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THE GOVERNMENT PENSION IDENTITY CRISIS

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ABSTRACT

The Contract Clause once dominated the docket of the Supreme Court. But now the clause belongs to the museum of constitutional law. This artifact, however, is gaining new life in ongoing litigation over public pension reform that significantly impacts the financial benefits of government workers such as teachers, firefighters, and even judges. Unlike private sector workers, public servants do not have a federal safety net in the form of insurance should their pension plans become insolvent. In analyzing the major doctrines and principles of a government pension contract, along with the themes and theories that ground them, this Article exposes a government pension identity crisis. It emphasizes the thinness of legal scholarship that coalesces around otherwise common areas of study like contracts, trusts, employment, and constitutional law. It further clarifies how the ill-defined image of a public pension contract is complicated by its common law character that has consequences for changing constitutional contract law and reforming government pensions.

INTRODUCTION

Runaway pension liabilities have become a legislative priority, making news headlines across the country.[1] State and local governments are raising taxes, reducing government services like education, and issuing bonds in response to burgeoning pension debt.[2] With limited recourse in the wake of continuing budget crises, government employers are also trimming the pensions of new and

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[1] *See* Aaron Brown, *Time Bomb of Public Pension Funding Ticks Louder*, WASH. POST (Feb. 14, 2023), https://www.washingtonpost.com/business/energy/time-bomb-of-public-pension-funding-ticks-louder/2023/02/13/a9cbcfae-ab94-11ed-b0ba-9f4244c6e5da_story.html; Sam Sutton, *State pension plans were hammered in 2022. Next year will be worse*, POLITICO (Dec. 28, 2022), https://www.politico.com/news/2022/12/28/newsom-democrat-governors-pension-recession-00075279; Steven Malanga, *Public Pensions' Lost Decade*, CITY J. (July 28, 2022), https://perma.cc/XXE8-RT9J (noting that a number of "public pension systems holding the retirement funds of millions of government employees are now below sixty percent funded").

[2] *See* T. Leigh Anenson, Alex Slabaugh & Karen Eilers Lahey, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 6 (2014) [hereinafter *Reforming Public Pensions*] (explaining that governments will raise taxes if unable to lower the cost of pension benefits); Steve Forbes, *Pension Crisis: Are Your Taxes Going To Go Up?*, FORBES (Oct. 12, 2021), https://www.forbes.com/sites/steveforbes/2021/10/12/the-public-pension-crisis-are-your-taxes-going-to-go-up/?sh=4245efe56a59; Mary Williams Walsh, *To Plug a Pension Gap, This City Rented Its Streets. To Itself.*, N.Y. TIMES (Feb. 16, 2021), https://www.nytimes.com/2021/02/16/business/dealbook/pension-borrowing-retirement.html?auth=login-email&login=email (reporting on California and Arizona cities that are issuing bonds to pay for the growing pension debt); *see also* T. Leigh Anenson et al., *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. 337, 378–79 (2021) [hereinafter *Constitutional Limits on Public Pension Reform*] (explaining that California pension costs have caused states to cut essential government services like education).

existing employees (and retirees).[3] In fact, cutting pension benefits has become synonymous with public pension reform.[4]

Government workers, however, are challenging these reforms in court.[5] Ongoing legal battles seek to invalidate reforms by claiming pension cuts impair government workers' contract rights under the Contract Clause.[6] The U.S. Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[7] Most state constitutions contain similar provisions.[8] These clauses raise key issues of whether and when government pension are contracts. The contract assessment is multi-faceted, ranging from when a contract begins to what obligations it protects.[9] Courts neither agree nor are (necessarily) consistent on these issues.[10] Because a principled philosophy will enable a more cohesive treatment of government pension reform, the foregoing examination explores the development and reception of ideas about public pensions as contracts.

This Article summarizes the convergence (and divergence) of differing state regimes for government pension contracts.[11] Diagramming the dimensions of a pension contract is not only necessary for the rational development of doctrine, but also for a deeper understanding of contract theory and its place within private and public law. To be sure, litigation about restructuring pension obligations reveals that public pensions are undergoing an identity crisis.

The concept of a government pension contract sits at the intersection of the well-mined fields of contract, employment, and constitutional law.[12] Yet these connections are unfamiliar to most scholars and essentially ignored in the law school curriculum.[13] Trust law plays a prominent role in the management of pension assets, with academic interest focused on the federal regulation of

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[3] *See Reforming Public Pensions*, *supra* note 2, at 12–14 (surveying reforms from 2011–14 across thirteen states); T. Leigh Anenson & Jennifer K. Gershberg, *The Legal and Ethical Implications of Public Pension Reform: Analyzing the New Constitutional Cases*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 118–19 n.6 (2021) [hereinafter *Pension Law and Ethics*] (surveying almost fifty cases from 2014–19 across twenty-two states); Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 174–75 (compiling reforms from 2001–2012 across eight states).

[4] *See Reforming Public Pensions*, *supra* note 2, at 2, 11 ("The gravity of the current crisis has pushed pension reform . . . to the front of the public policy agenda in each state capital.").

[5] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 340–41.

[6] *See id.*

[7] U.S. CONST. art. I, § 10.

[8] *See, e.g.*, CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed."); ME. CONST. art. I, § 11 ("The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts . . ."); UTAH CONST. art. I, § 18 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.").

[9] *See infra* Part I.

[10] *See infra* Part I.

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Part II.

employee benefits (including private pensions).[14] The prevailing intellectual fog contributes to the diversity of judicial opinions about public pension contracts.

The main goal of this Article is to expose this conceptual crisis and consider its consequences. This Article additionally criticizes current law and makes recommendations for what legislatures (or the people through constitutional change) might do to improve it. Given that most pension contract law is judge-made, perspectives on the patterns and practices of decision-making correspondingly offer courts a sound footing to reach the right (reasonable) decisions.

The Article proceeds in three parts. Part I maps public pension contract law to illustrate its uncertainty and incoherence. Part II explains a reason for the confusion that places the blame (in part) on academia. Part III underscores why a better picture of government pensions matters. This Article concludes by arguing that taking stock of the contract question—descriptively, functionally, and normatively—assists in solving the public pension problem that has become a focus of national attention.

I. THE DIMENSIONS OF A GOVERNMENT PENSION CONTRACT

The last decade of judicial decisions that determined the validity of public pension reforms under state and U.S. Contract Clauses have depended almost exclusively on the contract condition.[15] Over time, it might be expected that repeat resolutions would yield clarity and consistency on one or more contractual issues. But judicial opinions have proven far from predictable.[16] The uncertainty is no doubt complicated by the fact that determinations about contracts cut across state courts and state laws. Undeniably, the law on government pension contracts is muddled, with no concrete theory, doctrine, or policy to discern whether a contract exists or to identify its terms.[17] The outcomes vary along four dimensions that include: (1) a contract's existence, (2) the point of formation, (3) its duration, and (4) its terms.[18] The following discussion explains the doctrinal architecture of government pension contracts to better enable a clear vision as to their future design.

