THE LEGAL AND ETHICAL IMPLICATIONS OF PUBLIC PENSION REFORM: ANALYZING THE NEW CONSTITUTIONAL CASES

T. LEIGH ANENSON, J.D., LL.M., PH.D.* AND JENNIFER K. GERSHBERG, J.D.†

ABSTRACT

In this thought-provoking and well-researched article, the authors take up the public pension crisis as a case study in the legal and ethical responsibilities of government. Examining six years of litigation, they initially demonstrate—contrary to conventional wisdom—why the Contract Clause fails to provide a meaningful barrier to pension reform. The appraisal then offers a path forward: an ethical framework to be used by policymakers so that decisions are both morally right and politically defensible. The study's contribution to the literature lies in its interwoven discussion of landmark constitutional litigation and contemporary ethical theories applied in the government pension reform context. This interdisciplinary analysis is a first step toward re-thinking how state and local governments can (and should) be legally and morally accountable in this era of austerity.

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* Professor of Business Law, University of Maryland; Associate Director, Center for the Study of Business Ethics, Regulation, and Crime; Of Counsel, Reminger Co., L.P.A; lanenson@umd.edu. For their useful observations, thanks to the participants of the 2021 Annual Conference of the Pacific Southwest Academy of Legal Studies in Business and the 2021 Employee Benefits & Social Insurance Virtual Conference. We are especially appreciative of feedback from Jon Forman and Peter Wiedenbeck, as well as from Izzy Goldowitz, Norman Stein, and Anna-Marie Tabor. We are also grateful for the invitation to present this article to the members of the Department of Law and Ethics at Indiana University, Bloomington, and for their valuable remarks. The paper additionally benefitted from a careful review by Kathleen Lacey, Josh Perry, and Don Mayer. Matthew Gershberg and Varsha Ramachandran provided excellent research assistance. We are indebted to Robyn Hart for technical help with the diagrams. All errors, of course, remain our own.

† Associate Clinical Professor of Business Law, University of Maryland Robert H. Smith School of Business; J.D., The George Washington University Law School; B.A., Cornell University.

> "Public sector pensions will be the litigation flashpoint in this cycle of austerity."[1]

INTRODUCTION

Government pensions are at a crossroads.[2] On one side, state and local governments are trying to shore up failing pension funds through a variety of reform measures.[3] On the other, employees are resisting such cutbacks with lawsuits pursuant to state and federal Contract Clauses.[4] Similar litigation is ongoing in certain states that have special protection for public pensions under their own constitutional Pension Clauses.[5]

This Article surveys six years of public pension reform litigation, including several new landmark state supreme court decisions.[6] It covers

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1. *See* Kenneth T. Cuccinelli, II et al., *Judicial Compulsion and the Public Fisc—A Historical Overview*, 35 HARV. J.L. & PUB. POL'Y 525, 540 (2011).

2. *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). There are 297 state-administered funds and 5,123 locally-administered defined benefit public pension systems. *See 2018 Annual Survey of Public Pensions: State & Local Tables*, U.S. CENSUS BUREAU https://www.census.gov/data/tables/2018/econ/aspp/aspp-historical-tables.html (Oct. 8, 2021). These plans hold trillions of dollars in assets. *See* Robert Novy-Marx & Joshua Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1211, 1213 (2011) (noting that the 116 state plans studied had $1.94 trillion in total assets in 2009); *id.* at 1215 (estimating that local plans hold $560 billion in assets); *See also* Phillip Vidal, *Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Report: 2014*, U.S. DEP'T. OF COM., ECON. AND STAT. ADMIN. 2 (2015), http://www2.census.gov/govs/retire/g14-aspp-sl.pdf (showing total investments in public pension funds).

3. *See* Keith Brainard & Alex Brown, Significant Reforms to State Retirement Systems, NAT'L ASS'N OF STATE RET. ADM'RS, 2 (Dec. 2018), https://www.nasra.org/files/Spotlight/Significant%20Reforms.pdf (showing 116 reforms to state pension systems from 2007 to 2018); *infra* Part I; Appendix. For earlier surveys of reforms, see T. Leigh Anenson, Alex Slabaugh & Karen Eilers Lahey, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 12–14 (2014) (surveying reforms from 2011 to 2014 across thirteen states); Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 172–73 (2015) (compiling reforms from 2001 to 2012 across eight states).

4. *See infra* Part I.A. 1–6; Diagrams 1–2. Thirty-nine decisions allege violations of the state and/or federal Contract Clause. *Id.*

5. *See infra* Part I.A. 1–6; Diagrams 3–4. Nine cases contain parallel challenges concerning applicable state statutory and Pension Clause violations. *See id.* For completeness, we include in this calculation challenges to similar state pension statutes.

6. *See infra* Appendix (listing state and federal Contract Clause and state Pension Clause and statutory cases). The cases we consider come from twenty-two different states. *See id.* Thirteen of the decisions involve pension modifications via local ordinances or regulations, and the other thirty-six purport to modify pensions through state statutes. Although thirty-one of these cases were

Contract Clause and Pension Clause cases challenging public pension reform from 2014 to 2019 in the United States.[7] The analysis includes subsequent decisional history through July 2020.[8] It then considers the results along two lines: positive and normative.

Part I asks whether state and local governments *can* reform public pensions.[9] Concentrating on Contract and Pension Clause challenges, this Part organizes the decisions by the types of reforms and their resolution.[10] It finds that while state Pension Clauses offer some protection from benefit reduction, state and federal Contract Clauses do not.[11] To be sure, contrary to conventional wisdom, the study discovers that the Contract Clause is not much of a barrier to reform at all.[12]

Yet just because state and local governments have the power to reduce or—in some situations—eliminate pension benefits entirely does not mean that they should do so. In this vein, Part II explores the ethical dimension of public pension reform for the first time. It asks whether state and local governments *should* reform public pensions. This Part evaluates the ethics of pension reform under the celebrated and conflicting moral philosophies of Jeremy Bentham and Immanuel Kant.[13] These opposing ethical frameworks, Bentham's Act Utilitarianism and Kantian Ethics, are then reconciled in the context of public pension reform.[14]

A case-based analysis is an essential starting point before attempting to explain or even justify judicial and political action. Referring only to the sources of, and constraints on public pension reform, and any underlying political and theoretical presuppositions of a particular philosophy of law would be like an announcer of a baseball game describing the field and the rules rather than accounting for what the players are actually doing. Describing the legal and ethical ways of looking at the pension problem will give us a framework to better understand it. The idea is to build up from cases rather than down from great principles or to depict the topic as abstract theory. There is a danger in

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brought in state court, seventeen were brought in federal court. The different levels of courts are well represented: fifteen are trial courts, sixteen are intermediate appellate courts, and seventeen are supreme courts.

7. *See infra* Appendix; Diagrams 1–4.

8. *See infra* Appendix; Diagrams 1–4.

9. Although the meaning of "reform" in the strictest sense is not neutral (usually signifying a method of making things better), we use the word here (and throughout this Article) in a neutral way and simply as a synonym for cut or modify.

10. *See infra* Part I.A.; Diagram 1.

11. *See infra* Part I.B.

12. *See infra* Part I.B.

13. *See infra* Part II.A–B. As explained more fully in Part II, we are not seeking to contribute to the ethics (or philosophy) literature. We are merely using an ethics-inspired policy analysis to inform pension reform.

14. *See infra* Part II.C.

beginning from general notions when the necessary information is incomplete or in flux.[15]

Contract Clause jurisprudence is a heavily-criticized conceptual conundrum.[16] This is undoubtedly due in part to the absence of any seminal case from the U.S. Supreme Court.[17] Legal scholarship on the subject of public pension reform is also incomplete.[18] Scholars from fields like tax, employee benefits, and even employment may take up the subject on a one-time or limited-time basis.[19] This assessment is meant to bridge that gap. It adds a comprehensive study of current state and federal court practice to the existing literature, including an ethical evaluation of the decision to reform government pensions.

The relevant authorities are set out in an accessible way that makes sense of a rapidly developing area of law. The Article also provides an appendix and other diagrams documenting these findings and conclusions.[20] The goal is to provide a clear construct with which to understand the law and thus assist policymakers, practitioners, judges, academics, and others in navigating their way through the complex constitutional law and ethics of public pension reform.

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15. *See* T. Leigh Anenson et al., *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. 337, 342-44 (2021) (outlining the doctrinal and methodological confusion about the existence of a statutory pension contract). Many of the new cases are of first impression, and the other decisional law is in flux, raising issues of precedent that was ill-conceived or not fully considered in which the courts are now attempting to backtrack. *Id.*

16. *See, e.g.*, JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 1 (2016) (explaining that "the criteria for invoking the contract clause remain uncertain"); Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIA. L. REV. 183, 253 (1985) ("Substantial gaps and ambiguities continue to plague the contract clause doctrine."); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 437–45 (1982) (describing the U.S. Supreme Court's Contract Clause jurisprudence as essentially incoherent).

17. *See* Anenson et al., *supra* note 15, at 369 (noting that the Supreme Court has not heard a public pension case for more than eighty years). For an excellent discussion of the Contract Clause in historical perspective, see ELY, *supra* note 16.

18. Public pensions are regularly studied by academics in the field of economics and policy. *See* Novy-Marx & Rauh, *supra* note 2; *See also* Karen Eilers Lahey et al., *Real Estate and Alternative Asset Allocations of U.S. Firms' Defined Benefit Pension Plans*, 18 J. REAL EST. PORTFOLIO MGMT. 273, 273–87 (2012). The legal literature on public pension constitutional challenges usually involves one or a limited number of states. *See, e.g.*, Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 299 (2011) (concentrating on Wisconsin but also examining recent litigation in three other states).

19. Professor Amy Monahan has made a career of studying public pension law. But it takes more than one person, astute as they may be, to spark a debate.

20. *See infra* Appendix and Diagrams 1–8.

We do not pretend that this analysis is a game-changer. Rather, the Article begins to fill in a baseline to enable further work on the subject. It additionally provides an interdisciplinary background. The study illustrates the ways in which governments are attempting to manage pension deficits. It identifies who exactly is at risk and what is at stake. It supplements this descriptive account with a prescriptive evaluation of reform measures drawn from the field of business ethics. Consideration of pension reform controversies and their moral implications should help sharpen the policy debate as courts and politicians continue to pick winners and losers.

I. EXAMINING THE LEGAL LANDSCAPE

The following survey of constitutional cases organizes the results by type of reform. It offers a new sustained account of reforms that have succeeded and the grounds for that success.

The Supreme Court has decided precisely one Contract Clause case concerning public pension reform—and it was long ago.[21] In fact, since the beginning of the twentieth century, the Court has not appeared very interested in the Contract Clause at all.[22] The absence of high court instruction underscores the fact that it is the lower state and federal courts that are shaping the contours of the clause in the twenty-first century.[23] Without a wide-ranging survey of government pension jurisprudence, the implications of this litigation will be overlooked or at least underappreciated. Comparing case outcomes among the various reform measures not only clarifies the current chaotic law, but also works backwards from these decisions to predict where the law is going.

The objective is to examine how courts are dealing with constitutional challenges to provide a more nuanced perspective on public pension law. There is a kind of understanding of law that can come only from familiarity with doctrine. Therefore, this Part offers an introduction to public pension law and litigation grounded in its developing rules and principles.

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21. T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause*, 54 U. MICH. J.L. REFORM 147, 173 (2020) (citing Dodge v. Bd. of Educ. of Chi., 302 U.S. 74 (1937)).

22. *See* ELY, *supra* note 16, at 249 (commenting on the Supreme Court's "marked neglect" of the Contract Clause after the nineteenth century); *see also* Anenson et al., *supra* note 15, at 370 (noting the Court's most recent decision in *Sveen v. Melin*, 138 S. Ct. 1815, 1821–26 (2018), was a missed opportunity to clarify key elements of the clause).

23. *See* ELY, *supra* note 16, 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."); *id.* at 3 ("It is important to remember that state courts did much of the heavy lifting in interpreting and enforcing the contract clause. They are an integral, if too often overlooked, part of the story.").

A. Survey of Public Pension Reform Litigation

The U.S. Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[24] Most state constitutions contain similar provisions.[25] Despite the absence of a uniform taxonomy, key conditions of a Contract Clause claim usually include: the existence of a contract, the substantial impairment of that contract, and no sufficient government justification.[26] Under the last condition, government policy objectives are tested pursuant to the intermediate scrutiny standard.[27] This test requires that the impairing legislation or other law be reasonable and necessary to accomplish an important purpose.[28]

In the last six years, government employees from coast to coast have filed Contract Clause, Pension Clause, and other claims seeking to prevent state and local governments from reducing their pension benefits.[29] The reform measures contested include: increasing employee contribution rates, reducing or freezing cost-of-living allowances (COLAs), eliminating pension spiking, changing benefit formulas and actuarial factors, redefining the earnable compensation criterion, and reducing or eliminating health care benefits.[30]

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24. U.S. CONST. art. I, § 10.

25. State courts often say they interpret these state constitutional contract clauses as corresponding to federal law. *See* ELY, *supra* note 16, at 251 ("More than twenty states have treated the state contract clauses as equivalent to the federal provision."). Although state judicial opinions are not always clear whether the grounds of the decision are under the federal or state constitution. *Id.* at 251; Anenson et al., *supra* note 15, at 342 (citing recent case examples). The true degree of convergence between federal and state constitutional law is unknown and appears to be changing. *See id.*

26. *See generally* Anenson et al., *supra* note 15 (analyzing the contract element of Contract Clause challenges to public pension reform).

27. The U.S. Supreme Court announced the intermediate scrutiny test for the review of state government contracts under the Contract Clause in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17–18 (1977). The decision to raise the level of scrutiny for public contracts has received almost universal condemnation. *See, e.g.*, Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 293 (1988) (arguing that interference with private contract rights lies at the heart of the Contract Clause such that "the modern thrust of contract clause jurisprudence is precisely backwards").

28. *See* Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244–50 (1978). *Compare* Whitney Cloud, Comment, *State Pension Deficits, the Recession, and a Modern View of the Contracts Clause*, 120 YALE L.J. 2199, 2208–09 (2011) (arguing that states may use the recession to justify pension modifications), *with* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 999–1003 (1977) (analyzing possible pitfalls to modifications of public pensions due to economic crises).

29. *See infra* Part I.A.1–6. These plaintiff groups include police officers, state troopers, fire fighters, and teachers, among others.

30. *See infra* Diagrams 1–2.

1. Employee Contributions

One type of public pension reform aimed at promoting pension fund solvency is requiring employees to increase their contribution rates to the state or city retirement fund.[31] Pensions in the public sector are primarily defined benefit plans[32] that involve both employer and employee contributions to a trust fund.[33] Whether these modifications survive Contract Clause challenges depends on factors such as the existence and timing of the contract formation, whether the increases operate retroactively or prospectively, and whether such changes are determined to be employee obligations as opposed to benefits.[34]

All three recent decisions have upheld increases in employee contributions.[35] In *Taylor v. City of Gadsden*,[36] a group of firefighters filed a class action lawsuit against the City of Gadsden and the city's mayor, arguing that the City's imposition of a 2.5% increase in the firefighters' contributions to the state-administered retirement fund violated the Contract Clauses of both the state and federal constitutions.[37] Under the statute, firefighters became "vested" (eligible for retirement and ensuing benefits) after ten years of "creditable service" upon the age of 60 or after 25 years of "creditable service" regardless

31. Brainard & Brown, *supra* note 3, at 3 fig.1 (showing that 40 states increased employee contributions between 2007 and 2018).

32. Seventy-six percent of government workers have defined benefit plans. U.S. BUREAU LAB. STATS., BULL. 2791, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2019 (2019), https://www.bls.gov/ncs/ebs/benefits/2019/ownership/govt/table02a.pdf.

33. 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, 310 (2007). Investment earnings are the third source of funding. It is the employer's duty to fund a defined benefit plan. *Id.* at 311. Upon retirement, periodic payments (defined benefits) are made to the employee for life, usually along with his or her spouse. *Id.* The employer bears the life expectancy and market risk. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 457 (2004).

34. *See infra* notes 35–54 and accompanying text.

35. But the Supreme Court of Arizona has struck down increases to employee contribution rates to public pension funds on the ground that such changes were contrary to prior precedent. *See* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1113, 1117 (Ariz. 2016); *see also id.* at 1130–31 (Bolick & Trebesch, J.J., dissenting in part and concurring in judgment) (clarifying majority decision). The court held that a contract begins at the outset of employment (rather than at the time the benefit is due) and identified the employee contribution rate as part of the benefit instead of a separate obligation. *Id.* at 1114.

36. 767 F.3d 1124 (11th Cir. 2014).

37. *Id.* at 1126–27.

of age.[38] The plaintiffs argued that those firefighters who had reached retirement eligibility had a contract right to an unchanged contribution rate.[39]

The Eleventh Circuit Court of Appeals agreed that in Alabama, a constitutionally protected interest occurs once employees have met retirement eligibility requirements and not upon the commencement of employment.[40] Yet the court rejected the plaintiffs' argument that the increased contribution rate constituted a benefit.[41] Rather, it found that this modification was an alteration of the employees' "pension *obligations*."[42] The court of appeals reasoned that the increased contribution rate reduces anticipated compensation by deducting from their future take-home pay.[43] As such, it ruled that "[n]othing in the challenged legislation divests plaintiffs of their earned pension benefits."[44]

The Supreme Court of New Hampshire applied similar reasoning in upholding prospective increases in employee contribution rates to firefighters' public pension funds. In *Professional Fire Fighters of New Hampshire v. State*,[45] several state employee associations and six individual plaintiffs (three of whom had met their retirement eligibility requirements) sued the state of New Hampshire, alleging that such modifications violated the Contract Clause of the state and federal Constitutions.[46] Plaintiffs argued that employee contribution rates were a contractual right that could not be modified.[47] The court disagreed.[48] It declared that such changes would be prospective only, distinguishing between prospective and retrospective modifications (the latter would be impermissible).[49] As in *Taylor*, the supreme court applied this reasoning even to those employees who had already become "vested" by meeting their retirement eligibility requirements.[50]

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38. *Id.* at 1134 (citing ALA. CODE § 36-27-16(a)(1) (2021)).

39. *Id.* at 1134. Plaintiffs sought declaratory and injunctive relief to prohibit the increase. *Id.* at 1130–31.

40. *Id.* at 1134. The appellate court explained that "contractual rights to retirement benefits accrue when employees have fulfilled their end of the bargain." *Id.*

41. *Id.* at 1135.

42. *Id.* (emphasis added).

43. *Id.*

44. *Id.* The court also emphasized the permissibility of modifications to pension obligations even after vesting has occurred, reasoning that no precedent under Alabama law holds to the contrary. *Id.* at 1134.

45. 107 A.3d 1229 (N.H. 2014).

46. *Id.* at 1231.

47. *Id.* Plaintiffs sought declaratory and injunctive relief. *Id.*

48. *Id.* at 1235.

49. *Id.* at 1233, 1236.

