that workers could retire at predetermined ages and be able to live their post-employment life with dignity and economic security has recently been shaken by the fear of having inadequate retirement income and suffering higher future medical costs.[96]

Americans across the political divide are unified both in their anxiety about economic security during their retirement years[97] and their frustration with the lack of political leadership in resolving this important issue.[98] Many factors help to explain why Americans have this insecurity about retirement income although much of it is attributable to having insufficient savings. However, the statistics reveal two different groups of American retirees: those with retirement savings and those without. Recent research by the U.S. GAO has indicated that 52% of American households aged fifty-five and older have no retirement savings in a retirement account or an IRA, but rely on Social Security for most of their retirement income.[99] The other 48% of this age group having some retirement savings has, on average, $109,000 in savings which generating $409 per month at current rates for a sixty-five year old.[100] More depressing is the fact that 41% of all American households in this age range have absolutely no retirement savings and other financial resources.[101] With so little retirement savings, this 40% of the older American population views Social Security

95. U.S. Social Security and Medicare Boards of Trustees, A Summary of the 2017 Annual Reports 1 (2017), https://www.ssa.gov/oact/TRSUM/tr17summary.pdf (noting that depletion of existing trust funds is predicted to occur in 2035 for the Old Age and Survivors Insurance, 2028 for Disability Insurance, and 2029 for Medicare Hospital Insurance).

96. Suzanne Woolley, *Retirement Dread Is Replacing the American Dream*, Bloomberg-Personal Finance (July 18, 2017), https://www.bloomberg.com/news/articles/2017-07-18/retirement-dread-is-replacing-the-american-dream (noting the anxiety caused by limited Social Security trust funds, higher future medical costs and general income inequality).

97. A recent public opinion research study found that 76% of respondents were concerned about economic conditions affecting their ability to have a secure retirement and that 88% perceived that the nation faces a "retirement crisis." Diane Oakley & Kelly Kenneally, *Retirement Security 2017: A Roadmap for Policy Makers*, Nat'l Inst. on Ret. Sec. 5 (2017), https://www.nirsonline.org/wp-content/uploads/2017/06/2017_opinion_nirs_final_web.pdf.

98. *Id.* at 9 Fig. 3; *Id.* at 10 Fig. 4.

99. U.S. Gov't Accountability, GAO-15-419, Retirement Security: Most Households Approaching Retirement with Low Savings (2015), available at https://www.gao.gov/assets/680/670153.pdf.

100. *Id.*

101. *Id.* at 9. This group has a median net worth of $21,000 with only $1,000 in non-retirement financial resources.

payments as its main retirement income although in 2018 the average Social Security retirement payment was $1,412.14 per month or $16,945 per year.[102] As it approaches retirement age, the economic prospects for this group planning to rely on Social Security engenders justifiable anxiety. In this anxious environment, those Americans currently having employer-sponsored retirement pensions view them as a crucial lifeline protecting their economic futures. Pension reforms cutting future retirement income just makes matters worse.

A. For State and Local Government Workers, How Bad is the Problem?

Even more uncertain is the adequacy of the retirement plan funds to pay out the future benefits. Employers and employees both contribute to a trust fund to pay these benefits, but these funds are not adequate, by themselves, to pay the promised benefits if trust fund investment gains do not consistently add to the fund. While it is possible for governments to pay employee pension costs on a "pay as you go" system, nearly all states have adopted a "trust fund" method of making annual contributions into a fund that is invested in assets for growth. The pension trust fund, usually designed according to actuarial standards, is then expected to grow with the reinvestment of trust fund profits. These growth assumptions have been based upon historic investment returns that are assumed to continue for decades[103] enlarging the size of the trust fund to pay future pension.

Unfortunately, due to the underfunding of current employer contributions and, more importantly, the earning of lower than expected financial returns on trust fund assets, many of these pension trust funds have not steadily risen in value needed to pay promised benefits.[104] Although investment returns vary from year to year based on

102. This is the average amount paid to retirees. *See* Social Security Administration, Monthly Statistical Snapshot, December 2018, at Table 2, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/.

103. A study of 649 the largest pension systems in the U.S. found that the average of expected returns used by these systems was 7.6%. This assumption assumes that state and local governments can invest money today, obtain an average of 7.6% that would keep compounding and that it would double in value every 9.5 years. *See* Rauh, *supra* note 8, at 1–2. However, there can be year-to-year variations in the retirement trust fund rates of return. For instance, the North Carolina Retirement System reported a 13.5% return on its $98.3 billion of assets in 2017. *See* Hazel Bradford, *North Carolina Retirement Systems Sees 13.5% Return in* 2017, Pension & Investments (Feb. 6, 2018), https://www.pionline.com/article/20180206/ONLINE/180209869/north-carolina-retirement-systems-sees-135-return-in-2017.

104. The U.S. Census Bureau reported in June, 2016 that the 100 largest state and local government employee pension systems had cash and financial assets totaling $3.25 billion in the

investment choices, managerial skill and market performance, each pension system makes long term assumptions on expected investment returns believed to be necessary to meet future obligations. Underperformance in any one year or in a number of years can set the growth of the fund back below asset levels that were assumed and that are needed to reach future pension pay-out levels.[105] When this happens these funds are said to carry substantial "unfunded liabilities" meaning that the retirement trust fund has not accumulated sufficient assets to pay future benefits even assuming that investment growth actually rebounds to assumed rates.[106]

Once the fund falls below the assumed growth curve, it must be supplemented with additional contributions to bolster the trust fund, or it must achieve investment results above, or even well above, the plan's assumed rate of growth. The trust fund must greatly increase in value or else it will not be large enough to meet future payments. Should this negative underperformance pattern continue, the expected retirement income generated by these trust funds could be insufficient to pay the full, promised benefits to retirees.[107] When this looming pension unfunded liability is considered in conjunction with governmental debt service costs on usual borrowing and other, non-pension benefits, the results in some states have appeared to be finan-

first quarter of 2016. As large as this appears to be, it represents growth of only .1% over the prior quarter and was 4% less than the assets held a year earlier. With expected rates of growth commonly assumed to be from 7% to 8% over 20 to 30 year periods, these low returns could spell disaster. U.S. DEPARTMENT OF COMMERCE CENSUS BUREAU, G16-QSPP1, SUMMARY OF THE QUARTERLY SURVEY OF PUBLIC PENSIONS FOR 2016: Q1 (2016), available at https://www.census.gov/content/dam/Census/library/publications/2016/econ/g16-qspp2.pdf.

105. Fluctuation of investment returns can be highly variable. One recent report analyzing 164 state and local government pension funds indicated that returns for 2017 were 7.8% while those for 2016 were only 1.5%. *See* NATIONAL CONFERENCE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS, 2017 NCPERS Public Retirement Systems Study 20 (2018), https://www.ncpers.org/files/2017%20NCPERS%20Public%20Retirement%20Systems%20Study%20Report%20-%20Final.pdf.

106. Research has noted that jurisdictions with significant unfunded future pension liabilities "assume higher portfolio returns. . .and are more likely to do so through higher inflation assumptions rather than higher real returns." Alexsandar Andonov & Joshua Rauh, *The Return Expectations of Institutional Investors*, SSRN (Dec. 28, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091976 (criticizing pension fund managers' assumptions about both expected rates of return from unreliable historical patterns and the use of exaggerated future inflation expectations).

107. Whether a municipality would honor its pension commitments has surfaced in the small number of Chapter 9 bankruptcies in Detroit, Michigan, Stockton, San Bernadino, Vallejo, California, and Jefferson County, Alabama. *See* James E. Spiotto, *How Municipalities in Financial Distress Should Deal with Unfunded Pension Obligations and Appropriate Funding of Essential Services*, 50 WILLAMETTE L. REV. 515, 520 & 545–48 (2014). Chapter 9 of the federal Bankruptcy code only provides relief for municipalities, not states.

cially overwhelming.[108] Many of these jurisdictions have attempted to reckon with this looming disaster by adopting a range of "pension reform" tactics.

The seriousness of the pension funding shortfall is best understood by focusing on the structure of most state and local government pension systems. Traditionally, these plans have adopted the defined benefit (DB) method of pensions where the employer promises a level of retirement income based on longevity on the job, average final salary and an investment percentage. This three-part multiplication defines a lifetime annuity for the retiring worker and obligates the governmental employer to have sufficient funds available to make all payments. This format puts the responsibility of future performance in paying retirement income squarely on the employer. Because it is not structured as a "pay-as-you-go" payment system, government pension planning also entails a considerable amount of estimation uncertainty and risk. All retirement systems employ actuarial estimation to determine their future pension payment liabilities and the sufficiency of their retirement trust funds to provide timely payments.

The structure of the defined benefit retirement income system focuses on a superficially simple calculus, which combines annual employer and employee contributions to a managed retirement trust fund. This money is invested in a range of financial and other assets. Investment income and capital gains made by these assets provide the long-term expansion that will enhance the trust fund's size and will allow for payment of future pensions. Long, sustained investment earnings for retirement trust funds are crucial to the viability of this system. A recent study put the relative effect of employer and employee trust fund contributions as well as trust fund investment returns into stark perspective. The report analyzed public pension sources of revenue from 1986 through 2015 and concluded that these trust funds totaled $6.3 trillion in 2015 with a) 12% coming from employee contributions, b) 25% given by employers, and c) 63% generated by investment earnings. The striking conclusion of this study was that investment performance was twice as important to pension trust fund growth as employer and employee contributions combined.

108. Alicia H. Munnell & Jean-Pierre Aubry, Will Pensions and OPEBS Break State and Local Budgets?, Ctr. for Retirement Res., 4–5 figs. 5, 6, & 7 (2016), available at http://crr.bc.edu/wp-content/uploads/2016/10/slp_51_rev.pdf (illustrating the wide variation of required payments for pensions, OPEBs and debt service as a percentage of state revenue in FY2014).

With nearly two-thirds of the trust fund's future size being derived from their investment yield, managers must be consistently successful over decades and must reinvest gains for the high compounded results needed to pay pensions. Any underperformance from predicted levels of return would result in inadequate funds to fully pay all pension claims when due.

The recent pension reform legal and policy changes have been adopted in the face of some alarming financial predictions. In 2017, state and local government retirement systems controlled $3.96 trillion in financial assets in trust funds for worker's pensions.[109] However, the Federal Reserve calculated that nationwide these pension entitlements were underfunded by 32% in 2017.[110] Although pension liabilities differ from state to state, the highest unfunded liabilities exist in New Jersey, Illinois, Alaska, Kentucky and Connecticut.[111] Some analysts fear that existing retirement trust funds in a number of states may be so seriously underfunded that they may not be able to provide the promised benefits.[112] If that were to occur either retirement benefits would have to be cut or future budgets would have to pay retirees the missing portion. Although the health of state retirement plans is unevenly distributed, the overall shortfall is truly astounding in degree-reaching trillions of dollars.[113] In some states, these shortfalls are so large that the financial health of the entire state and local govern-

109. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FINANCIAL ACCOUNTS OF THE UNITED STATES: FIRST QUARTER 99 tbl. L. 120 (2017).

110. *Id.* A study by the Society of Actuaries analyzed 130 state and large city public pension plans covering 27 million workers and retirees and concluded that the unfunded liability in this sample was 27% in 2014. Lisa Schilling & Patrick Wiese, U.S. PUBLIC PENSION PLAN CONTRIBUTION INDICES, 2006–2014, SOCIETY OF ACTUARIES (2017).

111. In New Jersey and Illinois, the unfunded liability reached $12,656 and $12,413 respectively for each and every person living in those states. On the other end of the spectrum, residents of North Carolina and Oregon had per capita unfunded liabilities of $73 and $43 in the same year. Wisconsin and South Dakota actually had retirement trust fund surpluses. *See* Chris Edwards, FISCAL POLICY REPORT CARD ON AMERICA'S GOVERNORS 2016 10–11 tbl. 2, CATO INST. (2016).

112. Collectively, state and local government pension obligations represent a huge future liability. Some recent estimates have estimated the future unfunded liability of state and local government pensions to be $4 trillion and some believe that pension liabilities have been greatly underestimated. Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1 (2010) (Viewing these pension promises as deferred compensation and as debt, this number dwarfs all existing state and local bond liability by a 4 to 1 ratio).

113. *See* Elizabeth Campbell, *Reckoning Comes for U.S. Pension Funds as Investment Returns Lag*, BLOOMBERG (Sept. 21, 2016), https://www.bloomberg.com/news/articles/2016-09-21/reckoning-comes-for-u-s-pension-funds-as-investment-returns-lag (unfunded liability of state and local government pension systems estimated at $1.9 trillion and predicted to grow with continued low interest rates).

ments has also been called into question,[114]with predictions of catastrophic economic and social effects without changes in current policies.[115] With pension expenses growing so quickly legislators see pension expenses as crowding out other state and local budget priorities and devouring huge percentages of public revenues.

The second uncertain aspect of pension plan design is the amount and duration of the retirement pension payments. The expansion of the trust fund caused by investment income is simultaneously reduced by the financial benefits paid out to retiring employees and by the expenses incurred in managing the fund. As simple as this system may appear, these defined benefit retirement plans promise specific financial benefits whose size is difficult to estimate. There is a great deal of uncertainty in these important financial plans. How long will employees work? What will be their final compensation level? How long will retirees live? All of these factors combine to make meeting the government's future pension obligations a daunting estimation problem.

Finally, as the public workforce ages and reaches retirement age, the adequacy of state and local governmental retirement systems will be challenged as the financial demands of paying benefits mount. Complexity is added to this system by the long time period separating the contributions to the fund from the withdrawals in the payment of benefits. Retirement funds pay core benefits in the form of a pension payments payable as a monthly annuity and often this income support is increased through post-retirement benefit adjustments called cost of living increases. The entire retirement system is predicated on the idea that an adequately-funded trust fund will grow to pay these benefits. With the financial collapse in 2008–2009 shrinking trust funds, the sustainability of the current system was certainly in doubt.

