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T. Leigh Anenson
University of Maryland

Jennifer K. Gershberg
University of Maryland Robert H. Smith School of Business

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CLASHING CANONS AND THE CONTRACT CLAUSE

T. Leigh Anenson, J.D., LL.M., Ph.D.* and
Jennifer K. Gershberg, J.D.**

ABSTRACT

This Article is the first in-depth examination of substantive canons that judges use to interpret public pension legislation under the Contract Clause of the U.S. Constitution and state constitutions. The resolution of constitutional controversies concerning pension reform will have a profound influence on government employment. The assessment begins with a general discussion of these interpretive techniques before turning to their operation in public pension litigation. It concentrates on three clashing canons: the remedial (purpose) canon, the "no contract" canon (otherwise known as the unmistakability doctrine), and the constitutional avoidance canon. For these three canons routinely employed in pension law, there has been remarkably little research on their history, evolution, or impact. This study spotlights the methodology that underlies these diverse and complicated judgments. Illuminating actual judicial practices lets us better comprehend when, how, and why these canons function. It puts us in a position to choose the most appropriate canon(s) and to offer improvements on their operation. It also allows us to relate the role of canons to other kinds of legal reasoning. Significantly, studying these canons fills a void in state statutory interpretation as well as contributes to a better understanding of state court enforcement of the Contract Clause that has received scarcely any attention.

TABLE OF CONTENTS

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* Professor of Business Law, University of Maryland; Associate Director, Center for the Study of Business Ethics, Regulation, and Crime; Of Counsel, Reminger Co., L.P.A; lanenson@rhsmith.umd.edu. For their useful observations, thanks to the participants of the Ninth Annual Employee Benefits and Social Insurance Law Conference at Boston College Law School, the Eighth Annual ERISA, Employee Benefits, and Social Insurance Law Scholars Workshop at the University of Illinois School of Law, the 2019 Annual Conference of the International Academy of Legal Studies in Business, and the 2020 Annual Conference of the Pacific Southwest Academy of Legal Studies in Business. We are also grateful for the valuable feedback from James Ely, Karen Eilers Lahey, Dana Muir, and Peter Wiedenbeck. Mazin Elhag, Diamond Fatoki, Christopher Harris, Steven Ioannidis, Florina Lam, and Cristina Macker provided excellent research assistance. All errors, of course, remain our own.

** University of Maryland Robert H. Smith School of Business; J.D., The George Washington University Law School; B.A., Cornell University.

> *[T]he inescapable problems of [Contract Clause] construction have been: What is a contract? What are the obligations of contracts? . . . Questions of this character, "of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation."*
>
> —Home Building & Loan Ass'n v. Blaisdell[1]

INTRODUCTION

Canons of construction can have a profound effect in shaping the law.[2] In a number of important decisions challenging the constitutionality of public pension reform, judges have applied various canons to interpret state and local legislation.[3] Across and within states, however, these methods of interpretation have not been

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1. 290 U.S. 398, 429 (1934) (quoting 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1369 (1833)).

2. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989) ("The canons of construction continue to be a prominent feature in the federal and state courts."); *see generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1107–12 (2017) (discussing canons of interpretation).

3. *See* discussion *infra* Part II.

congruent.[4] In fact, they have directed courts to reach completely opposite conclusions.[5]

Public pension plans across the United States are in crisis.[6] Their impending insolvency jeopardizes the fiscal security of states and cities, the nation's long-term financial health, and the retirement benefits of government workers.[7] The pension debt debacle has spurred politicians in nearly every state to implement reforms that affect millions of workers and retirees.[8] Courts have entered the milieu as impacted employees test whether these changes surmount legal obstacles and comply with constitutional requirements.[9]

The primary barrier to pension reform is the Contract Clause found in both the U.S. Constitution and state constitutions.[10] A condition of any successful constitutional challenge under this clause is an initial finding of a contract.[11] Almost all of the new pension cases turn on this issue.[12] The key question influenced by the choice of canons is whether current and former employees have an unchangeable contract to their previous, legislatively-

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4. *See* discussion *infra* Part II.

5. *See* discussion *infra* Part II.

6. *See, e.g.*, T. Leigh Anenson, Alex Slabaugh & Karen Eilers Lahey, *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 11–12 (2014).

7. *See, e.g.*, *id.* at 2–3. More than twenty-one million public sector workers have defined benefit plans. U.S. CENSUS BUREAU, 2018 ANNUAL SURVEY OF PUBLIC PENSIONS: STATE & LOCAL TABLES, https://www.census.gov/data/tables/2018/econ/aspp/aspp-historical-tables.html [https://perma.cc/W7EP-Y3LH]. This constitutes eighty-six percent of government workers. U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE U.S., MARCH 2019; *see also* William T. Payne & Stephen M. Pincus, *The Constitutional Limitations of Public Employee Pension Reform Legislation*, 19 PUB. LAW. 12, 13 (2011) ("[D]efined benefit plans still make up the bulk of the retirement plans in the public sector."). There are 297 state-administered funds and 5,123 locally administered defined benefit public pension systems in the United States. U.S. CENSUS BUREAU, *supra*.

8. *See* Anenson et al., *supra* note 6, at 2, 11 ("The gravity of the current crisis has pushed pension reform . . . to the front of the public policy agenda in each state capital."); *id.* at 12–14 (surveying reforms from 2011–2014 across thirteen states); Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 172 (compiling reforms from 2001–2012 across eight states).

9. JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 2–3 (2016) ("[S]teps by state and local governments to trim the benefits of public-sector employees have spawned numerous contract clause challenges in both federal and state courts.").

10. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); *see* Anenson et al., *supra* note 6, at 17, 21 (comparing Contract Clause challenges to other constitutional legal barriers to reform like the Due Process and Takings Clauses). Some states also have constitutional or statutory protections for public pensions. *See* ELY, *supra* note 9, at 334 n.136 (listing three states with statutes declaring participation in a retirement system is a contract and seven states with constitutional provisions protecting public pensions).

11. *See* T. Leigh Anenson, Linda L. Barkacs & Jennifer K. Gershberg, *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. (forthcoming Jan. 2021) (qualitative study of public pension cases from 2014–2019).

12. *See id.*

provided pension benefits.[13] While the most common basis for the contract is a state statute, additional sources of the contract right, among others, may include a local ordinance or even a state constitutional provision.[14]

This Article provides the first study of the use of canons of construction in cases challenging the constitutionality of changes to government employee pension benefits. In the last six years, there have been nearly fifty cases disputing retirement reform under the Contract Clauses of the federal and state constitutions.[15] More than half of these decisions employed canons of construction.[16] These canons influenced the construction of pension legislation at all levels of the judicial system and across fifteen states.[17]

The assessment begins with a general discussion of these interpretive techniques before turning to their operation in public pension litigation. It concentrates on three clashing canons: the remedial (purpose) canon, the "no contract" canon (otherwise known as the unmistakability doctrine), and the constitutional avoidance canon. The first canon results in the liberal construction of the statute favorable to government employees.[18] By contrast, the second canon requires strict statutory construction beneficial to government employers.[19] The third canon is likewise advantageous to the government.[20] This research clarifies these conflicting canons in order to reconcile reasons and results. Through a thick descriptive and normative analysis of canon jurisprudence in the context of constitutional Contract Clause cases, the Article offers a sustainable vision of pension reform and the court's role in that process.

Along with improving legislative and judicial decision-making, the inquiry seeks to extend the theoretical debates in statutory interpretation. Statutory interpretation wars, including those about

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13. *See* discussion *infra* Parts II–III.

14. *See* Anenson et al., *supra* note 6, at 21–22.

15. *See* Anenson et al., *supra* note 11 (manuscript at 3).

16. *See* Cranston Firefighters v. Raimondo, 880 F.3d 44, 50 (1st Cir. 2018); Taylor v. City of Gadsden, 767 F.3d 1124, 1133–34 (11th Cir. 2014); Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 702 (Ct. App. 2016); Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 389 (Ct. App. 2016), *review denied*, S237460, 2020 WL 5667326 (Cal. Sept. 23, 2020) (mem.); AFT Mich. v. State, 893 N.W.2d 90, 103 (Mich. Ct. App. 2016) (Saad, J., dissenting); Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645, 650 (N.C. Ct. App. 2019); R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149 at *6 (R.I. Super. Ct. Apr. 25, 2014).

17. *See id.*; *infra* Appendix. Public employees challenged state and local pension reform in which judges invoked substantive canons of construction across the following states: Alabama, Arizona, California, Colorado, Kentucky, Oregon, Illinois, Maine, Michigan, New Hampshire, New Jersey, North Carolina, Rhode Island, Tennessee, and Washington. The issue reached conclusion in eleven state supreme courts.

18. *See infra* Section II.A.

19. *See infra* Section II.B.

20. *See infra* Section II.C.2.

the value and function of canons of construction as well as more general issues of interpretive uniformity and its status as precedent, have been waged primarily through an evaluation of federal law.[21] Scholars have devoted insufficient attention to state courts (or state law) where more than ninety percent of litigation takes place.[22] Therefore, this appraisal fills a gap in an otherwise exhaustive amount of academic commentary and brings methodological matters in the employment law of government pensions within that conversation.

Part I provides necessary background on canons of construction. It explains what they are and what they do. It also frames the controversies over canons as a method of statutory interpretation.

Part II analyzes three competing canons of construction: the remedial (purpose) canon, the "no contract" canon (unmistakability doctrine), and the constitutional avoidance canon. It charts their course across the United States in constitutional cases contesting public pension reform under the Contract Clause.[23] It describes the canons, documents their sources, and investigates their justifications along with any qualifications on their application. It also outlines their evolution outside the new pension cases. Tracing the history of the canons puts their current use in perspective

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21. Focusing on federal law, scholars have examined the canons collectively as well as individually. *See, e.g.*, Baude & Sachs, *supra* note 2; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992). Many of these studies focus on the U.S. Supreme Court rather than the lower federal courts. *But see* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (1st ed. 2008) (providing one of the first studies of the lower federal courts).

22. *See* ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS – JUDICIAL BUSINESS 2018, tbl. 3, tbl. 5 (2018), https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018 [https://perma.cc/9BJY-QM29]; COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, TOTAL INCOMING CASES IN STATE Courts, 2007–2016, http://www.courtstatistics.org/~/media/Microsites/Files/CSP/National-Overview-2016/EWSC-2016-Overview-Page-1-Trends.ashx [https://perma.cc/4H6B-NWXF]. Notable exceptions that address state statutory interpretation are: Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010), which analyzes methodological developments in the state supreme courts of Oregon, Texas, Connecticut, Washington, and Michigan; and Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010). For particular canons by states, see Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. L. & POLIT. 261, 263–64 (2004), which maintains that courts should adopt textualism to "eliminate unpredictability and confusion" and install "a disciplined interpretative approach"; and William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389 (2020), which discusses state presumptions against extraterritoriality.

23. We use "Contract Clause" throughout our article to refer to both Article I, Section 10, Clause 1 of the U.S. Constitution and comparable provisions in state constitutions.

and contributes to a literature that largely lacks longitudinal studies of particular canons.[24]

Part III evaluates this canonical jurisprudence in light of continuing conversations about statutory interpretation as well as public pension doctrine and policy. It argues that the "no contract" canon, rather than the remedial canon, is the better choice for assessing the existence of a contract (or the interpretation of its terms) for public pension benefits. It finds that the constitutional avoidance canon does scarcely any work other than to establish the burden of proof. Moreover, it discovers that much of what has been written about canons under federal law is no longer accurate at least in the environment of public pension reform litigation. In particular, courts are using the canons in the service of ascertaining legislative intent.[25] Contrary to conventional wisdom, the methodology also appears to have *stare decisis* effect.[26] This Part correspondingly offers improvements in the use of canons going forward.

