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Like as the waves make towards the pebbled shore,
So do our minutes hasten to their end,
Each changing place with that which goes before,
In sequent toil all forwards do contend.
Nativity, once in the main of light,
Crawls to maturity, wherewith being crowned,
Crooked eclipses 'gainst his glory fight,
And time that gave doth now his gift confound.
Time doth transfix the flourish set on youth
And delves the parallels in beauty's brow;
Feeds on the rarities of nature's truth,
And nothing stands but for his scythe to mow.
And yet to times in hope my verse shall stand,

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Praising thy worth, despite his cruel hand.[1]

-William Shakespeare

"*Pacta sunct servada*"—agreements must be kept—encompasses a familiar concept most of us are taught at childhood, but also pervades bedrock principles of civil law. As Americans, one could confidently say the importance of equity, fairness, and obligation is woven into the very fabric of our society. These fundamental concepts are indeed expressed by the most sacred document in American society—the United States Constitution. The federal "Contract Clause" contained in Article One, Section Ten of the United States Constitution declares that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[2] Individual states likewise adopted the same or similar provisions in their respective constitutions to extend this safeguard against legislative interference with contracts on both the federal and state levels.[3] To what degree is this seemingly clear prohibition enforced? Can a state legally impair contractual obligations, even when it is a party to a contract and owes significant obligations itself? The Contract Clause serves as a necessary check to ensure that state legislatures functionally comply with core principles of fairness and obligation.

This Comment will explore the Contract Clause as it relates to the Rhode Island Retirement Security Act ("RIRSA").[4] RIRSA is a landmark piece of state legislation, intended to overhaul the ailing and grossly underfunded public pension system in the state of Rhode Island. It consists of three primary legislative actions: (1) it changes state employee public pension plans from defined benefit plans to "hybrid" defined contribution plans; (2) it indefinitely suspends and permanently reduces cost-of-living adjustments ("COLAs"); and (3) increases the retirement age. These alterations to Rhode Island's public pension system come at the expense of a significant negative impact on current and retired

1. William Shakespeare, *Sonnet 60*, *in* SHAKESPEARE'S SONNETS 69, 69 (Waiheke Island: The Floating Press 2009).

2. U.S. CONST. art. I, § 10, cl. 1.

3. *See, e.g.*, R.I. CONST. art. 1, § 12 ("No . . . law impairing the obligation of contracts, shall be passed.").

4. *See generally* 2011 R.I. Pub. Laws 408. For the text of the relevant bills establishing this legislation, see generally H.B. 6319, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011); S.B. 1111, 2011 S., Reg. Sess. (R.I. 2011).

state employees. RIRSA infringes on a wide variety of contractual rights. Perhaps even more importantly, the sweeping breadth and long reformatory arm of RIRSA represents a high-water mark for state public pension reform legislation nationwide.[5] If RIRSA can withstand constitutional challenges, many other states will implement elements of RIRSA in some capacity to attempt to alleviate the burdensome debt of their own underfunded pension systems. The potential impact of this legislation cannot not be overstated. RIRSA will have a tremendous impact in Rhode Island and is likely to reverberate throughout the country in the coming years.[6]

Section I of this Comment details the general background facts surrounding the passage of RIRSA, with subsections dedicated to the notable substantive changes prescribed by the Act.[7] Section II will describe the analytic formula implemented by the Supreme Court of the United States and later adopted by Rhode Island courts for the purposes of evaluating a Contract Clause challenge. Subsections will further describe each prong of that test and the nuances and considerations behind each prong of the inquiry.[8] Section III begins by briefly surveying the challenge

5. *See* John J. Chung, *Twenty Years of Impact: The Role of Roger Williams University School of Law's Alumni in Rhode Island Legal History*, 19 ROGER WILLIAMS U. L. REV. 679, 700–02 (2014).

6. *See* Stuart Buck, *The Legal Ramifications of Public Pension Reform*, 17 TEX. REV. L. & POL. 25, 27–28, 31–32, 71–75, 77–80, 87–90 (2012) (using RIRSA as part of a multi-state case study of pension reform legislation and acknowledging elements of RIRSA as a potentially viable model for other states to follow, notwithstanding constitutionality of each element); Chung, *supra* note 5, at 701; Honor Moore, *The Public Pension Problem*, 21 ELDER L.J. 249, 253 (2014) ("[E]valuating Rhode Island's pension reform and legal challenges can provide insight into how Illinois, and other states' pension reforms, will be challenged and how they will fare in court.").

7. *See* discussion *infra* Part I.A (examining the implementation of a "hybrid" public pension system in lieu of the existing traditional "defined benefit" plan); Part I.B (exploring the cost-of-living-adjustment ("COLA") suspension and permanent reduction); Part I.C (discussing the increase in retirement age).

8. *See* discussion *infra* Part II.A (discussing whether the state law, in fact, substantially impairs a contractual relationship); Part II.B (discussing whether the state can show a legitimate public purpose behind the regulation); Part II.C (discussing whether the modification of the rights and responsibilities of the parties to the contract is nonetheless reasonable and necessary in light of the public purpose).

to RIRSA currently pending in the Rhode Island Superior Court,[9] and moves on to an application of all the elements of a Contract Clause challenge to RIRSA de novo. Section IV concludes the analysis and finds that RIRSA, as it was enacted, cannot survive a Contract Clause challenge and is, therefore, unconstitutional.

I. RHODE ISLAND'S PUBLIC PENSION REFORM AND THE SUBSTANCE OF RIRSA

At the time RIRSA was passed in 2011, Rhode Island was amid a period of economic decline so bleak that it prompted one commentator to hyperbolically characterize the state as "an American Greece."[10] To many Rhode Islanders, the widespread media coverage of the unstable economic conditions in Rhode Island was "almost too ubiquitous to warrant repeating,"[11] but a brief review is necessary for the purposes of context. The American economy suffered greatly over a period of time between approximately 2008 and 2009 which has been colloquially coined "The Great Recession."[12] While every state felt the ripple effect of the economic stagnation and decline, few were as dramatically impacted as Rhode Island.[13] The Ocean State suffered from a

9. As of this writing, the litigation remains pending, although settlement negotiations between the state and the union plaintiffs are ongoing. A majority of the plaintiffs have voted to settle, but some claims have yet to be resolved. *See* Tom Mooney & Katherine Gregg, *'An awesome achievement:' Williams announces pension deal with public employees*, PROVIDENCE J. (Apr. 2, 2015, 5:54 PM), http://www.providencejournal.com/article/20150402/NEWS/150409837/13943.

10. *See* David Von Drehle, *The Little State That Could*, TIME, Dec. 5, 2011, at, 30, 32, *available at* http://www.law.yale.edu/documents/pdf/cbl/Rhode_Island_Materials.pdf.

11. Andre S. Digou, *A View of the Rhode Island Pension Landscape: The Potential Reform of Local Pension Plans Under the Preemption Doctrine*, 19 ROGER WILLIAMS U. L. REV. 740, 746 (2014).

12. *See, e.g.*, Ben Stevermen, *The Great Recession Put Us in a Hole. Are We Out Yet?*, BLOOMBERG BUS. (Oct. 27, 2014, 10:29 AM), http://www.bloomberg.com/news/2014-10-27/the-great-recession-put-us-in-a-hole-are-we-out-yet-.html; *see also The Recession of 2007–2009*, U.S. BUREAU OF LAB. STAT. (Feb. 2012), http://www.bls.gov/spotlight/2012/recession/.

13. *See* ANTHONY RANDAZZO, PENSION REFORM CASE STUDY: RHODE ISLAND, POLICY STUDY 428, 1, 8–10 (2014), *available at* http://reason.org/files/pension_reform_rhode_island.pdf; Von Drehle, *supra* note 10, at 32, 34; Mary Williams Walsh, *The Little State with a Big Mess*, N.Y. TIMES (Oct. 22, 2011), http://www.nytimes.com/2011/10/23/business/for-rhode-island-the-pension-crisis-is-now.html?_r=2&pagewanted=all.

wide array of internal and external financial issues that were greatly exacerbated by this economic event.[14] Joblessness in the state climbed to ten and three-fifths percent, compared to the 2011 national average of nine and one-tenth.[15] Textile and jewelry manufacturing in the state had largely dried up, and the majority of employers in the nation's smallest state—healthcare and education—were, and still are, largely dependent on government spending.[16]

It was amid this economically vulnerable period that many states, including Rhode Island, decided that much of the internal state debt could be alleviated or mitigated by reforming the public pension system.[17] Rhode Island's public pension system suffered from years of failed investment gambles and general neglect by the executive and legislative branches.[18] The well documented "decades of drift, denial, and inaction" by the Rhode Island government had rendered the state's $14.8 billion pension system extremely inefficient and vulnerable.[19] In 2011, ten cents of every tax dollar went toward maintaining the grossly neglected pension system.[20] Gina Raimondo—then the face of Rhode Island's pension reform movement in her capacity as then General Treasurer and now Governor of the State—contributed to the tension in the state between wary tax payers and loyal public employees by agreeing with the sentiment that the public employees "have an unbelievably rich Cadillac plan" that needed to be scaled back.[21] While piecemeal legislation was put in place

14. *See* Walsh, *supra* note 13.
15. *Id.*
16. *See id.*
17. *See* AMY MONAHAN, AM. ENTER. INST., UNDERSTANDING THE LEGAL LIMITS ON PUBLIC PENSION REFORM at 4–7 (2013), *available at* http://www.aei.org/wp-content/uploads/2013/05/-understanding-the-legal-limits-on-public-pension-reform_104816268458.pdf; Buck, *supra* note 6, at 27–28.
18. *See* Von Drehle, *supra* note 10, at 32; Walsh, *supra* note 13.
19. Walsh, *supra* note 13; *see also* RANDAZZO, *supra* note 13, at 6.
20. Walsh, *supra* note 13.
21. Mike Stanton, *General Treasurer Gina Raimondo wants long-term solution to underfunded pension system*, PROVIDENCE J. (Apr. 9, 2011, 12:01 AM), http://www.providencejournal.com/article/20110409/BUSINESS/304099999/0/SEARCH. *But see* ROBERT HILTONSMITH, ECON. POL'Y INST., RHODE ISLAND'S NEW HYBRID PENSION PLAN WILL COST THE STATE MORE WHILE REDUCING RETIREE BENEFITS (2013), *available at* http://www.epi.org/publication/ib366-rhode-islands-hybrid-pension-plan/ (characterizing the public pension system in Rhode Island prior to RIRSA's reforms as "not

to attempt to alter the system in some way, Rhode Island took "unprecedented" steps to totally warp the public pension system in the state with the introduction of RIRSA.[22]

It was amid this tumultuous backdrop of economic uncertainty that RIRSA was passed. Although RIRSA encountered strong criticism from the general public, the General Assembly nevertheless passed the reform bill in 2011.[23] Now applauded by parties who likewise wish to dramatically reduce the state government's financial obligations to the state public pension system, RIRSA represents the high-water mark for state pension reform.[24]

As a practical matter, it is worth noting at this point that state pension program implementation and interpretation are regulated and maintained by the states themselves, rather than the federal government.[25] As such, the legal status of public pensions varies from state to state.[26] Although historically seen as gratuities from the government, the states have almost uniformly rejected that theory in lieu of "contract" or "property" theories, which view public pensions as contractually protected promises from the government or property rights, respectively.[27] Rhode Island has adopted a form of the contractual theory of public pensions.[28] Although this puts Rhode Island in the majority, different interpretations and applications of the Contract Clause and its analytic test create scattered and often unpredictable results regarding issues of precisely when an

particularly generous" compared to the majority of other states).

22. MONIQUE MORRISSEY, ECON. POL'Y INST., TRUTH IN NUMBERS? A BRIEF HISTORY OF CUTS TO THE EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND 1, 6–8 (2013), *available at* http://www.epi.org/publication/bp363-brief-history-of-cuts-to-the-employees-retirement-system-of-rhode-island/.

23. *See* Walsh, *supra* note 13.

24. *See* MONAHAN, *supra* note 17, at 7; MORRISSEY, *supra* note 22, at 1, 7.

25. *See* Amy Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y 617, 626 (2010).

26. *See* Moore, *supra* note 6, at 266.

27. *See* Terry A. M. Mumford & Mary Leto Pareja, *The Employer's (In)ability to Reduce Retirement Benefits in the Public Sector*, ALI-ABA COURSE STUDY, Sept. 11, 1997, at 34–36, 38–49, *available at* WESTLAW, SC14 ALI-ABA 27.

28. *See id.* at 37; *see also* Bristol/Warren Reg'l Sch. Emps. v. Chafee, No. PC 12-3168, 2014 WL 1743142, at *15 (R.I. Super. Ct. Apr. 25, 2014) (acknowledging that the Rhode Island Supreme Court has adopted a middle-ground approach between pure contract models and a gratuity model).

employee has a vested contractual right in their retirement benefits.[29] To appreciate the sweeping breadth of this legislation, one must first look at some of the most dramatic alterations implemented by RIRSA. The next Sections will briefly explain the nature, function, and effect of RIRSA's most controversial elements.

A. *Transformation of the Retirement System from the Existing Traditional "Defined Benefit Plan" to a Unique "Hybrid Plan"*[30]

Traditionally, retirement benefit systems are categorized into two distinct categories: defined benefit plans and defined contribution plans. Generally speaking, defined benefit plans are associated with public or "government" retirement systems, while defined contribution plans have recently been almost exclusively associated with private retirement systems that fall under the broad aegis of the Employee Retirement Income Security Act of 1974 ("ERISA").[31] The differences between these two types of pension structures are crucial to the expectations and actual benefits enjoyed by the employee.[32]

Simplistically, in a defined benefit structure, the employer bears the burden "to contribute funds to the pension plan on an actuarially sound basis so that sufficient funds exist to pay the worker when he or she retires."[33] This places the market risks on the employer to "invest enough in the present to fund the ongoing pension expenses that largely involve pension payments to current retirees."[34] "The minimum funding of a defined benefit plan is

29. Some states (e.g., California) have held that pension benefits vest at the beginning of employment, while other states have held that no benefit has vested until the end of employment. *See infra* notes 172–75. While Rhode Island seems to fall into a more flexible category somewhere in between these two extremes, the issue of contractual vesting greatly complicates the following issues. However, a full discussion of the various subsets of plaintiffs in this case and their unique vesting provisions is outside the scope of this Comment and will not be discussed at great length. For a more comprehensive discussion of vesting issues in pension reform across the country, see Mumford & Leto Pareja, *supra* note 27, at 39–40.

30. *See* R.I. GEN. LAWS §§ 36-10.3-1 to -12 (2012).

31. *See* Paul M. Secunda, *Constitutional Contract Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L. J. 263, 267–68 (2011).

32. *See id.* at 268–69.

33. *Id.* at 268.

