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Michael B. Kent

Campbell University - Norman Adrian Wiggins School of Law

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MICHAEL B. KENT, JR.*

* Associate Professor, Norman Adrian Wiggins School of Law, Campbell University.
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INTRODUCTION

Of the many current issues facing state and local governments, perhaps one of the most pressing is public pension reform. According to the U.S. Census Bureau, there are nearly 4,000 public pension systems in the United States, the vast majority (3,742) of which are administered by local governments.[1] As of 2014, these systems had more than 19,000,000 members and more than 9,000,000 beneficiaries receiving periodic payments.[2] But many of these systems are in serious financial trouble, collectively facing unfunded liabilities that, by some estimates, equal approximately $4.7 trillion.[3] In light of these shortfalls, many states have enacted a variety of reform measures to stave off fiscal collapse,[4] and these reforms have drawn numerous legal challenges from public sector employees and retirees.

One of the challenges often asserted by these plaintiffs is that changes to public pension plans violate the Takings Clause of the federal constitution or one of its state constitutional counterparts. Despite the frequency with which they are raised, however, these claims seldom receive engaged analysis by the courts, and they have been given a sort of second-class treatment by most legal scholars. On one level, this treatment is not all that surprising. Because most public pension plans are deemed to create contract rights in their participants, the Contracts Clause seems the more obvious provision under which to analyze pension plan changes. As a result, takings challenges are often overshadowed by challenges brought under the Contracts Clause, with many courts and commentators viewing them as largely duplicative. Additionally, even when takings challenges are treated independently, the number of troublesome issues and the general messiness of takings doctrine make meaningful analysis difficult.

Even so, I contend that the short shrift given to the Takings Clause in this context is unwarranted. As an initial matter, the notion that public pension plans create contracts between government employers and employees is not universally accepted. A handful of states explicitly reject

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1. Phillip Vidal, *Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data Summary Report: 2014*, U.S. CENSUS BUREAU, July 2015, at 5, *available at* http://www.census.gov/content/dam/Census/library/publications/2015/econ/g14-aspp-sl.pdf.

2. *Id.* at 3.

3. *See* Joe Luppino-Esposito, *Promises Made, Promises Broken 2014: Unfunded Liabilities Hit $4.7 Trillion*, AM. LEGIS. EXCHANGE COUNCIL (Nov. 12, 2014), https://www.alec.org/article/promises-made-promises-broken-2014-unfunded-liabilities-hit-4-7-trillion/.

4. These reform measures have included increasing employee contributions, reducing cost of living adjustments, changing age and service requirements, adjusting the way in which benefits are calculated, and converting from defined benefit plans to some type of alternative. *See* T. Leigh Anenson et al., *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 12 (2014) (listing recent reform measures); Stuart Buck, *The Legal Ramifications of Public Pension Reform*, 17 TEX. REV. L. & POL. 25, 49 (2012) (same).

that approach, holding instead that such plans create property interests. In these "property states," the Contracts Clause clearly provides no protection against plan changes but the Takings Clause might. Far from being duplicative, in these jurisdictions, takings claims form the most viable constitutional challenge to reform.

But the Takings Clause has significance even in the majority of states that accept the contract view. As interpreted by the Supreme Court, the Contracts Clause would only prohibit impairments to those plans that were not "reasonable and necessary to serve an important public purpose."[5] No such justification attends a Takings Clause analysis, however, which focuses on the *effects* of a regulation rather than its *purposes*. Indeed, the Supreme Court has held that a focus on the government's purpose or motive "has no proper place in our takings jurisprudence."[6] As such, it is possible that a law might be upheld under the Contracts Clause but nevertheless amount to an unconstitutional taking. Again, rather than merely duplicating the Contracts Clause, in the right case, a takings challenge could achieve an entirely different result. And, given that fact, it is all the more important to consider the issues that a takings claim would raise.

This Article seeks to fill the gap left open by previous judicial and scholarly treatment and begin a more robust conversation about the role of the Takings Clause in public pension reform litigation. In service of that larger objective, this Article has two primary goals. The first, advanced in Parts I and II, is to make the case for taking the Takings Clause seriously in this context. Because a takings claim depends upon the existence of a cognizable property right, Part I addresses the legal status of public pension benefits. Although a small number of states view such benefits as gratuities, most states regard them as creating either contract or property rights in plan participants. As such, public pension benefits are subject to certain constitutional protections—namely, those afforded by the Contracts Clause, the Due Process Clause, or the Takings Clause. Part II addresses the particular significance of the Takings Clause, distinguishing it from the other two provisions and demonstrating its potential value for plan participants under both the "property view" and the "contract view" of public pensions.

The second goal, more modest but equally important, is to consider (although not necessarily resolve) some of the legal issues that any serious evaluation of a takings claim must confront. Part III begins this consideration, focusing on how courts might go about determining whether a particular reform measure effects a taking of property in the first instance. This task requires fitting challenges to public pension reform within the Supreme Court's analytical framework for regulatory takings, which in turn necessitates a choice about the appropriate test to apply. Assuming that a

5. U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25 (1977).
6. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005).

reform measure is deemed to effect a taking, Part IV turns to the constitutional requirements of "public use" and "just compensation," with particular emphasis on the thorny questions raised by the latter.

I. THE STATUS OF PUBLIC PENSION BENEFITS UNDER STATE LAW

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[7] Most state constitutions contain similar constraints on the government's taking authority.[8] Because the Takings Clause protects "private property," a threshold issue in any takings case is whether the claimant has a protectable property interest at the time the taking is alleged to have occurred.[9] The Supreme Court has indicated that, in most cases, that issue will be governed by the laws of the various states.[10] To appreciate the significance of a takings challenge to public pension reform efforts, therefore, it is first necessary to understand the status of public pension benefits under state law.

A. Gratuity View

The traditional view adhered to by most states until the mid-twentieth century was that public pensions amounted to a mere gratuity.[11] Under this view, pension benefits given to public employees were considered to be "a bounty springing from the appreciation and graciousness of the sovereign," and as such, could be "modified, revised, amended, superseded, or repealed by the Legislature" at its discretion.[12] Where this view of public pensions holds, neither takings protections nor

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7. U.S. CONST. amend. V. The Takings Clause applies to the states via the Fourteenth Amendment. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987); Chi., B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226, 233-34 (1897).

8. *See, e.g.*, ALA. CONST. art. I, § 23 ("[P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor."); WIS. CONST. art. I, § 13 ("The property of no person shall be taken for public use without just compensation therefor."). A notable exception is the North Carolina Constitution, which contains no explicit takings protections. *See* Bailey v. State, 500 S.E.2d 54, 68 (N.C. 1998) (noting the absence of express constitutional takings provision). Even so, the North Carolina courts have recognized the basic protections of the Takings Clause to form part of the fundamental law of the state. *Id.*

9. *See, e.g.*, Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004); *see also* L.C. Canyon Partners v. Salt Lake Cnty., 266 P.3d 797, 805 (Utah 2011) (employing similar analysis under state constitution).

10. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010) (plurality); Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998).

11. *See* Buck, *supra* note 4, at 49-50; Amy Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y 617, 619 (2010).

12. Blough v. Ekstrom, 144 N.E.2d 436, 440 (Ill. App. Ct. 1957).

other constitutional constraints limit the government's ability to reform its retirement system.[13]

Today, only three states—Arkansas, Indiana, and Texas—continue to adhere to the gratuity approach, and even those states do not apply that approach with full force. The courts in Arkansas and Indiana make a distinction between voluntary and involuntary pension plans, and they follow the gratuity view only with regard to those plans in which the employee had no choice but to participate.[14] Voluntary plans, by contrast, have been held to create contracts in both states, and the courts have protected certain aspects of those contracts against subsequent changes.[15] In Texas, all public pension plans continue to be governed by the gratuity approach,[16] but the state appears to have applied its power sparingly with regard to recent reform measures.[17] The result is that most states, even those that continue formally to adhere to the traditional gratuity view, treat public pension plans as creating some form of protectable right or interest in at least some circumstances.[18]

B. Contract View

The majority of states have moved away from the gratuity approach by protecting plan participants under principles of contract law. Although most jurisdictions apply some type of contract view to their public retirement systems, wide variety exists in the details. The primary differences concern *how* the contract is created, *when* the contract becomes effective, and *what* terms the contract includes.

A number of states specifically identify their pension plans as contractual relationships via constitutional or statutory pronouncement.[19] In

13. *See* Anenson et al., *supra* note 4, at 16 (explaining that governments operating under gratuity approach "may be constrained by moral and policy concerns, but not the law").

14. *See* Robinson v. Taylor, 29 S.W.3d 691, 693-94 (Ark. 2000) (holding that plan funded entirely by employer without any voluntary contributions from employee was gratuity); Ballard v. Bd. of Trs. of Police Pension Fund, 324 N.E.2d 813, 815 (Ind. 1975) (distinguishing between voluntary and involuntary plans).

15. *See, e.g.*, Jones v. Cheney, 489 S.W.2d 785, 788-89 (Ark. 1973); Bd. of Trs. of Pub. Emps.' Ret. Fund v. Hill, 472 N.E.2d 204, 208-09 (Ind. 1985).

16. *See, e.g.*, Klumb v. Hous. Mun. Emps. Pension Sys., 458 S.W.3d 1, 15-16 (Tex. 2015).

17. *See* Monahan, *supra* note 11, at 620 n.4 (noting that recent changes to state pension plan applied to new hires only, leaving benefits for current employees untouched).

18. Aside from policy concerns about leaving public employees wholly unprotected, state constitutional provisions prohibiting the gifting of public funds also counsel against the gratuity approach. *See id.* at 619-20 (citing Yeazell v. Coplin, 402 P.2d 541 (Ariz. 1965)).