A. *Contract Existence*

In some states, constitutional provisions and statutes expressly declare that pension benefits constitute contractual agreements.[19] Most jurisdictions lack

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[14] *See infra* Part II.

[15] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 341.

[16] *See id.* at 343–44 (explaining that there is no uniform concept of a government pension contract and reporting conflicting decisions on its dimensions).

[17] *See id.* at 343.

[18] We have examined these dimensions in an earlier work that we draw from in this part. *See* T. Leigh Anenson & Hannah Weiser, *Top Trends in Public Pension Litigation*, N.Y.U. REV. EMP. BENEFITS & EXEC. COMP. 6–11 (2023) [hereinafter *Top Trends*].

[19] *See* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016); BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 334 n.136 (1938) (listing

such explicit provisions though, meaning that judges must analyze the statutory language to determine whether a legally binding agreement exists by implication.[20] Typically, statutory silence on the creation of a pension contract advantages governments and disadvantages government workers attempting to invalidate reforms that negatively affect their benefits.[21] Not even mandatory language such as "shall" is usually sufficient to constitute a contract.[22] Moreover, other evidence of intent like reservation clauses, employee handbooks, and even the amendment of the legislation over time has been relied upon to invalidate workers' contract claims and uphold pension reform.[23] Judicial decisions from other jurisdictions have also been impactful.[24]

In reading pension statutes that are silent on the contract existence issue, courts in several states employ a presumption against any such agreement.[25] Historically referred to as the unmistakability doctrine,[26] this interpretative technique has been called the "no contract" canon by emphasizing its effect on the meaning of statutory language.[27] Dating to the Founding Era and refined by state and federal courts in the early nineteenth century,[28] the "no contract" canon of construction is a special rule of government contracting that the yielding of sovereign authority by the legislature must appear in unmistakable terms.[29]

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three states with statutes declaring that participation in a retirement system is a contract and seven states with constitutional provisions protecting public pensions). The Texas Constitution expressly protects the accrued retirement benefits of most non-statewide plans. *See* Eddington v. Dall. Police & Fire Pension Sys., 589 S.W.3d 799, 799–800 (Tex. 2019) (citing TEX. CONST. art. XVI, § 66).

[20] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 359–68. Some decisions delineate that contractual existence depends on whether participation is compulsory. *See* Haverstock v. State Pub. Emps. Ret. Fund, 490 N.E.2d 357, 360–61 (Ind. Ct. App. 1986) (distinguishing between voluntary plans that are contractual and compulsory plans that are gratuities); *cf.* McNamee v. State, 672 N.E.2d 1159, 1162 (Ill. 1996) (noting that Illinois amended its constitution to negate the "traditional classification" in which only optional plans are contractually protected).

[21] *See Top Trends, supra* note 18, at 6–7; *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 374.

[22] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 360 n.129 (citing cases).

[23] *See id*. at 375.

[24] *Id*. at 368–69.

[25] *See* T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause,* 54 U. MICH. J.L. REFORM 147, 215–16 (2020) [hereinafter *Clashing Canons*] (showing overwhelming majority of courts applied the "no contract" canon to presume statutes providing benefits are not contracts in survey of pension reform litigation from 2014–19).

[26] *See id.* at 150 (noting that the most common substantive canon applied in Contract Clause cases contesting public pension reform is the unmistakability doctrine).

[27] *Id.* at 171.

[28] *Id.* at 172–73 (citing cases). The U.S. Supreme Court grounded the modern unmistakability doctrine in an opinion by Chief Justice Marshall. *See id.* at 172 (citing United States v. Winstar Corp., 518 U.S. 839, 873–74 (1996) (plurality) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810))).

[29] *Id.* at 171; *see id.* at 155 ("[M]any courts require the legislature to speak directly and unmistakably before treating legislatively-created pensions as contracts.").

A rationale for the presumption against statutes as legally binding agreements is based on the idea that legislatures make policy.[30] Policies, unlike contracts, can be changed and do not bind future legislatures.[31] The canon is thus grounded in basic governance principles supporting the separation of powers.[32] Corresponding to the same reason that statutes do not generally create contracts, the "no contract" canon has likewise been couched in terms of legislative intent.[33]

Alternatively, in certain jurisdictions, judges fill statutory gaps by inferring that a contract exists. For instance, California courts employ a near automatic classification of pensions as contracts to the extent that benefits are part of the employment relationship.[34] California's judge-made rule has deep roots, yet it is less clear whether it forms a coherent and justifiable doctrine.[35] In earlier works, we explained how blind adherence to precedent misses the mark and pointed out the absence of reasoning in past precedent that continues to the present day.[36] As such, the authority, while well-established, is not entirely satisfactory from a logical point of view.[37]

This is not the place for an exhaustive analysis of these complex concepts, though we have recently urged the Supreme Court of California to renounce the rule regarding government pensions in part and rehabilitate the remainder.[38] The main point of this section is to highlight that the existence or non-existence of a pension contract is neither easy nor clear. Ultimately, the contract's existence is subject to precedent, the presence of contractual language in statutes or constitutional provisions, and the judge's interpretative discretion.

Furthermore, courts' considerations of whether the public pension benefits altered through reform legislation were part of a pre-existing contract no longer turn only on a contract's existence. Decisions ruling on the constitutionality of reforms have been grounded on other contractual matters as well.

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[30] *See id.* at 179.

[31] *See id.*

[32] *See id.* at 180–81.

[33] *Id.* at 179–80. *See Top Trends*, *supra* note 18, at 19–30 (identifying an interpretative turn to formalism in judicial reasoning about public pension contracts).

[34] *See* T. Leigh Anenson & Jennifer K. Gershberg, *Stare Decisis and the Status of California's Super Pension Contract*, 56 LOY. L.A. L. REV. 727, 776 (2022) [hereinafter *California's Super Pension Contract*] (explaining that the California Supreme Court acknowledged the "no contract" canon for pension benefits but created an exception to it in the government employment setting so long as the benefits are connected to compensation).

[35] *See id.* at 763–75 (providing an in-depth examination of California's public pension law); T. Leigh Anenson, *The Argonauts: One Hundred Years of the California Rule*, 38 ABA J. LAB. & EMPL. L. (forthcoming 2024) [hereinafter *The Argonauts*], https://ssrn.com/abstract=4438648.

[36] *See California's Super Pension Contract*, *supra* note 34, at 737 (noting that the Supreme Court of California "has never fully explained itself").

[37] *See id.* at 738–40.

[38] *See id.* at 793–96; *infra* Part I.C.