50. *Id.* at 1235. The important factors in this decision were the prospective nature of the modifications and the absence of any governing precedent that would prohibit the legislature from imposing those changes. *Id.*

This rationale was adopted the following year by the Supreme Court of Georgia in *Borders v. City of Atlanta*.[51] In a class action lawsuit against the City of Atlanta, the mayor of Atlanta, and members of the Atlanta City Council, city employees who had not yet retired alleged that prospective increases in their retirement contributions violated the state constitution's Contract Clause.[52] The court found that the modification referred only to the employees' pension obligations and not their earned benefits.[53] Because the changes were only prospective and were limited to what the supreme court saw as obligations rather than rights, it upheld the reforms at issue.[54]

2. Cost of Living Allowances

Another type of pension reform whose permissibility has been adjudicated recently by courts is the reduction or elimination of cost of living adjustments (COLAs). COLA increases are a means of offsetting the costs of inflation for employees and retirees.[55] COLAs can take different forms. Some are fixed and others are variable, instead tied to inflation rates.[56] By cutting the COLA, pension costs are substantially reduced.[57] As illustrated below, whether COLA modifications were upheld depended on whether they were prospectively or retrospectively applied and whether COLA benefits were considered part of the regular pension benefits established by statutory contract.[58]

In *Moro v. State*,[59] a group of active and retired members of the Public Employee Retirement System sued the State of Oregon regarding the reduction of COLAs, alleging that the reform violated both the state and federal Constitutions.[60] In deciding whether such a modification would violate the Contract Clause, the Supreme Court of Oregon emphasized the distinction

51. 779 S.E.2d 279 (Ga. 2015).

52. *Id.* at 281. Plaintiffs sought declaratory and injunctive relief. *Id.*

53. *Id.* at 287.

54. *Id.*

55. Anenson et al., *supra* note 3, at 13. Because COLA increases take effect the year after inflation, COLA adjustments only partially compensate for income losses that have already occurred. *Id.*

56. *See* Moro v. State, 351 P.3d 1, 15 (Or. 2015) (analyzing one of the reforms that converted the COLA from being based on the consumer price index to a fixed rate).

57. *See infra* notes 251–252.

58. *See infra* notes 59–101 and accompanying text. Two cases decided by the Illinois Supreme Court held COLA modifications unconstitutional under the state Pension Clause rather than Contract Clause. *Jones v. Mun. Emps.' Annuity & Benefit Fund of Chi.*, 50 N.E.3d 596, 605–06 (Ill. 2016); In re *Pension Reform Litig.*, 32 N.E.3d 1 (Ill. 2015).

59. *Moro*, 351 P.3d 1 (Or. 2015). Intervenors included the State of Oregon and other public employers participating in PERS. *Id.*

60. *Id.* at 6–7. While the new COLA structure was still graduated, the COLA reform was generally lower than the previous COLA caps. *Id.* at 15.

between prospective and retrospective application of the amendment.[61] It concluded that insofar as the COLA amendments apply retrospectively to benefits earned before the effective dates, they impair the pension contract and violate the Contract Clause.[62] In the alternative, the court clarified that there is "no contractual right to receive the pre-amendment COLA for benefits that they earned *on or after* the effective dates of the amendments."[63] Consequently, PERS members who worked both before and after the effective date of the COLA amendments would receive a blended COLA rate reflecting the original rate for work already completed before the amendments took effect and the modified rate for all work completed thereafter.[64]

Other courts have focused more on whether COLA benefits fall within the regular bundle of pension benefits for which a statutory right exists. All but one court has determined that no such right exists as applied to COLAs. In *Maine Ass'n of Retirees v. Board of Trustees of the Maine Public Employees Retirement System*,[65] associations of retired public employees and their individual members brought suit against the Maine Public Employees Retirement System and its Board of Trustees, alleging that the COLA modification violated both federal and state constitutions.[66] The First Circuit disagreed, ruling that COLA does not clearly constitute a "benefit" under a pension contract.[67] In this lawsuit, neither pre-modification nor post-modification retirees prevailed under the Contract Clause.[68]

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61. *Id.* at 8.

62. *Id.* The court seemed to rule only on state Contract Clause grounds for the COLA modification. *See id.* at 18–19, 41–42. The court left open whether the impairment had to be substantial because it found that the COLA change that resulted in lowering cumulative benefits by 10% over the participants' lifetime was a substantial impairment in this case. *Id.* at 37–38. It additionally held that the retroactive reform was not reasonable and necessary to serve an important public purpose. *Id.* at 38–39.

63. *Id.* at 8.

64. *Id.* at 39–40. The Fifth Circuit employed similar reasoning in *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016), a case alleging violation of the Pension Clause of the Texas Constitution. Plaintiffs were vested members of a public pension plan who had, at the outset of employment, selected a variable COLA rate guaranteed to remain between 0–4%. *Id.* at 533. Subsequent legislation modified the COLA to a 2% fixed rate. *Id.* As in *Moro*, the court of appeals upheld COLA modifications that were prospective in nature, noting the essential difference between prospective changes and modifying accrued benefits to which members are already entitled. *See Moro*, 351 P.3d 1 (Or. 2015). The case appears to be in federal court due to a federal Contract Clause challenge, but the majority held in the last sentence of its analysis that upholding reforms under the state Pension Clause precluded resort to the federal Contract Clause. *Van Houten*, 827 F.3d at 540.

65. 758 F.3d 23 (1st Cir. 2014).

66. *Id.* at 25, 27. While the synopsis of the case stated that plaintiffs sought injunctive relief, the opinion itself did not specify the remedy sought. *Id.*

67. *Id.* at 31.

68. *Id.*

The Supreme Court of New Jersey reached the same conclusion with similar reasoning in *Berg v. Christie*.[69] Retired employees sued the state of New Jersey and state officials, alleging that legislative suspension of COLAs constituted a violation of both state and federal constitutions.[70] The court upheld the COLA modifications, deciding that COLAs were not clearly part of the benefits program and that the plaintiffs had no statutory contract guaranteeing a continued increasing COLA.[71]

The Supreme Court of Colorado also upheld COLA modifications. In *Justus v. State*,[72] a group of retired public employees sued the State of Colorado, state officials, and the Colorado Public Employees' Retirement Association, asserting that COLA reductions violated their state and federal constitutional rights under the Contract Clause.[73] The court rejected plaintiffs' position, ruling that they had not established that the legislature intended an unchangeable COLA formula fixed upon retirement.[74] The court clarified that a COLA is distinct from other types of pension benefits to which a statutory right attaches because it accounts for changing economic conditions.[75]

Relying on *Justus* and other cases, the Supreme Court of New Hampshire in *American Federation of Teachers v. State*[76] also upheld COLA reforms.[77] In this case, employees and their representative organizations sued the State of New Hampshire, claiming that altering the method of funding COLAs violated the Contract Clause of the state and federal constitutions.[78] The supreme court distinguished the pension benefit from an adjustment to that benefit in the form of COLAs.[79] It further found that the statutory language confirmed this

69. 137 A.3d 1143 (N.J. 2016).

70. *Id.* at 1149. Plaintiffs sought injunctive and monetary relief. *Id.* The legislation suspended COLAs and further froze COLAs at the 2011 level for current and future qualifying employees. *Id.*

71. *Id.* at 1147. The supreme court explained that a statutory contract is only found with "the clearest" statutory language and legislative intent, which were lacking in this case. *Id.* at 1147, 1152.

72. Justus v. State, 336 P.3d 202 (Colo. 2014).

73. *Id.* at 205. The remedy sought was not specified in the opinion.

74. *Id.* at 211 (finding that they had "not established that the legislature intended a clear and unmistakable right").

75. *Id.* at 210. In a challenge to statutory authority rather than under the Contract Clause, the Court of Appeals of California in *San Joaquin County Correctional Officers Ass'n v. County of San Joaquin*, upheld a modification eliminating an employer pickup of the employees' share of COLA contributions. 211 Cal. Rptr. 3d 822, 826 (Cal. Ct. App. 2016). A correctional officers' union brought action against the county arising out of this modification. The court upheld the county's termination of the pickup because it was consistent with its statutory authority. *Id.*

76. 111 A.3d 63 (N.H. 2015).

77. *Id.* at 73.

78. *Id.* at 67. Plaintiffs sought declaratory and injunctive relief. *Id.*

79. *Id.* at 73.

distinction.[80] Therefore, the court declared that plaintiffs had no contractual right to an unchangeable COLA.[81]

The Supreme Court of Washington additionally upheld COLA modifications in *Washington Education Ass'n v. Department of Retirement Systems*.[82] A group of public employees and unaffiliated employee associations sued the state and state agencies, alleging that the state's repeal of COLA increases impaired employees' contracts with the state in violation of the state constitution.[83] The court disagreed, finding that the authority to repeal the COLA was contained in the legislation itself.[84] Therefore, the supreme court held that acting on such authority did not alter any contract that was formed by the statute.[85]

The Sixth Circuit Court of Appeals similarly allowed legislation lowering future COLA increases in *Puckett v. Lexington-Fayette Urban County Government*.[86] A group of retired county employees sued their county and individual public officials alleging violations of the state and federal Contract Clauses to bar modifications of future COLA payments.[87] In disallowing Plaintiffs' claims, the court declared that "[t]here is no provision . . . that gives retirees an immutable lifetime entitlement to COLA increases in their public pensions . . . ."[88]

Comparable reasoning applied in *Frazier v. City of Chattanooga*,[89] a decision by the United States District Court for the Eastern District of Tennessee. In *Frazier*, retired firefighters and police officers challenged an ordinance that decreased future COLA payments, alleging that the reform violated the federal Contract Clause.[90] The district court rejected the claim.[91] It distinguished between COLAs and benefits, noting that a COLA is an adjustment to a benefit rather than a benefit itself.[92] As a result, the *Frazier*

80. *Id.* at 72–73.

81. *Id.* at 73.

82. 332 P.3d 439 (Wash. 2014).

83. *Id.* at 442.

84. *Id.* at 444. The plaintiffs also argued that the prior COLA reform containing the reservation clause was unconstitutional. *Id.* at 446–48. But the court determined that the COLA scheme with the clause did not impair any contract rights because the new reform was better for the plaintiffs than the old. *Id.* at 447.

85. *Id.* at 444.

86. 833 F.3d 590, 596 (6th Cir. 2016).

87. *Id.* Plaintiffs sought declaratory and injunctive relief. *Id.*

88. *Id.* at 601 (finding no proof of intent "much less with unmistakable clarity").

89. 151 F. Supp. 3d 830 (E.D. Tenn. 2015).

90. *Id.* at 833. Plaintiffs sought injunctive relief. *Id.*

91. *Id.* at 838.

92. *Id.*

court ruled that prospective COLA amendments do not violate the Contract Clause.[93]

Likewise, the First Circuit Court of Appeals in *Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo*,[94] refused to find that state legislation involving a fixed COLA amount constituted a binding contract.[95] Unions representing city firefighters and police officers alleged that legislation changing COLA payments from fixed to variable violated the federal Contract Clause.[96] The court of appeals denied the claim, commenting that the original legislation could not be construed as a binding contract.[97]

In spite of these decisions, a series of state trial court decisions in Rhode Island, the *Chafees*,[98] viewed COLA modifications differently. These cases were heard before the same court and considered the constitutionality of pension reforms reducing and otherwise suspending COLAs.[99] In all three cases, a number of local affiliates of various unions representing municipal employees sued the governor of Rhode Island and the Employees' Retirement System of Rhode Island, alleging that such modifications violated the Contract Clause of the state constitution.[100] The court found that the plaintiffs had met their vesting requirements under the pension statute because they had each completed at least ten years of service, and thus enjoyed a protected and enforceable contractual right to their pension benefits.[101]

3. Pension Spiking

An additional type of pension reform that has been challenged (albeit unsuccessfully) is pension spiking. "Pension spiking" is a type of loophole that

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93. *Id.*

94. 880 F.3d 44 (1st Cir. 2018).

95. *Id.* at 48.

96. *Id.* at 46–47.

97. *Id.* at 48 (noting the necessity of proving a clear and unequivocal expression of intent by the legislature).

98. *See* R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC 12–3166, 2014 WL 1577496 (R.I. Super. Ct. Apr. 16, 2014); R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149 (R.I. Super. Ct. Apr. 25, 2014); Bristol/Warren Reg'l Sch. Emps. v. Chafee, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142 (R.I. Super. Ct. Apr. 25, 2014).

99. *See Bristol/Warren*, 2014 WL 1743142, at *1*; R.I. Council 94*, 2014 WL 1743149, at *1; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *1. The reform permanently reduced all COLAs to apply only to the first $25,000 of retirement allowance as well as suspended all COLAs, except every five years until the fund is funded to 80% (which is estimated to take at least 16 years). *R.I. Council 94*, at *2.

100. *Bristol/Warren*, 2014 WL 1743142, at *3; *R.I. Council 94*, 2014 WL 1743149, at *2–3; *R.I. Pub. Emps.' Retiree Coal.,* 2014 WL 1577496, at *2. Plaintiffs sought declaratory and injunctive relief in each case.

101. *Bristol/Warren*, 2014 WL 1743142, at *9–10; *R.I. Council 94*, 2014 WL 1743149, at *7; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4–6.

allows employees to collect payments based on an artificially inflated base compensation figure.[102] It has been universally condemned by scholars as a financial abuse.[103] Modifications of such practices have been upheld on a variety of grounds.[104]

Elimination of pension spiking was upheld by the Illinois Court of Appeals in *Pisani v. City of Springfield*.[105] In this case, an electrical worker who was currently employed and an electrical workers' union sued the city of Springfield, alleging that its elimination of an allowance for retirees to "cash in" unused vacation time to increase retirement benefits constituted a violation of the state constitution's Contract Clause.[106] The court also permitted this modification because the vacation buyback provision was contained in a city ordinance and not in a state statute.[107] The appellate court held that there was no contractual right to an unmodified pension spiking allowance because the pension contract was between plaintiffs and the state and the pension spiking provision was unrelated to the state pension contract.[108]

The Supreme Court of California evaluated another form of pension spiking in *Cal Fire Local 2881 v. California Public Employees' Retirement System* (CalPERS).[109] Professional firefighters and their union sued CalPERS concerning removal of an option to purchase up to five years of non-qualifying

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102. Anenson et al., *supra* note 3, at 50; *see* Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 371 (Cal. Ct. App. 2016) (quoting Little Hoover Commission) (defining pension spiking as **"**[t]he practice of increasing [an employee's] retirement allowance by increasing final compensation or including various non-salary items (such as unused vacation pay) in the final compensation figure used in the [employee's] retirement benefit calculations, and which has not been considered in prefunding of the benefits."), *review dismissed*, 473 P.3d 312, 312 (Cal. 2020).

103. Anenson et al., *supra* note 3, at 50 (recommending that states eliminate loopholes like double-dipping and pension spiking); *see* Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 415–16 (2012) (labeling pension spiking a moral hazard because it involves "the subsidization by taxpayers of unaffordable commitments entered into by their political representatives during the course of bargaining with public unions.").

104. *See infra* notes 105–114 and accompanying text. Two cases from California could also be characterized as eliminating pension spiking, but they concern changes to earnable compensation and are analyzed with that category of reform. *See* Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85 (Cal. 2020); *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. at 365.

105. 73 N.E.3d 129 (Ill. Ct. App. 2017).

106. *Id.* at 130. Plaintiff sought declaratory and injunctive relief against enforcement of the amendment. *Id.* Plaintiffs also challenged the reform under the state constitutional Pension Clause. *Id.* The court resolved the case on the same grounds for both the Contract and the Pension Clauses. *Id.* at 138–39.

107. *Id.* at 137.

108. *Id.*

109. 435 P.3d 433 (Cal. 2019).

service credit ("airtime").[110] Plaintiffs argued that they had a contractual right to this option and that any elimination or modification of it would violate the Contract Clause of the state constitution.[111] The court found, however, that the absence of statutory language or legislative history indicating legislative intent to create an unchangeable pension benefit was dispositive.[112] The court also mentioned that the airtime credit was a benefit for which the employees themselves had paid entirely, rather than a true benefit paid by the state.[113] For these reasons, the supreme court upheld the airtime credit modification.[114]

4. Actuarial Factors and Benefit Formulas

Courts have also considered whether changes in actuarial factors and/or benefit formulas constitute Contract Clause violations. Almost all such modifications of factors and formulas have been upheld.[115]

Actuarial factors are variables that go into calculation of the formula that determines pension benefits.[116] The typical formula under most plans entitles an employee to an annual benefit following retirement equal to a percentage of the employee's final average salary, multiplied by the number of years of employment.[117] Certain plans base benefits on earnings averaged over the highest three years of employment, while others use the average earnings over the course of employment.[118] Courts upholding actuarial factor and formula changes generally remark that the methods by which pensions are calculated do not constitute pension benefits themselves, so there is no contractual right to unmodified methods of calculation.[119]

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110. *Id.* at 433.

111. *Id.* at 442. Plaintiffs requested a writ of mandate and injunctive relief. *Id.* at 433.

112. *Id.* at 446.

113. *Id.* at 450.

114. *Id.*

115. Three of the cases finding modifications unconstitutional were from the same state. *See infra* notes 141–145 and accompanying text. The majority of courts ruling under state constitutional Pension Clauses have struck down such modifications. They have ruled that the contractual right to pension benefits necessarily incorporates the method and formula used for calculation. *See* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1113 (Ariz. 2016); Fields v. Elected Offs.' Ret. Plan, 320 P.3d 1160, 1165 (Ariz. 2014); *In re* Pension Reform Litig., 32 N.E.3d 1 (Ill. 2015). *Contra* Eddington v. Dall. Police & Fire Pension Sys., 589 S.W.3d 799, 805 (Tex. 2019) (finding formula is not the same as the benefit itself and upholding prospective reform under Texas Pension Clause).

116. For an explanation of the various types of defined benefit formulas used in calculating plan benefits, see EVERETT T. ALLEN, JR. ET AL., PENSION PLANNING: PENSION, PROFIT SHARING, AND OTHER DEFERRED COMPENSATION PLANS 229–34 (9th ed. 2003).

117. Anenson et al., *supra* note 3, at 14.

118. Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683, 687–91 (2000).

119. *See infra* notes 120–40 and accompanying text.