---

114. The State of Illinois presents the most vivid current conflict between a state's governor and legislature with its employee unions and its Supreme Court. *See* Bruce J. McNeil & Jack E. Karns, *Illinois Supreme Court Deal Says to the Government: The Price is Right for the Pension Prize*, J. PENSION PLANNING & COMP. 35–65 (2015). Illinois is not alone with an array of state legislatures have embarked upon highly divisive reform strategies. *See e.g.*, Brian Eason, *Colo. Lawmakers Face Their Most Costly Issue in Years*, THE DENVER POST at A1, March 13, 2018; Tom Loftus, *Bevin Posts Message to Make Case for Pension Bill*, THE COURIER-JOURNAL (Mar. 18, 2018), https://www.courier-journal.com/story/news/politics/2018/03/18/kentucky-gov-matt-bevin-social-media-pension-bill/436152002/

115. George F. Will, *America's Utterly Predictable Tsunami of Pension Problems*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/opinions/americas-utterly-predictable-tsunami-of-pension-problems/2017/02/22/1e5de00e-f869-11e6-9845-576c69081518_story.html?utm_term=.1695e8a93b6d (claiming that each American household is responsible for $19,000 government pension debt).

IV. RECENT STATE POLICY RESPONSES TO FEARS OF PENSION TRUST FUND INADEQUACY

States and local governments have begun to recognize the serious deficiencies in their retirement systems and the funds dedicated to pay future benefits. They have started to take action. Over the last several years a large number of states and localities have begun to address these difficult questions through the adoption of a range of measures subsumed under the general heading of "pension reform."[116] Reflecting the universality of this social and economic problem, similar reform measures have been recently proposed in other nations as well.[117] These changes are widespread throughout the nation with a recent study of nearly 260 state and local government pension plans finding that from 2009 through 2014, 74% of state plans and 57% of large local plans reduced retirement benefits and/or raised employee contributions.[118] Most frequently, new employees have been affected most by these program changes, although in some places current workers also have had their retirement plans changed.

Many different pension reform policies have been adopted across the United States. These retirement benefit changes run the gamut from making technical retirement calculation adjustments to the imposition of whole-scale revisions to existing retirement systems. The most common reforms have fallen into the following patterns:

1. Requiring current employees to make higher rates of employee pension contributions and applying higher rates to new hires. Public employees contribute a portion of their salaries to the state's retire-

116. *See* Jeffrey R. Brown, *Reforming Public Pensions Subject to Political and Legal Constraints: The Illinois Experience*, 67 NAT. TAX REV. 941–64 (2014); Maria O. Hylton, *The Case for Public Pension Reform: Early Evidence from Kentucky*, 47 CREIGHTON L. REV. 585–609 (2014); Andre S. Digou, *A View of the Rhode Island Pension Landscape: The Potential Reform of Local Pension Plans Under the Preemption Doctrine*, 19 ROGER WILLIAMS L. REV. 740–66 (2014). *See also* THE PEW CHARITABLE TRUSTS, ROADS TO REFORM: CHANGES TO PUBLIC SECTOR RETIREMENT BENEFITS ACROSS STATES 1 (2010), http://www.pewtrusts.org/en/research-and-analysis/reports/2010/11/11/roads-to-reform-changes-to-public-sector-retirement-benefits-across-states.

117. *See, e.g.*, Lans Bovenberg & Raymond Gradus, *Reforming occupational pension schemes: the case of the Netherlands*, 18 J. ECON. POL. REFORM 244–257 (2015); Richard Disney, *Pension Reform in the United Kingdom: An Economic Perspective*, 237 NAT'L. INST. ECON. REV. R6–R12 (2016).

118. Jean-Pierre Aubry & Caroline V. Crawford, STATE AND LOCAL PENSION REFORM SINCE THE FINANCIAL CRISIS, CTR. FOR RETIREMENT RES. 3 (2016). The major plan changes were increased employee contributions to pension plans, reduced cost of living adjustments in received pensions, calculations for the final average salary, reduction in the benefit factor used to calculate pension benefits, increasing the retirement age or pension vesting time, and the shift to a defined contribution or hybrid system of pensions.

ment fund and this contribution is matched by a contribution made by the state or local government employer. Pension reforms have shifted more of the costs of funding the governmental defined benefit retirement plans on to the employees with legislation mandating increased deductions from employee salaries in differing amount.[119] In some instances, these higher retirement benefit costs were imposed solely on new hires and not on current workers; but in some jurisdictions, they were charged to both categories of workers. Some jurisdictions totally abandoned defined benefit retirement plans for newly hired workers, replacing them with 401k-like defined contribution systems.[120]

2. Requiring increased age and service requirements before pension eligibility for new hires and existing workers. Government pensions require workers to satisfy minimum age and length of service requirements before they can be eligible for receiving retirement benefits. Recent changes have extended those minimum requirements for current workers making the terms required for earning the pensions more onerous and longer to achieve. New hires have also been subject to lengthier "vesting" requirement establishing the minimum working time needed for being determined eligible for even a small pension.

3. Reducing pension benefits by reducing the defined benefit pension multiplier "factor." Defined benefit pensions are usually determined by multiplying three elements together: the number of years of work, the average final salary, and the pension multiplier factor. The pension multiplier is a percentage that is multiplied by the number of years of service resulting in a percentage of the final average salary that will be received as the pension. This final element is described with many different terms, but it has the potential to greatly affect the

119. *See generally* PENSION LITIGATION TRACKER, http://pensionlitigation.org/category/all/topics/increased-employee-contribution/ (Last visited Jan. 27, 2019); Christina McFarland, *Making Informed Choices About Public Sector Pension Plans,* NAT'L LEAGUE OF CITIES, https://www.nlc.org/sites/default/files/2017-03/MakingInformedChangestoPublicSectorPensionPlans.pdf. On the federal level, the proposed FY2019 budget proposal includes a new requirement that federal employees contribute 6% of their salary to their federal pensions; Eric Yoder, *Budget Provides No Raise, Targets Retirement Benefits for Employees*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/02/12/budget-provides-no-raise-targets-retirement-benefits-for-federal-employees/?utm_term=.6b31039ba953.

120. *See* Tom Loftus, *Kentucky pension crisis: Are 401(k) Plans the Solution*, THE COURIER-JOURNAL (Sept. 15, 2017, 6:17PM), https://www.courier-journal.com/story/news/politics/2017/09/15/kentucky-pension-crisis-401-k-plans-solution/626423001/.

size of the defined benefit pension received by the employee.[121] As the percentage rises, the final pension payment increases and when it falls the final pension decreases. Different categories of employees may be awarded different multiplier factors as a reflection of their job characteristics or their political power.

4. Increasing the number of years to determine the employees "average final salary." Since most defined benefit pensions are determined by multiplying the number of years of credited employment by the average final salary, determining this second factor can affect the resulting pension payments. Many states had previously adopted a three year "average final salary" metric which computed an average over a continuous thirty-six month period with the highest compensation.[122] To lower future pension benefits, some states have increased the averaging period for the "average final salary" to five years which has had the effect of lowering the average final salary by adding lower salary years to the expanded average.[123] By reducing this factor in the three part calculus, the final annual pension would be made lower.

5. Disallowing employees from using accrued sick leave, vacation leave or overtime pay to augment their number of years of work or final average income. Some pension systems have allowed employees to receive pension credit for unused leave and final year's overtime pay to increase their income and extend their work time in the final years of employment. This has been called pension "spiking" and has been widely targeted as one form of pension abuse where workers

---

121. *See, e.g.*, PHILADELPHIA BOARD OF PENSIONS AND RETIREMENT, SUMMARY PLAN DESCRIPTION (2015) https://www.phila.gov/pensions/PDF/Summary%20Plan%2010.pdf (last visited Jan. 29, 2019); TEACHER'S RETIREMENT SYSTEM KENTUCKY, https://trs.ky.gov/active-members/membership/plan/ (last visited Jan. 27, 2019).

122. Pennsylvania's retirement system employs a 3-year averaging period. *See* EMPLOYEES RETIREMENT SYSTEM, MEMBER HANDBOOK: RETIREMENT BENEFIT CALCULATION STATE 11 http://sers.pa.gov/pdf/SERS_Member_Handbook.pdf (last visited Jan. 29, 2019). Some states like New York have multiple final average salary averaging periods for different "tiers" of employees. *See NYSLRS Basics: Final Average Salary,* NEW YORK RETIREMENT NEWS (Sept. 27, 2017), http://nyretirementnews.com/nyslrs-basics-understanding-final-average-salary/. Contrary to popular belief, Congressmen and Senators draw their pensions with this same 3-year average and they must have at least 5 years of service to draw any pension. *See* Katelin P. Isaacs, CONG. RESEARCH SERV. RETIREMENT BENEFITS FOR MEMBERS OF CONGRESS, CRL REPORT RL 30631 (Dec. 5, 2017).

123. The FY2019 proposed federal budget changes the average final salary calculation from 3 years to 5 years and the elimination of Cost of Living Adjustments. Ian Smith, Substantial Cuts to Federal Employee Benefits Proposed in FY 2019 Budget, FEDSMITH (Feb. 12 2018), https://www.fedsmith.com/2018/02/12/substantial-cuts-federal-employee-benefits-proposed-fy-2019-budget/.

have been able to substantially raise their final average income above their actual earnings.[124] This has been disallowed or limited.

6. Reducing or eliminating pension cost of living (COLA) adjustments.[125] Government pension benefits often are supplemented by cost of living adjustments that annually raise pension cash payments to keep them in line with inflation. The cost of living adjustment, often tracking the CPI, raises retiree pension payments each year and thereby increases the long-term costs to the pension system.[126]

The stakes in this public policy conflict could not be higher having serious consequences for government employees and for taxpayers. How will governmental employers deal with their long-term employees who have served them well and who have relied on earlier promises regarding their retirement pensions and other benefits.[127] A reciprocal problem exists for state legislators and policy makers since finding financial resources to honor these promises made by their predecessors may pose serious questions since meeting existing pension promises may impose higher present and future costs diverting

124. *See, e.g.*, Natanya Friedheim, *Pension Spiking Costs Taxpayers Millions — Now The Push Is On To Stop It*, HONOLULU CIVIL BEAT (Sept. 15, 2017), http://www.civilbeat.org/2017/09/pension-spiking-costs-taxpayers-millions-now-the-push-is-on-to-stop-it/; Mary Jo Webster, *Public Pension 'Spiking': Overtime Hours Soar for St. Paul Fire Supervisors*, TWIN CITIES (Dec. 8, 2012), https://www.twincities.com/2012/12/08/public-pension-spiking-overtime-hours-soar-for-st-paul-fire-supervisors/; NORTH CAROLINA DEP'T OF STATE TREASURER, NORTH CAROLINA RETIREMENT SYSTEMS ANTI-PENSION SPIKING CONTRIBUTION-BASED BENEFIT CAP (2014), https://www.nctreasurer.com/ret/Board%20of%20Trustees/AntiPensionSpikingContributionBasedBenefitCap.pdf#search=pension%20spiking; Catherine Saillant, Maloy Moore & Doug Smith, *Salary 'spiking' Drains Public Pension Funds, Analysis Finds*, LA TIMES (Mar. 3, 2014), http://articles.latimes.com/2014/mar/03/local/la-me-county-pensions-20120303; Mike Baker, *State Feels Bite of Workers' Pension Spiking*, SEATTLE TIMES (Apr. 6, 2013), https://www.seattletimes.com/seattle-news/state-feels-bite-of-workers-pension-spiking/.

125. In Kentucky, public school teachers threatened to strike if the Kentucky legislature reduced the retiree cost of living adjustment from 1.5% to 1% annually. *See* Tom Loftus, *State Pension Fight Nears End; Fate of Big School Cuts Also Hangs in Balance*, THE COURIER-JOURNAL 2 (Mar. 27, 2018).

126. *See* California's cost of living adjustment policy found at California Public Employees Retirement System. CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Cost-of-Living Adjustment (COLA)*, https://www.calpers.ca.gov/page/retirees/cost-of-living/cola. Some states have pension reform proposals that cap future COLA payments and tie their availability to the overall funding level of the state's pension system. *See* Michael Katz, *Louisiana Proposes Pension Reform Bill*, CHIEF INVESTMENT OFFICER (Apr. 4, 2018), https://www.ai-cio.com/news/louisiana-proposes-pension-reform-bill/ (pension system would have to be 65% funded for COLAs to be granted).

127. This article will focus its discussion on retirement income provided by pensions. State and local governments have made similar post-employment promises with regard to retiree health insurance and other benefits. Analysis suggests that rapid health care cost escalation may also make these retirement benefits underfunded and the next target for cost-cutting governmental employers. *See* Marc E. Fitch, *Connecticut Has $36 Billion in Unfunded OPED Liabilities*, YANKEE INST. FOR PUB. POL'Y (Mar. 29, 2018), http://www.yankeeinstitute.org/2018/03/connecticut-has-36-billion-in-unfunded-opeb-liabilities/.

scarce financial resources from other much-needed public expenditures. Without supporting tax increases, how will basic governmental services be provided if employee pension costs greatly increase?

With assessments of pension funds indicating that existing plans would not be sufficient to meet their obligations, each state has been confronted with a series of policy and legal choices. How would this ever-expanding future financial obligation be met? Would future employee retirement income and other benefits be reduced? Would employees and/or employers be required to contribute more into the pension trust fund? Would the defined benefit plan design be abandoned to limit future governmental pension exposure? These important, and highly controversial, questions have surfaced in many state-level political conflicts and they have been examined in academic policy analyses.[128] Unfortunately, there appears to be no "perfect" answer about how to proceed. Finding ways to meet existing pension obligations will undoubtedly impose serious financial demands on state and local government budgets crowding out other important government programs.[129] This occurs at a time when virtually no political will exists to increase state or local taxes.[130] In this political environment, policymakers have been left with one alternative – cutting back on current employee costs and making public retirement benefits less generous.

