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A View of the Rhode Island Pension Landscape: The Potential Reform of Local Pension Plans Under the Preemption Doctrine

Andre S. Digou*

INTRODUCTION

On a national scale, public debate surrounding the deteriorating status of pension systems and the inability of states, cities and towns to meet funding obligations has likely reached its peak. Despite being the smallest state in the United States geographically, Rhode Island has been at the center of the debate because of unprecedented pension reform legislation enacted in 2011. Rhode Island, with only thirty-nine cities and towns, has four state-administered pension plans and thirty-six locally-administered pension plans. As of June 2012, the four state-administered plans were collectively unfunded by approximately \$4.8 billion. As of June 2009, the locally administered plans were only 43% funded and had an unfunded liability of approximately \$1.9 billion. While the 2011 pension reform legislation was aimed at rectifying the state administered plans, locally administered plans remain largely unaltered and ripe for state intervention.

Section I of this article discusses the overall pension landscape in Rhode Island, including the types of pension plans

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and plan participants. Section II of this article focuses on the sweeping pension reform enacted by the Rhode Island legislature in 2011. Section III analyzes Rhode Island's approach to pension modifications. Section IV discusses a unified approach to pensions in Rhode Island and potential legislative remedies to the existing local pension scheme. Finally, Section V concludes that, should the Rhode Island legislature desire to reform local pension plans, the legislature could do so by unifying the existing local pension scheme under preemption doctrine principles and without modifying existing participants' benefits.

I. THE RHODE ISLAND PENSION LANDSCAPE

A. *State-Administered Plans*

Rhode Island, comprised of just thirty-nine cities and towns, has four distinct state-administered retirement plans, each of which was created pursuant to statute.¹ The four state-administered retirement plans are: (1) the employee retirement system of Rhode Island ("ERSRI"), which includes state employees and teachers; (2) the municipal employee retirement system ("MERS"), which includes locally funded plans which elect to participate in MERS; (3) the Rhode Island State Police Retirement Benefits Trust ("SPRBT"); and (4) the Rhode Island Judicial Retirement Benefits Trust ("JRBT") (collectively referred to as the "State System").² The State pools plan funds for investment purposes, and the Rhode Island Retirement Board ("Retirement Board") administers the State System.³ The Rhode Island General Treasurer, who is responsible for the State System's investment

1. See R.I. GEN. LAWS ANN. §§ 36-8-1 to -10-40 (West 2006 & Supp. 2013) (ERSRI); R.I. GEN. LAWS ANN. §§ 45-21-1 to -66 (West 2006 & Supp. 2013) (MERS); R.I. GEN. LAWS ANN. §§ 42-28-22 to -22.3 (West 2006 & Supp. 2013) (SPRBT); R.I. GEN. LAWS ANN. §§ 8-3-8 to -8.2 (West 2006 & Supp. 2013) (JRBT).

2. To be precise, according to the General Treasurer's Chief of Staff, in 2010 there were 113 named plans encompassed in the four state-administered plans, and 36 locally administered pension plans. See C. Eugene Emery Jr., *King Says Rhode Island's Public Employees Have 150 Different Pension Plans*, POLITIFACT (Aug. 30, 2010, 12:01 a.m.), <http://www.politifact.com/rhode-island/statements/2010/aug/30/kernan-kerry-king/king-says-rhode-islands-public-employees-have-150-/>. So, there are actually 149 different named pension plans in Rhode Island. See *id.*

3. R.I. GEN. LAWS ANN. § 36-8-4(a).

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decisions and setting asset allocation strategies, chairs the Retirement Board.⁴

The majority of State System participants are covered by a defined benefit plan (commonly referred to as a “DB Plan”), which means that retirement allowances are calculated using a preset formula.⁵ DB Plans are funded by a combination of employee and employer (i.e. the state, city, town or local entity) contributions plus investment returns on the funds invested. Participants with DB plans generally receive cost of living adjustment (“COLA”)⁶ increases, and retirement eligibility is based on years of credited service or satisfying certain age requirements set forth in the statutes.⁷ Retirement allowance is computed using an average of the participant’s highest earned salary calculated over three years (or five years, depending on the date of retirement eligibility), multiplied by the number of credited years of service.⁸ Participants receive their retirement allowance in fixed equal monthly installments after retirement.⁹ DB plan contributions are not correlated with the performance of plan investments, and therefore the employer bears the risk of investment performance and accuracy of the plan’s financial assumptions.¹⁰

Some participants, however, are covered by a defined contribution plan (commonly referred to as a “DC Plan”) whereby retirement allowances are calculated based on the employee’s contributions, employer contributions, and investment returns.¹¹ A DC Plan, unlike a DB Plan, offers the participant an opportunity to select investments for their personal account and

4. R.I. GEN. LAWS ANN. §§ 36-8-4, -9.

5. *See, e.g.*, R.I. GEN. LAWS ANN. §§ 36-10-9, -10.

6. COLAs are adjustments in contribution percentages that are commonly used to combat erosion of pension funds by inflation. Once granted, COLA adjustments compound and cause a sharp increase in the funding obligation of the funding entity.

7. R.I. GEN. LAWS ANN. §§ 36-10-9 to -9.3 (West 2006 & Supp. 2013); R.I. GEN. LAWS ANN. § 16-16-12 (West 2006 & Supp. 2013).

8. R.I. GEN. LAWS ANN. § 36-8-1(5) (West 2006 & Supp. 2013); R.I. GEN. LAWS ANN. § 38-10-10 (West 2006 & Supp. 2013) (state employees); R.I. GEN. LAWS ANN. § 16-16-13 (West 2006 & Supp. 2013) (teachers).

9. *See id.*

10. *See id.*

11. *See Frequently Asked Questions – Hybrid Plans*, STATE OF RHODE ISLAND OFFICE OF THE GENERAL TREASURER, <http://www.treasury.ri.gov/secure-path-ri/rirsa/faq/hybrid-how.php> (last visited Feb. 20, 2014).

supplement contributions made by employers up to certain IRS monetary limits. Like an individual retirement account, participants in a DC Plan receive a lump-sum payment upon retirement (which can be converted into an annuity or drawn down), and DC Plans are portable to subsequent employment.¹² Under a DC Plan, the employee bears the risk of investment performance.¹³

Generally, any employee within one of the classes mentioned below is required, as a condition of their employment, to become a member of one of the state plans. With the exception of certain contractual conditions, the State System covers the following classes of employees:

- a) any individual employed by the State in a position for 20 hours per week or more,
- b) any public school teacher (including administrators such as a principal) who is regularly employed on at least a half-time basis,
- c) certain Airport Corporation, Economic Development Corporation and Narragansett Bay Corporation employees,
- d) any correctional officer,
- e) anyone employed as a registered nurse by the Department of Behavioral Healthcare or the Development Disabilities and Hospitals,
- f) anyone employed by a participating municipality in a position for 20 hours a week or more,
- g) any police officer or firefighter who are employees of departments that are participants in MERS,
- h) members of the State police hired after July 1, 1987, and
- i) all justices and judges of the Supreme, Superior, Family, District and Workers' Compensation Courts, and Traffic Tribunal engaged after December 31, 1989.¹⁴

