THE EMINENT DOMAIN PATH OUT OF A PUBLIC PENSION CRISIS

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INTRODUCTION

The longstanding social compact that promised generous post-retirement benefits to government workers[1] in exchange for spending their careers in public service[2] is now being tested. In many cities and states today, the cost of public pension funds comprise a rapidly increasing share of government spending,[3] and policy makers are facing difficult choices about how to allocate resources. The pension benefits themselves, however, are almost completely insulated from these difficult decisions, due to legal protections that exist in most states.[4] The

1 In the 1850s "several large cities began providing disability and retirement benefits to employees in their police and fire departments," and "some cities also provided benefits to teachers and other employees." ROBERT L. CLARK, LEE A. CRAIG & JACK W. WILSON, A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 4 (2003), http://www.pensionresearchcouncil.org/publications/pdf/0-8122-3714-5-1.pdf.

2 *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 17050 (2014) (stating that the intent of the Maine legislature in establishing that state's retirement system was "to encourage qualified persons to seek public employment and to continue in public employment during their productive years"); Klamm v. State *ex rel.* Carlson, 126 N.E.2d 487, 489 (Ind. 1955) (noting that the purpose of a pension is "to induce long continued service [and] to hold out to those who adopt such service as a career some assurance of income upon retirement because of age or disability," and that "[t]his in expectation that more competent persons will be attracted to such positions"); Bailey v. State, 500 S.E.2d 54, 65 (N.C. 1998) (noting that a pension benefit "was a significant difference between governmental and comparable private employment that helped attract and keep quality public servants").

3 *See* Mark Peters, *Pension Pinch Busts City Budgets*, WALL ST. J. (Nov. 5, 2013, 6:05 PM), http://www.wsj.com/articles/SB10001424052702303471004579163602529729442. As a national average, by contrast, state and local expenditures on public pensions have remained relatively constant in proportion to total expenditures. *See* NAT'L ASS'N OF STATE RET. ADM'RS, NASRA ISSUE BRIEF: STATE AND LOCAL GOVERNMENT SPENDING ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS 1–2 (2015), http://www.nasra.org/files/Issue%20Briefs/NASRACostsBrief.pdf.

4 *See infra* Part II (discussing state constraints on pension reforms). Note that the Employee Retiree Income Security Act of 1974 (ERISA), which regulates retirement benefits promised by private employers, is expressly inapplicable to public pension plans. 29 U.S.C. § 1003(b)(1) (2012) ("The provisions of this subchapter shall not apply to any employee benefit plan if[] (1) such plan is a governmental plan . . . ."); *see also* 29 U.S.C. § 1002(32) (2012) (defining "governmental plan" for ERISA purposes).

effect is that unimpaired pension spending is prioritized over nearly all other public expenditures, up to and including public safety and social services.[5] As those governments facing especially dire crises have sought alternatives to their current pension schemes, the legal protections have posed near-total roadblocks to reform.[6]

The Takings Clause,[7] typically invoked by pension reform opponents,[8] may in fact be a tool that a government could use to clear a path out of the crisis under appropriate circumstances.[9] Most of the case law and scholarship related to the Takings Clause in the public pensions context explores whether and when a reduction or termination of pension benefits is a taking—presuming that an affirmative finding would effectively preclude the government-employer from implementing the policy reform as a result of its inability or disinclination to pay just compensation.[10] This Note presumes the opposite, and considers whether and how a government could clear a path to reform by proactively asserting its eminent domain power against the pensions promised to its current employees,[11] in exchange for just compensation.

To be clear, this Note does not attempt to identify specific states or localities where conditions are presently such that eminent domain is a proper remedy. Rather, it plumbs the reaches of that power proceeding

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5 *See infra* notes 13–16 and accompanying text.

6 *See infra* notes 103–11, 117 and accompanying text.

7 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The Takings Clause applies to the states via the Fourteenth Amendment. U.S. CONST. amend. XIV; Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233–34 (1897).

8 *See infra* note 10.

9 This Note is not alone in suggesting use of the Takings Clause against financial instruments as a path out of a fiscal crisis: after the subprime mortgage crisis in 2008, scholars, advocates, and policy makers argued that cities should "exercis[e] their eminent domain authority to purchase, then write-down principal on, otherwise unmodifiable home mortgage loans facing foreclosure." Robert Hockett, *"We Don't Follow, We Lead": How New York City Will Save Mortgage Loans by Condemning Them*, 124 YALE L.J. F. 131 (2014). In several important respects, a taking of home mortgage loans would present the same legal issues as a taking in the context of public pensions.

10 *See, e.g.*, Cherry v. Mayor & City Council, 762 F.3d 366, 369 (4th Cir. 2014) (public workers challenging pension reform scheme as an unconstitutional taking); Justus v. State, 336 P.3d 202, 207 (Colo. 2014) (en banc) (same); Scott v. Williams, 107 So. 3d 379, 384 (Fla. 2013) (same); Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 63–67 (2013) (analyzing the Takings Clause as a constraint on pension reform); Gavin Reinke, Note, *When a Promise Isn't a Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees*, 64 VAND. L. REV. 1673, 1692 (2011) (highlighting challenges to pension reforms under the Takings Clause).

11 The focus is necessarily confined to current employees because the just compensation a government would have to pay to retirees if it were to condemn their pensions would equal the amount already owed under the pension plan, inuring no benefit to the state or locality. *See infra* note 151.

upon two assumptions: that such conditions may now or soon exist in one of the great many states and localities grappling with its pension obligations; and that pension promises made to current public workers are neither dispensable nor a suicide pact.[12] More specifically, this Note argues that use of the eminent domain power would allow a government in serious financial distress to restructure its pension obligations to current workers by effectively freezing its obligations to those workers under the existing plan, and permitting it to substitute a different plan going forward, which would satisfy the constitutional requirement of just compensation.

This Note will proceed in four parts. Part I of this Note frames the problem by considering the causes and effects of the current pension issue, as well as several of the alternative solutions a city or state might look to before or alongside eminent domain. Part II examines how states characterize the right held by current workers to their future pension. Part III analyzes how states define and limit the takings power as a matter of state constitutional law, and how that power might be expected to interact with the pension rights examined in Part II. Part IV proposes that a government may exert its eminent domain power against the pension benefits promised to its current workers, with just compensation paid as a combination of continuing obligations under the existing plan, plus the benefits of a new retirement plan with value on the market going forward.

I. BACKGROUND

A. *The Stakes*

For a state or municipality that cannot pay its debts, the stakes could hardly be higher. Basic government functions deteriorate, up to and including public safety,[13] infrastructure maintenance,[14] and

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12 *Cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[T]he Constitution . . . is not a suicide pact.").

13 The average "priority one [police] response time" is just under an hour in Detroit, and firefighters there are cautioned against using their trucks' hydraulic ladders because they have "not received safety inspections 'for years.'" *In re* City of Detroit, 504 B.R. 97, 120 (Bankr. E.D. Mich. 2013). When Jefferson County, Alabama could not afford to pay its prison guards, the president of its legislature "floated the idea of freeing several hundred inmates." Mary Williams Walsh, *When a County Runs Off the Cliff*, N.Y. TIMES, Feb. 19, 2012, at BU1, http://www.nytimes.com/2012/02/19/business/jefferson-county-ala-falls-off-the-bankruptcy-cliff.html.

14 Before Stockton, California, entered bankruptcy proceedings, City Hall itself was seized by its mortgager after the city was unable to make its payments on the building. Maneeza Iqbal, *New Stockton City Hall Building Seized by Wells Fargo; City Preps Bankruptcy Contingency*

provision of social services.[15] Major public institutions, once great sources of pride and learning, become unaffordable luxuries.[16]

Much current scholarship and commentary focuses on the pension problem as a leading cause to be worried that governments may become unable to pay their bills,[17] and there are several reasons why that focus is warranted. Broadly, these reasons include: (1) the ballooning nature of the pension problem; (2) the political context in which key pension management decisions take place; (3) the legal roadblocks to addressing the challenges; and (4) the sheer scale of the problem.

The first reason underscores how the pension problem is not just big, but ballooning, making it a particularly challenging—and critical—problem to address. The revenue for a government pension system comes from three sources: employee contributions, government-employer contributions, and returns on fund investments.[18] A pension

Plan, NEWS10/KXTV (May 30, 2012, 10:18 PM), http://archive.news10.net/rss/article/195090/2/Stockton-preps-bankruptcy-contingency-plan. Jefferson County, Alabama, closed four of its courthouses. Barnett Wright, *Jefferson County to Close 4 Satellite Courthouses Beginning April 22*, BIRMINGHAM NEWS (April 13, 2011, 6:30 AM), http://blog.al.com/spotnews/2011/04/jefferson_county_to_close_4_sa.html. Shortly before the city of Vallejo, California emerged from bankruptcy, the city manager asked rhetorically: "Do you know that some cities actually pave their streets?" Michael Lewis, *California* and *Bust*, VANITY FAIR, Nov. 2011 (quoting the Vallejo city manager), http://www.vanityfair.com/business/features/2011/11/michael-lewis-201111.

15 After cutting funding for early childhood education for the fifth consecutive year, Illinois' Assistant Budget Director said, "[t]he budget cuts are largely driven by the pension problems . . . . It's a real fight to maintain funding for these programs." Lewis Wallace, *Chicago Community Groups Protest Child Care Cuts*, WBEZ (May 14, 2013), http://www.wbez.org/news/chicago-community-groups-protest-child-care-cuts-107161. Advocates for social services in Illinois also credited the state's pension crisis as a reason for cuts to services including emergency and transitional housing, homeless prevention, homeless youth, senior care, and certain Medicaid benefits. Suzanne Hanney, *Counting Down to Illinois Pension Reform: Senior Services and Supportive Housing Fight for Their Share*, STREETWISE (Apr. 10, 2013) (quoting the chair of the state assembly's Human Service Appropriations Committee, and the policy director of Housing Action Illinois), http://streetwise.org/2013/04/counting-down-to-illinois-pension-reform-senior-services-and-supportive-housing-fight-for-their-share.

16 *See, e.g.*, Beermann, *supra* note 10, at 84 ("[California], which once boasted of the most comprehensive and inexpensive higher education systems in the nation, is now finding it impossible, for example, to continue to offer sufficient community college slots for all students."); Randy Kennedy, *Fate of Detroit's Art Hangs in the Balance*, N.Y. TIMES, Dec. 4, 2013, at A20, http://www.nytimes.com/2013/12/04/us/fate-of-detroits-art-hangs-in-the-balance.html (reporting on the debate about a possible sale of works from the Detroit Institute of Arts to satisfy the city's creditor claims). Notably, the Detroit art collection ended up as the "linchpin" supporting the "grand bargain" that recently brought the city out of bankruptcy proceedings. Matthew Dolan, *In Detroit Bankruptcy, Art Was Key to the Deal*, WALL ST. J. (Nov. 7, 2014, 7:09 PM), http://www.wsj.com/articles/in-detroit-bankruptcy-art-was-key-to-the-deal-1415384308. While the bargain was rightfully celebrated, the art collection will be unavailable for a repeat performance if Detroit's financial problems persist.

17 *See* Beermann, *supra* note 10, at 10–16 (highlighting competing views of the scale of the pension crisis).

18 *See, e.g.*, PEW CTR. ON THE STATES, THE WIDENING GAP UPDATE 4 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/

system is underfunded when a state or local government has promised pension benefits to its workers that exceed the funding to meet those obligations.[19] Governments are able to underfund their pension systems,[20] and do so either intentionally or due to unrealistic assumptions concerning investment performance and the amount that will be owed over time.[21] When public workers retire and begin collecting their pension benefits, the local or state government is obligated to make up the difference if the pension system deficit is too large.[22]

So while the employee's contribution remains constant, the other two sources of pension fund revenue are essentially tied to each other: that is, the less a pension fund accumulates through investments, the more a government must contribute to make up the difference to the employee after she retires. And a pension that is not funded until it comes due—after the employee retires—will not have time to accumulate through investments at all. Thus, it follows that: the longer a government puts off its contributions, the more it will owe, because its contributions will have had less time to accumulate; and a government

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PewPensionsUpdatepdf.pdf (explaining that pension funding comes from employee contributions, employer contributions, and earnings on investments).

19 *See* PEW CTR. ON THE STATES, THE FISCAL HEALTH OF STATE PENSION PLANS: FUNDING GAP CONTINUES TO GROW 1 (2014), http://www.pewtrusts.org/~/media/Assets/2014/03/31/PewStatesWideningGapFactsheet2.pdf.

20 By contrast, private pension plans regulated under ERISA cannot be underfunded. *See* ERISA, 29 U.S.C. § 1082 (2012) (establishing ERISA's minimum funding standards).

21 Beermann, *supra* note 10, at 6. Compare to federal regulations of private pensions under ERISA, which prevent private companies from failing to make required payments. *Id.* at 5 n.3. With regard to the issue of unrealistic assumptions concerning investment performance, see *infra* notes 28–32 and accompanying text. The underfunding is functionally a form of deficit spending, whereby current taxpayers are able to enjoy the benefits of the services performed by government workers, while burdening future taxpayers with the costs. *See* Beermann, *supra* note 10, at 7 ("It is a double whammy for those future taxpayers—they will not only be required to pay for the consumption of prior generations, but will also receive reduced government services as state and local governments allocate funds to pensions and health care for retired workers rather than services for current taxpayers."); *see also Deficit Spending*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The practice of making expenditures in excess of income . . . .").

22 This is the case for "defined benefit" pension plans. *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, 784–85 (2014) (contrasting "defined benefit" and "defined contribution" pension plans). Under a defined benefit plan, the promise made by the government-employer is that the employee will receive a set pension benefit, and that the government will make up any shortfall if there are insufficient funds when benefits are due; under a defined contribution plan, the government promises to make set contributions to the employee's retirement fund, and the risk of shortfall or market underperformance is borne by the employee. *See generally id.* Another difference between the two schemes is that in a defined contribution plan, employer and employee contributions are made to individually maintained accounts for each employee. *See* Ass'n of State Prosecutors v. Milwaukee Cty., 544 N.W.2d 888, 892 n.3 (Wis. 1996). Of state and local government workers who have access to retirement plans, eighty-three percent have access to a defined benefit plan. Chung, *supra*, at 784 n.57.

that defers its contributions altogether must pay all benefits to its retirees directly, without the benefit of any accumulated investment income at all.[23] And, as just described, the government is on the hook to make up any shortfall, whether due to poor investment performance or failure to contribute all or part of its obligated contribution in the first place.[24] Once in such a predicament, a government is even less likely to be able to cover its contributions for its current employees, spiraling the problem well into the next generation, and forcing state and local governments to allocate more and more of their budgets to fulfilling obligations that were made long ago.[25]

A second reason is that so many of the decisions regarding public sector pensions take place in the context of politics, and the political incentives here favor profligacy. Consider a hypothetical collective bargaining scenario: on one side of the negotiating table are public sector workers, represented by public sector unions, seeking an increase in compensation; on the other side is the government-employer, represented by elected officials or their appointees. A pay increase might be considered, but it would be an immediate hit to the public fisc—one that government leaders would have to find a way to pay for. The cost of a pension enhancement, on the other hand, is deferrable until long after the individual government (and union) leaders have been replaced.[26] Thus pension enhancements are a much easier concession than other forms of compensation, even if the eventual cost to the government may be much higher.[27]

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23 Thomas J. Healy, Carl Hess & Kevin Nicholson, *Underfunded Public Pensions in the United States: The Size of the Problem, the Obstacles to Reform, and the Path Forward* 6 (Harvard Kennedy Sch. of Gov't, Working Paper No. 2012-08, 2012), http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/mrcbg/publications/fwp/MRCBG_FWP_2012_08-Healey_Underfunded.pdf. At that point, the pension system is effectively "pay as you go." *See id.* at 17.

24 *See supra* notes 20–22 and accompanying text.

