JUDICIAL COMPULSION AND THE PUBLIC FISC – A HISTORICAL OVERVIEW

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INTRODUCTION

On September 13, 2011, the Providence Rhode Island Superior Court denied the State's motion for summary judgment on a claim, brought by a number of public employee unions, asserting that the statutory pension system "establishes a contractual relationship between the State of Rhode Island and participating employees" sufficient to trigger the Contract Clause and the Takings Clause of the state constitution when benefits to vested employees are statutorily reduced.[1] Undoubtedly this case can be regarded as early thunder from a not-so-distant storm.[2] The likelihood of litigation arising from alteration of pension benefits has generated interest at both the federal and state levels.[3] In times of fiscal contraction, social welfare benefits might be altered in ways that engender litigation.[4] Guaran-

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1. R.I. Council 94 v. Carcieri, No. PC 10-2859, 2011 R.I. Super. LEXIS 120, at *1 (R.I. Sup. Ct. Sept. 13, 2011).

2. *See id*. at *21 (noting that the states of Alaska, Hawaii, Illinois, Louisiana, Michigan, and New York protect pension rights in their constitutions).

3. *See, e.g.*, JENNIFER STAMAN, CONG. RESEARCH SERV., R41736, STATE AND LOCAL PENSION PLANS AND FISCAL DISTRESS: A LEGAL OVERVIEW 1 (2011), *available at* http://www.nasra.org/resources/CRS%20state%20and%20local%20legal%20framework %201104.pdf; Stephen C. Fehr, *States test whether public pension benefits can be taken away*, STATELINE (Aug. 10, 2011), http://www.stateline.org/live/printable/story?contentId=504503.

4. *See, e.g.*, Butte Cmty. Union v. Lewis, 712 P.2d 1309 (Mont. 1986) (affirming district court's injunction of a house bill that would have restricted the ability of

tees of quality education in state constitutions have produced many suits affecting the public fisc.[5] Historically, the most dramatic fiscal-forensic disputes arose from the repudiation of public-bonded indebtedness.[6]

In Part I, we review the law bearing on actions implicating the public fisc until 1960. In Part II, we give an overview of the law since 1960. In the Conclusion, we discuss why judicial recognition of vested rights in mere legislative provisions might be unwise both for the broader public interest and for the beneficiaries of such legislation regarded as a class.

I. JUDICIAL COERCION AND THE FISC TO 1960

A. Law of Nations on Sovereign Immunity

According to the customary law of nations at the time of the Founding, a true sovereign could not be sued in its own courts, nor in those of another sovereign, without its consent.[7] For sovereign (as opposed to commercial) debt, that same principle continues to find recognition under the Foreign Sovereign Immunities Act.[8] Under the law of nations, "the non-payment of the debts of a State, due to the citizens of another State, as to the latter State, is a wrong of a political character, the proper subject of

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certain able-bodied individuals with no minor dependent children from receiving welfare benefits).

5. *See* Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1107–09 (2000).

6. *See* Sarah Ludington, Mitu Gulati & Alfred L. Brophy, *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES L. 247, 268–79 (2010).

7. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574–76 (2002) (citing *Coolbaugh v. Commonwealth*, 4 Yeates 493, 494 (Pa. 1808) (holding that no sovereign power is amenable to suits either in its own courts or those of a foreign country without its consent)).

8. *See* 28 U.S.C. § 1602 (2006). *Compare* 28 U.S.C. § 1604 (granting foreign states immunity from the jurisdiction of federal and state courts, subject to enumerated exceptions), *with id.* § 1605(a)(2) (creating an exception to immunity for foreign nations in actions based on commercial activity), *and* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 609, 611, 614–15 (1992) (holding that the issuance of certain debt instruments by the Republic of Argentina fell within the commercial exception to foreign state sovereign immunity of 28 U.S.C. § 1605(a)(2) because the "foreign government act[ed], not as regulator of a market, but in the manner of a private player within it").

negotiation and treaty, and even a *casus belli*."[9] Indeed, because default of obligations was a valid *casus belli* under international law, the United States sometimes found itself acting as an international debt collector to keep European countries from acting militarily in the New World.[10]

B. The Immunity of the British Crown by the End of the Eighteenth Century

By 1786, British courts recognized that there was no generally effective judicial remedy against the Crown.[11] Of course, "[i]t bears remembering that the common law had nothing akin to modern public-law litigation, which holds the government accountable for broad constitutional violations."[12] With respect to contract, "Blackstone argued that contract actions against the King succeeded not as a matter of legal right but only because 'no wise prince will ever refuse to stand to a lawful contract.'"[13] Nor, according to Blackstone and Locke, was there liability in tort.[14]

As a consequence, "nearly all of the cases in which the Crown was amenable to suit involved 'real actions'—the branch of common law that dealt with rights in real property."[15] There were special reasons to permit these real action suits: Before the abolition of the last incidents of feudal tenure in 1660, the Crown had an interest in these real actions, "for otherwise it might be impossible to determine proper feudal relationships."[16] So many limitations were placed on the suits, however, that they essentially amounted to suits by consent.[17]

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9. W.H. Burroughs, *Can States Be Compelled To Pay Their Debts?*, 3 VA. L.J. 129, 136 (1879).

10. SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 827 (1965) ("Roosevelt . . . announced as a 'corollary' to the Monroe Doctrine that, since we could not permit European nations forcibly to collect debts in the Americas, we must ourselves assume the responsibility of seeing that 'backward' states fulfilled their financial obligations.").

11. Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1236–38 (2009).

12. *Id.* at 1238 n.252.

13. *Id*. at 1214 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *230–70).

14. *Id*. at 1214–15.

15. *Id*. at 1215.

16. *Id.*

17. *Id.* at 1213–14.

Also, the "more generally useful remedy" in real actions—the petition of right[18]—in fact required consent.[19]

Although the *monstrans de droit*[20] did not technically require consent, it was subject to tacit consent because the Crown could always abate it through the writ of *rege inconsulto*.[21] In the course of the seventeenth and eighteenth centuries, Parliament acquired complete control over state finances through the appropriation power.[22] It also put the Crown on a legally, or at least practically, inalienable allowance.[23] These developments led Lord Mansfield to conclude that money judgments against the king could have no practical benefit.[24] Although he recognized that the House of Lords had ruled in 1700 in the *Bankers' Case* that suit could be brought to enforce annuities backed by the king's private revenue, Mansfield also observed that the ruling had done the bankers no good.[25] The only satisfaction they ever received was by way of parliamentary appropriation.[26]

C. State Sovereign Immunity and the Constitution

There has never been any doubt that the States continued to enjoy law of nations sovereign immunity under the Articles of Confederation.[27] Anti-Federalists worried that this immunity might not survive ratification.[28] Other Founders, however, gave assurances that the States would retain their immunity under the new Constitution. Alexander Hamilton observed in *Federalist* No. 81 that "[i]t is inherent in the na-

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18. "The petition of right asked the Crown to submit itself to the laws applied to private persons." *Id.* at 1213.

19. *Id.* at 1214.

20. "[A] method[] for determining the crown's interests in property held in feudal obligation." *Id.* at 1213 n.32.

21. *Id. See* BLACK'S LAW DICTIONARY 1395 (9th ed. 2009) ("A writ issued by a sovereign directing one or more judges not to proceed, until advised to do so, in a case that might prejudice the Crown.").

22. Figley & Tidmarsh, *supra* note 11, at 1227–29.

23. *Id.* at 1235–36.

24. Macbeath v. Haldimand, (1786) 99 Eng. Rep. 1036, 1038 (K.B.).

25. *See id.*

26. Figley & Tidmarsh, *supra* note 11, at 1235, 1237.

27. Nelson, *supra* note 7, at 1577–79.

28. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 264–69 (1985) (Brennan, J., dissenting).

ture of sovereignty not to be amenable to the suit of an individual *without its consent*."[29] At the Virginia ratifying convention, James Madison argued that Article III would not operate against a state unless it "should condescend to be a party."[30] In this he was supported by John Marshall: "It is not rational to suppose that the sovereign power should be dragged before a court."[31]

The Anti-Federalists were initially better at prognostication. In 1793, the Supreme Court "announce[d] the principle, that a State is not sovereign as to the debts she may contract."[32] At the next session of Congress, the Eleventh Amendment was adopted.[33] The Eleventh Amendment is the reason that citizens of a state cannot sue that state in federal court.[34] Although by its terms the Amendment bars only suits by certain individuals named in the Amendment, "the Eleventh Amendment does not define the scope of the States' sovereign immunity," and instead "is but one particular exemplification of that immunity."[35]

There is, of course, the *Ex Parte Young*[36] exception to state sovereign immunity and to the Eleventh Amendment. This exception is limited to claims for prospective injunctive relief for purely federal rights[37] and is therefore protective of the state fisc.[38] Attempts to use the exception to enforce an executory contract have been explicitly rejected.[39] And although a state can sue another state over defaulted bonds,[40] a

29. Alden v. Maine, 527 U.S. 706, 716 (1999) (citation omitted).

30. *Id.* at 717 (citation omitted).

31. *Id.* at 718 (citation omitted).

32. Burroughs, *supra* note 9, at 131 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)).

33. *Id.*; *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

34. Hans v. Louisiana, 134 U.S. 1, 10–11 (1890).

35. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002).