12. *See id.*

13. *See id.*

14. *See* EMPS.' RET. SYS. OF R.I., AN EMPLOYEE'S GUIDE TO

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ERSRI was created by the Rhode Island General Assembly in 1936 to benefit state employees, schoolteachers, and participating municipal employees by providing retirement benefits.¹⁵ The state is responsible for funding state employees' benefits and a portion of the benefits for schoolteachers. As of 2012, ERSRI had a total of 25,041 state employee participants, comprised of 11,166 active members, 11,200 retirees, and 2,675 inactive members.¹⁶ The ERSRI state employee plan was 56.3% funded.¹⁷ There was a total of 26,642 teacher participants in ERSRI including 13,212 active members, 10,622 retirees, and 2,808 inactive members.¹⁸ The ERSRI teacher plan was 58.8% funded.¹⁹

In 1951, the General Assembly created MERS, which empowered municipalities to allow their employees to enroll in a state-administered plan.²⁰ Pursuant to section 45-21-4 of the Rhode Island General Laws, each municipality is given the opportunity to choose whether to participate in MERS. Upon a municipality so choosing, the eligible employees of the municipality are required to become MERS participants. The state is responsible for administering MERS, but municipalities are obligated to fund MERS participant benefits. As of June 30, 2012, MERS was comprised of 113 units, sixty-eight covering general municipal employees and forty-five covering police and/or fire fighters.²¹ The contribution rate for each unit is statutorily mandated and augmented by contractual agreements; on average,

UNDERSTANDING THE RHODE ISLAND RETIREMENT SECURITY ACT 4–5 (2012), https://www.ersri.org/public/documentation/FINAL_RIRSAGuide_January2012.pdf [hereinafter EMPLOYEE'S GUIDE].

15. An Act to Provide for the Retirement of Employees of the State of Rhode Island, 1936 R.I. Pub. Laws ch. 2334, 868 (codified at R.I. GEN. LAWS §§ 36-8-1 to -10-40).

16. See GABRIEL ROEDER SMITH & CO., EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND: ACTUARIAL VALUATION REPORT AS OF JUNE 30, 2012 2 (2012) [hereinafter EMPLOYEES' RETIREMENT].

17. See *id.*

18. See *id.* at 3.

19. See *id.*

20. See An Act to Provide for a Retirement and Benefit System for Municipal Employees, its Financing and Administration, and its Integration with the Federal Social Security Act, 1951 R.I. Pub. Laws ch. 2784, 374 (codified at R.I. GEN. LAWS §§ 45-21-1 to -66).

21. See EMPLOYEES' RETIREMENT, *supra* note 16, at 2. At the time of writing, the most recent date for which actuarial data was available was June 30, 2012.

MERS is funded 82.5% across all units.²²

The SPRBT was created in 1987 as a separate plan for the benefit of state police employees.²³ As of June 30, 2012, the SPRBT covered 231 active members, ten retirees and four inactive members, for a total of 245 participants.²⁴ The plan includes two groups that are funded differently. The state funds participants hired prior to 1987 on a pay-as-you-go basis from general assets of the state.²⁵ This amount of funding appears as a line item in the state's budget. A second group of participants, however, is funded by a combination of state and employee contributions that are statutorily mandated.²⁶ Specifically, as of June 30, 2012, the state contributes 17.24% and SPRBT participants contribute 8.75%.²⁷ The SPRBT was 89.6% funded as of June 30, 2012.²⁸

The General Assembly created the JRBT in 1987 for the benefit of justices and judges of the Rhode Island court system.²⁹ As of June 30, 2012, the JRBT included fifty-three active justices and judges and twelve retirees, for a total of sixty-five participants.³⁰ Like the SPRBT, the JRBT has two groups that are funded differently. Justices and Judges hired prior to January 1, 1990 are funded from general state assets on a pay-as-you-go basis.³¹ A second group of participants is funded by a combination of state and JRBT participant contributions.³² For the JRBT, the state contributes 28.32% and participants contribute 12%.³³ As of

22. *See id.* at 28; R.I. GEN. LAWS § 45-21-42 (West 2006 & Supp. 2009).

23. *See* 1987 R.I. Pub. Laws ch. 118, art. 15, § 3, 275

24. *See* EMPLOYEES' RETIREMENT, *supra* note 16, at 2. At the time of writing, the most recent date for which actuarial data was available was June 30, 2012.

25. *Id.* at 1.

26. *See* R.I. GEN. LAWS ANN. § 42-28-22.1 (West 2006 & Supp. 2007).

27. STATE POLICE RETIREMENT BENEFITS VALUATION REPORT, *supra* note 24, at 2.

28. *Id.*

29. *See* 1987 R.I. Pub. Laws ch. 118, art. 15, §1, 274.

30. EMPLOYEES' RETIREMENT, *supra* note 16, at 2. At the time of writing, the most recent date for which actuarial data was available was June 30, 2012. *See id.*

31. *Id.* at 1.

32. *See* R.I. GEN. LAWS ANN. §§ 8-3-16, 36-10-1 (West 2006 & Supp. 2013).

33. JUDICIAL RETIREMENT BENEFITS ACTUARIAL VALUATION, *supra* note 30, at 2.

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June 30, 2012, the JRBT was 83.4% funded.³⁴

B. *Locally Administered Plans*

In contrast to the state administered pension plans, there are thirty-six local pension plans (“LPP” and collectively “Local System”) administered by municipalities or local employee unions.³⁵ For those municipalities with LPPs, each such municipality or employee union is responsible for administering and funding LLPs, determining plan provisions, investing plan assets, and paying retirement benefits. In addition to LPPs, several municipalities have established other post-employment benefit plans (“OPEB”) for their employees. OPEB plans generally include health-care benefits for retirees, and each municipality is likewise responsible for administering, funding, and determining plan provisions, investing plan assets, and paying benefits.³⁶

C. *Underfunding*

1. *State Plans*

The widespread media coverage and criticism of Rhode Island’s underfunded pensions are almost too ubiquitous to warrant repeating. However, brief mention is necessary to provide context for the ensuing discussion. Table 1 demonstrates the unfunded liabilities of state-administered plans as of June 30, 2012.

34. *Id.*

35. See DENNIS E. HOYLE, AUDITOR GENERAL, STATUS OF PENSION AND OPEB PLANS ADMINISTERED BY RHODE ISLAND MUNICIPALITIES 1 (Mar. 2010).