B. *Contract Formation*

Another contractual issue raised in government pension reform litigation is the moment at which a contract is formed. Assuming a contractual relationship is established, judicial determinations of *when* the contract takes effect vary significantly.[39] And as many as ten jurisdictions have not provided any guidance on the issue of contract formation.[40] In those that do, the time frame spans from the first day of work to the last, and even at points during the period of employment.[41]

Courts in many states pronounce pensions contractually binding from the first day of employment. The first-day rule is the most common approach to pension protection.[42] Although protecting pensions upon hiring is not the only feature of California law,[43] the concept is associated with the "California Rule" because of the state's early adoption of that rule and resulting influence on other jurisdictions.[44]

In contrast, certain state courts hold that pension contracts are formed on an employee's last day of employment corresponding with retirement.[45] Taking an intermediate position, some courts find the contract formed somewhere throughout the length of the employee's career.[46] A common arrangement is employee satisfaction of the vesting (minimum service) requirements of the retirement system.[47] Another middle ground approach is to protect benefits once *both* minimum age and service requirements are met.[48] The result is a patchwork of start dates that yield distinct ramifications for a government's ability to reduce pensions and for protecting the benefits of public servants from different states with the same jobs.

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[39] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 375; *Legal Protections for State Pensions and Retiree Health Benefits*, PEW CHARITABLE TR. 5–6 figs. 2 & 3 (May 2019), https://perma.cc/KW66-GWNP [hereinafter PEW CHARITABLE TR.].

[40] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (listing ten states).

[41] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 375–76.

[42] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (counting twenty-two states that protect accrued benefits from the moment employees begin participating in the plan).

[43] *See supra* Part I.A; *infra* Part I.C.

[44] *See* Alexander Volokh, *Overprotecting Public Employee Pensions: The Contract Clause And The California Rule*, FEDERALIST SOC'Y 4, 5 (Dec. 31, 2013), https://perma.cc/5CFB-EXS3 (estimating that the California Rule covers one-quarter of the U.S. population); *see generally* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1036, 1071 (2012) [hereinafter Monahan, *The California Rule*] (tracing the history of California public pension law and other states that follow it).

[45] *See* PEW CHARITABLE TR., *supra* note 39, at 5 (listing Iowa, Ohio, and Virginia).

[46] *See Reforming Public Pensions*, *supra* note 2, at 27–29 (discussing different intermediate approaches in which pensions are protected pre-retirement eligibility and post-hiring).

[47] *See* Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 27 (1st Cir. 2014).

[48] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 400 diagram 7; PEW CHARITABLE TR., *supra* note 39, at 5 (counting four states in this category).

C. *Contract Duration*

Apart from the timing of contract initiation, the question of whether a pension arrangement constitutes a single lifelong contract or a series of contracts corresponding to daily work performed also varies among jurisdictions.[49] States fall along opposite ends of this spectrum with little examination of the durational aspect of contracts.[50]

Overlooked until recently in employment law,[51] it is perhaps not surprising that assessing contract length is new in the law of public pensions.[52] It is difficult to overstate the importance of the issue because the contract period resolves whether government pension contracts prevent reforms that operate prospectively.[53] Because most reform legislation binds future actions upon enactment, the career-long contract duration decree bars *any* benefit reductions unless another dimension of contract law moderates this result (or reforms are justified under other elements of the Contract Clause).[54]

Many jurisdictions follow the federal regulation of private pensions to protect only past and not future accruals.[55] California law diverges by safeguarding future accruals as well.[56] This means that in California, courts protect pensions not only upon hiring, but also restrict any reduction from the first day of employment *onward*.[57] Preserving the level of pension benefits effectively

[49] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 384–85.

[50] *The Argonauts*, *supra* note 35, at 6; *see also California's Super Pension Contract*, *supra* note 34, at 740 (discussing how the one career-long contract idea was inadvertent and unfortunate attribute of California law); *id*. at 754–55 (focusing on contract length); *Constitutional Limits on Public Pension Reform, supra* note 2, at 384–85 (discussing issue of pension contract duration for the first time).

[51] *See* Rachel S. Arnow-Richman & J. H. Verkerke, *Deconstructing Employment Contract Law*, 75 FLA. L. REV. 897, 899–900 (2023) (arguing that employment should be seen as a single bilateral contract); *cf.* 19 RICHARD A. LORD, 19 WILLISTON ON CONTRACTS § 54:52 (4th ed. 2019) (citing cases demonstrating that discharged employees have a right to a proportionate or pro rata share of benefits, including pensions, for work performed); Rachel Arnow-Richman, *Foreword: Symposium on the Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 3 (2003) (explaining the traditional view that "the execution of each unit of work by the employee marks the commencement of a new agreement under new terms").

[52] *See Top Trends*, *supra* note 18, at 8 (explaining that the issue of contract duration is new and "has not been noticed among courts or pension scholars"); *see generally* T. Leigh Anenson & Hannah Weiser, *Public Pension Contract Minimalism*, 61 AM. BUS. L.J. (forthcoming 2024) (on file with authors) (arguing for the adoption of a multiple contract approach to pensions for descriptive and normative reasons).

[53] *See California's Super Pension Contract*, *supra* note 34, at 742 (explaining that safeguarding past accruals validates reforms that operate prospectively and safeguarding future accruals invalidates those same reforms).

[54] *See supra* Part I.B. and *infra* Part I.D.; *see also Top Trends*, *supra* note 18, at 11–16 (analyzing Contract Clause elements of substantial impairment and intermediate scrutiny).

[55] *See California's Super Pension Contract*, *supra* note 34, at 769; PEW CHARITABLE TR., *supra* note 39, at 5 (listing twenty-two states); *cf*. *id.* at 5 fig. 2 (showing that eighteen states protect past accruals after the first day).

[56] *California's Super Pension Contract*, *supra* note 34, at 742.

[57] *Id.* at 758.

prevents them from decreasing during an employee's career.[58] Another judge-made rule of implied consent has validated increases in benefits and protected them from cuts.[59] Effectively, California law sets a floor and not a ceiling for public pension benefits.[60]

While a dozen states have adopted California law in protecting pensions upon hiring,[61] it is unclear how many jurisdictions have also incorporated this other extreme part of the rule concerning a career-long contract.[62] Courts in some jurisdictions that embraced all of California's government pension contract law have since withdrawn from it.[63] And states that adhere to every aspect of the so-called California Rule have not revisited the ruling since the pension crisis.[64]

We recently argued that the California Supreme Court should adopt a daily contract interval to safeguard past and not future accruals.[65] We illustrated how precedent on which the career-long contract concept purportedly stands is shaky. In particular, the initial decision determined the issue inadvertently and later decisions never offered any (let alone a reasonable) rationale.[66] Besides weak (erroneous) precedent, failing to follow an earned-each-day outlook undermines jurisprudential coherence and causes undesirable (or unjust) effects.[67] Disparate outcomes include government pension case law that is contrary to judicial approaches to at-will employment and the Contract Clause, along with favoring public sector pensions over private sector pensions concerning plan changes.[68] For these reasons, we contended that the Supreme Court of California should move from a single contract position to a multiple contracts position by modifying precedent to protect pensions on a pro rata basis as a compromise between employee interests in securing some contract protection and the government's interest in fixing pension shortfalls.[69]

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[58] *Id.* at 741–42. Contractual obligations can survive constitutional scrutiny to the extent they are justified under other elements of the Contract Clause test. *See* discussion *infra* Part III. The justification component has proven difficult to establish until recently. *See* Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020) (finding public pension reform eliminating pension abuse was justified despite government's contractual obligation).