36. 209 U.S. 123 (1908).

37. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102–103 (1984) (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

38. *Id.* at 101 n.11; Land v. Dollar, 330 U.S. 731, 738 (1947).

39. Pennoyer v. McConnaughy, 140 U.S. 1, 9 (1891); Louisiana v. Jumel, 107 U.S. 711, 727–28 (1883).

40. South Dakota v. North Carolina, 192 U.S. 286, 314–16 (1904).

state may not evade the Eleventh Amendment by doing so on behalf of its citizens.[41]

Ex Parte Young's exception also applies to suits to enforce rights under federal spending statutes.[42] But state involvement in such programs has always been voluntary,[43] and the expense and "affront to state sovereignty"[44] can be avoided by the state refusing to participate.[45]

D. Suits Against a State in Its Own Courts

At common law, a state may be exposed to a money judgment in tort in its own courts only upon a waiver of sovereign immunity.[46] The Federal Tort Claims Act, upon which state equivalents are based, was not enacted until 1946 and is "subject to 13 enumerated exceptions."[47] States that waive tort immunity are similarly free to limit their exposure.[48]

It is unlikely that sovereign immunity ever barred contract actions against a state,[49] and even if it did, the act of contracting can be viewed as a waiver.[50] But a contract action against a state can

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41. New Hampshire v. Louisiana, 108 U.S. 76, 88–91 (1883).

42. Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) (allowing an independent state agency, which had been created by a federal spending statute, to sue state officers in their official capacities to obtain access to records).

43. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 479–80 (1923).

44. *Stewart*, 131 S. Ct. at 1645 (Kennedy, J., concurring).

45. *Cf.* South Dakota v. Dole, 483 U.S. 203, 210 (1987).

46. Alden v. Maine, 527 U.S. 706, 715–16 (1999).

47. Kosak v. United States, 465 U.S. 848, 851–52 (1984); *see also* 28 U.S.C. § 2680(a)–(n) (2006).

48. *See, e.g.*, Virginia Tort Claims Act, VA. CODE ANN. § 8.01-195.3. This limited waiver was enacted in 1981. 1981 Va. Acts 650–52. Subsequent amendments have resulted in the tort liability of the Commonwealth of Virginia being capped at $100,000. 1993 Va. Acts 575.

49. *See* Wiecking v. Allied Med. Supply Corp., 391 S.E.2d 258, 260 (Va. 1990) (noting that Virginia courts "have never extended [the sovereign immunity] defense to actions based upon valid contracts entered into by duly authorized agents of the government"). Rather, the Virginia General Assembly has statutorily enshrined, "since 1778, the 'cherished policy of Virginia' to allow to citizens 'the largest liberty of suit against herself' in contract cases." *Id.* at 261 (quoting Higginbotham's Ex'x v. Commonwealth, 66 Va. (25 Gratt.) 627, 637 (1874)).

50. *See* V.S. DiCarlo Constr. Co. v. Missouri, 485 S.W.2d 52, 54 (Mo. 1972) ("[W]hen the state enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses . . . .").

be hedged with notice requirements,[51] and payment of a judgment depends upon a general or specific appropriation.[52] This also would be true of liability for self-executing constitutional provisions, such as the prohibition on uncompensated takings.[53]

Subdivisions of a state are on a different footing. At the time of the Founding, English cities and towns were not units of government in the American sense but were instead corporations whose charters were subject to revocation through *quo warranto*.[54] The English common law rule that the property of the inhabitants of localities was available to satisfy judgments was accepted in New England.[55] A rule permitting a statutorily authorized court-ordered tax to satisfy a judgment mitigated this threat of direct levy on the property of inhabitants.[56] In 1960, however, it was

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51. VA. CODE ANN. §§ 2.2-814, 2.2-815; s*ee also* Mid-Atl. Bus. Commc'ns, Inc. v. Va. Dep't of Motor Vehicles, 606 S.E.2d 835, 836–37 (Va. 2005) (holding a claim against the Commonwealth barred for failure to file within six months of the public body's final decision denying the claim).

52. *See, e.g.*, *V.S. DiCarlo Constr. Co.*, 485 S.W.2d at 57; *Wiecking*, 391 S.E.2d at 261 ("[T]he legislature has the power to withhold appropriations to cover the state's obligations . . . .") (citations omitted).