The Article concludes that capturing conflicting interpretative strategies allows for a deeper exploration of the policies in pension reform litigation and develops a better appreciation of the responsibilities of courts, legislatures, and society. The investigation also fosters an informed dialogue over the choice of canons and the circumstances of their operation in the ongoing legal battles about restructuring pension obligations. It should additionally advance the use of these canons as analytical tools.

I. COMPREHENDING CANONS OF CONSTRUCTION

Canons of construction are interpretative rules on which judges rely to discern the meaning of a legal text.[27] They are essentially simplifying strategies that courts employ in reading written materials like constitutions, statutes, and even contracts.[28]

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24. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1588 (2020) ("[T]here are very few longitudinal studies tracing the history of particular canons.") (quoting Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 182 n.72 (2001)).

25. *Accord* Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 830 (2017) (finding that the Roberts' Court honors and not frustrates legislative intent); *infra* Part III.

26. *See* Gluck, *supra* note 22, at 1756; *infra* Part III.

27. *See generally* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 11–27 (2016) (discussing state and federal canons of construction).

28. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 83 (2015) (calling canons proxies for judicial expertise); *cf.* Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 2

There are two kinds of interpretative canons.[29] Descriptive (linguistic or textual) canons operate like rules of syntax.[30] Courts use them to infer the meaning of a statutory provision from its textual structure or context.[31] Familiar Latin maxims fall into this category, such as *expressio unius est exclusio alterius* ("to say the one means to exclude the other").[32] Substantive canons are principles and presumptions derived from the legal effect of the rule.[33] They are normative guidelines that direct judges toward a specific result in order to serve a particular policy.[34] Such policies often reflect institutional interests in inter-governmental relations like federalism and separation of powers.[35] Canons also safeguard the rights of vulnerable and underrepresented groups and the more general right of citizens to due process of law.[36] These policy-based canons derive from different sources such as common law practices, constitutions, and statutory policies.[37]

(Univ. Chi. L. Sch. Pub. L. & Legal Theory Working Paper, Paper No. 01), http://dx.doi.org/10.2139/ssrn.193848.

29. *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005).

30. *See, e.g.*, WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 22-24 (2002) (distinguishing textual from substantive canons).

31. *Id. But see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 120 (2010) ("The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic.").

32. *See* HUHN, *supra* 30, at 23 (discussing how this common canon is used to draw a negative implication from a positive statement). Another common textual canon is that "all laws pertaining to the same subject matter must be interpreted in *pari materia,* or in reference to each other." *See* State v. Williams, 60 So.3d 1189, 1191 (La. 2011) (citation omitted).

33. *See* Barrett, *supra* note 31, at 117–18 (describing these interpretative principles as "promot[ing] policies external to a statute.").

34. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989) (explaining that canons of construction are influenced by public values rooted in sources outside of the provision at issue, such as the Constitution, common law, or other statutes); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (calling substantive canons "normative canons").

35. *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 37–39 (2008) (explaining standard arguments in support of the so-called 'clear statement rule,' on the grounds this interpretive canon advances judicial modesty and fosters inter-branch relations.). Some scholars view all interpretive conventions this way. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995) (suggesting that "canons of construction of any type – constitutional or otherwise – can be justified in separation of powers terms as inherent or ancillary aspects of a court's interpretative and lawmaking power under Article III[]"); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1422 (2005) (noting some scholars refer to canons as "buffering devices" designed to avoid "unnecessary interbranch and intergovernmental friction").

36. *See, e.g.*, Sunstein, *supra* note 2, at 459 n.201 (listing rule of lenity and anti-state preemption canon as derived from the due process clause).

37. *See* Eskridge, *supra* note 34, at 1018 (describing the constitution, statutes, and the common law as three sources of public values in federal law); William N. Eskridge & Philip

Courts have cited both descriptive and substantive canons to assist them in construing public pension legislation.[38] Descriptive canons, however, are less impactful in this setting and are not the subject of this study.[39] Rather, scrutiny centers on the ever-controversial and conflicting substantive canons.[40]

Substantive canons of construction can differ in their degree of influence over interpretation. Some serve as rules of thumb for choosing between two reasonable meanings.[41] Other canons are more forceful and prompt a court to reject the most natural reading of the legal language in favor of an interpretation protective of a policy objective.[42] Depending on their strength, canons can be called tie-breakers, presumptions, or clear statement rules.[43]

Clear statement rules exert arguably the strongest influence on interpretation.[44] This category of canons creates a presumption of

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P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992) (suggesting that substantive canons are rooted in "substantive values drawn from the common law, federal statutes, or the United States Constitution"); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 414 (1993) (describing substantive canons as "policy-based canons").

38. The New Jersey Supreme Court in *Berg v. Christie* is illustrative of arguments containing both types of canons. 137 A.3d 1143 (N.J. 2016). Concerning the textual canon, the pension participants pointed to the statutory definition of the right that specifically excludes medical benefits but does not expressly exclude anything else. They claimed this was evidence of a clear legislative intent that cost-of-living allowances (COLAs) were included within this right and could not be reduced. *Id.* at 1155. The court of last resort was not persuaded. *Id.* at 1159. The same canon also failed in Rhode Island. A trial court held that an express right to amend the statutory pension provisions for city employees did not provide evidence of clear intent to contract for state employees not mentioned. *See* R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149 at *5 (R.I. Super. Ct. Apr. 25, 2014).