34. *Id.* at 268–69.

calculated based on a complex actuarial analysis revolving around factors such as age, length of service, projected future salary increases, and rate of return on plan investments."[35] In essence, defined contribution plans are generally more desirable for the majority of employees because the majority of the financial risk and investment burdens are borne by the employer as opposed to a potentially financially illiterate, disinterested, or otherwise insufficiently sophisticated employee.[36]

By contrast, defined contribution plans shift this economic liability from the employer to the employee. The employer will provide a menu of investment options for the employee and may or may not match the employee's salary contribution to the fund, thereby usually ending any further obligation to provide funding to the pension.[37] Under this structure, the employee bears all respective risks including: "risk of longevity[,] risk of investment return[,] and risk on inflation."[38] The benefit of such a system, of course, is the portability of a consumer-driven system that allows employees to have more control over their pensions.[39] However, the policy argument evaluating the comparative advantages and disadvantages between defined contribution and defined benefit structures has largely been enclosed to the ERISA-governed private-sector.[40]

Perhaps the most noticeable element of RIRSA is the abandonment of a pure traditional defined benefit structure in lieu of a "hybrid" structure that establishes a defined contribution fund, which ideally operates in tandem with the existing defined benefit plan that has been in place.[41] Under RIRSA, public employees retain all benefits accrued as of June 30, 2012, but

35. *Id.* at 269.
36. *See id.* at 268–69.
37. *See id.* at 269. To further illustrate this point, consider a standard 401(k) retirement plan. A 401(k) is a basic defined contribution retirement plan. Employees have a defined contribution amount that they contribute to the plan, which may be matched by an employer. It differs from a defined benefit plan in that employees have no guaranteed income from a 401(k) or defined contribution plan. The performance of their retirement accounts is subject to the market performance of the investments in the plan and, thus, is not guaranteed.
38. *Id.*
39. *See id.*
40. *See id.* at 269–70.
41. *See* RANDAZZO, *supra* note 13, at 18–19.

after that date, the employees are enrolled in a mandatory system that retains vestiges of the previous defined benefit plan; but the new plan also compels employees to participate in a mandatory defined contribution fund.[42] Under this plan, "each participant contributes 8.75% of their base pay, of which 3.75% is contributed to the [defined benefit] and 5% is contributed to the [defined contribution] plan."[43] "The state (or municipality responsible) also contributes 1% to the participant's [defined contribution] plan."[44] This keeps the contribution rates for public employees at the same rate (eight and three-fourths percent), but puts more than half of this contribution (five percent) in a defined contribution plan.[45]

While it is beyond the scope of this Comment to fully evaluate the benefits and burdens of a defined contribution plan as opposed to a defined benefit plan, the fact of the matter is that this shift to a partial defined contribution plan has been perceived as highly controversial.[46] Employees who enter the public-sector in Rhode Island expect to have a defined benefit plan rather than a defined contribution plan or some amalgamation of both. Moreover, the innate market risks are largely shifted from the state employer to public employee. This was a major issue of contention in the past RIRSA litigation.[47]

B. *"Cost-of-Living Adjustment" Suspension & Permanent Reduction*[48]

COLAs are a dynamic part of public pension systems. According to a National Association of State Retirement Administrators ("NASRA") issue brief, the general purpose of

42. *See id.*; Digou, *supra* note 11, at 750–52.

43. Digou, *supra* note 11, at 750.

44. *Id.*; *see also* Jack M. Beermann, *Resolving the Public Pension "Crisis,"* 41 FORDHAM URB. L.J. 999, 1004–06 (2014) (pointing to the means to avoid contributory obligations that are unavailable to states, but are available to municipalities, namely: bankruptcy and the issuance of bonds); Christopher D. Hu, Note, *Reforming Public Pensions In Rhode Island*, 23 STAN. L. & POL'Y REV. 523, 524, 529 (2012) (introducing the obligation imposed on municipalities to develop their own pension systems as a major element of RIRSA).

45. HILTONSMITH, *supra* note 21, at 4.

46. *See* HILTONSMITH, *supra* note 21, at 1–6; Hu, *supra* note 44, at 528.

47. *See, e.g.*, HILTONSMITH, *supra* note 21, at 1–6; RANDAZZO, *supra* note 13, at 18; Secunda, *supra* note 31, at 268–71; Hu, *supra* note 44, at 528.

48. *See* R.I. GEN. LAW § 36-10-35 (2014).

COLAs are to "offset or reduce effects of inflation on retirement income" in an apparent effort to keep the retiree's spending power relatively consistent over time.[49] As the rate of inflation is adjustable depending on a variety of factors, presumably so too is the COLA. However, it is worth noting the basic principle that inflation constantly increases the cost of goods and services in the economy; thus, with most COLAs the adjustment percentage generally increases in order to protect a retiree's spending power. One of RIRSA's key provisions suspends and reduces COLAs.[50]

In the "Legislative Intent and Findings" section of RIRSA, the legislature states that "[t]he vast majority of unfunded liability for [the public pension system] is attributable to service rendered by employees who have already retired, and a very significant portion of this unfunded liability is represented by future cost of living adjustments (COLAs)."[51] Accordingly, the legislature warned that "it is essential that the COLA benefits for retirees be impacted as part of this comprehensive reform of the retirement system."[52] Although going forward the reader is presumably braced for an impact on COLA benefits, the substance of the COLA reductions are still remarkably ambitious.

Most notably, RIRSA suspends annual COLAs for retired state employees for an indeterminate amount of time.[53] Specifically, the retirees will not be entitled to COLAs under RIRSA until their individual pension plan is eighty percent funded overall.[54] Filling these coffers will be no easy task given the gross underfunding that provoked RIRSA. At the time the

49. NASRA, COST-OF-LIVING ADJUSTMENTS 1 (2014), *available at* http://www.nasra.org/content.asp?contentid=125.

50. R.I. GEN. LAW § 36-10-35 (2014). *See also* Buck, *supra* note 6, at 71–73 (citing various cases in which courts had previously struck down efforts to reduce COLAs). *But see* Justus v. State, 336 P.3d 202, 205, 212–13 (Colo. 2014). In *Justus v. State*, the court held that a Contract Clause challenge to a Colorado pension reform provision, which decreased COLA percentages from a fixed three-and-a-half percent rate to a formulaic calculation that was capped at two percent, failed because the plaintiffs did not establish that there was, in fact, a contractual relationship between the government and the employees. *Id.* The court relied on the fact that the legislature frequently altered the COLA percentages and, thus, made no clear indication that they intended the relationship to be contractually binding in nature. *Id.*

51. 2011 R.I. Pub. Laws 408, § 1 (a)(10).

52. *Id.*

53. *See* Hu, *supra* note 44, at 527.

54. *See id.*

legislation was passed, the pension plans were only forty-eight percent funded.[55] The concerns surrounding the eighty percent mark are exacerbated when one considers the unpredictability of financial returns on Rhode Island's aggressive hedge fund investments of public pension money.[56] It is estimated that it will take at least sixteen years for the pension system to be eighty percent funded.[57] This means that retired state employees will not receive a substantial adjustment in their benefits, regardless of how expensive living becomes, for more than a decade and a half, at best.

Retirees are, however, entitled to an "interim" COLA once every five years, but the calculation of this COLA "is capped at 4% and applied only to the retiree's first $25,000 of pension income."[58] Even if the pension system is eventually eighty percent funded, this same capped formula will continue to apply going forward.[59] Thus, this element of RIRSA also represents a permanent reduction to the COLA benefits for new employees, current employees, and even current retirees.[60] The net effect of the provision is to calculate an adjustment on the basis of only a percentage of a retiree's pension income, rather than the full amount—decreasing the effect of the adjustment and leaving large portions of income subject to inflation. Even with the limited interim payment, most retirees will not be able to rely on a COLA

55. *See id.*

56. *See* David Sirota, *Rhode Island Has Lost $372 Million As State Shifted Pension Cash to Wall Street*, INT'L BUS. TIMES (Aug. 28, 2014, 1:34 PM), http://www.ibtimes.com/rhode-island-has-lost-372-million-state-shifted-pension-cash-wall-street-1671790.

57. *See, e.g.*, Bristol/Warren Reg'l Sch. Emps. v. Chafee, No. PC 12-3168, 2014 WL 1743142, at *6 (R.I. Super. Ct. Apr. 25, 2014).

58. Hu, *supra* note 44, at 527. Outside of the four percent cap, this is also substantively different in the sense that, originally, this was out of the first $35,000. According to some reports, the final settlement offer from the State contained concessions at this point of contention between the parties in the RIRSA lawsuit. *See Rhode Island's Landmark Pension Reform Could Be Adjusted Under Proposed Settlement Agreement*, CIVIC FEDERATION (April 4, 2014, 10:27 AM), http://www.civicfed.org/iifs/blog/rhode-island%E2%80%99s-landmark-pension-reforms-could-be-adjusted-under-proposed-settlement-agreem.

59. *See id.* at 527 n.31.

60. *See Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *5–6; Chung, *supra* note 5, at 704.

to combat the effects of inflation.[61] Additionally, this provision is a permanent reduction to COLA benefits for future retirees.[62]

C. *Retirement Age Increase*[63]

RIRSA increases the eligible minimum retirement age for almost all public employees.[64] Changes to employee retirement plans raise substantial fairness concerns on the basis of an employee's reliance on a set retirement scheme.[65] RIRSA does mitigate this concern to some degree by raising the retirement age in a way that is prorated based on previous years of service.[66] An additional concern is that increasing "the retirement age during one's working life inherently reduces the present value of all past accruals, because that present value would have to have been calculated by discounting for a longer period."[67]

In terms of prorating the retirement age to avoid situations of obvious unfairness, RIRSA eliminates the possibility that an employee will be forced to work extra years on the eve of her retirement by excluding employees who were already eligible to retire as of July 1, 2012—the day the law took effect—from the retirement age increase.[68] For any employee with less than five years of service on June 30, 2012, RIRSA automatically increases the retirement age to the Social Security retirement age, changing the eligible age for retirement from sixty-two to sixty-seven.[69] For

61. *See* Hu, *supra* note 44, at 527.

62. R.I. GEN. LAWS § 36-10-35 (Supp. 2014); *see also* Chung, *supra* note 5, at 704.

63. *See* R.I. GEN. LAWS §§ 36-10-9 to -10 (2011 & Supp. 2014).

64. *Id.*; *see also* Moore, *supra* note 6, at 270; Hu, *supra* note 44, at 524.

65. *See* Buck, *supra* note 6, at 77.

66. *See id.* at 78.

67. *See id.* at 79. Buck provides an example to further illustrate this concern:

> [I]f I am thirty-five and now have to work to age [sixty-seven] rather than age sixty-two, the then-present value of what I earned at age twenty-five, twenty-six, twenty-seven, etc., would all have been determined by discounting back from age [sixty-seven] rather than sixty-two, and with any discount rate above zero, that will automatically make the present value of those accruals lower.

Id. This can be thought of as retroactively reducing the present value of previous accruals. *See id.*

68. *See id.* at 78.

69. *Id.* Buck argues that this increase is reasonable because younger employees presumably "do not yet have a substantial interest in retiring at

in-between employees who, at the time RIRSA takes effect, have five years or more of service in the public-sector—or are otherwise eligible for retirement at the original age of sixty-two—the retirement age is calculated by "adjust[ing] downward in proportion to the amount of service the member has earned as of June 30, 2012."[70] "In other words, the formula in Rhode Island now prorates any increase in retirement age in inverse proportion to how many years the employee had already worked toward the previous retirement age."[71]

II. CONTRACT CLAUSE JURISPRUDENCE

Rhode Island's constitution states that "[n]o . . . law impairing the obligation of contracts, shall be passed."[72] This language mirrors the Contract Clause of the United States Constitution.[73] As such, the tests adopted by the United States Supreme Court for Contract Clause challenges have been substantially followed by the Rhode Island Supreme Court.[74] Although the test to be applied in a Contract Clause challenge differs depending upon the character of the contract in question, RIRSA affects solely public contracts between state employees and the state itself; this analysis proceeds under the test governing public-sector contracts.[75] The state constitution of Rhode Island and its interpretations in state court are the only binding forms of authority relied on throughout this Comment.[76]

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some earlier age." *Id.* Note that the normal retirement age was sixty-five after ten years of service and sixty-two after twenty-nine years of service. *See* HILTONSMITH, *supra* note 21, at 3.

70. R.I. GEN. LAWS § 36-10-9(1)(a)(ii) (Supp. 2014). *See also* Buck, *supra* note 6, at 78 (providing two examples of how this calculation operates).

71. Buck, *supra* note 6, at 79.

72. R.I. CONST. art 1, § 12.

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

74. *See, e.g.*, R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co., Inc., 716 A.2d 730, 736 (R.I. 1998); R.I. Depositors Corp. v. Brown, 659 A.2d 95, 106 (R.I. 1995).

75. Note that the ultimate purpose of this Comment is to address RIRSA's infringement on the contract between the public employees and the State. Therefore, there will be an increased focus on alleged contracts in which the government is a party as opposed to legislative infringement of private contracts. However, much of the analysis is similar between these two categories of contracts, so this distinction will not be exclusive.

76. *See, e.g.*, Monahan, *supra* note 25, at 620. It is worth noting that

The test consists of a three pronged inquiry: (1) whether the state law in question substantially impairs a contractual relationship ("Prong I" or "first prong");[77] if so, (2) whether the state can show a legitimate public purpose behind the regulation ("Prong II" or "second prong");[78] and, (3) whether the modification of the rights and responsibilities of the parties to the contract is nonetheless reasonable and necessary in light of the public purpose ("Prong III" or "third prong").[79] This test can be understood as a series of "hurdles" for the parties to clear. The "height" of each hurdle varies depending on the nature of the contract that a law substantially impairs—different tests are prescribed for private and public contracts.[80]

The distinction between private and public contracts[81] is

Rhode Island's largest public employee union approved a pension settlement plan on March 27, 2015. *See* Katherine Gregg, *R.I.'s largest public employee union approves pension settlement plan*, PROVIDENCE J. (Mar. 27, 2015, 3:37 PM), http://www.providencejournal.com/article/20150327/NEWS/150329314.

77. *E.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983); *R.I. Insurers' Insolvency Fund*, 716 A.2d at 736. Note that many contemporary Contract Clause challenges falter at this stage. *See, e.g.*, *R.I. Insurers' Insolvency Fund*, 716 A.2d at 736.

78. *E.g.*, *R.I. Depositors Corp.*, 659 A.2d at 106.

79. *E.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 26 (1977). Note that the Supreme Court of Rhode Island has framed the Contract Clause test in the following way:

> A court first must determine whether a contract exists. If a contract exists, the court then must determine whether the modification results in an impairment of that contract and, if so, whether this impairment can be characterized as substantial. Finally, if it is determined that the impairment is substantial, the court then must inquire whether the impairment, nonetheless, is reasonable and necessary to fulfill an important public purpose.

Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1202 (R.I. 1999) (citations omitted). Despite the structural difference, the Rhode Island Contract Clause test operates in the same fashion as the Supreme Court Contract Clause test.

80. *Compare R.I. Insurers' Insolvency Fund*, 716 A.2d at 736–37 (applying the Contract Clause test to a case of private contractual impairment), *with Nonnenmacher*, 722 A.2d at 1202–04 (applying the Contract Clause test to a case of public contractual impairment and, while finding the law to be constitutional in the face of the Contract Clause, still promulgating a different test to be applied to public contracts).

81. For the sake of clarity, "private contracts" in this context refers to a contract involving two independent private entities, and "public contracts" in this context refers to contracts between the government and some other entity, such as state employees.

material in public pension reform laws, such as RIRSA, because the government is a party to the public contract impaired by its own passage of a law.[82] In cases of private contracts, the first hurdle (Prong I) is relatively static and somewhat easy to overcome for the plaintiff.[83] At Prongs II and III of the analysis, however, the hurdles for the government—to articulate a legitimate public purpose for the law and to justify the law as "reasonable" in light of those public purposes—are similarly low when private contracts are at issue as a result of judicial deference to state legislatures.[84] By contrast, with the public-sector contract analysis, the hurdles at Prongs II and III are substantially higher for the government to surpass. The Supreme Court explained this rule in *United States Trust Co. of New York v. New Jersey*, stating that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[85] Establishing the existence of a contract, and substantial impairment of that contract, is more difficult for plaintiffs *because* of the higher judicial scrutiny public contracts receive when searching for both existence and impairment.[86] As the First Circuit reasoned in *Parella v. Retirement Board of Rhode Island Employees' Retirement System*, this heightened burden is justified because the existence of a public contractual obligation means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons.[87]

It is also important to note that, despite the Contract Clause test's superficial similarity to rational basis review, it does not apply that standard. Rational basis review inquires into whether the means used by the government are rationally related to a legitimate government purpose.[88] The Contract Clause test asks

82. *See U.S. Trust Co. of N.Y.*, 431 U.S. at 26.

83. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 238–43 (1978).

84. *See, e.g.*, *id.*

85. 431 U.S. at 26. *See also* Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 194–98 (1985).