53. *See* Kitchen v. City of Newport News, 657 S.E.2d 132, 140 (Va. 2008) (reiterating that the Virginia Constitution's prohibition of taking private property for public use without just compensation "'is self-executing and permits a property owner to enforce his constitutional right to just compensation in a common law action. . . . [S]uch an action . . . is a contract action and, therefore, is not barred by the doctrine of sovereign immunity.'"(quoting *Bell Atl.-Va., Inc. v. Arlington Cnty.*, 486 S.E.2d 297, 298 (Va. 1997))); *Wiecking*, 391 S.E.2d at 261 (noting, in the context of an action for breach of contract against the Commonwealth, that "the legislature has the power to withhold appropriations to cover the state's obligations," but that this "safeguard[] . . . affect[s] only the remedy, not the validity of the obligation on which the claim is based").

54. JOHN MILLER, JAMES II 113 (Yale Univ. Press 3d ed. 2000) (London's charter was declared forfeit on "legal pretexts" after "[t]he City's Whig sheriffs returned juries which acquitted Shaftesbury and other leading Whigs"). American law still recognizes a state's absolute power over its political subdivisions. *See* City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539, 549 (1905) ("[A] municipal corporation is not only a part of the State but is . . .'one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence." (quoting United States v. R.R. Co., 84 U.S. 322, 329 (1872)).

55. *See* Nichols v. City of Ansonia, 70 A. 636, 638–39 (Conn. 1908); *see also* D. Bruce La Pierre, *Enforcement of Judgments Against States and Local Governments: Judicial Control over the Power to Tax*, 61 GEO. WASH. L. REV. 299, 305–06, 384–92 (1993).

56. La Pierre, *supra* note 55, at 394–401.

highly unlikely that anyone would have thought that the judicial power to order a tax to satisfy a judgment in the absence of state authorization would run against a state itself.[57]

In 1960, there was little concern that mandatory defined-benefit state pension plans created vested rights to benefits that could not be lawfully reduced because public pension plans were regarded as gratuities, not contracts.[58] As a consequence, "a pension granted by the public authorities [was] not a contractual obligation, but a gratuitous allowance, in the continuance of which the pensioner has no vested right."[59] This rule had an exception: "voluntary plans were deemed to create vested rights while compulsory participation meant no vested interest accrued."[60]

In 1960, educational funding equality cases lay entirely in the future.[61] In contrast, bondholders had considerable historical data to evaluate. There have been three waves of state bond default in American history. In "the financial panic of 1837, four states—Mississippi, Arkansas, Florida, and Michigan—repudiated state debts owned largely by foreign investors."[62] In resulting court challenges, "the defaults were largely upheld either because a court determined that the loans had been contracted without the proper authority of the state, or because the Eleventh Amendment protected states from lawsuits brought in federal court."[63] Post-war repudiation by former confederate states of war debts was actually constitutionally mandated.[64] Following Reconstruction,

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57. Rees v. City of Watertown, 86 U.S. 107, 116–17 (1873) (judiciary lacks power to levy a tax for repayment of state bonds); s*ee also* Missouri v. Jenkins, 495 U.S. 33, 65–75 (1990) (Kennedy, J., concurring in part and concurring in the judgment) (collecting cases demonstrating that absent state authorization federal courts lack power to impose a tax as a remedy.).

58. *See, e.g.*, Pennie v. Reis, 132 U.S. 464, 471 (1889); Ballurio v. Castellini, 102 A.2d 662, 666 (N.J. Super. Ct. App. Div. 1954).

59. Annotation, *Vested Right of Pensioner to Pension*, 54 A.L.R. 943 (1928).

60. Pineman v. Oechslin, 488 A.2d 803, 808 (Conn. 1985) (citing R.D. Hursh, Annotation, *Vested Right of Pensioner to Pension*, 52 A.L.R. 2d 437, 441–43 (1957)).

61. Lundberg, *supra* note 5, at 1107 n.32.

62. Ludington et al., *supra* note 6, at 269–70.

63. *Id*. at 270 (internal citations omitted); *see also* Principality of Monaco v. Mississippi, 292 U.S. 313, 330–31 (1934) (holding that the Supreme Court has no jurisdiction to hear a case brought by a foreign state against one of the United States without that state's consent).

64. U.S. CONST. amend. XIV, § 4; s*ee also* Hanauer v. Doane, 79 U.S. 342 (1870) (notes issued in aid of the rebellion void); Texas v. White, 74 U.S. 700, 739–41

"[e]ight southern states engaged in large-scale repudiation or scaling down of their Reconstruction-era debt."[65]