Many courts have upheld actuarial factor changes. In *City of Hollywood v. Bien*,[120] police officers sued the city, alleging that the imposition of a deadline for entry into a deferred retirement option plan violated the state constitution's Contract Clause.[121] Plaintiffs sought deferred entry in order to increase the calculation of their monthly benefit.[122] Notwithstanding, the Florida Court of Appeals held that the prospective change to retirement benefits at issue did not operate as an impairment of a contract.[123]

The Supreme Court of Washington also upheld changes in actuarial factors, although for different reasons. In *Lenander v. Washington State Department of Retirement Systems*,[124] a retired state trooper sued the Department of Retirement Systems (DRS) for reducing his monthly pension benefit following his having opted for his surviving spouse to receive the same monthly benefit following his death.[125] Plaintiff alleged that this reduction violated the state constitution's Contract Clause.[126] The court confirmed that the actuarial factor that was reduced "was always subject to periodic updating."[127] Along with finding that no contractual promise had been broken, the court alternatively held that there was no substantial impairment.[128] It distinguished actuarial factors from the formula for calculating the benefit, determining that the former change resulted in a benefit of equal value.[129] As such, it pronounced that the benefit modification was constitutional.[130]

In *Cranston*, the First Circuit considered pension modifications involving the addition of a minimum retirement age, an increase in the number of years of required service, and a decrease in the pension accrual percentage.[131] The court rejected the unions' claim that these modifications violated the federal Contract Clause.[132] Utilizing the same reasoning as with the COLA modification discussed in Part I.A.2, the court of appeals emphasized that there was no

120. City of Hollywood v. Bien, 209 So. 3d 1 (Fla. Dist. Ct. App. 2016).

121. *Id.* at 1. Plaintiffs brought a declaratory judgment action. *Id.* The plan allowed eligible officers to commence their monthly retirement payments and have them placed in an interest-bearing account while they continued to work and receive wages. *Id.* at 2.

122. *Id.* at 1.

123. *Id.* at 3.

124. 377 P.3d 199 (Wash. 2016).

125. *Id.* at 199. The reduction in monthly benefit was imposed in order to make the pension actuarially equivalent in value given the prospective benefit to his surviving spouse. *Id.* at 203.

126. *Id.* at 203–04. Plaintiff sought declaratory relief. *Id.*

127. *Id.* at 212 (ruling that the plaintiff "was entitled only to the standard retirement allowance or the option of an 'actuarial equivalent' allowance with a full survivor benefit, subject to the DRS's right to adopt new actuarial factors").

128. *Id.* at 212–13.

129. *Id.*

130. *Id.*

131. Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo, 880 F.3d 44, 46 (1st Cir. 2018); *supra* notes 94–97.

132. *Cranston Firefighters*, 880 F.3d at 51.

evidence of legislative intent to turn the initial legislation into an unchangeable contract.[133]

An additional type of reform related to the benefit formula and affecting the calculation is a change in the payment system structure. In *Valde v. Employment Appeal Board*,[134] a retiree sued the Employment Appeal Board and his public retirement system, alleging violations of the state and federal Contract Clauses.[135] Plaintiff left his employment in 2002 and applied for his retirement benefit in 2015.[136] The Plan used the "calendar method" to calculate the benefit, which utilized his salary from his years worked.[137] Plaintiff claimed that the Plan should instead have used the "quarter method" in place at the time of his departure.[138] The court upheld the Plan's application of the calendar method.[139] The court proclaimed that retirees have no contract rights in a particular retirement payment system and that these systems are properly susceptible to being adversely affected by subsequent legislation without constituting a constitutional violation.[140]

Conversely, the trio of Rhode Island trial court decisions, the *Chafees*,[141] described previously in Part I.B., each found a contract for various changes reducing the pension benefit.[142] The legislative modifications included the termination of the accrual of benefits for retirement-eligible employees, increases in the length of service required to receive prior benefits, and increases in the minimum service requirement.[143] As with its COLA analysis, the trial court determined that the various plaintiffs had met their vesting requirements under the pension statute given the fact that each had completed at least ten years of service.[144] Because the court equated contract formation with statutory

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133. *Id.*

134. No. 17-0266, WL 4050330, at *1 (Iowa Ct. App. Sept. 13, 2017).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* This method would have applied the average of his highest twelve consecutive quarters of service to determine the benefit owed. *Id.*

139. *Id.* at *2.

140. *Id.* The court additionally observed that the quarter method legislation had been repealed before it had ever been used. *Id.*

141. R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC 12-3166, 2014 WL 1577496 (R.I. Super. Ct. Apr. 16, 2014); R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149 (R.I. Super. Ct. Apr. 25, 2014); Bristol/Warren Reg'l Sch. Emps. v. Chafee, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142 (R.I. Super. Ct. Apr. 25, 2014).

142. *Bristol/Warren*, 2014 WL 1743142, at *9–10; *R.I. Council 94*, 2014 WL 1743149, at *7; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4–6.

143. *Bristol/Warren*, 2014 WL 1743142, at *2; *R.I. Council 94*, 2014 WL 1743149, at *1; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *1.

144. *Bristol/Warren*, 2014 WL 1743142, at *9–10; *R.I. Council 94*, 2014 WL 1743149, at *7; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4–6.

vesting, it deemed there to be a protected contract right to unmodified pension benefits.[145]

5. Earnable Compensation

A handful of courts have recently upheld changes to the definition of "earnable compensation" for purposes of calculating retirement benefits. The concept of earnable compensation is closely related to the actuarial factors and formulas set forth above in Part I.D., and in certain cases, the elimination of pension spiking in Part I.C. Pension plans use an employee's "earnable compensation" in the formula to calculate benefits.[146] As a result, what constitutes earnable compensation is paramount to a retiree's ultimate pension benefits. The more that can be included within the earnable compensation definition, the higher the benefit. For this reason, many recent pension reform measures have targeted what qualifies as earnable compensation and some laws have excluded particular items from this category.[147]

In *Southern States Police Benevolent Ass'n, Inc. v. Bentley*,[148] a pension plan initially interpreted "earnable compensation" to include overtime worked and employees made contributions accordingly.[149] Police officers and their union sued when the plan changed its policy concerning the definition of "earnable compensation" and began to exclude overtime from this calculation.[150] Plaintiffs asserted that the modification violated the Contract Clause of the state constitution.[151] The Supreme Court of Alabama acknowledged that the plan was permitted to change its interpretation of the "earnable compensation" definition.[152] The court underscored that this was merely a change in interpretation and not a modification to a contract right.[153] Therefore**,** it was a permissible change.[154]

The Supreme Court of New Hampshire additionally upheld modifications to the definition of "earnable compensation" in *American Federation of Teachers*.[155] Plaintiffs, including teachers, police officers, fire fighters, and

145. *Bristol/Warren*, 2014 WL 1743142, at *9–10; *R.I. Council 94*, 2014 WL 1743149, at *7; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4–6.

146. ALLEN ET AL., *supra* note 116, at 230–31.

147. *See infra* notes 148–72 and accompanying text.

148. S. States Police Benevolent Ass'n v. Bentley, 219 So. 3d 634 (Ala. 2016).

149. *Id.* at 637.

150. *Id.* at 638. Later, in 2012, the applicable statute was amended to provide that overtime would be included, but only on a limited basis (earnable compensation could not exceed 120% of base salary). *Id.* at 649–50.

151. *Id.* at 640. Plaintiffs sought injunctive relief as well as a declaration that "earnable income" is to include overtime. *Id.* at 635–36.

152. *Id.* at 647.

153. *Id.*

154. *Id.*

155. Am. Fed'n of Tchrs. v. State, 111 A.3d 63 (N.H. 2015); *see supra* notes 76–81.

state employees (among others), sued the state of New Hampshire concerning exclusions made with respect to what constitutes "earnable compensation."[156] Prior to the changes, "earnable compensation" had included numerous items such as car allowances/reimbursements, clothing allowances, and educational assistance.[157] The legislature subsequently amended the applicable statute to exclude these items from the "earnable compensation" construct.[158] The court upheld the reform by resolving that the statute did not demonstrate the requisite legislative intent to be bound against prospectively changing the definition of earnable compensation.[159]

The California Court of Appeal in *Marin Ass'n of Public Employees v. Marin County Employees' Retirement Ass'n* (MCERA)[160] reached a similar result although for different reasons. A new statute changed the operation of a county plan that would begin to prospectively exclude standby pay, administrative response pay, callback pay, and cash payments for waiver of health insurance from the calculation of members' final compensation.[161] Current employees and organizations representing public employees sued MCERA, alleging that the reform violated the Contract Clause of the state and federal constitutions.[162] The court disagreed with Plaintiffs, holding that while a public employee does have a protected contract right to a pension, "that right is only to a 'reasonable' pension—not an immutable entitlement to the most optimal formula of calculating the pension."[163] It advised that the legislature may, prior to the employee's retirement, alter the formula, thereby reducing the anticipated pension.[164] The court of appeals observed that the modification at issue was permissible because what remained was still a "reasonable" pension.[165] The California Supreme Court recently endorsed this result.[166]

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156. *Am. Fed'n of Tchrs.*, 111 A.3d at 67.

157. *Id.* at 70. Other items included stipends, amounts paid in exchange for waiver of health and dental insurance, domestic partner medical coverage, health and fitness reimbursement, relocation expenses, and settlements paid to employees. Plaintiffs sought declaratory and injunctive relief. *Id.*

158. *Id.* at 67.

159. *Id.* at 72 (ruling that there was a failure to prove the necessary "unmistakable intent by the legislature to bind itself").

160. 206 Cal. Rptr. 3d 365 (Cal. Ct. App. 2016), *review granted*, 383 P.3d 1105 (Cal. 2016).

161. *Id.* at 372, 388.

162. *Id.* at 377. Plaintiffs sought declaratory and injunctive relief, as well as a writ of mandate to compel calculations consistent with the original promises. *Id.*

163. *Id.* at 369.

164. *Id.*

165. *Id.* at 393. For an in-depth discussion of the *Marin* case, see generally John R. Dorocak & James Estes, *The California Rule On Modifying Public Employees' Protected Pension Rights: Reasonable Pension Or Reasonable Modification?*, 39 U. LA VERNE L. REV. 268, 273–77 (2018).

166. The California Supreme Court had previously granted review in *Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n*, 383 P.3d 1105, 1105 (Cal. 2016). However, after deciding

More specifically, the Supreme Court of California upheld the same reform in a companion case.[167] In *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*,[168] the court ruled that the "earnable compensation" definitional changes constituted contractual modifications but were nonetheless justified.[169] Public employees and employee associations had sued three county associations alleging that exclusions like overtime pay violated the Contract Clause of both the state and federal constitution.[170] The court disagreed. While accepting that the components of earnable compensation were part of an employee's contract right, the supreme court determined that the reduction in benefits was appropriate.[171] It held that the government's purpose in prohibiting certain items that artificially inflated benefits beyond work ordinarily performed was a reasonable response to stem abuses of the pension system.[172]

6. Health Care Benefits

The other major area of public sector benefit reform concerns health care benefits.[173] While healthcare benefits are not pension benefits per se, we include them for completeness.[174] Both are retirement benefits and the judicial treatment of constitutional challenges to their reform follows a similar pattern. The courts considering these changes have typically upheld the challenged

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the companion case of *Alameda*, the court dismissed the appeal in light of that decision. *Marin Ass'n of Pub. Emps.*, 473 P.3d 312, 312 (Cal. 2020).

167. The lawsuit stemmed from the same pension reform statute at issue in *Marin*. The challenged changes to county retirement systems were enacted by the California Public Employees' Pension Reform Act of 2013 (PEPRA).

168. Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85 (Cal. 2020).

169. *Id.* at 93–94.

170. *Id.* at 100. Plaintiffs sought writs of mandate. *Id.* The case involved a consolidated action involving Alameda, Contra Costa, and Merced counties. *Id.*

171. *Id.* at 126–27.

172. *Id.* at 93–94, 127. The California Court of Appeals in *Marin* appeared to equate the reasonableness of the change with the lack of substantial impairment. *See Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d 365, 386–92 (Cal. Ct. App. 2016). The California Supreme Court in *Alameda*, in contrast, seemed to determine the same issue of reasonableness under the intermediate scrutiny test. *See Alameda*, 470 P.3d at 128 (Cuéllar, J., concurring); *see also* Anenson et al., *supra* note 3, at 30 (noting uncertainty about how California Contract Clause jurisprudence relates to federal law).

173. *Legal Protections for State Pensions and Retiree Health Benefits*, PEW CHARITABLE TR., 9 (2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/05/legal-protections-for-state-pension-and-retiree-health-benefits (finding that the law of health care benefits "is less developed, and less protective, than that governing pension[s]").

174. *See generally* Natalya Shnitser, *Healthcare Promises for Public Employees*, 60 ARIZ. L. REV. 369 (2018) (commenting on the growing liabilities associated with retiree healthcare promises that have strained state and local budgets).

modifications.[175] The most common reform measure increased employee contributions.[176] Collectively, they maintained that health care benefits differ from pension benefits, that there is no contractual right to unmodified health care benefits, and that there is comparably no contract right to an unchanged employee contribution rate with respect to health care benefits.[177]

In *Fry v. City of Los Angeles*,[178] a California court of appeal heard a pension reform case involving health care benefits. A city's fire and police department's employees and an association for retired fire and police employees sued Los Angeles and the Board of Commissioners of the Los Angeles Fire and Police Pensions, alleging a violation of the Contract Clause of the state constitution.[179] A 1974 City Charter provision permitted the City Council to provide by ordinance a subsidy program for health insurance premiums of retired employees.[180] The ordinance that followed in 1975 provided that the City Council would maintain authority to determine the maximum subsidy amount.[181] In 2011, the City Council passed a "Freeze Ordinance" that froze the subsidy amount (rather than permitting increases as it had until that point) for those employees who opted not to contribute to the increases.[182] Plaintiffs argued that the "Freeze Ordinance" violated their contract rights to ongoing

175. Two non-Contract Clause decisions upheld reforms to health care benefits as well. In *Schwegel v. Milwaukee County*, the Supreme Court of Wisconsin considered a 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 (Wis. 2015). The court determined that there was no contract right to an unmodified reimbursement system where the three requirements of vesting (one of which was retirement by the specified dates) had not been met. *Id.* at 90. The Illinois Court of Appeals in *Underwood v. City of Chicago* upheld a city's termination of health care benefits for city retirees pursuant to the state Pension Clause because the legislature had specifically provided that the health care benefits would be time-limited. 62 N.E.3d 375, 381–83 (Ill. App. Ct. 2016) (finding that Plaintiffs had "no ascertainable claims to lifetime health care benefits" because "the benefit always came with an expiration date"); *see also id.* at 381–82 (finding that other groups where benefits did not expire could not establish the reform reduced their benefits). A third non-Contract Clause case produced a mixed result. In *Dannenberg v. State*, the Supreme Court of Hawaii reversed and remanded so that the trier of fact could determine whether changes to the health care benefits were reasonable under the Pension (so-called "Non-Impairment") Clause of the state constitution. 383 P.3d 1177, 1196–97, 1200 (Haw. 2016).

176. *See* Donohue v. New York, 347 F. Supp. 3d 110 (N.D.N.Y. 2018); AFT Mich. v. State, 893 N.W.2d 90 (Mich. Ct. App. 2016), *aff'd,* 904 N.W.2d 417 (Mich. 2017); Matter of Weaver v. Town of N. Castle, 153 A.D.3d 531 (N.Y. App. Div. 2017); Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645 (N.C. Ct. App. 2019).

177. *See infra* notes 178 –214 and accompanying text.

178. 199 Cal. Rptr. 3d 694 (Cal. Ct. App. 2016).

179. *Id.* at 700. Plaintiffs sought a writ of mandate as well as injunctive and declaratory relief. *Id.*

180. *Id.* at 697.

181. *Id.* at 697–98.

182. *Id.* at 699.

increasing subsidies.[183] The court of appeals disagreed. It concluded that there was no right to an increasing subsidy or a board-determined subsidy because the City Council retained discretion to set and change the subsidy amount.[184] So the City Council's decision to freeze the health insurance premium subsidy was upheld.[185]

The Supreme Court of New York, Appellate Division, has also upheld the constitutionality of modifications to a health insurance plan. In *Matter of Weaver v. Town of North Castle*,[186] current and former nonunion employees of the Town of New Castle sued the town for passing a 2012 resolution that prospectively increased the cost of health insurance contributions for employees.[187] Plaintiffs alleged that this modification violated their contractual right to retirement health insurance benefits at fixed contribution rates.[188] The court found, however, that nothing in the language of the resolution indicated that the town meant to create a contractual right.[189]

In *Petit-Clair v. City of Perth Amboy*,[190] the Appellate Division of the Superior Court of New Jersey reached the same result. The appellate court held that part-time public employees did not have a contractual right to receive health care benefits after retirement.[191] Plaintiff was a part-time employee eligible for retirement who sued the city after it withdrew retiree health benefits for part-time non-union workers (but left them in place for certain full-time employees).[192] Plaintiff argued that the legislation providing the retirement health care benefits created a contractual right.[193] The court rejected this position, remarking that the legislative creation of a contractual right was not proved.[194]

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183. *Id.* at 700.

184. *Id.* at 701, 703.

185. *Id.* at 703.

186. Matter of Weaver v. Town of N. Castle, 153 A.D.3d 531 (N.Y. App. Div. 2017).

187. *Id.* at 533.

188. *Id.* Plaintiffs sought a judgment declaring the modification null and void and to recover damages for the increased premium amount paid since the change. *Id.* The opinion does not specify whether the source of the violation is state or federal law and ambiguously refers to Plaintiffs' claim of a "vested" contract right. *Id.*

189. *Id.* at 534. Buttressing its conclusion was the observation that resolutions (unlike ordinances) typically are temporary and therefore do not create contractual rights. *Id.* The court did note, however, that an applicable local law required the town to contribute health care benefits for retirees so remanded the case as to the retirees on that point. *Id.* at 534–35.

190. No. A-2049-14T2, 2018 WL 4262959 (N.J. Super. Ct. App. Div. Sept. 7, 2018).

191. *Id.* at *9–10. This opinion does not indicate whether the alleged violation was of the state or federal constitution and does not specify the remedy sought.

192. *Id.* at *2.

193. *Id.* at *1.

194. *Id.* at *10 (finding neither unequivocal nor unmistakable contractual intent as required). Plaintiff also argued that the city's mayor had assured him, before his hire, that he would receive

The Court of Appeals of North Carolina additionally upheld modifications to health care benefits, although its reasoning was different from that of other courts. In *Lake v. State Health Plan for Teachers and State Employees*,[195] state retirees brought actions against their state health plan and North Carolina, alleging violations of the state and federal Contract Clauses.[196] The modification at issue required employees and retirees to contribute toward their health insurance premiums.[197] The court clarified that health care benefits are different from pension benefits, and that there was no contract between the state and retirees for health care benefits.[198] Accordingly, it concluded that there could be no Contract Clause violation stemming from modifications to retirees' health care plans.[199]

The United States District Court for the Northern District of New York further decided in favor of government employers on a group of related cases involving increases in employee contributions to their health care premiums.[200] Each of the decisions relied on the reasoning of *Donohue v. New York*, the "Lead Case."[201] The series of cases involved retired state employees alleging that a modification increasing their contribution toward health care premiums violated the Contract Clause of the federal constitution.[202] Central to the contract analysis was the content of the collective bargaining agreement providing time limits on the premium upon termination of the contract.[203] The court found that the employees did not have a contractual right to an unmodified contribution rate for health care premiums.[204] For the same reason, the district court ruled

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them. *Id.* at *1. However, the court ruled that the mayor lacked the authority to bind the City. *Id.* at *10.

195. 825 S.E.2d 645 (N.C. Ct. App. 2019).