86. *See, e.g.*, Parella v. Ret. Bd. of R.I. Emps. Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999) (citing Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)).

87. *Id.*

88. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488–

whether a law's means are *reasonable* and *necessary* to achieve a legitimate government purpose.[89] Rational basis review makes no inquiry into the reasonableness of a law's means, only its rationality. Likewise, rational basis review does not require a law's means be necessary, only that it rationally relates to the purposes asserted. It appears clear that while Contract Clause review does not rise to the exacting levels of scrutiny afforded in intermediate and strict scrutiny, it is nonetheless a more searching inquiry than rational basis review.[90]

The language of the Contract Clause itself is deceptively simple. The government cannot pass any law that impairs the obligation of contracts.[91] It is well settled, however, that the language of the Contract Clause is not rigidly applied to all impairments of contracts. The Supreme Court noted in *Home Building & Loan Ass'n v. Blaisdell* that "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[92] This has the effect of rendering application of the Contract Clause problematic: outcomes are dependent upon judicial interpretations of reasonableness, which necessarily invite a great deal of subjective, context-sensitive decision-making. This makes it difficult for parties challenging legislation to overcome the initial hurdle of establishing that a law *substantially* impairs a contractual relationship.[93] Additionally, this also opens the door for the introduction of the ever-enigmatic "police power" doctrine as a justification for invasive state legislation.[94] Before a court enters these murky, analytic waters, however, a Contract Clause challenge must first satisfy the baseline inquiries concerning the existence of a contract. The following subsections will provide an overview of each prong of a

91 (1955).

89. *Compare Williamson*, 348 U.S. at 488–91, *with U.S. Trust Co. of N.Y.*, 431 U.S. at 20–29. *See also Parella*, 173 F.3d at 60.

90. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003) (utilizing the strict scrutiny standard); United States v. Virginia, 518 U.S. 515 (1996) (utilizing an intermediate scrutiny review).

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

92. 290 U.S. 398, 428 (1934).

93. *See, e.g.*, Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203–04 (R.I. 1999); Retired Adjunct Professors of R.I. v. Almond, 690 A.2d 1342, 1347 (R.I. 1997).

94. *See, e.g.*, *U.S. Trust Co. N.Y.*, 431 U.S. at 21–24; Clarke, *supra* note 85, at 245–52.

public Contract Clause analysis.

A. *Has the State Law Substantially Impaired a Contractual Relationship?*

The first element of a Contract Clause challenge is the most important and difficult element for a plaintiff to overcome. This threshold inquiry establishes exactly whether a contract has been impaired and to what degree. It is, therefore, largely determinative of the outcome of the case. In the case of public pension reform, for example, there are diverse subsets of plaintiffs with potentially very different contractual relationships with the state depending on the time of service and nature of employment.[95] This step is essential in defining the scope of the "obligation" owed to the impaired party.[96] As the First Circuit noted:

> Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons. Because of this constraint on subsequent legislatures, and thus on subsequent decisions by those who represent the public, there is, for the purposes of the Contract Clause, a higher burden to establish that a contractual obligation has been created.[97]

Although commentators criticize this rationale and it is not universally binding, it underscores the general difficulties that challengers alleging an unconstitutional violation of a public contract will encounter at Prong I of a Contract Clause analysis.[98] This initial inquiry—has the state law, in fact, substantially impaired a contractual relationship—is composed of at least three sub-inquiries. The three sub-inquires of this element are: (a) whether there is a contractual relationship; if so (b) whether a change in the law impairs that contractual relationship; and (c)

95. *See* Buck, *supra* note 6, at 49–65.

96. *See, e.g.*, Edwards v. Kearzey, 96 U.S. 595, 600 (1877) ("The obligation of a contract includes every thing within its obligatory scope.").

97. Parella v. Ret. Bd. of R.I. Emps. Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999).

98. *See* Buck, *supra* note 6, at 51–52.

whether that impairment is substantial.[99]

i. Whether There is a Contractual Relationship

In cases involving alleged government contracts, as opposed to private contracts, the Supreme Court of the United States has instructed lower courts to proceed cautiously in determining whether a state intended to contractually bind itself by statute.[100] Specifically, courts have been instructed to look for a clear indication that the legislature has intended to be bound.[101] Thus, absent clear statutory language indicating intent on behalf of the government to establish a contractual right, it is presumed that the legislature merely made a law to establish a policy of the state which, unlike a contract, is inherently subject to revision and repeal.[102] This rule of construction, generally referred to as "the unmistakability doctrine," has been said to "balance 'the Government's need for freedom to legislate with its obligation to honor its contracts.'"[103] "[T]he government may not use these doctrines simply 'as a means to escape from contracts that it subsequently concluded were unwise.'"[104]

Courts are not limited to only the literal text of the statute as criteria for the purposes of determining the state's intent to be contractually bound.[105] The reviewing court may use apparent

99. *E.g.*, Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992).

100. Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985).

101. *Id.*

102. *Id.* The Supreme Court of the United States elaborated on the distinction between policies and contracts as follows:

> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of the legislative body.

Id. (citation omitted).

103. R.I. Pub. Emps.' Retiree Coal. v. Chafee, C.A. No. PC 12-3166, 2014 WL 1577496, at *6 (R.I. Super. Ct. Apr. 16, 2014) (quoting Connor Bros. Constr. Co., Inc. v. Geren, 550 F.3d 1368. 1371–72 (Fed. Cir. 2008)).

104. R.I. Council 94 v. Chafee, C.A. No. PC 12-3168, 2014 WL 1743149, at *13 (R.I. Super. Ct. Apr. 25, 2014) (quoting *Connor Bros. Constr.*, 550 F.3d at 1374).

105. *See, e.g.*, R.I. Laborers' Dist. Council, Local Union 808 v. Rhode

purpose, context, legislative history, and any pertinent evidence to discern the actual intent of the legislature.[106] As the United States Supreme Court put it in *United States Trust Co. of New York*, where the statute at issue is ambiguous, the reviewing court looks to whether "the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[107] Nevertheless, overcoming the presumption that the government generally does not intend to create a private contractual right has proven difficult, and often fatal, for many Contract Clause claims.[108]

ii. Whether a Change in the Law Impairs that Contractual Relationship

Once a contractual relationship is recognized, the court then engages in the process of evaluating the existence and extent of an impairment on that contractual relationship. For this purpose of determining an "impairment," the total destruction of a contractual obligation is not necessary.[109] Rather, "legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract."[110] Additionally, "[l]egislation that reduces the value of

Island, 145 F.3d 42, 44 (1st Cir. 1998). *But see* McGrath v. R.I. Ret. Bd., By & Through Mayer, 906 F. Supp. 749, 759 (D.R.I. 1995) (stating that the most important indication of whether a statute constitutes a contractual offer is the language of the statute itself), *aff'd sub nom*. McGrath v. R.I. Ret. Bd., 88 F.3d 12 (1st Cir. 1996).

106. *See McGrath*, 906 F. Supp. at 761–62; *accord* R.I. GEN. LAWS § 36-10-7 (2007) ("Guarantee by State – Annual Appropriations: The general assembly of the state of Rhode Island hereby declares that it is the intention of the state to make payment of the annuities, benefits, and retirement allowances provided for under the provisions of this chapter and to that end that it is the intention of the state to make the appropriations required by the state to meet its obligations to the extent provided in this chapter.").

107. 431 U.S. 1, 17 n.14 (1977).

108. *See, e.g.*, Justus v. State, 336 P.3d 202, 208–09, 212–13 (Colo. 2014) (finding no evidence granting COLA benefits to retirees in a Colorado statute or in the legislative history of said statute that would be indicative of a "clear indication" of the legislature's intent to be bound to provide a fixed COLA to members of a state retirement system throughout their retirement).

109. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983).

110. N. Pac. Ry. Co. v. Minnesota, 208 U.S. 583, 591 (1908).

a contract has also been found to be an impairment."[111] Generally speaking, most courts tend to view any legislative modification of a contractual right as an "impairment."[112]

iii. Whether the Impairment is Substantial

Even if a plaintiff can show a contractual relationship, and legislative impairment of that relationship, she must still demonstrate that the impairment is requisitely "substantial" to clear this initial hurdle of the Contract Clause test.[113] The requisite "substantiality" of impairment that gives rise to a Contract Clause challenge is by no means a clearly defined standard. A review of judicial history reveals an inconsistent evaluative methodology that, at times, borders on arbitrary. The United States Supreme Court has provided very little guidance on how courts should evaluate the substantiality of a contractual impairment.[114] For example, in the context of a private Contract Clause analysis it stated:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts.

111. MONAHAN, *supra* note 17, at 14 (citing Ret. Pub. Emps. of Wash. v. Charles, 62 P.3d 470, 482 (Wash. 2003)).

112. It is of note that some federal district courts have attempted to sharpen this point of the Contract Clause analysis in favor of the state. *See, e.g.*, St. Paul Gaslight Co. v. St. Paul, 181 U.S. 142, 149–51 (1901); Univ. of Hawai'i Prof'l Assemb. v. Cayetano, 183 F.3d 1096, 1106–07 (9th Cir. 1999); Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250 (7th Cir. 1996). The Seventh Circuit Court of Appeals has articulated the stance that a mere breach of contract is insufficient to garner constitutional protection. *Horwitz-Matthews*, 78 F.3d at 1250. The court reasoned that "[i]t would be absurd to turn every breach of contract by a state or municipality into a violation of the Federal Constitution." *Id.* If a court adopts this logic, "[t]he crucial question becomes whether the plaintiffs . . . retain the right to recover damages for the breach." Secunda, *supra* note 31, at 286. However, in the case of most public pension cases, "this threshold issue would not appear to be an obstacle as plaintiffs could normally contend that they were barred from recovering damages from the State as the result of the State's amendment of their pension plan." *Id.* As such, it will not be addressed in this Comment.

113. *See* Green v. Biddle, 21 U.S. 1, 84–85 (1823) (holding that, although changes to the terms of a contract, however minute, can impair the obligation of contract, the objection that a statute impairs the obligation of contract does not depend on the extent of the change which the law effect in it).

114. *See* MONAHAN, *supra* note 17, at 8 n.9.

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.[115]

The "substantial" element of a Contract Clause analysis becomes even murkier in cases of public contracts. For example, the United States Supreme Court has acknowledged from the beginning that states may reserve the right to modify the terms of a contract.[116] Today, courts have recognized that a general reservation of the right to modify is insufficient, however, "[i]f a state explicitly reserves the right to modify benefit levels, any subsequent modification may be considered an *insubstantial* impairment."[117] Thus, courts often consider whether the government in the past has regulated the industry that the complaining party has entered.[118] If the court answers the question in the affirmative, it usually will conclude that the impairment has not risen to the necessary level of substantiality.[119] In sum, a law will substantially impair a public contract when it alters an obligation that the government has intended to bind itself to in a manner that affects the obligations owed in a significant and meaningful manner. The nebulousness of the inquiry into "substantiality" is problematic. If a court determines that the alleged impairment is not substantial enough, it will decline to further analyze the challenge, thereby ending the inquiry and the lawsuit. Moreover, the degree of judicial scrutiny exercised in the second and third prongs of the test is directly linked to the extent of the impairment deduced in the first prong.[120] The severity of the impairment increases the level of scrutiny to which the legislation will be subjected.[121]

115. Allied Steel Co. v. Spannus, 438 U.S. 234, 245 (1978). *See also* MONAHAN, *supra* note 17, at 8 n.9.

116. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 683 (1819) (Story, J., concurring).

117. Mumford & Leto Pareja, *supra* note 27, at 35 (emphasis added).

118. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983).

119. *See, e.g.*, *id.* at 411–12.

120. *See, e.g.*, *id.* at 411–13.

121. *See, e.g.*, *id.* at 411–12.

B. *Can the State Show a Legitimate Public Purpose Behind the Regulation?*

If the complaining party can overcome the initial hurdle of showing a substantial burden, the state must demonstrate a legitimate public purpose behind the challenged legislation. Articulating a legitimate public purpose is not a steep hurdle for the state to clear. As the body of precedent on this concept in constitutional law is sufficiently dense, this Comment will only provide a cursory review of what constitutes a "legitimate public purpose" in a Contract Clause challenge.[122]

In 1827, Chief Justice Marshall first recognized the "police power" of the states as a permissive basis for legislation.[123] Police power has come to encompass the authority of the states "to provide for the public health, safety, and morals."[124] This umbrella of authority is intentionally broad, for among other reasons, to solidify principles of federalism and state autonomy.[125] Moreover, since the New Deal, the judiciary has generally given more deference to a state's articulated "purpose" behind legislation.[126] So long as the legislation is not facially abusive, the courts will generally recognize a purported government public purpose as "legitimate."[127]

For the purposes of a Contract Clause claim, it is difficult to

122. For a more complete discussion of state police powers, see generally Legarre Santiago, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007).

123. Brown v. Maryland, 25 U.S 419, 443–44 (1827).

124. *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991).

125. *See* Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 267 (2012).

126. *See generally* David A. Strauss, *Why Was Lochner Wrong*?, 70 U. CHI. L. REV. 373 (2003) (analyzing contemporary elements of judicial review of state legislation in an effort to clarify the modern understanding of the infamous *Lochner* decision, which characterizes it as well outside the judicial mainstream). *See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 419–22, 424–25 (1934) (discussing the interplay of the police power doctrine with the Contract Clause in consideration of the constitutionality of a Minnesota mortgagee relief statute enacted during the Great Depression). *But see* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735–40 (1984) (arguing that the police power doctrine has come to eviscerate the importance and utility of the Contract Clause).

127. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488–91 (1955) (explaining the contemporary "rational basis" test). *See also* Epstein, *supra* note 126, at 735–40.

construct a hypothetical where legislation would fall outside this broad classification of state power. Courts have recognized even "broad and generalized economic or social problems" as permissible purposes for the execution of legislation under the doctrine of police power.[128] As such, this hurdle is especially easy for a state to clear. It is necessary for the judiciary to fully grasp the government's intended public purpose to come to a proper conclusion under Prong III.

Despite the historically low burden placed on states to justify legislation in other constitutional contexts, the independent importance of a legitimate public purpose in the context of a Contract Clause challenge to a public contract remains somewhat unclear. Chief Justice Burger argued for heavier judicial scrutiny at this prong in his concurring opinion in *United States Trust Co. of New York*.[129] There, Burger stated that in order for the law in question to avoid running afoul of the Contract Clause, "the state must demonstrate that the impairment was *essential* to the achievement of an important state purpose."[130] Justice Burger continued that, in his opinion, "the State must show that it did not know and could not have known the impact of the contract on that state interest at the time that the contract was made."[131] This specific deviation from general judicial deference to the police power doctrine at Prong II has not been expressly followed by courts, despite the impression that it logically comports with the principal that stricter judicial scrutiny should apply to *both* Prong II and III of the Contract Clause analysis.

C. *Is the Modification of the Rights and Responsibilities of the Parties to the Contract "Reasonable and Necessary" in Light of the Public Purpose?*

If the government can meet the historically low burden of articulating a legitimate public purpose behind the impairment of a public contract, the court must then evaluate if the impairment of the contract is reasonable and necessary in light of the articulated public purpose. It is important to note that the context

128. U.S. Steel v. Spannaus, 438 U.S. 234, 250 (1978).
129. 431 U.S. 1, 32–33 (1977) (Burger, C.J., concurring).
130. *Id.* at 32 (emphasis added).
131. *Id.*

of the court's determination of the reasonableness of a law's means is related to the extent of the contractual impairment determined at Prong I of the analysis.[132] For contracts with the state, a more demanding review is necessary at this level, because the state's self-interest in surviving the Contract Clause challenge might cause its legislature to make legislative findings and judgments which are not objective, but prejudiced in favor of the state.[133] Thus, courts defer to the legislature to a lesser degree in order to account for the likelihood of the state's underlying self-interest.[134]

The federal District Courts of Washington have offered five factors to contextualize the inquiry into the reasonableness of a law's means. Under their test, courts should consider:

> (1) the emergency nature of the legislation; (2) whether the state had previously regulated the subject activity; (3) whether the impact is generalized or specifically directed toward a narrow class; (4) whether the reliance on pre-existing rights was both actual and reasonable; and (5) whether the challenged law worked a severe, permanent, and immediate change in those relationships reasonably relied upon.[135]

A judicial determination of "reasonableness" traditionally rests on the law itself.[136] The reasonableness test, in the Contract Clause context, was described by Justice Blackmun in *United States Trust Co. of New York* as essentially "whether the reason for the impairment was foreseeable in light of the surrounding circumstances at the time the contract was made."[137] As noted above, the review does not reach formal heightened standards of review; the Supreme Court appears to have articulated a standard of reasonableness that assesses more than whether the law is

132. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983).