Overall, the repudiating states met "with significant, but not complete, success."[66] The bondholders who sued North Carolina in state court lost because state law had never provided a coercive remedy for bondholders.[67] The bondholder in *South Dakota v. North Carolina* fared no better from a personal standpoint, even though South Dakota was permitted to bring an original action against North Carolina in the Supreme Court, because the individual bond holder had given the bonds "outright and absolutely to the State" of South Dakota.[68] Because the Eleventh Amendment does not apply to municipalities, and most other subdivisions of the state,[69] the holders of city bonds in *Louisiana v. Pilsbury*[70] fared far better than the holders of state bonds. In *Pilsbury*, the Court required New Orleans to pay its bondholders by levying an annual tax.[71] The Court went so far as to strike down a state law that would have prohibited the city from levying the necessary tax, using the robust impairment of contracts doctrine prevailing at the time.[72] "Justice Field, writing for the Court, warned of the 'leprosy of repudiation'" before issuing a writ of mandamus to city personnel to levy the tax.[73]

(1869) (Texas can repudiate its confederate government's sale of U.S. bonds because they were actions taken in furtherance of the rebellion against the United States). *But see* Keith v. Clark, 97 U.S. 454, 465–66 (1878) (notes not shown to have been issued in aid of the rebellion still valid).

65. Ludington et al., *supra* note 6, at 276.

66. *Id.* at 278.

67. *See* Baltzer v. North Carolina, 161 U.S. 240, 245–46 (1896).

68. 192 U.S. 286, 310 (1904); *see also* Ludington et al., *supra* note 6, at 278 ("South Dakota's success in court prompted North Carolina to settle with individuals for a fraction of the value of the bonds.").

69. Jinks v. Richland Cnty., 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.").

70. 105 U.S. 278, 300 (1882).

71. *See id.* at 300.

72. *Id.* at 297–301.

73. Ludington et al., *supra* note 6, at 278 (quoting *Pilsbury*, 105 U.S. at 300).

II. JUDICIAL COERCION AND THE FISC AFTER 1960

A. Protection of Public Pensions

By 1998:

> all states had defined benefit plans as their primary pension plans for their general state workers except for Michigan and Nebraska (and the District of Columbia), which had defined contribution plans as their primary plans, and Indiana, which combined both defined benefit and defined contribution components in its primary plan.[74]

Over the next ten years, "only one additional state (Alaska) had adopted a defined contribution plan as its primary plan; one additional state (Oregon) had adopted a combined plan, and Nebraska had replaced its defined contribution plan with a cash balance defined benefit plan."[75] The ubiquity of defined benefit public pensions is noteworthy because of the protections now afforded these interests and the degree to which they are underfunded. "In nine states, constitutional provisions" contain "a specific guarantee of the right to a benefit."[76] Such "protections usually apply to benefits for existing workers or benefits that have already accrued; thus, state and local governments generally can change the benefits for new hires by creating a series of new tiers or plans that apply to employees hired only after the date of the change."[77] It is widely thought that "a funded ratio of about 80 percent or better [is] sound for state and local government pensions."[78] Although "most plans' funding may be sound, a few plans have persistently reported low funded ratios, which will eventually require the government employer to improve funding, for example, by reducing benefits or by increasing contributions."[79] In the face of unfunded liabilities that might exceed $3 trillion, "[i]n 2010 alone, over 20 states introduced or

74. BARBARA D. BOVBJERG, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-983T, STATE AND LOCAL GOVERNMENT PENSION PLANS: CURRENT STRUCTURE AND FUNDED STATUS 8 (2008), *available at* http://www.gao.gov/new.items/d08983t.pdf.

75. *Id.*

76. *Id.* at 13.

77. *Id.* at 14.

78. *Id.* at 18.

79. *Id.*

passed legislation aimed to reduce or otherwise modify pension plan benefits for current or future retirees."[80] Whether such legislation is invalid under the impairment of contract or takings clauses of state constitutions will depend on whether and to what extent benefits are contractual or otherwise legally vested.[81]

States that adhere to the view that pensions are mere gratuities are at low risk for litigation.[82] The six states that "have a constitutional provision that, in general, explicitly provides that membership in, or accrued benefits from, a state's retirement system creates a contract between the state and its employees that cannot be impaired"[83] are at high risk for litigation

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80. STAMAN, *supra* note 3, at 1.

81. *Id.* at 5–8. The Employee Retirement Income Security Act (ERISA) sensibly recognizes that plans might fail and provides for reduced payments from the employing entity. Public pensions are not covered by ERISA in any relevant way. *See id.* at 2.

82. *See* Robinson v. Taylor, 29 S.W.3d 691, 694 (Ark. 2000) (finding noncontributory pension benefits mere gratuities); Haverstock v. State Pub. Emp. Ret. Fund, 490 N.E.2d 357, 360–61 (Ind. Ct. App. 1986) (same); *see also* Spina v. Consol. Police and Fireman's Pension Fund Comm'n, 197 A.2d 169, 174–76 (N.J. 1964) (finding pension not a gratuity but not a contract because solvency not guaranteed); Davis v. Wilson Cnty., 70 S.W.3d 724, 728 (Tenn. 2002) (concluding that health care benefits amount to welfare benefits terminable at any time).