36. See *id.* at 7.

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Table 1

Plan	Funding	Unfunded Liability
MERS ³⁷	Locally Funded	\$262,298,831
ERSRI–State Employees ³⁸	State Funded	\$1,876,069,769
ERSRI–Teachers ³⁹	40% State Funded, 60% Locally Funded	\$2,626,781,473
SPRBT ⁴⁰	State Funded	\$9,738,000
JRBT ⁴¹	State Funded	\$8,657,000
	Total	\$4,783,545,073

2. *Local Plans*

The Local System includes twenty-four municipalities that administer at least one plan for employee participants.⁴² Among the thirty-six total LPPs, the Rhode Island Auditor General identified twenty-three that were considered at risk and delineated three categories of risk based on funding levels and the percentage of annual required contributions made. Category 1 includes seven plans that are funded less than 60% and are making less than 80% of the annual required contributions.⁴³ Category 2 includes twelve plans that are funded less than 60%

37. MUNICIPAL EMPLOYEES' RETIREMENT SYSTEM ACTUARIAL VALUATION, *supra* note 21, at 38.

38. EMPLOYEES' RETIREMENT SYSTEM ACTUARIAL VALUATION, *supra* note 16, at 13.

39. *Id.*

40. STATE POLICE RETIREMENT BENEFITS ACTUARIAL VALUATION, *supra* note 24, at 20.

41. JUDICIAL RETIREMENT BENEFITS ACTUARIAL VALUATION, *supra* note 30, at 20.

42. *See* HOYLE, *supra* note 35, at 7.

43. *See id.* at 10.

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and are making more than 80% of the annual required contributions.⁴⁴ Category 3 includes four plans that are funded more than 60% but are either making less than 80% of the annual required contributions or such annual required contributions are declining.⁴⁵

In total, twenty-three of thirty-six LPPs are considered at risk.⁴⁶ Collectively, as of June 30, 2009, the LPPs were 43% funded and had an unfunded actuarial liability of approximately \$1.9 billion.⁴⁷ With respect to the OPEB plans administered by municipalities, such plans had a collective funding ratio of 1% and an unfunded actuarial liability of \$2.4 billion.⁴⁸

II. 2011 PENSION REFORM

In 2011, the Rhode Island General Assembly embarked on a sweeping reform of the State System and, to some extent, the Local System. Two acts permanently changed the structure of pension plans across the state.⁴⁹ The Rhode Island Retirement Security Act (“Retirement Security Act” or “Act”), which made substantial changes to the State System, has received far greater criticism and scrutiny than its counterpart, the Retirement Security Act for Locally Administered Pension Funds (“Local Act”), which only affects locally administered plans.

A. *The Retirement Security Act*

The unprecedented Retirement Security Act passed the House of Representatives (57-15) and Senate (35-2) on November 17, 2011 and was signed into law the following day.⁵⁰ Through the

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* HOYLE, *supra* note 35, at 7. Recently, however, LLPs were required to submit financial and funding improvement plans to the State pursuant to section 45-65-4 Rhode Island General Laws on or before April 1, 2012. Presumably, the Treasurer’s Office is undertaking an analysis of the submitted financials and funding improvement plans with an eye toward improving the viability of Local Plans.

48. *See id.*

49. *See* Rhode Island Retirement Security Act, 2011 R.I. Pub. Laws ch. 408, 1919 [hereinafter Rhode Island Retirement Security Act]; Retirement Security Act for Locally Administered Pension Funds Act, R.I. GEN. LAWS ANN. §§ 45-65-1 to -9 (West 2006 & Supp. 2012).

50. *See* Rhode Island Retirement Security Act, *supra* note 49; *see also*

Retirement Security Act, the General Assembly intends to “ensure the sustainability of the state’s public retirement systems.”⁵¹ Section 1 of the Retirement Security Act sets forth sixteen legislative findings, which explain in detail the reasoning underlying the reform and conclude with the following four overarching goals of the Act:

- (1) To ensure that cities and towns will be able to provide retirement benefits that will enable our public employees to enjoy a dignified retirement.
- (2) To ensure a secure and adequate source of retirement funds for public retiree benefits.
- (3) To ensure that the cost of current and future benefits is not so great and onerous that it jeopardizes the ability and obligation of the state and its town and cities to fund the costs of providing our children with an excellent public education; rebuilding and sustaining our economy; maintaining roads and bridges; providing assistance, care, and support of our neediest and most vulnerable citizens; and addressing other essential public programs and purposes.
- (4) The general assembly expressly finds and declares that the situation currently confronting the State of Rhode Island’s publicly financed pension systems has reached an emergency stage and must be addressed without delay and the enactment of the Rhode Island Retirement Security Act of 2011 is reasonable and necessary to achieve and protect the compelling public interests listed herein. The general assembly further finds and declares that the achievement of those compelling public interests, on balance, far outweigh any impact that such enactment might have upon the expectations of active and retired members of the affected pension systems as to potential future pension benefits.⁵²

The Rhode Island Retirement Security Act of 2011 (RIRSA), OFFICE OF THE GENERAL TREASURER, available at <http://www.treasury.ri.gov/secure-path-ri/rirsa/legislation.php> (last visited Nov. 13, 2013).

51. Rhode Island Retirement Security Act, *supra* note 49, § 1.

52. *Id.* § 16(b)(1)-(4).

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Prior to enactment, however, the General Treasurer issued a report in June 2011 that outlined the factors driving the pension system's structural deficit.⁵³ According to the General Treasurer's report, the pension crisis is attributable to: (1) the failure to utilize sound actuarial practices, (2) generous benefit improvements without corresponding taxpayer or employee contributions, (3) pension plan design,⁵⁴ (4) retirees living longer, and (5) lower-than-assumed investment returns.⁵⁵ With this backdrop, the following subsections discuss the key provisions of the Retirement Security Act.

1. *Hybrid Plans*

The Retirement Security Act instituted a hybrid plan for ERSRI state employees, teachers, and MERS and altered the DB plan for corrections officers, state police, judges, and public safety employees.⁵⁶ Participants retain all benefits accrued as of June 30, 2012, and eligibility for retirement as of June 30, 2013 remains unchanged.⁵⁷ The hybrid plan, however, enrolls participants in both a DB plan and a DC plan. Under the hybrid plan, each participant contributes 8.75% of their base pay, of which 3.75% is contributed to the DB plan and 5.0% is contributed to the DC plan.⁵⁸ The state (or municipality responsible) also contributes 1% to the participant's DC plan.⁵⁹

The hybrid plan, however, was not extended to public safety plans or to the JRBT. The public safety plans and JRBT DB plans were subject to revisions under the Act. General changes to the DB plans include limiting service credit multipliers to 1% and

53. See GINA M. RAIMONDO, RHODE ISLAND GENERAL TREASURER, TRUTH IN NUMBERS: THE SECURITY AND SUSTAINABILITY OF RHODE ISLAND'S RETIREMENT SYSTEM (June 2011), available at <http://www.treasury.ri.gov/documents/SPRI/TIN-WEB-06-1-11.pdf>.