196. *Id.* at 648–49. Plaintiffs sought injunctive relief. *Id.*

197. *Id.* at 648.

198. *Id.* at 652.

199. *Id.*

200. There were eleven related cases brought against the same defendants and involving the same issue: whether increases in employee contribution rates for retirees' health insurance violated the Contract Clause. *See, e.g.*, Roberts v. Cuomo, 339 F. Supp. 3d 36 (N.D.N.Y. 2018); Police Benevolent Ass'n v. Cuomo, 343 F. Supp. 3d 39 (N.D.N.Y. 2018); Krey v. Cuomo, 340 F. Supp. 3d 109 (N.D.N.Y. 2018). For a list of the cases, see Appendix. Because the material facts and analysis were the same across these cases, our discussion will treat these decisions together for efficiency purposes.

201. *See* Donohue v. New York, 347 F. Supp. 3d 110 (N.D.N.Y. 2018); *see also Roberts*, 339 F. Supp 3d at 48 (referring to *Donohue* as the "Lead Case").

202. *Roberts*, 339 F. Supp. 3d at 46–47; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 47–48; *Krey*, 340 F. Supp. 3d at 117–18. Plaintiffs sought declaratory and injunctive relief.

203. *See Roberts*, 339 F. Supp. 3d at 64; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 51; *Krey*, 340 F. Supp. 3d at 121.

204. *Roberts*, 339 F. Supp. 3d at 65; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 51; *Krey*, 340 F. Supp. 3d at 121.

that there was no substantial impairment of any contract.[205] It further determined that the reforms were reasonable and necessary to address the state's $10 billion budget gap.[206] As such, the court upheld the modification in all of the cases.[207]

In contrast to the above-mentioned decisions, one recent decision in Michigan struck down health care benefit modifications. The case, *AFT Michigan v. State of Michigan*,[208] involved public school employees and their unions suing the state of Michigan concerning a new requirement that employees contribute 3% of their salaries for a non-vesting retirement plan.[209] The non-vesting nature of the plan meant that the wages withheld "were taken without any legally enforceable guarantee that the contributors would receive the retirement health benefits provided to present retirees."[210] Plaintiffs alleged that this change violated the Contract Clauses of the state and federal constitutions.[211] The Court of Appeals of Michigan announced, and the Supreme Court of Michigan agreed, that this new employee contribution constituted a clear constitutional violation because it directed the state to pay 3% less to employees than the amount for which they had contracted.[212] While a legislative amendment replaced the mandatory contribution provision with one that was strictly voluntary, the appellate court employed the same analysis (affirmed on appeal) and found that even a voluntary system that changed the employees' ultimate compensation is unconstitutional.[213] That this retirement plan was solely non-vesting was a critical factor in the decision because the changes imposed necessarily amounted to a reduction in employee benefits (unlike in the decisions differentiating between employee obligations and benefits).[214]

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205. *Roberts*, 339 F. Supp. 3d at 68; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 53; *Krey*, 340 F. Supp. 3d at 122.

206. *Roberts*, 339 F. Supp. 3d at 67–68; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 69; *Krey*, 340 F. Supp. 3d at 122.

207. *Roberts*, 339 F. Supp. 3d at 65; *Police Benevolent Ass'n*, 343 F. Supp. 3d at 52; *Krey*, 340 F. Supp. 3d at 122.

208. AFT Mich. v. State, 893 N.W.2d 90 (Mich. Ct. App. 2016), *aff'd*, 904 N.W.2d 417 (Mich. 2017).

209. *Id.* at 92–93.

210. *Id.* at 96.

211. *Id.* at 93, 103. Plaintiffs sought summary disposition and the return of improperly paid funds. *Id.*

212. *Id.* at 96, *aff'd*, 904 N.W.2d at 418. The court found that the degree of impairment was substantial by comparing the reduction to that of another case. *Id.* at 96–97.

213. *Id.* at 94.

214. *Id.* at 94–95.

B. Summary of Results and Implications

The foregoing assessment makes clear that some types of public pension reforms are more likely to be upheld under the Contract Clause than others. Overall, reforms have been surprisingly successful.[215] Only in states with a separate Pension Clause do the case results meaningfully diverge.[216] Under the Contract Clause, courts considering employee contribution rates, pension spiking, and the definition of "earnable compensation," consistently upheld those modifications.[217] Decisions that addressed changes to cost-of-living allowances, actuarial factors, benefit formulas, and health care benefits almost always upheld changes in those areas with one or two exceptions.[218]

These patterns carry some predictive and instructive value as local and state governments attempt to resolve public pension deficits in a lawful manner consistent with constitutional requirements.[219] The cases show that the Contract Clause is not an insurmountable obstacle to reform.[220] These results are surprising. Before the recent litigation, extant understanding was that state and federal Contract Clauses would prevent any substantial reform of government pensions.[221] Acting on this belief, policymakers across the country directed reforms at new hires—an approach that is unlikely to salvage failing pensions.[222] But desperate times call for desperate measures. And some politicians went further and attempted major overhauls of their pension systems. Again, as evidenced above in Part I.A., many of these reforms proved successful and withstood constitutional challenge.

At minimum, then, these results suggest that state and local governments can expand the scope of reforms to include existing employees and even

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215. *See infra* Diagrams 1, 3–4.

216. *See infra* Diagrams 3–4.

217. *See infra* Diagram 1.

218. *See infra* Diagram 1.

219. *See* Michael Thom, *The Drivers of Public Sector Pension Reform Across the U.S. States*, 47 AM. REV. PUB. ADMIN. 431, 432 (2017) (noting that one of the drivers of public pension reform is what other states are doing).

220. *See supra* Part I.A.; *infra* Diagrams 1, 3–4.

221. *See, e.g.*, Cuccinelli et al., *supra* note 1, at 540 ("Attempts to change the benefits of the retired, those qualified to retire, and voluntary participants in contributory programs probably would not be worth the effort.").

222. *See* Anenson et al., *supra* note 3, at 14 ("Presumably to avoid the high costs of lawsuits, states have been careful to limit reforms (other than COLA changes) to new hires."); *id*. at 52 (discussing reforms targeting new hires because of legal concerns); *see also* Jean-Pierre Aubry & Caroline V. Crawford, *State and Local Pension Reform Since the Financial Crisis*, CTR. FOR RET. RSCH. BOS. COLL. (Jan. 2017), https://crr.bc.edu/briefs/state-and-local-pension-reform-since-the-financial-crisis/ (finding that states with the strongest legal protections were more likely to limit the cuts to new hires).

retirees.[223] It also indicates that additional benefit cuts are inevitable.[224] As a result, the next section evaluates these anticipated reforms using contemporary ethical theories before suggesting a framework to guide government action.

II. EXPLORING AN ETHICAL FRAMEWORK

Having surveyed the cases contesting reforms under the Contract (and state Pension) Clauses, this Article now considers these reforms through a moral lens. It proposes an ethical framework to enhance government accountability and ensure that reforms are enacted in a responsible and sustainable manner. The following discussion should spur more robust debate as to whether, and to what extent, some or all public pension and related benefits should be reduced or eliminated.

As shown in Part I, existing judicial doctrine fails to offer much protection to government employees and, in some situations, retirees.[225] Given the lack of effective legal redress, this Part relies on ethics as a guide to government (and to some extent employee) behavior to determine when, and under what circumstances, to enact reforms. It analyzes the ethical soundness of public pension reform using two starkly different normative theories: Jeremy Bentham's Act Utilitarianism[226] and Immanuel Kant's Ethics.[227] Where Bentham argued that only consequences matter, Kant claimed that consequences have no proper role in the morality of any particular act.[228] More specifically, Kant's ethical construct is deontological and depends on duty

223. The case outcomes also suggest that current and former employees should use political influence (and not litigation) as the way to maintain existing pension protection and to safeguard pensions from further reductions. *See* Ronald H. Rosenberg, *Cutting Pension Rights for Public Workers: Don't Look to the Courts for Help*, 62 HOW. L.J. 541, 543 (2019) (examining 10 years of public pension litigation). The results may also say something about the value of labor unions and collective bargaining.

224. All states have large funding gaps. BOB WILLIAMS ET AL., AM. LEGIS. EXCH. COUNCIL, UNACCOUNTABLE AND UNAFFORDABLE 2016 2 (2016), https://www.alec.org/app/uploads/2016/10/2016-10-13-Unaccountable-and-Unaffordable.pdf.; *infra* Appendix. Even Wisconsin's pension plan, that is arguably the best-funded plan in the country, is operating at only 63.4% funding. *Id*. at 2; *see also The State Pension Funding Gap: 2018*, PEW CHARITABLE TR., 9 (June 11, 2020), at 4, fig.2, https://www.pewtrusts.org/-/media/assets/2020/06/statepensionfundinggap2018.pdf (listing state by state pension debt). For a listing of ongoing liabilities in California and Texas, see *Pension Tracker*, BILL LANE CTR. W., https://www.pensiontracker.org (last visited Sept. 11, 2021).

225. *See infra* Part I. Plan participants can also bring non-constitutional claims under private law. *See, e.g.*, Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020) (also seeking remedies for breach of contract and equitable estoppel); *see also* James W. Ely, Jr., *Still in Exile? The Current Status of the Contract Clause*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 93, 109–11 (2019) (distinguishing impairment from breach of contract claims).

226. *See infra* Part II.A.

227. *See infra* Part II.B.

228. *See infra* Parts II.A–B.

alone.[229] Bentham's teleological approach focuses on whether these actions produce "right" results.[230]

Neither theory is complete. In fact, we chose these two philosophies precisely because they represent opposite ends of the spectrum of possible ethical frameworks. Despite the limitations of any single approach, it is useful to examine the ethics of public pension reform from opposing perspectives to more fully understand the issue and its implications.[231] Both theories remain popular in solving modern problems. From charities and animal welfare groups to human rights activists, supporters have drawn upon the tenets of these two philosophies to advance their causes and ideals.[232]

After analyzing the ethical dimensions of pension reform along these two fronts, we craft a hybrid model to accommodate the complexity involved in assessing pension reform. As seen below, the diversity of interests and their interplay with multiple circumstances cannot be overstated. The model reconciles the contrasting ethical approaches and explains how they overlap with the commonly articulated goals of social retirement policy.[233] Throughout the ethical evaluation of pension reform, we include a decision-making paradigm developed in our prior work that contemplates the major stakeholders involved.[234]

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229. JAMIE DARIN PRENKERT ET AL., BUSINESS LAW: THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT 4–5 (18th ed. 2021).

230. *Id.*; *see also* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 54 (2002) (attributing utilitarianism to the ancient philosophy of teleology developed by Aristotle).

231. Although our aim is to enhance the quality of the conversation about ethical standards as they relate to reform, it is noteworthy that both theories have also had an influence on the law and legal reasoning. *See* NIGEL WARBURTON, A LITTLE HISTORY OF PHILOSOPHY 116 (Yale Univ. Press 2011); *infra* note 331.

232. *Introduction* to JEREMY BENTHAM, DEONTOLGOGY; OR, THE SCIENCE OF MORALITY (1834); Emilie Dardenne, *From Jeremy Bentham to Peter Singer*, REVUE D'ÉTUDES BENTHAMIENNES Sect. 2.1, para. 16 (2010), https://doi.org/10.4000/etudes-benthamiennes.204 (noting that Bentham's argument that all sentient beings should be included in the utilitarian calculus became a must in the propaganda of the animal movement); Piper Gibson, *Can Utilitarianism Improve the US Criminal Justice System? An Evaluation of Punishment and the Utility Calculus*, UNIV. N.H. INQUIRY J. (2020), https://www.unh.edu/inquiryjournal/spring-2020/can-utilitarianism-improve-us-criminal-justice-system-evaluation-punishment-and-utility; Jonathan Peterson, *Book Review*, NOTRE DAME PHIL. REV., https://ndpr.nd.edu/reviews/kant-and-applied-ethics-the-uses-and-limits-of-kant-s-practical-philosophy/ (reviewing MATTHEW C. ALTMAN, KANT AND APPLIED ETHICS: THE USES AND LIMITS OF KANT'S PRACTICAL PHILOSOPHY (2011) (explaining that the author argues that Kant's ethical theory has implications for a broad range of moral issues, including capital punishment, marriage, publicly-provided healthcare, and animal cruelty)); *see infra* note 310.

233. *See infra* Part II.C. (examining hybrid model along the dimensions of adequacy, equity, and efficiency).

234. Anenson et al., *supra* note 3, at 34–35 (developing a decision-making framework for political action); *infra* Part II.A., C.

Before embarking on the following philosophical discussion, however, it is important to underscore the constraints of our methodology. We are aware of the rich and varied writings in moral philosophy and the limitations of labeling our analysis too closely as pure Kant or Bentham. Our purpose is not to be ethical purists, but rather, ethical pragmatists. While we take seriously the technical, philosophical boundaries of what may be properly considered within or outside of these theories, we also believe an ethical valuation of pension legislation *inspired by* Kant and Bentham is a useful lens to think about the law and its public policy implications. We additionally realize that the role of government and lawmaking is addressed in the field of political science.[235] Nevertheless, we think it is legitimate to bring moral ideas *in the tradition of* Bentham and Kant into the conversation about legislation and public policy. These two theories offer convenient ways to identify and weigh the interests and values at stake in government pension reform.

A. Bentham's Act Utilitarianism

Jeremy Bentham popularized utilitarianism in eighteenth century England.[236] His purpose was to reform the laws of England and find solutions to the social problems around him.[237] Act Utilitarianism is a consequentialist moral philosophy that emphasizes the maximization of happiness.[238] Under this model, whatever behavior will result in the most net happiness is the ethical act.[239] Not surprisingly, this viewpoint is also known as the "Greatest Happiness Principle."[240] According to Bentham, one can simply calculate the pleasure derived from an action and then subtract the units of pain that might be

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235. *See* discussion *infra* note 331 (listing other possible approaches). Kant, himself, had separate writings on political philosophy.

236. Francis Hutcheson was the first person to propose a utilitarian approach to morality, but Bentham was the first to put it into practice. WARBURTON, *supra* note 231, at 122.

237. *Id.* In fact, it was the British school of utilitarianism (and the American philosophy of pragmatism) that led to the legal realism movement in the United States. HUHN, *supra* note 230, at 53–54; *see also id.* at 56 (relating how utilitarianism supplanted deontology in philosophy circles, just as in American law, policy analysis in the early twentieth century struggled against the categorical reasoning of the century before).

238. WILLIAM H. SHAW, BUSINESS ETHICS 49–51 (9th ed. 2017). Bentham's ethics resembles the ancient Greek philosophy of Epicurus who considered happiness to be the highest good. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

239. SHAW, *supra* note 238, at 49.

240. Jason Lloyd, Note, *Let There Be Justice: A Thomistic Assessment of Utilitarianism and Libertarianism*, 8 TEX. REV. L. & POL. 229, 231 (2003) ("As the father of utilitarian theory, Bentham's formulation of the greatest happiness principle is the starting point for all subsequent utilitarian theories. He states that 'the end and aim of a legislator should be the happiness of the people. . . .'" (quoting JEREMY BENTHAM, THEORY OF LEGISLATION 1 (C.M. Atkinson trans., Clarendon Press 1914) (1802))).

caused by it.[241] What is left is the value of the action—the "utility"—from which the theory gets its name.[242] The more pleasure an action brings, the more useful to society.[243] As such, Act Utilitarianism does not consider innate virtue or duty as per the Kantian model discussed next in Part II.B; it looks only at the consequences of the act in question.[244]

To employ a utilitarianism analysis, one must consider all potential stakeholders and predict the happiness (or lack thereof) that the stakeholders would experience were the act to occur. It is thus necessary to study the effect of public pension reform on state and local governments, public sector employees and retirees, and taxpayers.[245] As expected, pension modifications benefit some stakeholders and harm others.

1. State and Local Governments

State and local governments favor pension reform because reducing pension benefits allows the government to save money. Undeniably, every type of pension reform is geared toward this objective, including all of the measures studied in Part I.[246] For example, the controversy in *American Federation of Teachers v. State*,[247] arose because the New Hampshire legislature changed the definition of "earnable compensation" to eliminate car allowances, clothing allowances, and educational assistance from the formula used to calculate

241. WARBURTON, *supra* note 231, at 123 (how long it is, how intense it is, how likely that it will give rise to future pleasures). The net happiness equation is called the "Felicity Calculus." *Id*.

242. *Id.* (explaining that "utility" meant usefulness).

243. *Id.* Bentham introduced his theory of utility in BENTHAM, *supra* note 238. HUHN, *supra* note 230, at 55 n.140. In an essay published in 1863, his pupil (and later critic) John Stuart Mill systemized the method of utilitarianism. *Id.* (citing 22 ENCYCLOPEDIA BRITANNICA 914 (1950)).

244. For Bentham's critique of Kantianesque inherent principles, *see* JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 84 (Charles Warren Everett ed., 1945) (focusing on natural law philosophy). Act Utilitarianism is different from Rule Utilitarianism. The latter judges actions by a rule rather than an act. PRENKERT ET AL., *supra* note 229, at 4–8. The rule is moral if, over the long run, it maximizes benefits over costs. *Id*.

245. Anenson et al., *supra* note 3, at 36–43 (outlining stakeholder interests in considering reforming public pensions). For the sake of simplicity, we include (without specifying) pension beneficiaries in our analysis of employees and retirees. Also, because the government represents constituents who include taxpayers and employees, critics may claim we are double or triple counting. For purposes of pension reform, however, each of the groups identified has distinct interests.

246. The kinds of public pension reforms examined in Part I include increasing employee contributions to state retirement funds and health care benefits, eliminating spiking, and modifying COLAs, actuarial factors, benefit calculations, and the definition of earnable compensation.

247. 111 A.3d 63 (N.H. 2015).

retirement benefits.[248] There is no doubt that this reform measure was intended to rein in government spending at employees' expense.[249]

Reducing COLAs also helps governments to economize, so it is not surprising that a number of governments in our six-year study targeted COLAs.[250] Other studies confirm this result. Alicia Munnell, an economist and Director of the Center for Retirement Research at Boston College, explained how eliminating a 2% COLA reduces lifetime benefits by at least 15% and that eliminating a 3% COLA reduces lifetime benefits by up to 25%.[251] Similarly, a Pew study found that Arizona saved government (and taxpayers) $1.5 billion over 30 years by replacing a permanent COLA with one that was capped at 2% annually.[252]

Many public pension plans are on the brink of insolvency or will be soon.[253] An aging population and uncertain economy are contributing to their demise.[254] These plans operate on a pay-as-you-go, Ponzi-like basis.[255] Court opinions in the new constitutional cases often emphasized the peril that prompted political action.[256] Take California, which is notoriously one of the worst states in the country for troubled pension plans.[257] The adverse impact of

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248. *Id.* at 70; *supra* Part I.A.5.

249. The government claimed the statutory changes to earnable compensation (and COLAs) were reasonable and necessary to comply with the plan's tax-exempt status under the Internal Revenue Code that was in jeopardy under the former legislation. *Am. Fed'n of Tchrs.,* 111 A.3d at 67.