83. STAMAN, *supra* note 3, at 5. *See* ALASKA CONST. art. XII, § 7 ("Membership in employee retirement systems of the state or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired."); ARIZ. CONST. art. XXIX, § 1(C) ("Membership in a public retirement system is a contractual relationship that is subject to article II, section 25 [impairment of contracts], and public retirement system benefits shall not be diminished or impaired."); HAW. CONST., art. XVI, § 2 ("Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."); ILL. CONST. art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."); MICH. CONST. art. IX, § 24 ("The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."); N.Y. CONST., art. V, § 7 ("After July first, nineteen hundred forty, membership in any pension or retirement system of the state or a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."); *see also* Duncan v. Retired Pub. Emps. of Alaska, Inc., 71 P.3d 882, 886–88 (Alaska 2003) (concluding state constitution vests property right in employees at time of employment, and this property right encompasses all retirement benefits in the package, including health insurance); Di Falco v. Bd. of Trs. of Firemen's Pension Fund, 521 N.E.2d 923, 925 (Ill. 1988) (concluding relationship governed by terms of pension at time employee

when they attempt to change these programs. The same is true of New Mexico because its constitution provides that:

> [u]pon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.[84]

Some states recognize a contractual relationship capable of giving rise to impairment of contract protection. These states include Georgia,[85] Kentucky,[86] Maryland,[87] Minnesota,[88] Montana,[89] Nebraska,[90] New Hampshire,[91] North Carolina,[92] Oklahoma,[93] Oregon,[94] Rhode Island,[95] South Carolina,[96] South Dakota,[97] Utah,[98] Vermont,[99] and Wisconsin.[100] Other states provide fairly robust

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entered system); McDermott v. Regan, 624 N.E.2d 985, 987 (N.Y. 1993) (concluding reduction of state contribution violated New York Constitution).

84. N.M. CONST. art. XX, § 22(D).

85. *See* Swann v. Bd. of Trs. of Joint Mun. Emps.' Benefit Sys., 360 S.E.2d 395, 398 (Ga. 1987); Withers v. Register, 269 S.E.2d 431, 432 (Ga. 1980).

86. *See* Jones v. Bd. of Trs. of Ky. Ret. Sys., 910 S.W.2d 710, 713 (Ky. 1995) ("inviolable contract").

87. *See* Davis v. Mayor of Annapolis, 635 A.2d 36, 40 (Md. Ct. Spec. App. 1994).

88. *See* Hous. & Redevelopment Auth. v. Norman, 696 N.W.2d 329, 337 (Minn. 2005).

89. *See* Baumgardner v. Pub. Emps.' Ret. Bd., 119 P.3d 77, 80 (Mont. 2005).

90. *See* Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995).

91. *See* Gilman v. County of Cheshire, 493 A.2d 485, 487–88 (N.H. 1985).

92. *See* Simpson v. N.C. Local Gov't Emps.' Ret. Sys., 363 S.E.2d 90, 93 (N.C. Ct. App. 1987), *aff'd*, 372 S.E.2d 559 (N.C. 1988) (per curiam).

93. *See* Taylor v. State Educ. Emps. Grp. Ins. Program, 897 P.2d 275, 278–79 (Okla. 1995).

94. *See* Strunk v. Pub. Emps. Ret. Bd., 108 P.3d 1058, 1064 (Or. 2005); Or. Police Officers' Ass'n v. State, 918 P.2d 765, 775–76 (Or. 1996).

95. *See* Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203 (R.I. 1999).

96. *See* Layman v. State, 630 S.E.2d 265, 267 (S.C. 2006).

97. *See* Tait v. Freeman, 57 N.W.2d 520, 522 (S.D. 1953).

98. *See* Newcomb v. Ogden City Pub. Sch. Teachers' Ret. Comm'n, 243 P.2d 941, 948 (Utah 1952).

99. *See* Burlington Firefighters' Ass'n v. City of Burlington, 543 A.2d 686, 689 (Vt. 1988).