133. *See, e.g.*, *U.S. Trust Co. of N.Y.*, 431 U.S. at 26; Md. State Teachers Ass'n, Inc. v. Hughes, 594 F. Supp. 1353, 1360 (D. Md. 1984).

134. *See, e.g.*, RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1147 (9th Cir. 2004).

135. Cycle Barn, Inc. v. Arctic Cat Sales Inc., 701 F. Supp. 2d 1197, 1203 (W.D. Wash. 2010) (citing Chico's Pizza Franchises, Inc. v. Sisemore, 544 F. Supp. 248, 249 (E.D. Wash. 1981)).

136. *See, e.g.*, McGarth v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996).

137. Clarke, *supra* note 85, at 197 (citing *U.S. Trust Co. of N.Y.*, 431 U.S. at 31–32).

rational but does not require intermediate or strict scrutiny. The analysis is instead, as Justice Blackmun notes, analogous to questions raised by negligence law. The fundamental question to be asked is whether the government's chosen means, considering the circumstances of the law and the substantial impairments it places on contractual obligations, are ones that a reasonable individual would foresee at the creation of the contract.

The question of whether the law is "necessary" in light of the public purpose invites the court to consider the existence of any less restrictive, viable alternatives that exist for the state.[138] A state cannot not pass legislation substantially impairing its own contractual obligation without first pursuing other alternatives which might achieve a similar public purpose.[139] Additionally, the court should look to severity of impairment and consider if a more moderate course of action might serve the purported public purposes equally well.[140] The necessity element is a separate and independent analysis to the reasonableness inquiry. A law cannot be either reasonable or necessary to survive challenge; the law's means must be both reasonable *and* necessary.

III. RIRSA AND THE CONTRACT CLAUSE

This Section applies the substance and effect of RIRSA, discussed above in Section I, to the general legal framework of a publically impaired Contract Clause challenge, discussed in Section II. This Section addresses each element of a Contract Clause analysis in order to fully explore the issues likely to arise.

138. *See id.* (citing *U.S. Trust Co. of N.Y.*, 431 U.S. at 29–30) (establishing that an impairment is "necessary" if the legislature's purpose cannot be accomplished by impairment in a less drastic fashion and alternative means of achieving the legislature's purpose without impairment are not available). *See also, e.g.*, Univ. of Hawaii Prof'l Assemb. v. Cayetano, 183 F.3d 1096, 1107 (9th Cir. 1999) (discussing that a contractual impairment may not be considered necessary, for Contract Clause purposes, if there is an alternative that would also serve the defendants' purpose, especially since the Contract Clause limits the state in curtailing its obligations unnecessarily); Balt. Teachers Union v. City Council of Balt., 6 F.3d 1012, 1020 (4th Cir. 1993) (stating that a court must consider whether a state is acting in self-interest in abridging contract obligations, and also whether more reasonable means exist, in order to decide whether the contract impairment violates the Contract Clause).

139. *See, e.g.*, *Cayetano*, 183 F. 3d at 1107.

140. *See, e.g.*, *Balt. Teachers Union*, 6 F.3d at 1020.

As of this writing, the current RIRSA litigation pending in the Rhode Island Superior Court is awaiting a final settlement order.[141] Notwithstanding any forthcoming resolution of that particular dispute, the underlying issues with RIRSA's constitutionality remain salient. This Comment explores the legal theory underpinning a challenge to RIRSA under the Contract Clause of the Rhode Island Constitution. A proper application of the Contract Clause to RIRSA will result in the law's invalidation. RIRSA substantially impairs a public contract by means that are not reasonable and appropriate to secure the interests it asserts. Although the law serves a legitimate governmental interest in balancing the state's budgetary liabilities, that financial burden alone is insufficient for the law to survive a Contract Clause challenge. Each element is addressed in turn below.

A. *Is There A Substantial Impairment of a Public Contract?*

The first element of a Contract Clause challenge is assessing whether there is a substantial impairment of a contract by the legislation in question. This involves answering a necessary predicate question: is there, in fact, a contract between the parties (here, the state and its public-sector employees)? Once this threshold question has been answered, the inquiry turns to addressing whether the contract is substantially impaired. This question has been litigated by the parties; however, this Comment argues that, independent of the reasoning of the superior court, RIRSA substantially impairs a contract between the State of Rhode Island and its workforce.

i. Whether There is, in fact, a Contractual Relationship Between Rhode Island and Members of the Public Pension Systems

As discussed in Section II.A.i above, the initial hurdle for plaintiffs bringing a Contract Clause challenge is significantly higher in cases where the alleged contract at issue is with the state.[142] To clear this hurdle, the plaintiffs must first establish that a contract exists between themselves and the State of Rhode Island. While only a preliminary step in the greater scheme of

141. *See* Gregg, *supra* note 76.

142. *See* discussion *supra* Part II.A. *See also* Parella v. Ret. Bd. of R.I. Emps. Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999).

clearing Prong I of a Contract Clause challenge for plaintiffs, it is nevertheless a step of dire importance and difficulty.[143]

The existence of a contractual relationship was the only issue addressed by the Rhode Island Superior Court in its constitutional evaluation of RIRSA.[144] Thus, this subsection will focus primarily on the plaintiffs' and government's arguments articulated at this stage. After a summary of the arguments and the opinion of the court, the remainder of the analysis will depart from describing the specific facts of the ongoing challenge to RIRSA and will apply the test of the Contract Clause to RIRSA directly.

A sub-class of plaintiffs[145] with more than ten years of service under their proverbial belt received an encouraging sign in April of 2014 when the Associate Justice of the Rhode Island Superior Court presiding over the case, Judge Sarah Taft-Carter, rejected a motion to dismiss brought by the State.[146] Judge Taft-Carter recognized a unilateral, implied-in-fact contract between the employees with ten or more years of service and the State of Rhode Island.[147]

In its consolidated motion to dismiss, the State leaned heavily on the unmistakability doctrine to support the claim that there was no statutory language to support the plaintiffs' initial burden of establishing a contract with the state.[148] Judge Taft-Carter recognized that, although Rhode Island has yet to expressly adopt the unmistakability doctrine, the Rhode Island Supreme Court adopted its foundational reasoning in *Brennan v. Kirby*.[149] While

143. *See, e.g.*, Justus v. State, 336 P.3d 202, 208–09 (Colo. 2014).

144. *See* Bristol/Warren Reg'l Sch. Emps. v. Chafee, No. PC 12-3168, 2014 WL 1743142, at * 15 (R.I. Super. Ct. Apr. 25, 2014).

145. *See id.* at *1 n.1; s*ee also* R.I. GEN. LAWS § 36-10-1 (2011); R.I. GEN. LAWS § 16-16-22 (2013); R.I. GEN. LAWS § 45-21-41 (2009).

146. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *2.

147. *Id.* at *14. Judge Taft-Carter went on to clarify that this was only a preliminary step in finding merit in the plaintiffs' constitutional claims against the government and elaborated that the court had not made a final ruling with respect to the State's ability to unilaterally alter the pension statute with respect to the sub-set of plaintiff-employees who have not yet fully retired. *Id.*

148. Defendant's Motion to Dismiss Plaintiffs' Complaint at 7–9, R.I. Pub. Emps.' Ret. Coal., v. Chafee, No. PC123166, 2014 WL 1577496 (R.I. Super. Ct. Apr. 16, 2014), 2012 WL 5520089.

149. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *6–7 ("[O]ur Supreme Court stated that, absent a clear indication by the Legislature that it intended to bind itself contractually by passing an enactment, the

she acknowledged that Rhode Island does not expressly state that pension benefits are contractual in nature, she also brought attention to Rhode Island General Laws section 36-10-7, entitled "Guaranty by state—Annual appropriations."[150] Section 36-10-7 provides, *inter alia*, that "it is the intention of the state to make payment of the annuities, benefits, and retirement allowances provided for under the provisions of this chapter."[151] Further, the court stated that "the language [of § 36-10-7] provides some evidence that the State promised to provide some pension benefits, § 36-10-7 does not promise any particular amount of pension benefits, nor does it indicate that the benefit levels may not be changed or altered."[152] In her analysis of the language of section 36-10-7, Judge Taft-Carter relied heavily upon the First Circuit's reasoning in *National Education Ass'n-R.I. ex rel. Scigulinsky v. Retirement Board of Rhode Island Employees' Retirement System.*[153] There, the court concluded that the language of section 36-10-7 "falls at least a step short of clearly expressing a contractual commitment not to change benefit levels or other plan variables by legislation" and, therefore, fails to meet the clear and unequivocal standard of the federal unmistakability doctrine.[154] Thus, Judge Taft-Carter ultimately concluded that the isolated text of section 36-10-7 is ambiguous for the purposes of finding that the legislature intended to be bound contractually to the

presumption pervades that [the] law is not intended to create private contractual or vested rights but merely declares a policy to be pursed until the legislature shall ordain otherwise." (quoting Brennan v. Kirby, 529 A.2d 633, 638 (R.I. 1887)) (internal quotation marks omitted)).

150. *Id.* at *7; R.I GEN. LAWS § 36-10-7 (2011) (providing language that arguably evinces the Rhode Island legislatures intent to be contractually bound to the full payment of pension benefits to members of the public retirement benefit system). *Compare* MASS. GEN. LAWS ch. 32, § 25(5) (2009), *with* R.I. GEN. LAWS § 36-10-1 (2011) (contrasting the express statutory language of a Massachusetts statute establishing contractual pension benefits with the absence of such language in Rhode Island laws defining the public pension system).

151. R.I. GEN. LAWS § 36-10-7.

152. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *8.

153. *Id.* (citing Nat'l Educ. Ass'n-R.I. *ex rel.* Scigulinsky v. Ret. Bd. of R.I. Emps.' Ret. Sys., 172 F.3d 22, 28–29 (1st Cir. 1999)).

154. *Scigulinsky*, 172 F.3d at 28; *see also* Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985) (articulating the need for the language of legislation to clearly and unequivocally indicate legislative intent to be bound by contract for the purposes of the unmistakability doctrine).

payment of public pension benefits.[155]

Finding ambiguity in the contractual nature of the pure language of section 36-10-7, Judge Taft-Carter went on to clarify that the statute may be interpreted as a contract in cases where the legislative intent to be bound is established and supported by language of the statute *and the surrounding circumstances*.[156] Accordingly, she turned to a brief analysis of the legislative history of section 36-10-7.[157] She acknowledged that the General Assembly expressly reversed the right to amend, alter, or repeal provisions of the Municipal Employment Retirement System ("MERS").[158] Thus, it appears that the General Assembly had an opportunity to implement a similar provision for the ERSRI but did not elect to do so.[159] However, Judge Taft-Carter declined to "construe the absence of such a provision as evidence of an unmistakable intent to be contractually bound" and concluded that "[§ 36-10-7] remains ambiguous as to the existence of a contractual relationship between Plaintiffs and the State."[160]

Failing to find any conclusive evidence of legislative contractual intent from the legislative history, Judge Taft-Carter ultimately turned to foundational principles of contract law—namely offer and acceptance—in reaching her conclusion.[161] In so doing, she was careful to distinguish the State as an employer contracting with employees as opposed to a sovereign dealing with private citizens.[162] Thus, the existence of an employer-employee relationship between the state and its employees weighs in favor of finding an implied contract.[163] She found that the government had made an offer by inducing the employees to enter into a

155. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *8.
156. *Id.* at *9; *see also* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17 n.14 (1977); Retired Adjunct Professors of R.I. v. Almond, 690 A.2d 1242, 1346 (R.I. 1997).
157. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *7.
158. *Id.* at *2; *see also* R.I. GEN. LAWS § 45-21-47 (2009).
159. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *8.
160. *Id.*
161. *Id.* at *12.
162. *Id.* at *11.
163. *Id.* at *16–17; *see also* Nat'l Educ. Ass'n-R.I. *ex rel.* Scigulinsky v. Ret. Bd. of R.I. Emps.' Ret. Sys., 172 F.3d 22, 28–29 (1st Cir. 1999). *See also* McGrath v. R.I. Ret. Bd., 88 F.3d 12, 17 (1st Cir. 1996) ("[A] pension plan represents an implied-in-fact unilateral contract [in the context of both] state and municipal pension plans.").

bargain by dangling the incentive of a pension payment.[164] The State offered these pension benefits in exchange for "continued and faithful service" to the State and pension system.[165] She concluded that "[w]ith respect to unilateral contracts, an offeree may accept an offer by beginning to perform."[166] Therefore, the plaintiffs accepted the State's offer by beginning their employment, contributing to the mandatory pension system, and, for the purposes of this sub-class of plaintiffs, continued their service for the required time (ten years) in order for the pension benefits to become vested as prescribed by the governing pension statute.[167]

Judge Taft-Carter's holding, while favorable for challengers to RIRSA, must be taken with a procedural grain of salt. This decision was in response to a pre-trial motion to dismiss filed by the State and, thus, is to be viewed through the prism of Rhode Island's liberal pleading standards. Accordingly, the court "[did] not deal with the likelihood of success [of the plaintiffs Contract Clause challenge] on the merits, but rather with the viability of [the] plaintiff's bare-bones allegations and claims as they are set forth in the complaint."[168] Therefore, in finding a unilateral, implied-in-fact contract between the State and the plaintiffs, Judge Taft-Carter must have "assume[d] that the allegations contained in the complaint [were] true, and examine[d] the facts in light most favorable to the nonmoving party"—in this case, the challengers to the legislation.[169]

This decision establishes the importance of "vesting" in the impending analysis. Judge Taft-Carter recognized that there is

164. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *11–12.

165. *Id.* at *12; *see also* R.I. GEN. LAWS § 36-10.1-1 (2011) ("Rhode Island Public Employee Pension Revocation and Reduction Act").

166. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *12 (citing WILLISTON ON CONTRACTS § 6:26 (4th ed. 2010)).

167. *See id. See also "Vested" in Glossary of Terms*, EMPS.' RET. SYS. OF R.I., http://content.ersri.org/glossary-of-terms/#gsc.tab=0 (last visited Mar. 22, 2015) ("You must have 10 years of contributing service credit to be vested in ERSRI. Once you are vested, you are eligible to collect a retirement benefit when you reach retirement age.").

168. *Bristol/Warren Reg'l Sch. Emps.*, 2014 WL 1743142, at *4 (quoting Hyatt v. Vill. House Convalescent Home, Inc., 880 A.2d 821, 823 (R.I. 2005)) (internal quotation marks omitted).