[59] *See* Volokh, *supra* note 44, at 12–13 (citing cases and emphasizing the "ratchet effect" of the California Rule).

[60] *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 372.

[61] *See* Monahan, *The California Rule*, *supra* note 44, at 1071.

[62] *See California's Super Pension Contract*, *supra* note 34, at 767.

[63] *See id.* at 767–68 (detailing shifts in doctrine in Massachusetts, Colorado, and Oregon).

[64] *See id.* at 768 (counting six states).

[65] *See id.* at 796; *The Argonauts*, *supra* note 35, at 3.

[66] *See California's Super Pension Contract*, *supra* note 34, at 739–40, 793 (noting the absence of reasons for the prospective accrual rule amounting to one career-long contract); *see also id.* at 739–40 (noting that the idea that public pensions were contracts at all and that they were protected on the first day of employment arose from dicta).

[67] *See id.* at 793–96.

[68] *See id.* at 763–67.

[69] *Id.* at 796.

Whereas only a minority of states protect future accruals like California (and not all of them pursuant to their respective Contract Clauses),[70] this part of the law is critical to pension solvency because it restricts legislative reform.[71] At the very least, courts should pay attention to contract duration (protecting prospective accruals versus accrued benefits) in considering the constitutionality of pension reform.

D. *Contract Obligation*

Whether pension benefits are actually contract terms is a frequently litigated question in recent reform litigation.[72] Assuming a contract exists, that it starts during a time frame impacted by reforms, and that the contract interval influences the benefit structure, a court must still determine if the challenged reform impairs an obligation of the pension contract.

As a practical matter, deciding whether reforms breach contractual terms circumvent precedent setting high levels of pension protection along other contractual dimensions.[73] As discussed previously, precedent in some states sets a lengthy (single) contract duration or mandates contract formation on the first day of employment.[74] Conventional wisdom signifies that either or both doctrinal rules would block reforms under the Contract Clause. In these same states, nonetheless, courts have ruled that reforms are not within the terms of the pension contract and are open to modification.[75] Concentrating on the pension agreement's obligations allows judges to show fidelity to decisional law while being simultaneously supportive of the legislative enterprise.

In summary, there are differing degrees of contract protection for pension benefits across the nation. The myriad approaches encompass issues such as if and when a contract begins, its duration, and the extent of the obligations it safeguards. The next section reveals the role of scholarly specialization in the emerging decisional law that lacks a coherent picture of government pension contracts.

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[70] *Id.* at 769.

[71] *Id.* at 772.

[72] *See Pension Law and Ethics*, *supra* note 3, at 123–40 (analyzing cases); *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 378–82 (illustrating phenomenon through recent decision).

[73] *See Top Trends*, *supra* note 18, at 10 (noting that courts negating reforms as contractual obligations makes it conceivable that public pension reforms will withstand constitutional scrutiny in a seemingly non-political way even in jurisdictions with high levels of public pension benefit protections).

[74] *See supra* Parts I.B., I.C.

[75] *See Reforming Public Pensions*, *supra* note 2, at 125–26 (discussing cases from Colorado, Maine, Massachusetts, and New Mexico); *Constitutional Limits on Public Pension Reform*, *supra* note 2, at 378–82 (citing Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019)) (analyzing the reasoning in California Supreme Court's decision in *Cal Fire* which found that so-called "airtime" credit was not an obligation of California's pension contact).

II. THE IMPACT OF SCHOLARLY SPECIALIZATION

Extensive economics and finance scholarship measures existing government pension debt,[76] yet few legal scholars devote attention to solving associated legal problems.[77] Even fewer focus their consideration on constitutional barriers to pension reform. The scope of any project analyzing constitutional obstacles to public pension reform stands at the intersection of five legal literatures: constitutional law (Contract Clause), contracts, employment, trusts, and pensions (including employee benefits more specifically). Scholars writing in these domains tend to be siloed. As such, addressing the pension problem necessitates connecting discussions from areas that have had very little communication.

Because of parallels between private and public pension law, public pension literature is primarily authored by professors who study the federal statutory law of the Employee Retirement Income Security Act (ERISA).[78] Much of this legislation is founded upon the law of trusts.[79] With the ongoing dialogue deliberating the fiduciary duties of pension fund management, the applicability of the trust paradigm on pension law is not complete or foolproof.[80] ERISA scholars have stressed the traditional mismatch of trust law roles and responsibilities in the pension space when applying (translating) trust law to

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[76] *See* Nathan H. Jeppson et al., *Defining and Quantifying the Pension Liabilities of Government Entities in the United States*, 29 J. CORP. ACCT. & FIN. 98, 98 (2018) (estimating public defined benefit pension liabilities to be more than $5 trillion). Studies from an economics perspective have been historically devoted to private pension funding as compared to public pension funding. *See* Stephen P. D'Arcy et al., *Optimal Funding of State Employee Pension System*, 66 J. RISK & INS. 345, 346–47 (1999).

[77] *See Pension Law and Ethics*, *supra* note 3, at 120 (noting that legal scholarship about government pensions is incomplete because scholars write on it infrequently).

[78] *See* Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2000). ERISA expressly excludes government pension plans. 29 U.S.C. § 1003(b) (2012) ("The provisions of this subchapter shall not apply to any employee benefit plan if (1) such plan is a governmental plan."); *see generally* Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117 (2015).

[79] *See* H.R. REP. No. 93-1280, at 295 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (commenting that the final version of ERISA incorporated the "rules and remedies similar to those under traditional trust law"); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 169 (1997) (noting that "ERISA's legislative history makes clear that Congress meant to track the common law of trusts.").

[80] *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. LAB. & EMP. L. 391, 393–94 (2000); *see also* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1107 (1988) (noting that the exclusive benefit rule of ERISA's fiduciary law "misdescribes the reality of the modern pension and employee benefit trust"). Because state and local governments codified (and sometimes constitutionalized) customary trust duties of loyalty and prudence for public pension trustees, scholarship on public pension governance concentrates on how trust law informs fiduciary duties. *See* T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J.L. REF. 251, 269–71 (2017) [hereinafter *Public Pensions and Fiduciary Law*].

pension governance.[81] And private trust law does not provide a definitive answer to hot button issues involving the revocation and amendment of government pension plans.[82] Small wonder that none of the pension reform decisions in the last decade reference trust law to determine the effect of silence on that issue.[83]

Contract scholars have not applied their expertise to the public pension problem. They also tend to treat employment contracts as a separate species. Thus, even these two areas of private law are disconnected.[84] What is more, critics from each domain blame the other for inciting errors and sowing confusion that continue to flow along the stream of stare decisis.[85] Contract is a richly theorized concept—employment contracts less so. Employment scholars can, but rarely do, address pension law.[86] The doctrine of employment-at-will that is germane to pension modification law is a tiny field in comparison to nondiscrimination, labor, and the myriad other laws involving the world of work. The incoherence within employment modification law is relevant to pension reform and the imprecise picture of pension contracts.[87]

Moreover, the purposes of contract and employment overlap. Both sets of laws are designed to prevent breach and opportunism between the parties as well as to preserve freedom of choice (autonomy).[88] Nevertheless, general contract law's assumption of commercial dealing on equal footing does not necessarily hold in the employment context. The social setting in which these contracts arise is

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[81] *See* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 B.Y.U. L. REV. 629, 669 (2016) ("Structuring the governance of public pension plans by analogy to private gratuitous trusts ignores the economic realities of the relevant parties.").