100. *See* WIS. STAT. § 40.19(1) (2009–10) ("Rights exercised and benefits accrued . . . shall be due as a contractual right and shall not be abrogated by any subsequent legislative act.").

pension protection on other formulations.[101] Of course, if a state's high court views contractual or statutory rights as accruing only upon entitlement to retire, the state will maintain substantial authority with respect to all other participants. In Alabama, there is contractual protection for vested benefits in favor of those eligible to retire.[102] Similar rules are found in Delaware,[103] Florida,[104] Iowa,[105] Nevada,[106] North Dakota,[107] Ohio,[108] Tennessee,[109] Texas,[110] and Virginia.[111] In Colorado, partially vested pension rights may be adjusted in certain circumstances,[112] and similar rules exist in Maryland[113] and Washington.[114]

The authors uncovered reports of public pension litigation ongoing this year in Colorado, Minnesota, and South Dakota.[115]

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101. *See* Spiller v. State, 627 A.2d 513, 516–17, 517 n.12 (Me. 1993) (refusing to imply contractual rights but stating that legitimate retirement expectations may be protected by due process); Opinion of the Justices, 303 N.E.2d 320, 328 (Mass. 1973) (holding that the "core of [an employee's] reasonable expectations" is protected); Dadisman v. Moore, 384 S.E.2d 816, 829 (W. Va. 1988) (holding that payment of public pension benefits is a contractual and moral obligation of the state); Peterson v. Sweetwater Cnty. Sch. Dist. No. One, 929 P.2d 525, 530–31 (Wyo. 1996) ("[L]egitimate retirement expectations may constitute property rights that may not be deprived without due process of law."); *see also* Gutierrez v. Bd. of Ret., 72 Cal. Rptr. 2d 837, 838–39 (Cal Ct. App. 1998) (noting that public pension rights are governed by statute not contract principles).

102. *See* Bd. of Trs. of Policemen's & Firemen's Ret. Fund v. Cary, 373 So. 2d 841, 842 (Ala. 1979).

103. *See In re* State Emps.' Pension Plan, 364 A.2d 1228, 1235 (Del. 1976).

104. *See* O'Connell v. State Dep't. of Admin., 557 So. 2d 609, 610–11 (Fla. Dist. Ct. App. 1990).

105. *See* Nelson v. Bd. of Dirs. of Ind. Sch. Dist. of Sioux City, 70 N.W.2d 555, 559 (Iowa 1955).

106. *See* Nicholas v. State, 992 P.2d 262, 264–65 (Nev. 2000).

107. *See* Quam v. City of Fargo, 43 N.W.2d 292, 297 (N.D. 1950); Payne v. Bd. of Trs. of Teachers' Ins. & Ret. Fund, 35 N.W.2d 553, 556–57 (N.D. 1948).

108. *See* State *ex rel.* Horvath v. State Teachers Ret. Bd., 697 N.E.2d 644, 654 (Ohio 1998).

109. *See* Blackwell v. Quarterly Cnty. Ct., 622 S.W.2d 535, 543 (Tenn. 1981).

110. *See* TEX. CONST. art. XVI, § 66(d).

111. *See* Pitts v. City of Richmond, 366 S.E.2d 56, 58 (Va. 1988).

112. *See* Peterson v. Fire & Police Pension Ass'n, 759 P.2d 720, 724–25 (Colo. 1988).

113. *See* City of Frederick v. Quinn, 371 A.2d 724, 726–27 (Md. Ct. Spec. App. 1977).

114. *See* Bakenhus v. City of Seattle, 296 P.2d 536, 540 (Wash. 1956).

115. *See* Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 276 (2011).

As a practical matter, for plaintiffs to prevail in such suits they will have to demonstrate a violation of the federal or state impairment of contract clauses. At the federal level there is a three-part test to determine Contract Clause violations: "(1) whether there is a contractual obligation; (2) if a contract exists, whether the legislation imposes a 'substantial impairment'; and (3) if there is an impairment, whether the legislation is 'reasonable and necessary to serve an important public purpose.'"[116] Resolution of such claims will necessarily be fact-specific. One factor militating in favor of challengers is that the state is entitled to less deference in the question of reasonableness and necessity, the third prong, when it exercises its sovereign power in a manner that benefits itself.[117] On the other hand, the Supreme Court has turned aside an impairment claim when, in the absence of a modification, the impaired obligations "represented only theoretical rights" because the obligor "city could not raise its taxes enough to pay off its credits under the old contract terms."[118] In those circumstances, the contract claim itself becomes circular. "'The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired.'"[119]

B. General Welfare Obligations

Although there is no well-developed theory that would prevent modification of general welfare obligations,[120] attempts to reduce welfare costs have resulted in declarations of unconstitutionality under state constitutions.[121] Because most broad

116. Whitney Cloud, Comment, *State Pension Deficits, the Recession, and a Modern View of the Contracts Clause*, 120 YALE L.J. 2199, 2204 (2011) (quoting U.S. Trust Co. v. New Jersey, 431 U.S. 1, 22–27 (1977)).

117. U.S. Trust Co., 431 U.S. at 25–26.

118. *Id.* at 28 (citing Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 509–10 (1942)).

119. *Id.* (quoting *Faitoute Iron*, 316 U.S. at 511).