54. Specifically, contributions to certain state pension plans, prior to the reform, failed to cover the amount of benefits to be paid each year.

55. RAIMONDO, *supra* note 53, at 3–4.

56. EMPLOYEE'S GUIDE, *supra* note 14, at 6. SPRI/FINAL_RIRSAGuide_January2012.pdf.

57. RHODE ISLAND GEN. ASSEMBLY, EXECUTIVE SUMMARY OF RHODE ISLAND RETIREMENT SECURITY ACT 5 (2011), available at <http://www.pensionreformri.com/resources/ReportwithGRSAppendix.pdf>.

58. *Id.* at 5–6.

59. *Id.* at 6.

increasing the period used to calculate final average salary from three to five years.⁶⁰ Contributions were adjusted down from 8.75% to 3.75% effective on July 1, 2012.⁶¹ Lastly, the vesting period was reduced from ten to five years.⁶² The specific DB plan modifications are discussed herein.

The MERS plan, which encompasses correctional offices, was modified to replace declining contributions after thirty years of service with a 2% continuous accrual.⁶³ In addition, the maximum benefit was reduced from 80% to 75%. Correctional officer participants continue to contribute 8.75% of their base salary and will not participate in the DC plan.⁶⁴

The MERS police and fire plans include both a twenty-five-year plan and a twenty-year plan with each municipality or union electing the plan in which to participate.⁶⁵ The majority of participants are in the twenty-year plan.⁶⁶ Prior to the Act's revisions, under the twenty-five-year plan: (i) a participant could retire with full benefits after twenty-five years of credited service or upon reaching age fifty-five with ten years of credited service; and (ii) the final average salary was based upon the final three years of service.⁶⁷ After the Act's revisions, all MERS police and fire participants are essentially switched to the twenty-five-year plan.⁶⁸ The retirement age requirements are the same, however "members age 45 with at least 10 years of service currently eligible to retire before 52 to retire at 52; or retire at current retirement date but at accrued benefit as of June 30, 2012."⁶⁹ The final average salary is now based on the last five years of service, rather than three years, which effectively reduces the benefit at retirement.⁷⁰ Like the correctional officers, MERS police and fire

60. R.I. GEN. LAWS ANN. §§ 36-10-9, -10 (West 2006 & Supp. 2013).

61. *Id.* § 36-10-1(a).

62. EXECUTIVE SUMMARY OF RHODE ISLAND RETIREMENT SECURITY ACT, *supra* note 57, at 5.

63. *Id.* at 6.

64. *Id.* at 7.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

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plans will not participate in the DC plan.⁷¹

The SPRBT DB retirement age was modified to allow participants to retire after a participant's retirement allowance reaches 50% and forcing retirement when a participant's retirement allowance reaches 65% or when the participant reaches age sixty-two.⁷² In the event a SPRBT participant does not reach 50% retirement allowance by sixty-two, the Act allows each such participant to accrue benefits until reaching 50% and then to retire.⁷³ Overall, the Act allows a SPRBT participant to work up to thirty-three years, whereas prior to the revisions the limit was twenty-five years and thirty years depending on hire date.⁷⁴ Lastly, final compensation is calculated based on the last five years of service rather than three years.⁷⁵

The Act alters the JRBT by creating a 12% contribution rate, regardless of whether the participant was contributing prior to July 1, 2012.⁷⁶ Prior to the Act, those who were contributing did so at a rate of 8.75%.⁷⁷ Active Supreme Court justices are excluded from the Act's provisions altering contribution rates because of a constitutional provision prohibiting any reduction in compensation.⁷⁸ As mentioned above, members of the JRBT will not participate in the DC plan.⁷⁹

2. *COLAs and Re-Amortization*

The Retirement Security Act does not affect COLAs granted prior to July 1, 2012 but suspends COLA payments until the aggregate funding levels of the State System (specifically ERSRI state employees, JRBT and SPRBT) reach 80%.⁸⁰ There are,

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 8.

76. *Id.*

77. *Id.*

78. *See id.*; R.I. CONST. art. X, § 6 ("Judges of supreme court—Compensation.—The judges of the supreme court shall receive a compensation for their services, which shall not be diminished during their continuance in office.").

79. EXECUTIVE SUMMARY OF RHODE ISLAND RETIREMENT SECURITY ACT, *supra* note 57, at 8.

80. EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND, RHODE ISLAND RETIREMENT SECURITY ACT OF 2011 – MUNICIPAL PUBLIC SAFETY 7 (2011),

however, interim COLA increases calculated at five-year intervals.⁸¹ Once the State System reaches the aggregate funding goal, COLAs of 0-4% for the first \$25,000 of the participants' salary will be awarded based on the funds' average investment returns.⁸² The key function of the COLA reform provisions is that all participants are moved to the same COLA as of July 1, 2012.⁸³ This ensures that COLAs are only granted when the plans are adequately funded.

The Act's re-amortization provisions were also a significant change from the prior scheme. As part of the overall reform, payment of the existing unfunded liability was extended from the scheduled nineteen years to twenty-five years.⁸⁴ This approach is intended to reduce volatility and to lessen the burden at the end of the amortization period.⁸⁵

B. Pathway to Retirement Security for Locally Administered Pension Funds Act

The General Assembly enacted the Pathway to Retirement Security for Locally Administered Pension Funds Act ("Local Pension Act") "to provide retirement security to current and retired municipal employees by codifying standards to promote the sustainability and longevity of pension plans established and administered by municipalities."⁸⁶ It is the legislature's expressed intent "to begin the process of ensuring the sustainability of locally administered pension plans and to advance and maintain the long-term stability of such plans."⁸⁷ The Local Pension Act governs "any defined benefit pension plan established by a municipality for its employees," but excludes plans that: (a) participate in ERSRI or MERS; (b) are established by a municipality that has filed under Chapter 9 or Chapter 11 of

available at https://www.ersri.org/public/documentation/RI_RetirementSecurityActof2011_MERS_%20Pand_F_rev2.pdf; EXECUTIVE SUMMARY OF RHODE ISLAND RETIREMENT SECURITY ACT, *supra* note 57, at 4.

81. *Id.* at 7.

82. *Id.* at 5.

83. *Id.*

84. *Id.* at 9.

85. *Id.*

86. Retirement Security Act for Locally Administered Pension Funds, R.I. GEN. LAWS ANN. § 45-65-2 (West 2006 & Supp. 2013).

87. *Id.* § 45-65-3.

the United States Bankruptcy Code; and (c) are established by a municipality for which a receiver or fiscal overseer has been appointed pursuant to the Fiscal Stability Act (sections 45-9-1 through 45-9-23 of the Rhode Island General Laws).⁸⁸ The definition of “municipality” in the Local Pension Act embraces “any town or city in the State of Rhode Island, any city or town housing authority, fire, water, sewer district, regional school district or public building authority.”⁸⁹

The primary focus of the Local Pension Act is to monitor Local Plans through reporting requirements and oversight.⁹⁰ The Local Pension Act established a fourteen-member study commission that is charged with reviewing existing legislation and recommending changes to improve Local Plan funding levels (“Study Commission”).⁹¹ Municipalities administering local plans are required to submit an annual actuarial valuation to the Study Commission on or before April 1, 2012, with subsequent actuarial studies to be submitted once every three years.⁹² Pursuant to the Act, the state agreed to subsidize 50% of each municipality’s cost

88. *Id.* § 45-65-4(4).