[82] There is a split of authority. The majority view presumes that the maker (settlor) of the trust has no power to revoke it while the minority view codified in the Uniform Trust Code allows revocation or modification unless explicitly negated. *See* 76 AM. JUR. 2d *Trusts* § 76, Westlaw (database updated May 2023); *see also* UNIF. TRUST CODE § 602 cmt. (UNIF. L. COMM'N 2000). Presumptions prevail under the Restatement (Third) of Trusts as well depending on whether the settlor retains an interest in the trust. RESTATEMENT (THIRD) OF TR. § 63 cmt. c (AM. L. INST. 2003). Extrinsic evidence can be used to rebut or reinforce the presumption. *Id*. at cmt. b.

[83] *Pension Law and Ethics*, *supra* note 3, at app. (referencing cases from 2014–2019). Case research through 2024 conducted on Westlaw.

[84] *See generally* Arnow-Richman & Verkerke, *supra* note 51 (arguing to merge employment and contract law as a doctrinal matter); Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 1, 49–73 (2023) (noting disconnect between contract and employment law and attempting to reunite them in theory).

[85] *See* Arnow-Richman & Verkerke, *supra* note 51, at 899.

[86] *See* Paul M. Secunda, *Litigating for the Future of Public Pensions*, 2014 MICH. ST. L. REV. 1353, 1358; Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 266–67 (2011).

[87] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 343; Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 434 (2016).

[88] *See* Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, at 361, 362–63, *in* OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold et al. eds., 2020).

different. Employment contracting occurs in relatively close-knit communities with social norms of respect and reciprocity.[89]

Due to the more familiar relationship between contracting parties in an employment relationship, one scholar also sees private employment law as evidencing an anti-domination principle that limits power by employers over employees.[90] With government contracts, however, the tradeoff between choice and tyranny gets more complicated.[91] Public interests are at stake beyond the employer-employee relationship, including taxpayers, society, and even other (newer) employees that may disproportionately bear the economic shortfall in their own pension benefits.[92] There are detrimental results to non-contracting third parties as well.[93] If pension law is impervious to change, state residents will suffer from increased taxes and decreased government services.[94]

The retirement security of government employees may similarly suffer if cuts are too deep or, alternatively, if plans fail because changes are blocked by legal obstacles. State and local employees are especially vulnerable to reductions if they lack Social Security.[95] And, unlike private sector workers, no federal safety net exists in the form of insurance should plans become insolvent.[96] Additionally, with government employment there is the moral hazard problem of political rent-seeking that suggests employees may have gotten a pension windfall in the first place.[97] How the theory of contract—along with other ideas

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[89] *See* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 549–50 (2004) (explaining the idea of relational contracts originally espoused by Ian Macneil in the context of employment contracts); Arnow-Richman & Verkerke, *supra* note 51, at 958 (calling employment a "hyper-relational setting"). The employment relationship is even more closely connected with defined benefit plans because they incentivize employees to stay by earning higher benefits later in their careers. *See* Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 323 (2007); *Pension Law and Ethics*, *supra* note 3, at 148 (explaining the extended forfeiture periods of public pension plans have encourage long service to a degree not seen in the private sector).

[90] *See* Bagchi, *supra* note 88, at 361–64.

[91] *See* Alan W. Mewett, *The Theory of Government Contracts*, 5 MCGILL L.J. 222, 222 (1959) (noting there is no separate government contract concept in the common law as there is in the civil law).

[92] *See Public Pensions and Fiduciary Law*, *supra* note 80, at 269–71; *Pension Law and Ethics*, *supra* note 3, at 32–41.

[93] *See* Wendy N. Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 6 CARDOZO L. REV. 2211, 2256–57 (2013) (arguing that members of the public should be considered third party beneficiaries who can sue to enforce the public interest for government service contracts); *see also* Bargo v. Rauner, 715 Fed. App'x. 548 (7th Cir. 2018) (finding citizens had no standing to sue Illinois on Equal Protection Clause grounds for increasing taxes to pay for public pensions costs).

[94] *See Pension Law and Ethics*, *supra* note 3, at 150, 152–53.

[95] *Reforming Public Pensions*, *supra* note 2, at 57.

[96] *See Public Pensions and Fiduciary Law*, *supra* note 92, at 254.

[97] *See* Booth v. Sims, 456 S.E.2d 167, 183 (W. Va. 1994) ("It 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."); Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 3 (2013); Maria O'Brien Hylton, *Combating Moral*

and policies specific to government or employment contracts—should be expressed for a rational development of doctrine remains to be seen.

We offered preliminary reflections previously (and in other literature) on the making and parameters of a public pension contract.[98] Collectively, these recommendations sought to resolve tensions across a range of doctrines and locate the contract concern within a jurisprudential framework.[99] Absent some measure of debate about this largely undiscussed matter, one must not expect a compelling account to be forthcoming.

To make matters worse, there are few constitutional scholars who study the Contract Clause.[100] Literature on the clause tends to follow from U.S. Supreme Court decisions that have been almost non-existent since the early twentieth century.[101] Plus, academic writing highlights federal law and not the diffuse and chaotic state law that is a central barrier to reforming government pensions.[102] The Contract Clause was one of the most litigated provisions of the Constitution after the founding of the federal government.[103] It then went dormant.[104] Now the clause is making a comeback in the context of government pensions.[105]

Furthermore, many areas of state law have had the support of a dedicated group of scholars working to summarize and synthesize the law. These efforts usually result in uniform acts or Restatements to facilitate harmonization and

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Hazard: The Case for Rationalizing Public Employee Benefits, 45 IND. L. REV. 413, 413 (2012); *see also* Epstein, *supra* note 93, at 2254–55 (arguing that a mandatory duty to further the public interest should be imposed on parties to government contracts).

[98] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 358-75; *Clashing Canons*, *supra* note 25, at 200–13; *supra* Part I; *see generally Reforming Public Pensions*, *supra* note 2 (suggesting a decision-making framework for thinking about public pension reform).

[99] *See California's Super Pension Contract*, *supra* note 34, at 791–96.

[100] *See generally* ELY, JR., *supra* note 19 (omitting state court decisions).

[101] *See* Naomi Cahn, Response, Sveen v. Melin*: The Retro View of Revocation on Divorce Statutes*, GEO. WASH. L. REV. ON DOCKET (June 23, 2018), https://perma.cc/2ZGN-FQJS.

[102] *See generally* Thomas Halper, *The Living Constitution and the (Almost) Dead Contracts Clause*, 9 BRIT. J. AM. LEGAL STUD. 387 (2020) (focusing on the Supreme Court's interpretation of the federal Contract Clause); Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995) (analyzing federal Contract Clause jurisprudence in the context of other constitutional protections of economic rights); *see also* ELY, JR., *supra* note 19, at 3 (noting that an earlier book ignored state courts and state Contract Clause jurisprudence).