39. In the constitutional cases challenging public pension reform, textual canons are used with less frequency and given less weight than the substantive canons. For recent work on descriptive canons, see Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 914 (2016) (empirical study suggesting that linguistic canons do not have any greater effect in ensuring consistent interpretations than tools such as legislative history or references to congressional intent or purpose); *cf.* Krishnakumar, *supra* note 25, at 836 n.44 (advising that there are opposing views on whether descriptive canons undermine or approximate legislative intent).

40. The literature on substantive canons is immense and offers a variety of perspectives: theoretical, doctrinal, and empirical. *See, e.g.*, Krishnakumar, *supra* note 25 (one of the most recent published works, studying 296 cases from the Roberts Supreme Court decided during its first six and a half terms).

41. Barrett, *supra* note 31, at 109 (using "rules of thumb" to designate canons that help decide between two equally reasonable interpretations); Eskridge, *supra* note 34, at 1065 (describing public values-based modes of interpretation as "tiebreakers").

42. *See, e.g.*, Eskridge, *supra* note 34, at 1066; Barrett, *supra* note 31, at 109–10.

43. *See* Shapiro, *supra* note 21, at 934 (noting that distinctions between presumptions and tie-breakers may be "more of a matter of degree than of kind"); Krishnakumar, *supra* note 25, at 835 (listing canon categories as presumptions, liberal or strict construction canons, and clear statement rules).

44. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreward: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994) (discussing how some substantive canons have been developed into more powerful clear statement rules).

a particular meaning that can only be rebutted by a clear statement to the contrary.[45] In requiring an unequivocal announcement before reading the law to reach an exact outcome, courts protect constitutional and other foundational ideas.[46] Well-known examples include waivers of federal or state sovereign immunity or the extraterritorial reach of federal statutes.[47] Assuming courts are consistent in their invocation, the more aggressive canons can also function as prophylactic rules that require legislatures to stop and think before enacting laws that impact important societal values.[48] The demand for legislative clarity, so the argument goes, fosters a greater level of transparency and accountability in the legislative process.[49]

As analyzed in Section II.B, many courts require the legislature to speak directly and unmistakably before treating legislatively-created pensions as contracts.[50] Nonetheless, as with other clear statement canons, the evidence showing that the law is sufficiently clear can vary.[51] Undeniably, the kind and quality of rebuttal evidence amounting to a contract may differ by state and merits investigation.[52]

Moreover, some canons have conditions of application. While clear statement rules and other presumptions usually apply at the beginning of the interpretative enterprise, subject to rebuttal for

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45. *See, e.g.*, Sossamon v. Texas, 563 U.S. 277, 291 (2011) (quoting Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion) ("Clear statement rules ensure Congress does not, by broad or general language, legislate on sensitive topics inadvertently or without due deliberation")); Astoria Fed. Sav. & Loan Ass'n v. Solomino, 501 U.S. 104, 108 (1991) (explaining that clear statement canons apply "only to the protection of weighty and constant values, be they constitutional . . . or otherwise . . . .").

46. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403–04 (2010) (explaining that clear statement rules conserve constitutional and other values by imposing a "clarity tax" on Congress); *see also* Stephenson, *supra* note 35, at 11 (advancing a "stronger claim that judicial imposition of additional enactment costs on legislatures enables courts to reduce their comparative informational disadvantage" under certain circumstances).

47. *See generally* Dodge, *supra* note 24 (illustrating the history of the extraterritorial canon).

48. *See* Barrett, *supra* note 31, at 175 (observing that substantive canons can press the legislature on a point when important societal values are at stake); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1608 (2000) (maintaining that "clear statement rules may prompt the "sober second thought" for legislatures in enacting statutes that implicate those values).

49. *See* Stephenson, *supra* note 35, at 2; Sunstein, *supra* note 2, at 458–59 (arguing that canons promote superior lawmaking).

50. *See* discussion *infra* Section II.B.

51. *See* discussion *infra* Section II.B.2.d. and II.C. Some scholars only call a canon a clear statement rule if rebuttal must be express as opposed to implied. *See, e.g.*, Eskridge & Frickey, *supra* note 44.

52. *See* discussion *infra* Section II.B.

clarity, other canons enter the search for meaning later.[53] They are relevant only if the legal text is ambiguous and susceptible to more than one meaning.[54] This prerequisite to a canon's application makes the distinction between plain and ambiguous language paramount.[55] There is not always clarity (or even an explanation) as to when legal language becomes appropriately ambiguous for the application of a particular canon.[56]

Certain canons may additionally be subject matter-specific. For example, when legislation affects vulnerable groups like veterans or Native Americans, canons direct courts to construe statutory language in the group's favor.[57] There are also canons that focus on particular fields, such as tax law and constitutional law, to similar effect.[58] There are even more specific default rules operating as doctrines, including the *Chevron* (administrative) canon and the equity canon.[59] The "no contract" canon (otherwise known as the unmistakability doctrine), analyzed in Section II.B., falls within this category as well.[60] Other canons apply more broadly across the board. In many situations, characterizing a case or issue as of a cer-

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53. Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENV'T L. REV. 199, 245 (1996) (discussing temporal difference in the application of canons).

54. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 793 (1st Cir. 1996) (clarifying that a canon of construction is apposite only when the legislature "has blown an uncertain trumpet. . . ."); *see also* Barrett, *supra* note 31, at 123 (explaining that textualists view statutory ambiguity as legislative delegation where policy analysis in the exercise of a judge's interpretative discretion is acceptable).

55. *See* discussion *infra* Part III.

56. *See, e.g.*, Gluck, *supra* note 22, at 1842 (explaining that the U.S. Supreme Court currently is struggling with the question of "how ambiguity is discerned. . . ."); Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 346 (1994) ("What is controversial, and not so simple, are the procedures used to find ambiguity.").