Finding a way to reduce pension costs has been a primary concern of state and local governments. With this cost-saving goal, these new policies also have been associated with providing reduced benefits to public workers or making it more difficult for them to qualify.[131] The overall goal of these varied changes has been to lower

128. Juan Perez Jr., *CPS Slates 4 Furlough Days to Aid Budget Gap: District Says Move Will Save $35M, Won't Cut Class Time*, CHI. TRIB., at C1 (Jan. 14, 2017) (Governor's veto of bill granting $215 million to teacher pension fund since it did not broadly reform the pension system).

129. *Id.*; *supra* note 45, at x–xi.

130. In its 2017 ranking of the states by fiscal condition, the Mercatus Center at George Mason University evaluated the fiscal solvency of the states and determined that unfunded pension liabilities drive the states into "fiscal peril." *See* Eileen Norcross & Olivia Gonzalez, *Ranking States by Fiscal Condition 2017 Edition*, MERCATUS CENTER: GEORGE MASON UNIV. (July 11, 2017), https://www.mercatus.org/statefiscalrankings2017. *See also* Elise Young, *Hoboken Crash Tests a Railroad Beset by N.J. Fiscal Crisis*, BLOOMBERG (Sept. 29, 2016, 1:48 PM), https://www.bloomberg.com/news/articles/2016-09-29/beleaguered-n-j-transit-gets-another-round-of-rail-hardship https://www.bloomberg.com/news/articles/2016-09-29/beleaguered-n-j-transit-gets-another-round-of-rail-hardship.

131. Michael Corkery, *Pension Crisis Looms Despite Cuts*, WALL ST. J. (Sept. 21, 2012, 8:02 AM), https://www.wsj.com/articles/SB10000872396390443890304578010752828935688 (stating that 45 states had reduced public pension benefits).

present and future benefit costs to government employers making these future obligations sufficiently funded and more likely to be honored.[132] Pension reform policies affect three categories of workers: (1) currently retired former employees; (2) members of the existing workforce; and (3) prospective workers who will be hired in the future. The strongest claim to pension stability rests with currently retired persons since they have begun to receive their earned benefits. The weakest claim to prior pension rights appears to be with new workers who have accepted a less generous package of benefits as they entered employment. The second category – existing workers – presents the most difficult group to assess since their benefits have been reduced after being previously more generous. Not surprisingly, these new state policies have been extremely unpopular with existing public employees, often resulting in legal challenges most often in state court.[133] As a result, state and local employees have been presented with pension policy changes that work to reduce expected and retirement benefits or to increase employee costs for expected retirement income.[134] Not surprisingly, widespread court challenges have been made. The outcome of this litigation has varied and these case decisions are the main subject of the next section of this article.

---

132. A secondary benefit of implementing pension reform has been to improve the credit worthiness of the state or city as reflected in maintaining or raising the quality of their governmental debt and lowering their borrowing costs. *See* Amanda Albright, *Memphis No Longer Sings Pension Blues Ahead of Biggest Bond Sale*, BLOOMBERG LAW: BENEFITS & EXECUTIVE COMPENSATION NEWS (Apr. 17, 2018) (describing the Memphis, Tennessee experience). *But see* James Comtois, *Connecticut's High Unfunded Pension Liabilities Leads to Credit Downgrade*, PENSIONS & INV. (Apr. 17, 2018, 2:42 PM), https://www.pionline.com/article/20180417/ONLINE/180419841/connecticuts-high-unfunded-pension-liabilities-leads-to-credit-downgrade (describing Connecticut's bond rating downgrade).

133. There are also many cases challenging restrictive interpretations of state or local government retirement law. In these cases, courts are asked to interpret the meaning of state or local government retirement statutes in a conventional manner. *See, e.g.*, Office of Admin. & Pa. State Police v. State Emp. Ret. Bd., 180 A.3d 740 (Pa. 2018) (Pennsylvania Supreme Court upholding ruling that union service pay was retirement pension compensation) and McGlynn v. State, 230 Cal. Rptr. 3d 470, 473 (Cal. Ct. App. 2018) (upholding trial court holding that state retirement statute applied to judges elected under prior law).

134. Similar warning alarms have recently sounded with regard to retiree health care benefits which nearly 77% of all local governments pay for their retirees and whose unfunded liability has recently been estimated at $1 trillion or about 1/3 of all state and local government annual revenue. *See* Byron Lutz & Louise Sheiner, *The Fiscal Stress Arising from State and Local Health Obligations*, 38 J. HEALTH ECON. 130, 130-46 (Dec. 2014) (constituting ½ of the unfunded liability of retirement pensions).

V. SEEKING JUDICIAL PROTECTION FOR PUBLIC EMPLOYEE PENSION "RIGHTS"

A. What State Pension Reforms Triggered Litigation by Employees and Retirees?

Pension reforms have taken a range of forms as state and local governments have attempted to shore up the financial foundations for their employee retirement benefits by redesigning the benefits offered to new workers and by modifying features of existing programs. With these changes being considered adverse to collective employee and retiree financial interests, it is not surprising that litigation has ensued. The resort to court review of pension reform policies also represents a response to the changing political fortunes of public employees. As such, these lawsuits represent political statements of protest as much as attempts to use legal principles to invalidate or limit the benefit changes that have been enacted. This litigation history is important to understand for both its symbolic significance as well as its practical importance.

Disappointed and dissatisfied with changes made to their benefits by current political leaders, workers and their representatives have elected to litigate their claims in an effort to vindicate their "rights" which the current political system has refused to respect. They have also accused state pension officials of mismanagement and poor judgment.[135] As the discussion below will reveal, much of the recent litigation challenging the pension benefit changes have been unsuccessful for employees and retirees.[136] These unsuccessful cases often reflect workers' misperceptions about the true nature of their employment "rights" – many times believing that they are permanent and unchangeable. This belief has turned out to be a mistake as the courts

135. Tom Loftus, *Lawsuit: Retirement Systems Gambled on Hedge Funds, Concealed its Financial Mess*, LOUISVILLE COURIER J. (Dec. 27, 2017, 2:25 PM), https://www.courier-journal.com/story/news/politics/2017/12/27/lawsuit-kentucky-retirement-systems-gambled-hedge-funds/982740001/ (accusing retirement officials, consultants, hedge funds of entering a "civil conspiracy" on poor investment choices that were concealed from employees.); Michael Katz, *Hedge Fund Tells Kentucky Pension to Take a Hike, Chief Investment Officer* (July 5, 2018), https://www.ai-cio.com/news/hedge-fund-tells-kentucky-pension-take-hike/ (hedge fund refused to comply with CFA Institute's codes of ethics and professional conduct that was part of a Kentucky pension transparency bill).

136. The article concentrates on litigation brought to challenge systematic changes in state and local government retirement benefit plans. Other cases not the main focus of this article consider individual claims based on complaints based on the administration of existing pension systems. *See, e.g.*, Kendall v. Gov't V.I., 596 F. App'x 150 (3d Cir. 2015) (affirming district court judgment against retired judge's challenge to pension calculation).

have been unwilling to strike down many of these recent reform measures adopted in the face of the looming financial crisis facing the governmental employers. The cases ultimately illustrate the futility of using courts to rectify these kinds of political decisions.

This review of selected state and federal litigation from 2008-2018 has been comprised of a total of 100 reported case decisions from 35 states reflecting a wide national distribution.[137] Twenty-seven of these decisions were from the federal district courts, courts of appeals, and bankruptcy courts while 72 of them were rendered in state supreme courts, courts of appeals, and trial courts. Each year saw some decisions although the peak frequency in decisions was in 2014 through 2016.[138] This distribution probably reflects the lag time between the adoption of the pension reform, litigation, and the issuance of a reported decision.

The analysis of these decisions revealed patterns in the nature of the retirement policy changes that led employee and retiree groups to seek judicial review and their potential invalidation.[139] Obviously, this litigation was triggered by the executive and legislative branches of government adopting the challenged pension reforms. The challengers were seeking to have the popularly-supported reform measures invalidated as being contrary to specific statutory standards or particular constitutional principles. Viewed in this light, the court

137. In selecting the cases for review there was a conscious effort to avoid merely procedural decisions related to pension reform challenges. *See, e.g.*, Wood v. Unified Gov't Athens-Clarke Cty., 818 F.3d 1244 (11th Cir. 2016) (reversing district court on statute of limitations issue to retiree benefits change).

138. The pension reform litigation analyzed in this review had the following distribution:
Total number of cases reviewed: 100.
Total number of states involved: 35.
Level of courts:
State Supreme Court: 36 cases.
State Appellate Court: 33 cases.
U.S. Circuit Court of Appeals: 17 cases.
U.S. District Court: 10 cases.
U.S. Bankruptcy Court: 1 case.

FREQUENCY OF DECISIONS-YEAR BY YEAR:

2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008
13 cases (until July 6, 2018)	12 cases	20 cases	18 cases	14 cases	4 cases	7 cases	7 cases	3 cases	case	cases

139. The group of cases chosen for review in this analysis is a representative sample of reported litigation of pension reform policies in the eight-year period from 2010 through early 2018 does not constitute an exhaustive survey but rather it seeks to provide a general description of the most common forms of pension reform challenges.

challenges attempted to use legal concepts to block democratically-adopted policy choices that disadvantaged workers and retirees. Examples of the most common policies triggering litigation challenges were:

i. The State Amended Existing Retirement Plans by Either Cutting Retirement Benefits or Reducing the State Contributions.[140]

ii. The State Modified the Retirement Benefit Calculation Formula.[141]

iii. The State Required Employees to Increase Their Contributions to the Pension Plan for Retirement Benefits.[142]

iv. The State Decreased the Cost of Living Adjustment (COLA) to Retirement Pension Benefits.[143]

140. *See, e.g.*, Cherry v. Mayor & City Council of Balt., No. MJG–10–1447, 2011 WL 11027560 (D. Md. Sept. 6, 2011); Metcalfe v. State, 382 P.3d 1168 (Alaska 2016); San Joaquin Cty. Corr. Officers Ass'n v. Cty. of San Joaquin, 211 Cal. Rptr. 3d. 822 (Cal. Ct. App. 2016); S.D. Police Officers Ass'n v. S.D. City Emps.' Ret. Sys., 568 F.3d 725 (9th Cir. 2009); Awdziewicz v. City of Meriden, 115 A.3d 1084 (Conn. 2015); Jones v. Mun. Emps.' Annuity & Benefit Fund, 50 N.E.3d 596 (Ill. 2016); Heaton v. Quinn, 32 N.E.3d 1 (Ill. 2015); Welch v. Brown, 935 F. Supp. 2d 875 (E.D. Mich. 2013); Coal. of State Emp. Unions v. State, 870 N.W.2d 275 (Mich. 2015); Moro v. State, 351 P.3d 1 (Or. 2015); Dodd v. City of Chattanooga, 846 F.3d 180 (6th Cir. 2017); Puckett v. Lexington-Fayette Urban Cty. Gov't, 833 F.3d 590 (6th Cir. 2016); Alameda Cty. Sheriff's Ass'n v. Alameda Cty. Emps. Ret. Ass'n., 227 Cal. Rptr. 3d 787 (Cal. Ct. App. 2018).

141. *See, e.g.*, Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160 (Ariz. 2014); Hall v. Elected Officials' Ret. Plan, 383 P.3d 1107 (Ariz. 2016); S.D. City Firefighters v. Bd. of Admin., 141 Cal. Rptr. 3d 860 (Cal. Ct. App. 2012); Cty. of Orange v. Ass'n of Orange Cty. Deputy Sheriffs, 121 Cal. Rptr. 3d 151 (Cal. Ct. App. 2011); Deputy Sheriffs' Association of S.D. v. Cty. of S.D., 182 Cal. Rptr. 3d 759 (Cal. Ct. App. 2015); Stoker v. Milwaukee Cty., 857 N.W.2d 102 (Wis. 2014); Marin Ass'n of Pub. Emps.' v. Marin Cty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365 (Cal. Ct. App. 2016); City of Hollywood v. Bien, 209 So. 3d 1(Fla. Dist. Ct. App. 2016); *Puckett*, 833 F.3d 590; Cloutier v. State, 42 A.3d 816 (N.H. 2012); Am. Fed'n of Teachers v. State, 111 A.3d 63 (N.H. 2015); Local 101 of Am. Fed'n & Mun. Emps. v. Brown, No. 14-cv-05640-BLF, 2017 U.S. Dist. LEXIS 130988 (N.D. Cal. Aug. 16, 2017); Valde v. Emp. Appeal Bd., No. 17-0266, 2017 Iowa App. LEXIS 953 (Iowa Ct. App. Sept. 13, 2017); Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo, No. 16–130–ML, 2017 WL 899948 (D.R.I. Mar. 7, 2017); Cranston Firefighters, IAFF Local, 1363 AFL-CIO v. Raimondo, 880 F.3d 44 (1st Cir. 2018).

142. *See, e.g.*, Taylor v. City of Gadsden, 767 F.3d 1124 (11th Cir. 2014); Borders v. City of Atlanta, 779 S.E.2d 279 (Ga. 2015); Prof'l Fire Fighters of N.H. v. State, 107 A.3d 1229 (N.H. 2014); Teamsters Local 97 v. State, 84 A.3d 989 (N.J. Super. Ct. App. Div. 2014); Andrews v. Lombardi, No. KC-13-1129, 2017 R.I. Super. LEXIS 31 (R.I. Super. Feb. 2, 2017); Bishop v. City of Columbia, 738 S.E.2d 255 (S.C. Ct. App. 2013).