[103] *See* ELY, JR., *supra* note 19, at 58, 249 (commenting that the Contract Clause was among "the most litigated provisions of the Constitution" throughout the nineteenth century); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 369 (citing Dodge v. Bd. of Educ. of Chi., 302 U.S. 74 (1937) (noting that the Supreme Court has not heard a Contract Clause case involving public pension benefits for more than eighty years)).

[104] *See* ELY, JR., *supra* note 19, at 1.

[105] *See id.* at 2–3 ("[S]teps by state and local governments to trim the benefits of public-sector employees have spawned numerous contract clause challenges in both federal and state courts.").

understanding.[106] Government pension law has not had this advantage.[107] Its contract-centric concentration also means that there are potentially fifty distinctive versions of constitutional contract doctrine despite similarities in the language of the Contract Clauses themselves.[108] Without a Restatement or any unifying legislation, there is no comprehensive and uncontroversial definition.

Still the challenge is not simply synthesis; it is integration. To what extent should public pension law absorb the ancillary areas of employment, contract, trusts, private pensions, and employee benefits? Put differently, how much fusion is appropriate? When analogous areas treat the same issues differently, which law should be borrowed (or ignored) and why? In the fast-paced field of litigation, judges do not have the luxury of time to contemplate the niceties of untangling the general from the many specific (albeit related) laws of contract.[109] Courts are likewise dependent on the attorneys who practice before them. The practicing bar, without sustained and substantial scholarly discourse (and a narrow jurisdictional-based context), lacks a deeper and wider perspective on these thorny pension contract issues. Along with the sweeping nature of state and local law, the absence of devoted study has contributed to a hodge-podge of doctrinal rules.[110] Some rules have been made without apparent justification, yielding a constitutional law that is indeterminate and ambiguous.[111]

Suffice it to say that government pension contracts are undergoing an identity crisis.[112] Suffering from neglect due to distinct disciplinary domains, these contracts have been overlooked and under-conceptualized notwithstanding a

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[106] *See* T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1835 (2018) (discussing history and purpose of the American Law Institute and resulting Restatements of Law).

[107] *See Pension Law and Ethics*, *supra* note 3, at 120 (explaining that "[s]cholars from fields like tax, employee benefits, and even employment may take up the subject [of public pension reform] on a one-time or limited-time basis"). Even the comparison of state and local pension systems is a challenge. *See Public Pensions and Fiduciary Law*, *supra* note 92, at 275–77 (discussing the diversity in governance among the state pensions). There was a uniform act attempted in 1997, but few states have enacted it. *See* Lahey & Anenson, *supra* note 89, at 329–31 (advocating for more states to adopt the legislation). The National Conference of Commissioners on Uniform State Laws approved the Uniform Management of Public Employees Retirement Systems Act (UMPERSA) to promote transparency and uniformity of public pension systems. *See id*. at 329–30.

[108] PEW CHARITABLE TR., *supra* note 39, at 2 (surveying legal protection for public pension across fifty states). The New Hampshire Constitution does not have a Contract Clause per se, yet its courts have read the prohibition against retroactive laws to include contracts. *See* American Federation of Teachers v. State, 111 A.3d 63, 69 (N.H. 2015) (citing N.H. CONST. pt. I, art. 23).

[109] *See* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 147–62 (2012).

[110] *See supra* Part I.

[111] California public pension law is a prime example. *See California's Super Pension Contract*, *supra* note 34, at 737 (critiquing the California Rule as a historical accident that has not been justified by reason); *id.* at 793 (describing the rule as "born in secret and clothed in dicta").

[112] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 344 n.27 ("Pension law is part of employee benefits law, which is a subset of employment law that is an aspect of contract law. Not all of these legal dimensions are completely connected and congruent.").

major financial impact to many stakeholders. In advancing a nascent legal field, future research should help to explain what these contracts are and why these contracts exist. These thoughts can then be brought to bear on the pension modification dilemma that has been dogging state legislative agendas.[113] Meanwhile, new cases challenging pension reform are cropping up daily in state and federal courts.[114] Existing decisions are dispersed, riddled with mistakes, and provide faulty (or no) rationales.[115]

The goals of this section are simply to show that much of the chaos can be attributed to a limited interest in the controversial concept of a government pension contract and to encourage academic efforts that intersect at multiple fields. Especially in jurisdictions without definitive determinations, another objective is to widen the horizons of lawmakers (including courts) by demonstrating that the present predicament is neither natural nor inevitable. An additional aspiration is to inform the public pension community of the current law and to raise awareness of the roads not taken.

III. THE CONSTITUTIONAL LAW OF JUDGES

Judges (primarily) make constitutional contract law so the lack of concern from the academic community undermines an appreciation of the protections afforded public pension benefits and policymakers' ability to reform them. For constitutional scholars, the fact that constitutional law is fundamentally a judicial creation is not new. The sparse wording of the federal and many state constitutional clauses virtually guarantees a common law of constitutional interpretation.

In assessing whether pension reform violates the Contract Clause, courts typically employ a three-part test: (1) whether there is a contractual obligation; (2) whether the legislation imposes a substantial impairment of the contract; and (3) whether the legislation is nonetheless reasonable and necessary to serve an important public purpose.[116]

Two of these elements of a Contract Clause claim—substantial impairment and intermediate scrutiny—have no textual basis. Not surprisingly, perhaps, both elements receive their fair share of criticism that are not the focus of this paper.[117] Concerning the first element, the United States and state Contract

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[113] *See Reforming Public Pensions*, *supra* note 2, at 12–14 (enumerating statutory reform measures); *Pension Law and Ethics*, *supra* note 3, at 141 (analyzing several kinds of reform measures and their success in surviving constitutional challenges).

[114] *See Pension Law and Ethics*, *supra* note 3, at 102 (surveying almost fifty cases in the last six years including several landmark state supreme court decisions).

[115] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 343–44.

[116] *Reforming Public Pensions*, *supra* note 2, at 122; *Pension Law and Ethics*, *supra* note 3, at 122.

[117] *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 526 (1987) (arguing that an original understanding of the Contract Clause would require invalidation of all retrospective modifications of contractual obligations); Nila M. Merola, *Judicial Review of State Legislation: An Ironic Return to Lochnerian Ideology when Public Sector Labor Contracts*

Clauses *do* specify protection for contracts.[118] But "contract" is not defined in the constitutional text either. Therefore, the nature and extent of the contractual duty is necessarily committed to courts.[119]

The U.S. Supreme Court has instructed that state law informs the federal definition of contract—at least up to a point.[120] How far states can push the contract concept has never been tested. And state courts can simply rest their conclusions on their own state constitutions should they create a higher level of contractual protection than federal law.[121] State Contract Clause jurisprudence (generally) assumes ordinary contract principles control.[122] Except some states' contract rules are honored more in the breach (pun intended) likely due to an identity crisis outlined previously and the extent of fusion of the common law of contract and employment.[123]

Complicating matters further is that another source of law—legislation—is often involved as well. Hence, understanding what benefits are protected requires the consideration of three sources of law: constitution, common law, and statute (or ordinance). The ensuing analysis examines the anatomy of a government pension contract and its implications for political alteration.