169. *Id.* (quoting Boyer v. Bedrosian, 57 A.3d 259, 270 (R.I. 2012)) (internal quotation marks omitted).

significant disagreement in Rhode Island case law over exactly when pension benefits vest for the purposes of establishing a legally cogent contract.[170] The initial determination of the existence of a contractual relationship becomes somewhat convoluted in cases of public pension reform because of inconsistent interpretation of vested pension benefits throughout the states. The question of *when* exactly a contractual provision vests in an employee is a highly complex issue that can frustrate an entire Contract Clause analysis. For example, if a court concludes that the benefit has not yet vested in the employee, then there is, of course, no contractual relationship to impede through legislation. Some states have taken a very liberal approach to this issue and have concluded that a public employee's benefits vest at the beginning of their employment.[171] Thus, if a state legislature substantially changes a retirement benefit system on a public employee's first day on the job, she presumably has a contractual right to that benefit for the purposes of a Contract Clause analysis.[172] On the other end of the spectrum, some states have held that pension rights only become contractually vested at the time of retirement or eligibility for retirement.[173] Some states

170. *Id.* at *10. *Cf.* Buck, *supra* note 6, at 20 (describing vested rights interchangeably with contractual rights). *But see* Nat'l Educ. Ass'n-R.I. *ex rel.* Scigulinsky v. Ret. Bd. of R.I. Emps.' Ret. Sys., 172 F.3d 22, 26 (1st Cir. 1999) ("'Vesting' and 'contractual' are not synonymous.").

171. *See* Buck, *supra* note 6, at 54. The California Supreme Court has held that "[a] public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." Betts v. Bd. of Admin. of Pub. Emps. Ret. Sys., 582 P.2d 614, 617 (Cal. 1978).

172. *See* Buck, *supra* note 6, at 54. Although whether this contract is *substantially* impaired is apparently a different question entirely. The Oregon Supreme Court held that "[a]n employee's contract right to pension benefits becomes vested at the time of his or her acceptance of employment. On vesting, an employee's contractual interest in a pension plan may not be substantially impaired by subsequent legislation." Hughes v. Oregon, 838 P.2d 1018, 1029 (Ore. 1992) (citations omitted).

173. *See* Buck, *supra* note 6, at 55. The Nevada Supreme Court held:

> Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.

have taken a more dynamic approach to this question and have concluded that pension rights become contractual at some point later than the beginning of employment, although the exact period is usually undefined.[174]

Rhode Island public pension benefits appear to vest in employees who have contributed at least ten years of faithful and honorable service.[175] Thus, any public employee who has "contributed money [to the Public Employment systems] that, in addition to their continued service, was given in exchange for the State's promise to provide pension benefits" has established an implied-in-fact contract with the State of Rhode Island.[176] This conclusion, of course, does little for any employee who has not met the ten-year threshold. However, "[the Rhode Island] Supreme Court appears to have accepted that pension rights become enforceable as contracts once an employee has fulfilled the statutory requirements, *if not before*."[177] The Rhode Island Supreme Court has "specifically acknowledged that '[c]ontract rights may attach *upon entering* public employment and service.'"[178]

In sum, it seems clear that retired employees, as well as employees with at least ten years of honorable service and

Nicholas v. Nevada, 992 P.2d 262, 264 (Nev. 2000) (quoting Police Pension & Relief Bd. of Denver v. McPhail, 338 P.2d 694, 700 (Colo. 1959)).

174. Buck, *supra* note 6, at 54–55. The Tennessee Supreme Court stated that "we are not convinced that a [pension] plan is 'frozen' against detrimental changes or modifications the moment an employee begins to participate in it, where such changes are necessary to preserve the fiscal and actuarial integrity of the plan as a whole." Blackwell v. Quarterly Cnty. Ct. of Shelby Cnty., 622 S.W.2d 535, 541 (Tenn. 1981). However, the Kansas Supreme Court stated that public employees have a contractual right in the state pension system after "[c]ontinued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions to the fund are made." Singer v. City of Topeka, 607 P.2d 467, 474 (Kan. 1980).

175. *See* R.I. GEN. LAWS § 36-10-9 (2011) (providing that, *inter alia*, the statutory requirement for state employees is ten years of contributory service); R.I. GEN. LAWS § 16-16-12 (providing that, *inter alia*, the statutory requirement for teachers is ten years of contributory service).

176. Bristol/Warren Reg'l Sch. Emps. v. Chafee, No. PC 12-3168, 2014 WL 1743142, at *13–14 (R.I. Super. Ct. Apr. 25, 2014).

177. *Id.* at *13 (emphasis added) (citing *In re* Almeida, 611 A.2d 1375, 1385–86 (R.I. 1992)).

178. *Id.* at *19 (emphasis added) (quoting *In re Almedia,* 611 A.2d at 1385).

contribution to ERISA, have a contractual relationship with the State of Rhode Island. Although apparently not at issue in the RIRSA litigation,[179] the Rhode Island Supreme Court has left open the possible existence of a contractual relationship between non-vested, public employees and the State of Rhode Island.[180] The scope of these relationships is variable depending on the employment status of the plaintiff, but, for the purposes of a Contract Clause challenge, it appears that most, if not all, state employees have a contractual relationship with the State of Rhode Island. At the very least, RIRSA impairs contractual relationships that have already been created, and it was designed to do precisely that. Because the fundamental purpose of RIRSA is to redefine preexisting contractual relationships with employees whose pension plans have already vested, at least some plaintiffs can challenge the law.

ii. Does RIRSA Impair the Contractual Relationship Between the Public Employees and the State of Rhode Island?

Recall that, for the purposes of a Contract Clause challenge, courts have considered an "impairment" to be a mere alteration to the contractual relationship.[181] According to noted public pension reform commentator Amy B. Monahan, case law indicates that it is relatively easy for a challenger to establish a contractual

179. *Id.* at *19 ("Because the instant case involves Plaintiffs who have already vested, it is not necessary for the Court to decide what, if any, contractual rights may attach before vesting. For the purposes of this case, Plaintiffs are all vested employees who have fulfilled the statutory requirements.").

180. *See In re Almedia*, 611 A.2d at 1385, 1386. *But see* Retired Adjunct Professors of R.I. v. Almond, 690 A.2d 1342, 1345, 1346 (R.I. 1997). In *Almond*, the Rhode Island Supreme Court explored the notion that reliance interest alone should not determine the contractual nature of a legislative enactment as it would greatly limit the amount of permissible statutory changes to pension-benefit schemes. *Id.* However, commentators have dissented on the judiciary's ubiquitous majoritarian policy concern for the possibility of state legislatures being tethered to past "contracts," thus rendering them politically inflexible with their sovereign powers in the future. *See, e.g.*, Epstein, *supra* note 126, at 709, 717, 718, 719, 732, 735, 738.

181. *See, e.g.*, McGrath v. R.I. Ret. Bd., By and Through Mayer, 906 F. Supp. 749, 764 (D.R.I. 1995) ("The question of whether the contract was impaired has already been answered in the affirmative . . . The more nettlesome question is whether that deprivation amounted to a substantial impairment."). *See also* discussion *supra* Part II.A.ii.

impairment in the realm of public pension law.[182] "[M]any legislative changes to public pension plans are found to be impairments [including] benefit formula changes, . . . changes in funding sources or methodology[,] state action eliminating [COLA] supplemental payments[, and] offsetting pension benefits by the amount of workers' compensation benefits received."[183]

As noted above, RIRSA imposes three major substantive changes to the public pension benefit system: (i) changing the retirement benefit system from a pure defined contribution system to a "hybrid" system, (ii) the suspension and permanent reduction of COLAs, and (iii) the increased retirement age. Taking into account Monahan's framework, it is clear that all three of these legislative changes constitute an "impairment" for the purposes of this analysis.[184] However, a mere impairment of a contractual relationship or obligation is not enough to satisfy Prong I of the Contract Clause analysis. The challenger must further establish that this impairment is of requisite substantiality to justify further judicial review of state legislative interference with a public contract.

iii. Is the Contractual Impairment Imposed by RIRSA of Requisite Substantiality to Justify Further Analysis?

The contractual rights and relationships established between the State of Rhode Island and the members of the public retirement system have been substantially impaired by the alterations of RIRSA. Recall that many Contract Clause challenges to alleged impairments of public contracts falter at this stage; however, none of the legislation previously evaluated contains the degree of sweeping and severe legislative alteration as does RIRSA. No state employee could have reasonably expected that the State would attempt to warp the public employment benefit system in such a drastic way. RIRSA is more than mere commonplace regulation of a pension system; it is an unprecedented and drastic economic measure taken with the expressly stated purpose of avoiding state financial insolvency. However, at this stage of the Contract Clause analysis, the

182. MONAHAN, *supra* note 17, at 15.
183. *Id.*
184. *See id.*

purpose and potential justification for the impairment is immaterial. It is sufficient at this stage to accept that the impairment of the contractual relationship and rights flowing from that relationship between state employees and the Rhode Island government are surely substantial enough to reach further inquiry.

The first two elements of RIRSA's pension-reform framework, the benefit reduction and change to a defined contribution plan and the COLA reductions—by themselves—substantially impair the contractual relationship between the State and its employees. The shift from a pure defined benefit retirement system to a hybrid system is the most drastic measure.[185] This element of RIRSA dramatically warped the very structure of the public employee benefit system such that it is almost beyond recognition. While Rhode Island's old retirement system was not especially generous to retirees, the new system imposed by RIRSA represents not just a reasonably expected erosion of those benefits, but a palpable corruption of the expectation interests and idiosyncratic retirement plans of contributing public employees.[186]

RIRSA changes the accrual rate under the residual defined benefit plan from a guaranteed benefit based on calculable factors, to one percent of the final average salary per year of service.[187] Additionally, under RIRSA, five percent of the employee's salary—more than half of their total contribution—is automatically deposited into a mandatory defined contribution account.[188] The formulaic changes from a defined contribution plan to a hybrid plan, articulated in Section 7 of RIRSA, impose on the average thirty-year worker "an average benefits cut of 14 percent."[189] While this number is a significant decrease of guaranteed benefits in and of itself, it has the potential to become even more substantial after one considers the market risks to which the employee is exposed to as a result of RIRSA's defined contribution

185. *See* discussion *supra* Part I.A. *See also* 2011 R.I. Pub. Laws 408, § 7.

186. *See* discussion *supra* Part I.A. *See also* 2011 R.I. Pub. Laws 408, § 7. *See also* HILTONSMITH, *supra*, note 21, at 2; MORRISSEY, *supra* note 22, at 4.

187. *See* discussion *supra* Part I.A.; 2011 R.I. Pub. Laws 408, § 7. *See also* HILTONSMITH, *supra*, note 21, at 3.

188. HILTONSMITH, *supra*, note 21, at 3.

189. *Id.* at 2.

system.[190]

Beyond the raw mathematical impairment imposed by RIRSA, the shift from a defined benefit plan to a hybrid plan is such a unique disruption of the status quo that it ultimately must impact the employee's expectations. A fundamental purpose of the public pension system is to induce skilled workers away from the private-sector with the promise of a lucrative pension.[191] In Rhode Island, this pension was always structured, until RIRSA, as a traditional defined benefit system.[192] As discussed above in Section I.A, defined benefit plans are desirable to employees because they are relatively calculable based on a variety of factors that are largely in control of the employee herself.[193] Surely, a number of public employees had at least partially planned for their financial future around the concrete and comparatively predictable benefit estimates under a defined benefit plan. By dismantling the existing defined benefit system and sewing a debased version of it back together with variable accrual formulas and the unpredictable presence of market risk inherent in defined contribution systems, RIRSA frustrates the public employees' expected benefit of the bargain, not merely by reducing the actual benefits, but by eviscerating future financial plans formulated in reliance on the old pension system.

RIRSA's manipulation of COLA benefits is also an independent ground for finding a substantial impairment of the contractual relationship between the government and the state employees. The COLA reform element of RIRSA suspends COLA benefits until the pension system is eighty percent funded and permanently reduces the COLA formula once that threshold is eventually reached.[194] This applies to not only future and current

190. *See id.* (forecasting "[f]or the quarter of future employees who are in the lowest quartile of investment returns on their [defined contribution] plan" an average cut of "22 percent or higher"); MORRISSEY, *supra* note 22, at 3.

191. *See, e.g.*, Kern v. Long Beach, 179 P.2d 799, 803 (Cal. 1947); Cloutier v. State, 42 A.3d 816, 823 (N.H. 2012); James B. Jacobs et al., *Pension Forfeiture: A Problematic Sanction for Public Corruption*, 35 AM. CRIM. L. REV. 57, 81 (1997).

192. *See* HILTONSMITH, *supra* note 21, at 2; MORRISSEY, *supra* note 22, at 1.

193. *See* HILTONSMITH, *supra* note 21, at 2; RANDAZZO, *supra* note 13, at 18–19.

194. *See* discussion *supra* Part I.B (discussing COLA reform).

state employees, but also impairs the benefits of retirees as well. Retirees do not just have vested contractual rights in their retirement benefits, but have fully completed their end of the contractual relationship. Because retirees will presumably regain their reduced COLA benefits once the pension system is eighty percent funded, RIRSA appears to stop short of permanently revoking COLA benefits for retirees. Given the expectation that it will take approximately sixteen years to reach the eighty percent threshold, this minimal concession for retirees is largely illusory.[195] If these estimations are correct, retirees will have much less time to enjoy the benefit of COLA payments, as this annuity traditionally extinguishes at the death of the retiree and surviving spouse.[196] Thus, the government appears to be running out the proverbial clock on their obligations by suspending these benefits until such a lofty goal of financial stability is achieved. This is not just a delay in the provision of benefits. The stakes are quite clear: either the retirees will have COLAs in the relatively limited period before their deaths, or they will not. RIRSA stands for the latter position.

Moreover, a fully vested retiree who has contributed a full career's worth of honorable service could, and should, not expect to have their financial stability completely altered in retirement. While some other options exist for retirees to maintain financial stability in their post-work life, such as Individual Retirement Accounts ("IRAs"), the retirees affected by RIRSA have not had the benefit of foresight to plan for such an unprecedented suspension of benefit. Retirees are generally too old to reenter the workplace and supplant their benefits with additional income. Therefore, unless the retiree has exhibited a paranoid level of economic prudence, taking into account the possibility of a portion of her retirement benefit completely drying up for an indeterminate period of time, it is obvious that the retiree has had

195. *See* Bristol/Warren Reg'l Sch. Emps. v. Chafee, No. PC 12-3168, 2014 WL 1743142, at *6 (R.I. Super. Ct. Apr. 25, 2014).

196. R.I. GEN. LAWS § 28-30-17 (Supp. 2014) ("[A judge's] surviving spouse shall receive annually thereafter during his or her lifetime and so long as he or she remains unmarried, an amount equal to one-half (1/2) of the annual payment that the judge was receiving by way of salary or retirement pay at the time of his or her death."); R.I. GEN. LAWS §§ 28-30-18, 36-10-18 to -19.1 (Supp. 2014). *See also* R.I. GEN. LAWS § 36-10-35 (Supp. 2014) (providing the statutory structure of COLA benefits before RIRSA).

her contractual right substantially impaired. The mere possibility that one retiree had her financial security and stability shaken by the COLA suspension is sufficient to render RIRSA a substantial impairment of the contractual relationship between the State and the state employees.

Additionally, current vested employees likewise have an argument that the COLA suspension and permanent reduction, taken in isolation, are sufficient to constitute a substantial impairment for the purposes of a Contract Clause challenge. As already noted above, a principal purpose of a public pension system is to lure skilled employees away from the private sector by using a lucrative public pension as inducement.[197] A key element of the public pension benefit system is COLAs. As discussed above in Section I.B, COLAs operate as a supplemental source of income for retirees to help cope with the costs of living following retirement. A permanent reduction of these benefits represents a substantial step backward from the premise that COLAs are intended to operate in step with increasing inflation costs, thus rendering the COLA, and the public pension benefit system by proxy, substantially less lucrative than when the public employee originally joined the workforce.

The increase in retirement age, standing alone, does not have as substantial of an effect as the shift to a hybrid plan and the COLA reductions. It does, when taken in context with the other two changes, however, work to substantially impair a state employee's contractual relationship with the State. Depending on the age of the employee, an increased retirement age can have a significant impact on the future retirement expectations of the employee. This requires the employee to contribute additional years to the pension system—while also being that much older, and thus closer to extinguishment of pension payouts from the State. Additionally, this impacts the expectations and future plans of the employee, especially if the employee in question is older and closer to retirement.[198] Although this is certainly an impairment of a contractual relationship, it does not appear to be of the requisite substantiality to invoke the heightened judicial review of

197. *See, e.g.*, Kern v. City of Long Beach, 179 P.2d 799, 803 (Cal. 1947); Cloutier v. State, 42 A.3d 816, 823 (N.H. 2011); Jacobs et al., *supra* note 191, at 81.