25 *See* Beermann, *supra* note 10, at 84. The problem is especially acute in places where the population is shrinking, which "causes a pension debt overhang created by having fewer taxpayers to sustain retirement commitments made by a larger past population for a larger past workforce." Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1147 (2014). Professor Anderson also cites increased longevity post-retirement as a factor compounding the problem. *Id.*

26 *See, e.g.*, Or. State Police Officers' Ass'n v. State, 918 P.2d 765, 774 (Or. 1996) (en banc) ("[F]ollow[ing] lengthy negotiations between the state and employee unions, . . . employees agreed to forego a requested pay raise in exchange for a right to bargain with public employers for a [pension enhancement]."). Professor Beermann notes that pension promises not only "allow for current officials to provide services without requiring taxpayers to pay for them until much later, when they may be out of office," but that they also "help politicians shore up support among government workers, or at least avoid opposition from government workers, which would be substantial if significant reductions in pension benefits were proposed." Beermann, *supra* note 10, at 27 (footnote omitted).

27 *See supra* notes 23–25 and accompanying text (explaining the high cost to a government of underfunding its defined benefit pension plans).

Another type of decision that illustrates the political nature of the problem relates to what is essentially an accounting maneuver: the deceptively innocuous[28] assumptions a government makes about how well a pension fund will perform while invested in the financial markets.[29] Each year, the government-employer determines the level at which it must contribute to the pension system based on its expectation of how well the pension fund investments will perform—a high anticipated reinvestment rate means that government will not have to contribute as much now, but if the assumed rate turns out to be overly optimistic relative to market performance, then there will be a shortfall which will add to the overall pension deficit.[30] It turns out that, even when the assumed rates are clearly high,[31] there are strong political incentives to leave them where they are. Doing so enables government leaders to keep employer contributions artificially low and avoid having to come up with present funds to make up the difference—a strategy that public-sector unions are in accord with, since benefits would be harder to obtain or defend if they depended on the public putting up more money up front.[32] Of course, this masks the true cost of pension promises.

A third reason has to do with the legal roadblocks faced by governments seeking to address the problem. Most states have—by statute, constitution, or operation of court decision[33]—extremely robust "pension protection provisions" that operate to preclude a government from modifying the pension promises made to its employees.[34] The

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28 One might think that the great political battles waged over this actuarial determination would belie its innocuity. *See, e.g.*, Diane Lincoln Estes, *Can Investment Assumptions Worsen the State Pension Fund Crisis?*, PBS NEWSHOUR: THE RUNDOWN (June 22, 2011, 4:25 PM), http://www.pbs.org/newshour/rundown/can-investment-assumptions-worsen-the-state-pension-fund-crisis-1; Mary Williams Walsh & Danny Hakim, *Public Pensions Faulted for Bets on Rosy Returns*, N.Y. TIMES, May 28, 2012, at A1, http://www.nytimes.com/2012/05/28/nyregion/fragile-calculus-in-plans-to-fix-pension-systems.html.

29 In addition, decisions about how a fund is actually invested may also be made in a political context. *See* David Weigel, *Eliot Spitzer Could Use Comptroller's Office to Engage Pension Funds in Politics*, SLATE (July 8, 2013, 2:49 PM), http://www.slate.com/blogs/weigel/2013/07/08/eliot_spitzer_could_use_comptroller_s_office_to_engage_pension_funds_in.html.

30 *See* Walsh & Hakim, *supra* note 28. As of 2012, the typical pension plan assumed eight percent reinvestment rates despite actual returns of 5.7% since 2000. *Id.*

31 "Absolutely hysterical" and "totally indefensible" were, respectively, the terms used by then-Mayor Michael R. Bloomberg of New York City to describe that city's established assumed reinvestment rate (eight percent) and proposed rate (seven percent). Walsh & Hakim, *supra* note 28. Mayor Bloomberg added: "If I can give you one piece of financial advice: If somebody offers you a guaranteed 7 percent on your money for the rest of your life, you take it and just make sure the guy's name is not Madoff." *Id.*

32 *See* Estes, *supra* note 28 (suggesting that increasing the government's contribution could "spur . . . taxpayer anger about public employees' perceived generous benefits").

33 *See infra* notes 88–90.

34 *See* Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework* 3–4 (Minn. Legal Studies Research, Working Paper No. 10-13, 2010), http://ssrn.com/abstract=1573864.

purpose and effect of these provisions is to protect public employees' retirement savings from "political and fiscal winds,"[35] and they have been remarkably effective to that end.[36] In the context of the current state of affairs, such provisions have supported legal challenges to many efforts to address the pension problem,[37] making it uniquely intractable.[38]

A final reason is the sheer scale of the problem. As of 2012, estimates of the total underfunding of all state and local government contributions to public employee pension plans in the United States ranged from $757 billion[39] to $3 trillion.[40] In California, a bipartisan, independent state oversight agency estimated the state's ten largest public pension plans were underfunded by a total of $240 billion in 2010.[41] Adding some context to that large number, the agency's report noted that cities such as Los Angeles, San Diego, San Francisco, and San Jose are preparing to devote fully one-third of their operating budgets to retirement costs in the coming years.[42]

Of course, the stakes are also pressingly high for the current public employees who were promised, and may be relying on, post-retirement benefits.[43] Their interest in a retirement plan that is sustainable over the long term is surely as strong as anybody's. Some commentators suggest that the employees' concerns are overblown, because the promised benefits were overly generous to begin with;[44] others argue such

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35 *See* Beermann, *supra* note 10, at 45.

36 *See infra* notes 103–11, 117 and accompanying text.

37 *See* Eric M. Madiar, *Public Pension Benefits Under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants?*, 27 A.B.A. J. LAB. & EMP. L. 179, 180–81 (2012).

38 This Note explores these provisions in much greater depth. *See infra* Part II.

39 PEW CTR. ON THE STATES, *supra* note 18, at 1. The Pew Center updated its data with 2012 numbers, showing a total pension debt over $1 trillion. PEW CTR. ON THE STATES, *supra* note 19, at 1.

40 STATE BUDGET CRISIS TASK FORCE, REPORT OF THE STATE BUDGET CRISIS TASK FORCE 35 (2012), http://www.statebudgetcrisis.org/wpcms/wp-content/images/Report-of-the-State-Budget-Crisis-Task-Force-Full.pdf. The numbers may actually be even higher, since this report and the one cited in note 39, *supra*, adopt the pension systems' assumed reinvestment rate, which is typically set much higher than actual market performance. *See supra* notes 28–32 and accompanying text. For more similarly startling figures, including those cited in this paragraph, see Beermann, *supra* note 10, at 10–12.

41 LITTLE HOOVER COMM'N, PUBLIC PENSIONS FOR RETIREMENT SECURITY 3 (2011), http://www.lhc.ca.gov/studies/204/Report204.pdf.

42 *Id.* at iii. New York City, as of 2012, was depositing ten percent of its budget into its pension funds. Walsh & Hakim, *supra* note 28.

43 *See* Beermann, *supra* note 10, at 44–45 (noting that "in the typical case, [public employees] have legitimately relied on their employers' retirement promises").

44 *E.g.* Andrew G. Biggs, Opinion, *How to Become a (Public Pension) Millionaire*, WALL ST. J. (Mar. 14, 2014, 7:18 PM), http://www.wsj.com/articles/SB10001424052702304360704579415173512940990.

suggestions do not reflect the reality for most public workers.[45] Whichever the case, it is at least clear that public employees worked under the expectation of a promised pension, and now, like victims of Bernie Madoff,[46] they have good reason to fear that the promises—and the investment accounts—are empty.[47]

B. *Alternative Remediations*

Once a state or local government finds itself in existential financial distress, there are a few options its leaders might explore in order to stave off insolvency. These include: (1) tax increases and spending reductions; (2) bankruptcy; and (3) bailouts. A robust treatment of these options is well beyond the scope of this Note, but a general awareness of them will help to put the eminent domain alternative—which may be seen as provocative—in some context. That is to say, the pension problem is one with no good solutions, and while some strategies will be better suited for addressing the crisis in some places than others, there are unfortunately no panaceas to be found.

Furthermore, a fundamental flaw with each of these alternatives—with the possible, untested, exception of bankruptcy[48]—is that they do not get to the root of the problem. Unless a city or state is able to address the policies that have permitted the problem to get so out of hand, these policies will remain in place, setting future generations up to face the very same, very difficult, choices.[49]

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45 *E.g.*, Jonathan Cohn, *Why Public Employees Are the New Welfare Queens*, NEW REPUBLIC (Aug. 8, 2010), http://www.newrepublic.com/blog/jonathan-cohn/76884/why-your-fireman-has-better-pension-you.

46 Bernard L. Madoff is inmate no. 61727-054 at the Butner Federal Correctional Complex in Butner, North Carolina. *Inmate Locator*, FED. BUREAU OF PRISONS, http://www.bop.gov/inmateloc (search "Bernard Madoff"). He is best known for defrauding thousands of investors by falsely leading them to believe their good-faith investments were realizing incredible returns. *See* Binyamin Appelbaum et al., *'All Just One Big Lie'*, WASH. POST, (Dec. 13, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/12/AR2008121203970.html.

47 The comparison to the infamous ponzi schemester is Professor Beermann's. He notes that "workers were told what level of benefits they should expect and that money was being set aside each month on their behalf," and are now discovering that has not been the case. Beermann, *supra* note 10, at 86.

48 *See infra* notes 66–67 and accompanying text.

49 Indeed, it may not even take that long. The City of Vallejo, California, restructured its debt and committed to certain changes in pension benefits for new and current workers when it emerged from bankruptcy in 2011. Bobby White, *Bankruptcy Exit Approved for City*, WALL ST. J. (Aug. 6, 2011), http://online.wsj.com/news/articles/SB10001424053111903885604576486402778541450. Three years later, with retirement benefits occupying a quarter of the city's overall budget, it is facing the prospect of bankruptcy once again. *See* Rick Karr, *Cities in Financial Straits Weigh Bankruptcy*, PBS NEWSHOUR WEEKEND (Feb. 8, 2014, 3:25 PM), http://www.pbs.org/newshour/bb/cities-financial-straights-weigh-bankruptcy.

1. Tax Increases (and Spending Reductions)

Raising revenue by means of a tax increase[50] is the most straightforward way to close a fiscal gap.[51] Furthermore, a tax increase could theoretically be used to diffuse the burdens of a fiscally distressed city or state across a larger share of its population—a feature that may have particular appeal in our age of income inequality.[52] However, if the intended effect of a tax increase is to solve the pension problem while distributing the burdens of the solution, in the context of a government on the brink, the effect of such an increase may ultimately be the opposite.

First, with regard to possible taxes on commercial entities, cities and states already compete for businesses to locate within their borders so that citizens will benefit from the jobs and tax revenues that come with those businesses.[53] A city or state under serious financial strain is unlikely to be an attractive destination for commerce as it is,[54] and its leaders are likely to be under significant pressure to stem an outward flow of jobs and business. Rather than mitigating the problem, a tax increase might well compound it.[55]

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50 Illinois, for example, enacted a sixty-seven percent income tax increase in 2011, in part to address a hundred billion dollar pension shortfall. Trip Gabriel, *Voters in Illinois Governor's Race to Choose 'Failure' or the 'Billionaire'*, N.Y. TIMES, Oct. 31, 2014, at A12, http://www.nytimes.com/2014/10/31/us/voters-in-illinois-to-choose-failure-or-the-billionaire.html. That state's serious pension problems persist. *See generally* Mary Williams Walsh, *Judge Rejects Overhaul of Illinois's Beleaguered State Pension System*, N.Y. TIMES, Nov. 22, 2014, at A10, http://www.nytimes.com/2014/11/22/business/judge-rejects-overhaul-of-illinoiss-beleaguered-state-pension-system.html.

51 Reducing government services is perhaps even more straightforward, and cities and states are doing just that, which raises the difficult question: what are the minimal services that a state or local government should have to provide? For a good take on answering that question, see Anderson, *supra* note 25. Professor Anderson begins with a striking anecdote from "San Bernardino, the third California city to declare bankruptcy in the recent recession, [where] the City Attorney followed another round of deep cuts to the police department with solemn advice to residents: 'Lock your doors and load your guns.'" *Id.* at 1120 (footnote omitted) (citing Ian Lovett, *A Poorer San Bernardino, and a More Dangerous One, Too*, N.Y. TIMES, Jan. 15, 2013, at A12, http://www.nytimes.com/2013/01/15/us/crime-rises-in-san-bernardino-after-bankruptcy.html).

52 *See* Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 852–56 (2013) (describing trends in income and wealth inequality in the United States).

53 Indeed, far from imposing tax increases that would affect businesses, many cities and states are offering tax subsidies instead. *See* Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES, Dec. 2, 2012, at A1, http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html.

54 See *supra* notes 13–16 and accompanying text, describing the public safety, infrastructure, and quality of life challenges that arise when a government cannot pay its debts.

55 That tax rates are a factor in deciding where to locate is reflected in this tip sheet from the U.S. Small Business Administration, which suggests that businesses choosing where to locate ask themselves, "[c]ould you pay less in taxes by locating your business across a nearby

Furthermore, the proportion of taxable properties and incomes, and the taxable value of either, is likely to be low, meaning that any incremental additional tax revenue would not have much to offer toward addressing a city's debt.[56]

2. Bankruptcy

Chapter 9 of the Federal Bankruptcy Code provides the means by which a municipality can adjust its debts.[57] Like its sibling statute, Chapter 11,[58] the general goal of Chapter 9 is to give the insolvent debtor a means and opportunity to discharge its debts while formulating a repayment plan with its creditors.[59] The primary difference is that the debtor is a local government, rather than a business or an individual, and creditors may include bondholders, retired public employees, contractors, and tort plaintiffs.[60] One possible advantage of bankruptcy is that it often distributes costs among a broad range of creditors.[61]

Historically, bankruptcy has not been the preferred recourse for local governments in distress,[62] even though the process builds in

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state line?" *Tips for Choosing Your Business Location*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/content/tips-choosing-business-location (last visited Jan. 13, 2015).

56 *See* Christine Sgarlata Chung, *Government Budgets as the Hunger Games: The Brutal Competition for State and Local Government Resources Given Municipal Securities Debt, Pension and OBEP Obligations, and Taxpayer Needs*, 33 REV. BANKING & FIN. L. 663, 677 (2014). Consider Detroit, where "[f]rom 2007 to 2011, 'only 54% of Detroiters owned a home, the median value of which was $71,100,' reflecting the degree to which Detroit's property tax revenues are constrained by poverty and blight." *Id.* (brackets omitted) (quoting Declaration of Kevyn D. Orr in Support of City of Detroit, Mich.'s Statement of Qualifications Pursuant to Section 109(c) of the Bankr. Code at 17, *In re* City of Detroit, 504 B.R. 97 (Bankr. E.D. Mich. 2013) (No. 13-53846) [hereinafter Orr Declaration]). "Property tax revenues for [Detroit's] 2013 fiscal year were $134.9 million, a $12.9 million (or approximately 10%) reduction from the prior fiscal year and $23.6 million (or approximately 15%) lower than the average property tax revenue for the preceding five fiscal years." *Id*. at 677 n.56 (quoting Orr Declaration, *supra*, at 4–5).

57 11 U.S.C. §§ 901–46 (2012).

58 11 U.S.C. §§ 1101–1174 (2012).

59 Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 HASTINGS L.J. 885, 888–89 (2002).

60 Anderson, *supra* note 25, at 1122. Professor Anderson's compelling article focuses on the fact that a city's inhabitants, who have the most at stake, are left out of the creditor equation, and asks what is the minimal basic level of services that a municipality should have to supply. *Id.* at 1122–23.

61 *See* David A. Skeel, Jr., *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 HOUS. L. REV. 1063, 1085 (2013).