143. *See, e.g.*, Protect Our Benefits v. City & Cty. of S.F., 185 Cal. Rptr. 3d 410 (Cal. Ct. App. 2015); Justus v. State, 336 P.3d 202 (Colo. 2014); Me. Ass'n of Retirees v. Bd. of Trs., 758 F.3d 23 (1st Cir. 2014); Berg v. Christie, 137 A.3d 1143 (N.J. 2016); Bartlett v. Cameron, 316 P.3d 889 (N.M. 2013); Frazier v. City of Chattanooga., 151 F. Supp. 3d 830 (E.D. Tenn. 2015); Frazier v. City of Chattanooga, 841 F.3d 433 (6th Cir. 2016); Van Houten v. City of Fort Worth, 827 F.3d 530 (5th Cir. 2016); Wash. Educ. Ass'n v. Wash. Dept. of Ret. Sys., 332 P.3d 439 (Wash. 2014); *Cherry*, 762 F.3d 366.

v. The State Denied Employees the Right to Purchase Credited Service to Enhance Pension Benefits.[144]

vi. The State Changed/Reduced/ Refused to Increase Health Benefits.[145]

vii. The State Increased Premiums for Retiree Health Care Benefits or the State Removed Health Care Benefits from Pension Plans.[146]

B. How Does the Law Characterize Employee Retirement Benefits?

Citizens often believe that they have "rights" in many things—free speech, voting, and fair treatment under the law. They consider these rights in the abstract assuming that they have some form of legal protection grounded in a general conception of "the law." Most public employees consider their compensation and other employee benefits to be earned and once earned to be their property or at least something that they "own." Workers look to their representatives and to their employers to explain these complicated future rights and often they have been given concrete verbal or written predictions of their retirement benefits. Consequently, when state and local officials act to change the expected terms of these pension "rights," many of these workers feel that their trust has been betrayed and they must act to take legal action challenging the change.

When these challenges move from the arena of public opinion and employee belief to the state and federal courts, the legal charac-

144. *See, e.g.,* Pendergast v. Ariz. State Ret. Sys., 323 P.3d 1186 (Ariz. Ct. App. 2014); Cal Fire Local 2881 v. Cal. Publ. Emps.' Ret. Sys., 212 Cal. Rptr. 3d 471 (Cal. Ct. App. 2016).

145. *See, e.g.,* Sacramento Cty. Retired Emps. Ass'n v. Cty. of Sacramento, No. CIV S–11–0355 KJM–EFB, 2012 WL 1082807 (E.D. Cal. March 31, 2012); Fry v. City of L.A., 199 Cal. Rptr. 3d 694 (Cal. Ct. App. 2016); Requa v. Regents of Univ. of Cal., 152 Cal. Rptr. 3d 440 (Cal. Ct. App. 2012); Dannenberg v. State, 383 P.3d 1177 (Haw. 2016); Underwood v. City of Chi., 779 F.3d 461 (7th Cir. 2015); Kanerva v. Weems, 13 N.E.3d 1228 (Ill. 2014); Matthews v. Chi. Transit Auth., 51 N.E.3d 753 (Ill. 2016); AFT Mich. v. State, 866 N.W.2d 782 (Mich. 2015); Retired Pub. Emps. Ass'n v. Cuomo, 123 A.D.3d 92 (N.Y. App. Div. 2014); R.I. Council 94 v. R.I., 705 F. Supp. 2d 165 (D.R.I. 2010); Vallejo Police Officers Ass'n v. City of Vallejo, 223 Cal. Rptr. 3d 280 (Cal. Ct. App. 2017); Weaver v. Town of N. Castle, 153 A.D.3d 531 (N.Y. App. Div. 2017); Wood v. Unified Gov't Athens-Clarke Cty., No. 3:14-CV-43, 2018 U.S. Dist. LEXIS 9476 (M.D. Ga. Jan. 22, 2018).

146. *See, e.g.,* Hussey v. Milwaukee Cty., 740 F.3d 1139 (7th Cir. 2014); Retired Emps. Ass'n of Orange Cty., Inc. v. Cty. of Orange, 266 P.3d 287 (Cal. 2011); Christiansen v. Cty. of Douglas, 849 N.W.2d 493 (Neb. 2014); State Emps.' Ass'n of N.H. v. State, 20 A.3d 961 (N.H. 2011); Gamel v. Cincinnati, 983 N.E.2d 375 (Ohio Ct. App. 2012); N.Y. State Corr. Officers & Police Benevolent Ass'n v. N.Y., 911 F. Supp. 2d 111 (N.D.N.Y. 2012); Roberts v. N.Y., 911 F. Supp.2d 149 (N.D.N.Y. 2012).

terization of employee retirement benefits becomes a central focus strongly affecting the resolution of the legal challenge. What exactly does the employee own and what rights are actually associated with these retirement benefits? In the absence of federal preemption, the states have been free to fashion their own law and policy to answer these questions. Often a state's formal legal characterization of employee pensions provides a structured analysis that can determine the ultimate lawfulness of pension reform measures.[147] While fitting into a group of patterns, each state has fashioned its own jurisprudence on this subject, often blending both federal and state law.[148] It is also common for litigants to plead multiple legal theories simultaneously seeking the invalidation of some pension benefit policy change.[149]

Legal analysis has broken the states down into 5 theoretical categories:[150]

1. Pensions are the employer's gratuity or gift to the employee when made.

2. Pension rights are governed by promissory estoppel principles focusing on justifiable reliance.

3. Pension benefits are property rights when earned and are protected under Due Process and Takings principles.

4. Pensions are employee contract rights when earned and protected by general contract law principles as well as constitutional "impairment of contract" prohibitions.

5. Pensions are employee contract rights when earned and have additional protection under specialized state constitutional provisions.

---

147. Some cases are judicial review of administrative decisions about operation of a retirement plan. *See, e.g.*, Pub. Emp. Ret. Admin. Comm'n v. Contrib. Ret. Appeal Bd., 90 N.E.3d 744 (Mass. 2018) (upholding decision that sick pay and vacation pay are not regular compensation) and Worcester Reg'l Ret. Bd. v. Contrib. Ret. Appeal Bd., 88 N.E.3d 1169 (Mass. App. Ct. 2017) (upholding decision to allow purchase of additional work credit).

148. *See generally*, Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y (2010); JENNIFER STAMAN, CONG. RESEARCH SERV., R41736, STATE AND LOCAL PENSION PLANS & FISCAL DISTRESS: A LEGAL OVERVIEW (2011).

149. Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo, No. 16-130-ML, 2017 U.S. Dist. LEXIS 32327, at *25 (D.R.I. Mar. 7, 2017) (Contracts clause, Takings clause and Due Process clause theories in complaint); Teamsters Local 97 v. State, 84 A.3d 989 (N.J. Super. Ct. App. Div. 2014) (arguing Contract, Due Process, and Takings Clauses).

150. *See* Alicia H. Munnell & Laura Quinby, *Legal Constraints on Changes in State and Local Pensions*, CTR. FOR RETIREMENT RES. AT B.C.: STATE AND LOCAL PENSION PLANS 2 (No. 25, Aug. 2012) and William T. Payne, Joel R. Hunt & Ruairi McDonnell, *The Constitutional Limitations on Public Employee Pension Reform Legislation*, 25 PUB. LAW. 10, 12-13 (2017).

1. The Gratuity Approach

Perhaps the most unrealistic view of public employee pension rights is the view taken in the states of Texas and Indiana which view the pension as a gratuity or gratuitous allowance.[151] The gratuity approach advances the idea that the public employer should have unfettered discretion in determining the amount and availability of retirement benefits.[152] In the 19th and early 20th century, public and private employers considered this form of deferred compensation to be truly discretionary and dependent on the continuing good will and financial solvency of the employer.[153] The main legal theory supporting this view was that the employer's current promise of future retirement income was a current gratuitous promise to make a future gift of money.[154] Viewed from the Texas perspective, the existence and character of pension rights would be a subject of legislative supremacy that is: "made subject to the reserved power of the Legislature to amend, modify, or repeal the law upon which the pension system is erected, and this necessarily constitutes a qualification upon the anticipated pension and a reserved right to terminate or diminish it."[155]

This position has been applied in an array of cases including one holding that retiree pensions actually being received could legally be reduced or terminated because they had "no vested rights in future installments."[156]

---

151. IND. CONST. art. X, § 5; *id.* art. XI, § 12. *See* Bd. of Trs. of the Pub. Emps.' Ret. Fund v. Hill, 472 N.E.2d 204 (Ind. 1985) and Ballard v. Bd. of Trs. of Police Pension Fund, 324 N.E.2d 813, 815 (Ind. 1975) ("The Court of Appeals correctly held that in Indiana pensions under a state compulsory contribution plan like the Police Pension Fund have traditionally been considered gratuities from the sovereign involving no agreement of the parties and, therefore, creating no contractual rights.") This characterization generally applies to benefits received from "involuntary" retirement plans where "voluntary" plans are considered contract benefits. *See also* Kern v. State, 10 N.E.2d 915 (Ind. 1937); Klamm v. State, 126 N.E.2d 487 (Ind. 1955).

152. R.D. Hursh, Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R.2d 437 (1957); *See also* Pennie v. Reis, 132 U.S. 464, 470-72 (1889) (employee had no property interest in public pension benefits because state retained the contribution in its retirement fund).

153. *See, e.g.*, Eddy v. Morgan, 75 N.E. 174, 178 (1905) (Public pensions are "a bounty springing from the graciousness and appreciation of sovereignty.").

154. Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMMITTEE NEWSLETTER (Summer 2014).

155. This view was expressed by the Texas Supreme Court in City of Dallas v. Trammell, 101 S.W.2d 1009, 1014 (Tex. 1937) and recently affirmed in Klumb v. Hous. Mun. Emps. Pension Sys., 458 S.W.3d 1, 16 (Tex. 2015). The Fifth Circuit has consistently followed this view. *See also* Van Houten v. City of Fort Worth, 827 F.3d 530 (5th Cir. 2016) and Kunin v. Feofanov, 69 F.3d 59, 63 (5th Cir. 1995).

156. *Trammell*, 101 S.W.2d at 1012–13. *See also Klumb*, 458 S.W.3d at 17; Devon v. City of San Antonio, 443 S.W.2d 598 (Tex. Civ App. 1969); Jud v. City of San Antonio, 313 S.W.2d 903 (Tex. Civ. App. 1958).

Curiously, the theory of "gratuity" pensions has not been attacked as being unconstitutional under state laws; making gifts of government funds to private persons would seemingly violate the prohibition on these gratuities.[157] It would appear that unless some superior state or federal constitutional rights were identified as protecting retirement benefits, the legislatures of Texas and Indiana would seemingly be empowered to make restrictive pension policy changes with great freedom, constrained mainly by limits of public opinion.

2. The Promissory Estoppel View

Taking a unique legal view that is grounded in a sense of fundamental fairness towards employees, Minnesota has established a legal framework for assessing public employee pension rights under the theory of promissory estoppel. Recognized in the 1983 case of Christensen v. Minneapolis Municipal Employees' Retirement Board,[158] the Minnesota Supreme Court established the doctrine in a case where a municipal employee had existing pension benefits be suspended under a new state law requiring a minimum age for retirement pensions and applying it retroactively to the employee.[159] Rather than adopting the gratuity approach or the prevalent contractual view, the Minnesota court announced a new approach and one that remains identified with the state to this day.[160] It holds that a reviewing court must examine two questions in considering the lawfulness of a benefit change: (1) what has been promised by the state; and (2) to what degree and to what aspects of the promise has there been reasonable

157. TEX. CONST. art. 3, §51 ("The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever . . . ") When a governmental entity is not liable on a claim, the payment of that claim constitutes "a pure gift or donation" and violates the constitution. *See* Tompkins v. Williams, 62 S.W.2d 70, 71 (Tex. Comm'n App. 1933); State v. City of Austin, 331 S.W.2d 737, 742 (Tex. 1960). *But see* Spina v. Consol. Police & Firemen's Pension Fund Comm'n, 197 A.2d 169, 175–76 (N.J. 1964) (pension benefits not a gratuity within state's constitutional prohibition on donations).

158. Christensen v. Minneapolis Municipal Employees Retirement Bd., 331 N.W.2d 740 (Minn. Mar. 18, 1983).

159. *Public Employee Pension Benefits—A Promissory Estoppel Approach—Christensen v. Minneapolis Municipal Employees' Retirement Board, 331 N.W.2d 740 (Minn. 1983)*, 10 WM. MITCHELL L. REV. 287, 288–289 (1984).

160. The Minnesota promissory estoppel approach has been adopted in a small number of decisions outside of Minnesota. *See* City of Long Beach v. Mansell, 476 P.2d 423 (Cal. 1970); Crumpler v. Bd. of Admin., 108 Cal. Rptr. 293 (Cal. Ct. App. 1973); Shafer v. State, 521 P.2d 736 (Wash. 1974).

reliance on the part of the employee?[161] As the two-part framework reveals, the promissory estoppel eschews a rigid and formalistic contractual approach to existence of employee benefits to a more flexible and contextual analysis. The *Christensen* viewpoint has been followed since it was announced and it appears to be tied to the equity principles mentioned in the Restatement (Second) of Contracts.[162] Occasionally Minnesota's idiosyncratic promissory estoppel analysis has been argued in cases arising in other jurisdictions but usually without success.[163] Counsel for the challengers appear willing to advance a range of theoretical arguments challenging pension benefit changes hoping that the reviewing court will find one or more persuasive.[164] Some of these arguments have been extremely creative even if they have not been successful.[165]

3. The Property Approach

There are six states that are believed to have taken a Property law approach to characterizing retirement benefits.[166] Since state law defines the existence and the features of individual ownership of

161. *Christensen*, 331 N.W.2d at 749.