250. *See* discussion *supra* Part II.A.2. State legislatures from Maine to Oregon enacted these measures.

251. Alicia H. Munnell et al., *COLA Cuts in State/Local Pensions*, 38 CTR. FOR RET. RSCH. BOS. COLL. 1, 3 tbl.1 (2014).

252. PEW CHARITABLE TR., *supra* note 173 at 4.

253. The American Legislative Exchange Council (ALEC), the nation's largest non-partisan, voluntary membership organization of state legislators, calculated pensions liabilities near $5.6 trillion, equaling $17,427 pension debt per capita. *Unaccountable and Unaffordable 2016*, ALEC 2 (2016), https://www.alec.org/app/uploads/2016/10/2016-10-13-Unaccountable-and-Unaffordable.pdf.

254. Anenson et al., *supra* note 3, at 10–11 ("Pension receipt among retirees is expected to continue to grow as aging baby boomers, who account for a disproportionate share of the population, retire sooner and live longer than previous generations."). For a list of other factors contributing to the demise of public pensions, see Anenson et al., *supra* note 15, at 339 n.3.

255. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 85–86 (2013) (comparing public pension recipients to victims of Bernie Madoff's Ponzi scheme, except on a lower end of the economic scale).

256. *See, e.g.*, Justus v. State, 336 P.3d 202, 208–09 (Colo. 2014); *In re* Pension Reform Litig., 32 N.E.3d 1, 5–14 (Ill. 2015); Lenander v. State Dep't of Ret. Sys., 377 P.3d 199, 203–10 (Wash. 2016).

257. *See* T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J.L. REFORM 251, 270 (2017) ("The dire financial situation in several states, especially California, led one analyst to conclude that 'bankruptcy or the complete cessation of all state functions save paying benefits to retirees is not unthinkable.'" (quoting Hylton, *supra* note 103, at

government pensions on state finances led then-Governor Jerry Brown to stake out a plan to fix failing plans that the California legislature later enacted into law.[258] Accordingly, the upside of public pension reform is that it saves the government money and potentially salvages the pension system for its employees.

One potential downside of public pension reform as it affects the government is the danger of losing competent employees.[259] It benefits the government to employ effective and productive workers (and doing so helps the government operate efficiently). But if employees work for a city or state government that fails to keep its pension promises, they may well move to find an employer who will honor those obligations.[260] On this basis, those states whose constitutions contain a Pension Clause that tend to be more protective of employee and retiree benefits would likely become more attractive

434)); *see also* Beermann, *supra* note 255, at 84 ("[California] which once boasted of the most comprehensive and inexpensive higher education systems in the nation, is now finding it impossible, for example, to continue to offer sufficient community college slots for all students."). In 2004, before the financial crisis, CalPERS was in relatively good shape. Lahey & Anenson, *supra* note 33, at 320 (analyzing 2004 pension data and concluding that California public pension were in relatively good health). After the crisis, unfunded liabilities were enormous. *See* Howard Bornstein et al., *Going for Broke: Reforming California's Public Employee Pension Systems*, STAN. INST. FOR ECON. POL'Y RSCH. 2 (2010), http://siepr.stanford.edu/system/files/shared/GoingforBroke_pb.pdf (studying California's three largest pension plans and applying a risk-free rate of 4.14% rather than rate of return assumptions of 8%, 7.75%, and 7.5% and finding unfunded liabilities several times larger than reported); *cf.* Elizabeth S. Goldman & Stewart E. Sterk, *The Impact of Law on the State Pension Crisis*, 54 WAKE FOREST L. REV. 105, 119 (2019) (not listing California as one of the five worst states for pensions pursuant to the authors' funding level criteria).

258. *See* Cal. Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 440–41 (Cal. 2019).

259. Studies are inconclusive over whether terminating defined benefit plans will cause turnover. Anenson et al., *supra* note 3, at 53; Gregory B. Lewis & Rayna L. Stoycheva, *Does Pension Plan Structure Affect Turnover Patterns?*, 26 J. PUB. ADMIN. RSCH. & THEORY 787 (2016) (noting public managers fear that the adoption of the defined contribution plan will foster greater turnover); Yongqing Cong et al., *Path Dependence in Pension Policy: The Case of Florida Local Governments*, 37 PUB. BUDGETING & FIN. 92, 105 (2017) (noting perception that government employment is not an attractive alternative to Millennial workers that would make it difficult to find replacements) (citing Eddy S.W. Ng, Charles W. Gossett & Richard Winter, *Millennials and Public Service Renewal: Introduction on Millennials and Public Service Motivation (PSM)*, PUB. ADMIN. Q. 412, 412–28 (2016)); *see also* Alicia H. Munnell & Rebecca Cannon Fraenkel, *Compensation Matters: The Case of Teachers*, 28 CTR. FOR RET. RSCH. BOS. COLL. 2 (2013), http://crr.bc.edu/wp-content/uploads/2013/01/slp28-1.pdf (opining that pension cuts "will almost certainly result in a lower quality of applicants."). In the private sector, employers can offset pension reductions with stock options and grants. Anenson et al., *supra* note 3, at 53.

260. Anenson et al., *supra* note 3, at 49 (explaining that pensions are a recruitment and retention tool for government service); Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y 617, 618 (2010) (emphasizing that offering defined benefit plans may determine who enters public service and how long they stay).

employers.[261] However, some of these so-called Pension Clause states also top the "worst public pensions" list.[262] As a result, employees would need to choose wisely.[263]

In addition, a number of government jobs no longer offer a public pension, or defined benefit plan, in which the government assumes the risks of employee longevity and market performance.[264] Rather, many government positions offer only the defined contribution plan that operates like a 401k to shift both risks to public employees.[265] This reverse-risk-allocation trend is true, for instance, of teacher pensions.[266] At the end of the day, then, public sector employees may have nowhere to go. The lack of mobility for government employees is particularly pronounced because many public pension plans have extended forfeiture periods to encourage long service to a degree not seen in the private sector.[267] Remaining employees though may be less invested in their jobs, resulting in decreased productivity to the government's detriment.[268] Recall that these are essential workers in fields such as public safety, education, sanitation, and mass transit.[269] Government employees also may demand a higher salary if deferred compensation in the form of pensions is not certain, which would increase government costs.[270]

Of course, employee commitment, caliber, and cost concerns are based on generalities and assumptions. Much would additionally depend on the pension

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261. *See* discussion *supra* Part I.A; Diagrams 3–4.

262. Illinois is a prime example. *See* Lahey & Anenson, *supra* note 33, at 318–20; *id*. at 319 ("While most state retirement systems are in serious financial trouble, the funding problem in Illinois is the worst."); *see also* Anenson et al., *supra* note 3, at 41 (describing how pension underfunding undermined the state's credit rating and increased its cost of borrowing); Scott Andrew Shepard, *The Lead Lemming: Illinois on the Pension-Crisis Brink*, 14 J. L. ECON. & POL'Y 151 (2017) (discussing the pension problem in Illinois and concluding that "the math is not just difficult, but effectively impossible – for the state to save itself").

263. Anenson, *supra* note 257, at 268 (relating how it will be difficult to find an equivalent job in another state with a retirement system that is not in jeopardy).

264. Anenson et al., *supra* note 3, at 52.

265. *Id.* (discussing concerns with different tiers of employees where one tier may not be getting the same level of retirement security).

266. *Id*. at 52–53 (citing states offering exclusive or optional defined contribution plans).

267. *Id.* at 53 (explaining the mobility penalty of defined benefit plans); Anenson & Gershberg, *supra* note 21, at 205 (discussing the mobility risk of public sector pensions in comparison to private sector pensions); *see also* Lahey & Anenson, *supra* note 33, at 323 (noting that defined benefit plans incentivize employees to stay because they earn higher benefits later in their careers).

268. Nila M. Merola, Note, *Judicial Review of State Legislation: An Ironic Return to Lochnerian Ideology When Public Sector Labor Contracts are Impaired*, 84 ST. JOHN'S L. REV. 1179, 1213–14 (2010).

269. *Id.* at 1213–14 ("Without them, gangs, not justice, would rule the streets, fires would blaze unabated, children would go untaught, garbage would linger, and the pace of our days would come to a halt.").

270. *Id*. at 1213.

benefit amount at risk of reduction and the rate of unemployment.[271] Within the same state, too, there is tremendous variation among plans and worker salaries.[272] Therefore, any long-term adverse impact on labor force quality is speculative and may only affect discrete groups of workers. Based on the foregoing considerations, reforming public pensions is generally a good thing for the government.

2. Employees and Retirees

Employees and retirees are disadvantaged by public pension reform. From their perspective, reforms lead to a smaller anticipated or agreed-upon benefit amount. The particular degree of unhappiness that modifications cause employees is hard to measure because some employees and retirees will be more adversely affected than others. Even a seemingly small change can have a big impact on retirement income. COLA reforms are a perfect example. In *Justus v. State*,[273] a 1.5% COLA reduction had a serious financial impact on pension participants.[274] Retirees who received a pension of $33,254 in 2009 would lose more than $165,000 in benefits over a twenty-year period.[275]

Moreover, retirees will probably suffer more than employees given that employees still have time left to work and make up some of the lost benefit. Reforms can also impact current employees differently depending on when they were hired. This differential was shown in *Moro v. State*, analyzed in Part I, and caused confusion among the judges on how to determine whether reforms constituted a substantial impairment.[276]

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271. Public sector employment packages are so good that some analysts have found that they exceeded private sector packages. Hylton, *supra* note 103, at 422 (citations omitted); *see also* PHILIP ARMOUR ET AL., HOW RELIANT ARE OLDER AMERICANS ON STATE AND LOCAL GOVERNMENT PENSIONS?, Univ. of Mich. Retirement and Disability Res. Center Paper No. 2019-399 (2019), https://ssrn.com/abstract=3489348 and https://mrdrc.isr.umich.edu/publications/papers/pdf/wp399.pdf (challenging the idea that public pension participants are on the lower end of the economic scale).

272. *See* Daniel J. Kaspar, *Defined Benefits, Undefined Costs: Moving Toward a More Transparent Accounting of State Public Employee Pension Plans*, 3 WM. & MARY POL'Y REV. 129 (2011) (proposing federal legislation that requires states to adopt a uniform standard for the reporting and valuation of pension funding); Lahey & Anenson, *supra* note 33, at 329–31 (underscoring the lack of uniformity as an obstacle to public pension reform and proposing the adoption of a uniform state law). *See generally* CYNTHIA L. MOORE, PUBLIC PENSION PLANS: THE STATE REGULATORY FRAMEWORK (2d ed. 1993) (discussing various state disclosure and reporting requirements).

273. Anenson et al., *supra* note 3, at 33 (citing First Amended Class Action Complaint at 8–9; Justus v. State, No. 2010-CV-1589 (Colo. Dist. Ct. Mar. 17, 2010)). For an analysis of the final resolution of the case in the Colorado Supreme Court, *see supra* notes 72–75.

274. *Id.*

275. *Id.*

276. *See* Moro v. State, 351 P.3d 1, 37–38 (Or. 2015); *supra* Part I.A.2.

Some employees or retirees rely on the originally stated benefit more than others from a financial planning standpoint as well. Certain government positions pay more than others, allowing higher paid workers to (presumably) accumulate more personal savings. As mentioned earlier in Part I.A.1, there is a wide range of public servants providing necessary government services. Most likely, a judge or governor is going to earn more in take-home pay than a sanitation worker. Whether government employees live in a state where they contribute to Social Security is another consideration in contemplating the degree of reliance on their pensions during retirement.[277] Despite these individual variations, however, public pension reforms usually have negative repercussions for public employees and retirees.[278]

But the adverse employee impact attributed to reforms considers only the short-run. In the long-run, public sector workers may benefit from reform. Reforms would be advantageous if they improved the financial condition of the plan and obviated the government's need to repudiate pension benefits all together. Perhaps employees feel secure in speculating that the government will raise taxes or issue bonds rather than abandon pensions.[279] Yet even then, employees will be living in a jurisdiction with fewer public services and more taxes. They would probably still choose their pension over the other externalities (and possibly retire out of state). Local government employees, though, may not be so lucky.[280] Unlike states, cities and counties can declare bankruptcy, as made famous in San Diego and Detroit.[281] Other municipalities

277. Anenson et al., *supra* note 3, at 58–59; Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245 (2004) (discussing pensions, personal savings, and Social Security as the "three-legged stool" of retirement); *see also* ALLEN ET AL., *supra* note 116, at 7 (noting that personal savings rates are "running at historically low levels").

278. *See generally* Donald C. Carroll, *The National Pension Crisis: A Test in Law, Economics, and Morality*, 50 U.S.F. L. REV. 469 (2016) (exploring Catholic values and concluding that the nation is flunking the moral test of providing sufficient retirement security to its citizens).

279. Lahey & Anenson, *supra* note 33, at 321–22 (cautioning against using bonds as a stop-gap measure that gambles on economic upswings or other uncertainties); *see also* Gavin Reinke, Note, *When a Promise Isn't a Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees*, 64 VAND. L. REV. 1673, 1675 (2011) (arguing that the federal government could incentivize state governments to adopt minimum funding requirements by allowing them to issue tax-exempt bonds for the purpose of funding the pensions of public employees).

280. Changes in local law may be even easier to withstand constitutional challenge. For example, in litigation over the reform of local pension law, courts in two jurisdictions in our study held that resolutions are not "law" to anchor a Contract Clause claim. *See* Taylor v. City of Gadsden, 767 F.3d 1124 (11th Cir. 2014) (distinguishing between a resolution and an ordinance); *In re* Weaver v. Town of N. Castle, 153 A.D.3d 531, 534 (N.Y. App. Div. 2017) (same).

281. *How San Diego Avoided Bankruptcy*, SAN DIEGO UNION-TRIBUNE (July 14, 2012, 12:00 PM), https://www.sandiegouniontribune.com/news/politics/sdut-how-san-diego-avoided-bankruptcy-2012jul14-htmlstory.html (comparing three California cities that declared bankruptcy due in large part to astronomical pension debt); John M. Broder, *Sunny San Diego Finds Itself Being Viewed as a Kind of Enron-by-the-Sea*, N.Y. TIMES, Sept. 7, 2004, at A14 (reporting on $1.15 billion

could follow suit.[282] Thus, local government employees and retirees are at greater risk of pension failure.[283]

A legal barrier to reform may also stop governments from offering public pensions to the detriment of future workers.[284] Eliminating public pensions would result in the unequal distribution of benefits among existing and new employees, with new hires receiving a smaller slice of the retirement pie. The pensions of current workers with career longevity would also be in danger if membership in the plan closed. Namely, there would be fewer employee contributions—one of the three key funding sources of public pension plans—which would jeopardize the plan's long-term financial condition.

What is more, other avenues of redress are unavailable.[285] There is no effective recourse either to compel compliance with funding requirements to avoid plan failure or to force legislatures to appropriate funds, raise taxes, or incur debt in the event of insolvency.[286] Unlike private sector pensions, public sector employees cannot rely on federal remedies.[287] The federal government

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pension deficit); Monica Davey et al., *Detroit Ruling on Bankruptcy Lifts Pension Protections*, N.Y. TIMES (Dec. 3, 2013), https://www.nytimes.com/2013/12/04/us/detroit-bankruptcy-ruling.html.

282. *See How San Diego Avoided Bankruptcy*, *supra* note 281 ("The list of municipal bankruptcies is expected to grow as more cities speed toward a financial cliff that San Diego was able to avoid but not without a significant sacrifice to basic services, such as public safety, libraries and parks."); Davey et al., *supra* note 281 (noting that the federal court ruling that pensions are not protected in bankruptcy "is likely to resonate in Chicago, Los Angeles, Philadelphia and many other American cities where the rising cost of pensions has been crowding out spending for public schools, police departments and other services."); *see also* R.I. Pub. Emps. Retiree Coal. v. Raimondo, No. PC 2015-1468, 2015 WL 3648161, at *25 (R.I. Super. Ct. June 09, 2015) (approving class action settlement as fair because "the [pension] crisis is here") (citing Anenson et al., *supra* note 3, at 64).

283. *See* Diane Lourdes Dick, *Bondholders vs. Retirees in Municipal Bankruptcies: The Political Economy of Chapter 9*, 92 AM. BANKR. L.J. 73 (2018) (showing how insolvent cities are using bankruptcy to restructure pension obligations in a way that is not necessarily in the best interests of employees and retirees); *see also* 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 ballooning pension debt).

284. Anenson et al., *supra* note 3, at 51 (noting the erosion of government guaranteed pension benefits); *see also* Lahey & Anenson, *supra* note 33, at 326–28 (supporting the movement of state governments to optional or exclusive defined contribution plans, coupled with an employee education program describing the distinction).

285. *See* Terrance O'Reilly, *A Public Pensions Bailout: Economics & Law*, 48 U. MICH. J.L. REFORM 183, 222 (2014) (relating limited remedies against the government in the event of pension plan default).

286. *See* Amy B. Monahan, *When a Promise is Not a Promise: Chicago-Style Pensions*, 64 UCLA L. REV. 356, 362 (2017).

287. Anenson et al., *supra* note 3, at 3.

does not oversee state and local pensions nor is there an insurance program to provide benefits when the plans become insolvent.[288]

The foreseeable future notwithstanding, pension reform harms employees and retirees more than it possibly helps them. Though the extent of the damage depends on a number of factors that include what the benefit used to be, how much it was reduced, and the pension plan's potential for default.

3. Taxpayers

The final stakeholders to consider are taxpayers. The probable consequences of public pension reform to taxpayers are varied, but on balance, typically benefit taxpayers.

On one hand, taxpayers enjoy when their money is put to the best possible use. When the government spends less money on individual pension benefits, more funding is presumably available for services that directly benefit taxpayers.[289] Assuming that taxpayer money is going toward a better use, public pension reform works to taxpayers' advantage.[290]

On the other hand, as noted above, if pension reform drives out large numbers of public employees and renders those jobs less competitive, society may suffer from the reduced competence of public workers.[291] Again, however, this concern might be less relevant in a tight labor market in which there is more demand for jobs.[292] And failing to enact reforms may cause taxpayers to leave. In those jurisdictions where the law prohibits pension reform, taxes have increased exponentially to pay down the pension debt and effectively exiled

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288. Anenson & Gershberg, *supra* note 21, at 157; *see also* Anenson, *supra* note 257, at 254 (explaining that public pension managers are not regulated by ERISA).

289. *See* Stuart Buck, *The Legal Ramifications of Public Pension Reform*, 17 TEX. REV. L. & POL. 25, 35–36 (2012) (commenting on the policy trade-off between .pension benefits and public services); *see also* Robert M. Costrell & Michael Podgursky, *Teacher Pension Costs: High, Rising, and Out of Control*, EDUC. NEXT (June 25, 2013), http://educationnext.org/teacher-pension-costs-high-rising-and-out-of-control/ (concluding that the high costs of teacher defined benefit plans are real and are "crowding out other school spending and are leading to layoffs of young teachers").