62 "[O]nly about 40 general purpose localities filed for [C]hapter 9 from 1976 (when it was enacted) to 2010." Omer Kimhi, *A Tale of Four Cities—Models Of State Intervention in Distressed Localities Fiscal Affairs*, 80 U. CIN. L. REV. 881, 882–83 (2012).

significant leverage for the municipality.[63] That may be changing,[64] and indeed several local governments have entered bankruptcy proceedings in the last decade.[65] The lack of jurisprudence in this area, however, means the process remains unpredictable. In particular, the specific issue of how pension obligees would be treated in a bankruptcy proceeding relative to other creditors is one that has not yet been resolved,[66] and some scholars suggest that constitutional obstacles and principles of federalism would preclude any modification of benefits through the bankruptcy process.[67]

The most significant limitation on the bankruptcy option, however, is that it is not even available in many cases. Most notably, there is no provision at all in Chapter 9 for state governments to adjust their own debts through bankruptcy proceedings.[68] As for a local government

63 *See* Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 651 (2008) (describing the leverage a locality has by virtue of its exclusive right to submit readjustment plans for its debt to the bankruptcy court).

64 Professor Skeel suggests there has been a stigma associated with Chapter 9—that "real municipalities" never used it—which is wearing off. Skeel, *supra* note 61, at 1080.

65 Recent notable examples include: Detroit, Michigan; Jefferson County, Alabama (which encompasses Birmingham); Vallejo, California; and Stockton, California. Anderson, *supra* note 25, at 1120 n.1.

66 *See* Jeffrey B. Ellman & Daniel J. Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?*, 27 EMORY BANKR. DEV. J. 365, 384 (2011) (highlighting tools within the bankruptcy code which a municipality might use to modify its pension obligations, but noting that ultimately "very little case law exists in this area. As a result, how effective these bankruptcy tools will be in addressing a municipality's pension debt is far from clear."). The lack of a clear answer generated early and significant legal maneuvering by the parties in the Detroit bankruptcy to obtain a ruling about whether public pensions would be protected during the bankruptcy process. Jack M. Beermann, *Resolving the Public Pension "Crisis"*, 41 FORDHAM URB. L.J. 999, 1006–12 (2014) (describing the maneuvering in some detail).

Although the Detroit bankruptcy court ultimately announced that its powers to adjust the city's pension obligations would not be constrained by a pension protection provision in the Michigan state constitution, *In re* City of Detroit, 504 B.R. 97, 136–154 (Bankr. E.D. Mich. 2013), that announcement may have little precedential force, since the parties to the bankruptcy ultimately settled their claims, *see In re* City of Detroit, 524 B.R. 147 (Bankr. E.D. Mich. 2014); Monica Davey, *Judge Agrees to Delay Detroit Bankruptcy Trial*, N.Y. TIMES (Sept. 10, 2014), http://www.nytimes.com/2014/09/11/us/judge-agrees-to-delay-detroit-bankruptcy-trial.html ("[I]f settlements with [creditors] are completed, this case may not provide a judge's reasoned answer to a question some in the municipal bond industry have been awaiting: whether a city may shelter municipal retirees even as it forces tougher losses on bondholders and other financial-markets creditors.").

67 *E.g.*, Beermann, *supra* note 66.

68 Much recent scholarship has explored whether there should be a statutory means for states to declare bankruptcy akin to or within Chapter 9. *See, e.g.*, Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399 (2012); Skeel, *supra* note 61, at 1066–1080; David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677 (2012); Debra Brubaker Burns, Note, *Too Big to Fail and Too Big to Pay: States, Their Public-Pension Bills, and the Constitution*, 39 HASTINGS CONST. L.Q. 253, 280–293 (2011). In addition, Congress explored the issue in 2011. *See* Mary Williams Walsh, *A Path Is Sought for States to Escape*

seeking to enter bankruptcy, it must first receive specific authorization from the state.[69] States may impose a wide range of preconditions on the local government seeking authorization, or forbid municipal bankruptcy as an option altogether.[70] Michigan, for example, as a precondition to filing for bankruptcy, requires the locality's elected officials to turn over virtually all authority to a state-appointed emergency manager.[71]

3. Bailout

The externalities created by an insolvent municipality can affect surrounding municipalities or the state as a whole.[72] This creates strong incentives for state intervention, including direct financial assistance in the form of a bailout.[73] The terms of a bailout,[74] however, may present their own risks for the locality in the long run if the state imposes unfavorable requirements on repayment of funds,[75] or establishes an oversight or receivership board that permits the state to directly intervene in or reorganize the city's functions and finances.[76] Although a

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Their Debt Burdens, N.Y. TIMES, Jan. 21, 2011, at A1, http://www.nytimes.com/2011/01/21/business/economy/21bankruptcy.html.

69 11 U.S.C. § 109(c)(2) (2012); *see also* JAMES E. SPIOTTO, PRIMER ON MUNICIPAL DEBT ADJUSTMENT D-2 (2012) (collecting state authorizing statutes). For a history and evolution of the specific authorization requirement, see Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 457–71 (2014).

70 Joanne Lau, Note, *Modifying or Terminating Pension Plans Through Chapter 9 Bankruptcies with a Focus on California*, 40 FORDHAM URB. L.J. 1975, 1981–83 (2013) (providing an overview of the range of restrictions, and which states impose them); *see also Municipal Bankruptcy State Laws*, GOVERNING MAG., http://www.governing.com/gov-data/state-municipal-bankruptcy-laws-policies-map.html (map showing which states authorize municipal bankruptcies) (last visited Nov. 20, 2014).

71 *See* Skeel, *supra* note 61, at 1077. For more detail on the powers of an emergency manager in Michigan, see Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 586–592 (2012).

72 During New York City's fiscal crisis in the 1970s, state leaders were motivated, at least in part, by the impact a default by the city would have on the state's own ability to borrow, as well as by the state's obligations to take on certain costs if the city were unable to pay, such as providing welfare. Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 304–06 (2012).

73 A state might also act by facilitating access to credit markets, which a distressed locality would be unable to reach on its own. *See* Kimhi, *supra* note 62, at 889.

74 Central governments may impose harsh terms to counteract the "moral hazard" problem, whereby local governments incur debt that places upon centralized governments a risk outside of their control. Gillette, *supra* note 72, at 310.

75 One scholar suggests that local officials may acquiesce to unfavorable requirements in order to obtain relief from current financial distress, if funds need not be repaid until the distant future. *Id.* at 306.

76 For a thorough discussion of state supervisory boards, see Kimhi, *supra* note 62.

municipal bailout by the federal government would necessarily be far less restrictive,[77] only two distressed local governments—New York City and Washington, D.C.—have yet been bailed out by the federal government.[78]

The same externality problems that might motivate a state to intervene in local affairs[79] could likewise apply to the federal government if a state appeared on the brink of insolvency. However, no state has yet sought or received a bailout[80]—which could only come from the federal government—although fears about the perceived inevitability of such a request have stoked recent debate in Congress.[81]

Having considered the causes and effects of the present pension issue, and examined several possible recourses for states and localities in serious financial distress, this Note will next prepare to evaluate eminent domain as a recourse, by turning now to examine how states characterize the right held by current workers to their future pension.

II. STATE CONSTRAINTS ON PENSION REFORMS

The need for robust protections for public sector pensions is not hard to discern. When pension obligations are incurred by a government-employer, they may not actually become due for decades, following an employee's retirement.[82] As the public's priorities evolve—due to changed circumstances or changed decision-makers—there may be a strong temptation to reallocate those funds that were committed to

77 Due to both "institutional capacity and principals of federalism." Gillette, *supra* note 72, at 285.

78 *Id.* at 306, 308 (New York City is unique in its "greater national significance than other cities, both because of its size and its importance to the financial sector of the economy."). Washington, D.C., is unique in its position as the seat of government, under the exclusive jurisdiction of the United States. U.S. CONST. art. I, § 8, cl. 17.

79 *See supra* note 72 (describing New York State's intervention during a New York City fiscal crisis).

80 The Obama Administration recently indicated that it would not consider a bailout for Puerto Rico, an unincorporated territory of the United States that is presently facing significant fiscal challenges. Nick Timiraos, *Lew Says No Federal Bailout Being Considered for Puerto Rico*, WALL ST. J. (July 28, 2015, 7:12 PM), http://www.wsj.com/articles/lew-says-no-federal-bailout-being-considered-for-puerto-rico-1438118543. Instead, the administration supports a bill pending in Congress that would give Puerto Rico's municipalities and public corporations the same access to Chapter 9 that states have. *Id.*; *see* Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong.

81 *See* Ryan Holeywell, *Congress Examines Municipal Defaults, State Bankruptcy*, GOVERNING (Feb. 9, 2011), http://www.governing.com/blogs/fedwatch/Hearing-examines-municipal-defaults-state-bankruptcy.html (describing a House Oversight and Government Reform subcommittee hearing about a potential state bankruptcy mechanism); Walsh, *supra* note 68.

82 *See supra* notes 18–22 and accompanying text.

pay future retirement benefits.[83] Early law held that public pensions received essentially no protection at all—rather, a pension was a mere gratuity, subject to the whim of the legislature.[84] Unsurprisingly, this view has been roundly rejected,[85] and despite a few states that continue to employ the gratuity approach[86] at least under some circumstances,[87]

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83 Delegates to Illinois' 1970 Constitutional Convention, which adopted that state's pension protection provision,

> were also mindful that in the past, appropriations to cover state pension obligations had "been made a political football" and "the party in power would just use the amount of the state contribution to help balance budgets," jeopardizing the resources available to meet the State's obligations to participants in its pension systems in the future.

Kanerva v. Weems, 13 N.E.3d 1228, 1241 (Ill. 2014) (quoting 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2930–31 (statements of Delegate Bottino)).

84 A pension was considered to be "a bounty springing from the graciousness and appreciation of sovereignty [that] may be given or withheld at the pleasure of a sovereign power." Eddy v. Morgan, 75 N.E. 174, 178 (Ill. 1905). The source of this view was an 1889 Supreme Court decision declaring that a death benefit promised to a San Francisco police officer was—until that mortal event occurred—"a mere expectancy, created by the law, and liable to be revoked or destroyed by the same authority." Pennie v. Reis, 132 U.S. 464, 471 (1889). The $1,000 death benefit was established in 1878, when San Francisco more than doubled the number of officers on its police force—from 150 to 400. *Id.* at 465. This litigation was initiated by the estate of an officer who retired while the benefit was in place, but died intestate after the city repealed it. *Id.* at 471.

85 *See, e.g.*, Pineman v. Oechslin, 488 A.2d 803, 808 (Conn. 1985) ("In the seventh decade of the 20th century it seems somewhat absurd to speak of a pension as in the 'nature of a bounty springing from the appreciation and graciousness of the sovereign.' Medieval notions of the beneficence and graciousness of worldly monarchs have no relevance to modern notions of sovereignty." (citation omitted) (quoting Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 U. ILL. L. F. 32, 37 (1968))); Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740, 746 (Minn. 1983) ("In the past the gratuity theory may have been justified by the fact that promised benefits were insignificant in amount. But times have changed." (citation omitted)); *see also* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 997 (1977). Furthermore, in those states where gifts from the state to individuals are constitutionally prohibited, courts needed to construe pensions as non-gratuitous in order to avoid finding the pension statute unconstitutional altogether. *E.g.*, Yeazell v. Copins, 402 P.2d 541, 543 (Ariz. 1965).

86 This Note need not linger on pension benefits that are deemed gratuities, since the proposed eminent domain remedy adds little: governments may already modify such benefits at will, without resort to that power. *See supra* note 84. For examples of state high courts treating pension benefits as gratuities, see Robinson v. Taylor, 29 S.W.3d 691, 693–94 (Ark. 2000) (benefit was gratuitous where pension benefits were to be paid entirely from the city's general fund, with no employee contribution); Klamm v. State *ex rel.* Carlson, 126 N.E.2d 487, 489 (Ind. 1955) (in pension funds where enrollment is non-mandatory, the promised benefits are gratuities until the interest becomes vested upon retirement); City of Dall. v. Trammell, 101 S.W.2d 1009, 1013 (Tex. 1937) (adopting "the rule that the right of a pensioner to receive monthly payments from the pension fund after retirement from service, or after his right to participate in the fund has accrued, is predicated upon the anticipated continuance of existing laws, and is subordinate to the right of the Legislature to abolish the pension system, or diminish the accrued benefits of pensioners thereunder"). In 2003, Texas voters amended their constitution to partially overrule *Trammell* as applied to local retirement systems. *See* TEX. CONST. art. XVI, § 66 (Protected Benefits Under Certain Public Retirement Systems); *see also* Tex. Att'y Gen. Op. GA-0615, at 2–8 (2008) (construing the constitutional amendment).

nearly every United States jurisdiction has codified strong pension protection provisions in their state's law[88] or constitution,[89] or by operation of high court decisions.[90]

The pension protection provisions have been remarkably successful.[91] While protection of a public worker's legitimate reliance on her pension is warranted, it comes—at least in some cases—at the expense of the legitimate government interest in maintaining services, or even solvency.[92] It cannot be doubted that some strong protection is necessary. But a protection that has the purpose and effect of

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87 One enduring distinction divides pension plans where employee enrollment is voluntary from those where enrollment is mandatory. *Compare Klamm*, 126 N.E.2d at 489 (pension benefits were gratuitous where enrollment in the system was compulsory), *with* Bd. of Trs. of Pub. Emps.' Ret. Fund v. Hill, 472 N.E.2d 204, 208 (Ind. 1985) (retiree's pension benefits were contractually protected where enrollment in the system was voluntary). An underlying rationale for this distinction may relate to the strength of the employee's reasonable reliance. *But see* Note, *supra* note 85, at 994 ("[W]hile the pension system was mandatory, the decision to become a policeman . . . in the first instance was clearly not."). However, courts' stated rationale appears to be more conceptual. *See id.* at 994 ("[S]ince membership in the plan was compulsory, the officer 'never received [the money] or controlled it . . . [and] had no such power of disposition over it as always accompanies ownership of property.'" (quoting and describing *Pennie*, 132 U.S. at 470–71 (alterations original to the Note))); *see also* Ballard v. Bd. of Trs. of the Police Pension Fund, 324 N.E.2d 813, 815 (Ind. 1975) ("In a voluntary system the employee theoretically may keep his money or pay it back to the fund, while under the involuntary system the money, although denominated compensation, is never owned or controlled by the employee but retained by the state and is, therefore, in practical effect a contribution by the state.").

A related distinction is drawn between pension systems that are funded exclusively by the government-employer with no contribution needed from the employee and those where employee-members are required to contribute. *Robinson*, 29 S.W.3d at 693–94 ("The retirement benefit at issue in this case . . . is to be paid entirely from the city's general fund. As [the employee] contributed no funds, the retirement benefit was merely a gratuitous allowance." (citation omitted)).

88 *E.g.*, FLA. STAT. § 121.011(3)(d) (2015) ("[T]he rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.").

89 *E.g.*, ILL. CONST. art. XIII, § 5 ("Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."); N.M. CONST. art. XX, § 22(D) ("Upon 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."); N.Y. CONST. art. V, § 7 ("[M]embership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.").

90 *E.g.*, Withers v. Register, 269 S.E.2d 431, 433 (Ga. 1980); Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740, 747 (Minn. 1983). Hereinafter, these statutes, constitutional provisions, and high court holdings are referred to as "pension protection provisions."

91 *See infra* notes 103–11, 117 and accompanying text.

92 Note, *supra* note 85, at 994 (discussing these two legitimate, conflicting interests—the public worker's and the government-employer's—as the source of pension controversy).

prioritizing the complete payment of current and future public pensions over all other public priorities, as many of these do, can leave governments with little or no ability to deal with, or spread the burdens of, severe financial distress.[93]

State constraints on pension reforms vary in essentially two ways. First, such constraints differ in the nature of the right created by the protection provision. Broadly speaking, protections can be grouped into two categories: (1) contract; and (2) property.[94] Second, constraints differ with regard to when the protection takes effect.[95]

A. *Nature of the Right Created by the Protection Provision*

1. Contract[96]

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93 "[I]f unforeseen circumstances such as a general fiscal crisis arose, strict enforcement of the pension plan's defined benefit obligations would permit certain public employees to have an unexpectedly higher standard of living than other members of the society." *Id.* at 1005 (advocating the proprietary approach).