57. *See, e.g.*, Henderson v. Shinseki, 562 U.S. 428, 441 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.' ") (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 220 n.9 (1991)); Cnty. of Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' ") (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985)).

58. *See* Steve R. Johnson, *The Canon That Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 495–96 (2003) (reviewing various tax canons). *See generally* James J. Brudney & Corey Ditslear, *The Warp And Woof Of Statutory Interpretation: Comparing Supreme Court Approaches In Tax Law And Workplace Law*, 58 DUKE L.J. 1231 (2009) (comparing how the Supreme Court has used canons of construction in construing tax statutes and workplace statutes). For the constitutional avoidance canon, see *infra* Section II.C. and Part III.

59. *See generally* T. Leigh Anenson, *Statutory Interpretation, Judicial Discretion, and Equitable Defenses*, 79 UNIV. PITT. L. REV. 1 (2017) (identifying and justifying the U.S. Supreme Court's assumption of equitable defenses in federal statutes); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351–52 (1994) (arguing that textualism is contextual).

60. *See infra* Section II.B. and Part III.

tain type can determine the availability of these specialty canons.[61] The remedial canon, discussed in Section II.A, is invoked regularly in the interpretation of public pension law and can defy definition for these reasons.[62]

Furthermore, given the wide variety of canons and contexts, conflicting canons often arise in a given case. This conflict can lead to a hierarchy among the canons under certain circumstances.[63] A constant criticism of the judicial use of canons is the existence of competing canons of construction.[64] Critics complain that the availability of conflicting canons does not advance useful guidance for decision-making.[65] Instead, they claim that canons are simply conclusory of results reached on other grounds,[66] or worse, manipulations that mask the real reason for judicial action.[67]

Critiques of substantive canons generally take two forms: the authority objection and the competency objection.[68] The challenge to a court's authority to invoke canons of construction is the fear of impinging on democratic values.[69] The usual refrain is that substantive canons are undemocratic judge-made rules that defeat legislative intent.[70] The force of this objection is influenced by interpretative orientation, including the perception of the judicial role

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61. HUHN, *supra* note 30, at 100.

62. *See infra* Section II.A. and Part III.

63. *See generally* Sunstein, *supra* note 2 (developing a system of canons).

64. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1100 (2001) (discussing Karl Llewellyn's "nasty list" showing every canon to have a counter-canon negating it).

65. *See, e.g.*, HUHN, *supra* note 30, at 101 (explaining that scholars disagree on whether they are useful guides or merely conclusory).

66. *See, e.g.*, William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 CHI. L. REV. 671, 679 (1999) (explaining that some scholars critique judicial use of canons as "window-dressing" to justify conclusions reached through other interpretative tools).

67. *See* Krishnakumar, *supra* note 25, at 837 ("[N]umerous commentators writing over a wide time span have maintained that judges use substantive canons strategically. . . ."); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 676 (1990) (arguing that Justice Scalia uses substantive canons selectively and arbitrarily).

68. *See generally* Anenson, *supra* note 59 (assessing authority and competency objections to the U.S. Supreme Court's inclusion of equitable defenses in silent statutes).

69. *See, e.g.*, Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 389–90 (1989) ("[J]udicial interpretation of statutes raises a problem of legitimacy, i.e., justification for unelected and unrepresented judges making law in a representative democracy."); *infra* Part III.

70. *See, e.g.*, Eskridge & Frickey, *supra* note 37, at 636–40 (discussing ordinary and superstrong presumptions as counter-majoritarian to the extent "they permit the Court to override probable congressional preference in statutory interpretation in favor of norms and values favored by the Court"); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992) (identifying concern that substantive canons are unsound because they may be judicial policymaking through the guise of statutory interpretation).

either as faithful agents or cooperative partners with the legislature.[71] It also depends, to some extent, on the strength of the canon in practice.[72]

The competency objection largely concerns rule of law values.[73] Detractors denounce "loose canons" that are decontextualized from the surrounding circumstances and that apply without regard for the type of statute at issue.[74] Ideally, canons should foster clarity, consistency, and certainty in interpretation.[75] In reality, in spite of the slippery nature of the ground rules for interpretation (some of which is inherent in the process of legal reasoning and the incremental way of judging complex cases),[76] canons continue to influence the interpretative process and, ultimately, case outcomes.

Substantive canons, in particular, express value choices courts make in discerning the meaning of the law. Sometimes canons are rationalized as a proxy for legislative intent, even if they are also justified on grounds independent of the policies expressed in the written law.[77] Recognition of a canon signals the types of interests that courts take into account when a text is open to more than one

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71. The classification and validity of interpretative conventions is subject to varying philosophies of the judicial role in statutory interpretation. *See* Barrett, *supra* note 31, at 110 (discussing debate between dynamic statutory interpreters who view courts as cooperative partners with Congress and textualists who view courts as faithful agents); *id.* at 114 ("[T]he debate between textualists and dynamists about the strength of that norm [of legislative supremacy] is a critical one in recent scholarship."); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 528–42 (1998) (reviewing debate and dividing factions into intentionalists, purposiveness, textualists, and dynamicists).

72. *See, e.g.*, Eskridge & Frickey, *supra* note 37, at 636–40 (discussing ordinary and superstrong presumptions as counter-majoritarian to the extent "they permit the [U.S. Supreme] Court to override probably congressional preference in statutory interpretation in favor of norms and values favored by the Court"); Shapiro, *supra* note 21, at 925–26 (discussing how "legislative purpose can be thwarted by excessive devotion to the status quo").

73. Eskridge, *supra* note 66, at 678 (listing rule of law aspirations for canons to be objective, consistent, and transparent); Schacter, *supra* note 35, at 650 (describing competency critiques contending that judges lack the skills and resources to create and use certain kinds of normative canons).