19. Seven states provide for contract rights in their constitutions. *See* ALASKA CONST. art. XII, § 7; ARIZ. CONST. art XXIX, § 1(C); HAW. CONST. art XVI, § 2; ILL. CONST. art. XII, § 5; LA. CONST. art. X, § 29(A) & (B); MICH. CONST. art. IX, § 24; N.Y. CONST. art. V, § 7. At least three states explicitly provide such rights by statute. *See* FLA. STAT. ANN. § 121.011(3)(d); MASS. GEN. LAWS ANN. ch. 32, § 25(5); N.J. STAT. ANN. § 43:13-22.33.

most states, however, courts have inferred the existence of a contract (or similar relationship) based on the statutory language creating a pension plan, promises and representations made to plan participants, employees' reasonable expectations and reliance interests, or other relevant facts and circumstances.[20] Although the reasoning of these decisions is by no means uniform, a leading rationale for the contract view is that pension plans create a unilateral contract whereby the government offers retirement benefits as a form of deferred compensation, which the employee accepts through job performance.[21] Other states, while admitting that the strict application of contract principles does not reflect the realities of public pension programs, have nonetheless reached a similar result under theories of quasi-contract.[22]

In addition to differing about how the contract is created, states following the contract view also vary with regard to when the contract is deemed to form. In several jurisdictions, the contract is formed as of the first day of employment,[23] while in others the contract is not effective until

20. *See, e.g.*, Bd. of Trs. of Policemen's & Firemen's Ret. Fund v. Cary, 373 So. 2d 841, 842 (Ala. 1979); Kern v. City of Long Beach, 179 P.2d 799, 801 (Cal. 1947); Colo. Springs Fire Fighters Ass'n, Local 5 v. City of Colorado Springs, 784 P.2d 766, 770 (Colo. 1989); Petras v. State Bd. of Pension Trs., 464 A.2d 894, 896 (Del. 1983); Withers v. Register, 269 S.E.2d 431, 432 (Ga. 1980); Nash v. Boise City Fire Dep't., 663 P.2d 1105, 1108-09 (Idaho 1983); Singer v. City of Topeka, 607 P.2d 467, 473 (Kan. 1980); Jones v. Bd. of Trs. of Ky. Ret. Sys., 910 S.W.2d 710, 713 (Ky. 1995); Bd. of Trs. of Emps.' Ret. Sys. v. Mayor of Balt. City, 562 A.2d 720, 733 (Md. 1989); Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740, 747 (Minn. 1983); State *ex rel.* Sullivan v. State Teachers' Ret. Bd., 571 P.2d 793, 795 (Mont. 1977); Calabro v. City of Omaha, 531 N.W.2d 541, 548-51 (Neb. 1995); Pub. Emps.' Ret. Bd. v. Washoe County, 615 P.2d 972, 974 (Nev. 1980); Cloutier v. State, 42 A.3d 816, 822-24 (N.H. 2012); Bailey v. State, 500 S.E.2d 54, 60-61 (N.C. 1998); Taylor v. State & Educ. Emps. Grp. Ins. Program, 897 P.2d 275, 278-79 (Okla. 1995); Moro v. State, 351 P.3d 1, 20 (Or. 2015); Ass'n of Pa. State Coll. & Univ. Faculties v. State Sys. of Higher Educ., 479 A.2d 962, 965-66 (Pa. 1984); Arena v. City of Providence, 919 A.2d 379, 393 (R.I. 2007); Tait v. Freeman, 57 N.W.2d 520, 522 (S.D. 1953); Blackwell v. Quarterly Cnty. Court, 622 S.W.2d 535, 540 (Tenn. 1981); Utah Pub. Emps.' Ass'n v. State, 131 P.3d 208, 215-16 (Utah 2006); Burlington Fire Fighters Ass'n v. City of Burlington, 543 A.2d 686, 689 (Vt. 1988); McAllister v. City of Bellevue Firemen's Pension Bd., 210 P.3d 1002, 1004 (Wash. 2009); Booth v. Sims, 456 S.E.2d 167, 181 (W. Va. 1995).

21. *See, e.g.*, *Moro*, 351 P.3d at 20-22; Bakenhus v. City of Seattle, 296 P.2d 536, 538 (Wash. 1956).

22. *See, e.g.*, Opinion of the Justices, 303 N.E.2d 320, 327-28 (Mass. 1973) (acknowledging infeasibility of fitting statutory retirement system into "ordinary contract law," and explaining that use of "contract" in this context "is best understood as meaning that the retirement scheme has generated material expectations on the part of employees and those expectations should in substance be respected"); *Christensen*, 331 N.W.2d at 748 (rejecting "conventional contract approach" to public pensions but finding protectable interest under theory of promissory estoppel).

23. *See* Anenson et al., *supra* note 4, at 22-23 (identifying Alaska, California, Colorado, Illinois, Nevada, and Massachusetts as employing the "first day" rule).

the employee actually retires or is qualified to do so.[24] Still other jurisdictions understand the contract to form at some intermediate point, which generally depends upon the reasonable expectations and reliance interests of the employee.[25]

A final point of divergence among the "contract states" concerns what precisely is protected by the contract once formed. For example, a number of state courts have interpreted the public pension contract to protect both past and future accruals of benefits, usually as a result of language found in their state constitutions.[26] In these jurisdictions, "[e]mployees who are already in the system could not be subject to any plan amendment that results in a lower benefit than that calculated under the terms of the plan at their dates of enrollment."[27] Other states—again, typically as a result of constitutional language—construe the contract as protecting only past benefit accruals, meaning that the government cannot diminish benefits already earned but can amend the pension plan prospectively.[28] In most states, however, courts construe the terms of the contract in light of the statutory language creating the pension system, as well as the government's course of conduct relative to that system.[29] As such, courts in different states can reach widely divergent results on whether a particular benefit is included within the contract. For example, some courts have concluded that state tax exemptions for public retirement benefits were an included term of the pension contract, while others have held such exemptions to lie outside the contract.[30] Recent litigation over

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24. *See id.* at 26 (identifying Kentucky, Louisiana, Missouri, and Ohio as following this "last day" rule).

25. *See id.* at 27; *see also Singer*, 607 P.2d at 474 ("Continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions into the fund are made . . . cause the employee to acquire a contract right in the pension plan."); *Bailey*, 500 S.E.2d at 62-63 (explaining that determination of whether contract forms is "rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right").

26. *See* Monahan, *supra* note 11, at 622-24 (identifying Alaska, Arizona, Illinois, and New York as following this approach).

27. *Id.* at 624.

28. *See id.* at 624-25 (placing Hawaii, Louisiana, and Michigan in this group).

29. *See id.* at 627 (noting that "the pension contract includes the statutory provisions relevant to the retirement plan," as well as "long-standing administrative practices related to the retirement plan").

30. *Compare Bailey*, 500 S.E.2d at 63 ("[I]t is clear the tax exemption was a term or condition of benefits of the Retirement Systems to which plaintiffs have a contractual right."), *with* Sheehy v. Pub. Emps. Ret. Div., 864 P.2d 762, 766 (Mont. 1993) ("We hold that . . . state employees retiring prior to [alterations in the tax exemption] did not have a contractual right to continued exemption from taxation of their state retirement benefits.").

changes to plan participants' cost-of-living adjustments similarly has produced conflicting outcomes.[31]

Irrespective of the aforementioned differences, once a contract is formed, the rights and benefits of plan participants included within the contract become subject to constitutional protections. Chief among these protections is the prohibition against state impairment of the contractual relationship.[32] Additionally, because contracts generally qualify as property for purposes of the Takings Clause, the restrictions of that provision also apply.[33]

C. Property View

A handful of states have rejected the view that public pension plans create contracts and suggest instead that plan participants have rights best described as some form of property.[34] Still other states, while not rejecting the contract approach outright, seem to emphasize plan participants' property rights as paramount when addressing changes to public pension programs.[35]

Typically, courts that reject the contract view do so as a result of the "unmistakability doctrine," under which a statute is recognized to create contract rights only where there is "some clear indication that the legislature intends to bind itself contractually."[36] Because "the principal

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31. *Compare* Justus v. State, 336 P.3d 202, 209-11 (Colo. 2014) (finding no contract right to unchangeable COLA), *with* Arena v. City of Providence, 919 A.2d 379, 393-95 (R.I. 2007) (holding that retirees had right to lifetime COLA without alteration).

32. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .").

33. *See* U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for public purposes provided that just compensation is paid."); Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.").

34. *See, e.g.*, Pineman v. Oechslin, 488 A.2d 803, 809-10 (Conn. 1985); Spiller v. State, 627 A.2d 513, 517 n.12 (Me. 1993); Pierce v. State, 910 P.2d 288, 301-02 (N.M. 1995). New Mexico has since codified this property right in its state constitution, *see* N.M. CONST. art. XX, § 22(D), although the New Mexico Supreme Court has held that the provision must "be read harmoniously" with its earlier decision in *Pierce*. Bartlett v. Cameron, 316 P.3d 889, 892 (N.M. 2013).

35. *See, e.g.*, State *ex. rel.* Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 652 (Ohio 1998) (suggesting that participant had a cognizable property right in certain aspects of public retirement system, but rejecting the claim that participant had contract rights); Wis. Prof'l Police Ass'n v. Lightbourn, 627 N.W.2d 807, 840-41 (Wis. 2001) (discussing contract rights as species of participants' protected property interests); *see also* Peterson v. Sweetwater Cnty. Sch. Dist. No. One, 929 P.2d 525, 530 (Wyo. 1996) (suggesting that "legitimate retirement expectations may constitute property rights").

36. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-66 (1985); *see also Oechslin*, 488 A.2d at 808 (applying this rationale to public

function of a legislature is not to make contracts, but to make laws that establish the policy of the state,"[37] any ambiguity that the public pension statutes were legislatively intended to bestow contract rights is resolved against the creation of a contract.[38] At the same time, these courts have declined to follow the traditional gratuity approach because it gives the government "an unfettered power" to revoke public pension plans, resulting in too little protection for plan participants.[39] Accordingly, under this view, plan participants are deemed to have property rights (though not contract rights) in certain aspects of the plan.[40]

Because of these property rights, subsequent changes to the public pension system may trigger certain constitutional concerns. At least three courts, for example, have expressly noted that property interests in public pension plans are subject to due process protections.[41] Accordingly, plan participants are entitled to notice and an opportunity to object to any alterations of their interests,[42] and such alterations must not deprive those interests unreasonably or arbitrarily.[43] More significantly for purposes of this Article, property rights in public pension plans are also subject to the protections of the Takings Clause.[44]

II. THE VALUE OF A TAKINGS CLAUSE CHALLENGE

As the foregoing discussion demonstrates, the vast majority of states grant public employees some type of contract or property right in certain aspects of their retirement benefits, and these rights are subject to constitutional protections, including those enumerated in the Takings Clause. But takings challenges to plan alterations have not proved very successful.[45] In large measure, this lack of success results from a tendency

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pension statutes); *Spiller*, 627 A.2d at 515 (same); *Pierce*, 910 P.2d at 301 (same); *Horvath*, 697 N.E.2d at 652-655 (same).

37. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 466.

38. *See, e.g.*, Parker v. Wakelin, 123 F.3d 1, 9 (1st Cir. 1997) ("[T]he language of [the public pension statute] remains at best ambiguous, and we cannot find that the legislature as a whole unmistakably intended to create contract rights. . . . ").

39. *Oechslin*, 488 A.2d at 808; *accord Spiller*, 627 A.2d at 517 (holding that "retirement benefits are more than a gratuity to be granted or withheld arbitrarily at the whim of the sovereign state").

40. *See Oechslin*, 488 A.2d at 810; *Spiller*, 627 A.2d at 517 n.12; *Pierce*, 910 P.2d at 301; Ass'n of State Prosecutors v. Milwaukee Cnty., 544 N.W.2d 888, 894 (Wis. 1996).

41. *Oechslin*, 488 A.2d at 810; *Spiller*, 627 A.2d at 517 n.12; *Pierce*, 910 P.2d at 304-05.

42. *See Pierce*, 910 P.2d at 304-05.

43. *See Oechslin*, 488 A.2d at 810.

44. *See Pierce*, 910 P.2d at 304 (stating that "any action by the legislature that serves to terminate, diminish or alter the value of pension plans must be compensated"); *Ass'n of State Prosecutors*, 544 N.W.2d at 893 (finding that statute requiring transfer from county pension fund to state pension fund effected a taking of county participants' property).

45. *See* Monahan, *supra* note 11, at 637 (noting that claims brought under the Takings Clause "have been uniformly unsuccessful"); Gavin Reinke, Note, *When a Promise Isn't a*

to treat takings claims as entirely dependent on claims brought under the Contracts Clause, such that challenges under these two provisions rise and fall together.[46] In the right context, such treatment makes perfect sense. In states where the participants' interest in a pension plan is protected by contract principles, for example, a finding that the challenged alteration is not included within the terms of that contract means no protectable interest has been taken and, thus, there can be no violation of the Takings Clause.[47]

But this analysis does not always fit the legal paradigms. In *Budge v. Town of Millinocket*, for example, the Supreme Judicial Court of Maine rejected the plaintiffs' takings claim because they could not demonstrate contract rights to the benefits at issue.[48] Although the rejection of the takings claim may ultimately have been correct, the curious thing about *Budge* is that the court failed to acknowledge its prior decision in *Spiller v. State*, which had indicated that legitimate retirement expectations might qualify as property rights even absent a contract.[49] Although the court cited *Spiller* for the proposition that no contractual relationship was created by the retirement plan,[50] it failed to recognize *Spiller*'s implication that a takings claim could exist apart from such a relationship, nor did it evaluate whether the plaintiffs had an independent property interest notwithstanding the existence of a contract. Instead, the court simply viewed the employees' takings challenge as derivative of their contract claim.[51]

Some scholars have taken a similar tack, describing a Takings Clause challenge as "parasitic on a Contracts Clause claim," such that the success of the former depends entirely on the latter.[52] Other scholars, while acknowledging that the Takings Clause "theoretically" might offer different protections than the Contracts Clause, nonetheless conclude that takings

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Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees, 64 VAND. L. REV. 1673, 1693 (2011) (stating that Takings Clause challenges "have uniformly failed"). By using the term "uniformly," these commentators overstate their cases, providing another example of the inadequate treatment takings challenges have received.

46. *See, e.g.*, Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 58-59 (1st Cir. 1999) ("The facts here require us to consider whether plaintiffs had the requisite property right to support a Takings Clause claim by analyzing their claim under the Contracts Clause."); Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 838 (E.D. Tenn. 2015) (stating that "analysis under . . . the Takings Clause tracks the same lines as the analysis under the Contracts Clause").

47. *See Parella*, 173 F.3d at 62 ("[B]ecause the plaintiffs have failed to establish a contractual right to the withheld benefits, they cannot show that the Board took their 'property' when it withheld the benefits. . . ."); Justus v. State, 336 P.3d 202, 213 (Colo. 2014) (finding that employees had no contract right in a particular COLA, which meant they had no property interest for purposes of takings claim).

48. Budge v. Town of Millinocket, 55 A.3d 484, 492 (Me. 2012).

49. Spiller v. State, 627 A.2d 513, 517 n.12 (Me. 1993).

50. *Budge*, 55 A.3d at 489-90.

51. *Id.* at 492.

52. Buck, *supra* note 4, at 93; *see also id.* at 28 n.10 ("A takings violation may arise only if the plaintiffs have a contractual right to the stream of payments, which in turn means that a takings claim usually rises or falls along with a contractual claim.").

claims are "unlikely to add much . . . because a participant's interest in pension promises is unlikely to be property unless it is found to be a contractual promise protected under the Contracts Clause."[53]

While I agree that, in many contexts, takings challenges to public pension reform are properly influenced by the existence of contract rights, it is incorrect to regard such challenges as mere "tag-alongs."[54] Doing so overlooks the distinction between the contract and property views articulated above and (like the court in *Budge*) ignores the fact that plan participants may have protectable property rights even where no contract exists. Additionally, viewing claims brought under the Takings Clause as nothing more than repackaged Contracts Clause challenges discounts the different analytical frameworks that govern those two provisions.

This Part demonstrates why the Takings Clause has independent significance to public pension reform efforts. First, in property view states, takings challenges may present the only viable constitutional protection to plan participants. Second, even in contract view states, Takings Clause analysis is distinct from that governing the Contracts Clause, and this distinction may be significant in certain cases.

A. Property View States

In states that adopt the property view of public pensions, the Takings Clause presents the best option for challenging plan alterations as unconstitutional.[55] This is so, as an initial matter, because the Contracts Clause simply is unavailable. As explained above, courts adhering to the property view largely reject the notion that public retirement plans create contractual relationships between the government and its employees,[56] but the existence of a contract is a prerequisite for bringing a claim under the Contracts Clause.[57] Because a public pension plan creates no contractual relationship under the property view, the Contracts Clause perforce offers no protection to plan participants where this view is adopted.[58] Accordingly, plan participants must look to some other constitutional provision for relief.

53. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 63 (2013).

54. *See* Buck, *supra* note 4, at 28 n.10 ("In most cases, a takings clause argument appears, if at all, only as a tag-along claim to a contracts argument.").

55. To say that the Takings Clause presents the best option is not to say that takings challenges will necessarily be successful. The issues related to analyzing a takings claim are addressed in Parts III & IV, *infra*.

56. *See supra* Part I.C.

57. *See* General Motors Corp. v. Romein, 503 U.S. 181, 186-87 (1992) (identifying existence of contractual relationship as first component of Contracts Clause analysis).

58. *See, e.g.*, Pineman v. Fallon, 842 F.2d 598, 600-01 (2d Cir. 1988) (applying property view to reject Contracts Clause challenge); Spiller v. State, 627 A.2d 513, 515-16 (Me. 1993) (same); Pierce v. State, 910 P.2d 288, 301-02 (N.M. 1995) (same).

One potential avenue is to challenge plan changes as violating the Due Process Clause. For various reasons, however, such challenges are unlikely to meet with any meaningful success. With regard to procedural due process, for example, the legislative system itself typically will satisfy the requirements that plan participants be given notice and an opportunity to be heard.[59] Because most changes to public retirement systems are accomplished legislatively, courts should have little trouble in determining that these requirements are met. Likewise, in most cases, substantive due process should pose few difficulties because courts will apply rational basis scrutiny to any alterations made in the pension system.[60] So long as the government can demonstrate that its pension reform measures were rationally related to a legitimate state interest—such "as reducing expenditures in a time of fiscal crisis"[61]—those measures will be upheld.

The other alternative is to attack plan alterations under the Takings Clause. Although the success of a takings claim is hardly assured, courts may find these challenges more difficult to dismiss because of their distinct analytical framework. Unlike a substantive due process analysis, the evaluation of a takings claim does not depend on a means-end test. In *Lingle v. Chevron U.S.A.*, the Supreme Court explained that its Takings Clause jurisprudence focuses on the *effects* that result from a legislative scheme rather than the *interests* that scheme is designed to promote.[62] The sort of means-end inquiry utilized under the Due Process Clause "probes [a] regulation's underlying validity,"[63] but it reveals nothing about the central question with which the Takings Clause is concerned—i.e., whether (and how much) the law interferes with private property rights.[64] For that reason, the Court explained, this type of inquiry "has no proper place in our takings jurisprudence."[65]

The upshot is that a takings claim cannot be rejected simply because the government's action is reasonably linked to a legitimate goal or

59. *See, e.g.*, Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 839 (E.D. Tenn. 2015) (concluding "[t]here is no basis for a finding that the process was lacking" where changes to municipal pension benefits were "adopted by the City Council after lengthy public meetings with all interested stakeholders"); *Pierce*, 910 P.2d at 305 (suggesting that newspaper notices and open committee hearings were sufficient to meet procedural due process requirements).