198. *See* Buck, *supra* note 6, at 77.

a public contract for the purposes of a Contract Clause analysis.[199] However, when taken in conjunction with the aggregate effect of the other two independently substantial impairments imposed by RIRSA, it is clear that the overall effect of RIRSA substantially impairs the pension contracts between public employees and the State. One independent substantial impairment would be sufficient, but RIRSA imposes two and adds a third significant factor that exacerbates the harms caused by the other two.

While it is apparent that the government is permitted to make reasonable and insubstantial modifications to contractual relationships, RIRSA and the various contractual impairments that flow from it greatly exceed the level of traditional and reasonable modification.[200] For example, in *Retired Adjunct Professors of the State of Rhode Island v. Almond*, the Supreme Court of Rhode Island initially failed to find a contractual relationship between the parties, but it went on to note that, even if there was a contractual relationship, it was not substantial enough to warrant further review under the Contract Clause.[201] There, the plaintiffs challenged a state statute under the Contract Clause that, in effect, imposed a $10,000 cap on the annual earnings of retired public employees that reentered the workplace after retirement.[202] On the substantiality element, the court reasoned that "it is not even clear as a factual matter that the new $10,000 cap on reemployment earnings will actually have an adverse (let alone *substantially* adverse) impact on all of these plaintiffs' previous earnings under the [previous reemployment scheme]."[203] Here, the aggregate effect of increased investment risk in a compulsory hybrid system, the suspension of benefits for an indeterminate amount of time, the permanent reduction of some benefits, and an increased retirement age clearly leaves little doubt as to whether RIRSA will have an adverse impact on public employees.

The court in *Retired Adjunct Professors* also reasoned that the

199. *See, e.g.*, Pineman v. Oechslin, 637 F.2d 601, 603 (2d Cir. 1981) (ultimately not addressing the issue on abstention grounds).

200. *See, e.g.*, McGrath v. R.I. Ret. Bd., By and Through Mayer, 906 F. Supp. 749, 764 (D.R.I. 1995).

201. 690 A.2d 1342, 1345–48 (R.I. 1997).

202. *Id.* at 1344, 1347.

203. *Id.* at 1347.

alleged impairment was not substantial because "[p]ublic pensions have always been a heavily regulated legal arena. Therefore, individual expectations of immunity from future statutory change would have been unwarranted."[204] Unlike the plaintiffs in *Retired Adjunct Professors*, the challengers to RIRSA encompass a diverse breadth of state employees. Therefore, this is not a case of individual expectations of immunity among sub-classifications of employees, but rather, this is a collective challenge to burdensome elements of RIRSA that echo through multiple chapters of Rhode Island civil law.

Although courts, including the Rhode Island Supreme Court in *Retired Adjunct Professors*,[205] have considered previous government regulation of the industry as indicia that evinces a lack of "substantial" impairment in Contract Clause challenges, this is by no means a determinative finding. In *Retired Adjunct Professors*, the court addressed the regulation of reemployment benefits that, while facially similar to retirement benefits and COLAs, are more similar to health benefits.[206] Unlike health benefits and reemployment benefits, which are subject to the "vagaries of labor negotiations,"[207] Rhode Island General Laws section 36-11-12 provides that "[a]ny and all matters relating to the employees' retirement system of the state of Rhode Island are excluded as negotiable items in the collective bargaining process."[208] Therefore, it would be misguided to attach strong persuasive weight to the "substantial impairment" element of the *Retired Adjunct Professors* analysis because that court confronted a very distinguishable aspect of related facts.[209]

However, even if one is to accept the general premise that

204. *Id.* at 1347; *accord McGrath*, 906 F. Supp. at 764.

205. *See, e.g.*, *Retired Adjunct Professors*, 690 A.2d at 1347; Nat'l Educ. Ass'n-Rhode Island v. Ret. Bd. of R.I. Emps.' Ret. Sys., 890 F. Supp. 1143, 1163–64 (D.R.I. 1997) (opining that the challenged statute substantially impaired a contractual relationship despite the fact that the contractual relationship involved the highly regulated industry of public pensions).

206. *Retired Adjunct Professors*, 690 A.2d at 1343.

207. R.I. Council 94 v. Carcieri, No. PC 10-2859, 2011 WL 4198506, at *30 (R.I. Super. Ct. Sept. 13, 2011) (quoting Uricoli v. Bd. of Trs., Police & Firemen's Ret. Sys., 449 A.2d 1267, 1273 (N.J. 1982)) (internal quotation marks omitted) (adopting a portion of the analysis implemented in *Uricoli*).

208. R.I. GEN. LAWS § 36-11-12 (2011). *See also Carcieri*, 2011 WL 4198506, at *30.

209. *See* 690 A.2d at 1347.

public pensions are subject to substantial statutory modification and therefore more difficult for challengers to establish a substantial impairment,[210] the massive and unendurable burden imposed by RIRSA upon such an widespread group of current and retired public-sector employees in Rhode Island is nonetheless sufficiently unreasonable to establish a substantial impairment and, at a minimum, justify further review.[211] The bottom line is that RIRSA represents a remarkably broad and unprecedented attempt at public pension reform with alarmingly ambitious goals and very real hardships for members of the public employment system as a result. Commentators are generally compelled to remark on the radical nature and broad reformatory stroke of RIRSA regardless of whether they are criticizing or applauding the legislation.[212] Because of the expansive nature of RIRSA, any argument flowing from the premise that public pension systems are traditionally regulated and, therefore, impairments are not requisitely substantial, must fail. No public employee could reasonably be assumed to have considered the risk of a wholesale government rebuild of the public pension system that substantially reduces contractual rights at multiple junctures. The presumed underpinning of this premise is that public employees should expect some reasonable modification in their field; however, RIRSA is far from reasonable. Even if one disagrees with the notion that RIRSA is patently unreasonable, further evaluation at Prongs II and III of the Contract Clause test are then at least necessary.

In sum, individual elements of RIRSA standing alone severely impact the contractual rights established between the government and vested state employees, including retirees.[213] RIRSA does not

210. *See id.*

211. *See* MORRISSEY, *supra* note 22, at 7–8.

212. *Compare* Von Drehle, *supra* note 10, at 32, 36 (commenting on the ambitiousness of the reform while also applauding the reformatory effort), *with* Walsh, *supra* note 13, at 4 (commenting on the breadth of the reform effort while highlighting concern of public employees in 2011). *See also* MORRISSEY, *supra* note 22, at 1.

213. Note that a public employee with less than ten years of service is not completely ruled out at this stage. If she succeeds in establishing a contractual relationship with the State, she too can presumably establish a substantial impairment of that relationship. *See* discussion *supra* Part III.A.i. Modifications to pension systems that frustrate merely the

just impose one or two of the elements discussed, rather it imposes all three, plus a variety of additional modifications to the public retirement system that, for the sake of brevity, will not be discussed in this Comment. While Rhode Island's public pension system may have suffered through "a death by a thousand cuts," the deepest and most significant of the cuts are a direct result of RIRSA.[214] RIRSA is not a traditional legislative modification of a public pension system; it is a remarkably broad act that imposes a diverse array of burdens on public employees across the entire public-sector. The aggregate burdens and impairments of RIRSA rise to the level of substantiality necessary for challengers to clear the heightened first prong of the Contract Clause analysis.

B. *Can Rhode Island Show a Legitimate Public Purpose Behind RIRSA?*

Having addressed the predicate issue of whether RIRSA substantially impairs a public contract, the analysis turns to whether the government can articulate a legitimate purpose behind the legislation. A state may impair a contract where it serves a legitimate governmental interest through necessary and appropriate means.[215] It is important to note again that while this language mirrors in many respects the rational basis test employed by courts, it is clearly not the rational basis test. Neither, however, is it intermediate or strict scrutiny. The appropriate test for a Contract Clause challenge involving a public contract employs a more searching inquiry than the deferential rational basis test, but does not reach the exacting inquiry of more

expectation interest in non-vested benefits are generally insufficient for the purposes of establishing requisite substantiality of impairment for the purposes of the Contract Clause. *See*, *e.g.*, Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203 (R.I. 1999). However, some courts have found that non-vested employees have contractual rights in pension plans, with those rights being subject to *reasonable* modification by the legislature. *See*, *e.g.*, Nev. Emps. Ass'n, Inc. v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990). The question of RIRSA's reasonableness is certainly in question and is better suited at Prongs II and III of the Contract Clause analysis; thus, non-vested employees should be afforded the benefit of further judicial review.

214. MORRISSEY, *supra* note 22, at 7.

215. *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22 (1977); Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 59 (1st Cir. 1999); R.I. Hospitality Ass'n v. City of Providence, 775 F. Supp. 2d 416, 434 (D.R.I. 2011); *Nonnenmacher*, 722 A.2d at 1202.

formal heightened scrutiny. It appears that this is the case because Contract Clause jurisprudence, both in Rhode Island and nationally, is unfortunately far less developed than other areas of law dealing with heightened scrutiny. To exceed rational basis while not reaching heightened scrutiny invites a simple solution: the judiciary should make an independent assessment of the reasonableness of the law. This does not invoke the mere rationality of the law, but the reasonableness of its application to circumstances. The purpose of this step of the Contract Clause evaluation is to establish the legitimate public purpose behind the legislation that will be evaluated with extra vigilance at Prong III of the analysis.[216] As a normative matter, the government generally has no issue with establishing a legitimate public purpose. As such, this Section will introduce some of the potential legislative purposes behind RIRSA identified in the "Legislative intent and findings" section of the law itself, but will operate under a presumption of legitimacy consistent with general, analytic themes in constitutional jurisprudence.[217]

At the outset of RIRSA, the General Assembly expressed its primary intention "to ensure the sustainability of the state's public retirement systems."[218] In support of this intent, the legislature reiterated the vulnerabilities of Rhode Island's public pension system and the general economic hardships that the State faced at the time of the legislation.[219] Additionally, they identified "Rhode Island's critically underfunded pension system" as a factor that, when combined with the State's general economic woes and preexisting tax burden to citizens, "threatens the base pensions of current and future public workers, hampers the ability of the state to provide its citizens with vital services necessary for the public's health, safety and welfare, and places an unsustainable financial burden on all Rhode Island citizens and taxpayers."[220] In a similar vein, the legislature expressed concern that Rhode Island's current pension system, if left as is, "will substantially increase Rhode Island's capital cost structure and adversely affect and greatly diminish the state's ability to address

216. *See, e.g.*, McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996).
217. *See* 2011 R.I. Pub. Laws 408, § 1; 2011 R.I. Pub. Laws 409, § 1.
218. 2011 R.I. Pub. Laws 408, § 1(a); 2011 R.I. Pub. Laws 409, § 1(a).
219. 2011 R.I. Pub. Laws 409, § 1(a)(1)–(2).
220. *Id.* §1(a)(3).

critical infrastructure needs for education, transportation, and other public projects."[221]

The General Assembly continued by "find[ing] and declar[ing] that it is of critical and immediate public importance that these public pension programs be restructured" for a variety of reasons.[222] Among the legislature's articulated reasons behind RIRSA are: (1) "[t]o ensure that the state [and municipalities] will be able to provide retirement benefits that will enable our public employees to enjoy a dignified employment";[223] (2) "[t]o ensure a secure and adequate source of retirement funds for public retiree benefits";[224] and (3) "[t]o 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 [municipalities] to fund the costs of [education, sustainable economy, infrastructure, providing needs to vulnerable citizens, and] other essential programs and purposes."[225]

In the "Legislative intent and findings" section of RIRSA, the General Assembly concludes by expressly finding and declaring that the public pension crisis in Rhode Island "ha[d] reached an emergency stage and must be addressed without delay."[226] Thus, it appears that the General Assembly identified three broad public purposes behind RIRSA: (1) ensuring that the public pension system does not collapse due to the State's inability to fund it; (2) a general concern that the State would not have been able to meet its obligations under its sovereign police power, such as providing adequate education and maintaining infrastructural integrity, absent public pension cuts and restructure; and (3) the overall economic status of the public pension system had reached an "emergency" level and therefore needed to be addressed. Because the means of RIRSA are not reasonable and appropriate to achieving even a legitimate government interest, this Comment will assume that governmental purpose animating RIRSA is legitimate for the purpose of further analysis.[227]

221. *Id.* §1(a)(11)–(12).
222. *Id.* §1(b); *id.* §1(b)(1)–(4).
223. *Id.* §1(b)(1).
224. *Id.* §1(b)(2).
225. *Id.* §1(b)(1)–(3).
226. *Id.* §1(b)(4).
227. For arguments challenging the legitimacy of the General Assembly's purported public purposes behind RIRSA, see generally MORRISSEY, *supra*

C. *Are the Contractual Impairments Reasonable and Necessary in Light of the Public Purposes Behind RIRSA?*

If the court finds a legitimate public purpose behind RIRSA, it will then determine if the contractual impairment established at Prong I is reasonable and necessary in light of the public purpose driving the legislation.[228] The General Assembly borrowed language directly from Contract Clause jurisprudence, concluding the "Legislative intent and findings" section of RIRSA by declaring the legislation to be "reasonable and necessary to achieve and protect the compelling public interests listed [t]herein."[229]

note 22. Morrissey argues, *inter alia*, that Rhode Island's economic problems have little to do with public employees currently receiving retirement benefits, but rather are a result of decades of improper and ineffective spending by politicians in the State. *Id.* at 1–2, 7–9. Other commentators, including Morrissey, have argued that the actuarial numbers used by then General Treasurer Gina Raimondo in her campaign to drum up public support for RIRSA are unreliable. *See, e.g.*, *id.* at 4–9 (critiquing Gina Raimondo's "Truth in Numbers" report as false and misleading). Additionally, a union-backed, financial, forensic investigation of Gina Riamondo's handling of the state pension fund has accused Ms. Raimondo of using public pension reform as a Trojan horse to pull legislative wool over the public's eyes and improperly invest public pension money in financially risky hedge funds with the intent of enriching herself and two venture capitalist partnerships she formerly managed at the venture capitalist firm, Point Judith Capital. *See* Katherine Gregg, *Forensic investigation' financed by union blasts Raimondo's handling of R.I. pension fund*, PROVIDENCE J., (Oct. 17, 2013, 1:00PM), http://www.providencejournal.com/breaking-news/content/20131017-forensic-investigation-financed-by-union-blasts-raimondo-s-handling-of-r.i.-pension-fund.ece. Absent a thorough investigation by the Securities and Exchanges Commission, this author is not prepared to expressly rely on this argument, but interested readers should see generally Edward "Ted" Siedle, *Rhode Island Public Pension Reform: Wall Street's License to Steal*, FORBES INC. (Oct. 18, 2013, 8:26 AM), http://www.forbes.com/sites/edwardsiedle/2013/10/18/rhode-island-public-pension-reform-wall-streets-license-to-steal/. *See also* R.I. GEN. LAWS § 36-8-17 (2011) ("[N]o member of the board . . . shall have any interest, direct or indirect, in the gains or profits of any investment made by the retirement board."); 2011 R.I. Pub. Laws 408, § 4, *repealing* R.I. GEN. LAWS § 36-8-8.1 (Supp. 2014) (directing the retirement board to conduct an internal audit on all special pension benefits conferred). If Governor Raimondo is conclusively found by an independent investigation to have used RIRSA to enrich herself directly or indirectly through her previous employer, Point Judith Capital, a reasonable argument can be made that the articulated public purposes of RIRSA are not "legitimate."

228. *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22, 25 (1977); Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1203 (R.I. 1999).

229. 2011 R.I. Pub. Laws 408, § 1(b)(4).