162. Restatement (Second) Contracts §90 (1981).

163. *See, e.g.*, Weaver v. Town of N. Castle, 153 A.D.3d 531 (N.Y. App. Div. 2017) (no reliance and no promise for retiree health insurance); Vallejo Police Officers Ass'n v. City of Vallejo, 223 Cal. Rptr. 3d 280 (Cal. Ct. App. 2017) (promissory estoppel theory derivative to failed contract theory regarding retiree health insurance coverage); Christiansen v. Cty. of Douglas, 849 N.W.2d 493 (Neb. 2014) (equitable estoppel did not prevent increased in health insurance premiums); Gamel v. City of Cincinnati, 983 N.E.2d 375, 379 (Ohio Ct. App. 2012) (promissory estoppel could not be invoked to challenge a city exercising a governmental function under state law); S.D. City Firefighters, Local 145, AFL-CIO v. Bd. of Admin., 141 Cal. Rptr. 3d 860 (Cal. Ct. App. 2012) (benefit adopted by city was void and the resolution enacting it did not give rise to promissory estoppel right); Bishop v. City of Columbia, 738 S.E.2d 255 (S.C. Ct. App. 2013) (estoppel claims rejected based on employee handbook and benefits booklet but accepted based representations by supervisors); Myers v. W. Va. Consol. Pub. Ret. Bd., 704 S.E.2d 738 (W.Va. 2010) (10 years of government service leads to presumption of detrimental reliance on benefits).

164. Hall v. Elected Officials' Ret. Plan, 383 P.3d 1107 (Ariz. 2016) (multiple legal theories advanced but the case decided under state constitutional pension clause); Awdziewicz v. City of Meriden, 115 A.3d 1084 (Conn. 2015) (multiple contract, equitable and constitutional theories advanced but decided under the facts).

165. Moro v. State, 351 P.3d 1, 40–41 (Or. 2015) (legislation eliminating income tax offset benefits to non-resident state retirees did not violate the U.S. Constitution's Privilege and Immunities Clause); *Myers*, 704 S.E.2d at 738 (W.Va. 2010) (theory of contractual detrimental reliance recognized although not found to exist in the case).

166. These states are: Maine, Wyoming, Connecticut, New Mexico, Ohio, and Wisconsin. However, careful examination of opinions reveals some confusion over the accuracy of this summary. *See* Pierce v. State, 910 P.2d 288, 298 (N.M. 1995) (finding Connecticut, Maine, Minnesota, New Jersey, and Rhode Island had recognized pensions as "important property interest(s) or right.") Courts in other states occasionally will characterize retirees' benefits as property rights. *See* N.Y. State Corr. Offs. & Police Benevolent Ass'n v. N.Y., 911 F. Supp. 2d 111 (N.D.N.Y. 2012).

things of value, it is hardly surprising that these jurisdictions have used this conceptual framework to analyze the employee retirement rights. Most often this property characterization must be discerned from court opinions that use terms such as "vested rights" or "statutorily created property interest(s)" to describe the pension rights under review.[167] The property rights analysis is frequently undertaken as a second-tier alternative discussion in court opinions concluding that employees do not have contract rights to pension benefits. In this way it replaces the contract characterization.

It is not difficult to apply this property view to retirees who currently receive pension income since they are enjoying the financial transfer from an annuity "paid-for" by a working career. Considering the situation presented by non-retired, currently employed workers creates a more nuanced situation where the property is "earned" in increments over time as basic pension rights first vest and then later, additional units accrue. The concept of property is not bound to the limited list of conventional forms including land, buildings, financial assets, and personal property since as a legal concept, property is a flexible idea dealing with the relationship between owners and the assets they own expanding to meet new situations.[168] Due to this flexibility, making the property concept applicable to protect employee and retiree pension rights is clearly within the prerogative of the courts. As Professor Charles A. Reich wrote over 50 years ago in his prescient article entitled, The New Property, "one of the most important developments. . .has been the emergence of government as a major source of wealth."[169]

The states adopting the property view of retirement benefits adopted this idea in a small number of court decisions the 1980s and

167. *Pierce*, 910 P.2d at 299–300, 302 (property rights that could later be made taxable).

168. Concerning the breadth of the property concept in American law, Justice Stanley Mosk wrote a notable dissent in Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 509 (Cal. 1990) saying,

> The concepts of property and ownership in our law are extremely broad. . ..A leading decision of this court approved the following definition: 'The term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.'

169. Robert A. Reich, *The New Property*, 73 YALE L. J. 733, 733 (1964). He noted that "no form of government largesse is more personal or individual than an old age pension . . . . No form is more obviously a compulsory substitute for private property; . . . . No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual." *Id.* at 769. His prescription was to accord these new forms of property legal protection.

1990s.[170] This property classification has often been done in a muddled fashion with minimal analytical rigor. Finding the existence of a property right is the predicate for the analysis under federal and state constitutional law theory[171] although many cases end at the start through dismissal with the courts not finding that a property right exists.[172] These property-based challenges arise under the authority of the fifth and the fourteenth amendments to the federal constitution as well as state constitutional analogues.[173] While state law is the source of property rights through their statutes, common law rules, constitutions, and judicial opinions, the federal constitution imposes a floor that limits how states and localities can affect these property rights. These protections have been made applicable to the states for over a century and there is no modern precedent for finding any state immunity from these federal constitutional norms.[174]

When considering a retirement policy change under substantive due process, the first necessary element is the establishment of the existence of an individual's property right that has been diminished or adversely affected by some government action. While some state courts have explicitly found pensions and other retirement benefits to

---

170. *See* Pineman v. Oechslin, 488 A.2d 803, 810 (Conn. 1985) (property interest in the existing state retirement fund which is protected from arbitrary state treatment by the Due Process clause); Ass'n of State Prosecutors v. Milwaukee Cnty., 544 N.W.2d 888, 889 (Wis. 1996); Peterson v. Sweetwater Cnty. Sch. Dist. No. One, 929 P.2d 525, 530 (Wyo. 1996); Spiller v. State, 627 A.2d 513, 515 n.12 (Me. 1993) (vague suggestion that pension benefits "may" constitute property rights; no clear holding); *Pierce*, 910 P.2d at 302-03 (the right to receive benefits confers a property right upon vesting but may be subject to later taxation); State ex rel. Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 655 (Ohio 1998).

171. *See* Van Houten, 827 F.3d at 539–40 (all aspects of the pension system were made subject to the reserve power of the legislature to amend, there was no vested property right). *Accord Klumb*, 458 S.W.3d at 15–16.

172. Clifford v. Raimondo, 184 A.3d 673, 678 (R.I. 2018) (upholding a judgment approving a class action settlement affecting retirement age and COLAs); Puckett v. Lexington–Fayette Urban Cnty. Gov't, 60 F. Supp. 3d 772, 778 (E.D. Ky. 2014); Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 839 (E.D. Tenn. 2015) (no property right exists in cost of living or COLA pension adjustments), *and Dodd*, 846 F.3d at 187 (if the state has total discretion to award or remove a benefit, a person cannot claim entitlement to the benefit). Both district court cases mentioned were later affirmed by the 6th Circuit. *See Puckett*, 833 F.3d at 602-03; Frazier v. City of Chattanooga, 841 F.3d 433, 439 (6th Cir. 2016) (abandoning property arguments, the COLA is not a vested financial benefit that is a contract right). However, some courts will ignore the entire property rights issue to permit the plaintiff's case to survive a motion to dismiss. *See Roberts*, 911 F. Supp. 2d at 183.

173. U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"); U.S. Const. amend. XIV, § 1 (". . . nor shall any state deprive any person of life, liberty, or property, without due process of law").

174. *See* Chi., B. & Q.R. Co. v. Chi., 166 U.S. 226, 239 (1897) (incorporation of the fifth amendment through the fourteen amendment).

constitute property,[175] in many cases the due process inquiry ended at this initial stage with a decision that no vested property right existed in the employees or retirees that made the challenge.[176] As crucial as this issue is to the property-based constitutional analysis, many courts have struggled in their reasoning and often they have failed to provide a coherent explanation of why the right does or does not exist.[177] Since property is not created by constitutions, judges must look to state law to answer questions about its existence. The U.S. Supreme Court in *Board of Regents v. Roth* found that property interests were "defined by existing rules or understandings that stem from. . .state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[178]

Identifying these "understandings" in specific cases appears to be extremely difficult when governments act to change the rules. Some courts have been clearer than others in setting forth when property interests exist although the analysis is often conclusory and not very explanatory.[179] As straightforward as this inquiry might appear in states with a tradition of property characterization for pensions, some courts do not extend the "property" label to policies which are considered to be peripheral to core pension benefits. This is especially true with pension cost of living adjustments (COLAs), health insurance, and tax exemptions for pension income. Narrowly construing the definition of a vested property right, only the base retiree pension has been found to be a vested property right.[180] Some court opinions

175. *See, e.g.*, *Peterson*, 929 P.2d at 530 (legitimate retirement expectations may constitute property rights that may not be deprived without due process of law); Madison Teachers, Inc. v. Walker, 11CV3774*26–27 (Dane Cnty. Cir. Ct. 2012) (challenge to state law shifting pension contributions to workers a "legitimate claim" but no due process arbitrariness or irrationality shown); Konicki v. Ill. Mun. Ret. Fund, No. 4-17-0056, 2018 Ill. App. Unpub. LEXIS 334 **2, at *7 (Ill. March 2, 2018) (total confusion about whether an employee had a vested property or contract right to a pension system feature).

176. Duncan v. Muzyn, 833 F.3d 567, 583–84 (6th Cir. 2016) (reducing COLA found not unconstitutionally taken since they are not a "cognizable property interest" because COLAs are not "vested"); Frazier v. City of Chattanooga, 151 F.Supp.3d at 838–39 (no legally cognizable contract or property right in a higher COLA found); N.Y. State Corr. Officers & Police Benevolent Ass'n v. N.Y., 911 F. Supp. 2d 111, 148 (N.D. N.Y. 2012) (no property interests found even though the employees constitutional claim survives a motion to dismiss).

177. For examples of a more thoughtful consideration of the property interest existence as well as the due process issues, *see Puckett*, 833 F.3d at 603; Hussey v. Milwaukee Cty., 740 F.3d 1139, 1142–43 (7th Cir. 2014).

178. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

179. *See, e.g.*, *Pierce*, 910 P.2d at 302 (concluding that state statutes "create vested property rights" that do not "mature" until the final statutory condition is met).

180. Bartlett v. Cameron, 316 P.3d 889, 896 (N.M. 2013) (retirement benefits protected by the state constitution are property rights but COLAs or tax emptions for pensions are not).

have restricted the recognition of property rights created by statutes in the same way they have limited the finding of contractual pension rights- by setting a high presumption against finding the existence of these rights.[181] Without showing an "unmistakable" legislative intention to create a binding right, no cognizable property interest might be found, thereby terminating the due process and takings analysis.[182] Without finding a vested property right, courts effectively conclude that the governmental employer may change the retirement benefit to the employee's disadvantage. With so many cases not finding the existence of a property right, it is not surprising that these fifth and fourteenth amendment challenges largely have failed.[183]

a. Pension Reforms as Unconstitutional Denials of Property Rights without Due Process of Law

Once courts have recognized a property right in a pension benefit, they use two forms of constitutional analysis to evaluate the lawfulness of the government actions restricting it. These are: 1) due process and 2) the taking of property principles derived from the fourteenth and fifth amendments of the U.S. Constitution and their state constitutions.[184] Due process arguments have been the most common form of "property-based" constitutional review with courts using both substantive and procedural branches of due process analysis.[185] Both

181. Berg v. Christie, 137 A.3d 1143, 1163 (N.J. 2016) (vested rights created by statute requires a "clear indication" to meet the "heightened standard"); Borders v. City of Atlanta, 779 S.E.2d. 279, 284 (Ga. 2015) (no legislative statement recognizing vested pension rights nor a reduction or termination of existing pension rights); *Dodd*, 846 F.3d at 187 (no property right in a death benefit because there was no entitlement due to the fact that the city had the discretion to remove the benefit).

182. *Duncan*, 833 F.3d at 583. *But see* Degan v. Bd. Of Trs. Of the Dal. Police and Fire Pen. Sys., Civil Action No. 3:17-CV-01596-N (U.S. Dist. Ct. N.D. Tex., Mar. 14, 2018) (retirement plan balance considered to be a vested property right).

183. *Degan*, Civil Action No. 3:17-CV-01596-N (U.S. Dist. Ct. N.D. Texas, March 14, 2018) (no procedural or substantive due process or takings claim shown in retirement fund change).

184. This argument has also been used in private sector pension cases reaching the U.S. Supreme Court. *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984) (applying due process rational basis review on changes to private sector pension benefits). Some recent cases have even employed refinements to these two property-based constitutional theories. *See* AFT Mich. v. State, 866 N.W.2d 782, 785 (Mich. 2015) (whether a state retiree healthcare insurance policy change imposed an unconstitutional condition and finding none).

185. For examples of a procedural due process claim, *see* Hipsher v. L.A. Cty. Emps. Ret. Ass'n, 234 Cal. Rptr. 3d 564, 569 (Cal. Ct. App. 2018) (retirement benefit forfeiture of vested pension denied procedural due process); *Puckett*, 833 F.3d at 606–08 (rejected a claim that legislation was improperly adopted by the state); *Frazier*, 151 F. Supp. 3d at 839 (failed claim since the pension policy was adopted by legislative action and that was all the "process" required); Pierce, 910 P.2d at 304 (usual legislative process provides adequate notice of change and opportunity to participate through the political process). *But see* Leff v. Clark Cty. Sch. Dist., 210 F.

federal and state constitutional arguments have been made often with a blend of federal and state constitutional provisions cited.[186] While the substantive due process approach has been more common than the procedural due process theory, it has employed a variety of "rational basis" approaches with each testing the sufficiency of the justifications provided for retirement benefit program alterations.[187] With economic and social values at stake, low-level due process scrutiny usually has been applied by the courts,[188] which has been a relatively easy standard for state policy changes to satisfy. As the Michigan Supreme Court noted, substantive due process claims face "an exceedingly high hurdle of demonstrating that the law is unreasonable" and that the government policy is "not reasonably related to a legitimate government interest."[189] Justifications offered by the government based on the state or locality's need to maintain its pension fund solvency and to resolve financial deficiencies have provided courts with an adequate "rational basis."[190] As a result, due process scrutiny has been consistently undemanding and courts have been unwilling to question policy judgments shifting financial resources away from worker benefits and towards other priorities.[191]

Supp. 3d 1242, 1250 (D. Nev. 2016) (upholding claim that loss of property right in post-probationary status without notice or due process).