A. *Anatomy of a Government Pension Contract*

In typical Contract Clause cases, the state or local legislature (or government-controlled entity) has made a promise and subsequent government action has abrogated that commitment. In the employment law of government pensions, the original promise enumerates a certain kind and amount of pension or related benefits. The source of the promise (and its repudiation) can be specified in an

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are Impaired, 84 ST. JOHN'S L. REV. 1179, 1211 (arguing for strict scrutiny rather than intermediate scrutiny of government labor contracts because employees deserve the highest protection).

[118] *See* U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed.").

[119] The variety of contractual issues raised by widespread pension reform has already been analyzed. *See supra* Part I (explaining the diversity of judicial opinions on that the subject of contract as applied to pension benefits).

[120] The issue of whether there is a contract is one of federal and not state law under the U.S. Constitution *See* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (citing Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999)). Federal courts "accord respectful consideration and great weight to the views of the State's highest court." Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)).

[121] *See* ELY, JR., *supra* note 19, at 58 (advising that some states read state Contract Clauses above the floor set by federal law); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 347 n.315 (noting that courts have not been precise in specifying whether decisions rest on state or federal Contract Clause grounds).

[122] *See, e.g.*, Moro v. State, 351 P.3d 1, 24–27 (Or. 2015) (citing treatises by Corbin and Williston, as well as the Restatement of Contract Law).

[123] *See California's Super Pension Contract*, *supra* note 34, at 765 (noting that California Contract Clause doctrine for public pensions differs from its other Contract Clause jurisprudence and employment at will); *supra* Part II.

actual contract, such as a collective bargaining agreement.[124] Outside of unionized areas of public employment, the benefit itself is usually provided by statute or ordinance.[125]

It bears repeating that state and local legislation may explicitly affirm that pension benefits are contracts.[126] Most laws, however, do not. There are even state constitutional clauses that specify pensions are contracts as well.[127] Again, though, many constitutions contain no such pension-is-a-contract clause.[128] So whether a government pension benefit constitutes a contractual obligation is a matter of statutory interpretation left to the courts.[129] Judges determine the effect of silence on this crucial contract issue.[130] Concomitantly, in the improbable event that constitutions or statutes expressly announce pensions as contracts, there are still multiple other outcome-determinative contractual issues of scope that involve terms, duration, and the like that courts ultimately determine and control.[131] Hence, the contract's existence alone does not negate the fact that judges are writing the pension protection story. Courts are the main rule creators in pension contract law leading to workplace benefits that are promised yet unpredictable.

The law's court-centeredness may be surprising in the private sector world of employee benefits. Private pensions are regulated by federal statutory law where more issues are pinned down by legislation.[132] Indeed, an open question in public

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[124] *See Reforming Public Pensions*, *supra* note 2, at 19–20, 20 n.112 (also explaining that collective bargaining agreements can constitute contracts).

[125] *See Clashing Canons*, *supra* note 25, at 150 (noting that state statutes are the most common sources of contract rights along with ordinances and state constitutional provisions).

[126] *See* discussion *supra* Part I.A. In *Schwegel v. Milwaukee County*, the Supreme Court of Wisconsin upheld a statutory modification that limited the County's obligation to reimburse Medicare Part B premiums at retirement to employees retiring by certain dates. 859 N.W.2d 78, 90 (Wis. 2015) (claiming contract right as explicitly provided for in pension legislation).

[127] *See* 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 benefits of which shall not be diminished or impaired.").

[128] *See Clashing Canons*, *supra* note 25, at 150; T. Leigh Anenson & Kevin J. McGarry, *Pension and Contract: A Tale of Two Constitutional Clauses*, at 6 (working paper) (on file with author) (studying state pension clauses).

[129] *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 455 n.1 (Cal. 2019) (Kruger, J., concurring) (clarifying that the statute itself is not the offer to contract that an employee can accept but the offer makes the statute relevant in providing the contract terms) (citing Moro v. State, 351 P.3d 1, 21 (Or. 2015)); JOHN E. MURRAY, MURRAY ON CONTRACTS § 8, at 17 (3d ed. 1990) (explaining that a contract exists independent of the writing to memorialize it).

[130] *See Reforming Public Pensions*, *supra* note 2, at 20 n.112 ("Because most state statutes do not expressly create a contract, the central judicial inquiry is whether such a contract may be implied from the circumstances.").

[131] *See* discussion *supra* Part I.A.

[132] *See* Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 402–04 (1999) (tracing the historical events leading to the enactment of ERISA and Congress' concern that private pension plan failures will harm Social Security).

pension litigation about whether plans can be modified prospectively is settled (and allowed).[133]

Accordingly, while government pension contracts are of constitutional concern, questions of contract are found almost entirely in cases. Pension contract rights are (for the most part) not positive edicts; they emerge from hundreds of decentralized decisions. Judicial interpretations of public pension legislation have supplanted statutes as the source of governing norms for adjudication.[134] As a result, case outcomes will likely depend on the unwritten (decisional) law and not the written law.[135]

B. *Implications for Changing Constitutional Common Law*

The limited written law (and essentially unlimited unwritten law) has implications for policymakers seeking to modify pension benefits. Recall that most public pension law is judge-made, determining a few integral issues: whether a contract exists, the scope of the contract, and variations on when the contract is formed.[136] And jurisdictions take conflicting approaches to whether government pensions are even contracts at all.[137] Depending on a state's pension contract precedent, along with the type of reform, the source of law needed to change or reverse judicial action will differ.

Stare decisis, naturally, is not cast in stone.[138] But courts rarely change course quickly or acknowledge when they do.[139] The reality is that courts have limited capacity to correct errors or change directions even when judges view constitutional precedents as weaker than judicial rulings interpreting statutes.[140]

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[133] *See* ERISA § 204(g), 29 U.S.C.A. § 1054 (West) (prohibiting reduction in accrued benefits by plan amendment even if not yet vested); *see also* Dana M. Muir, *An Agency Costs Theory of Employee Benefit Plan Law*, 43 BERKELEY J. EMP. & LAB. L. 361, 368 (advising the agreement of commentators and the federal courts agree on the deferred compensation concept of private pension law); *supra* Part I.C.

[134] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 344–46 (discussing the difficulty and importance of analyzing public pension reform decisions).

[135] Cases are called unwritten law because once upon a time decisions were considered evidence of the law and not the law itself. *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 104 (2000). A judge's job was to discover the law and not to make it. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999) (discussing the declaratory theory of law).

[136] *See supra* Part I.

[137] *Id.*

[138] *See California's Super Pension Contract*, *supra* note 34, at 743, 792 (noting that American stare decisis doctrine was never as rigid as in England).