94 *See infra* Part II.A. Ultimately, this distinction makes little difference in the present context, since the notion that contract and property rights are both subject to the eminent domain power is uncontroversial. *See infra* note 102 (contract rights). Nonetheless, a treatment is helpful in order to characterize the rights condemned.

95 *See infra* Part II.B.

96 Included in this subsection is Minnesota, which deems the contractual relationship implied-in-law under the doctrine of promissory estoppel. *See* Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740, 747 (Minn. 1983); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981) (defining promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance"). This is an approach that Maine has entertained as well. *See* Budge v. Town of Millinocket, 55 A.3d 484, 490–92 (Me. 2012) (rejecting estoppel claim by finding the town had not promised the claimed benefit); Spiller v. State, 627 A.2d 513, 517 n.12 (Me. 1993) (dicta). *Contra* Pineman v. Oechslin, 488 A.2d 803, 809 (Conn. 1985) ("The promissory estoppel approach, in focusing attention on the reasonable expectations of the employee, ignores the distinction traditionally made between private and public entities in determining the existence of contractual rights and obligations. 'Courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel.'" (brackets omitted) (quoting Kizas v. Webster, 707 F.2d 524, 535 (D.C. Cir. 1983))).

The key difference between the promissory estoppel approach and the standard contract approach is in how the court determines whether there is a contract to begin with. *See Christensen*, 331 N.W.2d at 749–50 (noting that under promissory estoppel, the crux of that inquiry is reasonable, detrimental reliance). *Compare Christensen*, 331 N.W.2d at 743, 749 (upon entering city service and voluntarily joining the pension system, retiree reasonably relied on promise that he would be entitled to pension benefits after he worked for the city for ten years, without regard to his age), *with* Duluth Firemen's Relief Ass'n v. City of Duluth, 361 N.W.2d 381, 386 (Minn. 1985) (no evidence that firefighters detrimentally relied on purported promise by the municipal government to maintain active members' benefits at the same level). Once the implied contract is found, however, a promise enforced by estoppel is entitled to virtually identical protections as a promise enforced in contract. *Christensen*, 331 N.W.2d at

Under the contract approach,[97] the pension benefits promised to public workers are treated as forming a contractual relationship between the government-employer and the employee-beneficiary, and the parties are thereby accorded the rights and obligations arising under the law of contracts.[98] The effect on pension benefits so protected is that they are brought within the scope of the federal Constitution's Contracts Clause[99]—which forbids any state law impairing the obligation of contracts[100]—and equivalent provisions in most state constitutions.[101]

749–50 (noting that both are protected by normal contract remedies and the Contracts Clauses of the state and federal constitutions, and that both remain "subject to modification under the state's police power"); *see also* Hous. & Redevelopment Auth. v. Norman, 696 N.W.2d 329, 337 (Minn. 2005) (finding no need to resort to promissory estoppel where the promise was expressly contractual, but reaching the same result in any case—that the termination of certain retirement benefits was unlawful).

97 Seven states adopt this approach constitutionally: Alaska, Arizona, Hawaii, Illinois, Louisiana, Michigan, and New York. *See* ALASKA CONST. art. XII, § 7 ("Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship."); ARIZ. CONST. art. XXIX, § 1(C); HAW. CONST. art. XVI, § 2; ILL. CONST. art. XIII, § 5; LA. CONST. art. X, § 29; MICH. CONST. art. IX, § 24; N.Y. CONST. art. V, § 7. Other states' contractual protection is by operation of court decision; these include Alabama, California, Georgia, Nebraska, North Carolina, Oregon, and Washington. *See* Bd. of Trs. of Policemen's & Firemen's Ret. Fund v. Cary, 373 So. 2d 841, 842 (per curiam) (Ala. 1979); Legislature v. Eu, 816 P.2d 1309, 1330–35 (Cal. 1991) (in bank); Withers v. Register, 269 S.E.2d 431, 433 (Ga. 1980); Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995); Wiggs v. Edgecombe Cty., 643 S.E.2d 904, 908 (N.C. 2007); Moro v. State, 351 P.3d 1, 19 (Or. 2015); Bakenhus v. City of Seattle, 296 P.2d 536, 540 (Wash. 1956).

States that reject the contract approach often rely on the "unmistakability doctrine" to resist implying a contract. *E.g.*, *Pineman*, 488 A.2d at 807 (refusing to recognize a contract right where the legislature had not created one expressly and unambiguously, since the effect of a contract is to "surrender the legislature's governmental power of revision and to restrict the legislative authority of succeeding legislatures"); *Spiller*, 627 A.2d at 515 ("[T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.").

98 *See, e.g.*, *Cary*, 373 So. 2d at 842 (analogizing pension promises "to a unilateral contract, where the promisee has completely performed all of the obligations and all conditions precedent so that the promisor has an unqualified duty to pay those obligations"); Hammond v. Hoffbeck, 627 P.2d 1052, 1056 (Alaska 1981) ("[T]hese benefits are regarded as an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment."); Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1167 (Ariz. 2014) (noting that once "the right to a public pension on the terms promised vests[,] . . . 'the State may not impair or abrogate that contract without offering consideration and obtaining consent of the employee.'" (citation omitted) (quoting Proksa v. Ariz. State Schs. for the Deaf & the Blind, 74 P.3d 939, 942 (Ariz. 2003) (en banc))); *Withers*, 269 S.E.2d at 432 (holding that typographical error in legislation, which would have inflated retirement benefits of certain employees by as much as 300 percent, was subject to reformation in equity); Buddell v. Bd. of Trs., State Univ. Ret. Sys., 514 N.E.2d 184, 187 (Ill. 1987) ("[T]he rights conferred upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles.").

99 U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

100 Under limited circumstances, a state may enact legislative modifications that impair contracts without violating the Constitution. *See* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977). In the public pensions context, a court must find that the modification: (1) has

The state and federal contracts clauses do not, however, bar a government's use of its supervening power of eminent domain, which cannot be contracted away at all.[102]

A variety of pension reforms have been blocked by the Contracts Clause. For example, after Oregon voters approved a referendum amending the state's constitution to require public employees to contribute to their pension plans, the Oregon high court invalidated the amendment,[103] finding that: the state's earlier commitment to cover

"substantially" impaired the contract; and (2) is justified by a public purpose. *See* Monahan, *supra* note 34, at 5–21 (noting that whether an impairment is substantial "is a relatively easy test to satisfy," and that the only cases that found the public purpose prong satisfied "were cases in which the court first held that no substantial impairment occurred"). *But see* Saetre v. State, 398 N.W.2d 538, 542 (Minn. 1986) ("The significant and legitimate public purpose of this legislation [affecting state employee's retirement rights] takes precedence over any claim that the legislation substantially impairs [the employee's] contract rights."); Whitney Cloud, Comment, *State Pension Deficits, the Recession, and a Modern View of the Contracts Clause*, 120 YALE L.J. 2199 (2011). Note that the "public purpose" standard in *U.S. Trust* is distinct from the one employed in an eminent domain case. *See infra* notes 144–45 and accompanying text.

101 For examples of state constitutional contracts clauses, see ALA. CONST. art. I, § 22; GA. CONST. art. I, § 1, ¶ X; OR. CONST. art. I, § 21. A handful of states have constitutional pension protection provisions that have been held to accord even greater protections than the federal or state's Contracts Clause: rather than applying an ordinary Contracts Clause analysis, a court need only find that a modification operates to diminish or impair pension benefits in order to hold it unconstitutional. *See, e.g.*, Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1164–65 (Ariz. 2014) (construing ARIZ. CONST. art. XXIX, § 1(C)); Kanerva v. Weems, 13 N.E.3d 1228, 1244 (Ill. 2014) (construing ILL. CONST. art. XIII, § 5); Civil Serv. Emps. Ass'n Inc., Local 1000 v. Regan, 525 N.E.2d 1, 3 (N.Y. 1988) (construing N.Y. CONST. art. V, § 7).

102 *See U.S. Trust*, 431 U.S. at 23–24 ("[T]he police power and the power of eminent domain were among those that could not be 'contracted away[]' . . . ."); W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532–33 (1848) ("[I]nto all contracts . . . there enter conditions which . . . are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all . . . . Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition."); *see also* Moro v. State, 351 P.3d 1, 19 (Or. 2015) ("[T]he state may enter into contracts and be bound by the promises contained in those contracts, so long as the state is not 'contracting away its "police powers"' or limiting its power of eminent domain." (brackets omitted) (quoting Strunk v. Pub. Emps. Ret. Bd., 108 P.3d 1058, 1095 (2005) (en banc))). This rule would seem to apply even in those states whose constitutional pension protection provisions have been held to accord even greater protection than the Contracts Clause. *See supra* note 101. The remedy for property taken by eminent domain is not contract damages, but just compensation. *See infra* note 166 and accompanying text.

103 A more recent decision by the Supreme Court of Oregon disavowed the reasoning in this case; however it remains a helpful illustration of how the Contracts Clause operates to preclude reforms to pensions that are protected as contracts. Or. State Police Officers' Ass'n v. State, 918 P.2d 765 (Or. 1996) (en banc), *abrogated by Moro*, 351 P.3d at 36.

certain employees' contributions[104] was contractually protected[105]; the amendment "[u]nquestionably" impaired the state's obligation of contract; and the amendment did not come within the limited exception for permissible modifications.[106] Other state high courts have reached similar conclusions when invalidating: a municipality's repeal of a cost-of-living pension supplement;[107] a voter referendum that imposed limitations on incumbent state legislators' pensions;[108] a state act that removed a tax exemption on retirement benefits;[109] and a county ordinance that imposed a prohibition on "double-dipping."[110] In Illinois, a significant pension reform package enacted with bipartisan support was invalidated by that state's supreme court earlier this year.[111]

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104 While defined benefit pension plans are typically funded by contributions from both the employee and the employer, *see supra* note 18 and accompanying text, Oregon had agreed in some cases to cover the employee's contribution, *Or. State Police*, 918 P.2d 765 at 774–76.

105 In Oregon, the contractual protection accorded to pension promises occurs by operation of court decision. Hughes v. State, 838 P.2d 1018, 1027 (Or. 1992) ("The contractual nature of . . . pension schemes was settled in Taylor v. [Multnomah Cty. Deputy Sheriff's Ret. Bd.,] 510 P.2d 339 ([Or.] 1973).").

106 *Or. State Police*, 918 P.2d at 774–76. In the same case, the Oregon court also invalidated amendments that would have eliminated a guaranteed rate of return, *id.* at 777, and a pension enhancement for employees who retire with unused sick leave, *id.* at 777–78. The "limited exception" is the one set forth in *U.S. Trust*, 431 U.S. 1. *See supra* note 100. The exception was not satisfied because the court found the impairment was "substantial" and that no public purpose was present. *Or. State Police*, 918 P.2d at 776.

107 Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995). By contrast, some high courts have permitted cost-of-living modifications, finding they were not contractually protected to begin with. *E.g.*, Justus v. State, 336 P.3d 202, 212–13 (Colo. 2014); Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys., 332 P.3d 439, 444 (Wash. 2014).

108 Legislature v. Eu, 816 P.2d 1309, 1330–35 (Cal. 1991) (in bank).

109 Bailey v. State, 500 S.E.2d 54, 67 (N.C. 1998). *Contra* Blair v. State Tax Assessor, 485 A.2d 957, 960 (Me. 1984) ("Even if we were to find the exemption [of pension benefits from taxation] to be a contractual right of state employment, the legislative grant of such a right would violate the Maine Constitution, which states: 'The Legislature shall never, in any manner, suspend or surrender the power of taxation.'" (quoting ME. CONST. art. IX, § 9)).

Several states grappled with this issue following the Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) (holding that federal law prohibited states from creating tax exemptions for state pensions, while collecting taxes on federal and other pensions), and the ensuing legislative responses. *See* Pierce v. State, 910 P.2d 288, 294 (N.M. 1995) (collecting cases).

110 Wiggs v. Edgecombe Cty., 643 S.E.2d 904, 908 (N.C. 2007). "Double-dipping" allows a retiree to draw pension benefits while being simultaneously employed and salaried by another member of the pension system. *Id.*

111 *In re* Pension Reform Litig., 32 N.E.3d 1 (Ill. 2015); *see* Monica Davey, *Illinois Justices Reject 2013 Pension Overhaul*, N.Y. TIMES, May 9, 2015, at A11, http://www.nytimes.com/2015/05/09/us/illinois-supreme-court-rejects-lawmakers-pension-overhaul.html. The legislation at issue in Illinois would have raised the retirement age, capped the salary amount that could be used in calculating pension benefits, and changed the COLA formula, among other things. *Pension Reform Litig.*, 32 N.E.3d at 11.

2. Property

A smaller number of jurisdictions adopt the property approach.[112] Under this approach, public sector employees have a proprietary interest in their promised retirement benefits.[113] Courts scrutinize modifications of pension benefits protected as property under the Due Process Clause of the Fourteenth Amendment and related state provisions,[114] or under the Takings Clause of the Fifth Amendment and related state provisions,[115] or both. Courts have suggested that pensions

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112 New Mexico's pension protection provision is constitutional. N.M. CONST. art. XX, § 22(D) ("Upon 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."); *see also* Bartlett v. Cameron, 316 P.3d 889, 892, 896 (N.M. 2013) (construing the constitutional provision "harmoniously" with *Pierce*, 910 P.2d 288, and finding it did not create a property right to a future cost of living adjustment). Other states' proprietary protection is by operation of court decision; these include Connecticut, Maine, Wisconsin, and Wyoming. *See* Pineman v. Oechslin, 488 A.2d 803, 810 (Conn. 1985) (noting that all state employees have a proprietary interest in the retirement fund, which becomes statutory upon becoming eligible to receive benefits); Spiller v. State, 627 A.2d 513, 517 n.12 (Me. 1993) (noting in dicta that the retirement expectations of state employees "may constitute property rights that the legislature cannot deprive . . . without due process of law"); Wis. Prof'l Police Ass'n, Inc. v. Lightbourn, 627 N.W.2d 807, 838–40 (Wis. 2001) ("[E]ach participant has a property interest in his or her annuity or individual account, and . . . a broad property interest in the [retirement system] as a whole."); Peterson v. Sweetwater Cty. Sch. Dist. No. One, 929 P.2d 525, 530 (Wyo. 1996) (noting that "legitimate retirement expectations may constitute property rights," and finding that payment of benefits before normal retirement age did not constitute such legitimate expectations). Note that even in jurisdictions that employ the property approach, rights protected under a pension plan may nonetheless be contractual if language of the pension plan itself evinces unmistakable intent to contract. *See, e.g.*, Madison Teachers, Inc. v. Walker, 851 N.W.2d 337, 379–81 (Wis. 2014).

113 *See supra* note 112.

114 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also, e.g.*, N.M. CONST. art. II, § 18. For state high court decisions applying Due Process scrutiny, see, for example, Fennell v. City of Hartford, 681 A.2d 934, 940 (Conn. 1996) (finding no property right to a specific method of calculating pension benefits); *Bartlett*, 316 P.3d at 892, 896 (finding no property right to a future cost of living adjustment); *Peterson*, 929 P.2d at 530 (finding no property right to payment of benefits before normal retirement age). *See also* Monahan, *supra* note 34, at 25–26 (describing procedural and substantive due process challenges to pension modifications).