89. *Id.* § 45-65-4(5). As mentioned above, the Local Pension Act only covers DB plans. A plain reading of the Local Pension Act demonstrates that it does not cover DC plans or hybrid plans. Interestingly, however, the Auditor General’s Report recommends that local governments consider alternatives to defined benefit plans such as defined contribution plans or hybrid plans.⁸⁹ It seems odd for the Auditor General to recommend an alternative plan that would allow a municipality to administer a plan outside the coverage of the Local Pension Act. Perhaps the recommendation was made with further legislative changes in mind. Furthermore, it is quite interesting that the statute refers to a Chapter 11 filing by a municipality under the United States Bankruptcy Code. While it appears evident that section 45-65-4(b) was included in response to Central Falls’ Chapter 9 petition, the inclusion of a Chapter 11 filing in the Local Pension Act language begs certain questions. For instance, was Chapter 11 included because the Rhode Island legislature believes that a municipality would be eligible for bankruptcy under Chapter 11, or was the reference to Chapter 11 included in response to the court’s decision in *In re Northern Mariana Islands Ret. Fund*, No. 12-00003, 2012 U.S. Dist. LEXIS 131709 (US Dist. Ct. Northern Mariana Islands, Jun. 13, 2013) (dismissing a Chapter 11 petition filed by a government employee retirement fund for lack of eligibility under Chapter 11 and reasoning that the fund was an “instrumentality” of the government under the Bankruptcy Code).

90. R.I. GEN. LAWS ANN. § 45-65-3.

91. *Id.* § 45-65-8.

92. *Id.* § 45-65-6(1).

of conducting the actuarial study.⁹³ The actuarial studies must conform to “accepted actuarial standards and applicable public pension accounting laws, rules and regulations.”⁹⁴ If, as a result of the required actuarial study, the actuary determines that the Local Plan is in critical status (that is, less than 60% funded), the municipality must notify the plan’s participants and beneficiaries, the General Assembly, the Governor, the General Treasurer, the Director of Revenue, and the Auditor General within thirty business days.⁹⁵

While largely advisory, the Local Pension Act contains two enforcement provisions. First, if a Local Plan is determined to be in critical status, the administrator must submit a “reasonable alternative funding improvement plan” to the Study Commission within 180 days of the critical status notice required under section 45-65-6(2) of the Rhode Island General Laws.⁹⁶ Second, if a Local Plan fails to comply with the requirements of the Local Pension Act, the general treasurer is authorized to withhold state funds due to the municipality “for any purpose other than education, including but not limited to, municipal aid provided under §§ 45-13-5.1, 45-13-12, 44-34.1-2, 44-13-13, 44-18-18.1, 44-18-36.1(b) and 42-63.1-3.”⁹⁷ In February 2013, legislation was introduced which

93. *Id.* § 45-65-6(3).

94. *Id.* § 45-65-5.

95. *Id.* § 45-65-6(2).

96. *Id.*

97. *Id.* § 45-65-7. Section 45-13-5.1 of the Rhode Island General Laws provides for State appropriations in lieu of property taxes for tax-exempt entities at a rate of 27% of the total tax that would otherwise have been collected. Section 45-13-12 of the Rhode Island General Laws established a distressed communities relief fund whereby qualifying communities could receive State assistance yearly, based on the communities’ tax levy relative to the total tax levy of all eligible communities. As of June 2013, qualifying communities are eligible to receive up to \$784,458 in State assistance. R.I. GEN. LAWS ANN. § 45-13-12 (West 2006 & Supp. 2013). Section 44-34.1-2 of the Rhode Island General Laws provides a reimbursement to municipalities and fire districts from general State revenues “equal to the amount of lost tax revenue due to the phase out or reduction of the excise tax.” Under section 44-18-18.1 of the Rhode Island General Laws municipalities are eligible to receive funds from the State collected a result of taxes, penalties or forfeitures, interest, costs of suit and fines” for local meals and beverage taxes. Like local meal and beverage taxes, a municipality is eligible to receive from the state “the hotel tax, penalties or forfeitures, interest, costs of suit and fines” under sections 44-18-36.1 and 42-63.1-3 of the Rhode Island General Laws.

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proposes to have the General Treasurer deposit any funds withheld from municipalities on account of section 45-65-7 of the Rhode Island General Laws into an interest bearing escrow account for a period of one year.⁹⁸ At the expiration of the one-year period, the General Treasurer would deposit the withheld funds directly into the Local Plan.⁹⁹ Under the proposed legislation, the General Treasurer has the discretion to: (a) release the withheld funds if the municipality submits an adequate funding plan; or (b) to seek instructions from the General Assembly if the Local Plan from which funds are withheld is insolvent or non-existent.¹⁰⁰

The Local Pension Act, in essence, only creates a structure for reporting and oversight of Local Plans. The Act does not alter or modify any of the provisions of the Local Plans or impact participants' benefits. It remains to be seen whether the Local Pension Act is a stepping-stone for more sweeping reform like the Retirement Security Act enacted for state plans. Certainly, the Study Commission and legislators will need sufficient time to scrutinize the actuarial valuations and funding improvement plans submitted by Local Plans pursuant to section 45-65-6 of the Rhode Island General Laws.

III. RHODE ISLAND'S APPROACH TO PENSION MODIFICATIONS

Generally, and in Rhode Island, the legal debate surrounding pension reform focuses on the modification of participants' pension benefits. Commonly, there are three legal frameworks under which modifications to pension benefits are analyzed: (a) the property approach; (b) the contractual approach; and (c) the promissory estoppel approach. Rhode Island courts have recognized, but have not necessarily applied, all three approaches.¹⁰¹ The following discussion outlines the approaches used by courts applying Rhode Island law to modifications of

98. S. 0522, 2013 Gen. Assemb. Jan. Sess. (R.I. 2013)

99. *Id.*

100. *Id.*

101. *See* R.I. Council 94 v. Carcieri, No. PC 10-2859 (R.I. Super. Ct. filed Sept. 13, 2011) (*Carcieri II*) (discussing changes to the Retirement Security Act under the Contracts Clause, Takings Clause, and Promissory Estoppel); *see also* Nonnemacher v. City of Warwick, 722 A.2d 1199 (R.I. 1999) (discussing municipal ordinance changing pension benefits under the Contracts Clause).

pension and/or retiree benefits.