Further, the General Assembly applied their own balancing test and declared that "the achievement of [the aforementioned] compelling state interests . . . far outweigh[s] any impact that [RIRSA] might have upon the expectations of active and retired members of the affected pension systems as to future pensions."[230] Despite the General Assembly's self-affirmation that it was justified in repudiating and changing the material terms of its contractual relationship with public employees, it is the role of the judiciary to engage in this evaluative analysis, not the legislature.

Challenges that allege legislative impairment of public contracts to which the state is a party are evaluated with extra vigilance because the state's self-interest is at stake, rendering rational basis deference to the legislature inappropriate.[231] In the case of RIRSA, the reviewing court will likely be wary of the fact that the State obviously has a self-interest in avoiding their financial obligations to public employees, and accordingly, it will likely review the government's justifications with a higher degree of scrutiny then it would if the government had impaired a contract between two private entities through legislation.[232] While not rising to the level of strict scrutiny, the court applies a variable degree of scrutiny that is clearly more searching than the rational basis standard.[233]

Additionally, a court must consider the "substantiality" of the contractual impairment established earlier in the Contract Clause analysis to better frame the analytic inquiry of whether the impairment was "reasonable and necessary" in light of the State's articulated public purpose behind the legislation.[234] Accordingly, the more substantial the impairment, the more difficult it will be to conclude that the impairment is reasonable and necessary.[235]

230. *Id.*

231. *See, e.g.*, *U.S. Trust Co. of N.Y.*, 431 U.S. at 25–26; McGrath v. R.I. Ret. Bd., 88 F.3d 12, 16 (1st Cir. 1996).

232. *See, e.g.*, *U.S. Trust Co. of N.Y.*, 431 U.S. at 25–26; *McGrath*, 88 F.3d at 16. As stated above in note 9, this case, at the time of this writing, appears to be on the cusp of settlement. A settlement is by no means determinative on the issue of RIRSA's constitutionality. Accordingly, the following argument still has constitutional merit and is styled in as if the litigation were to continue without settlement.

233. *See* discussion *supra* Part II.C.

234. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983).

235. *See, e.g.*, *id.*

Given that the impairments of the contract in question, as discussed in Section I above, are dire, the means used by RIRSA must be reasonable in light of their severity.

RIRSA's means are not reasonable, nor are they necessary. They radically alter the relationship between the parties without regard to the effects on retirees and public employees. The calculus of RIRSA disregards the State's contractual obligations in order to secure its bottom-line fiscal budget. While it may be difficult to balance the State's budget, the State cannot do so by trampling the rights of its employees by discharging its obligations through legislative fiat. The Contract Clause, if it is to have any meaning at all, must prohibit this action. It is essential to a system of ordered liberty that governments be constrained by the organic documents that give them form and authority. The State of Rhode Island must be so constrained from using drastic means to achieve its objective of solvency. It must act only in accordance with the dictates of its Constitution. It must follow the principle of its Contracts Clause.[236]

i. Are the Contractual Impairments Reasonable in Light of the Public Purposes Behind RIRSA?

Government reform in the abstract is generally accepted as beneficial for society. There is a presumption that the legislature will not act unreasonably. Therefore the judiciary will often defer to the judgment of the elected officials to do what is in the best interest of society. The issue of public pension reform falls into a controversial area of legislative utilitarianism, where the expectation is that the smaller group of public employees will make an economic sacrifice for the greater good. Indeed, all states allow for reasonable modification of public pensions to accommodate changing conditions and to keep the public pension itself flexible.[237] However, at this stage of the Contract Clause analysis, it is incumbent on the court to protect the public from overreaching and abusive legislation such as RIRSA.

What constitutes a "reasonable" modification of public

236. To reiterate, for the purposes of this Section, the articulated policy goals of RIRSA, discussed above at Part. III.B, are presumed to be valid.

237. *See* Mumford & Leto Pareja, *supra* note 27, at 40–41; *see also* MONAHAN, *supra* note 17, at 6.

employee retirement benefits is not entirely clear.[238] Generally speaking, the reasonable modification rule states "[t]o be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."[239] This premise can be broken up into two elements: (1) whether RIRSA alters pension rights in a way that relates to the theory of a successful public pension system; and (2) whether RIRSA appropriately disperses the benefits of the legislation with the detriments to the infringed upon public employees.

Despite the stated concern in the "Legislative intent and findings" section of RIRSA regarding the State's inability to provide secure pension benefits in the future without modification to employees current contributory obligations, there is no definitive evidence that RIRSA's massive overhaul of the public employee retirement system will achieve success.[240] In fact, one commentator has concluded that elements of RIRSA "actually increase[] costs to the state and local governments and taxpayers while making retirement incomes less secure and failing to make up for the cuts to the [defined benefit] portion of employees' pensions."[241] While there may be significant debate regarding the success of defined benefit plans versus defined contribution plans, it is likely that the increased retirement age and seized COLA benefits will, on a purely numerical level, undoubtedly contribute to refunding the pension system. In spite of this, a more completely funded public pension is not necessarily successful if it is attained through measures that run contrary to the policy theories that underpin a contemporary understanding of public pension benefits.[242]

238. *See* Mumford & Leto Pareja, *supra* note 27, at 40–41.

239. Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955).

240. *See* 2011 R.I. Pub. Laws 1919–21.

241. HILTONSMITH *supra* note 21, at 5 (relying on actuarial evaluation of the Employee's Retirement System of Rhode Island from June, 30, 2010 to predict the inefficiency of defined contribution plans).

242. *See generally* WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 121–34, 176–209, 210–41 (1976) (referencing specifically Chapter 5 entitled "Public Employee Retirement Plans," Chapter 8 entitled "Public Policy—Financing Pension Benefits," and Chapter 9

Even if a court finds the elements of RIRSA to be reasonably related to a theory of successful pension operations, the ends do not justify the means if the detriment imposed on the public employees is not accounted for by a countervailing benefit to the burdened class.[243] States have adopted two distinct theories on how to measure a benefit and its corresponding detriment in evaluating the reasonableness of a public pension modification.[244] The first test considers each individual's benefit incurred versus the detriment involved, and the second compares the benefits and detriments of the group as a whole.[245]

Under the first test, the court requires the benefits and detriments of each individual to be evaluated.[246] Under this framework, "if one employee experiences a detriment from the [modification to the pension system], that same employee also must experience an offsetting benefit" in order for the modification to be sustained as reasonable.[247] The most obvious case of RIRSA falling outside of this framework is the retirees who "temporarily" forfeit their COLAs. It is immaterial if future public employees enjoy the benefits of a sustainable public pension system as a result of the detriment placed on retirees, because the burdened retiree receives no countervailing benefit.[248] "The benefits experienced by other employees cannot offset the detriment of the individual employee."[249] The system cannot be reasonable under the circumstances of its enactment if it accrues all of its benefits to the state at the zero-sum expense of harm to current employees and retirees.

Under the second theory of "benefit versus detriment," the court will evaluate the benefits and detriments of the public

entitled "Public Policy—Income Objectives and Retirement Ages").

243. *See Allen*, 287 P.2d at 767–68.

244. *See* Mumford & Leto Pareja, *supra* note 27, at 41.

245. *See id.*

246. *See, e.g.*, Abbott v. City of L.A., 326 P.2d 484, 489–92 (Cal. 1958) (exploring the benefits and detriments that the city's pension modification had on the plaintiff).

247. Mumford & Leto Pareja, *supra* note 27, at 41.

248. *See id.* This argument also logically applies to all current members of the retirement system as well because they will receive no true benefit from the detriment of having their COLA permanently reduced. An argument also can be made for older current public employees in regards to the increase in retirement age.

249. *Id.* (citing *Abbot*, 326 P.2d at 484).

employees as a whole.[250] "[I]f the overall benefit to the employees as a group offsets the overall detriment to the employees as a whole, then the change is valid as a reasonable modification."[251] This utilitarian balancing act forces the court to evaluate the overall economic policies of the government as opposed to the more tangible interests of individual parties. It will be exceedingly difficult for a judge or jury to weigh an elderly retiree's loss of COLA benefits for two-and-a-half decades against the unpredictable benefits to the group of employees as a result of the reform effort. The court should reject the "group as a whole" test and instead evaluate the detriments and benefits of the modifications as they apply to individual classes of employees. Even if a court does not, the important consideration is the allocation of benefits and harms. As a whole group, employees are universally harmed. They receive no benefit whatsoever. They receive no concession, and the state makes no effort to accommodate them. They worked, in many cases for decades, upon the promise of a pension at a value set by the General Assembly. They retired to find that the General Assembly felt it appropriate to deny them all the benefits they expected and keep all savings to itself. This cannot, as a matter of law, constitute a reasonable modification of a government contract. The severity of RIRSA is its undoing. There is simply no reasonableness in the law.

Further, the court may follow the precedent set in *United States Trust Co. of New York* and place an emphasis on the foreseeability of the impairment in determining the reasonableness of the legislation.[252] There, the state governments of New York and New Jersey retroactively repealed a 1962 statutory covenant that provided financial security to holders of bond issued by the Port Authorities of New York and New Jersey.[253] The states argued that retroactive repeal of the

250. *See id.*

251. *Id.* (citing Singer v. City of Topeka, 607 P.2d 467 (Kan. 1980)).

252. 431 U.S. 1, 31–32 (1977). *See also id.* at 32 (Burger, C.J., concurring) (explaining that "the State must show that it did not know and could not have known the impact of the contract on that state interest at the time that the contract was made" to properly repeal the covenant); Clarke, *supra* note 85, at 197 (explaining the Court's "unreasonableness" test in terms of foreseeability).

253. *U.S. Trust Co. of N.Y.*, 431 U.S. at 4–14 (detailing the history leading

covenant was reasonable for the purposes of a Contract Clause challenge because it occurred as a result of changed circumstances, namely a shift in the public perception in favor of public transportation.[254] Justice Blackmun, writing for the majority, keyed in on the government's ability to foresee and anticipate this shift in public perception between the time the covenant was adopted in 1962 and when it was unilaterally repealed by the state governments in 1974.[255] Blackmun concluded that a societal need for public transit had been well documented and ongoing since 1922, and therefore, the government should have reasonably expected this ongoing development.[256] He concluded by acknowledging that while the government could not have foreseen the degree of public concern for environmental protection and energy conservation that would exist in 1974, twelve years before the covenant was drafted, these concerns were, nevertheless, not totally unknown to the legislature at the time of contracting.[257] Therefore, the changed circumstances were inadequate for the purposes of justifying a contractual repeal as "reasonable."[258] Chief Justice Burger underscored this evaluative framework of reasonableness in cases of government interference with public contract by emphasizing, in his concurrence, that "the State must show that it did not and could not have known the impact of the contract on [the State's articulated interest at Prong II of a Contract Clause challenge] at the time that the contract was made."[259]

Adopting this framework of foreseeability in order to determine reasonableness, RIRSA's contractual impairments are unreasonable. It should be noted that the requisite course for the State has always been to simply fund its pension program adequately. Regardless of whatever economic harms occurred to the State, the appropriate stance has always been for the State to ensure adequate funding. It has not done so. It is not reasonable to apportion the harm of that failure to those who had no say in

up to the repeal of the 1962 covenant).

254. *Id.* at 29, 32.
255. *Id.* at 31–32.
256. *Id.*
257. *Id.*
258. *Id.* at 32.
259. *Id.* (Burger, C.J., concurring).

the degree of funding apportioned to the pension system. It is foreseeable that pension costs will exist, and they must be met. The State cannot dodge its obligations by asserting a myopia about fundamental realities.

In sum, in light of the legislature's articulated public purposes behind RIRSA, its modifications are largely unreasonable. RIRSA, in effect, runs contrary to major theories that underpin a successful public pension system. An evaluation of the individual benefits and detriments to public employees reveals a severely unequitable distribution, particularly to certain individual members of the retirement system who are retired. Moreover, even if the assessment of benefits and detriments is taken from a purely utilitarian, "greater good" perspective, the future benefits of RIRSA are speculative in nature, and they do not outweigh the gross burdens suffered by public employees at large. Additionally, the government could have reasonably foreseen the economic issues that could flow from underfunded public pension liabilities at the time it entered into a contract with the employees. The fact that circumstances changed in the form of the national recession in the late 2000s to early 2010 is not sufficient to make the unilateral modification of the entire public pension system "reasonable" for the purposes of a Contract Clause analysis. Given the heightened degree of judicial scrutiny at this prong of the analysis, a court would likely conclude that RIRSA's impairments are unreasonable in light of any of the legislature's previously stated public purposes.

ii. Are Contractual Impairments Necessary in Light of the Public Purposes behind RIRSA?

Even if a court were to find the contractual impairments imposed by RIRSA to be reasonable in light of the government's public purpose, the court would still be required to evaluate if the impairments were necessary to achieve that purpose.[260] Questions of necessity in this sphere can be considered on two levels: (1) whether the legislative impairment as presented is essential in order to achieve the public purpose behind the

260. *See, e.g.*, *id.* at 28–29 (majority opinion); Nat'l Educ. Ass'n-Rhode Island *ex rel.* Scigulinsky v. Ret. Bd. of the R.I. Emps. Ret. Sys., 890 F. Supp. 1143, 1162–64 (D.R.I. 1995).

legislation; and (2) whether less burdensome alternative means were available to achieve similar policy goals.[261] Under this analytic framework, RIRSA and all the impairments that it prescribed were not necessary to achieve the legislature's goals of maintaining a sustainable public pension fund in the future and ensuring that the State has the economic resources available to meet its obligations to the general citizenry under its police power.[262]

The first inquiry in determining the necessity of the legislation in the face of impairment requires the court to evaluate if the impairment is essential in order to achieve the public purpose behind the legislation.[263] In order for RIRSA to be "essential," the court must determine that the government could not have achieved its purported policy ends without the modifications imposed by RIRSA.[264] In doing so, the court is to consider if less drastic contractual modifications could have been employed to achieve the RIRSA's desired effect.[265]

Through this lens, RIRSA is not essential to achieve the stated policy goals of protecting the pension system from collapse due to underfunding. As already discussed, it is well settled that a legislature may make reasonable changes to public pension systems to accommodate legislative flexibility and account for changing circumstances. By contrast, RIRSA represents an unprecedented and overly ambitious model for public pension reform in both scope and degree. Even if deemed reasonable, RIRSA cannot be seen as essential for the purposes of establishing "necessity."

Public pension reform can take many shapes to achieve the self-preservationist policy goals intended to maintain the solvency of a public pension system. Stuart Buck, in his 2012 article *The Legal Ramifications of Public Pension Reform*, identifies seven individual modifications to public pension plans that could presumably achieve the goals of more sustainably maintaining the

261. *See, e.g.*, *U.S. Trust Co. of N.Y.*, 431 U.S. at 29–30.
262. *See* discussion of legitimate public purposes behind RIRSA above in Part III.B.
263. *See U.S. Trust Co. of N.Y.*, 431 U.S. at 29–30.
264. *See id.* at 30.
265. *See id.*

economic feasibility of the public pension system.[266] The General Assembly did not choose to implement one individual reformatory modification of the public pension system, but rather it implemented an amalgamation of nearly all of pension reform tactics discussed by Buck.[267] RIRSA could be whittled down to a reasonable public pension reform structure and, very likely, substantially achieve the policy goal of maintaining a workable and solvent public pension system.[268] Similarly, the harshness of the modifications in RIRSA could be significantly reduced and still presumably lead to a more financially stable and digestible public pension reform structure.[269] Therefore, it is difficult to conclude that the scope and degree of contractual impairments imposed by RIRSA's various pension reform elements, as it stands, were essential to achieve any legitimate policy goal of the legislature.