60. *See Fallon*, 842 F.2d at 601.

61. Parker v. Wakelin, 937 F. Supp. 46, 58 (D. Me. 1996), *aff'd in relevant part*, 123 F.3d 1, 9 (1st Cir. 1997).

62. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540-43 (2005).

63. *Id.* at 543.

64. *See id.* at 539 (stating that takings analysis "focuses directly upon the severity of the burden that government imposes upon private property rights"); *see also id.* at 542 (explaining that means-ends test about "whether a regulation of private property is *effective* in achieving some legitimate public purpose" says "nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights") (emphasis in original).

65. *Id.* at 540.

objective. Indeed, "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[66] Accordingly, arguments that pension plan changes are rationally related to alleviating legitimate budgetary concerns will most likely defeat a substantive due process challenge, but they should have no traction in a proper Takings Clause analysis.

B. Contract View States

A similar case can be made for the Takings Clause even where public pensions are viewed as creating contracts. While the Contracts Clause offers the primary source of protection in this context, the way claims under the Contracts Clause are analyzed potentially leaves room for a meaningful Takings Clause challenge in the right circumstances.

Per its express terms, the Contracts Clause prohibits a state from "pass[ing] any . . . Law impairing the Obligation of Contracts."[67] Despite this unqualified language, however, the Supreme Court has indicated that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[68] The limitations imposed by the Contracts Clause must be balanced, the Court has explained, against the sovereignty of the states and their needs to utilize that sovereignty in the best interests of their citizens.[69]

The first step in this analytical balancing act is to determine whether the state action being challenged "has, in fact, operated as a substantial impairment of a contractual relationship."[70] This step thus depends on a showing that: (1) a contractual relationship exists; (2) a change in the law impaired that relationship; and (3) the resulting impairment qualifies as substantial.[71] Where any of these characteristics is missing, there is no violation. But even where the state has substantially impaired a contract, its action may still be upheld if the impairment was "reasonable and necessary to serve an important public purpose."[72] The

66. *Id.* at 543.

67. U.S. CONST. art. I, § 10. Most state constitutions contain a similar provision. *See, e.g.*, COLO. CONST. art II, § 11 ("No . . . law impairing the obligation of contracts . . . shall be passed by the general assembly."); N.M. CONST. art. II, § 19 ("No . . . law impairing the obligation of contracts shall be enacted by the legislature."). Moreover, when interpreting these provisions, state courts typically apply federal Contracts Clause analysis. *See, e.g.*, Justus v. State, 336 P.3d 202, 208 (Colo. 2014) (noting state adoption of federal Contracts Clause test); Pierce v. State, 910 P.2d 288, 295 (N.M. 1995) (same).

68. U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 21 (1977) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934)).

69. *See id.*

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

71. General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).

72. *U.S. Tr. Co. of N.Y.*, 431 U.S. at 25; *see also* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411-12 (1983) (explaining that impairment of contract

analysis for a Contracts Clause challenge thus incorporates a means-end test similar to that used for substantive due process claims. So long as the government can demonstrate the appropriate relationship between the challenged legislation and a sufficient governmental interest, no constitutional violation will be found.[73]

As shown above, this type of means-end analysis is improper under the Takings Clause. A takings claim is concerned with the government's effect on private property rights; neither the legitimacy of the government's goals nor the rationality of the government's method can deflect a takings challenge. For this reason, a substantial pension modification that is justified as reasonable and necessary under the Contracts Clause might still effect a taking of property because the purpose for which the modification was implemented is irrelevant to the takings inquiry.[74]

III. EVALUATING WHETHER "PROPERTY" HAS BEEN "TAKEN"

Having demonstrated that the Takings Clause presents an independently significant piece of the pension reform puzzle, the next issue is to consider how challenges brought under that Clause should be evaluated. Such consideration requires a basic understanding of the manner in which the Takings Clause has been implemented by the courts, focusing on three foundational questions: (1) whether the government has taken private property; (2) whether any taking is for a public use; and (3) whether the owner has received just compensation for the taking. This Part addresses the first of those questions, leaving the second and third questions for Part IV.[75]

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may be justified if based upon "reasonable conditions" and "of a character appropriate to" some "significant and legitimate public purpose").

73. *See*, *e.g.*, Balt. Teachers Union, Am. Fed'n of Teachers Local 340 v. Mayor of Balt., 6 F.3d 1012, 1018-21 (4th Cir. 1993) (concluding that temporary salary reductions for public school teachers constituted a substantial impairment of contract but one that was justified as reasonable and necessary).

74. *See* Beermann, *supra* note 53, at 64 (noting "the government's justification for a taking is irrelevant"); Anenson et al., *supra* note 4, at 20 n.102 (same); *cf.* Cherry v. Mayor of Balt., 762 F.3d 366, 374 (4th Cir. 2014) (rejecting the Contracts Clause claim but vacating trial court's dismissal of public employees' takings claims and remanding those claims for further proceedings).

75. Although these discussions focus on federal constitutional requirements, as noted above, most state constitutions contain similar constraints on the government's taking authority. *See supra* note 8 and accompanying text. Moreover, although some differences exist between state and federal takings law, state courts tend to follow federal decisions in this area with regard to most issues. *See, e.g.*, San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 100-01 (Cal. 2002) ("[W]e appear to have construed the [federal and state takings] clauses congruently."); E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1045 n.10 (Colo. 2004) ("[W]e have considered decisions of the United States Supreme Court construing the federal takings clause as a guide in determining what constitutes a taking.") (internal quotations omitted); *see also* Phillips v. Montgomery County, 442 S.W.3d

A. The "Property" Requirement

Because the Takings Clause only applies to *takings*, an initial question is whether the government has taken private property at all.[76] To answer this question affirmatively, two independent requirements must be satisfied. The first of these is that the claimant must have a protected property interest at the time the taking is alleged to have occurred.[77] As demonstrated above, the existence of a property interest is largely defined by state law,[78] and the vast majority of states view public pension plans as giving participants either a contract or property right in at least some portion of their benefits.[79] For this reason, in the context of public pension reform, evaluating whether a property interest exists should be relatively straightforward in most cases. The plans at issue will either create contract or property rights in the benefit being modified or they won't.

B. The "Taking" Requirement

Demonstrating that the claimant has a property interest leads to the second and more challenging requirement—i.e., the governmental activity being complained of must, in fact, amount to a taking of the interest for which protection is sought.[80] In this regard, the courts have made clear that not every governmental action affecting private property is compensable.[81]

233, 240-41 (Tenn. 2014) (listing states that apply federal regulatory takings framework to claims brought under state constitutional provisions).

76. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2597 (2013) ("[T]he Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.").

77. *See supra* note 9 and accompanying text.

78. *See supra* note 10 and accompanying text.

79. *See supra* Parts I.B & I.C.

80. *See, e.g.*, Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

81. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960) (stating that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense"); *see also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) ("[I]t cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."). As the Supreme Court has explained, the applicability of the Takings Clause to a particular case often depends on context:

> When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002).

Determining when a legislative or regulatory restriction,[82] in particular, amounts to a taking has proved troublesome, and the conventional wisdom is that takings doctrine is a "muddle."[83] Even so, the Supreme Court over time has brought a modicum of clarity to this issue, culminating in a multi-tiered analytical framework.[84]

1. Analytical Framework for Determining a "Taking"

Under this framework, the first question is whether the challenger can prove that the law forces him to suffer a permanent physical invasion or occupation of his property.[85] If so, then the law effects a taking per se and no other factors need to be considered.[86]

Where no permanent physical invasion occurs, however, the framework moves to a second query, asking whether the challenger can prove what has been termed a "total" taking—i.e., that the law deprived him of all economically productive use of the property.[87] An affirmative answer to this question raises the presumption that a taking has occurred and shifts the burden of proof to the government, which may rebut the presumption by demonstrating that the law accomplishes nothing more than what could have been achieved under the law of nuisance or similar "background principles" of the law of property.[88] Where the government meets this burden, no compensable taking has occurred; otherwise, the presumption of a taking stands and the government must compensate the owner.[89]

Finally, if a case cannot be resolved under either of the foregoing analyses, the framework resorts to "essentially ad hoc, factual inquiries" driven by three factors.[90] Known as the *Penn Central* test, this analysis applies to the vast majority of takings challenges and assesses an alleged taking based on: (1) the economic impact of the law or regulation being challenged; (2) the extent to which the law or regulation interferes with the claimant's distinct, investment-backed expectations; and (3) the character of the governmental action, which generally distinguishes between those

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82. Because most public pension reforms are enacted as legislative or regulatory modifications to existing plans, challenges to those enactments fall within the branch of takings law known as "regulatory takings." *Cf. Tahoe-Sierra Pres. Council*, 535 U.S. at 321-23 (distinguishing between "physical takings" and "regulatory takings").

83. *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

84. *See generally* Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. ENVTL. L.J. 63, 94-101 (2008) (explaining framework).

85. *Id.* at 94.

86. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

87. Kent, *supra* note 84, at 95.

88. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-32 (1992).

89. Kent, *supra* note 84, at 96.

90. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

activities appearing appropriative in nature and those that merely adjust "the benefits and burdens of economic life to promote the common good."[91]

2. Difficulties in Applying the Framework to Public Pension Reform

Most of the decisions establishing and applying the foregoing framework involved takings challenges to land use regulations, and though not without problems, the framework clearly is designed to operate within that milieu. It remains less certain how the analysis functions in other regulatory contexts, and this is true of public pension reform in particular. Chief among the issues that must be addressed is which portion of the framework is most appropriate for analyzing a challenge to pension reform legislation. Is altering a promised retirement benefit akin to "invading" or "occupying" the participants' interests in that benefit, such that the per se rule applies? What would it mean in the pension reform context to deny participants "all economically beneficial or productive use"[92] of their property, so as to qualify for a "total" taking? Or is pension reform more properly viewed as a garden-variety economic regulation that should be analyzed under the *Penn Central* factors?