74. *See* Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 583 (1992) ("They are loose canons, showing up at unpredictable times and rolling about in unpredictable directions. Worse than their unpredictability is their oppressive noise and the ever-present danger of explosion.").

75. *See, e.g.*, Eskridge, *supra* note 66, at 678–82; *see also* Eskridge, *supra* note 34, at 1023 (discussing how interpretation to preserve the traditional separation of responsibilities in government has been understood in institutional competence terms).

76. *See* Eskridge & Frickey, *supra* note 37, at 596 ("We agree that the malleability of the canons prevents them from constraining the Court or forcing certain results in statutory interpretation through deductive reasoning from first canonical principles."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 144 (1998) (explaining that it is unrealistic to expect consistency from methods of statutory interpretation, but that a "framework . . . to structure disputes so that disagreements focus on the issues" is doable).

77. Barrett, *supra* note 31, at 110; *see also* Ross, *supra* note 34, at 563 (claiming that substantive canons reflect judicial rather than legislative policy concerns).

interpretation.[78] Hence, the application of a particular canon or set of canons helps to pinpoint the considerations that judges evaluate in their decisions.[79]

It bears repeating that the rich literature assessing various canons and other interpretative techniques under federal statutory law does not offer much insight into their use and effect under state law.[80] Yet these methodologies are alive and well in the state law sphere. In the recent crop of cases challenging public pension reform on constitutional grounds, the impact of substantive canons has been substantial.[81] Judges have relied on them when interpreting government pension obligations, and both sides of a dispute have addressed substantive canons when making their arguments.[82]

Though there are potentially fifty different ways of employing a given set of substantive canons, it seems worthwhile to attempt to bring some form of horizontal coherence (at least within the government pension space) to the judicial discourse. Given the recent studies of canons generally, it is also useful to compare and contrast the operation of substantive canons in the interpretation of state and local pension law with the methodological stance of courts construing other federal and state legislation.[83] The next Part examines the three competing canons employed in contests over government pension reform under the Contract Clause.

II. COMPETING CANONS AND PUBLIC PENSION LEGISLATION

In assessing whether statutory changes to public pension benefits violate the Contract Clause, courts must first ascertain whether the alteration affected benefits that were terms of a pre-existing contract.[84] In making this determination, courts have applied competing canons of construction.

Certain courts have treated public pensions as corrective and, accordingly, applied the canon that remedial statutes should be liberally construed.[85] The remedial canon reinforces a finding of a prior contract and, as a result, benefits employees challenging re-

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78. *See* Eskridge, *supra* note 34, at 1011 (describing canons as an antecedent to modern public values analysis).

79. *See* discussion *infra* Part III.

80. *See* Gluck, *supra* note 22, at 1753–54.

81. *See* discussion *infra* Parts II and III.

82. *Id.*

83. *See generally* Gluck, *supra* note 22 (considering courts of last resort in five states); Krishnakumar, *supra* note 25 (analyzing U.S. Supreme Court cases).

84. *See* Anenson et al., *supra* note 6, at 21.

85. *See* discussion *infra* Section II.A.

form legislation.[86] Other courts, in contrast, strictly construe public pension law pursuant to the canon that legislatures generally make policies and not contracts.[87] This "no contract" canon (otherwise known as the unmistakability doctrine) weighs heavily in favor of upholding reforms to pension systems.[88] Another canon commonly invoked on the contract issue is that courts will avoid constitutional questions by assuming, at least initially, that legislation complies with the U.S. or state constitution.[89] The constitutional avoidance canon likewise supports a judgment that pension reforms withstand constitutional challenge.

While a few courts have considered (or at least noted) the availability of contradictory canons of construction, most have not.[90] Sharp divisions remain among the courts of both a single jurisdiction and the several states.[91] A crossfire of canons is currently occurring in the appellate courts of California—an influential state for conceptualizing pensions as contracts.[92] The conflicting canons question also reached the highest court of New Jersey.[93]

The following discussion explores these contrasting approaches. It documents canon use in the new pension cases in an effort to determine their place and impact in assessing the constitutionality of reforms. It additionally seeks to enhance the quality of the debate over the relative merits of competing canons and to contribute to a better appreciation of background assumptions in state statutory interpretation.

A. *Remedial Canon*

The remedial canon, or "remedial purpose" canon, is a judicially created substantive canon of construction under which remedial statutes are construed broadly to effectuate their remedial purposes. In a Contract Clause challenge to public pension reform, the

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86. *See id.*

87. *See* discussion *infra* Section II.B.

88. *See id.*

89. *See* discussion *infra* Section II.C.

90. *See, e.g.*, Berg v. Christie, 137 A.3d 1143, 1150 (N.J. 2016) (considering tension between the remedial canon and "no contract" clear statement rule); Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 227 Cal. Rptr. 3d 787, 804 (Ct. App. 2018) (noting incongruence between the constitutional avoidance canon and the remedial canon), *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020).

91. *See* discussion *infra* Parts II–III.

92. *See* discussion *infra* Section II.A.2.; Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1036, 1051–69 (2012) (tracing the ninety-year history of the California rule and counting twelve states that followed it); Watson, *supra* note 53, at 253 (using the term "crossfire").

93. *See* discussion *infra* Section II.A.2. and Part III.

application of this norm makes it more likely that a court will find that employees have a contractual right to their legislatively provided pension benefits.