A. *Property Approach*

The Takings Clause provides that “[p]rivate property shall not be taken for public uses, without just compensation.”¹⁰² Several cases, applying Rhode Island law, recognize the property approach to pension modifications under the takings clause.¹⁰³ The key inquiry in a Takings Clause analysis is whether the plaintiff has a constitutionally protected contract right to the pension benefits being altered.¹⁰⁴ Under the property theory, plaintiffs argue that a constitutionally protected property right exists in vested pension benefits such that modification of benefits by legislative act is a taking without just compensation.¹⁰⁵

In *R.I. Council 94 v. Carcieri*,¹⁰⁶ Judge William Smith of the United States District Court for the District of Rhode Island briefly discussed the Takings Clause approach to legislative pension modifications.¹⁰⁷ The case addressed the State’s enactment of section 36-12-4 of the Rhode Island General Laws, which reduced the amount the state would contribute to state retiree health benefits for employees not yet retired.¹⁰⁸ Council

102. R.I. CONST. art. I, § 16.

103. See, e.g., *Parella v. Ret. Bd. of the R.I. Emps. Ret. Sys.*, 173 F.3d 46, 57–59, 62 (1st Cir. 1999); *Nat’l Educ. Ass’n - R.I. v. Ret. Bd. of the R.I. Emps.’ Ret. Sys.*, 172 F.3d 22, 30 (1st Cir. 1999); *Carcieri II*, No. PC 10-2859 at 12, 17, 22, 26.

104. See, e.g., *Parella*, 173 F.3d at 59. Judge Taft-Carter recognized the takings clause approach in *Carcieri* but limited her analysis to “whether the statutorily-created ERSRI pension plan establishe[d] a contractual relationship between the State of Rhode Island and ERSRI participants for purposes of the Contract and Takings Clauses of the Rhode Island Constitution.” *Carcieri II*, No. PC 10-2859, at 1–2, 7–9, 12, 39. Because of the procedural posture of the case, Judge Taft-Carter did not actually apply the takings clause analysis, but nonetheless held that retirees possessed implied unilateral contract rights arising from ERSRI. *Id.* at 38-39. Presumably, at some point in the continued litigation, Judge Taft-Carter will be presented with the opportunity to actually apply a takings clause analysis to the 2009 and 2010 ERSRI amendments.

105. See e.g., *Carcieri II*, No. PC 10-2859, at 12, 17, 22, 26.

106. There are multiple iterations of the case captioned *R.I. Council 94 v. Carcieri* at the state and federal level. See, e.g., *R.I. Council 94 v. Carcieri*, 705 F. Supp. 2d 165, 165 (D.R.I. 2010) (*Carcieri I*); *Carcieri II*, No. PC 10-2859, at 1.

107. *Carcieri I*, 705 F. Supp. 2d at 165, 182.

108. *Id.* at 167 (citation omitted).

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94, a labor union, represented approximately 4,000 employees who contracted with the state through collective bargaining agreements.¹⁰⁹ Council 94 claimed that the state violated the Contracts Clause and Takings Clause by enacting legislation that reduced the amount of state contributions to retiree health benefits.¹¹⁰ Judge Smith began with a Contracts Clause analysis (discussed in more detail herein) and ultimately concluded that Council 94's claim failed because the collective bargaining agreement ("CBA") had properly terminated prior to the state enacting the legislation that altered benefits and because there was no language in the CBA that extended the expected benefits beyond the termination of the CBA.¹¹¹ Therefore, the retirees had no contractual relationship upon which to base their claim.¹¹²

Judge Smith next, when addressing the legislative change to retiree benefits, recognized that the "Takings Clause forbids the taking of private property for public use without just compensation."¹¹³ However, because Council 94 failed to demonstrate that a valid contractual right to future retiree health benefits existed, Judge Smith determined that Council 94 "failed to allege sufficient facts that would support a Takings Clause claim."¹¹⁴ Judge Smith's treatment of the issue in *Council 94 v. Carcieri* suggests that, with the appropriate facts, a plaintiff could be successful under the Takings Clause against legislative modification of post-employment benefits.¹¹⁵

Similarly, in a later Rhode Island Superior Court iteration of *Council 94 v. Carcieri*, Judge Taft-Carter addressed legislative changes to the ERSRI statutory scheme that increased the retirement age, decreased the amount of service allowances, and reduced COLAs.¹¹⁶ Judge Taft-Carter undertook an extensive discussion of pension cases in Rhode Island, but her analysis focused on the Contract Clause without reaching the Takings

109. *Id.* at 168.

110. *Id.* at 173.

111. *Id.* at 174–77.

112. *Id.* at 177.

113. *Id.* at 182 (citing U.S. CONST. amend. V; R.I. CONST. art. I, § 16).

114. *Id.*

115. *Id.*

116. R.I. Council 94 v. Carcieri, No. PC 10-2859 (R.I. Super. Ct. filed Sept. 13, 2011) (*Carcieri II*) 1, 4, 6–7.

Clause.¹¹⁷ Nonetheless, Judge Taft-Carter's holding in *Council 94 v. Carcieri* is instructive on pension modification claims advanced under the Takings Clause because she determined that long-term state employees "possess implied unilateral contract rights arising from the ERSRI" statutory scheme.¹¹⁸ As a practical matter, Judge Taft-Carter essentially established the property right upon which the long-term state employee ERSRI participants could maintain a Takings Clause claim.

B. *Contractual Approach*

Unlike other states, Rhode Island has no constitutional provision explicitly protecting pension benefits.¹¹⁹ As a result, challenges to pension modifications are commonly brought under the Contracts Clause of the Rhode Island and/or the United States Constitutions.¹²⁰ The Contracts Clauses of both constitutions prohibit states from enacting any law impairing the obligations of contracts.¹²¹ The Rhode Island constitution provides that "[n]o ex post facto law, or law impairing the obligation of contracts, shall be passed."¹²² Several Rhode Island cases present a similar fact pattern: a plaintiff seeks to invalidate a state or local law that impacts their pension or retirement benefits on the basis that a contract existed between the plaintiff and the state or local entity.¹²³

For example, in *Nonnemacher v. City of Warwick*, two retiree

117. *Id.* at 9–39.

118. *Id.* at 39.

119. *Id.* at 13–14. "Over the past century, a number of states have passed constitutional amendments protecting the contractual right of public employees to their pensions in varying degrees . . . Rhode Island, however, has no such provision." *Id.* at 14 (citation omitted).

120. *See, e.g., Nonnemacher v. City of Warwick*, 722 A.2d 1199, 1200 (R.I. 1999); *see also Carcieri II*, No. PC 10-2859, at 13–14 (explaining that in "states without clear constitutional or statutory provisions" protecting contractual rights in employee pensions, "a growing number have adopted the view that public employees possess implied-in-fact contractual rights to their statutorily-created pensions.").

121. *See* U.S. CONST. art. I, § 10, cl. 1; R.I. CONST. art. I, §12.