[139] *See id*. at 784 (criticizing the California Supreme Court in creating confusion by avoiding whether to reaffirm or repudiate the super pension contract); *see also Constitutional Limits on Public Pension Reform*, *supra* note 2, at 387 (commenting that the judge-made nature of the contract rules means that they can change more readily than resorting to a constitutional amendment).

[140] *See California's Super Pension Contract*, *supra* note 34, at 792 (noting that in California and other states, precedent has less force when the decisional rule has constitutional implications).

So, the most meaningful reforms will come from the political branches either through legislation or constitutional amendments. Voters in some states can similarly drive constitutional change through direct democracy initiatives.[141] Because "reforms" presumably aim to cut benefits to government employees, these changes will diminish pension contract rights potentially guaranteed under state and U.S. Contract Clauses (and sometimes Pension Protection Clauses).[142]

The California Rule, for example, protects the level of benefits offered on the first day of employment.[143] The controversial rule not only sets a baseline below which benefits cannot fall, but it also prohibits any reduction in benefits through retirement.[144] The doctrinal protection of future accruals is a constitutional matter since it identifies the parameters of the pension contract under the state Contract Clause.[145] Because of the constitutional barrier, statutory changes to the terms of any agreement validly apply only to new hires. The restricted reach of legislation will hardly solve California's government pension problem.[146]

Despite doctrinal impediments, the California Supreme Court has been agile enough to uphold recent legislative reforms without undertaking a major overhaul of its pension precedent. The court determined in consecutive cases that changes were either not a term of the contract or otherwise justified.[147] Unless the Supreme Court has the opportunity to make further changes to its pension contract doctrine soon though (such as moving from safeguarding prospective to accrued benefits earned daily) a constitutional amendment may be needed.[148]

In fact, in Arizona, voters passed constitutional amendments to allow cost of living adjustment ("COLA") changes in certain retirement systems after the state supreme court struck down public pension reform.[149] Arizona courts follow

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[141] *See* Neal Devins & Nicole Mansker, *Do Judicial Elections Facilitate Popular Constitutionalism: Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 30–31 (2011); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2088–93 (2010) (recognizing direct democracy responses to unpopular court rulings).

[142] *See Pension Law and Ethics*, *supra* note 3, at 5–23 (cataloguing public pension reform cases); ILL. CONST. art. XIII, § 5.

[143] *See California's Super Pension Contract*, *supra* note 34, at 737.

[144] *See Constitutional Limits on Public Pension Reform*, *supra* note 2, at 372; *supra* Part I.C.

[145] *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 443–44 (Cal. 2019).

[146] *See California's Super Pension Contract*, *supra* note 34, at 772 (discussing grave consequences unless the California Rule is modified).

[147] *See Cal Fire Loc. 2881*, 435 P.3d at 444–45; Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020); *California's Super Pension Contract*, *supra* note 34, at 741 (reviewing the cases).

[148] *See* CAL. CONST. art. XVIII, § 4 (declaring that an amendment to the state constitution can be passed by a majority of voters in a California election); *see also The Argonauts, supra* note 35, at 3 (arguing that the California Supreme Court should partially overrule the California Rule to protect only accrued benefits); *supra* Part I.C.

[149] *See* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1117–19 (Ariz. 2016) (striking down increases to employee contribution rates and changes to the benefit calculation and COLAs); *see also* Fields v. Elected Offs.' Ret. Plan, 320 P.3d 1160, 1166 (Ariz. 2014) (striking down

California's first-day-until-forever pension doctrine that freezes future accruals.[150] Consequently, voter initiatives compelling constitutional change were necessary.[151]

States with pension precedent protecting accrued (as opposed to prospective) benefits have fewer legal obstacles to legislative pension reform even if courts construe the contract as created upon the commencement of employment. By protecting benefits earned each day, statutory benefit cuts operate prospectively once enacted and apply to current employees. In short, there are no constitutional contract repercussions to these benefit modifications.

State sources of law can, of course, raise pension contract protection as a state constitutional matter even when the federal Contract Clause has been interpreted with less protection.[152] Courts were the primary actors in transforming gratuities into pension rights in the first place.[153] And state legislatures can always increase pension protection in response to the judicial reading of benefit statutes without corollaries under the Contract Clause.[154] Although raising benefits and protections would be unusual in this post-pandemic era of enormous pension liabilities.[155]

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public pension modifications on state Pension Clause grounds); *see generally* Walsh, *supra* note 2 (noting pension debt struggles of Arizona cities).

[150] *See Fields*, 320 P.3d at 1166.

[151] The constitutional amendments allowed changes to COLAs for active members and retirees in three retirement systems comprising corrections officers, elected officials, and public safety personnel. *See* ARIZ. CONST. art. XXIX, § 1(D); *see generally* Arizona Pension Laws: Infographic, EQUABLE (Nov. 20. 2021), https://perma.cc/FQ9T-2YNK (summarizing amendments).

[152] *See* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (citing Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999)); *supra* note 121 and accompanying text.

[153] *See* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 994–1003 (1977) (tracing the transition from the gratuity to the contract approach); Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251, 255–63 (1956) (tracing the transition from the gratuity to contract approach); *see generally* Robert L. Clark et al., *The Evolution of Public Sector Pensions in the United States, in* THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 239–70 (Olivia S. Mitchell ed., 2003).

[154] For instance, the Maine legislature amended its pension statute to say precisely when a contract is formed after a court read statutory silence to mean that public pensions were not protected from change until retirement. *See* Me. Ass'n of Retirees, 758 F.3d at 28–29 (citing Parker v. Wakelin, 123 F.3d 1, 7 (1st Cir. 1997)). It adopted clear language declaring that the contract commenced (pension benefits protected) when the member satisfied the service requirement. *See id.*

[155] *See* Oliver Giesecke & Joshua D. Rauh, *Trends in State and Local Pension Funds*, 15 ANN. REV. FIN. ECON. 221, 221 (Nov. 2023) (calculating the total reported unfunded liabilities of state and local U.S. plans is $1.076 trillion with the market value of the unfunded liability at approximately $6.501 trillion as of fiscal year 2021).

CONCLUSION

The Contract Clause once dominated the docket of the Supreme Court. But now the clause belongs to the museum of constitutional law.[156] This artifact, however, is gaining new life in ongoing litigation over public pension reform with extensive effects on workers and the economy.[157]

This Article provided an overview of the major doctrines and principles of a government pension contract while also looking at the themes and theories that ground them. It exposed a government pension identity crisis, emphasizing the thinness of legal scholarship that coalesces around otherwise common areas of study like contracts, trusts, employment, and constitutional law. It further clarified how the ill-defined image of a public pension contract is complicated by its common law character that has consequences for changing constitutional contract law and reforming government pensions.

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[156] ELY, JR., *supra* note 19, at 238; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890 (1987) (noting that the Contract Clause is mostly a "dead letter").

[157] *See generally* Note, *The Contract Clause Reawakened in the Age of Covid-19*, 136 HARV. L. REV. 2130, 2142–44, 2146 (2023) (discussing two other new issues involving potential Contract Clause constraints on state health measures pursuant to the pandemic and the clause's actionability under 42 U.S.C. § 1983).