At this stage of the Contract Clause analysis, the court will also consider any "less restrictive alternatives" to RIRSA.[270] In so doing, the court will consider the availability of alternative means that could have achieved the legislature's purported policy ends without impairing the government's financial obligations to its

266. Buck, *supra* note 6, at 67–88 (discussing: (a) Contribution Increases, (b) COLA Reductions, (c) Changing the Multiplier, (d) Changing What Components of Compensation Are Included, (e) Changing the Averaging Period, (f) Changing the Retirement Age, and (g) Converting to a Different Pension System Entirely). Buck's central focus seems to be on the logical concept of "pro-rating" employment benefits for the purposes of avoiding arbitrary and unfair reform practices. *See id.* at 69–70. While he applauds some of the more mathematically creative reformatory elements of RIRSA as being consistent with this pro-rating principle, he ultimately assesses each individual reform in its own insular universe and fails to realistically consider RIRSA as a whole, as that legislation implements nearly all of his suggested reforms in some capacity at once rather than as separate reforms. *See id.* at 74–80.

267. *See id.* at 67–88.

268. Note that the individual categories of pension reform discussed by Buck might carry their own constitutional implications. *See id.* at 67–88; *see also U.S. Trust Co. of N.Y.*, 431 U.S. at 30 n.28 (declining to evaluate whether any lesser impairments acknowledged by the Court would be constitutional).

269. Namely, the suspension of COLA benefits to retirees appears outside of the regulatory modifications recommended by Buck, who appears to be a strong proponent of legislative reform of public pensions. Buck, *supra* note 6, at 71–74 (recommending a pro-rata approach to COLA reductions and neglecting to speak to RIRSA's retiree COLA seizure).

270. *See U.S Trust Co. of N.Y.*, 431 U.S. at 30–31.

public employees.[271] Certainly, alternatives to RIRSA exist for the purposes of maintaining a financially solvent pension system that are both evident and more moderate than the unprecedented restructure of employee benefits prescribed by that statute.

The government maintains substantial financial autonomy to divert any number of revenues into the public pension system for the purposes of protecting that system and providing a dignified retirement for future retirees.[272] For example, under its taxing power, the government maintains the ability to fully fund the pension system through public tax increases.[273] While such an alternative may be politically toxic, it remains a viable option to defaulting on financial obligations aimed at a particularized class of employees. In a similar vein, the government is free to cut costs to programs that it owes no obligation to under contract. Again, while this is not an ideal task, the government acknowledged that meeting this compelling interest would not be easy.[274] If the government is compelled to engage in pension reform to seemingly save the public employees from themselves, it must be prepared to use any and all available means to reach that end. In this case, the government chose a path to financial stability that plainly impaired its financial obligations to an individualized group of employees. As this flies in the face of the Contract Clause of the United States and Rhode Island constitutions, the legislature rightly must make an alternative, a likely equally difficult choice, about how to restore economic stability to the pension system in Rhode Island.

Because RIRSA was not essential to the articulated policy goals of the legislature, and because less restrictive alternative means to these policy ends are apparent, RIRSA is not legally necessary to achieve any legitimate public purpose. More moderate courses of action exist in both the realm of reasonable and controlled public pension reform, as well as in the realm of

271. *See id.* at 31.

272. 2011 R.I Pub. Laws 1921.

273. *See* R.I. CONST. art. VI, §§ 12, 17; *id.* art. XIII, §§ 4–5. While the Rhode Island Constitution does not expressly deal with the General Assembly's taxing power, these articles, read together, reference that power by implication.

274. *See* GINA RAIMONDO, TRUTH IN NUMBERS: THE SECURITY & SUSTAINABILITY OF RHODE ISLAND'S RETIREMENT SYSTEM 2 (2011), *available at* http://www.law.yale.edu/documents/pdf/cbl/RI_TIN-WEB-06-1-11.pdf.

economic state reform on an abstract and general level. The mere fact that the State chose to target public pensions as the avenue for economic stability does not thereby render RIRSA reasonable nor necessary. In spite of the legislature's self-affirming balancing tests of RIRSA, the scales of justice tilt in favor of the unconstitutionality of RIRSA.

iii. Are the Contractual Impairments imposed by RIRSA Reasonable and Necessary when Viewed Through the Prism of an Economic "Emergency?"

Perhaps anticipating RIRSA to be insufficiently reasonable and necessary to pass constitutional muster, the General Assembly augmented its "Legislative intent and findings" with the caveat that "the situation currently confronting the State of Rhode Island's publically financed pension systems [to have] reached an *emergency* stage."[275] The legitimate existence of an emergency is one of many indicia considered by courts in the evaluation of the reasonableness and necessity of legislative impairments of contract.[276] A court should remain skeptical to the objectivity of an emergency declaration, given the innate prejudice imbedded within legislative impairments of public contracts to which the State is a party.[277] Accordingly, a court should critically evaluate the severity, foreseeability, and general reasonableness of such an emergency declaration and juxtapose it against the relative degree and nature of the impairment imposed by the legislation in order to effectively evaluate the weight of such a claim at this stage of the Contract Clause analysis.

The most familiar example of the interplay between emergencies and the legislative impairment of contract is *Home*

275. 2011 R.I. Pub. Laws 1921 (emphasis added). This express finding and declaration of an apparent financial emergency by the General Assembly is of notable significance at the third prong of the Contract Clause analysis and, therefore, will be addressed separately below.

276. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 420–23 (1934); Cycle Barn, Inc. v. Arctic Cat Sales Inc., 701 F. Supp. 2d 1197, 1203 (W.D. Wash. 2010) (citing Chico's Pizza Franchises v. Sisemore, 544 F. Supp. 248, 249 (E.D. Wash 1981)).

277. *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977); Md. State Teachers Ass'n, Inc. v. Hughes, 594 F. Supp. 1353, 1360 (D. Md. 1984).

Building & Loan Association v. Blaisdell.[278] There, the Supreme Court of the United States considered a *private* Contract Clause challenge to a Minnesota mortgage law that was passed in the wake of the Great Depression.[279] The law, among other things, extended the period of redemption on foreclosed properties and was to remain in effect "only during the continuance of the emergency and *in no event* beyond May 1, 1935."[280] A creditor alleged that the law impaired his contractual relationship with a borrower and, therefore, was repugnant to the federal Contract Clause.[281] Finding a contractual impairment and accepting the state court's finding that the legislature did not have any bias in declaring an emergency, the Court considered state emergency powers generally and the material elements of the statute to determine if the impairment was nevertheless reasonable in light of those circumstances.[282] The Court ultimately upheld the Minnesota law after it concluded that the statutory impairment of the contract was narrowly tailored in such a way that it was reasonable in light of the valid emergency.[283]

Some commentators have suggested that the factual parallels between Rhode Island's pension crisis and the Great Depression may render the evaluative line of reasoning in *Blaisdell* applicable in this case.[284] This conclusion is misguided for two primary reasons: (1) it necessarily relies on the premise that the national recession, (a) unpredictably precipitated the dire economic circumstances in Rhode Island leading to its allegedly unsustainable pension public pension system and (b) the recession and its impact on Rhode Island is, therefore, on a commensurate tier of economic emergency as the Great Depression; and (2) it overlooks the settled differences of appropriate judicial scrutiny between cases of private contractual impairments and public contractual impairments to which the State is a party.[285]

278. 290 U.S. 398.
279. *Id.* at 415–16, 419.
280. *Id.* at 417 (emphasis added) (internal quotation marks omitted); *see also* Chung, *supra* note 5, at 707.
281. *Blaisdell*, 290 U.S. at 415–16.
282. *Id.* at 419–27.
283. *Id.* at 444–48.
284. *See, e.g.*, Buck, *supra* note 6, at 27, 81, 88–91; Chung, *supra* note 5, at 710–12.
285. *See Blaisdell*, 290 U.S. at 415–16. *Blaisdell* dealt with a statutory

Blaisdell does not control because Rhode Island is the victim of self-inflected economic negligence rather than the unforeseen and dramatic consequences of the Great Depression. Additionally, the Rhode Island pension issue involves a dramatic legislative breach of financial contractual obligation, as opposed to a narrow and temporary breach of private contract.

As a matter of common sense, every state is aware of the financial and economic implications of a publically funded pension system. Rhode Island chose to neglect its obligations to this fund and set itself up for disaster. A state's economic mismanagement does not give rise to a financial emergency. Unlike the Great Depression, which led to a "nation wide [sic] and world wide [sic] business and financial crisis [that had] the same results as if it were caused by flood, earthquake, or disturbance in nature," the pension crisis in Rhode Island was more the result of decades of economic mismanagement than a singular national economic catastrophe.[286] The economic recession of the late 2000s was precipitated in part by the burst of the housing bubble and the collapse of the sub-prime mortgage crises.[287] Nationally, the states suffered, but few as badly as Rhode Island. This does not necessitate the conclusion that Rhode Island's pension system is allegedly unsustainable *because* of a national economic event. This overlooks the reasonable conclusion that the State's public pension system was mismanaged, underfunded, and inherently flawed for decades. A national economic event simply brought these flaws into focus. While this conclusion may justify reasonable reform, it does not give rise to the government justifying RIRSA on the grounds of an unprecedented emergency stemming from pension underfunding.

Even if one were to accept that the Rhode Island pension crisis was an "emergency," that is still merely one factor to be considered in the "reasonable and necessary" analysis discussed in the preceding sections. Applying the requisite level of scrutiny

impairment of a contractual relationship between a mortgagee-buyer and a borrower, whereas the challenge to RIRSA involves a case of governmental self-interest and, thus, heightened scrutiny of the reasonableness of the impairment. *See id.*

286. *Id.* at 423 (quoting Blaisdell v. Home Bldg. & Loan Ass'n, 249 N.W. 334, 340 (1933) (Olsen, J., concurring)).

287. *See* Chung, *supra* note 5, at 711.

prescribed for this stage of a Contract Clause challenge to a public contract, RIRSA is still both unreasonable and unnecessary. In the event that the judiciary acknowledges the existence of an emergency, the government might be able to establish that the public pension reform was "necessary" to establish economic stability. However, the broad scope and ambiguous obligations of RIRSA still render it unreasonable. Specifically, there is a clear contrast between the narrow statute discussed in *Blaisdell* and RIRSA.[288] Unlike *Blaisdell*, where the court relied on the narrowly tailored, temporary, and conditional private contractual impairment in conjuncture with an unprecedented economic emergency in concluding that the impairment was reasonable, RIRSA has permanent reductions and "suspensions" of benefits for indeterminate periods of time.[289] Moreover, RIRSA deals with public contracts; thus, the court must more intently scrutinize the government's position at this prong than did the Supreme Court in its evaluation of the statute in *Blaisdell*.[290]

In conclusion, it is appropriate to review the "emergency" declared by the General Assembly in RIRSA with a fair degree of skepticism given its clear self-interest in avoiding its financial obligations to public employees.[291] A critical look at this emergency reveals that the public pension crisis does not rise to the requisite level of "emergency" necessary to serve as a justification for RIRSA. The economic issues facing Rhode Island are more likely the result of decades of public pension mismanagement rather than some unforeseen and dramatic economic catastrophe. Even accepting the proposition that there is an economic emergency in Rhode Island, RIRSA still fails to pass the heightened hurdle of being a reasonable and necessary means to a legitimate policy end. RIRSA is entirely too broad and indeterminate to be considered reasonable, even with the added weight of a legitimate emergency. While reform might be necessary in the event that the public pension issue in Rhode Island has, in fact, crossed the threshold of an "emergency," RIRSA cannot be perceived as a reasonable modification. As the

288. *See* 290 U.S. at 415–17, 443–46.
289. *See id.* at 443–46.
290. *See id.* at 415–16.
291. *See* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977).

contractual impairment must be both necessary *and* reasonable to clear this hurdle, RIRSA remains unconstitutional when viewed through the lens of an alleged "emergency."

IV. CONCLUSION

"Whether it be in the field of sports or the halls of the legislature it is not consonant with the American Tradition of fairness and justice to change the ground rules in the middle of the game."[292] It is incumbent upon the judiciary to ensure that American traditions of fairness, equity, and obligation are upheld when state legislatures attempt to exclude themselves from such foundational principals. The Contract Clause is the judicial check on such legislative overreaching and abuse.

RIRSA contains multiple reformatory elements that are repugnant to the Contract Clause of both the United States and Rhode Island constitutions, and therefore, the law should be declared unconstitutional and invalid. The public employees have a contractual relationship with their employer—the State of Rhode Island—and thus, are entitled to the benefit of their bargain and fruits of their performance of a unilateral contract. It is assumed that the State has a legitimate public purpose compelling public pension reform; however, elements of RIRSA substantially impair a contractual relationship with the public employees of the State in a way that is not reasonable and necessary in light of the State's purported public purpose behind reform.

This is not to say that *any* type of public pension reform is unreasonable, unnecessary, or otherwise unconstitutional. States have, and ought to have, the legislative flexibility to make reasonable modifications to their public pension systems to account for changing circumstances. RIRSA, however, is not a reasonable modification of Rhode Island's ailing public pension system. RIRSA is a profoundly ambitious attempt to rectify Rhode Island's pension difficulties by placing all the costs of a solution upon those least able to bear them. The Contract Clause should not serve as a safety blanket, protecting against any law that might impair previous contractual relationships with the

292. Secunda, *supra* note 31, at 263 (quoting Sylvestre v. Minnesota, 214 N.W.2d 658, 665 (Minn. 1973)).

State. But if the clause is to have any meaning all, it must mean that the State cannot simply wave its hands and absolve itself of contracted obligations. The problem is especially more pressing given the origin of the pension crisis—it is the government of Rhode Island that created the underfunded pension liabilities that threaten the State, not the retirees. The Contract Clause must protect existing public employment retirement benefits from the massive erosion that RIRSA authorizes.

Although I conclude that RIRSA is unconstitutional, the public should, as I do, admire and applaud the General Assembly of Rhode Island and Governor Raimondo for being uncharacteristically proactive about the economic issues in Rhode Island. Unfortunately, the government attempted economic reform in a way that wrote its own significant contractual obligations out of the law and, therefore, in violation of the settled (albeit murky) principles of Contract Clause jurisprudence. This is not a case of the Rhode Island Constitution disallowing a broad range of government action. Instead, this is only a check on the government's power to abuse its plenary legislative authority to free itself of responsibility for promises given.

Rhode Island and other states looking to sustainably reform public pension systems should consider limiting reform to reasonable and incremental steps that apply only to incoming workers. This gives the worker the benefit of weighing the economic risks and benefits of the public-sector *before* commencing performance of a unilateral contract. While this does not achieve the immediate economic result that Rhode Island sought, it maintains the integrity of contractual obligation in a rational and constitutional manner that will eventually achieve the desired result.

The government should not be permitted to write its own substantial financial obligations out of the law. Obligation and expectation are baseline principles of fairness that serve as pillars for organized society. As Friedrich Nietzsche wrote:

> . . . To ordain the future in advance . . . man must first have learned to distinguish necessary events from chance ones, to think causally, to see and anticipate distant eventualities as if they belonged to the present, to decide with certainty what is the goal and what the means to it,

> and in general be able to calculate and compute. Man himself must first of all have become *calculable, regular, necessary,* even in his own image of himself, if he is to be able to stand security for *his own future*, which is what one who promises does!
>
> This precisely is the long story of how *responsibility* originated. The task of breeding an animal with the right to make promises evidently embraces and presupposes as a preparatory task that one first *makes* men to a certain degree necessary, uniform, like among like, regular, and consequently calculable.[293]

If the government acts in a manner inconsistent with this bedrock concept, it is incumbent on the judiciary to ensure that the obligation and sanctity of contract law remain intact.

293. FRIEDRICH NIETZSCHE, GENEALOGY OF MORALS 58–59 (Walter Kauffman ed. 1989), *available at* https://www.princeton.edu/~ereading/Friedrich%20Nietzsche,%20Second%20EssayGuilt%20Bad%20Conscience%20and%20the%20Like.pdf. Credit to Roy Kreitner for brining my attention to this quote in his book *Calculating Promises: The Emergence of Modern American.* ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE (1974).