The answers to these questions have obvious significance. Successfully arguing that a particular reform falls within either the per se rule or the "total" taking analysis would clearly favor plan participants. The per se rule, once triggered, automatically means a taking has occurred, and the only real issue remaining is the amount of compensation the government must pay to the property owner. Similarly, triggering the "total" taking test will require the government to compensate the property owner unless it can rebut the presumption that a taking has occurred. By contrast, the *Penn Central* test is, in practice, more deferential to the government, and claims analyzed under that test typically meet with little success.[93] As in other areas of constitutional law, framing the issues so as to fall within the right analytical test can be outcome-determinative of a

91. *Id.*

92. *Lucas*, 505 U.S. at 1015.

93. Numerous scholars have noted that the government wins a substantial percentage of cases analyzed under the *Penn Central* factors. *See, e.g.*, F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003) (reviewing data and concluding that, for claims analyzed under *Penn Central*, "owners prevailed in 13.4% of the cases where the merits were addressed"); Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 744 (2000) (reviewing data to conclude that government wins eighty-five percent of *Penn Central* cases brought in federal district courts and sixty-seven percent of such cases brought in Court of Federal Claims); Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test Or a One Strike Rule?*, 22 FED. CIR. B.J. 677, 698 (2013) (reviewing data from three federal circuits and concluding that plaintiffs have a success rate of "only 4.0% in all cases citing to *Penn Central*").

takings claim. Unfortunately, as with most things in the law of takings, choosing the appropriate test in the context of public pension reform is anything but straightforward.

C. Choosing the Proper Test

When considering the three choices available, perhaps the safest proposition is that the "total" taking analysis is the least likely to apply. Short of the politically unviable course of eradicating pension plans and all accrued benefits in their entirety, it is difficult to envision a reform measure that could truly be said to deprive participants of *all* economic value in the plans.[94] Indeed, the only court found to have addressed the "total" taking issue in the public pension reform context explicitly rejected its applicability.[95] Accordingly, whether any specific reform measure qualifies as a taking will most likely depend on whether a court chooses to apply the per se rule for physical invasions or the more pervasive and deferential *Penn Central* test. The arguments for both choices are highlighted below, beginning with *Penn Central*.

1. The Case for the *Penn Central* Test

The courts that have most meaningfully analyzed takings challenges to pension reform measures have done so under the *Penn Central* test,[96] with some explicitly rejecting the per se rule's applicability in this context.[97] This result is hardly surprising. For starters, although there are notable exceptions, the Supreme Court has exhibited a general reluctance to employ categorical analyses under the Takings Clause. Throughout its takings decisions, the Court repeatedly has expressed a preference for case-by-case inquiries,[98] and individual justices have

94. *But see* Nat'l Educ. Ass'n-R.I. by Scigulinsky v. Ret. Bd. of R.I. Emps.' Ret. Sys., 890 F. Supp. 1143, 1166 (D.R.I. 1995) (analyzing under *Penn Central* legislation that removed plaintiffs from public retirement system and extinguished all credits accrued).

95. *See* Parker v. Wakelin, 937 F. Supp. 46, 59 (D. Me. 1996), *rev'd on other grounds*, 123 F.3d 1 (1st Cir. 1997) (stating that legislation raising the retirement age, increasing early retirement penalty, and altering method of calculating benefits did not constitute "an elimination of the economic value of [participants'] benefits").

96. *See, e.g.*, Pineman v. Fallon, 842 F.2d 598, 602-03 (2d Cir. 1988); *Parker*, 937 F. Supp. at 58-59; *Scigulinksy*, 890 F. Supp. at 1166; State *ex. rel.* Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 650-51 (Ohio 1998).

97. *See, e.g.*, *Parker*, 937 F. Supp. at 59; *Horvath*, 697 N.E.2d at 648-49.

98. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("Our regulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.") (internal quotations and citations omitted); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986) ("[W]e have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case.").

reinforced that point in concurring and dissenting opinions.[99] Moreover, in its most comprehensive discussion of takings doctrine, the Court explained that, apart from the "two relatively narrow categories" of physical invasions and total economic deprivations, "regulatory takings challenges are governed by the standards set forth in *Penn Central*."[100] In light of these statements, any attempt to broaden the scope of the per se rule is likely to face an uphill battle.

Related to the Court's general aversion to categorical rules is the chief purpose for which its takings doctrine appears to exist. The decision rules that make up the law of takings are an example of what Brannon Denning and I elsewhere label "anti-evasion doctrines" ("AEDs")—i.e., gap-filling standards designed to prevent the government from formally complying with a previously-announced rule while actually undermining the substance the rule was designed to protect.[101] In this regard, takings doctrine seeks to curb governmental efforts to evade the just compensation requirement by regulating property rather than appropriating it. Where the regulation has the same effects as appropriation, takings doctrine requires just compensation to be paid irrespective of the governmental action formally employed.[102] But the decision to utilize an AED, as well as the level of scrutiny to be employed, largely depends on how courts balance the risks posed by the allegedly evasive conduct versus those posed by heightened judicial intervention.[103] Of particular importance to this risk assessment, Denning and I argue, is the existence of political safeguards that can be expected to adequately prevent governmental overreaching.[104]

When applied to the public pension context, these concepts would seem to favor the more deferential *Penn Central* approach. The financial consequences of the current situation are both widespread and relatively

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99. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to per se rules in either direction must be resisted."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1047 (1992) (Blackmun, J., dissenting) ("If one fact about the Court's takings jurisprudence can be stated without contradiction, it is that the particular circumstances of each case determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation.") (internal quotations omitted).

100. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005). The Court also set apart "the special context of land-use exactions," *id.*, which obviously have no bearing on the evaluation of public pension reform.

101. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1779 (2012).

102. *See id.* at 1777 (characterizing takings doctrine as AED); *see also* Michael B. Kent, Jr., *Viewing the Supreme Court's Exactions Cases Through the Prism of Anti-Evasion*, 87 U. COLO. L. REV. 827, 852-55 (2016) (same).

103. *See* Brannon P. Denning & Michael B. Kent, Jr., *Judicial Doctrine as Risk Regulation*, 82 TENN. L. REV. 405, 418-25 (2015) (arguing that doctrinal formation results, in part, from justices' perceptions of, and attempts to manage, risk to constitutional propositions posed by government action).

104. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397, 424 (2014).

well-known, while the potential policy solutions require complex and multifaceted considerations. As such, one would expect the political process by which reform measures are enacted to be robust and well-attended by the various interests involved. Under these circumstances, there is no guarantee that judicial involvement would outperform the political process. Indeed, given the potential for unintended errors, the costs of such involvement could be quite high. For these reasons, the *Penn Central* factors may present a safer course than the more intrusive per se rule.

Further bolstering the popularity of the *Penn Central* factors is that the Court has applied them in a series of cases addressing private sector retirement legislation. In *Connolly v. Pension Benefit Guaranty Corporation*, for example, the Court utilized the *Penn Central* test to evaluate a takings challenge to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[105] Designed to address financial instability in multiemployer pension plans caused by the withdrawal of individual employers from those plans, the MPPAA required withdrawing employers to pay to the plan a sum representing that employer's proportionate share of the plan's unvested benefits, irrespective of the employer's liability under the plan contracts.[106] Employers subject to this "withdrawal liability" asserted that the statute violated the Takings Clause by requiring them to transfer private assets to the plans without compensation. Although the Court acknowledged that the employers would be permanently deprived of the assets used to pay the liability,[107] it nonetheless indicated that the per se rule was inapplicable because "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use."[108] The Court reaffirmed this conclusion seven years later when it revisited the MPPAA's withdrawal liability provisions,[109] and it reached a similar result in a case brought against federal legislation that required coal industry employers to contribute to a multiemployer benefit plan for industry retirees and their dependents.[110]

Although each of these cases involved an alleged taking of property belonging to a plan *employer*, the basic principles clearly can be translated to takings claims brought by plan *participants*. If forcing employers to pay amounts into a plan over and above their contractual liabilities does not amount to a permanent occupation of the sums paid, then forcing

105. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986).
106. *Id.* at 216-17.
107. *Id.* at 222.
108. *Id.* at 225.
109. Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Tr., 508 U.S. 602, 643 (1993) ("We reject [the challenger's] contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation. . . .").
110. E. Enters. v. Apfel, 524 U.S. 498, 530 (1998) (plurality) (concluding that liability for fund contributions "is not . . . a permanent physical occupation . . . of the kind that we have viewed as a *per se* taking").

employees to accept alterations or reductions in the benefits received arguably should be viewed the same way.[111] And, in fact, several lower courts have relied on this line of decisions to evaluate claims brought by public employees.[112] Echoing *Penn Central*'s own admonition that "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good,"[113] these courts have found that public pension modifications fall within the latter characterization.[114]

Finally, utilizing the *Penn Central* test avoids any difficulty in analogizing pension reform legislation to a "physical" invasion or occupation of land. The principal cases developing the per se rule all concerned government actions that forced a private landowner to surrender his right to exclude others.[115] The unifying theme in these cases is that each concerned an entry onto the physical boundaries of the property without the consent of the owner. In other words, each case involved an action that resembled a trespass. But that resemblance is not as evident when it comes to public pension reform. In the latter context, the property at issue normally will consist of promises to hold plan funds in a certain manner, to pay benefits upon the achievement of certain criteria, and to calculate those benefits according to a prescribed method. It is difficult, at least on the surface, to see how modifications to those promises constitute a trespass or entry upon the plan participants' interests. Unlike land, promises cannot be physically inhabited.[116]

For the foregoing reasons, I agree that the *Penn Central* test is an easier fit for evaluating challenges to public pension reform, as well as the

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111. A potential distinction between *Connolly* and its progeny, on the one hand, and public pension reform, on the other, is that public pension alterations could be viewed as appropriations by the government itself. *Cf. Connolly*, 475 U.S. at 225 (noting that government did not "permanently appropriate any of the employer's assets for *its own use*") (emphasis added). For a discussion of this argument, see *infra* Part III.C.2.