186. In *Klumb*, 458 S.W.3d at 15, the Texas Due Course of Law provision found in Tex. Const. art. I, § 19 was argued while the Texas Supreme Court equated the federal due process norms with the Texas Due Course of Law constitutional concept. *See also Hussey*, 740 F.3d at 1142 (takings theory is the same under both United States and Wisconsin constitutions).

187. A few courts have also used an equal protection critique when programs have distinguished between different categories of employees or retirees in pension benefits and while others have added § 1983 claims seeking damages and attorneys' fees. *See In re* Request for Advisory Opinion Regarding Constitutionality of 806 N.W.2d 683, 706 (Mich. 2011) (advisory opinion on a statute reducing or eliminating a state tax exemption on public pensions). *See also* Teamsters Local 97 v. State, 84 A.3d 989, 1006–08 (N.J. Super. Ct. App. Div. 2014) (law requiring employees to makes contributions for health benefits did not violate equal protection); *Awdziewicz*, 115 A.3d at 1088 (suit in response to reduction in pension benefits include constitutional claims enforced by 42 U.S.C. § 1983).

188. Under the fifth and fourteenth amendments to the U.S. Constitution, government action may not deny an individual liberty or property interests without providing the equal protection and due process of law. Laws impacting fundamental freedoms or making suspect classifications may be reviewed under a tightened strict scrutiny review. Under rational basis review, a law or policy having adverse social or economic effects may be challenged requiring the government to justify its action by showing that the law advances a legitimate government objective. Generally, this is an easy standard to meet and most rational basis challenges fail. *See generally* Erwin Chemerinsky, Constitutional Law- Principles and Policies § 9.2.1–§ 9.2.3 (5th ed.2015).

189. *AFT Mich.*, 866 N.W.2d at 808 & 810 (requiring mandatory employee salary contribution for retiree health care benefit).

190. *See Puckett*, 833 F.3d at 608–609. *But see* Welch v. Brown, 935 F. Supp. 2d 875, 886–87 (E.D. Mich. 2013) (entitlement to health care benefits protected by due process).

191. *AFT Mich.*, 866 N.W.2d at 810.

Even though pension benefits have been publicly viewed as crucial elements to worker's retirement income and health insurance support, they have never been found to be "fundamental rights" by judges. The "fundamental rights" characterization would allow courts to impose a strict scrutiny standard of review requiring higher levels of government justification for restrictive policy changes. It would also shift the burden to the government for demonstrating a greater necessity. It seems doubtful that in the future state courts would wish to insert themselves in the contentious political battle over pension reform cut backs.

b. Pension Reforms as an Unconstitutional Taking of Private Property

Arguments have also been made that state pension reform policies reducing or changing benefits have unconstitutionally taken employee and retiree property rights.[192] Borrowing from the late twentieth century U.S. Supreme Court case precedent principally applying the fifth amendment takings doctrine to land use and environmental regulation, this constitutional argument has claimed that recent pension reform policies have "taken" the property rights of employees and retirees.[193] These fifth amendment cases have usually focused on regulatory takings or regulatory condition issues and any use of them in pension benefit cases would require careful analysis and argument by analogy to be effective.

As with the substantive due process claims, the taking arguments against pension reform must begin with the identification of a private property interest owned by the plaintiffs that has been "taken" by the defendant governmental employer. Plaintiffs often fail at this stage in

192. *Cherry*, 762 F.3d at 369; *Van Houten*, 827 F.3d at 539; *Hussey*, 740 F.3d at 1142; *Dodd*, 846 F.3d at 180; *Frazier*, 841 F.3d at 438; City of Hollywood v. Bien, 209 So.3d 1, 3 (Fla. Dist. Ct. App. 2016); *AFT Mich.*, 866 N.W.2d at 802; Bartlett v. Cameron, 316 P.3d 889, 896 (N.M. 2013); Scott v. Williams, 107 So.3d 379, 381 (Fla. 2013); *Puckett*, 833 F.3d at 610; Crosby v. City of Gastonia, 635 F.3d 634, 641 (4th Cir. 2011); *Welch*, 935 F. Supp. 2d at 886–887 (claim that lifetime health care benefits were property).

193. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 123–38 (1978) (setting forth a three factor test for finding a governmental taking of real property); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (applying a per se takings test for physical appropriation of real property); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992) (defining a taking as regulation that inflicts a total taking or destruction of real property); Dolan v. City of Tigard, 512 U.S. 374, 391–93 (1994) (government conditions on property use must bear rough proportionality to harm caused by property use); Kelo v. City of New London, 545 U.S. 469, 484–90 (2004) (allowing the use of government eminent domain to take property for public purposes and not public use).

establishing a property interest. Since the fifth amendment only applies to governmental action, the pension reform policy must be shown to destroy an existing private property right in order to be held an unconstitutional takings of property for which "just compensation" must be paid.[194] In comparison to the due process attacks which consider the adequacy of the "rational basis" for the government's action and weigh the sufficiency of the policy basis, the takings argument focuses on the destructive effect of the governmental action on a property right owned by the employee or retiree.

In the few recent cases considering this property-based claim, very few courts do a careful analysis under the prevailing takings law precedent.[195] These takings challenges are often argued in cases asserting multiple litigation theories; in most circumstances, these cases are usually resolved on other grounds with limited legal analysis of the taking issue.[196] One theme mentioned in a number of the taking decisions has been that the benefit change to be a permissible prospective change to the retirement plan and that no taking or contract infringement had occurred.[197] Another view was that since no enforceable contract right existed in a benefit, there could be no property interest that could be taken in violation of the fifth amendment.[198] None of this property rights oriented litigation has been successful in invalidating new pension reform policies with both federal and state courts usually rejecting both procedural and substantive due process as well as taking arguments.

In conclusion, recent case holdings indicate that a property characterization of retirement benefits provides workers and employees very little legal protection from policy changes that reduce employee

194. U.S. Const. Amend. V ("nor shall private property be taken for public use, without just compensation.")

195. *But see Degan*, Civil Action No. 3:17-CV-01596-N, 13–19 (Mar. 14, 2018) (reasoned analysis finding no per se or regulatory taking of property in a change to the city's deferred retirement option plan); *State ex rel. Horvath*, 697 N.E.2d at 651 (completing a Penn Central analysis). In one situation the government attempted to use federal takings law to delay a court decision. In Welch v. Brown, the government employer argued that the employees' due process and takings claims were not ripe because they had not sought compensation through a state inverse condemnation procedure. 935 F. Supp. 2d at 886–887. The district court rejected that defense finding "no case law to support" the state position. *Id.*

196. *Moro*, 357 Ore. at 233 (case decided without considering federal and state constitution Takings Clause claims); *City of Hollywood*, 209 So. 3d at 3; *Hall*, 383 P.3d at 1117 (decided without reaching the takings analysis).

197. *Duncan*, 833 F.3d at 583-84 (no property interest found); *City of Hollywood*, 209 So.3d at 3; *Scott*, 107 So.3d at 381–82.

198. Cherry v. Mayor of Balt. City, 2012 U.S. Dist. LEXIS 134772 (D. Md. Sept. 20, 2012), rev'd in Cherry, 762 F.3d at 374.

benefits.[199] This legal categorization is relatively uncommon and litigation rarely applies the usual constitutional law protections that have been accorded to conventional forms of property like land and buildings.

4. The Contract Approach

The most natural and most common interpretation of a public employee's pension rights is that they represent an element of deferred compensation that has been paid to the worker as an implied or express benefit included in their contract of employment. The clear majority of states categorize public employee pensions and retirement benefits as a form of contract right. However, there is great variation in the legal theory employed as the basis for these important rights and sometimes there are differences in explanations within the same state's jurisprudence. Three explanatory categories have emerged in state law defining the existence of retirement benefits as contract rights: 1) a state constitutional recognition of public employee retirement benefits as contract rights,[200] 2) state statutes identifying these forms of worker employment compensation as contracts,[201] and 3) court decisions finding contracts to exist employing a "facts and circumstances" type of analysis considering many factors including collective bargaining agreements.[202] A court's conclusion that retirement benefits are contractual in nature only begins the analysis.[203] Once that conclusion has been made, complex interpretive questions follow often requiring courts to analyze litigated issues in terms of an interwoven pattern of state constitutions, statutes, regulations, and prior case decisions.

---

199. Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, University of Minnesota Law School Legal Studies Research Paper No. 10-13 at 30 (Mar. 17, 2010).

200. *See infra* note 192.

201. *See, e.g.*, Ky. Rev. Stat. Ann. § 61.692(1) (LexisNexis 2018) (benefits pre-2014 hired employees constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall, except as provided in KRS § 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.); Wis. Stat. § 40.19(1) (2013) (rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act.).

202. Ambrose v. City of White Plains, No. 10-CV-4946, 2018 U.S. Dist. LEXIS 56309, at *1–6, *29–40, *39 (S.D.N.Y. 2018) (no contract found to exist).

203. A number of judicial decisions end with a finding that no contract right exists and no analysis of the legality of the benefit change is justified. *See Dodd*, 846 F.3d at 185 (no contract right to a default death benefit). *But see Roberts*, 911 F. Supp. 2d at 176 (plaintiffs proved the existence of a contract right to survive a motion to dismiss).

Litigation in these "contract" jurisdictions usually focuses on two important questions: 1) what is the scope or content of the contract related to retirement benefits and 2) are the modifications of pre-existing benefits providing less generous or more restricted worker entitlements lawful and, ultimately, enforceable? The first of these questions addresses a myriad of practical issues affecting all aspects of public employee retirement pensions and other benefits. What are the elements of the employment contract and what is its term? Several recent cases provide examples of these content questions and they have considered are range of issues including what working income is includible when calculating pension amounts,[204] which retirement system applies when there has been a change,[205] does a new collective bargaining agreement increase retiree health insurance premiums,[206] and what terms of pension calculations apply to certain employees?[207] Questions related to the employment contract's period of coverage also presents courts with a range of challenging issues. Is the agreement permanent providing for continuous and long-lasting employee benefits or does it represent a segmented series of contracts each possessing different terms?[208] These cases raise complicated interpretive issues of contractual composition and often require courts to undertake a wide ranging analysis.[209]

The second question that courts have confronted in pension reform litigation in these "contract" states deals with the legality of legislation or administrative action reducing worker retirement benefits. Lawsuits challenging the lawfulness of these reductions have been common and have occurred widely since 2008. This legal issue as-

204. Office of Admin. v. State Emps. Ret. Bd., 180 A.3d 740, 753 (Pa. 2018) (are union stipends income).

205. Lynch v. City of N.Y., 162 A.D.3d 589, 591 (N.Y. App. Div. 2018) (no service credit is given for correction officer's child care leave); McGlynn v. Cal., 230 Cal. Rptr. 3d 470, 478 (Cal. Dist. Ct. App. 2018) (do pre-PEPRA or post-PEPRA amendment rules apply to state judges). Along these lines, some cases have challenged the procedure required for the adoption of a pension policy. *See* City of Danville v. Garrett, 803 S.E.2d 326, 328-29 (Va. 2017) (non-application of state statute requiring police 2/3 disability pension).

206. In re New Brunswick Mun. Emps. Ass'n, 182 A.3d 394, 402–03 (N.J. Super. Ct. App. Div. 2018) (can a CBA impose higher retiree premiums in excess of statutory maximum).

207. New Orleans Fire Fighters Pen. & Relief Fund v. City of New Orleans, 242 So. 3d 682, 696 (La. Ct. App. 2018) (upholding trustee's decision to apply a higher compensation percentage to the calculation).

208. *Wood*, 818 F.3d at 1248–49 (finding that vested contract for retiree health care was a series of contracts and not one lifetime contract).

209. Sometimes courts simply treat the matter as a breach of contract action and award damages if they find a breach. *See* Bd. of Trs. of Harvey Firefighters' Pension Fund v. City of Harvey, 96 N.E.3d 1, 49 (Ill. App. Ct. 2017) (city failed to adequately fund pension fund and damages were awarded).

sumes clarity in the meaning of the terms of the revised employment contracts but these cases consider challenges to the legality of the action changing benefits. Rather than directly suing the government employer for breach of contract,[210] the overwhelming majority of these "legality" cases presents a state or federal constitutionally-based claim that the pension policy change "impairs" an existing contract right of workers and, therefore, violates the Contract Clause of the relevant constitution.[211] The remedial result sought by the employees challenging the state pension policy change is a judicial declaration that the modification is unconstitutional and, presumably, a nullity or void. Using the federal Contracts Clause also seeks to use federal supremacy principles to invalidate state policy decisions[212] although state contract clause cases generally follow a similar analysis but sometimes employ a state constitutional rationale.[213]

The Contract Clause analysis requires that a valid contract providing worker benefits exists and that the contract has been unconstitutionally "impaired" by state action. Recent case holdings have demonstrated that a very large number of courts wish to avoid the entire Contract Clause inquiry holding that workers or retirees do not have an enforceable contract right to pension and retirement bene-

210. The availability of a state law breach of contract damage remedy would presumably bar a Contracts Clause claim and several federal courts have so held. *See* e.g., *Cherry*, 762 F.3d at 371; Horwitz-Matthews, Inc. v. City of Chi., 78 F.3d 1248, 1252 (7th Cir. 1996); TM Park Ave. Assocs. v. Pataki, 214 F.3d 344, 349 (2d Cir. 2000); Crosby v. City of Gastonia, 682 F.Supp.2d 537, 543–44 (W.D. N.C. 2010). Another line of cases has held changing state and local law affects a breach of contract that constitutes an impairment of contract. *See* E&E Hauling, Inc. v. Forest Pres. Dist., 613 F.2d 675, 680–81 (7th Cir. 1980). Perhaps the best legal outcome would be to avoid the constitutional question if a statutory or common law remedy were available.