1. Overview

Rooted in the idea of purposive construction from medieval England, the remedial canon arose in America to assist judges with the integration of statutory enactments into the then preexisting and pervasive common law regime.[94] The term "remedial" was in reference to legislation that either supplemented or corrected a defect in the common law.[95] With the rise of the regulatory state, however, judges began to portray legislation as remedial without any indication of the prevailing private law.[96] Courts now determine whether a particular enactment is deserving of liberal construction by an ad hoc inquiry into its remedial nature.[97]

Unmoored from its origins in contradistinction to the common law, the canon's theoretical basis shifted and courts extended its coverage to a variety of statutes.[98] In consequence, a recurring

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94. *See* Watson, *supra* note 53, at 229–30 (sketching the history of the remedial canon); Barrett, *supra* note 31, at 154 n.216 (citing federal cases in the Founding Era using the remedial canon). The remedial canon has been traced as far back as 16th century England where Sir Edward Coke announced the "mischief rule" in *Heydon's Case*, (1584) 76 Eng. Rep. 637, 638. Coke pronounced that a judge should ascertain the problem that the legislature meant to be corrected for which the common law did not provide and construe the statute in light of that purpose. *See* L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733 (1987). This form of purposive construction was then transformed by Blackstone into the remedial purpose canon in use today. *See* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 806–08 (1985) (explaining that Blackstone's Commentaries were readily adopted and expanded by American courts and commentators).

95. The canon was in tension with, and served as a corrective to, the much-maligned canon that statutes in derogation of the common law should be strictly construed. *See* Watson, *supra* note 53, at 230–31; *see also* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 101–02 (1999). The remedial canon applied even if the statute created rights unknown to the common law and, accordingly, added a right rather than merely a remedy. *See, e.g.*, Koepp v. National Enameling and Stamping Co., 139 N.W. 179, 185 (Wis. 1912); Barbara Page, *Statutes in the Common Law: The Canon as an Analytical Tool*, 1956 WISC. L. REV. 78, 104.

96. *See* Watson, *supra* note 53, at 231.

97. *See id.* at 236–41 (listing a variety of federal statutes that courts have deemed remedial and construed such legislation liberally).

98. A leading treatise on statutory interpretations lists numerous categories of mostly federal law where at least some courts have utilized the remedial canon. Federal courts have invoked the canon to protect the public from nefarious business practices including antitrust, securities, and unfair competition regulation. 3A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 70.04, at 216–20 (7th ed. 2008). The canon has been applied in interpreting legislation designed to promote public health, *id.* at § 70.02, at 235–43, and safety, *id.* at § 70.04, at 255–70. They have additionally used the canon in protecting particular groups against various forms of discrimination, *id.* at § 74, at 351–404, or by providing them with a cause of action for compensatory damages

complaint about the remedial canon is uncertainty about the meaning of "remedial."[99] Adding to this confusion is that courts do not often describe the attributes of a remedial statute.[100] A study in one state, for instance, faults the canon for failing to explain scores of decisions given that the same legislation is sometimes deemed remedial and sometimes not.[101] In fact, scholars of all theoretical perspectives have criticized the indeterminacy of the canon's boundaries.[102] For the same reason, judges have also expressed reservations about the canon.[103]

Along with confusion over the remedial canon's coverage is the unpredictable extent of its application. Critics often point out the lack of specificity in ascertaining what "liberal" means.[104] On the whole, to what degree should the court stretch a statute's mean-

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such as with consumer legislation. *See* James P. Nehf, *Textualism in the Lower Courts: Lessons From Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 51 (1994) ("[T]he canon favoring liberal construction of remedial statutes is selectively applied and largely without meaning in practice.").

99. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364–66 (2012) (arguing that the canon is superfluous because every statute is remedial in seeking to remedy an unjust or inconvenient situation); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 156 (1990) (calling the remedial canon "largely useless").

100. *See, e.g.*, Page, *supra* note 95, at 103. Under federal law at least, a remedial statute is usually exclusive of criminal or other penal statutes where the operation of the long-standing rule of lenity instructs judges to strictly construe such legislation in favor of the accused. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 895, 895 (2004). But many states' legislatures have abolished this rule of construction. *See* Note, Alan R. Romero, *Interpretative Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 216 n.24 (1994) (listing Arizona, California, Delaware, Hawaii, Kentucky, Louisiana, Michigan, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Dakota, Texas, and Utah). *But see id.* at 216 n.26 (listing Florida, Georgia, Ohio, and Pennsylvania as states that have codified the common law rule requiring strict construction of penal statutes).

101. Page, *supra* note 95, at 103.

102. *See* Watson, *supra* note 53, at 235 ("[T]he remedial purpose canon has been criticized for being imprecise in terms of its coverage by proponents of legal realism, public choice theory, new textualism, and public values."); Sunstein, *supra* note 2, at 459 n.201 (concluding that the legal system would be better off without it).

103. *See* Standard Oil of Conn., Inc. vs. Adm'r, Unemployment Comp. Act, 134 A.3d 581, 608–09 (Conn. 2016) (reiterating the U.S. Supreme Court's pronouncement that whether a statute is remedial is often misused and misunderstood); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 304 (Fla. Ct. App. 2005) (Farmer, C.J., concurring) ("All these variations on remedial rob the canon of any real interpretive weight."); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119, 147 n.146 (2014) (citing federal circuit court opinions expressing dissatisfaction with the remedial canon); Brian M. Saxe, Note, *When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 MICH. ST. L. REV. 555, 588 (citing federal cases authored by Seventh Circuit Judges Easterbrook and Posner calling the remedial canon "one of the least persuasive" or "useless" canons).