112. *See* Pineman v. Fallon, 842 F.2d 598, 602 (2d Cir. 1988) (citing *Connolly*); Parker v. Wakelin, 937 F. Supp. 46, 58 (D. Me. 1996), *rev'd on other grounds*, 123 F.3d 1 (1st Cir. 1997) (same); State *ex. rel.* Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 649 (Ohio 1998) (same).

113. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

114. *Fallon*, 842 F.2d at 602; *Parker*, 937 F. Supp. at 59; *Horvath*, 697 N.E.2d at 649.

115. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding taking under state law that required landowner to permit installation of cable television facilities on roof of her building); United States v. Causby, 328 U.S. 256 (1946) (finding taking where government's use of nearby land for airport resulted in regular flights over plaintiff's parcel at significantly low altitudes); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166 (1871) (finding taking where government permanently flooded plaintiff's land in connection with dam project).

116. *Cf. Horvath*, 697 N.E.2d at 649 (distinguishing pension reform from leading case employing per se rule because that case "involved a *permanent physical occupation of real property*") (emphasis in original).

test most likely to be used by courts engaged in that evaluation. Even so, viewing the per se rule as wholly inapplicable to this context seems too narrow an interpretation of the rule, which the Court itself has applied to interests other than real property. The arguments for applying the per se rule should not be overlooked, and it is to those arguments that this Article now turns.

2. The Case for the Per Se Rule

On at least two occasions, the Supreme Court has referenced the per se rule, either directly or indirectly, in cases involving the alleged taking of a property interest other than land. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, for example, the Court considered a dispute involving the ownership of accrued interest on interpleaded funds paid into a state court's registry.[117] The receiver appointed to handle distribution of the funds asserted that the interest belonged to the prevailing parties, but a state statute provided that such interest belonged to the government. Siding with the receiver, the Supreme Court concluded that the statute amounted to a taking because it broke with the ordinary rule that owners of the principal also own the interest accruing thereon. Describing the statute as "a forced contribution to general governmental revenues," the Court analogized the situation to that at issue in one of the early per se cases because, in both, the government used private property for its own purposes without the permission of the owner.[118] "The state statute," the Court concluded, "has the practical effect of appropriating for the [government] the value of the use of the fund."[119]

The Court seemingly returned to this rationale several years later in *Brown v. Legal Foundation of Washington*.[120] That case involved a state program requiring that accrued interest on lawyers' trust accounts ("IOLTA") be used to pay for indigent legal services. Having previously held that such interest belonged to the clients whose funds were invested in the accounts,[121] the Court then addressed whether the mandatory use of that interest under the IOLTA program constituted a taking. Writing for the majority, Justice Stevens couldn't quite bring himself to say that a taking had occurred,[122] but he suggested that the per se rule for physical invasions would be the most appropriate test under which to make that determination.[123] The transfer of the interest earned in the IOLTA accounts,

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117. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

118. *Id.* at 163-64 (citing *Causby*, 328 U.S. 256 (1946)).

119. *Id.* at 164.

120. Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

121. Phillips v. Wash. Legal Found., 524 U.S. 156, 165-72 (1998).

122. *See Brown*, 538 U.S. at 233 ("[W]e must address the type of taking, *if any*, that this case involves.") (emphasis added); *id.* at 235 ("We therefore *assume* that . . . [the plaintiffs'] interest was taken. . . .") (emphasis added).

123. *Id.* at 235.

he explained, was "akin to the occupation of a small amount of rooftop space" that the Court addressed in the leading case applying the per se rule.[124] Inasmuch as neither bank accounts nor the interest earned on them can be physically inhabited or entered into, Justice Stevens's analogy to an "occupation" suggests that the per se rule encompasses more. The rule applies, it would seem, where the government affirmatively takes for itself or transfers to another the use of private property for public purposes.[125]

In both cases, then, the Court equated the rule's references to "invasion" or "occupation" with a similar, though not entirely synonymous, term—i.e., "appropriation." So construed, the per se rule may more readily fit the public pension reform context, as evidenced by a few state court decisions that tacitly apply that approach. Where Wisconsin gave members of a county-run plan the option to join a state-run plan, mandating a transfer of employer contributions from one plan to the other for any participant exercising that option, the Wisconsin Supreme Court held that the law requiring the transfer effected a taking.[126] "Vested County Plan beneficiaries have protectable property interests in the integrity and security of their retirement funds," the court explained, and the statute took that property interest by appropriating funds previously held by the county plan to the benefit of members enrolled in the state plan.[127]

A similar rationale appears to have animated the North Carolina Supreme Court's decision in *Bailey v. State*,[128] although the conclusory analysis in that case leaves much to be desired. *Bailey* involved an adjustment to the tax-exempt status of state and local retirement benefits. Initially, those benefits were exempted entirely from state taxation, but the legislature later capped the tax exemption to apply only to $4,000 of benefits per year.[129] Concluding that the retirement plans created a contractual relationship between the state and plan participants, and that the tax exemption was a term of the contract so created, the court determined that the change in the exemption amounted to an uncompensated taking of the participants' property.[130] Although the court offered little analytical

124. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

125. *See id.* at 240 ("A law that requires that the interest on [IOLTA] funds be transferred to a different owner for a legitimate public use . . . could be a *per se* taking requiring the payment of 'just compensation' to the client."). Such affirmative action is distinguished from mere regulation, which might *restrict* the use of private property but does not necessarily *compel* its use by or for someone other than the owner. *Cf.* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-64 (1980) (explaining that transfer of interest on funds deposited into court's registry was forced appropriation of fund's beneficial use rather than mere economic adjustment for common good).

126. Ass'n of State Prosecutors v. Milwaukee Cnty., 544 N.W.2d 888, 893 (Wis. 1996).

127. *Id.*; *see also id.* at 894 (equating statute to confiscation of county plan members' property).

128. Bailey v. State, 500 S.E.2d 54 (1998).

129. *Id.* at 58-59.

130. *Id.* at 69.

support for that determination,[131] it is not difficult to place the decision within the per se rule as articulated above. Under the contracts establishing the retirement system, the property belonging to the participants included 100% of every dollar in benefits paid, without having to remit anything back to the state in the form of taxes. By subsequently capping the amount of benefits eligible for the tax exemption, however, the state reduced the real amount paid to the participants by the amount of taxes now due. As such, much like the account interest at issue in *Webb's* and *Brown*, the state effectively appropriated the use of the benefits subject to taxation for its own purposes.

By far the clearest application of the per se rule in the context of public employee benefits comes from a recent decision of the Michigan Court of Appeals. In *AFT Michigan v. State*,[132] the court addressed the constitutionality of a statute that required all public school employees to contribute three percent of their salaries to a non-vesting retiree health benefit program. After concluding that the employees' salaries constituted "specific funds in which they unquestionably had a property interest,"[133] the court then found that the forced contribution to the retirement fund constituted a seizure of the employees' property. Citing to both *Webb's* and *Brown*, the court explained: "The law is . . . clear that where the government . . . asserts ownership of a specific and identifiable 'parcel' of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions 'per se' violations of the Takings Clause."[134] Put differently, by appropriating for its own benefit a portion of the employees' salaries, the state had triggered the per se rule and taken private property without compensation.

Applying the reasoning of these cases to contemporary reform efforts indicates that at least some modifications to public pensions might fall under the per se rule. While most of these reforms do not include an overt transfer of promised benefits to another party, many of the measures recently attempted or discussed could be viewed as having a similar effect. Changes in the formulae by which benefits are calculated, reductions in stated COLAs, or even a required increase in the employees' own contributions all have the consequence of decreasing the amount of benefits ultimately paid to plan participants. Where these participants have a vested right in the benefits affected, the reductions arguably are the equivalent of the government appropriating the participants' property (or a portion

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131. *See id.* (stating simply that "it is clear that the State has taken plaintiffs' private property" because alteration of exemption was "in derogation of plaintiffs' rights established through the retirement benefits contracts").

132. AFT Michigan v. State, No. 303702, 2016 WL 3176812 (Mich. Ct. App. June 7, 2016).

133. *Id.*

134. *Id.*

thereof) to fulfill its own purposes or obligations.[135] As the foregoing cases suggest, that type of appropriation might trigger the per se rule and thus constitute a compensable taking.

IV. EVALUATING "PUBLIC USE" AND "JUST COMPENSATION"

Although it is much easier to demonstrate a taking under the per se rule than the *Penn Central* test, in either case a determination that the government has in fact taken private property forces a consideration of the public use and just compensation requirements. With regard to public pension reform, just compensation is by far the more troublesome issue, as the following discussions demonstrate.

A. The "Public Use" Requirement

At least for purposes of federal law, the "public use" requirement has long been interpreted to include any measure justified by a "public purpose,"[136] which is defined broadly and with deference to legislative determinations.[137] Accordingly, the government typically has wide latitude in determining when and how the taking power should be utilized.