122. R.I. CONST. art. I, §12.

123. *See, e.g., City of Newport v. Local 1080, Int'l Ass'n of Firefighters* 54 A.3d 976, 978 (R.I. 2012); *Arena v. City of Providence*, 919 A.2d 379, 381-86 (R.I. 2007); *Nonnemacher*, 722 A.2d at 1200; *Carcieri II*, No. PC 10-2859, at 2.

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firefighters challenged a 1980 Warwick ordinance that reduced disability retirement payments by income earned from other employment.¹²⁴ Prior to the 1980 amendment, firefighters were entitled to 66.66% of their then-current salary upon disability retirement without the income setoff.¹²⁵ The plaintiffs argued that, by enacting the offset provision, the ordinance violated the Contracts Clause.¹²⁶

In evaluating the ordinance, the Rhode Island Supreme Court set forth a three-pronged analysis for determining whether a state or municipal law impermissibly impairs the obligation of contracts.¹²⁷ First, the court must determine if a contract exists.¹²⁸ Second, the court must determine if the contract was impaired and whether such impairment is substantial.¹²⁹ If the impairment is substantial, the court must then determine whether the impairment is reasonable and necessary to serve a legitimate public purpose.¹³⁰ As mentioned previously, Judge Taft-Carter recently followed this three-pronged approach in *Council 94 v. Carcieri* where two labor unions' challenged 2009 and 2010 amendments to ERSRI that impacted retiree benefits.¹³¹ Judge Taft-Carter's holding, that retired pension participants "possess implied unilateral contract rights arising from the ERSRI" statutory scheme, has the practical effect of satisfying the first element of the Contracts Clause analysis.¹³²

124. *Nonnemacher*, 722 A.2d at 1201.

125. *Id.*

126. *Id.* at 1200.

127. *Id.* The Supreme Court of the United States developed this three-part test in *General Motors Corp. v. Romein*, 503 U.S. 181, 186–87 (1992) and *Energy Reserves Group Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411–12 (1983). Rhode Island Courts have applied this test in other contracts clause cases. See e.g., *R.I. Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 106 (R.I. 1995); *Carcieri II* No. PC 10-2859, at 2.

128. *Nonnemacher*, 722 A.2d at 1202 (citing *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996)).

129. *Id.* (citing *Energy Reserves*, 459 U.S. at 411–12).

130. *Id.*

131. *Carcieri II*, at 4, 7, 10.

132. *Id.* at 39. Judge Taft-Carter is currently presiding over five pension challenge cases including Rhode Island Superior Court Case Nos. 12-3166, 12-3167, 12-3168, 12-3169 and 12-3579; the parties in these consolidated cases have been in settlement discussions for over a year. Ted Nesi, *RI Pension Settlement Talks Continue Into February*, WPRI (Feb. 3, 2014), <http://wpri.com/2014/02/03/ri-pension-settlement-talks-continue-into-february/>. On February 14, 2014, the parties reached a proposed settlement

Because Rhode Island courts were faced with attempts to modify existing pension benefits, the legal analysis and discussion did not focus on the potential for improving the long-term viability of pension plans without modification. This is no fault of the courts; rather it was a response to the factual scenario presented. There exists a legal framework, in the context of pension plan improvement, which has not been explored and may present a viable alternative to modification as the primary means for pension plan improvement.

IV. IMPROVEMENT OF THE LOCAL PENSION SYSTEM USING A UNIFIED APPROACH AND THE PREEMPTION DOCTRINE

While the discussion above includes cases where existing benefits were altered by state legislation or local law in an attempt to approve the long-term viability of pension plans, the following discussion shifts the focus from modification towards an alternative approach—unifying the Local System using the preemption doctrine.

Rhode Island has thirty-six local pension plans administered by municipalities or local employee unions.¹³³ In 2011, the state began monitoring Local Plans through the Local Pension Act, which contains certain reporting requirements.¹³⁴ Even though the Local Pension Act was an important step in developing a plan to move Local Pensions towards fiscal strength, the General Treasurer recognized that the state must consider whether state

agreement that has been presented to interested parties for ratification. For a copy of the settlement proposal, see SETTLEMENT AGREEMENT (2014), available at <http://ripensioninfo.org/wp-content/uploads/2014/02/Settlement-Agreement.pdf>. In general, the proposed settlement agreement sought to amend the Retirement Security Act by (1) reinstating certain COLA payments, (2) adjusting contribution rates, and (3) creating a retirement age transition period. See Exhibit B to Settlement Agreement. While the proposed settlement retracted some of the modifications brought by the 2011 legislation, many of the provisions aimed at correcting the structural deficit remain intact. It now seems that the proposal has been rejected and litigation will commence. Kaylen Auer, *Judge Rules State Worker Union Pension Lawsuit Can go to Trial*, PROVIDENCE BUS. NEWS (Apr. 16, 2014, 8:58 AM), <http://pbn.com/Judge-rules-state-worker-union-pension-lawsuit-can-go-to-trial,96497>.

133. Retirement Security Act for Locally Administered Pension Funds, R.I. GEN. LAWS ANN. § 45-64-3 (West 2006 & Supp. 2012).

134. *Id.*

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legislation is necessary to enable reform of the Local Pensions.¹³⁵ Presumably, the legislation contemplated would include merging the Local Plans with one of the state-administered plans or bringing the Local Plans under the administrative umbrella of the state.

The idea of merging Local Plans into one of the state-administered plans is not a novel one. In 2011, the Auditor General recommended that Local Plans be merged into MERS and that the state consider legislative changes to eliminate the obstacles to merging Local Plans into MERS.¹³⁶ One of the primary obstacles cited by the Auditor General is the nonconforming benefit structure of Local Plans.¹³⁷ In addition, the Auditor General recommended that the state consider legislation that would remove pension benefits from municipal collective bargaining agreements and/or revise the MERS benefit structure.¹³⁸ The advantages to unifying the Local Plans with a State Plan include reduced administrative costs, increased investment performance, increased transparency, and reduction of investment risk. Similar benefits could be obtained by the State's assumption of the administration of Local Plans.

The most apparent benefit of such an arrangement would be the immediate reduction of administrative costs by eliminating the several municipalities', unions', or local pension boards' obligations to administer the thirty-six Local Plans. The Auditor General also recommended pooled investments for Local Plans to accomplish similar goals.¹³⁹ Similarly, the Director of Revenue suggested that the Study Commission recommend legislation to correct challenges facing the Local Systems if necessary.¹⁴⁰ The General Treasurer has also suggested that state legislation may be necessary to improve Local Plans.¹⁴¹

135. See Gina M. Raimondo, *Next Up: Reforming Local Pension Plans*, PROVIDENCE J., Dec. 21, 2011, at B6.

136. HOYLE, *supra* note 35, at 33–39.

137. *Id.* at 32.

138. *Id.* at 34, 37.