211. U.S. Const. art. I, § 10, cl. 1 (No State shall. . .pass any. . . Law impairing the Obligation of Contracts. . ..). State constitutions also contain versions of the federal constitutional clause. *See* Tex. Const. art. 16, § 66(d). *See also* George D. Braden et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis (1977) (37 other state constitutions have contract impairment clauses).

212. Some have speculated that the U.S. Constitution's 11th Amendment sovereign immunity concepts limit the use of the federal courts for this purpose. *See* Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. Colo. L. Rev. 1101, 1111 n.59 (2008) ("[S]tate employers may be able to avail themselves of sovereign immunity under the Eleventh Amendment, and responsible agents of the employers may be able to avoid individual damages liability if they show they are eligible for qualified immunity, though they may still be subject to injunctive relief"). Recent federal cases ignore this potential defense often citing Carter v. Greenhow, 114 U.S. 317, 322 (1885) (stating that the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation).

213. *See, e.g.*, Dannenberg v. State, 383 P.3d 1177, 1180 (Haw. 2016) (under state Contracts Clause), Moro v. State, 351 P.3d 1 (Or. 2015) (state Contracts Clause analysis of COLA change); AFT Mich. v. State, 866 N.W.2d 782, 802 (Mich. 2015) (federal and state constitutions considered in health care and pension challenge); Vaughn v. Pub. Emps. Ret. Sys. of Miss., 182 So.3d 433, 437 (Miss. 2015).

fits.[214] Courts reach this conclusion in a wide variety of ways including: finding a lack of clarity in legislation creating the contract right,[215] a temporary nature or unenforceability of the benefit,[216] the prospective nature of the right,[217] the employee's ability to opt out of the impaired system,[218] and an unsatisfied contractual vesting requirement.[219] It is striking just how many recent court decisions employ this tactic to deny employees recovery and to completely avoid Contracts Clause analysis.

Once a contract right is found to exist, the Contracts Clause claim will be analyzed focusing on the following two principal questions: (1) is there proof that a state policy or law change has affected a "substan-

214. Justus v. State, 336 P.3d 202, 211 (Colo. 2014) (no contract right to COLA); Underwood v. City of Chi., 779 F.3d 461, 464 (7th Cir. 2015) (no contract right to enduring health care benefits); Puckett v. Lexington-Fayette Urban Cnty. Gov't., 833 F.3d 590, 600 (6th Cir. 2016) (no vested contract right to COLA); Me. Ass'n. of Retirees v. Bd. of Trs., 758 F.3d 23, 31 (1st Cir. 2014) (no contract right to COLA); Christiansen v. Cty., 849 N.W.2d 493, 508 (Neb. 2014) (no contract right to maintaining health care premium); Am. Fed. of Teachers v. State, 111 A.3d 63, 73 (N.H. 2015) (no contract right to calculating earnable compensation); Berg v. Christie, 137 A.3d 1143, 1164 (N.J. 2016) (no contract right to COLA); R.I. Council 94 v. R.I., 705 F. Supp. 2d 165, 182-83 (D.R.I. 2010) (no contract right to health benefits); Bishop v. City of Columbia, 738 S.E.2d 255. 258 (S.C. Ct. App. 2013) (no contract right to health benefits); Frazier v. City of Chattanooga, 841 F.3d 433, 439 (6th Cir. 2016) (no contract right to COLA); Dodd v. City of Chattanooga, 846 F.3d 180, 185 (6th Cir. 2017) (no contract right to COLA); Schwegel v. Milwaukee Cty., 859 N.W.2d 78, 90 (Wis. 2015) (no contract right to Medicare reimbursement); In re Request for Advisory Opinion Regarding Constitutionality of 2011 P.A. 38, 806 N.W.2d 683, 698–702 (Mich. 2011) (no contract right to tax exemption for pension income).

215. *See, e.g.*, Cranston Firefighters v. Raimondo, 880 F.3d 44, 49-50 (1st Cir. 2018) (unmistakability doctrine not satisfied); Leff v. Clark Cty. Sch. Dist., 210 F. Supp.3d 1242 (D. Nev. 2016) (no statutory text offered to prove contract); Frazier v. City of Chattanooga, 841 F.3d 433, 436 (6th Cir. 2016) (no unmistakable contract right to COLA); Me. Ass'n. of Retirees v. Bd. of Trs., 758 F.3d 23 (1st Cir. 2014) (no unmistakable intent to create a contract right); Am. Fed'n of Teachers v. State, 111 A.3d 63 (N.H. 2015) (presumption is that no legislative intent to create a contract right); Prof'l Firefighters of N.H. v. State, 107 A.3d 1229, 1234-35 (N.H. 2014) (no unmistakable intent to create a contract right); N.J. Educ. Ass'n. v. State 989 A. 2d 282 (N.J. Super. App. 2010) (no contract right absent clear indication of legislative intent to create a contract right); Berg v. Christie, 137 A.3d 1143 (N.J. 2016) (no finding of legislative unequivocal intent to create a contract right); Retired Public Emps. Ass'n., Inc. v. Cuomo, 123 A.D.3d 92 (N.Y. App.Div. 2014) (no words of contract to signal an intent to create a contract right); Gamel v. Cincinnati, 983 N.E.2d 375 (Ohio App. 2012) (no clear indication of legislative intent to contract); Fry v. City of L.A., 199 Cal. Rptr.3d 694 (Cal. App. 2016) (legislative intent to create a contract must clearly appear and all doubts resolved in favor of the power of government).

216. Aquirre v. State, 891 N.W.2d 516, 526-27 (Ct. App. Mich., 2016); AFT Mich. v. State, 866 N.W.2d 782, 806-07 (Mich. 2015).

217. City of Hollywood v. Bien, 209 So.3d 1, 5-6 (Fla. Ct. App. 4th Dist. 2016).

218. AFT Mich. v. State, 866 N.W.2d 782, 803 (Mich. 2015).

219. Borders v. City of Atlanta, 779 S.E.2d 279, 286 (Ga. 2015) (stating that increased employee contribution to pension plan was not unconstitutional since it worked prospectively); *see also* Rieder v. Milwaukee Cty., No. 2014AP496, 2015 Wisc. App. LEXIS 465, at *12 (Wis. Ct. App. June 30, 2015) (stating that contract right to health care benefit does not vest until retirement).

tial impairment of a contractual relationship,"[220] and (2) is the state law "appropriate . . . and reasonable" and designed to advance a "significant and legitimate public purpose."[221] Recent U.S. Supreme Court Contract Clause decisions have reinforced the analytical approach using these twin inquiries.[222]

The first hurdle that must be overcome is successfully proving that the pension reform measure constitutes a "substantial impairment of a contractual relationship." There could be many kinds of contract changes both large and small that could constitute an impairment of the contract. The critical point would be a court's finding that the contract modification was "substantial" in nature since a "nonsubstantial" impairment would not be barred by the Contract Clause. As Justice Kagan wrote in *Sveen v. Melin*, the substantiality of the impairment should be evaluated by "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding . . . his rights."[223] In one case, a federal court granted a preliminary injunction after finding a substantial impairment when an employer imposed large increases in deductibles and co-payments for retiree health care benefits under an agreement.[224] Another case found that the plaintiffs had proved both that a contract right to retiree health insurance existed and that the right had been substantially impaired by retiree cost increases sufficiently to survive a motion to dismiss.[225] Many other decisions fail to find substantial impairment with little discussion or sometimes confusing analysis unrelated to the Contracts Clause.[226] Although sounding as though it requires a careful judicial appraisal of

220. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

221. Energy Reserves Grp., Inc. v. Kan. P.& L. Co., 459 U.S. 400, 411–12 (1983).

222. *See* Sveen v. Melin, 138 S. Ct. 1815, 1818 (upholding a Minnesota statute automatically revoking a life insurance beneficiary designation upon divorce).

223. *Id.* at 1822 (citing Allied Structural Steel Co., 438 U.S. at 244). Some state courts also apply a gloss to the "substantial impairment" element by negating that conclusion if the pension benefit reduction is offset by a corresponding benefit. *See* Cloutier v. State, 42 A.3d 816, 826 (N.H. 2012) (adopting the offset standard).

224. Welch v. Brown, 935 F. Supp. 2d 875, 882 (E.D. Mich. 2013). *See also* Andrews v. Lombardi, No. KC-13-1128, 2017 R.I. Super. LEXIS 31, at *65 (R.I. Super. Feb. 2, 1017) (COLA reductions represented substantial impairments).

225. Roberts v. N.Y., 911 F. Supp. 2d 149, 177–78 (N.D.N.Y. 2012).

226. Ambrose v. City of White Plains, No. 10-CV-4946, 2018 U.S. Dist. LEXIS 56309, at *16–19 (S.D.N.Y. Apr. 2, 2018) (finding no substantial impairment hypothetically after finding no impairment due to the availability of damages). Other cases use the Contract Clause language of "substantial impairment" but completely fail to undertake the usual constitutional analysis. *See e.g.*, Borders v. City of Atlanta, 779 S.E.2d 279, 287 (Ga. 2015); AFT Mich. V. State, 866 N.W.2d 782, 802 (Mich. 2015); Scott v. Williams, 107 So.3d 379, 386-89 (Fla. 2013).

the impact of a change in benefits, this test actually has presented the courts with a great deal of discretion in making their judgment call about "substantiality." Relying on the Supreme Court's statements that contractual impairment occurs when "[l]egislation . . . alters the contractual relationship between the parties"[227] and "deprives one of the benefit of a contract, or adds new duties or obligations thereto. . .,"[228] decisions from the 1980s and 1990s appeared to make this element relatively easy to satisfy with state changes to public pension systems triggering this factor.[229] Case decisions during the last decade have been highly variable in their results but the clear trend has been away from finding "substantial impairment" when public employee retirement rights are narrowed[230] making this first prong of the Contracts Clause argument very difficult to prove.

Ruling that a state or local government pension benefit change does constitute a "substantial impairment" of workers' and retirees' contract rights is merely the initial step in the Contract Clause analysis. A court's determination that such an adverse change had occurred does not by its own force require the finding of a constitutional violation. Assuming that a "substantial impairment" has been found, the second factor in this analysis places the burden on the government employer to demonstrate that the policy change is "reasonable and necessary to serve an important public purpose."[231] Such an open-ended standard is obviously subject to a wide range of judicial interpretation with some courts simply ruling that adverse changes were

227. *Allied Structural Steel Co.*, 438 U.S. at 240.

228. N. Pac. Ry. Co. v. State, 208 U.S. 583, 591 (1908).

229. *See* Valdes v. Cory, 139 Ca. App. 3d 773, 783 (Cal. App. 1983); Deonier v. State, 760 P.2d 1137, 1143 (Id. 1988).

230. *See generally* Wash. Educ. Ass'n v. Wash. Dept. of Ret. Sys., 332 P.3d 428, 436 (Wash. 2014); Kendall v. Gov't. of the V.I., 596 F. App'x 150 (3d Cir. 2015); Bd. of Admin. v. Wilson, 52 Cal. App. 4th 1109 (Cal. Ct. App. 1997); Calabro v. City of Omaha, 531 N.W.2d 541 (Neb. 1995).

231. U.S. Tr. Co. v. N.J., 431 U.S. 1, 25 (1977). This decision is frequently cited for the analytical framework for pension policy changes reducing benefits. The case notes that "reasonableness" should be determined considering the degree of contractual impairment, the unforeseeable effects of the existing contract, and that no less drastic change could have achieved the same legislative policy objective. *Id.* at 27, 29-31. Its standard suggests much greater protection of retirement benefits than actually exists in the recent cases.

reasonable[232] and a few others scrutinizing legislative policy alternatives much more rigorously.[233]

Earlier analysis of the Contracts Clause litigation challenging pension reform measures suggested that this approach of constitutional theory might impose serious limits to state and local government policy flexibility in dealing with pension reform.[234] Some cases even repeated the *U.S. Trust v. New Jersey* dicta indicating that the Contracts Clause should be more rigorously enforced against a state when it seeks to impair its own contracts with its workers.[235] However, this has not been the case over the last decade. Advocates for public workers and retirees have continued using this "impairment of contract" Contracts Clause approach in their ongoing challenges to changing law and policy in more than 60 reported cases since 2009. Unfortunately for their clients, employing this most common and previously successful litigation theory has been a largely futile effort achieving very few court victories with 85-90% of the reported decisions upholding the states' policies against these constitutional challenges and rejecting worker claims.

5. State Constitutional Protections

Several states have adopted constitutional provisions specifically giving security to public employee pension benefits.[236] These provi-

232. Marin Ass'n. of Pub. Emps. v. Marin Cty. Emps.' Ret. Ass'n., 2 Cal. App. 5th 674, 708-09 (Cal. App. 2016). Some decisions use terms like "reasonableness" in a general sense untethered to the Contracts Clause to reach their holdings. *See* Dannenberg v. State of Haw., 383 P.3d 1177, 1196 (Haw. 2016).

233. *See generally* Moro v. State, 351 P.3d 1, 41 (Or. 2015), Roberts v. N.Y., 911 F. Supp. 2d 149, 180-82 (N.D.N.Y 2012); Stone v. N.C., 664 S.E.2d 32, 43 (N.C. App. 2008); *Andrews*, 2017 R.I. Super. LEXIS at *72–85.