Moreover, in the context of regulatory takings, there is a general presumption that the government's action is supported by a public purpose. As noted above, the Supreme Court has rejected the incorporation of means-end analyses into its Takings Clause jurisprudence, concluding that questions concerning the government's purposes for regulating are more properly addressed under the Due Process Clause.[138] Such inquiries are "logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[139] Put differently, a government action that advances no public purpose will violate due process and be unconstitutional for that reason alone.[140] By the time the analysis

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135. *Cf.* Booth v. Sims, 456 S.E.2d 167, 187 (W. Va. 1995) ("Requiring the [plan participants] to protect the future solvency of the pension system is an unconstitutional shifting of the state's *own burden*.") (emphasis added); *see also* Scott v. Williams, 107 So. 3d 379, 397 (Fla. 2013) (Lewis, J., dissenting) (arguing that reform legislation converting state retirement system from noncontributory to contributory, mandating employees contribute three percent of salaries, and eliminating COLAs was "a confiscation of private property of a few for a public use").

136. *See* Kelo v. City of New London, 545 U.S. 469, 479-80 (2005) ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'").

137. *Id.* ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

138. *See supra* notes 62-66 and accompanying text.

139. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005).

140. *Id.*

turns to the Takings Clause, the validity of the government's purpose is theoretically established.

Applying these principles to public pension modifications suggests that, in most cases, the public use requirement should be satisfied rather easily. So long as "the asserted public purpose is to avert fiscal calamity and its negative consequences,"[141] it is difficult to imagine a court finding the public use requirement has been violated.

B. The "Just Compensation" Requirement

After a taking is determined to be for a public use, the final requirement imposed by the Takings Clause is that of "just compensation." As the Supreme Court has made clear, the constitutional remedy is not to prohibit the taking,[142] but rather to ensure that the owner "be put in as good a position pecuniarily as if his property had not been taken."[143] Thus, the owner typically is entitled to "the fair market value of the property on the date it is appropriated,"[144] which "is measured by the property owner's loss rather than the government's gain."[145]

Although these principles appear fairly straightforward, they often raise difficult issues,[146] and this is no less true in the context of public pension modifications. It is not within the scope of this Article either to provide a full critique of the law of just compensation or to apply that law definitively to public pension reform. Rather, as with the question of whether a reform takes plan participants' property, I seek only to highlight the issues and arguments that litigants and courts will need to address.

1. "Dollar-for-Dollar" Valuation

From the participants' vantage point, the value of the property lost as a result of pension reform would most likely be the dollar amount by

141. Adam Riff, Note, *The Eminent Domain Path Out of a Public Pension Crisis*, 37 CARDOZO L. REV. 307, 334 (2015).

142. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 314 (1987).

143. Olson v. United States, 292 U.S. 246, 255 (1934).

144. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984); *accord* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015).

145. Brown v. Legal Found. of Wash., 538 U.S. 216, 235-36 (2003).

146. There is an inherent tension, for example, in the Court's statements that a property owner should be made whole and its application of the fair market value standard, which "excludes whole categories of damages . . . suffered by the property owner." Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678-79 (2005). Aside from this tension, the concept of fair market value itself "necessarily includes a host of background decisions that influence the size of awards." *Id.* at 704.

which their benefits were allegedly reduced.[147] To state it differently, plan participants would want to argue that the measure of just compensation is the difference between the benefits they would have received absent the modification and what they actually received as a result of the modification.[148] This measurement, so the argument goes, would most correctly represent the loss to plan participants and most adequately make them whole.[149]

Using such a formula, however, would likely have the practical result of prohibiting the taking altogether, rather than simply remunerating the property owner. Public pension reforms are typically enacted to alleviate dire fiscal circumstances, meaning that concerns already exist about the government's ability fully to satisfy its plan obligations. Requiring the government to pay those obligations anyway effectively nullifies the reform. Moreover, given the government's potential liability for interest, attorney fees, and other costs of litigating challenges, the government may ultimately find itself in a worse financial situation after the reform than before.[150]

2. Arguments Against "Dollar-for-Dollar" Valuation

That plan participants should be awarded compensation exactly equal to their pre-reform benefits, however, is not a foregone conclusion. To begin with, it is not certain that such an award represents fair market value in the first place. The Supreme Court typically defines fair market value as "what a willing buyer would pay in cash to a willing seller."[151] The lack of a functioning market for a particular species of property may make market value too difficult to discern and, thus, inappropriate to use as an assessment mechanism.[152] This concept could be applied to public pension

147. *See* Riff, *supra* note 141, at 335 n.151 (suggesting that value of property owned by "a retired public worker who is already collecting pension benefits" would likely be "equivalent to the amount already owed under the pension plan").

148. *See* Reinke, *supra* note 45, at 1698 (suggesting that fair market value of reduced benefits is "easily calculated" via this formula). If this amount was paid immediately upon entry of judgment, it would presumably be adjusted to reflect the present value of any future benefits not yet payable under the initial terms of the plan.

149. Some courts seem to agree. *See, e.g.*, Nat'l Educ. Ass'n-R.I. by Scigulinsky v. Ret. Bd. of R.I. Emps.' Ret. Sys., 890 F. Supp. 1143, 1166 (D.R.I. 1995) (holding that plan participants adequately alleged lack of just compensation by pleading that "value of the extinguished retirement benefits is greater than the amount of money that would be returned to the plaintiffs by the [challenged] statute").

150. *See generally* Wis. Retired Teachers Ass'n v. Emp. Tr. Funds Bd., 558 N.W.2d 83 (Wis. 1997) (requiring government to refund all amounts taken, with interest, and awarding attorney fees).

151. United States v. Miller, 317 U.S. 369, 374 (1943).

152. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) (stating that other measures of just compensation may be utilized "when market value has been too difficult to find"); United States v. 564.4 Acres, 441 U.S. 506, 512 (1979) ("The instances in which market value is too difficult to ascertain generally involve property of a

benefits, "which generally are not assignable, and therefore cannot be bought and sold."[153] Because these benefits are not freely traded on the open market, it is not necessarily clear that the exact dollar amounts initially promised to public employees are the actual "market value" of the property held by those employees.

Additionally, even if it best represents the market value of their property, a strict dollar-for-dollar equivalent to participants' alleged reductions may be too speculative, at least as to some portion of the benefits claimed.[154] In this regard, consider *United States v. Commodities Trading Corporation*, where the Supreme Court addressed the appropriate measure of compensation due for a wartime governmental requisition of 760,000 tons of privately-owned black pepper.[155] Noting that the price of pepper at the time of the requisition was subject to governmental price-fixing by the Office of Price Administration, the trial court nonetheless added to the fixed price a so-called "retention value."[156] According to the trial court, this "retention value" represented the owner's right to hold the property until after the wartime price-fixing program had ceased, when the owner presumably could have sold the pepper for higher prices (an option foreclosed by the government's taking of the pepper).[157] The Court rejected the inclusion of this "retention value," however, as too uncertain:

> [N]o one knew how long the war would last nor how long economic conditions due to war might lead Congress to continue price-fixing legislation. Predictions on these subjects were guesses, not informed forecasts. And even if such predictions were reasonably certain, there remained other unknowns. How much more than the ceiling price would a speculative purchaser have paid for property at the time of seizure? To what extent, if at all, would the lifting

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type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property.").

153. Riff, *supra* note 141, at 335-36 (citing 5 U.S.C. § 8346(a)); *see also* GA. CODE ANN. § 47-2-332(a)(3) ("The right to a pension, annuity, retirement allowance, return of contributions, the pension, annuity, or retirement allowance itself, any optional benefit, or any other right accrued or accruing to any person under [the Employees' Retirement System of Georgia] . . . are . . . [n]ot assignable. . . ."); Hamlin v. Pub. Emps. Ret. Bd. *ex rel.* State, 359 P.3d 581, 583 (Or. Ct. App. 2015) ("[A]s a general rule, a [Public Employees Retirement System] member's retirement account is not assignable. . . .").

154. *See Commodities Trading Corp.*, 339 U.S. at 126-27 (rejecting inclusion of certain values because of "the highly speculative nature of proof" necessary for them); Dep't of Transp. v. M.M. Fowler, Inc., 637 S.E.2d 885, 892 (N.C. 2006) (explaining that just compensation principles "do not require the expenditure of taxpayer funds for losses . . . too speculative to calculate with certainty").

155. *Commodities Trading Corp.*, 339 U.S. at 122.

156. *Id.* at 123.

157. *Id.* at 125.

> of war controls raise prices above the controlled ceilings? And as of what date should future value be estimated?[158]

Because there were no sound answers to these questions at the time of the taking, the "retention value" had to be excluded from the compensation award.

An analogy could be made to the calculation of promised pension benefits, at least for those that have not yet fully accrued as of the date of the reform. The amount of benefits to which an individual employee is entitled under most state and municipal systems often depends on the employee's age at retirement, number of years worked, and final average salary.[159] To the extent that any of these factors remains unknown at the time of the taking—that is, at the time of the plan modification—the valuation of pre-reform benefits arguably could be viewed as too speculative to support a compensation award based upon them.[160]

Lastly, even where these amounts are not too difficult to calculate, there remains the question of whether a dollar-for-dollar valuation would work a "manifest injustice" to either the plan participants or the public at large.[161] In the worst case scenario, requiring government employers to pay in full the amount of promised benefits without adjustment could have a number of severe societal consequences, including drastic tax increases, default on other governmental obligations, and loss of certain governmental services. And it could have adverse consequences on public employees as well, including reductions in the public workforce, salary and hiring freezes, bankruptcy (for municipal employers),[162] and the collapse of the pension system. In this parade of horribles, it may be that requiring governments to compensate plan participants for every dollar allegedly lost would work a "manifest injustice."

Unfortunately, neither the Supreme Court nor the lower courts have defined "manifest injustice" or explained when it might justify a deviation from fair market value. Perhaps the phrase is best interpreted in light of the Court's oft-stated emphasis that the Fifth Amendment's compensation remedy "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[163]

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158. *Id.* at 126-27.

159. *See* Buck, *supra* note 4, at 33-34.