115 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also, e.g.*, ME. CONST. art. I, § 21; WIS. CONST. art. I, § 13. For state high court decisions applying Takings scrutiny, see, for example, Budge v. Town of Millinocket, 55 A.3d 484, 492 (Me. 2012) (finding no taking of property when town government reduced certain retirement benefits); *Lightbourn*, 627 N.W.2d at 845–47, 855, 858 (finding no taking of property following a series of legislative modifications to the state's pension fund); Wis. Retired Teachers Ass'n, Inc. v. Emp. Trust Funds Bd., 558 N.W.2d 83, 93 (Wis. 1997) (finding a taking of annuitants' property when state legislature directed pension fund's investment earnings to be distributed in a manner unconforming with the pension statute). The Takings Clause in fact has even broader applicability, extending to pensions protected as contracts as well, which is discussed in greater detail in Part III.A.3, *infra*.

protected as property may be more easily modified than those protected as contracts.[116]

Wisconsin offers one example of how the property approach can protect pensions from modification.[117] After an act of the state legislature made all county prosecutors employes[118] of the state, existing Milwaukee County prosecutors were granted the option of remaining in the county pension system or transferring to the state system; forty-two non-vested prosecutors elected to transfer, and the act accordingly required that the County transfer the employer pension contributions it had made into its own fund on behalf of those prosecutors into the state fund.[119] Finding that the retirees and vested members of the county retirement plan had a property interest in its funds, the court held that the transfer of funds compelled by the act would amount to an unconstitutional taking of their property without due process.[120]

B. *When the Protection Takes Effect*

In addition to the nature of the right public employees have to their pension benefit, the manner in which the benefits are protected typically differs with regard to when the protection takes effect—that is, when the right becomes enforceable.[121] Prior to that moment, the eminent domain remedy will add very little, since governments may already modify their pension obligations at-will, without resort to eminent domain.[122]

In a number of states, the protection takes effect as soon as the public employee begins work or chooses to enroll in the applicable pension system.[123] By extension, any benefit that is added or enhanced

116 *E.g.*, *Pineman*, 488 A.2d at 810 ("[A] due process analysis provides the necessary flexibility that the contract approach lacks . . . .").

117 *See* Ass'n of State Prosecutors v. Milwaukee Cty., 544 N.W.2d 888 (Wis. 1996).

118 Until 1999, Wisconsin statutes spelled "employee" with a single "e" at the end. *See Lightbourn*, 627 N.W.2d at 816 n.3; *see also* Richland Sch. Dist. v. Dep't of Indus., Labor & Human Relations, Equal Rights Div., 479 N.W.2d 579, 583 n.1 (Wis. Ct. App. 1991).

119 *Ass'n of State Prosecutors*, 544 N.W.2d at 889–90.

120 *Id.* at 891, 893.

121 The term "vesting" is often used to describe the moment when the employee's right to a pension cannot be impaired. *E.g.*, Withers v. Register, 269 S.E.2d 431, 432 (Ga. 1980). However, it is also used to describe the moment when the employee has satisfied all conditions necessary to become eligible to receive the benefits (usually service for a specified number of years) but may not have yet attained the age of retirement. *Vested Pension*, BLACK'S LAW DICTIONARY (10th ed. 2014). Although these two moments may in fact coincide in some cases, *see infra* notes 125–26 and accompanying text, this Note will avoid the term and the ambiguity, except in direct quotations.

122 *See supra* note 84 (highlighting the vulnerability of unprotected pensions).

123 Examples include Alaska, Arizona, Illinois, Nebraska, New York, Washington, and, in some cases, Oregon. *See* Municipality of Anchorage v. Gallion, 944 P.2d 436, 440 (Alaska 1997)

during the course of employment or membership in the retirement system becomes part of the promised pension, and likewise cannot be diminished or rescinded.[124]

A state's protection of a government's promised pension benefits may instead take effect after the employee has worked a specified number of years.[125] Usually, this is the same as the number of years an

("[T]he right to benefits vests when the employee enrolls in the retirement system . . . ."); Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1167 (Ariz. 2014) ("[T]he right to a public pension on the terms promised vests upon acceptance of employment, and 'the State may not impair or abrogate that contract without offering consideration and obtaining consent of the employee.'" (citation omitted) (quoting Proksa v. Ariz. State Schs. for the Deaf & the Blind, 74 P.3d 939, 942 (Ariz. 2003) (en banc))); People *ex rel.* Sklodowski v. State, 695 N.E.2d 374, 377 (Ill. 1998); Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995) ("[A] public employee's constitutionally protected right in his or her pension vests upon the acceptance and commencement of employment . . . ."); Kleinfeldt v. N.Y.C. Emps.' Ret. Sys., 324 N.E.2d 865, 869 (N.Y. 1975) (holding that government may not impair "the amount of the retirement benefits payable to the members on retirement under laws and conditions existing at the time of his entrance into retirement system membership" (quoting Birnbaum v. N.Y. State Teachers' Ret. Sys., 152 N.E.2d 241, 246 (N.Y. 1958))); Bakenhus v. City of Seattle, 296 P.2d 536, 539 (Wash. 1956) (en banc) ("The promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise."); *see also* Moro v. State, 351 P.3d 1, 35–36 (Or. 2015) (noting that a vesting requirement "is impliedly irrevocable [because] the invited form of acceptance takes time to complete . . . .").

Considered within the framework of the contract approach, this may be understood as the employee accepting the government-employer's offer by means of part performance. *See* Or. State Police Officers' Ass'n v. State, 918 P.2d 765, 779 (Or. 1996) (en banc) ("[The retirement system] constitutes an offer by the state to its employees for a unilateral contract that may be accepted by the tender of part performance by those employees."), *abrogated by Moro*, 351 P.3d at 36.

124 *E.g.*, *Withers*, 269 S.E.2d at 432 ("[A] statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services while the law is in effect . . . .").

125 Examples include Alabama, Arkansas, Delaware, and North Carolina. *See* Bd. of Trs. of Policemen's & Firemen's Ret. Fund of Gadsden v. Cary, 373 So. 2d 841, 843 (Ala. 1979) (noting that "if these employees completed twenty years of service before the effective date of the 1975 amendment, they had the right to retire with their benefits immune from subsequent legislative modification"), *approved in* City of Gadsden v. Harbin, 148 So. 3d 690, 696 (Ala. 2013); Jones v. Cheney, 489 S.W.2d 785, 790 (Ark. 1973) ("[A]fter appellee's rights became vested by his having met the service requirements, his entitlements could not thereafter without his consent be affected by any future enactment . . . ."); *In re* State Emps.' Pension Plan, 364 A.2d 1228, 1235 (Del. 1976) ("[V]ested contractual rights exist under the State Pension Law and in the State Pension Fund, at least as to those employees and former employees who have statutory vested rights in service pensions or who have otherwise fulfilled eligibility requirements for pension."); Bailey v. State, 500 S.E.2d 54, 61 (N.C. 1998) (holding that where pension benefits had previously been tax exempt, a new tax on pension benefits could not be applied to individuals who had already worked the specified number of years prior to the effective date of the tax, "without regard to whether those benefits are attributable to service prior to or after that date").

employee must work to become eligible to receive the pension benefits upon reaching the age of retirement.[126]

In two additional categories of jurisdictions, eminent domain is less helpful. The first includes a small number of states where the only pension benefits protected are those held by a retiree who has already begun collecting the benefits.[127] The second comprises those states that only protect those benefits already earned on services performed, so that the government-employer is free to change the terms governing benefits to be earned on services provided going forward.[128] Governments in either type of jurisdiction are already able to make the kinds of changes

126 *E.g.*, *Bailey*, 500 S.E.2d at 58 ("[E]mployees [must] work a predetermined amount of time in public service before they are eligible for retirement benefits. After employment for the set number of years, an employee is deemed to have 'vested' in the retirement system."). Although describing a pension as "vested" can describe at least two events, the two events coincide here. *See supra* note 125; *see also supra* note 121 (describing the ambiguity associated with the term "vested").

127 *E.g.*, Klamm v. State *ex rel.* Carlson, 126 N.E.2d 487, 489 (Ind. 1955) (holding that in pension funds where enrollment is non-mandatory, the promised benefits are gratuities until the interest becomes vested upon retirement).

128 Examples include Florida, Hawaii, Michigan, and, as of recently, Oregon. *See* 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." (emphasis supplied)); Scott v. Williams, 107 So. 3d 379, 389 (Fla. 2013) (holding that a pension protection statute "was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the [pension system]"); Studier v. Mich. Pub. Sch. Emps.' Ret. Bd., 698 N.W.2d 350, 360 (Mich. 2005) (concluding the scope of protection is limited "to monetary payments for past services" when construing MICH. CONST. art. IX, § 24); Moro v. State, 351 P.3d 1, 33–36 (Or. 2015) (holding that retirement system members "repeatedly accept their employers' . . . offers by continuing to work," and so COLA rates could be altered as to services not-yet-performed, unlike benefits that "impose conditions on acceptance that take time to complete"—such as vesting requirements—which are irrevocable); *see also* Kaho'ohanohano v. State, 162 P.3d 696, 736 (Haw. 2007) (construing Hawaii's constitutional provision and detailing the legislative history around the insertion of the word "accrued").

This approach attempts to strike a balance between employees—who, reasonably relying on certain retirement benefits, accepted and remained in government jobs—and government-employers that may find it necessary to respond to dire economic conditions. Alicia H. Munnell & Laura Quinby, Ctr. for Ret. Research at Bos. Coll., *Legal Constraints on Changes in State and Local Pensions* 3 (2012), http://crr.bc.edu/wp-content/uploads/2012/08/slp_25.pdf; *see also Kaho'ohanohano*, 162 P.3d at 737 ("The purpose of the amendment will be to *preserve the accrued benefits but still leave the legislature free as to the future*." (quoting a delegate to the state's 1950 constitutional convention)). It is also the standard for pensions in the private sector under ERISA. *See* 29 U.S.C. § 1054(g)(1); *see also* Henry H. Drummonds, *The Aging of the Boomers and the Coming Crisis in America's Changing Retirement and Elder Care Systems*, 11 LEWIS & CLARK L. REV. 267, 287–88 (2007) (distinguishing the ERISA standard from the predominant public sector approach); Terrance O'Reilly, *A Public Pensions Bailout: Economics and Law*, 48 U. MICH. J.L. REFORM 183, 225–26 (2014) (advocating the ERISA standard for state and local retirement plans).

that would be permitted under eminent domain, without resorting to that remedy.[129]

Having framed the public pension issue in Part I, and considered how states characterize the right held by current workers to their future pension in Part II, the stage is now set to evaluate the eminent domain power in the context of public sector pensions.

III. CONSTITUTIONAL CONSTRAINTS ON THE EMINENT DOMAIN POWER OF STATE AND LOCAL GOVERNMENTS

Whether a state or local government can acquire property by eminent domain is a matter of both state and federal law, and a condemnation of pension benefits would have to be considered against each. State and local governments are bound by the Takings Clause of the U.S. Constitution[130] as that clause has been interpreted by the Supreme Court.[131] Furthermore, these governments are bound by similar provisions in their own state constitutions, as interpreted by the high court of the state.[132] Local governments and executive agencies are further bound by any statutory limitations created by the state legislature.[133]

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129 The effect of the eminent domain remedy, as argued in this Note, is to enable a government to modify its pension obligations as to benefits earned on services to be performed going forward. *See infra* text accompanying note 235.

130 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

131 *See infra* Part III.A.

132 *See infra* Part III.B.

133 Since this Note confines its inquiry to the constitutional limitations, an analysis of when and under what circumstances the local governments or executive agencies of a particular state could act without the cooperation of the state legislature is beyond the scope of the Note. At least one state constitution, however, extends broad eminent domain powers explicitly to its county and municipal governments. GA. CONST. art. IX, § 2, ¶ V ("The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose . . . ."); *see* Williams Bros. Lumber Co. v. Gwinnett Cty., 368 S.E.2d 310, 310 (Ga. 1988). The high court in Idaho has interpreted its constitution as having a similar effect. *See* Payette Lakes Water & Sewer Dist. v. Hays, 653 P.2d 438, 440 (Idaho 1982) ("This provision of our Constitution . . . has been held to be self-executing . . . . No action of the legislature further than providing the procedural machinery by which the right may be applied is necessary."). In other states, the legislature appears to have delegated broad eminent domain powers to their local governments by statute, such that local governments can initiate most eminent domain proceedings on their own. *See, e.g.*, CAL. GOV'T CODE § 37350.5 (West 2015) ("A city may acquire by eminent domain any property necessary to carry out any of its powers or functions."); ACCO Unlimited Corp. v. City of Johnston, 611 N.W.2d 506, 511 (Iowa 2000) ("[T]he [Iowa] Code allows a city to 'exercise [the eminent domain power as] it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.'" (quoting IOWA CODE § 364.1 (1995))). In Colorado, by contrast, "the power of eminent domain lies dormant in the state until the legislature speaks.

This Part first reviews the constraints imposed by the U.S. Constitution, which apply to all states. Next, it analyzes constitutional limitations that states impose on the takings power, beyond those imposed by the U.S. Constitution. Finally, it recognizes a powerful limitation on the use of eminent domain in any context: public opinion.

A. *The Federal Takings Clause*

The eminent domain power[134] is constitutionally limited in two fundamental ways. The first relates to the purpose for which property may be taken: only for a "public use."[135] The second relates to the right of the property owner whose property is subject to the taking: she has a right to "just compensation."[136] By contrast, the Constitution is silent as to the type of property that may be taken, and, accordingly, the Supreme Court has approved takings of personal and intangible property. This subsection reviews each in turn.

1. Purpose of the Taking: The "Public Use" Requirement

All government takings of property are subject to the "public use" requirement.[137] The requirement has been interpreted to encompass any taking for a "public purpose," even if the property will not be literally available for use by the public.[138] Thus, while a government may not take property for the sole purpose of transferring it to another private party,[139] it is permitted to do so if it is for a public purpose.[140] The

Accordingly, a party may not condemn private property without demonstrating that the taking has been statutorily authorized, either expressly or implicitly." Dep't of Transp. v. Stapleton, 97 P.3d 938, 941 (Colo. 2004) (en banc) (citation omitted). *Cf.* Dep't of Transp. v. City of Atlanta, 337 S.E.2d 327, 333 (Ga. 1985).

134 The eminent domain power is also called the takings power or the condemnation power, and this Note uses these terms interchangeably.

135 U.S. CONST. amend. V.

136 *Id.*

137 *Id.*

138 Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) ("Not only was the 'use by the public' test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when 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.'" (footnotes omitted)).

139 *Id.* at 477.

140 *Id.* at 482 ("'It is only the taking's purpose, and not its mechanics,' . . . that matters in determining public use." (brackets omitted) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984))). Public purposes may include economic development, *id.* at 485, combatting

concept of "public purpose" is defined broadly,[141] and the government is accorded wide latitude in determining what satisfies it.[142] Furthermore, property that is already being used for public purposes remains condemnable.[143]

Courts have undertaken to evaluate proposed pension reforms under the different "public purpose" standard that applies when engaging in a Contracts Clause analysis.[144] However, that standard is more demanding than the one applied under the Takings Clause, in part because the latter has the added protection of just compensation.[145]

Under the broadly deferential takings standard then, it seems clear that a government's condemnation of future pension benefits not yet earned under an existing pension plan would easily meet the federal "public use" requirement, where the asserted public purpose is to avert fiscal calamity and its negative consequences.[146]

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blight, Berman v. Parker, 348 U.S. 26 (1954), and elimination of a land oligopoly, *Midkiff*, 467 U.S. at 241–42.

141 *Kelo*, 545 U.S. at 480 ("Without exception, our cases have defined [the public use] concept broadly. . . ."); *see also Berman*, 348 U.S. at 33 ("The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

142 *Kelo*, 545 U.S. at 483 ("[O]ur public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) ("The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow.").

143 United States v. Carmack, 329 U.S. 230, 239–40 (1946) (condemning city-owned land for a post office).

144 *See, e.g.*, Moro v. State, 351 P.3d 1, 38–39 (Or. 2015). Under the Contracts Clause, contracts may be impaired if "th[e] impairment was both reasonable and necessary to serve . . . important purposes claimed by the State." U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 29 (1977).

145 *See U.S. Trust*, 431 U.S. at 29 n.27 (stating that "[s]tates remain free to exercise their powers of eminent domain to abrogate . . . contractual rights, upon payment of just compensation," even where they could not establish public purpose to satisfy the Contracts Clause). The *U.S. Trust* standard also contains a "necessity" requirement that precludes impairment where a state "could have adopted alternative means of achieving" its purpose—a requirement that the federal Takings Clause does not contemplate. *See id.* at 30; *see also, e.g.*, *Moro*, 351 P.3d at 39.

146 *See supra* notes 13–16 and accompanying text.