234. Amy Monahan, *Understanding the Legal Limits on Public Pension Reform* at 2, American Enterprise Institute, (May 2013) ("once a court finds an employee's right to her public retirement benefits to be contractual, it is generally unconstitutional for a state to take any action that substantially impairs the employee's benefits").

235. U.S. Trust Co. further noted that "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *U.S. Tr. Co.*, 431 U.S. at 30–31. It continued "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 25–26.

236. Alaska Const. art. XII, §7 ("membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired"); Ariz. Const. art. XXIX, §1 ("membership in a public retirement system is a contractual relationship that is subject to [the state impairment of contracts clause"); Haw. Const. art. XVI, §2 (membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired); Ill. Const. art. XIII, §5 (membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the bene-

sions, often similarly phrased, are focused upon the specific worker retirement rights and they do not rely upon the more general constitutional prohibitions against the impairment of contracts that were discussed in the prior section.[237] The language employed in these state constitutional provisions is often surprisingly direct and unambiguous. For example, Hawaii's constitution provides that "membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."[238] The power of this constitutional provision obviously lies in the meaning of the words "diminished or impaired." In this example, the Hawaiian provision has been interpreted as only protecting past accruals of pension rights as they are earned while reserving the right of state employers to change, and possibly reduce, future benefits.[239] Texas has a similar provision.[240] Although these provisions are constitutional in nature, akin to similar provisions of law, they find specific meaning through court decisions interpreting them. Interpretation of state constitutional protections and parsing of the state's jurisprudence has enormous social and economic impact making dry pension rights decisions infused with powerful political implications.[241]

fits of which shall not be diminished or impaired); Mich. art. IX, §24 ("the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby"); N.Y. Const. art. V, §7 ("membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired"); Tex. Const. art. XVI, §66 (service retirement benefits may not be reduced or impaired except on a prospective basis).

237. *See e.g.*, Colo. Const., art. II, §11; Fla. Const., art. I, §10; Ga. Const., art. I, §1, ¶X; Miss. Const. art. 3, §16. *But see* Neb. Const., art. III, §19 ("nothing in this section shall prevent local governing bodies from reviewing and adjusting vested pension benefits periodically as prescribed by ordinance").

238. Mich. Const. art. IX, §24 (the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.); Haw. Const. art. XVI, §2 ("membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired"); La. Const. art. 10, §29 (A) ("membership in such a retirement system shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member or retiree or to his lawful beneficiary upon his death").

239. *See* Ass'n. of Prof'l & Tech. Emps. v. City of Detroit, 398 N.W.2d 436, 454 (Mich. Ct. App. 1986); Smith v. Bd. of Tr. of La. State Emps. Ret. Sys., 851 So. 2d 1100, 1105 (La. 2003).

240. Tex. Const. art. XVI, §66 (service retirement benefits may not be reduced or impaired except on a prospective basis).

241. Not all court decisions under these constitutional provisions favor the employees. *See* Eddington v. Tomasovic, No. 05-15-00839-CV, 2016 Tex. App. LEXIS 13204, at *1 (Tex. App. 5th Dec. 13, 2016) (holding that Texas constitutional pension protection does not extend to future interest rate applied to benefits).

Not all constitutions are alike in their coverage. Several other states' constitutional provisions have even broader reach asserting protections for both accrued and future benefits having the effect of "freezing" benefits at the level expected on the first day of employment. This sweeping policy means that a retirement system could not be altered in a manner that would reduce or lessen employee retirement benefits from the level that would have been received in the plan in place on the first day of employment. Such a provision would have a tremendous benefit to employees when later state legislation reduces retirement benefits available to workers and several recent cases have so held.[242] The states of Illinois and New York have constitutional provisions specifically setting forth this policy.[243] The Illinois Constitution provides that "membership in any pension or retirement system . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."[244] Alaska and Arizona have constitutional sections that have been interpreted in the same fashion.[245] The result is that in these states with strong pension-protecting constitutional norms, until these strong constitutional sections are amended or repealed, the policy choices available to state legislatures and executives will be restricted by the language and the interpretation of the state's constitution.[246]With the observed decline in the utility of Contracts Clause attacks on pension reforms, these aspects of state constitutional law will take on even greater impor-

242. *See* Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1164–65 (Ariz. 2014) (Pension Clause confers additional, independent protection beyond the Contract Clause). This has been a much-litigated issue in Illinois with the protection of the Illinois Constitution's pension protection clause being found to apply only when the employee has "entered the [retirement] system." Konicki v. Ill. Mun. Ret. Fund, No. 4-17-0056, 2018 Ill. App. (4th) 170056-U, at *18 (Mar. 2, 2018).

243. A number of other states have reached the same policy position by statute. *See* Ky. Rev. St. §61.692(1) (finding public pension rights for pre-2014 employees to constitute an "inviolable contract" and that benefits shall not be subject to reduction or impairment by alteration, amendment, or repeal.); Wis. Stat. §40.19(1) (shall be due as a contractual right and shall not be abrogated by any subsequent legislative act for accrued benefits).

244. Ill. Const., art. XIII, §5. *See also* N.Y. Const., art. V, §7 ("membership in any pension or retirement system. . .shall be a contractual relationship, the benefits of which shall not be diminished or impaired"). Illinois courts have actively enforced this clause. *See generally* Jones v. Mun. Emps.' Annuity & Ben. Fund of Chi., 50 N.E.3d 596 (Ill. 2016); Matthews v. Chi. Transit Auth., 51 N.E.3d 753 (Ill. 2016); Heaton v. Quinn (In re Pension Reform Litigation), 32 N.E.3d 1 (Ill. 2015); Kanerva v. Weems, 13 N.E.3d 1228 (Ill. 2014).

245. Hammond v. Hoffbeck, 627 P.2d 1052, 1057 (Alaska 1981). *See generally* Mun. of Anchorage v. Gallion, 944 P.2d 436 (Alaska 1997); Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965).

246. *See In re* Pension Reform Litigation, 32 N.E.3d 1, 98 (Ill. 2015) (statute lowering pension benefits declared unconstitutional under state pension protection clause).

tance as a crucial protector of public employee pension rights in the states having this law.

VI. CONCLUSION: HAVE THE COURTS PROTECTED PENSION RIGHTS THAT LEGISLATURES HAVE ATTEMPTED TO CUT?

The subject of this article is a difficult one asking how to reconcile the competing interests of public employees against the larger interest of state and local governments and their taxpaying citizens. On the purely economic level, this conflict could be characterized as an ordinary struggle between two competing constituencies attempting to determine who should bear the deferred cost of service. But this is more than a tussle between employers and their workers since these employees are people who serve us as our teachers, police, fire-fighters, first responders and others providing critical services for long periods, sometimes for their entire working lives. While public worker salaries do vary, in general they support a modest, middle class existence for people who work every day.[247] The recently-adopted pension reforms have created great anxiety about the future in these workers striking a visceral chord - will I have stable retirement income? How will I live when I can no longer work? These are critically important issues for all people, but they are even more significant for modestly-paid public workers.

This is also a story about competing misunderstandings both on the part of public workers and of the government employers. Employees frequently believed that they had earned stable retirement income through their work and they strongly felt that once earned, these "rights" were permanent and not subject to later reduction. This was a hopeful belief that drove workers' groups to court to defend their perceived rights. It is also a tale about government leaders' misunderstandings of the implications of employee work agreements and pension promises. Over many years, retirement benefits have been offered with little serious consideration of their long-term costs.

247. In May, 2017 the U.S. Bureau of Labor Statistics set the average annual salary for all local government employees at $52,980 and the average state worker salary at $55,820. *See* U.S. DEP'T OF LABOR, Occupational Employment Statistics, Local Government, NAICS 999300; State Government, NAICS 999200 (May, 2017), https://www.bls.gov/oes/2017/may/naics4_999300.htm. Some teacher annual teacher salaries for 2016-17 were far less than these averages: South Dakota ($42,668), Mississippi ($42,925), Oklahoma ($45,245), and West Virginia ($45,701). *See* NATIONAL CTR. FOR EDUCATION STATISTICS, 2017 Tables and Figures, Table 211.60, https://nces.ed.gov/programs/digest/d17/tables/dt17_211.60.asp.

The granting of benefits without providing for their actual payment also reveals a willful ignorance of the economic consequences of prior promises. As history shows us, it is easy for politicians to make current promises that will have to be honored by others in the future.

Both of these misunderstandings (or policy errors) have led to the pension "reforms" that have recently been adopted. In every instance, government policy changed employee benefits in a way that was adverse to workers' interests usually at times of fiscal stress and after the precise costs of providing existing benefits had become better understood. These episodes also demonstrate another theme of the eroding public support for funding the true costs of state and local government services.[248] The reform of pension systems for fiscal reasons has succeeded in state legislatures following the usual democratic process with the citizens giving tactic approval. It is not clear that these cut backs are the result of any deep animus towards state and local workers but rather they reflect an increased resistance to higher taxation to fund the existing pension system.[249] This anti-tax trend and shifting support against public employees have recently triggered a backlash from some public workers that has occasionally been successful.[250]

248. Media portrayals of abusive and unreasonable public employee pension practices in some parts of the country have harmed public perceptions of worker entitlement to their retirement benefits even though these episodes distort average public worker's conduct. *See, e.g.*, Jan Hefler, *"Double Dipping"- Collecting a Government Pension and Salary Banned in Burlington County*, PHILADELPHIA INQUIRER, (September 30, 2016), http://www.philly.com/philly/news/politics/20160930__Double_dipping__-_collecting_a_government_pension_and_salary_-_banned_in_Burlington_County.html; Editorial, *Audit Port Authority for Pension Scams—And while we're at it, New Jersey*, STAR LEDGER, (June 27, 2016), https://www.nj.com/opinion/index.ssf/2016/06/audit_port_authority_for_pension_scams_and_while_w.html; Mary Williams Walsh and Amy Schoenfeld, *Padded Pensions Add to New York Fiscal Woes*, N.Y. TIMES, (May 21, 2010), https://www.nytimes.com/2010/05/21/business/economy/21pension.html. *See also*, Pisani v. City of Springfield, No. 4-16-0417, 2017 Ill. App. LEXIS 113, *8–9 (App. Ct. Mar. 3, 2017) (upholding city policy against use of vacation leave to "spike" pensions).

249. Although public attitudes towards the federal government have declined, state and local governments score consistently higher on surveys of favorability. *See generally*, *State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RESEARCH CTR. (2013), http://www.people-press.org/2013/04/15/state-govermnents-viewed-favorably-as-federal-rating-hits-new-low/; *Republicans Like State Government, Especially in GOP-Led States: Growing Gap in Favorable Views of Federal, State Governments* PEW RESEARCH CTR. (2012), http://www.people-press.org/2012/04/26/growing-gap-in-favorable-views-of-federal-state-governments/.

250. Michael Hansen, *Hidden Factors Contributing to Teacher Strikes in Oklahoma and West Virginia, and Beyond, Brown Center Chalkboard*, THE BROOKINGS INSTITUTION, (Apr. 6, 2018), https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/06/hidden-factors-contributing-to-teacher-strikes-in-oklahoma-kentucky-and-beyond/. *See also* Danielle Haynes, *Teacher Strikes Highlight Widening U.S. Pay Gap*, UNITED PRESS INTERNATIONAL (Apr. 12, 2018), https://www.upi.com/Teacher-strikes-highlight-widening-US-pay-gap/1091523033985/ (describing low teacher pay and 9 days strikes in Oklahoma and West Virginia).

As a reaction to their failure in the legislative and administrative arena, public employees have asked federal and state courts to moderate the impacts of these reform policies through judicial review. In order to do this, employee groups have had to prove that their "rights" to the affected pension system benefits have been unlawfully damaged. In cases where states have had strong constitutional protections for pension benefits or when state statutes undeniably limited government retrenchment of existing rights, the courts have been willing to rebuff the policy changes. However, when asked to "stretch" the meaning of statutes or prior interpretive precedent to block these reforms, most often courts have said "no."[251] Interestingly, this has been especially true with regard to claims based upon constitutional rights theory where judicial interpretation and the exercise of discretion have rarely been exercised in favor of workers or retirees.[252] Perhaps all this reveals is that retirement claims have been considered economic in nature and not protected by stronger constitutional or statutory norms.

Judges have been extremely reluctant to intervene into what they perceive as a socio-economic conflict between employees and their employer. Such non-interventionist judicial attitudes have been consistent with the majoritarian decisions made by elected officials. These courts have also been very careful not to challenge the authority of the legislature and with their narrow rulings they have protected themselves from "activism" criticism.[253] The clear import of this analysis has been that public workers must look to the political process for protection of their work-related rights- and not to the courts.[254] These

251. Some exceptions do exist, and some state supreme courts have made expansive readings of state pension rights statutes. *See, e.g.*, Milwaukee Police Ass'n. v. Milwaukee, No. 2015AP2375, 2018 Wisc. LEXIS 314 (July 6, 2018) (stating that city home rule power does not include the city's authority to change employee voting or representation on Annuity and Pension Board protected as "other rights" under state statute).

252. Compare demanding judicial review of state legislative restrictions on the exercise of public employee First Amendment constitutional rights.

253. Perhaps state courts are less inclined to challenge legislative choices perceiving legislatures to be more willing to cut back on the judicial role. *See, e.g.*, Legislative Assaults on State Courts 2018, BRENNAN CTR. FOR JUSTICE (Feb. 6, 2018) https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018 (Legislatures in at least 16 states considering legislation that would diminish the role or independence of state courts); Editorial, *Courts Shouldn't be Partisan Punching Bags*, N.Y. TIMES, (Apr. 9, 2018), https://www.nytimes.com/2018/04/08/opinion/judicial-independence.html.

254. There was no completely uniform pattern in all case decision and a small number of state courts like Arizona and Illinois clearly demonstrated a pro-worker/retiree emphasis.

employees must build public understanding, appreciation, and support for the important work that they do. Litigating to overcome legislative defeats is ultimately a losing game.