160. Riff, *supra* note 141, at 337-38.

161. *Commodities Trading Corp.*, 339 U.S. at 123 (stating that alternative methods of valuation are appropriate where fair market value "would result in manifest injustice to owner or public").

162. *See* 11 U.S.C. §§ 901-946 (2012) (providing for municipal bankruptcy); *see also* Beermann, *supra* note 53, at 76 (noting that "there is no provision for state governments to file for bankruptcy under federal law").

163. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005).

From the perspective of plan participants, of course, this notion would favor a dollar-for-dollar valuation of their lost property because "fairness and justice" requires the government to live up to its promises. Moreover, if tax increases and lost services are the price for doing so, then at least the public as a whole (and not just the subset of government employees/retirees) pays the price. On one level, this argument has particular force. After all, the public pension crisis is the result of government officials seeking to fulfill an ever-expanding demand for government services by the same public that generally revolts against increased taxes.[164] To the extent that those officials, with the tacit approval of taxpayers, have been underfunding those promises, it seems reasonable that all parties should share in the burden of "making things right."

But on another level, perhaps it's not that easy. Do "fairness and justice" dictate, for example, fiscal and governmental calamity because the government, in more prosperous times, made promises to a subset of the population? Does the just compensation requirement demand that public services be placed at risk to satisfy obligations that now seem imprudent or harmful? Another anchor tenet of the Supreme Court's takings jurisprudence is that changes in property rights must occasionally occur to promote the public interest, and that "Government hardly could go on" if every jot and tittle of these changes must be recompensed.[165] Some losses, the Court has explained, are "properly treated as part of the burden of common citizenship."[166]

In short, different maxims support varying views as to whether plan participants should receive the full equivalent of their reduced benefits as just compensation. As with most things in the law of takings, the relevant decisions contain, at best, general precepts that often appear to be in competition with one another and foreclose certain predictions or easy application. Suffice it to say, there are serious arguments on both sides of this question, and its resolution awaits development in future litigation.

3. The Possibility of Non-Cash Compensation

A final issue worthy of consideration is whether state and local employers might provide compensation to plan participants through means other than cash payments, thereby reducing some of the fiscal concerns that

164. *See* Beermann, *supra* note 53, at 26-27 (comparing unfunded pension promises to other types of deficit spending).

165. Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.").

166. Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

a taking might otherwise produce. In this regard, the Supreme Court has made clear that "consideration other than cash . . . may be counted in the determination of just compensation."[167] Such non-cash compensation may include benefits conferred upon the property owner as a consequence of the taking itself.[168] Thus, in the classic example, "damages arising from the condemnation of a sliver of property for a new road are offset by the enhanced value of the owner's remaining property as a result of the road."[169] Similarly, the Supreme Court has hinted that certain rights created by the government concomitant with the alleged taking—such as transferable development rights ("TDRs") in the land use context—might also qualify as a form of just compensation that can reduce or eliminate the need for monetary payment.[170]

Applying these decisions to the public pension context, the question is whether a government can build into a pension reform some type of compensating benefit for the participants. One interesting proposal along these lines recently appeared in the *Cardozo Law Review*. In a student note, Adam Riff recommends that state and local governments employ the Takings Clause as a reform mechanism itself, affirmatively condemning their employees' public pension benefits.[171] With regard to the just compensation requirement, Riff further recommends that a governmental unit adopting this approach: (1) fulfill its current pension obligations as to any benefits already earned by participants as of the date of the

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167. Blanchette v. Conn. Gen. Ins. Co., 419 U.S. 102, 151 (1974).

168. *See, e.g.*, *id.*; Bauman v. Ross, 167 U.S. 548, 584 (1897). Whether such benefits need be "special" to the property owner, or whether "general" benefits flowing to larger portions of the community may also be included, remains unclear. *Compare*, *e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015) (hinting that general regulatory benefits should not be included); Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (distinguishing between "direct compensating benefits accruing to the property" from those "generally and widely shared through the community") *with* McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 366 (1918) (allowing inclusion of both "peculiar and individual benefits" to property owner as well as benefits advantaging "all in the neighborhood"); Dep't of Transp. v. Rowe, 549 S.E.2d 203, 209-10 (N.C. 2001) (relying on *McCoy* to hold that both general and special benefits may be considered).

169. Serkin, *supra* note 146, at 694.

170. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), a majority of the Court found that there was no taking and, therefore, did not reach the issue of whether TDRs provided to the property owners amounted to just compensation. Nonetheless, the majority made clear its view that the TDRs "undoubtedly mitigate whatever financial burdens" the property owners had allegedly suffered, *id.* at 137, suggesting that TDRs might form a part of just compensation in the proper case. The dissenters, concluding that a taking had in fact occurred, also countenanced the idea that TDRs might qualify as just compensation and would have remanded the case for a determination of that issue. *Id.* at 151-52 (Rehnquist, J., dissenting). Finally, almost twenty years after *Penn Central*, Justice Scalia (joined by Justices O'Connor and Thomas) expressly voiced his view that TDRs may "form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property *is* taken." Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 750 (1997) (Scalia, J., concurring).

171. Riff, *supra* note 141, at 350-51.

condemnation; and (2) "establish a new retirement plan with value on the market that will benefit current workers on services performed going forward, such as a 401(k)."[172] The establishment of an alternative retirement plan, Riff argues, could be analogized to "special benefits" or TDRs that reduce or satisfy any just compensation owed for the taking.[173]

To see why, it is necessary to take a brief tangent into the world of retirement plan composition. Most government retirement plans are structured as defined benefit systems,[174] meaning that participants receive a fixed benefit upon retirement calculated with regard to their respective ages, salaries, and lengths of employment.[175] These benefits are typically funded by contributions into an investment pool controlled by the employer, who also bears the risks of underfunding because it must pay the benefits at the set amount regardless of shortfalls in the pool.[176] By contrast, the 401(k) plans used by most private employers are defined contribution systems, which typically fund retirement benefits through some combination of employer and employee contributions to individual employee savings accounts.[177] In these plans, the employers' obligation is simply to contribute at the promised level, not to guarantee any specific return or entitlement to the account holder.[178] Thus the participants themselves bear the ultimate risk[179] but also enjoy certain advantages not found in most defined benefit plans—e.g., more liberal vesting rules, increased portability, and greater control over the amount of their own contributions and choices of investments.[180]

Because defined contribution plans do not place the employer at risk for unfunded future liabilities, over time they would be less costly for the government and the taxpayers. At the same time, defined contribution plans would provide benefits to plan participants not enjoyed under the current retirement structures. In effect, Riff's proposal calls for government employers to use the savings occasioned by the taking of participant rights in a defined benefit plan to pay for the creation of other participant rights in

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172. *Id.* at 350.

173. *Id.* at 338-40. Other scholars have made similar recommendations—i.e., that state and local governments begin offering defined contribution plans—although not in the context of satisfying the just compensation requirement. *See, e.g.*, Karen Ellers 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, 322-28 (2007).

174. *See* Anenson et al., *supra* note 4, at 6.

175. *See* Buck, *supra* note 4, at 33-34; Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455 (2004).

176. *See* Christine Sgarlata Chung, *Zombieland/The Detroit Bankruptcy: Why Debts Associated with Pensions, Benefits, and Municipal Securities Never Die . . . And How They Are Killing Cities Like Detroit*, 41 FORDHAM URB. L.J. 771, 785 (2014).

177. *Id.* at 784; Zelinsky, *supra* note 175, at 455.

178. Zelinsky, *supra* note 175, at 455.

179. Chung, *supra* note 176, at 784-85.

180. *See* Lahey & Anenson, *supra* note 173, at 323-24 (discussing advantages of defined contribution plans).

a defined contribution plan.[181] And the value of these latter rights, he argues, should be included in any just compensation awarded to the plan participants for the taking of the former rights.[182]

Riff's overall proposal, of course, envisions direct takings pursued by the government. But the ideas about compensation, if workable, should apply equally to takings challenges advanced by plan participants. Indeed, on the surface anyway, the argument has an intuitive attraction. Finding a way to compensate plan participants while simultaneously reducing the government's overall pension liabilities would seemingly be a desirable outcome to any takings problem. Moreover, to the extent that the government provides real and valuable benefits in exchange for the property it takes, those benefits should be credited toward the satisfaction of any compensation the government otherwise owes. Given the lack of specific precedent and the general disorder of takings doctrine, however, whether courts ultimately agree with these propositions is anyone's guess.

CONCLUSION

The fiscal conditions relating to their pension systems pose unique problems for the strength and wellbeing of municipal governments in the first part of the twenty-first century. As recent litigation has demonstrated, effectively addressing those problems requires consideration of the constitutional protections afforded to plan participants. Among those protections, the Takings Clause has largely received a sort of subordinate status, taking a back seat to the Contracts Clause in much of the case law and scholarly commentary.

Properly considered, however, the Takings Clause forms an important component of the public pension reform conversation. In states that reject the contract view of public pensions, the Takings Clause presents the most viable constitutional claim for plan participants seeking to challenge reform efforts. Moreover, the analytical distinctions between claims advanced under the Contracts Clause and the Takings Clause may make takings challenges attractive even in states that adopt the contract view.

For these reasons, the Takings Clause and challenges brought under it should receive more serious engagement than they have heretofore garnered. A full evaluation of takings challenges requires fitting public pension reform within the Supreme Court's framework for determining when legislative or regulatory action qualifies as a taking. Additionally, difficult questions exist with regard to the proper measure of compensation owed to plan participants once a taking is found. This Article highlights some of the leading arguments with which judges and litigants must deal,

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181. *See* Riff, *supra* note 141, at 338 ("[T]he government could use the condemned property to establish a defined contribution plan that benefits workers going forward.").

182. *Id.* at 338-40.

with the hope that full development of these issues will be advanced by courts and commentators in the future.