2. Rights of the Property Owner: The "Just Compensation" Requirement

Every owner of condemned property has a constitutional right to be justly compensated for the taking.[147] The owner is entitled to the "full and perfect equivalent" of the property taken.[148] The just compensation requirement applies equally when the property is in the nature of a contract.[149] Where the measure of just compensation is greater than or equal to the benefit received by the state or locality as a result of the taking,[150] eminent domain will not be a desirable option.[151] With regard to the feasibility of a taking of pension benefits, then, much will depend on how the value of the public worker's property right is measured, and the form the compensation must take. This Note considers separately how a public worker might be justly compensated for: (1) the pension benefits already earned on services performed up to the date of the condemnation; and (2) the pension benefits not yet earned.[152]

Market value is the default standard for measuring just compensation.[153] However, there is some property that, although condemnable, is not susceptible to market valuation,[154] such as property that is "seldom, if ever, sold in the open market."[155] This applies to

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147 U.S. CONST. amend. V. The ascertainment of just compensation is a judicial inquiry. Monongahela Nav. Co. v. United States, 148 U.S. 312, 327 (1893).

148 United States v. Miller, 317 U.S. 369, 373 (1943). "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.*

149 *See U.S. Trust*, 431 U.S. at 19 n.16 ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

150 Just compensation is measured as the value to the property owner, not the benefit to the condemning government. *Miller*, 317 U.S. at 375.

151 For example, consider a retired public worker who is already collecting pension benefits. The value of the retiree's property right to her pension is likely to be measured as equivalent to the amount already owed under the pension plan; therefore the just compensation requirement would appear to fully protect the retiree from condemnation, because the value of the condemned property would inure no benefit to the state or locality. This is one reason this Note focuses on the pension benefits promised to current workers, not retirees. *See supra* note 11.

152 This Note refers to these as the "already-earned benefits" and the "not-yet-earned benefits," respectively. For the sake of simplicity, we can consider that the former category includes the pension benefits to which the employee would be entitled if she retired on the date of the condemnation, and the latter category includes the additional benefits to which the employee would be entitled under the existing pension plan if she continues to work for the state or locality. In reality, the line may not be so simply drawn.

153 *See* United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys., Pa., 441 U.S. 506, 511 (1979) ("Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." (quoting *Miller*, 317 U.S. at 374)).

154 *Id.* at 512.

155 United States v. 50 Acres of Land, 469 U.S. 24, 30 (1984); *see also 564.54 Acres of Land*, 441 U.S. at 513 (noting that market value is not ascertainable where the property is "of a type so

pension benefits, which generally are not assignable,[156] and therefore cannot be bought and sold.

The highest the already-earned pension benefits could be valued is the amount due under the existing pension plan.[157] Therefore, if the compensation paid to the worker were identical to that committed under the existing plan—that is, if the worker remained entitled to a pension upon retirement, at the level earned as of the date of condemnation—the requirement of just compensation should be satisfied with regard to the already-earned portion.[158]

One possible challenge could arise if a court held that just compensation requires an immediate cash payment of the employee's earned retirement benefits.[159] To be sure, a government-employer almost certainly would not have the cash resources necessary to pay such an accelerated benefit, even where limited to the already-earned portion of benefits. Such a holding seems unlikely,[160] but in any case, such a challenge should nonetheless be surmountable given that a

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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").

156 *See, e.g.*, 5 U.S.C. § 8346(a) (2012) (prohibiting assignment of federal civil service retirement benefits). Interestingly, British leaders recently floated the idea of creating a secondary market for pensions—but even that proposal would apply only to retirees already collecting benefits. *See* Richard Evans, *Sell Your Pension For Cash: the Two-Minute Briefing*, TELEGRAPH (London) (Jan. 8, 2015, 10:10 AM), http://www.telegraph.co.uk/finance/personalfinance/pensions/11331409/Sell-your-pension-for-cash-the-two-minute-briefing.html.

157 *See* Bauman v. Ross, 167 U.S. 548, 574 (1897) ("[The condemnee] is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.").

158 More dramatically, it is conceivable that switching the already-earned portion into a defined contribution pension plan such as a 401(k) could also satisfy the just compensation requirement, if the condemned property were used to support a 401(k) that benefits the worker. *Cf. infra* notes 169–77 and accompanying text (describing how a 401(k) could fit within the framework of a special benefit or a transferrable development right).

Even if a 401(k) would not legally satisfy the just compensation requirement for the already-earned portion, some workers may choose it anyway—if given the option. One difference between defined contribution retirement plans such as 401(k)s and the defined benefit plans more common in the public sector is that, in general, a defined benefit plan is not portable between jobs. Katherine Elizabeth Ulrich, *You Can't Take It with You: An Examination of Employee Benefit Portability and its Relationship to Job Lock and the New Psychological Contract*, 19 HOFSTRA LAB. & EMP. L.J. 173, 193 (2001). Therefore, defined contribution retirement plans such as 401(k)s offer a significant advantage to workers who do not (or would not) spend their entire careers in government.

159 In the typical condemnation, the condemning authority must pay just compensation immediately, and in cash. *See* United States v. Miller, 317 U.S. 369, 373 (1943) (noting compensation is the "full and perfect equivalent in money"); Kieselbach v. Comm'r of Internal Revenue, 317 U.S. 399, 403 (1943) (delay in payment requires interest).

160 Payment of pension benefits post-retirement, as under the existing plan, is surely a more "perfect equivalent" of the property taken than an accelerated payment would be. *See Miller*, 317 U.S. at 373.

number of federal courts have approved postponed receipt of just compensation awards, in the context of condemned future interests.[161]

Measuring just compensation for the not-yet-earned pension benefits presents the more uncertain challenge. Like the already-earned benefits, the maximum these could be valued is the amount due under the existing pension plan.[162] However, valuing the not-yet-earned benefits as of the date of the condemnation would require enormous speculation about, for example, the length of time the employee will continue to work,[163] and the employee's salary and rank at retirement.[164] This raises at least two issues. First, unlike contract damages after a breach, the measure of just compensation in a condemnation case does not include expectation damages,[165] even where the condemned property is itself a contract.[166] Second, losses as a result of a taking may

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161 With regard to condemned future interests, courts face a dilemma determining how to divide the compensation award between a life tenant and the remaindermen; although some courts apportion the just compensation according to an actuarial formula, others place the entire award in trust, which is only accessible by the remaindermen at the death of the life tenant. *See* United States v. Rodgers, 461 U.S. 677, 704–05 (1983) (dicta) (collecting cases); *see also* United States v. 122,000 Acres of Land, 57 F. Supp. 421, 422 (N.D. Tex. 1944); Olin L. Browder, Jr., *The Condemnation of Future Interests*, 48 VA. L. REV. 461 (1962); Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 B.Y.U. L. REV. 789, 800–13 (1989). Another way this challenge might be averted is to confine the taking to the not-yet-earned benefits—excluding those already-earned—since a government may confine a taking to portions of an estate. *Cf.* City of Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 407 (1912) (condemnation of an easement).

162 *See supra* note 157.

163 The length of time the employee will continue to work may be especially illusory if the fiscally distressed government is also facing employee layoffs as a means of plugging its budget holes.

164 *See* GRANT BOYKEN, CAL. RESEARCH BUREAU, ACTUARIALLY SPEAKING: A PLAIN LANGUAGE SUMMARY OF ACTUARIAL METHODS AND PRACTICES FOR PUBLIC EMPLOYEE PENSION AND OTHER POST-EMPLOYMENT BENEFITS 15–18 (2008), http://www.library.ca.gov/crb/08/08-003.pdf (describing assumptions that actuaries must make when estimating pension costs). *Cf.* Brief of Respondents-Appellants-Petitioners at 29–37, Ass'n of State Prosecutors v. Milwaukee Cty., 544 N.W.2d 888 (Wis. 1996) (No. 93-3329), 1995 WL 17050502, at *8 (county's brief arguing that funds contributed to a defined benefit retirement "on behalf of" an individual employee cannot be calculated, and explaining why a formula judicially devised by a lower court was deficient).

165 Expectation damages put the non-breaching party "in as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (AM. LAW INST. 1981).

166 *See* De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 71–72 (1931). *De Laval* arose after the federal government condemned its own contract with a steam turbine company before it had been fully performed; the Court held that just compensation did not require inclusion of the company's anticipated profits, except insofar as such profits would naturally be considered by a willing buyer of the contract. *Id.* at 70–73 (affirming a lower court award that was far lower than anticipated profits would have been); *see also* Russell Motor Car Co. v. United States, 261 U.S. 514, 523 (1923) ("This contention confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain. In fixing just compensation, the court must consider the value of the

not be compensable at all if they are too speculative or contingent.[167] Therefore, it is at least possible that the not-yet-earned benefits would be entirely uncompensable in a condemnation proceeding, in which case the only compensation due would be for the already-earned benefits.[168]

More likely, the not-yet-earned benefits would be assigned value. Even then, however, a government may still be able to justly compensate the worker whose interest is taken in a manner that would not be prohibitive, by using a permissible form of just compensation other than immediate cash. That is, the government could use the condemned property to establish a defined contribution pension plan that benefits the worker going forward,[169] such as a 401(k),[170] and such a plan would reduce or eliminate any just compensation owed by the government-

contract at the time of its cancellation, not what it would have produced by way of profits . . . if it had been fully performed."). *Cf.* United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 281–85 (1943) (noting that not all losses are compensable under the Fifth Amendment, which "allows the owner only the fair market value of his property; it does not guarantee him a return of his investment"); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123 (1924).

167 *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 11–12 (1949) (when measuring just compensation due to a business where the property on which the business is located is condemned, it should be assumed that the business can be relocated, for an alternative calculation would be too speculative); United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 406–07 (1949) (remote possibility that a condemned ferry might have been purchased by a far-away buyer should not have been included in measuring just compensation for the taking); *Powelson*, 319 U.S. at 279–81 (land's potential future use as a power plant was not compensable, where it depended on the owner's potential future use of its own eminent domain power to unite neighboring lands); *see also* 29A C.J.S. *Eminent Domain* § 159 (2014) (damages must be direct and certain); RESTATEMENT (FIRST) OF PROPERTY § 53 cmts. b, c (AM. LAW INST. 1936) (condemned future interests are uncompensable unless possession, but for the condemnation, would be probable and imminent). *But see, e.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 477–78 (1973) (requiring that measure of just compensation to lessee of condemned property include possibility that the lease would have been renewed); McCandless v. United States, 298 U.S. 342, 346 (1936) (finding error where the trial court excluded evidence that the condemned land might have been irrigated); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76–77 (1913) (not too speculative to consider that the condemned property would probably be desired and available for constructing a canal).

168 The effect is that pension benefits would be protected in the same manner as in those states that protect benefits on services performed, but permit the government-employer to change the terms going forward. *See supra* note 128 and accompanying text. This is also the standard for private pensions under ERISA. *Id.*

169 A defined contribution plan is less costly to a government-employer because it does not impose the risk of market underperformance on the government-employer. *See supra* note 22 (defining a "defined contribution" pension plan, and contrasting it with a "defined benefit" plan, which remains more common in the public sector).

170 "A 401(k) is a retirement savings plan sponsored by an employer. It lets workers save and invest a piece of their paycheck before taxes are taken out," together with a contribution from the employer. *What Is a 401(k)?*, WALL ST. J., http://guides.wsj.com/personal-finance/retirement/what-is-a-401k (last visited Jan. 13, 2015).

employer as either a "special benefit"[171] or as an instrument analogous to a "transferrable development right."[172] As a special benefit, whatever value the new 401(k) creates for the employee would be deducted from any compensation due from the government-employer.[173] Alternatively,

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171 *See* Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 151 (1974) ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation." (footnote omitted)); *see also* Bauman v. Ross, 167 U.S. 548, 584 (1897) ("The [C]onstitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and . . . no such prohibition can be implied . . . ."). *Bauman* contains a simple example of a special benefit: if Congress condemns a portion of land to construct a road, and the landowner's remaining property realizes an increase in value as a result of the new road, the "special benefit" received by the owner in the form of the remaining property's enhanced value may be deducted from any cash compensation due on the property taken. *Bauman*, 167 U.S. at 584.

172 The Court has left open the possibility that a government can justly compensate a property owner by creating and conveying a separate interest that has value on the market. *See, e.g.*, Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 122 (1978) (holding that no taking occurred, and so declining to decide whether transferrable development rights constitute just compensation); *id.* at 150–52 (Rehnquist, J., dissenting) ("I would remand to the Court of Appeals for a determination of whether TDR's constitute a 'full and perfect equivalent for the property taken.'"); *see also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747 (1997) (Scalia, J., concurring in part and concurring in judgment) (noting that a transferrable development right is "a *new* right conferred upon the landowner in exchange for the taking . . . ."). When the owners of Grand Central Station in New York City sought to increase the height of that building, they were denied a permit due to the building's status as a landmark. The limitation imposed by the local landmarks law substantially diminished the value of the property, but the city compensated the owners for the diminution by granting them "transferrable development rights," which could be sold to other property owners. *Penn Cent.*, 438 U.S. at 113–17, 131.

Although the Court has not approved this practice expressly, *id.* at 122 (holding that no taking occurred, and so declining to decide whether transferrable development rights constitute just compensation), the Justices have reviewed it more than once, *see Suitum*, 520 U.S. at 728–29 (holding that a takings claim was ripe for adjudication despite the property owner having not yet exercised her transferrable development rights); *id.* at 747 (Scalia, J., concurring in part and concurring in judgment) ("In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the regulation 'goes too far' (*i.e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation.").

Moreover, cities across the United States rely on a system of TDRs to enable many zoning, conservation, and historic preservation laws. *See* Rick Pruetz & Erica Pruetz, *Transfer of Development Rights Turns 40*, PLAN. & ENVTL. LAW, June 2007, at 3; *A Review of Transferable Development Rights (TDR) Programs in the United States*, AMERICAN LAW INSTITUTE–AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, SG040 ALI-ABA 409, 412 (2001).

173 *See supra* note 171. Just compensation is measured as the value to the property owner (here, the value of the 401(k)), not the cost to the condemning government (here, the initial investment in the 401(k)). *See* United States v. Miller, 317 U.S. 369, 375 (1943).

as an instrument analogous to a transferrable development right, the plan itself would justly compensate the worker as a separate, government-created interest that has value on the market.[174] Of course, the 401(k) would have to be generous enough to offset the judicially-determined value of the not-yet-earned benefits.[175] Although the value of those benefits might be substantial for a worker whose future employment is assured,[176] that is unlikely to be the reality for employees of a distressed government, since the government's ability to maintain its workforce may be quite uncertain.[177] Accordingly, its employees' rights to future earnings toward their pensions may actually be quite contingent.

3. Types of Property Subject to Taking: Personal and Intangible Property

Eminent domain occurs most often in the context of real property.[178] However, under the U.S. Constitution, there is no bar to governments employing the eminent domain power against personal and intangible property, including contracts.[179] Intangible property has often been considered "property" within the meaning of the Takings Clause, thereby receiving constitutional protection against takings

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174 *See supra* note 172.

175 Just compensation is measured as the value of the condemned property to its owner. *Miller*, 317 U.S. at 375. The property's value to the condemning government, if different, is not considered. *Id.*

176 Theoretically, a worker and her employer will continue to make contributions to her pension plan as long as she is employed, and those contributions will accumulate through investment. *See supra* text accompanying note 18. So it follows that the value of her pension would continue to grow for the duration of her employment.

177 For example, the city of Chicago recently announced that it would have to lay off 1,400 public school employees in order to make good on a payment to its teachers' pension fund. *See* Natasha Korecki, Fran Spielman & Lauren Fitzpatrick, *CPS Makes Pension Payment—With 1,400 Layoffs, Borrowing*, CHI. SUN-TIMES (June 30, 2015, 4:04 PM), http://chicago.suntimes.com/news/7/71/734086/cps-pension-payment-1400-layoffs-borrowing.

178 Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 33 (2011) ("This makes sense because the state should be able to purchase goods and services on the open market or produce its own; land is special because each parcel has a unique location. In addition, the transaction costs for 'taking' items of personal property would usually offset the items' value . . . .").