120. *See generally* William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543 (1998).

121. Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1314 (Mont. 1986), *superseded by constitutional amendment*, MONT. CONST. art. XII, § 3(3), *as recognized in* Zempel v. Uninsured Emp'rs. Fund, 938 P.2d 658, 661–62 (Mont. 1997); Tucker v. Toia, 371 N.E.2d 449, 449, 452 (N.Y. 1977).

welfare entitlements are contained within federal-state partnerships forged through federal Taxing and Spending Clause enactments,[122] it is likely that coercion claims like those advanced by the twenty-six states in the Florida healthcare litigation[123] also will be developed in other contexts. The Supreme Court has left open the possibility "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" and so violate the limits on federal power.[124] Were states unable to fund entitlement programs at federally mandated levels, that standard might become more salient than it is currently.

C. Educational Equality

In 1977, Justice Brennan famously noted that state courts of last resort could find rights in their own constitutions in excess of those emanating from the United States Constitution.[125] Four years earlier, the Supreme Court ruled that the Constitution does not require equal funding in public elementary education.[126] Because at least forty-eight states have "some provision regarding the state's duty to educate,"[127] Justice Brennan's counsel seemed promising to equal educational funding litigants. As of 2000, "[h]igh courts in forty-one states have considered the issue—seventeen courts finding state school funding systems unconstitutional, and twenty-four courts declining to make this ruling."[128] Since 2000, two other state high courts have declined to find the

122. *See, e.g.*, Rava, *supra* note 120, at 545 (describing 1996 welfare reform).

123. *See* Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1263–68 (11th Cir. 2011).

124. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

125. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 499 (1977).

126. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) ("[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.").

127. Lundberg, *supra* note 5, at 1107.

128. *Id.* at 1101.

state's school funding system unconstitutional.[129] Although an era of austerity will make funding decisions more complicated in jurisdictions mandating funding equality, the basic legal landscape is unlikely to change significantly.

D. The Outlook for Bondholders

In the last half century, state constitutional limits on debt instruments "have been disfavored by state courts, who frequently read the fiscal provisions narrowly, technically, and formalistically—often more like bond indentures than statements of important constitutional norms."[130] States have evaded debt limits and referenda requirements by issuing instruments that do not pledge the full faith and credit of the issuing jurisdiction. This trend has led to the point that "most state and local borrowing does not involve general obligation debt, but instead uses non-debt debts that avoid the pledge of full faith and credit . . . ."[131] This practice initially was criticized as a subterfuge because it was thought that an issuing jurisdiction would always act as though its full faith and credit were engaged to preserve its credit.[132] In an age of austerity there are, however, real dangers of default from these arrangements. Because Chapter 9 of the Bankruptcy Code applies broadly to political subdivisions of a state (where the state has consented),[133] bankruptcy reorganization is an additional danger.

CONCLUSION

Public sector pensions will be the litigation flashpoint in this cycle of austerity. Attempts to change the benefits of the retired, those qualified to retire, and voluntary participants in contributory programs probably would not be worth the effort. In states

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129. Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 518 (Ind. 2009); Davis v. State, 804 N.W.2d 618, 641 (S.D. 2011).

130. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910 (2003).

131. *Id*. at 918.

132. *See, e.g.*, *id.* at 926–27; *see also* Dykes v. N. Va. Transp. Dist. Comm'n, 411 S.E.2d 1, 11 (Va. 1991) (Stephenson, J., dissenting) ("Is anyone so naive that they truly believe that the County, in reality, is not compelled to make annual appropriations until the bonds are retired? . . . [Otherwise,] the County's credit would be seriously impaired, if not destroyed.").

133. Pub. L. No. 302, 50 Stat. 653 (1937) (as amended).

that postpone contractual protection until retirement eligibility, the legislature has a relatively free hand. The legislatures in all states have great discretion in altering benefits prospectively for those to be newly hired. The greatest controversy will be found in states that protect benefits from first hire or at first partial vesting. Changes in these situations could be sustained upon a showing of financial necessity to preserve the program at all. Refusal by the courts to accord some deference to a legislative finding of necessity would be problematic. If the question were deemed one to be resolved through a weighing of evidentiary fact, as opposed to deference to legislative facts, there would be a significant danger that overly favorable economic assumptions will be used to protect insolvent programs from reform until it is too late to save them.

Ultimately, in economically challenging times, people often turn to litigation in an attempt to improve their own financial circumstances relative to others. As many states face down budget problems, state attorneys general should expect an increase in claims such as those described above, as litigants become more creative in their efforts to establish a preference for their claims on the public fisc. Whether the courts will generally follow the historical patterns described above or will revisit these issues in light of this latest age of austerity remains to be seen.