290. *The Other Pension Crisis*, WALL ST. J., Aug. 18, 2006, at A14 ("Public pensions only have one source of money—the taxpayer."); *see also* Richard E. Mendales, *Federalism and Fiduciaries: A New Framework for Protecting State Benefit Funds*, 62 DRAKE L. REV. 503, 508 (2014) (explaining that the unsustainability of government pensions will cause "higher funding costs for public employers sponsoring the plans, higher general borrowing costs for states and municipalities with insufficiently funded plans, and ultimately higher borrowing costs for states regardless of how adequately their benefit plans are funded").

291. *See supra* Part II.A.1. The loss of trust caused by pension cuts, that may then lessen the attraction of public service, could have societal repercussions as well. Society would be worse off if reforms accelerate the problem that people under-appreciate public goods and services, leaving market forces to provide social and economic realities without the leavening effect of the public sphere.

292. *See supra* Part II.A.1.

residents to other states.[293] A mass exodus would reduce the tax base to the detriment of resident taxpayers (and the government).[294] All things considered, reducing pensions seems to help more than hurt taxpayers.

The opposing outcomes of pension reform among the stakeholders identified above exemplify the fundamental challenge with utilitarianism.[295] Although there is intrinsic appeal in the goal of maximizing happiness, the devil is in the details. Some of these details involve forecasting the future. Without a crystal ball, it is virtually impossible to calculate net units of happiness that would result from pension reform among the three stakeholder groups.[296] But despite these difficulties, the beauty of Bentham's theory lies in its simplicity. Public pension reform, by and large, assists governments and taxpayers more than it injures them. Because they are the majority stakeholders, reforms would be morally sound under a utilitarianism theory of ethical conduct notwithstanding the losses reforms cause to public employees and retirees.[297] In short, Bentham's theory of practical bliss favors reforming public pensions.

The next section dispels the notion that the rightness or wrongness of any action depends on the possible results. Instead, it examines public pension reform from the perspective of absolute duties that apply in all situations.

B. Kantian Ethics

A competing theory of moral philosophy relevant to the choice of modifying public pensions is Kantian ethics. Immanuel Kant was a German philosopher who, like Bentham, developed his moral philosophy during the

293. Anenson, *supra* note 257, at 270 ("Given the pervasiveness of the public pension problem across the country, individuals seeking to move to another state to avoid additional tax liabilities will likely encounter similar issues when they arrive."); Lahey & Anenson, *supra* note 33, at 318–20 (detailing the causes and effects of Illinois's pension debt).

294. *See* Marc Joffe, *Pay Down Pension Debt Before Taxpayer Exodus Makes the Problem Worse*, ORANGE CNTY. REG. (Feb. 9, 2021, 1:05 PM), https://www.ocregister.com/2021/02/09/pay-down-pension-debt-before-taxpayer-exodus-makes-the-problem-worse/. There is a recent proposal to reduce the incentives for taxpayers to flee by recoupment. *See* Julie A. Roin, *Retroactive Taxation, Unfunded Pensions, and Shadow Bankruptcies*, 102 IOWA L. REV. 559 (2017).

295. PRENKERT ET AL., *supra* note 229, at 4–8 (listing weaknesses of utilitarianism as the potential for majority tyranny as well as the unequal distribution of costs).

296. WARBURTON, *supra* note 231, at 125 (mentioning Robert Nozick's thought experiment demonstrating the weakness of Bentham's rationale that everyone wants to maximize pleasure and minimize pain). John Stuart Mill also systemized his approach. *Id.*; *see supra* note 243.

297. *See infra* Diagram 5. This is true even though the magnitude of the loss falls disproportionately on participants rather than the costs being spread across the general public (usually in the form of increased taxes or decreased government services). *See* Anenson & Gershberg, *supra* note 21, at 157; *supra* note 295.

eighteenth century.[298] Unlike Bentham, however, he was a deontologist who taught that morality is grounded in duty and that those duties can be deduced from fundamental and absolute principles derived from reason itself.[299] Thus, Kant's ethical construct was non-consequentialist in comparison with the utilitarianism approach.[300] Kant insisted that the results of an act have no bearing on the ethics of it.[301] Rather, in order for an act to be ethical, it must arise from an innate sense of duty.[302]

To illustrate his idea, Kant developed the concept of the "categorical imperative," which has three formulations: (1) The Principle of the Law of Nature, (2) The Principle of Ends, and (3) The Principle of Autonomy.[303] The first principle—law of nature—requires that any moral act apply consistently to everyone and be universally accepted. It must satisfy the test: What if everyone did this? Kant gave a poignant example of this ethical mandate. He explained: "When I believe myself to be in need of money, I will borrow money and promise to repay it, although I know I shall never do so."[304] Kant claimed that this act would be immoral.[305] If breaking the promise were to apply universally, promises would have no meaning.[306]

The second principle—ends—instructs that people must never be treated merely as a means to an end. Rather, everyone should be viewed and upheld as the ends themselves. Kant used the same cash-strapped hypothetical here. Borrowing money without the intent to repay it is using someone else for one's own financial benefit. Another one of Kant's examples is of the Good Samaritan.[307] If she helps out a person in need solely because she wants to get

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298. Kant's initial work was *The Critique of Pure Reason*, in which he investigated the nature of reality. WARBURTON, *supra* note 231, at 114. Only after this publication did he turn his attention to moral philosophy. *Id*.

299. HUHN, *supra* note 230, at 54; *see also* George P. Fletcher, *Why Kant*, 87 COLUM. L. REV. 421, 428 (1987) (asserting that a modern example of Kant's approach to defining legal responsibility is John Rawls' *Theory of Justice* (1971)).

300. R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 284–85 (2002) ("There is certainly more than one way to interpret Kant's formula, and in some interpretations, some broadly utilitarian elements may be present. But Kant's formula cannot be reduced to an expression of classical utilitarianism . . . As John Rawls has written, 'by viewing people as subjects of desires and inclinations and assigning value to their satisfaction as such, (classical) utilitarianism is at odds with Kant's doctrine at a fundamental level.'" (quoting JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 188 (Barbara Herman ed. 2000))).

301. SHAW, *supra* note 238, at 56.

302. *Id*. at 57.

303. *Id*. at 60 (highlighting the first two of Kant's formulations).

304. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (L. Beck trans. 1969).

305. *Id*.

306. *Id*.

307. WARBURTON, *supra* note 231, at 116.

into heaven, this would be immoral.[308] The ethical act would be assistance that is born out of a sense of duty.[309]

The third principle—autonomy—mandates that each individual must be given latitude and autonomy to determine and perform the morally acceptable act.[310] A modern example is the medical informed consent context.[311] Consent is not informed and violates Kant's autonomy maxim when a patient's decision neither corresponds with objective information nor his or her own value system due to emotions, false perceptions, or inadequate understanding.[312] In consequence, Kant's idea of the "right" action is an action that is universalizable, does not use other people, and treats them with respect.

So what does this Kantian system of categorical imperatives mean for pension reform? The challenge is that there may be multiple imperatives that fit Kant's nature-ends-autonomy maxims, some of which possibly lead to different ethical answers. We consider three such principles that impose two duties on government employers and one duty on employees. (Teaser: they do yield competing conclusions.) Again, there may be other applicable ethical mandates under a Kant-inspired view. Nevertheless, the imperatives evaluated below sufficiently capture the essence of the public pension reform debate.

1. Categorical Imperative: "Don't break promises."

One categorical imperative with respect to the morality of public pension reform could be: "Don't break promises." This meets Kant's three requirements. It is a categorical (rather than conditional) requirement that applies equally to everyone, does not use people as a means to an end, and treats people with respect. If this were the rule, then any kind of pension reform would be unethical. While most of the challenged reforms have been upheld on the

308. *Id.*

309. *Id.*

310. Kant's concept of autonomy, with its reverence for human dignity and worth, is at the core of modern human rights theory. WARBURTON, *supra* note 231, at 118. It has also been instrumental in the development of intellectual property law under both the Continental and Anglo-American legal traditions. *See, e.g.*, Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1062 (2008) (discussing Kant's influence on moral philosophy and the development of law); *see also* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 848 (1990) (describing the adoption of Kantian theories in intellectual property law).

311. Joshua E. Perry & Arlen W. Langvardt, *Political Figures and the Appropriation of Others' Music: Legal and Ethical Perspectives*, 20 TEX. REV. ENT. & SPORTS L. 25, 71–72 (2019) (citing IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 70 (H.J. Paton trans., 1964 (1785))).

312. *See* Chase M. Donaldson, *Using Kantian Ethics in Medical Ethics Education*, 27 MED. SCI. EDUCATOR 841 (2017).

basis that the promises were not part of a binding contract,[313] Kant would not distinguish between unenforceable promises and enforceable contracts. Ethically, the two would be treated the same way: as promises that cannot be broken no matter what. Full stop.

Even reforms requiring employees to increase contributions to their health care benefits or the general pension fund could be unethical under this imperative.[314] Bear in mind that courts have almost uniformly upheld employee-contribution-only reforms on the ground that the government's promise centered on the amount of pension benefits and not contributions (obligations).[315] Still, such reforms would break the promise implicit in establishing a pension system: that it is the employer's responsibility to maintain it. Shoring up runaway pension liabilities with employee money contravenes Kant's second maxim to not use employees merely as a means to an end. Indeed, government employers are doing indirectly what they (presumably) could not do directly in violation of Kant's autonomy principle.[316]

Reforms may be morally acceptable, perhaps required, if the pension system is in bad shape and on the brink of insolvency. Breaking a promise by cutting the amount of the benefit available during retirement is a lesser evil than breaking the main promise of providing a pension. Yet it would be antithetical to Kant's ideology to compare promises (lower benefit versus no benefit) and their relative immorality. Ranking the relative importance of rights is accepted in the modern moral rights theories.[317] Kant embraced the traditional view,[318] in which the promise at issue would be his focus. As a result, a government's duty to keep promises favors employees and counsels policymakers not to reduce pension benefits.

2. Categorical Imperative: "Don't waste taxpayer money."

But there are additional categorical imperatives that, if applied, might favor other stakeholder groups. For example, "Don't waste taxpayer money" could be a universal imperative.[319] Whether reforms are ethical under this

313. *See* Anenson et al., *supra* note 15, at 377.

314. *See supra* Part I.A.1.

315. *See* Borders v. City of Atlanta, 779 S.E.2d 279, 286–87 (Ga. 2015) (employee contributions); Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645, 652 (N.C. Ct. App. 2019) (health care contributions); *supra* Part I.A.1., I.A.6.

316. Whether these additional contributions that will be forcibly extracted from an employee's already-promised salary are a breach of contract will depend on employment status and modification law. *See* Anenson et al., *supra* note 15, at 375-77.

317. *See* PRENKERT ET AL., *supra* note 229, at 4–5 (explaining modern rights theories in relation to Kantian ethics).

318. *Id.*

319. We concede that Kantian experts may disagree on whether the prohibition against wasting taxpayer money would fit the technical definition of a categorical imperative. Again, our

imperative would likely depend on the kind of reform at issue. Certain reforms, especially spiking and other pension abuses would fit the "wasting taxpayer money" construct.[320] Recall that the California Supreme Court recently upheld reforms removing abuses in county pension systems.[321] The same principle could apply to COLAs during a recession or flat economy because the purpose of a COLA is to offset inflation.[322]

The crucial word triggering this government duty, of course, is "waste." There may be more pension abuses identified by examining whether the benefit is truly a form of deferred compensation. In fact, the picture of pension benefits as compensation for work performed has been decisive in determining whether reforms survive constitutional challenge.[323] When pension benefits are not tied to worker performance, they are wasteful and unethical (and their removal is constitutionally sound).

Reforming pension abuses is justified on the basis that taxpayers should always be treated as ends themselves. The moral hazard problem is well

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intent is to define moral rules in the spirit of Kant that help to understand and analyze the values and interests at stake in reforming public pensions.

320. *See* Hylton, *supra* note 103, at 422 (explaining instances of pension abuse where employees were encouraged to use up saved vacation and over-time during their last year of employment in order to inflate their income; the state would then pay ninety percent of this "final salary"—an amount often greater than the retiree's true base pay). Proponents of a ban on public sector collective bargaining also argue that unions disadvantage taxpayers for the same reason. *Id*. at 480–81 ("When public employees strike, they strike against taxpayers."); Beermann, *supra* note 255, at 23–24 (providing example of excessive benefits due to legislative largesse and overly zealous unionized public school teachers in Rhode Island); *see also* Anenson et al., *supra* note 3, at 41 (noting that Texas's prohibition on unions is partially credited for its successful implementation of public pension reform).

321. *See supra* Part I.A.3. and Part 1.A.5.

322. *See* Anenson et al., *supra* note 3, at 13. The government in *Maine Ass'n of Retirees v. Bd. Of Trs. Of the Maine Pub. Emps. Ret. Sys.*, 758 F.3d 23, 31 (1st Cir. 2014) asserted (and the appellate court agreed) that the base pension benefit was distinct from the COLA because the applicable and former statutory provisions for COLAs described them as "adjustments" to the benefit and because COLAs are contingent on extra system factors like the Consumer Price Index. *Id*. at 31.

323. *See* Anenson et al., *supra* note 15, at 381 (analyzing how the metaphor of compensation is central to legal analysis under the Contract Clause (citing Cal. Fire Local 2881 v. Cal. Public Emps.' Ret. Sys., 435 P.3d 433, 438 (Cal. 2019) and Moro v. State, 351 P.3d 1, 36 (Or. 2015))); *see also* R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC123166, 2014 WL 1577496, at *9–10 (R.I. Super. Ct. Apr. 16, 2014) (distinguishing between what it called the "deferred compensation" approach of California to its "contractual" approach); *cf*. Anenson & Gershberg, *supra* note 21, at 158–59 (analyzing how the picture of public pensions as deferred compensation also affects the choice among conflicting canons of construction on the existence of a contract).

known.[324] To please voters, many of whom are government workers, politicians bind taxpayers to (potentially) irresponsible pension commitments.[325] Additionally, the prohibition on wasting public money is important enough to apply unconditionally and promotes individual autonomy by respecting other people's resources. Therefore, such reforms would be ethically required under this imperative.

3. Categorical Imperative: "Don't abuse or exploit taxpayer money for personal gain."

A corollary to the government's duty not to waste taxpayer money is a corresponding duty on the part of employees to decline pension and related benefits that would constitute waste. Although the previous categorical imperatives focused on the ethics of government decision-making in enacting reform measures, it is instructive to consider the ethical duties of public employees as well. Government employees are public servants and, arguably, have an ethical obligation to avoid exploiting taxpayer money for their own personal benefit.[326] While many rank-and-file government employees are not *legal* fiduciaries, they are *ethical* envoys who work in the public interest.[327] As such, employees should be morally compelled to refrain from gaming the pension system and otherwise exploiting institutional weaknesses in violation of the public trust. In the spirit of Kant's ethics, a categorical imperative could command: "Public servants should not abuse or exploit taxpayer money for

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324. *See* Anenson et al., *supra* note 3, at 35 ("Short-term political manipulations have resulted in long-term harm to public employee retirement systems."); *id.* at 35–48 (outlining the moral hazard problem with government pensions and proposing ways to minimize it).

325. Political leaders curry favor with supporters (government workers) by providing pension benefits. *See, e.g.*, 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."); Anenson et al., *supra* note 3, at 35–36. Elected officials benefit from underfunding pensions because it allows them to reward workers without requiring the public to pay for them. Anenson et al., *supra* note 3, at 37; *see also* Beermann, *supra* note 255, at 32 (explaining that underfunding pensions is a form of deficient spending). They have left office by the time the bill comes due. *See* Anenson et al., *supra* note 3, at 37.

326. *Cf.* T. Leigh Anenson & Donald O. Mayer, "*Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation,* 12 U. PA. J. BUS. L. 947, 988 (2010) (discussing ethics literature on aligning executive and other employee pay and performance (citing George Bragues, *The Ancients Against the Moderns: Focusing on the Character of Corporate Leaders*, 78 J. BUS. ETHICS 373, 380 (2008) (asserting that a virtuous executive would not accept the highest possible amount if it might conceivably harm others within the firm) and Jeffrey Moriarty, *How Much Compensation Can CEOs Permissibly Accept?*, 19 BUS. ETHICS Q. 235, 235 (2009) (contending that the CEO has a moral duty to accept the minimum effective compensation—the minimum amount necessary to attract, retain, and motivate the CEO to maximize firm value))).

327. *See generally* Anenson, *supra* note 257 (developing equitable theory of fiduciary law for public pension fund managers).

personal gain."[328] This anti-opportunism instruction for employees is simply the other side of the public employment coin and, for the same reasons, is consistent with all three formulations. Likewise, similar to the previous moral mandate, this maxim corresponds to reforms eliminating pension spiking and other financial abuses.[329]

Other types of pension benefits, nonetheless, would fall outside the scope of this restriction on employees' undue advantage-taking. As a result, any ethical certitude would depend on the type of reform at issue. Consequently, Kantian duties direct governments not to reduce or otherwise eliminate pensions, except perhaps those that could be deemed an abuse of the public pension system.[330]

C. Reconciling Opposing Ethical Approaches

The foregoing ethical approaches are intended to recalibrate the moral compass of state and local governments as they contemplate reforming public pensions. Obviously, there are no easy answers to complex problems. Considering the ethical implications of public pension reform can, in some ways, complicate an already difficult decision. Weighing in the balance are competing norms, uncertainty about the future, and variations in stakeholder interests contingent on different kinds of reforms. All the same, decisions about public pension reform should be ethically justified and reflective of core societal values.

Although there are other normative theories available to aid analysis,[331] the two evaluated above represent a range of philosophical options. In fact, utilitarianism and Kantian ethics can be considered polar opposites. Utilitarianism does not contemplate the innate goodness or badness of an act, but focuses exclusively on results of stakeholder happiness. Kant, in contrast, taught that "[y]our moral duty is your moral duty *whatever the consequences and whatever the circumstances*."[332]

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328. As explained in note 319, whether this categorical imperative would truly satisfy Kant is beside the point.

329. *See* Anenson et al., *supra* note 3, at 50 (noting the universal condemnation of pension spiking as financial abuse); *supra* Part I.A.3.

330. *See infra* Diagram 6. The elimination of pension abuses would not impact the retirement security of retirees.

331. Other moral philosophies might be social contract theory, distributive justice, or to the extent that governments could be equated with corporations in this context, corporate social responsibility. The two contrasting theories chosen best addressed the legislator's dilemma caused by the difficult choice between harms. Other approaches grounded in whole or in part in political science and philosophy could also help identify what is the fair or appropriate reforms pursuant to a Rawlsian theory of justice or simply by relying on public choice theory.