179 *See* U.S. Trust 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 a public purpose provided that just compensation is paid."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934) ("[A]ll contracts are subject to the right of eminent domain."); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243 n.6 (1984) ("[T]he Contract Clause has never been thought to protect against the exercise of the power of eminent domain.").

without just compensation.[180] Additional cases reveal that intangible property is affirmatively condemnable.[181]

Thus, whether the right created by a state's pension protection provision is in the nature of a contract or property, the U.S. Constitution does not preclude a government's taking of that right. If a government is so precluded, it will be state law that precludes it.

B. *State Constitutional Limitations on the Takings Power*

Having established that there is unlikely to be any bar to takings of pension benefits as a matter of U.S. constitutional law, it remains to be explored whether additional constraints imposed by the various state constitutions further limit use of the power in a manner that might preclude such a taking.[182] This subsection first considers how states interpret each of the three requirements discussed above—public use, just compensation, and nature of the property taken. It then discusses various additional limitations and requirements that states impose.

1. Purpose of the Taking: The "Public Use" Requirement

In states where the "public use" requirement is similar to the Supreme Court's—that is, where the requirement is read broadly to describe something more akin to a "public purpose"[183]—the

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180 *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (collecting cases and deciding that trade secrets constitute property for purposes of the Takings Clause); Kimball Laundry Co. v. United States, 338 U.S. 1, 16 (1949) (trade routes). Personal property subject to eminent domain extends to takings of money in a bank account. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003) ("A law that requires that the interest on . . . funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking . . . .").

181 *E.g.*, Contributors to Pa. Hosp. v. City of Phila., 245 U.S. 20, 22–23 (1917) (condemning a contract made by the condemning government itself); W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 531–32 (1848) (same).

182 The Kansas Constitution only limits the eminent domain power in one very narrow, inapplicable context. KAN. CONST. art. XII, § 4. So in that state, most takings are limited by the federal Constitution alone, along with statutory protections. *See, e.g.*, Young Partners, LLC v. Bd. of Educ., Unified Sch. Dist. No. 214, Grant Cty., 160 P.3d 830, 835 (Kan. 2007).

183 Examples include Alabama, California, Colorado, Idaho, and Iowa. *See* Gober v. Stubbs, 682 So. 2d 430, 434 (Ala. 1996) ("[W]hatever is beneficially employed for the community, is of public use." (quoting Aldridge v. Tuscumbia, Courtland, & Decatur R.R. Co., 2 Stew. & P. 199, 203 (Ala. 1832))); City of Oakland v. Oakland Raiders, 646 P.2d 835, 841 (Cal. 1982) (in bank) ("We have defined 'public use' as 'a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'" (quoting Bauer v. Cty. of Ventura, 289 P.2d 1, 6 (Cal. 1955) (in bank))); City & Cty. of Denver v. Block 173 Assocs., 814 P.2d 824, 828 (Colo. 1991) (en banc); Payette Lakes Water & Sewer Dist. v. Hays, 653 P.2d 438, 440 (Idaho 1982) ("All improvements that may be made, if useful to the public, may be

requirement poses no additional barrier to condemnations. In endorsing this broad view, state courts have acknowledged the value and necessity of the takings power in addressing changing public needs.[184] Furthermore, these courts generally adopt a position of deference toward a legislative or official determination of public purpose.[185]

A few state high courts endorse a narrower "public use" requirement.[186] In a state that rejects an interpretation that encompasses "public purpose" or "public benefit,"[187] a government seeking to exert its eminent domain power against pension benefits would face challenges explaining how the condemned benefits are available for literal "use" by the public.[188] Additional states constitutionalize strong limitations to the

encouraged by the exercise of eminent domain." (quoting Potlatch Lumber Co. v. Peterson, 88 P. 426, 432 (Idaho 1906))); *In re* Luloff, 512 N.W.2d 267, 273 (Iowa 1994). The Hawaii "public use" requirement is even more permissive, demanding simply that "the legislature might reasonably consider the use public." Haw. Hous. Auth. v. Lyman, 704 P.2d 888, 897 (Haw. 1985).

184 *E.g.*, *Oakland Raiders*, 646 P.2d at 842; *Payette Lakes*, 653 P.2d at 440 ("The term 'public use' is flexible, and cannot be confined to the public use mentioned at the time of forming the constitution." (quoting *Potlatch Lumber*, 88 P. at 432)).

185 *See, e.g.*, *Block 173 Assocs.*, 814 P.2d at 828–29 ("In examining the stated public purpose for a condemnation, we look to whether the stated public purpose is supported by the record. If so, our inquiry ends."); *Haw. Hous. Auth.*, 704 P.2d at 897 ("[O]nce the legislature has spoken . . . , so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation."); CMC Real Estate Corp. v. Iowa Dep't of Transp., Rail & Water Div., 475 N.W.2d 166, 169 (Iowa 1991) ("Courts should not substitute their judgment for the legislature's judgment as to what constitutes a public use unless the use is palpably without reasonable foundation."); *Young Partners*, 160 P.3d at 842. In Arkansas, the "heavy burden" is on the property owner to prove that a taking is not for public use. Linder v. Ark. Midstream Gas Servs. Corp., 362 S.W.3d 889, 894 (Ark. 2010).

186 *See infra* notes 187–89 and accompanying text.

187 In Kentucky, with one exception that is not relevant, condemned property must be literally available for public use. City of Owensboro v. McCormick, 581 S.W.2d 3, 5, 7 (Ky. 1979). The court explained that "[i]f public use was construed to mean that . . . the property . . . taken might contribute to the comfort or convenience of the public, . . . there would be absolutely no limit on the right to take private property." *Id.* at 6 (quoting Chesapeake Stone Co. v. Moreland, 104 S.W. 762, 765 (Ky. 1907)). *Cf.* Portland Co. v. City of Portland, 979 A.2d 1279, 1289 (Me. 2009) ("'As a general rule, property is devoted to a public use only when the general public, or some portion of it (as opposed to particular individuals), in its organized capacity and upon occasion to do so, has a right to demand and share in the use.' To pass constitutional muster, the use for which the property is taken must at the time of the taking be a public use, 'not only in a theoretical aspect, but rather in actuality, practicality and effectiveness . . . .'" (citation omitted) (first quoting Blanchard v. Dep't of Transp., 798 A.2d 1119, 1126 (Me. 2002); then quoting Brown v. Warchalowski, 471 A.2d 1026, 1030 (Me. 1984))).

188 For example, such a government might be in a position of asserting that the condemned property—that is, the funds that would have otherwise been paid as pension benefits—is available for public use by virtue of the other government programs they support instead. If a public use can be shown, the fact that a private party may additionally benefit from the taking should not be a bar. *Portland Co.*, 979 A.2d at 1289 ("Although the dominant purpose of a taking must be for a public use, a taking is not unconstitutional on the sole basis that a private party will also benefit from the taking.").

public use requirement, which may preclude takings of pension benefits altogether.[189]

2. Rights of the Property Owner: The "Just Compensation" Requirement

The general principles of just compensation as articulated by the Supreme Court are also applied by state courts construing their state's constitution: owners are entitled to the full and perfect equivalent of their property taken, which is often measured as market value, although there is no one-size-fits-all rule for valuing condemned property.[190] The already-earned benefits, then, could be paid as if under the existing plan, and satisfy the just compensation requirement with regard to that portion.[191] As for the not-yet-earned benefits, the notion that they may be uncompensable if they are too speculative or contingent finds support in state law as well.[192]

The issue of how public pension rights might be valued under a state's just compensation clause has in fact come before at least one state high court. In 1987, the Wisconsin legislature directed that certain surplus monies in the state's pension fund be distributed among one

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189 *See, e.g.*, N.D. CONST. art. I, § 16 (public use excludes "increase in tax base, tax revenues, employment, or general economic health"); *see also* LA. CONST. art. I, § 4 (defining which uses are to be considered "public").

190 *See, e.g.*, Comm'r of Transp. v. Towpath Assocs., 767 A.2d 1169, 1177–78 (Conn. 2001); Walkenhorst v. State, Dep't of Rds., 573 N.W.2d 474, 480 (Neb. 1998); Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, 1231–32 (R.I. 2006); City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177, 185 (Tex. 2001); Appalachian Power Co. v. Anderson, 187 S.E.2d 148, 152 (Va. 1972).

191 *See supra* notes 157–58 and accompanying text.

192 *See, e.g.*, *Towpath Assocs.*, 767 A.2d at 1184 (holding that the condemned property should not be valued for use as a bridge site, since such a use by the owner was speculative); Kurth v. Iowa Dep't of Transp., 628 N.W.2d 1, 8 (Iowa 2001) (holding that the anticipated profits of a business located on condemned land were too speculative to be considered in measuring just compensation); Ocean Rd. Partners v. State, 670 A.2d 246, 252 (R.I. 1996) (holding that valuation of condemned land should not include anticipated profits based on owner's intent to develop it); *City of Harlingen*, 48 S.W.3d at 185 (holding that condemned open land should not be valued as if it were subdivided, since that "bypasse[s] all of the problems that could appear during an actual development, substituting instead the best possible outcome"); *Appalachian Power*, 187 S.E.2d at 155 (holding that valuation testimony was improperly admitted because based on speculation). Furthermore, in states that recognize special benefits, *see, e.g.*, L.A. Cty. Metro. Transp. Auth. v. Cont'l Dev. Corp., 941 P.2d 809, 824 (Cal. 1997) (recognizing general benefits in addition to special benefits); E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1039–40 (Colo. 2004); Ill. State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chi., 642 N.E.2d 1249, 1255 (Ill. 1994); *see also* John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1041 (1975), or transferrable development rights, it is possible that a 401(k) could serve as just compensation, *see supra* notes 171–72 and accompanying text.

specific class of retirees.[193] The state's high court found that the scheme effected a taking under the state's constitution,[194] and that the remedy was just compensation, which it measured as the total amount paid out of the pension fund under the scheme plus interest[195]—effectively reversing the taking. This illustrates one circumstance where the just compensation requirement effectively precluded use of eminent domain in the pensions context. However, the circumstances are distinguishable: The case involved a transfer of monies directly out of the pension fund, rather than a taking of an individual worker's interest in receiving her own pension benefits,[196] so the court was not presented with challenges of speculation in measuring the future value of a worker's interest.[197] Furthermore, nothing in the Wisconsin court's reasoning would preclude a taking confined to benefits earned in the future, which would not compromise any monies already in pension fund accounts.[198]

3. Types of Property Subject to Taking: Personal and Intangible Property

While it does not appear that any state has expressly limited its takings power to real property, a number of states have done the opposite, following federal courts' lead in expressly approving takings of personal and intangible property.[199] Whether pension promises are

193 Wis. Retired Teachers Ass'n v. Emp. Trust Funds Bd., 558 N.W.2d 83, 88 (Wis. 1997). The class specified was comprised of pre-1974 retirees. *Id.* In 1974, Wisconsin had prospectively increased its public pension benefits, and in order to afford the existing retirees an equivalent enhancement, the state allocated money from its general fund to pay them a supplemental benefit. *Id.* The 1987 legislation, then, sought to relieve the general fund of this burden by directing that the supplement be paid out of the pension fund's surplus investment earnings. *Id.* at 91.

194 Specifically, the court found that all members of the retirement system had a property interest in the fund, and that interest included the right to have the fund's board decide how to allocate surplus monies, which was taken when the legislature imposed its own discretion in directing that the surplus was to be allocated to the pre-1974 retirees. *Id.* at 93.

195 *Id.* at 95–96*; see also* Elizabeth Brixey, *Settlement OK'd in Pension Fund Suit*, WIS. ST. J., Sept. 5, 1997, at B1, http://newspaperarchive.com/us/wisconsin/madison/madison-wisconsin-state-journal/1997/09-05/page-17 (noting that the state ultimately paid $215 million in a settlement).

196 *Wis. Retired Teachers*, 558 N.W.2d at 91 (distinguishing the two).

197 Indeed, the court rejected a method of valuation, advocated by the state, which would have required substantial speculation by the court. *Id.* at 96.

198 *See infra* text accompanying note 235 (proposing that a government confine any taking to future benefits not yet earned).

199 *E.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835, 838 (Cal. 1982) (in bank) (football franchise); Young Partners, LLC v. Bd. of Educ., Unified Sch. Dist. No. 214, Grant Cty., 160 P.3d 830, 838 (Kan. 2007) (reversionary interest in land); Eighth Ave. Coach Corp. v. City of N.Y., 35 N.E.2d 907, 913 (N.Y. 1941) (public contract); *see also* Ill. Cities Water Co. v.

understood as creating contract or property rights, court decisions illustrate how states have approved takings of such rights as reversionary interests in land,[200] municipal contracts,[201] and even a football franchise,[202] when the ordinary takings requirements were met.

The most celebrated example arose in 1980 when the City of Oakland initiated eminent domain proceedings to take the Raiders,[203] after the football team announced its intention to move to Los Angeles.[204] As a franchise of the National Football League, the Raiders were described as a "network of intangible contractual rights."[205] The eminent domain proceedings were dismissed on summary judgment and affirmed by the intermediate appellate court, which held that such a network of contract rights was not condemnable.[206] The California Supreme Court reversed, reasoning that the eminent domain power is

City of Mt. Vernon, 144 N.E.2d 729, 731 (Ill. 1957) (noting the eminent domain power "encompasses property of every kind and character, whether real, personal, tangible, or intangible").

200 *Young Partners*, 160 P.3d at 838. This Kansas case arose when the holder of a reversionary interest in land challenged a taking by the possessory interest holder, a local school district. The district sought to condemn the reversionary interest for the purpose of protecting its investment in improvements on the land. The trial court enjoined the taking as a violation of the Contracts Clause: Since the reversionary interest pre-dated the state statute that authorized the taking, that statute, as applied in this case, would operate as an unconstitutional impairment of the contract that created the reversionary interest. The Supreme Court of Kansas reversed, applying the U.S. Supreme Court's reasoning that the eminent domain power is an essential attribute of sovereignty, not subject to the limitations of the Contracts Clause. *Id.* at 833–38.

201 *Eighth Ave. Coach*, 35 N.E.2d at 913. This New York case arose after a bus company challenged a New York City traffic regulation converting Manhattan's Eighth and Ninth Avenues from two-way streets into one-way streets; the bus company serviced those avenues pursuant to a contract with the city, and suddenly found its four routes—one northbound and one southbound on each avenue—cut in half. The New York Court of Appeals determined that the city's regulation materially impaired the rights granted by the contract it had made with the bus company to operate the Eighth and Ninth Avenue routes. It further found that those rights, like other forms of property, were protected by the state and federal constitutions. The protection, however, was not that the bus route contract was not condemnable—rather the court expressly found that the city could exercise its eminent domain power against the bus routes, subject, of course, to the requirement of just compensation. *Id.* at 908–13.

202 *Infra* notes 203–10.

203 The Raiders, a franchise of the National Football League, played their home games in Oakland from 1960–82 and in Los Angeles from 1982–95. TIMELINE—RAIDERS HISTORICAL HIGHLIGHTS, http://www.raiders.com/history/timeline.html (last visited Jan. 13, 2015). They returned to Oakland in 1995, and continue to play there today, *id.*, although they are once again threatening to move to Los Angeles "should their attempts to wring enough taxpayer money for [a] new stadium[] from [Oakland] come up short." Barry Petchesky, *The Chargers and Raiders Threaten to Move to Los Angeles Together*, DEADSPIN (Feb. 20, 2015, 8:55 AM), http://deadspin.com/the-chargers-and-raiders-threaten-to-move-to-los-angele-1686955350.

204 *Oakland Raiders*, 646 P.2d at 837.