139. *Id.*

140. See ROSEMARY BOOTH GALLOGLY, DEP'T OF REVENUE, OVERSIGHT OF MUNICIPAL FINANCES AND LOCALLY-ADMINISTERED PENSION PLANS IN RHODE ISLAND, 50 (Dec. 6, 2012).

141. Ted Nesi, *Raimondo: Move 36 Local Pension Plans into State-Run System*, WPRI (Jan. 30, 2012), <http://blogs.wpri.com/2012/01/30/raimondo->

Foreshadowed by the suggestions of the Auditor General, Director of Revenue, and the General Treasurer, the state is presumably considering legislation that would: (a) merge local plans with one of the state-administered plans (i.e. MERS); (b) bring Local Plans under state administration, even if not joined with one of the state-administered plans; and (c) enable Local Plans to pool investments. While the Auditor General, Director of Revenue, and General Treasurer have suggested that state legislation may be necessary to improve the Local System; there has been little public discussion, if any, on how the State might accomplish its goal. Assuming the State determines it is prudent to enact legislation to accomplish any of the above-mentioned methods to improve the Local System, the State will find a legal framework for its local pension reform in the preemption doctrine.

A. *Preemption of Municipal Laws*

As mentioned above, a local authority or employee union administers the thirty-six Local Plans in Rhode Island.¹⁴² These Local Plans exist pursuant to the cities' or towns' constitutional right to govern local matters. Specifically, the Rhode Island Constitution affords cities and towns the "right to self government in all local matters" but reserves to the state the "power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns."¹⁴³ Currently, municipal ordinances and local laws (and, to a certain extent, collective bargaining agreements) govern the administration, funding, provisions, investments, and payment of pension benefits for Local Plans.¹⁴⁴ In order for the State to bring Local Plans under the auspices of state administration, the state could preempt the entire field of local pension governance by enacting a statewide legislative scheme for local plans.

To determine whether statewide legislation overruling the local pension ordinances is permissible, Rhode Island courts would apply well-established principles of the preemption doctrine to the

[move-36-local-pension-plans-into-state-run-system/](#).

142. Retirement Security Act for Locally Administered Pension Funds, R.I. GEN. LAWS ANN. § 45-64-3 (West 2006 & Supp. 2012).

143. See R.I. CONST. art. XIII, §§ 1, 4.

144. See, e.g., BRISTOL TOWN CODE art. IV, § 21-101 (1998); CRANSTON, R.I. CODE OF ORDINANCES §2-20-010 (2012).

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state's legislative action.¹⁴⁵ The Rhode Island Supreme Court has pronounced the preemption doctrine as follows: “[a] state statute preempts municipal ordinances when either the language in the ordinance contradicts the language in the statute or when the Legislature has intended to ‘thoroughly occupy the field.’”¹⁴⁶ The Rhode Island Supreme Court’s (“Court”) analysis of the relationship between a state statute and a municipal law or ordinance is guided by two central inquiries.¹⁴⁷ First, the Court must determine whether there is a direct and material conflict between the two laws.¹⁴⁸ To resolve whether a conflict exists, the court must examine the intent of the “legislature when it enacted the statute.”¹⁴⁹

Second, the Court must decide “whether the General Assembly intended that its statutory scheme completely occupy the field of regulation on a particular subject.”¹⁵⁰ To answer the second inquiry, the Court must ask whether “state control is to be exclusive or whether the control is to be exercised concurrently by the state and by the municipality.”¹⁵¹ The Court has said that where the General Assembly has enacted a complex statutory scheme, it is evidence that the state intended to occupy the field.¹⁵² Therefore, in order for the state to improve Local Plans by merging them into one of the state-administered plans or taking over Local Plans administration, the state should include its legislative intent in the statute and enact a complex statutory scheme that is broad in scope and applies evenly to all cities, towns and local entities.

To satisfy preemption principles any proposed state legislation should definitively express the state's intent. For example, the state expressed its intent to reform the State System in the Retirement Security Act. Specifically, the state pronounced

145. See *Coastal Recycling, Inc. v. Connors*, 854 A.2d 711, 715 (R.I. 2004); *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992).

146. *Connors*, 854 A.2d at 715 (quoting *O'Neil*, 617 A.2d at 109).

147. See State *ex rel.* *City of Providence v. Auger*, 44 A.3d 1218, 1229–30 (R.I. 2012).

148. *Id.* at 1229 (citation and internal quotation marks omitted).

149. *Id.*

150. *Id.* at 1230 (quoting *Grasso Serv. Ctr., Inc. v. Sepe*, 962 A.2d 1283, 1289 (R.I. 2009)) (internal quotation marks omitted).

151. *Wood v. Peckham*, 98 A.2d 669, 671 (R.I. 1953).

152. See *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 110 (R.I. 1992).

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that the legislation was intended to “ensure the sustainability of the state’s public retirement systems.”¹⁵³ A similar pronouncement for local plans should satisfy a court’s inquiry into the state’s intent to occupy the field.¹⁵⁴ Second, any proposed legislation reform should apply evenly to all local plans within the state, to ensure that the legislation complies with the home rule provisions of the Rhode Island Constitution.¹⁵⁵ Such a broad state statutory scheme should satisfy a court’s inquiry into whether the state intended to occupy the entire field of regulation. Lastly, the state should include in any proposed legislation the determination that the state intends to thoroughly, completely and exclusively occupy the field of local pension governance. This will ensure that any municipal laws or local ordinances that attempt to govern local pensions will be in direct conflict with the state scheme, and therefore invalid.

Perhaps most importantly, the state could reform the Local System without modifying existing pension or retiree benefits, thereby avoiding the constitutional challenges discussed in Section III *supra*. With carefully crafted legislation, the state could take over administration of the Local Plans but would not assume the obligation to fund such plans or modify benefit provisions. Admittedly, a state scheme that only assumed responsibility for administering the Local Plans would not rectify the structural problems facing Local Plans. But, state assumption of Local Plans administration would obtain the costs savings recognized by the General Treasurer, including reduced administrative costs, increased investment performance, increased transparency, and reduction of investment risk.

V. CONCLUSION

The foregoing provides an analysis of the preemption framework under which legislation could be enacted to improve the viability of Local Plans and meet the goals identified by the General Treasurer, Director of Revenue, and Auditor General. While the legislature took the important first step of monitoring

153. Rhode Island Retirement Security Act, *supra* note 49, at ch. 408, § 1.

154. See State *ex rel.* City of Providence v. Auger, 44 A.3d 1218, 1230-31 (R.I. 2012).

155. See R.I. CONST. art. XIII, § 4.

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Local Plans, the fractionalized local system presents an opportunity to address a problem of statewide concern with serious implications on the State's economic future and the financial well being of its employees and residents.

Given the pervasive and growing nature of unfunded pension liabilities in Rhode Island, using the preemption doctrine as their tool, the State's fiscal leaders and lawmakers should carefully assess the potential for implementing a statewide legislative scheme that would preempt municipal and local laws governing Local Plans in an effort to improve the local pension system.