332. WARBURTON, *supra* note 231, at 118 (emphasis in original).

Applying these theories to the pension problem, Bentham's utilitarian approach seems to favor pension reform, subject to predictions about a reform's long-term effect on the quality of the workforce (which would not be immediate).[333] The most significant variable in this calculus is the forecast about the pension plan's financial health. The necessity of modifications is critical to the ethics of reform. Kant's ethical mandates point in the opposite direction. At best, the tripartite system of imperatives identified yield mixed results. One axiom (don't break promises) supports no reform and the other two axioms (don't waste taxpayer money or take advantage of it) favor reforms only to stop pension abuses.[334]

Perhaps a hybrid approach is most appropriate, beginning with Kant's categorical imperatives although evaluating the effects of such imperatives on the various stakeholders involved à la Bentham.[335] This mixed method compensates for the limitations of both theories by considering the costs and benefits (happiness and harm) of respecting others' rights. And those costs and benefits are not left up in the air, but rather, grounded in fundamental ideals. Another useful layer of inquiry is to analyze stakeholder interests in light of the three commonly articulated norms of old-age security: efficiency, adequacy, and equity (fairness).[336] Tying stakeholder interests to specific important values affords a more granular account of the interests at stake in weighing happiness and harm.

If we undertake this approach, it is likely that the most abusive forms of pension benefits (such as spiking) could ethically be eliminated. The majority of Kant's ethical axioms support this result. The norms of efficiency, adequacy, and, potentially, equity would also be satisfied. In particular, the ethical mandates of employer waste prevention and employee anti-opportunism would support the objective of efficiency. Undoubtedly, to avert the squandering of public money (or benefitting from it) is merely a negative duty correlating with the positive obligation (and goal) to spend taxpayer money wisely (efficiently). Because an abusive practice is abolished, there should be no danger to the adequacy of an employee's retirement or any unfairness in relation to other public or private sector workers. Curtailing pension abuses advantages (or at least does not disadvantage) all of the stakeholders.

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333. *See infra* Part II.A.; *supra* Diagram 5.

334. *See supra* Part II.B.1–3; *infra* Diagram 6.

335. In philosophical circles, this approach would likely be deemed an indirect (as opposed to a direct) form of utilitarianism. *See* JOHN BROOME, MODERN UTILITARIANISM, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 651 (Peter Newman ed., Palgrave Macmillan, London 2002), https://doi.org/10.1007/978-1-349-74173-1_248 (discussing forms of indirect utilitarianism that may overcome some of the objections to direct utilitarianism, including rule, character, and virtue utilitarianism).

336. *See infra* Diagram 7; Anenson et al., *supra* note 3, at 35–36 (listing three norms of retirement security); Brian J. Kreiswirth, *The Role of the Basic Public Pension in a Retirement Income Security System*, 19 COMP. LAB. L. & POL'Y J. 393 (1998) (discussing values of fairness, adequacy, and efficiency).

This conclusion comports with the two most recent California Supreme Court rulings that upheld the elimination of pension abuses: *Alameda* and *Cal Fire*.[337] The most recent decision in *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*, clarified that the contract right is simply to a reasonable pension and not to a definite benefit amount.[338] In fact, in *Marin Ass'n of Public Employees. v. Marin 'County Employees' Retirement Ass'n* (MCERA),[339] the California Court of Appeals expressly relied on adequacy grounds.[340] It declared that an employee's right to a pension extended "only to a 'reasonable' pension—not an immutable entitlement to the most optimal formula of calculating the pension."[341] Thus, even in an influential jurisdiction like California where courts have read the constitution to be extremely protective of government pension rights,[342] politicians and judges reached decisions that were ethically sound (and no doubt politically defensible).[343]

But, for the reasons of variability outlined earlier, the ethical evaluation of reform measures beyond pension abuse would be tricky. At first blush, the duty to keep promises (stated affirmatively) would seem to bar any reforms at all.[344] As discussed in Part II.B.1, much would depend on whether the point of view taken is short-term or long-term. It is a Hobson's choice between breaking a minor promise now to prevent breaking a major promise later. Arguably, the former breach of cutting benefits would be less severe than the latter breach of providing no benefits due to insolvency. But then again, the future is uncertain. It is probably the more moral position to avoid breaking the present promise. Ultimately, that is the decision being faced. Either way, breaking a promise may be unavoidable. To the extent that failing to reduce benefits puts the pension system in peril immediately (based on economic indicators such as

337. *See supra* Part I.A.3–5. Both decisions upheld challenges to the same pension reform statute.

338. 470 P.3d 85, 110 (Cal. 2020) ("The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension.").

339. 206 Cal. Rptr. 3d 365 (Cal. Ct. App. 2016), *review dismissed*, 473 P.3d 312, 312 (Cal. 2020).

340. *Id.* at 393.

341. *Id.* at 369.

342. *See* Anenson et. al, *supra* note 15, at 378 (explaining California law and its influence on other jurisdictions). For a history of California law, *see* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1036, 1051–69 (2012) (tracing the ninety-year history of the California Rule that recognizes a pension contract on the first day of employment).

343. While the focus of this research is on the ethics of policymakers in enacting reforms (and not courts in applying the Contract Clause), we note the congruence of certain case results.

344. *See supra* Part II.B.1.

funded status),[345] then the government's implicit promise of maintaining a financially sound system would be broken.

Continuing existing benefits would promote adequacy among employees (at least temporarily) to their advantage while decreasing efficiency to the disadvantage of taxpayers and the government.[346] Keeping pension promises would have a neutral effect on equity, unless reforms were intended to equalize pensions between employee groups.[347]

Hence, the ethical nature of reforms beyond correcting pension abuses under the hybrid model involves a conflict of values (adequacy versus efficiency) and stakeholders (employees and retirees versus governments and taxpayers).[348] The hybrid model would counsel against such reforms, yet other ethical theories would likely allow them. Under modern rights theories, for instance, enacting reforms may be the easier ethical choice assuming the government could establish their necessity.[349] This condition is, in essence, built into the doctrinal structure of a Contract Clause claim.[350] The intermediate scrutiny balancing test requires the government to justify reforms by establishing that they are reasonable and necessary to accomplish an important purpose.[351] It is noteworthy that very few courts facing constitutional challenges in recent litigation completed this stage of analysis.[352] Perhaps assessing legislative policy objectives makes courts uncomfortable. Judges no doubt want to avoid the perception of partisan values in evaluating reforms.

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345. *See* Lahey & Anenson, *supra* note 33, at 315. ("[T]he predominant calculation used to evaluate defined benefit plans is the funding ratio. This ratio measures a plan's financial health by dividing the market or actuarial value of assets by the liabilities. If liabilities exceed assets, the plan is underfunded.").

346. As explained in Part II.A.1, however, reforming pensions may also jeopardize government efficiency due to higher labor costs and lower productivity.

347. *Cf.* Kraus v. Bd. of Trs. Police Pension Fund Vill. of Niles, 390 N.E.2d 1281, 1293 (Ill. App. Ct. 1979) (suggesting that increasing contribution rates to some employees to equalize their contributions with those of others would not be constitutionally prohibited). For litigation between these employee groups with different pension benefits, see Wrzesien v. State, 380 P.3d 805, 807 (Mont. 2016) (lawsuit over allocation of employer contributions between defined benefit and defined contribution plan participants on equal protection and substantive due process grounds); Stevens v. Fox, 383 P.3d 269, 270 (Okla. 2016) (lawsuit by vested defined benefit plan employees alleging illegality of the legislature in creating defined contribution plan for nearly all new employees).

348. *See infra* Diagram 8.

349. *See* PRENKERT ET AL., *supra* note 229, at 4–5; *see also* SHAW, *supra* note 238, at 63 (discussing British scholar W.D. Ross (1877-1971) who promoted a pluralistic ethical framework respectful of the need for flexibility and prioritization in the face of competing demands).

350. *See supra* Part I.

351. *See supra* notes 27–28.

352. *See* Anenson et al., *supra* note 15, at 341; *supra* Part I.A.

Indeed, the government's justification standard pushes courts to the very border of their institutional responsibility vis-à-vis the political branches.[353]

In any event, these cases serve as a reminder that instead of seeing only where they want to go, government officials must continually look over their shoulders to assess the legal risk of their decisions. While this study has concentrated on choices to reform current pension plans, policymakers may at some point need to think outside the box. Perhaps it is time for a new kind of pension—one that would preserve retirement security but avoid the problems and associated pitfalls of the traditional defined benefit plan that contributed to the pension crisis in the first place.[354] In the meantime, surveying the legal landscape and framing the ethical debates about public pension reform should assist judges and policy makers in tackling tough issues and confronting impossible choices.

Given the variation in moral constructs as well as the diversity among pension plans in states with different legal and political environments, we do not propose a single solution to this intractable problem.[355] Even so, considering competing normative theories allows space for moral contemplation in the same way that garden walls create space for a garden.[356] Pondering the ethical implications of public pension reform certainly provides additional tools for legislators to ensure that their work respects society's most sacred moral values. At the very least, it may cause lawmakers to pause and reflect on a profound insight about power: "O, it is excellent [t]o have a giant's strength, but it is tyrann[ical] [t]o use it like a giant[.]"[357]

The foregoing findings and appraisal facilitates an understanding of the current legal and ethical framework. It does not seek to offer a complete resolution to the many issues investigated. Rather, the data and analysis are simply a first step—a move with the potential to illuminate and re-orient the reform conversation.

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353. *Cf.* Anenson & Gershberg, *supra* note 21, at 206–09 (analyzing procedural values supported by the presumption against statutory contracts).

354. *See* Jonathan Barry Forman & Michael J. Sabin, *Tontine Pensions*, 163 U. PA. L. REV. 755 (2015); *see also* Anenson et al., *supra* note 3, at 51–56 (weighing pros and cons of alternative plans). Once upon a time, employer defined benefit plan conversions were controversial under ERISA and engendered new federal legislation. *See generally* T. Leigh Anenson & Karen Eilers Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*, 9 U. PA. J. LAB. & EMP. L. 495 (2007).

355. *See generally* Anenson et al., *supra* note 3, at 34–60 (analyzing issues in the internal and external environment in which public pensions operate as contributing to the crisis); *supra* note 272 and accompanying text.

356. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 177 (1991) (discussing conflicting modes of legal reasoning and their potential for justice).

357. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, 107–09.

CONCLUSION

Winter is coming for public pension plans.[358] And the crisis is not going away anytime soon.[359] With no federal regulation or remedy, state and local pension funds across the country will remain vulnerable.[360]

Nor is it exclusively an American problem. In 2010, thousands stormed Greece's Parliament furious at the government for cutting pensions.[361] Almost a decade later in 2019, France was in a state of civil unrest as citizens rioted when pension reductions were contemplated.[362] Projections in the United States predict that one-half of government plans will default in the next decade.[363] If these assumptions prove accurate, the insolvencies will be epically-scaled and will adversely affect the U.S. economy.[364]

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358. Studies are underway on the impact of the Coronavirus Pandemic on public pensions. *See* Charles Sutcliffe, *The Implications of the COVID-19 Pandemic for Pensions* 235–44 (July 31, 2020) (Research Paper) https://ssrn.com/abstract=3623890. For a negative assessment of the virus on another source of old age security, see Andrew G. Biggs, *How the Coronavirus Could Permanently Cut Near-Retirees' Social Security Benefits* (Wharton Pension Rsch. Council, Working Paper No. PRC WP2020-6, 2020), https://repository.upenn.edu/prc_papers/675/.

359. *See, e.g.*, Sarah Krouse, *State and Local Pension Woes Are Starting to Bite—The Shortfall Is Hitting Retirees with Little Time to Engineer a Plan B*, WALL ST. J., July 31, 2018, at A1 (estimating that the liabilities of public defined-benefit pension plans in the U.S. are in the trillions of dollars); Anenson et al., *supra* note 3, at 48 n.281 ("[D]ata from the Bureau of Labor of Statistics show that public pension obligations account for almost seventeen percent of all public debt in the United States.").

360. *See* discussion *supra* notes 287–88 and accompanying text. *See* R. Eden Martin, *Unfunded Public Pensions—The Next Quagmire*, WALL ST. J., Aug. 19, 2010, at A17 (advising that "[t]he next big issue on the national political horizon may be whether the federal government should bail out the many budget-strapped states and municipalities across the country, especially their overly generous and badly underfunded pension plans."); Press Release, Julia Lawless & Antonia Ferrier, Hatch Releases Report Detailing Threat of $4.4 Trillion Public Pension Debt, U.S. SENATE COMM. ON FIN., (Jan. 10, 2012), http://www.finance.senate.gov/newsroom/ranking/release/?id=f9a92142-d190-4bca-a310-b43cb462eb45 (discussing senate report released upon the introduction of a pension reform bill analyzing "how the unfunded pension liabilities of state and local governments jeopardize the fiscal solvency of states and municipalities as well as the nation's long-term fiscal health, including the U.S. credit rating"); Joshua Gotbaum, *No, Rescuing Pensions Won't Destroy Them*, BROOKINGS (Apr. 5, 2021), https://www.brookings.edu/blog/up-front/2021/04/05/no-rescuing-pensions-wont-destroy-them/ (rejecting assessment that Congress will bailout state and local plans).

361. *See* Landon Thomas Jr. & Niki Kitsantonis, *Greece Approves Pension Overhaul Despite Protests*, N.Y. TIMES (July 8, 2010), https://www.nytimes.com/2010/07/09/business/global/09drachma.html.

362. *See* Aurelien Breeden, *France Pension Protests: Why Unions Are Up in Arms Against Macron*, N.Y. TIMES (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/world/europe/france-pension-protests.html.

363. *See* Anenson et al., *supra* note 3, at 12 (citing authorities and advising that "[e]ven with an optimistic rate of return on pension fund investments, projections estimate that plans in seven states will be insolvent by 2020 and plans in half the states will be broke by 2027.").

364. *See* Anenson, *supra* note 257, at 271 (explaining that "retirement savings plans are a driver of the national economy" and that "alarming actuarial deficits adversely impact the economic

Unless you are one of the twenty-one million public sector workers with a pension that is in jeopardy, "pensions" or "pension reform" might sound a bit dull.[365] But it is really about getting to the bottom line of urgent questions concerning fiscal responsibility, retirement security and, for that matter, social policy.[366] Even those without pensions will feel the impact of plan underfunding or failure.[367] Ongoing funding deficiencies raise the specter of more taxes and jeopardize important public services like education.[368]

This Article has sought to enrich our larger social understanding of what the Contract Clause means, and thereby what retirement security signifies, in an ongoing age of austerity. It examined almost fifty federal and state cases challenging pension reform under the Contract Clause and related state Pension Clauses (and statutes). In doing so, it presented preliminary research to assist in solving a problem common to most governments in the United States. It also added—for the first time—a normative account of pension reform by looking through the lens of two principal moral theories. Because prevailing constitutional law does not block reforms in a meaningful way, ethical constraints on government action are essential. The analysis advanced is intended to help policymakers in deciding what is morally right and not merely politically expedient. After all, with power comes responsibility. The legal and ethical perspectives offered have implications for state and federal Contract

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welfare of the entire country and its residents"); Jacob S. Hacker, *Restoring Retirement Security: The Market Crisis, the "Great Risk Shift," and the Challenge for Our Nation*, 19 ELDER L.J. 1, 2–3 (2011) (concluding that security in employer-sponsored public plans has even broader implications for states individually and for the U.S. as a whole).

365. *See* U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC PENSIONS: STATE AND LOCAL TABLES (2018), https://www.census.gov/data/tables/2018/econ/aspp/aspp-historical-tables.html (counting more than twenty-one million public sector workers with defined benefit plans).

366. One unfortunate result of pension plan failure will be that government workers with little personal savings will be forced into the welfare system. *Cf.* 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). States in which employees do not contribute to Social Security are particularly vulnerable. *See* Anenson et al., *supra* note 3, at 6–7 (comparing fifty state defined benefit pension plans for teachers and finding that the non-Social Security plans are at an even greater risk of not being able to meet promised benefit payments).

367. *See* Hylton, *supra* note 103, at 434 (concluding that the poor financial condition of public pensions in California, Colorado, and Illinois could mean that "bankruptcy or the complete cessation of all state functions save paying benefits to retirees is not unthinkable.").

368. *See* Anenson et al., *supra* note 3, at 6, 34; Leonard Gilroy & Zachary Christensen, Opinion, *Rising Costs of CalSTRS Debt Takes Money from Students, Classrooms*, ORANGE CITY REG. (Mar. 5, 2021), https://www.ocregister.com/2021/03/05/rising-costs-of-calstrs-debt-takes-money-from-students-classrooms/. *See generally* Anenson, *supra* note 257, at 269–71 (discussing the micro- and macro-economic effect of pension failure); discussion *supra* Part II.A.

Clauses, state Pension Clauses, the constitutionality of existing reforms, and the design of future reform measures.

APPENDIX

CASE OUTCOMES BY TYPE OF PUBLIC PENSION REFORM: 2014 – 2019

EMPLOYEE CONTRIBUTION RATES	3 upheld modifications[369] 0 struck down modifications
COST OF LIVING ALLOWANCES (COLA)	8 upheld modifications[370] 3 struck down modifications[371] 1 reached mixed result[372]
PENSION SPIKING	2 upheld modifications[373] 0 struck down modifications
ACTUARIAL FACTORS/BENEFIT	4 upheld modifications[374]

369. *See* Taylor v. City of Gadsden, 767 F.3d 1124, 1134–35 (11th Cir. 2014) (reviewing Alabama pension law); Borders v. City of Atlanta, 779 S.E.2d 279, 286–87 (Ga. 2015); Pro. Fire Fighters N.H. v. State, 107 A.3d 1229, 1235–36 (N.H. 2014). *But see* Hall v. Elected Officials' Ret. Plan, 383 P.3d 1107, 1114 (Ariz. 2016) (striking down a modification of employee contribution rates on the basis of precedent and not state Pension Clause or Contract Clause grounds).

370. *See* Cranston Firefighters, IAFF Local 1363 v. Raimondo, 880 F.3d 44, 48 (1st Cir. 2018) (assessing changes to Rhode Island pension scheme); Puckett v. Lexington-Fayette Urban Cnty. Gov't, 833 F.3d 590, 601 (6th Cir. 2016) (reviewing Kentucky pension legislation); Me. Ass'n Retirees v. Bd. Trs. Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 31 (1st Cir. 2014) (examining Maine pension system); Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 833, 838 (E.D. Tenn. 2015) (examining Tennessee city ordinance); Justus v. State, 336 P.3d 202, 210–11 (Colo. 2014); Am. Fed'n of Tchrs. v. State, 111 A.3d 63, 73 (N.H. 2015); Berg v. Christie, 137 A.3d 1143, 1147 (N.J. 2016); Washington Educ. Ass'n v. Dep't of Ret. Sys., 332 P.3d 439, 444 (Wash. 2014); *see also* Van Houten v. City of Fort Worth, 827 F.3d 530, 539 (5th Cir. 2016) (Texas Pension Clause grounds).