205 *Id.*

206 City of Oakland v. Oakland Raiders, Ltd., 176 Cal. Rptr. 646, 650 (Cal. Ct. App. 1981), *rev'd*, *Oakland Raiders*, 646 P.2d 835.

an inherent attribute of sovereignty,[207] constrained only by such limitations as are imposed by the constitution or the legislature.[208] Since the federal and California state constitutions imposed only two such limitations—public use and just compensation—the court found no limitation on the nature of the property that could be taken by eminent domain,[209] and remanded the case for a full trial to determine whether the proposed taking satisfied the public use requirement.[210]

4. Additional Requirements and Limitations

In addition to the traditional limitations discussed above, some states impose additional requirements or limitations on the eminent domain power as a matter of the state's constitutional law. Most notably, several states impose a "necessity" requirement.[211] In Arkansas, for example, this requirement means that the only property (or interest therein) that may be taken is that which is absolutely necessary to accomplish the public purpose.[212] In Louisiana, the requirement refers instead to the necessity of the purpose.[213] In each of these states, the condemning authority has broad discretion in its determination of

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207 *Cf.* Pfeifer v. City of Little Rock, 57 S.W.3d 714, 720 (Ark. 2001) ("The power of eminent domain is an attribute of, and inherent in, a sovereign state."); *supra* note 102.

208 *Oakland Raiders*, 646 P.2d at 838.

209 *Id.*; *see also id.* at 843 ("[I]f the city fathers of Oakland in their collective wisdom elect to seek the ownership of a professional football franchise are we to say to them nay? . . . Both federal and state Constitutions permit condemnation requiring only compensation and a public use."). The court also found no statutory limitation. *Id.* at 840.

210 *Id.* at 844–45. The court remanded with instructions to read the public use requirement broadly, *id.* at 840–41, and an explicit statement that "the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function," *id.* at 843. The Raiders ultimately prevailed on Commerce Clause grounds, after it was made clear that the Takings Clause and its state equivalent afforded no special protection to the intangible property rights associated with the franchise. City of Oakland v. Oakland Raiders, 220 Cal. Rptr. 153, 154–58 (Cal. Ct. App. 1985).

211 For discussions of necessity in the context of particular eminent domain *statutes*, see City of Phx. v. Superior Court, 671 P.2d 387, 389–90 (Ariz. 1983) (in banc); City & Cty. of Denver v. Block 173 Assocs., 814 P.2d 824, 828–29 (Colo. 1991) (en banc); Banks v. Georgia Power Co., 481 S.E.2d 200, 203 (Ga. 1997); ACCO Unlimited Corp. v. City of Johnston, 611 N.W.2d 506, 510–11 (Iowa 2000).

212 *Pfeifer*, 57 S.W.3d at 720. Maine's "public exigenc[y]" requirement is essentially equivalent to a necessity requirement. *See* ME. CONST. art. I, § 21 ("Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."); Portland Co. v. City of Portland, 979 A.2d 1279, 1288 (Me. 2009) ("A finding of public exigency involves a determination that the taking was necessary; the property interest was taken only to the extent necessary; and the property is suitable for the particular public use for which it was taken.").

213 Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So. 3d 192, 200 (La. 2010). Once that is established, the extent and location of the property to be condemned are within the discretion of the condemning authority. *Id.*

necessity, which is only reviewable under the most deferential standards.[214]

An Arkansas- or Maine-type necessity requirement could pose an additional hurdle in the pension benefits context: opponents of pension reform are sure to allege bad faith and abuse of discretion,[215] requiring the state or locality to explain to the court why and how it formed its particular condemnation plan. But in the context of a government facing imminent financial calamity, such matters should be addressable; indeed, the government will likely already address them in the context of demonstrating a public use. Furthermore, the government's hurdle is low, given the broad discretion it has in determining necessity.[216]

One final limitation may seem too plain to state: territoriality. That is, it would seem logical that a government's eminent domain powers could only extend to property within its borders. As it turns out, territoriality has not been such a rigid requirement as one might expect. For example, local governments may be statutorily or constitutionally authorized to condemn property that lies beyond their borders for certain enumerated purposes.[217] This could present a fascinating issue in the context of pension benefits, where bank accounts and pension fund investments may be located well beyond the territory of the state or locality. Of course, territoriality is not an explicit requirement in the federal or state constitutions.[218] Furthermore, courts could adopt the approach of the California Supreme Court in the *Raiders* case, which questioned whether any territorial limitation would even be applicable in the context of intangible property.[219]

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214 *See Pfeifer*, 57 S.W.3d at 721 (quoting State Highway Comm'n v. Saline Cty., 171 S.W.2d 60, 61 (Ark. 1943)) (fraud, bad faith, or gross abuse of discretion); *Exxon Mobil*, 35 So. 3d at 200 (arbitrary, capricious, or bad faith); *Portland Co.*, 979 A.2d at 1288–89 ("To pursue a claim for judicial review, the property owner must allege an abuse of the process by which the governmental entity determined that a public exigency exists.").

215 These are generally the standards of review for necessity determinations. *See supra* note 214.

216 *See supra* note 214.

217 *E.g.*, COLO. CONST. art. XX, § 1 (public works and utilities); UTAH CONST. art. XI, § 5(b) (public utilities); CAL. CIV. PROC. CODE § 1240.050 (West 2007) ("A local public entity may acquire [extraterritorial property] by eminent domain" where such power is "expressly granted by statute or necessarily implied as an incident of one of its other statutory powers.").

218 "Public use" and "just compensation" are the baseline requirements, U.S. CONST. amend. V, supplemented by additional requirements imposed by state constitutions as discussed in this subsection.

219 City of Oakland v. Oakland Raiders, 646 P.2d 835, 844 (1982) (in bank). The territoriality requirement at issue in the *Raiders* case was imposed by statute, and the court noted:

> It is questionable whether this statute is relevant to intangible property, which can have no permanent situs. . . . Even assuming [the statute's] applicability here, however, any such restriction would appear to be met on the record before us. Oakland is the principal place of business of the partnership. It is the designated NFL-authorized site for the team's "home games." It is the primary locale of the

C. *Public Opinion as a De Facto Limitation on Eminent Domain*

Public awareness of the eminent domain power has been especially high over the last decade, following the Supreme Court's decision in *Kelo v. City of New London*.[220] That decision spawned an outcry against perceived government overreach.[221] In several states, the outcry translated to votes for referenda that purported to constrain the government's eminent domain powers, and for candidates for public office who supported similar statutory constraints.[222]

Any public official considering the eminent domain power in any context will not be blind to this reality. In the context of public pensions, then, where exercise of eminent domain could potentially reach many thousands of voters or more—that is, public workers and their families[223]—the prospect of electoral backlash may indeed operate as a de facto limitation that precludes condemnation of public pensions in all but the most extreme circumstances. Despite that general proposition, however, there may now or soon be governments where the use of eminent domain in the context of public pensions would not only be necessary and appropriate, but where such use would not be as provocative.[224]

Polling suggests that public opinion with regard to eminent domain is not black and white. *Kelo* was not the first eminent domain case heard by the Supreme Court, and so the particular backlash to that

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> team's tangible personalty. We readily acknowledge that there may be similar or additional factors which would be relevant in determining the appropriate scope of a city's power of condemnation.

Id. For an argument that California law does prohibit extraterritorial takings of intangible property, see generally Michael M. Sandez, *Condemning a Residential Mortgage Loan: Is it an Extraterritorial Taking?*, 4 AM. U. BUS. L. REV. 237 (2015).

220 545 U.S. 469 (2005). *See* Janice Nadler, Shari Seidman Diamond & Matthew M. Patton, *Government Takings of Private Property*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 295–97 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008), http://www.americanbarfoundation.org/uploads/cms/documents/nadler_govt_takings_chapter.pdf (tracking national media coverage of eminent domain controversies).

221 *See* Nadler et al., *supra* note 220 at 305–06 (discussing concerns about government overreach as a factor that animated public response to *Kelo*).

222 For an assessment of these post-*Kelo* state-level limitations to the eminent domain power, see generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009). The post-*Kelo* limitations typically affect takings in the context of economic development, and thus would not constrain the takings analyzed in this Note.

223 The California Public Employees Retirement System, for example, has over 1.1 million active and inactive members, not including retirees. *See* CalPERS, *Facts at a Glance* 1 (September 2015), https://www.calpers.ca.gov/docs/forms-publications/facts-at-a-glance.pdf. CalPERS does not track how many are registered to vote.

224 *See supra* Part I.A (describing the high stakes for a state or locality that cannot pay its debts, and explaining why public pension systems are currently a prime culprit for governments struggling to remain solvent).

decision may have been exacerbated by particular values it threatened, such as sacredness of the home.[225] Indeed, one poll found marked differences in support for use of eminent domain in different hypothetical situations, depending on the property to be appropriated and the use it would be put toward.[226] How a population might respond to a taking of pension benefits is an open question, although it seems likely that it would depend on the severity of the community's fiscal constraints, and the nature of the replacement plan to be instituted for public workers.

Another reason that it may be difficult to predict reactions to takings in the public pension context is the unexpected political alliances that might result. Pension reform has become a bipartisan issue in many places,[227] despite the fact that it is vigorously opposed by the public sector unions that traditionally align with the political left.[228] And eminent domain is characterized by a level of government overreach that is generally anathema to libertarians.[229]

Finally, for the official who has already waded into the political minefield that typically characterizes pension reform (or made up her

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225 *See* Nadler et al., *supra* note 220, at 305.

226 The poll of New Jersey residents found, for example, that while ninety percent would not approve of a taking of low-value homes from people to build a shopping center, the number decreased to fifty-five percent when the purpose of the taking was to build a school, and sixty-five percent approved taking land from a developer when the purpose was to preserve open space. *Id.* at 302 (printing selected results from a Fall 2005 poll by Monmouth University/Gannett New Jersey). *See also The Daily Show: Little Seizers* (Comedy Central television broadcast Nov. 20, 2014), http://thedailyshow.cc.com/videos/u1knas/little-seizers (highlighting Republican members of Congress' opposition to eminent domain generally, while supporting it in the context of the Keystone XL pipeline).

227 For example, Gina Raimondo, "the [o]nly Democratic [s]tar of 2014," was elected governor of Rhode Island last year after successfully championing pension reforms as state Treasurer. David Freedlander, *Meet Gina Raimondo, the Only Democratic Star of 2014*, THE DAILY BEAST (Nov. 5, 2014, 8:30 PM), http://www.thedailybeast.com/articles/2014/11/05/meet-gina-raimondo-the-only-democratic-star-of-2014.html; *see* Katharine Q. Seelye, *Defying Unions, Democrat Vies to Become Rhode Island's First Female Governor*, N.Y. TIMES, Sept. 14, 2014, at A12, http://www.nytimes.com/2014/09/15/us/defying-unions-democrat-gina-m-raimondo-vies-to-become-rhode-islands-first-female-governor.html; *see also* Joanne von Alroth & Karen Pierog, *Illinois Lawmakers Pass Long-Awaited Pension Reform*, REUTERS (Dec. 3, 2013, 8:40 PM), http://www.reuters.com/article/2013/12/04/us-usa-illinois-pensions-idUSBRE9B303T20131204 (highlighting the bipartisan support behind Illinois' pension reform bill, including a Democratic governor and the "Democratic-controlled legislature"); Daniel DiSalvo, *How Public Sector Unions Divide the Democrats*, THE DAILY BEAST (Dec. 29, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/12/29/how-public-sector-unions-divide-the-democrats.html.

228 *See Public Sector Unions*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/indus.php?ind=P04 (last visited Jan. 13, 2015) (comparing campaign contributions to Democrats and Republicans by public sector unions).

229 *See Platform*, LIBERTARIAN NATIONAL COMMITTEE, http://www.lp.org/platform (last visited Jan. 13, 2015) (opposing eminent domain). *Cf. The Daily Show: Little Seizers*, *supra* note 226 (highlighting Republican members of Congress' opposition to eminent domain generally, while supporting it in the context of the Keystone XL pipeline).

mind to), incorporating eminent domain into her reform plan may not actually cause much further political damage, since the most vigorous opponents are quite likely already voting for someone else.

IV. PROPOSAL

Many cities and states are now or may soon be up against a wall when it comes to addressing severe financial distress. Having employed or considered a variety of traditional and novel remedies,[230] the government leaders may be asking anew what level of spending and service cuts its citizens can withstand.[231] Meanwhile, the funds allocated to pension benefits for public workers remain unimpaired.[232] At this point, the eminent domain remedy ought to be considered as a means to clear a path out of the crisis. The effect of that remedy would be to allow a government-employer to freeze its obligations to workers under its existing plan, and substitute a different plan going forward.

As a matter of federal constitutional law, there should be no bar to takings of a public worker's right to pension benefits, whether those rights are in the nature of contract or property.[233] Most state constitutions, although perhaps not all, are in accord.[234] In order to satisfy the just compensation requirement, the condemning government should do two things: (1) commit to fulfilling its pension obligations under the existing plan as to those pension benefits already earned on services performed up to the date of the 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).[235]

Consider Illinois, where a public worker's right to pension benefits is constitutionally contractual from the date of enrollment in the plan.[236] There would be no bar to the state condemning its employee's right to receive pension benefits, since both the state and federal governments adopt a broad and deferential construction of the "public use" requirement,[237] and furthermore, both sovereigns recognize contract

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230 *Supra* Part I.B.

231 *See* Anderson, *supra* note 25 (asking what are the minimal services a government should have to provide).

232 *Supra* Part II (describing legal constraints on pension reforms).

233 *Supra* notes 137–43 and accompanying text (public use requirement).

234 *Supra* notes 183–89 and accompanying text (states' application of the public use requirement).

235 *Supra* Part III.A.2 (just compensation).

236 ILL. CONST. art. XIII, § 5; People *ex rel.* Sklodowski v. State, 695 N.E.2d 374, 377 (Ill. 1998).

237 *Supra* Part III.A.1; Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 8–10 (2002) (noting broad public use concept, while rejecting a taking as conferring a benefit that

rights as condemnable.[238] By fulfilling its pension obligations under the existing plan as to the benefits earned on services already performed, the state will justly compensate the worker for that portion of the contract.[239] And even if the not-yet-earned benefits are assigned value, the new retirement plan benefitting the worker could fully set off the compensation due.[240]

CONCLUSION

The constitutional limitations on the eminent domain power exist in order to protect individuals from having to unjustly bear collective burdens.[241] The eminent domain power itself, however, is borne of the opposite necessity: to enable the collective to pursue functions that benefit the public at large, where private opponents could otherwise stand in the way.[242] Where conditions exist such that a government's pension obligations are standing in the way of averting—or emerging from—extraordinary fiscal crisis, use of the eminent domain power against those obligations may not only be proper—in some cases it may clear the only path out of the crisis. Naturally, the right to receive promised pension benefits—like private property in general—demands strong protection. Such protection can be found in the Takings Clause, whose high bar can be surmounted in the appropriate circumstances, by freezing existing obligations on benefits already earned, and substituting a different plan with value on the market going forward.

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was "purely private").

238 *Supra* note 179; Vill. of Hyde Park v. Oak Woods Cemetery Ass'n, 7 N.E. 627, 629–30 (Ill. 1886).

239 *See supra* note 158 and accompanying text.

240 *See supra* note 171 and accompanying text; Ill. State Toll Highway Auth. v. Am. Nat. Bank & Trust Co. of Chi., 642 N.E.2d 1249, 1255 (Ill. 1994) (approving special benefits). The new retirement plan might itself justly compensate the worker akin to a transferrable development right, *see supra* note 172 and accompanying text, although the Illinois court has not yet weighed in on such rights.

241 Armstrong v. United States, 364 U.S. 40, 49 (1960). The limitations are "public use" and "just compensation." U.S. CONST. amend. V.

242 Kohl v. United States, 91 U.S. 367, 371–72 (1875); *see also* United States v. Carmack, 329 U.S. 230, 237 (1946) (quoting *Kohl* and characterizing it as "the leading case on the federal power of eminent domain"). *Cf.* Monongahela Nav. Co. v. United States, 148 U.S. 312, 327 (1893) (noting that the question of what private property is needed for public purposes is "of a political and legislative character"). Even when the private individual isn't strictly standing in the way, he may demand an unreasonably high taxpayer-funded award. *See* Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain* 11–15 (Working Paper, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952511 (describing eminent domain as a means of addressing the holdout problem).