371. *See* R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149, at *7 (R.I. Super. Ct. Apr. 25, 2014); Bristol/Warren Reg'l Sch. Emps. v. Chafee, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142, at *9–10 (R.I. Super. Ct. Apr. 25, 2014); R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC 123166, 2014 WL 1577496, at *4–6 (R.I. Super. Ct. Apr. 16, 2014); *see also* Jones v. Mun. Emps.' Annuity & Benefit Fund Chi., 50 N.E.3d 596, 605–06 (Ill. 2016) (striking down COLA modifications under state Pension Clause rather than Contract Clause); Heaton v. Quinn, 32 N.E.3d 1, 28–29 (Ill. 2015) (same).

372. *See* Moro v. State, 351 P.3d 1, 39–40 (Or. 2015) (finding contractual right to unmodified COLA earned on or before, but not after, effective amendment dates).

373. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 450 (Cal. 2019); Pisani v. City of Springfield, 73 N.E.3d 129, 137 (Ill. App. Ct. 2017) (also decided under state Pension Clause).

374. *See Cranston Firefighters*, 880 F.3d at 51; City of Hollywood v. Bien, 209 So. 3d 1, 2 (Fla. Dist. Ct. App. 2016); Valde v. Emp. Appeal Bd., No. 17-0266, 2017 WL 4050330, at *1 (Iowa

FORMULAS	3 struck down modifications[375]
DEFINITION OF "EARNABLE COMPENSATION"	4 upheld modifications[376] 0 struck down modifications
HEALTH CARE BENEFITS	15 upheld modifications[377] 1 struck down modifications[378]

Ct. App. Sept. 13, 2017); Lenander v. Dep't Ret. Sys., 377 P.3d 199, 212 (Wash. 2016); *see also* Eddington v. Dall. Police & Fire Pension Sys., 589 S.W.3d 799, 805 (Tex. 2019) (decided on Pension Clause grounds of Texas Constitution).

375. *See Bristol/Warren*, 2014 WL 1743142, at *9–10; *R.I. Council 94*, 2014 WL 1743149, at *7; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4–6; *see also* Hall v. Elected Off.s' Ret. Plan, 383 P.3d 1107, 1113 (Ariz. 2016) (striking down modifications on state Pension Clause grounds); Fields v. Elected Off.s' Ret. Plan, 320 P.3d 1160, 1165 (Ariz. 2014) (same); *Heaton*, 32 N.E.3d at 28–29 (striking down modifications under state Pension Clause rather than Contract Clause).

376. *See* S. States Police Benevolent Ass'n, v. Bentley, 219 So. 3d 634, 647 (Ala. 2016); Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 126–27 (Cal. 2020) (finding contract but determining that the change is nevertheless constitutionally permissible); Am. Fed'n Tchrs.–N.H. v. State, 111 A.3d 63, 72 (N.H. 2015); Marin Ass'n Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 388 (Cal. Ct. App. 2016), *review dismissed*, 473 P.3d 312 (Cal. 2020).

377. *See* Donahue v. New York, 339 F. Supp. 3d 36, 73 (N.D.N.Y. 2018) (examining New York pension legislation); Roberts v. Cuomo, 339 F. Supp. 3d 36, 46 (N.D.N.Y. 2018) (same); Police Benevolent Ass'n N.Y. State v. Cuomo, 343 F. Supp. 3d 39, 51 (N.D.N.Y. 2018) (same); Krey v. Cuomo, 340 F. Supp. 3d 109, 121 (N.D.N.Y. 2018) (same); N.Y. State L. Enf't Officers Union Council 82 v. Cuomo, 346 F. Supp. 3d 256, 263 (N.D.N.Y. 2018) (same); N.Y. State Corr. Officers & Police Benevolent Ass'n v. Cuomo, No. 11-CV-1523, 2018 WL 4565761, at *5 (N.D.N.Y. Sept. 24, 2018) (same); N.Y. State Police Investigators Ass'n, Local 4 v. Cuomo, No. 11-CV-1527, 2018 WL 9988669, at *4 (N.D.N.Y. Sept. 24, 2018) (same); Spence v. Cuomo, No. 11-CV-1533, 2018 WL 10322881, at *7–8 (N.D.N.Y. Sept. 24, 2018) (same); N.Y. State Ct. Officers Ass'n v. Hite, No. 12-CV-532, 2018 U.S. Dist. LEXIS 162440, at *6 (N.D.N.Y. Sept. 24, 2018) (same); Brown v. Cuomo, No. 13-CV-645, 2018 WL 4565770, at *4 (N.D.N.Y. Sept. 24, 2018) (same); Police Benevolent Ass'n N.Y. State Troopers v. Cuomo, No. 11-CV-1526, 2018 U.S. Dist. LEXIS 163246, at *5 (N.D.N.Y. Sept. 24, 2018) (same); Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 703 (Cal. Ct. App. 2016); Petit-Clair v. City of Perth Amboy, No. A-2049-14T2, 2018 WL 4262959, at *9 (N.J. Super. Ct. App. Div. Sept. 7, 2018); Weaver v. Town of N. Castle, 153 A.D.3d 531, 534 (N.Y. App. Div. 2017); Lake v. State Health Plan Tchrs. & State Emps., 825 S.E.2d 645, 652 (N.C. Ct. App. 2019); *see also* Underwood v. City of Chicago, 62 N.E.3d 375, 381, 382 (Ill. Ct. App. 2016) (upholding reforms under the state Pension Clause); Schwegel v. Milwaukee Cnty., 859 N.W.2d 78, 90 (Wis. 2015) (upholding modification to health care benefits pursuant to state statute and not applying Contract Clause analysis); *cf.* Dannenberg v. State, 383 P.3d 1177, 1196–97, 1200 (Haw. 2016) (reversing and remanding so that the trier of fact could determine whether changes to the health care benefits were reasonable under the Pension (so-called "Non-Impairment" Clause of the state constitution).

378. *See* AFT Mich. v. State, 893 N.W.2d 90, 94–95 (Mich. Ct. App. 2016), *aff'd,* 904 N.W.2d 417 (Mich. 2017).

DIAGRAMS 1 – 8

Diagram 1

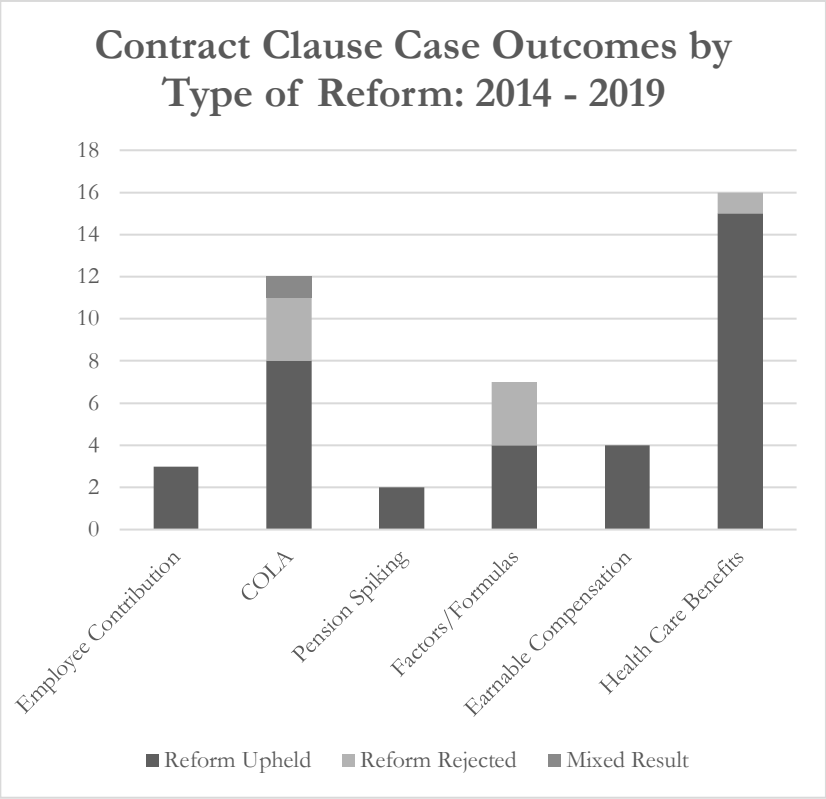

Diagram 2

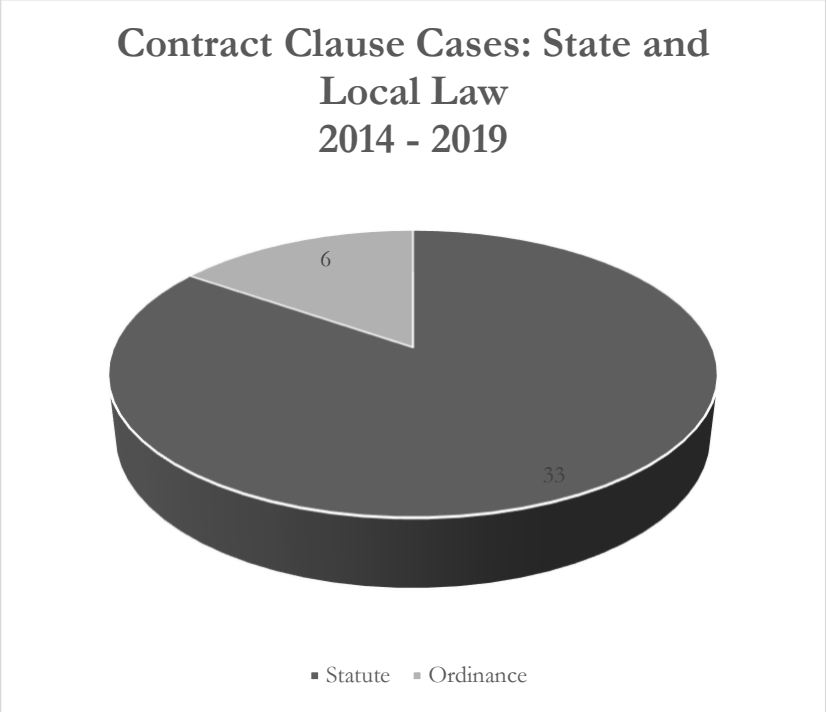
Contract Clause Cases: State and Local Law
2014 - 2019
6
33
Statute
Ordinance

Diagram 3

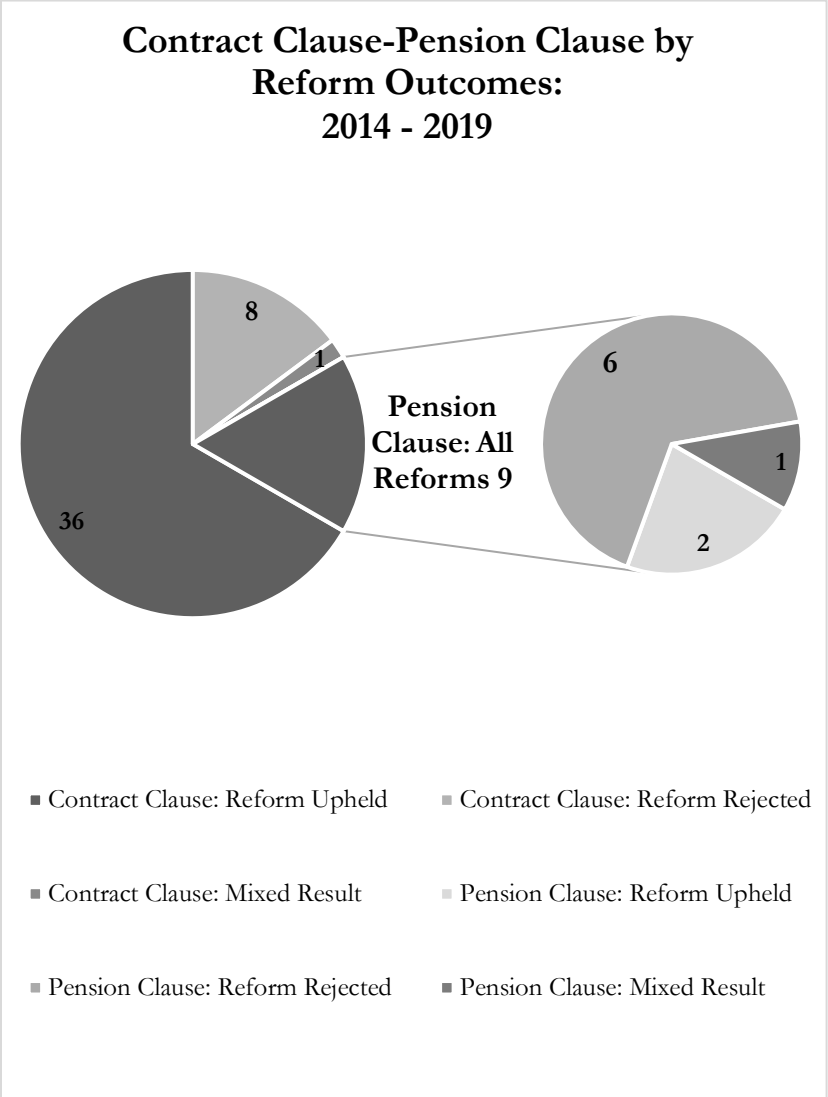
Contract Clause-Pension Clause by Reform Outcomes: 2014 - 2019
8
1
36
Pension Clause: All Reforms 9
6
1
2
Contract Clause: Reform Upheld
Contract Clause: Reform Rejected
Contract Clause: Mixed Result
Pension Clause: Reform Upheld
Pension Clause: Reform Rejected
Pension Clause: Mixed Result

Diagram 4

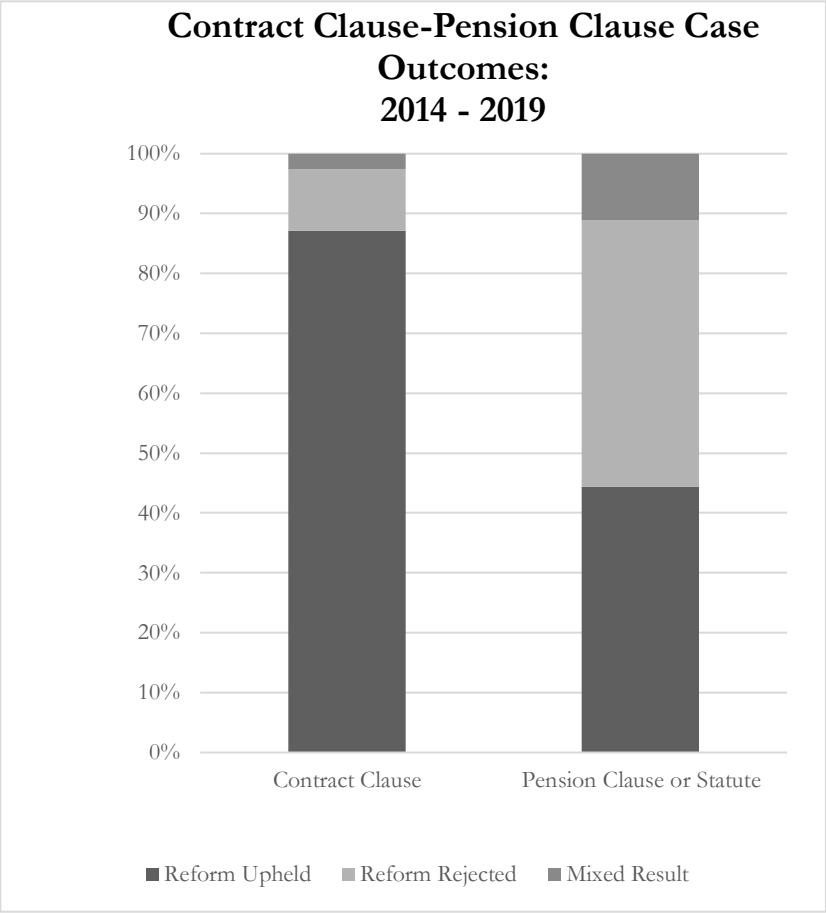
Contract Clause-Pension Clause Case Outcomes:
2014 - 2019
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Contract Clause
Pension Clause or Statute
Reform Upheld
Reform Rejected
Mixed Result

Diagram 5 — Bentham's Act Utilitarianism

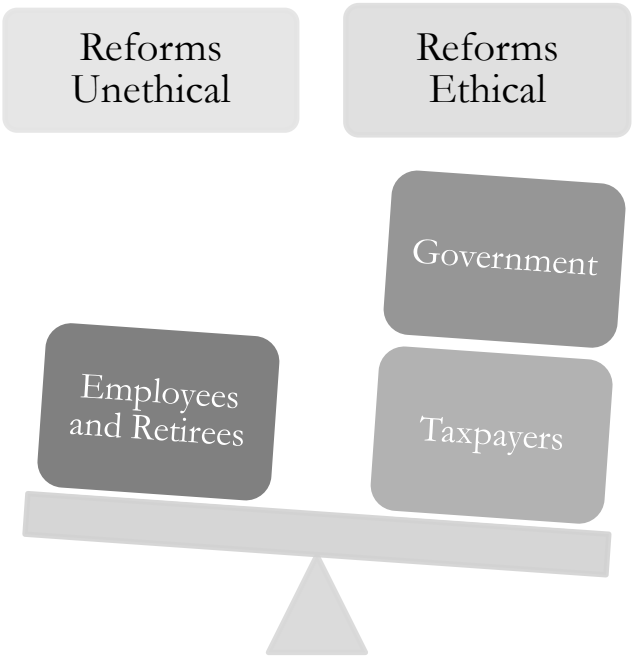

Diagram 6 — Kant’s Ethical Imperatives

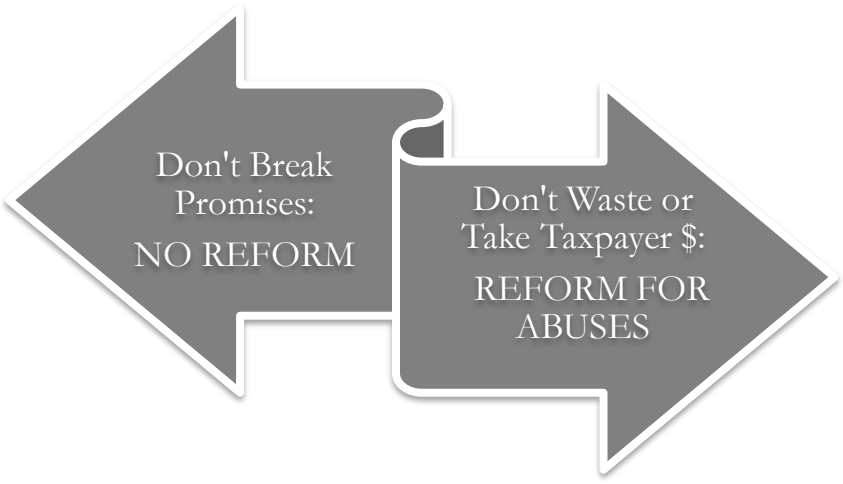

Diagram 7 — Hybrid Model of Ethics: Structure


Stakeholders
Government
Taxpayers
Employees and Retirees
Values
adequacy
equity
effi-ciency
Ethical Imperatives
- Don't Break Promises
- Don't Waste $
- Don't Take $

Diagram 8 — Hybrid Model of Ethics: Analysis