104. *See, e.g.*, *In re* Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("This [canon] tells us the direction to move but does not help us figure out how far to go. . ."); *Standard Oil*, 134 A.3d at 608–09 (explicating unpredictability in determining how liberal to interpret a remedial statute).

ing?[105] The remedial canon is therefore controversial due to its indefinite scope and uncertain effect.[106]

Nevertheless, criticisms of the canon can be overstated. Professor David Shapiro concluded that the remedial canon has a more limited scope than its broad wording would suggest.[107] Similarly, Professor Blake Watson observed that courts circumscribed its use in a number of situations: when the language is plain (clear), when it would upset a legislatively crafted compromise of policy goals, when reliance on the canon clashes with other interpretive principles, and when aggressive interpretation would disserve the remedial objectives.[108] Furthermore, the fact that the remedial canon is often difficult to apply has not deterred courts from invoking the canon on a regular basis. Notwithstanding the lack of a precise definition of "remedial" or "liberal," the leading treatise on statutory interpretation explains that the canon is "firmly established."[109]

What is more, there is consensus on the kinds of statutes for which the remedial canon is uniformly accepted, although it is not universally applied in every case. One such area is employment law. No doubt due to the canon's historical origins in updating and correcting the common law, worker safety legislation is deemed remedial and subject to liberal construction.[110] In many states, legislatures codified the remedial canon as part of the workers' compensation statutes to ensure that the law would be construed in favor of injured employees.[111] State legislatures have also statutorily mandated liberal construction of unemployment compensation laws.[112] Other work-related statutes have received similar treatment by judicial designation.[113] Worker safety and unemployment compensation are remedial in protecting workers from exploitation by

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105. This complaint gets lodged generally against any form of liberal or strict construction. *See generally* Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9 (2000).

106. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1989) ("How 'liberal' is liberal, and how 'strict' is strict?").

107. Shapiro, *supra* note 21, at 938 ("Though a comprehensive study of all the decisions remains to be done, my own reading in the field suggests that the 'remedial' canon has been given far less scope than its broad wording would suggest . . . .").

108. Watson, *supra* note 53, at 205–06.

109. SINGER & SINGER, *supra* note 98, § 60:1, at 250–52 (explaining that expressions of the remedial canon "appear over and over in judicial opinions"). *Contra* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 110–23 (2018) (describing abandonment of the canon that remedial statutes shall be liberally construed).

110. Page, *supra* note 95, at 103.

111. *See* Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 881 n.14 (1987).

112. Page, *supra* note 95, at 104.

113. SINGER & SINGER, *supra* note 98, § 73.02, at 324–42 (listing employment laws subject to remedial canon).

employers (and shielding society from stepping in with other support programs). Perhaps because pensions were offered initially to *injured* police officers, laws typically subject to the remedial canon include employee pensions and other benefits.[114]

Despite the frequent application and pervasiveness of the remedial canon, there has been no comprehensive state-by-state study of it (or any other canon) in employment law.[115] And more specifically, there has been no research on the extent to which judges have invoked the remedial canon to interpret state and local pension legislation.

2. Application

Courts are at a crossroads concerning the role of the remedial canon in ascertaining whether public pension legislation constitutes a contract. As government employees continue to challenge ongoing pension reforms, clashing canons will likely remain a recurring problem. The ensuing analysis juxtaposes canon warfare in two states: New Jersey and California. In New Jersey, the canon campaign recently concluded. The Supreme Court of New Jersey was the first court in the country to directly consider (and reject) the applicability of the remedial canon in cases contesting the constitutionality of public pension reform.[116] In California, there is a controversy over the choice of canons, including the use of the remedial canon in public pension reform litigation. Three intermediate state appellate courts have basically chosen three different canons.[117] The Supreme Court of California itself has not been consistent in its use of the remedial canon in the public pension context.[118]

In *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*,[119] a California court of appeals addressed the

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114. *Id.*; *see also* Kross v. W. Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983) (applying remedial canon in interpreting ERISA). *See generally* ROBERT L. CLARK, LEE A. CRAIG & JACK W. WILSON, A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES (2003) (discussing the evolution of public pensions); Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251, 251 (1956) ("Since the establishment of pension for Revolutionary War veterans by the Continental Congress and several states, governmental pensions have been extended first to policemen and firemen, later to teachers and finally to all classes of governmental employees.").

115. Scholars have analyzed the use of canons across federal workplace law. *See generally* Brudney & Ditslear, *supra* note 29 (empirical study).

116. Berg v. Christie, 137 A.3d 1143, 1151 (N.J. 2016); *see infra* notes 153–163

117. *See infra* notes 119–136 and accompanying text.

118. *See infra* notes 119–152 and accompanying text.

119. 227 Cal. Rptr. 3d 787 (Ct. App. 2018), *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020).

constitutionality of pension reform under the Contract Clause.[120] The court set forth the remedial canon in the standard of review section at the outset of the opinion, acknowledged a conflict between that canon and the constitutional avoidance canon, and then never referred to it again.[121] The appellate court relied on a California Supreme Court public pension case to explain the dimensions of the remedial canon.[122] It explicitly tied the canon to legislative intent and limited its use to ambiguous (as opposed to clear) statutes.[123]

The court spent much of its opinion on an issue preliminary to the contract question. It reconciled the prior and new pension statutes to assess whether or not the latter legislation actually changed the law.[124] As such, its primary focus was determining the meaning of the earlier legislation and not deciding whether that statute amounted to a contractual promise.[125]

Just a few years before the recognition of the remedial canon in *Alameda County*,[126] however, two other California appellate courts omitted any reference to it in assessing whether public pension reforms violated the Contract Clause. Instead, they resorted to con-

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120. *Id.* at 804. The plaintiffs alleged violations of the federal and state constitutions. *Id.* at 787. The court of appeals appeared to decide the contract element of the Contract Clause test under the California Constitution. *Id.* at 824–32.

121. *Id.*

122. *Id.* (citing Ventura Cnty. Dep. Sheriffs' Ass'n v. Bd. of Ret., 940 P.2d 891, 895 (Cal. 1997)). *Ventura* was apt because it dealt with a similar issue of what payments were required by the pension statute to be included in the calculation of the employee benefit. *Id.*

123. The California Court of Appeals explained:

> When the language of a statute is ambiguous—as *Ventura* declared sections 31460 and 31461 to be in many respects—our "primary responsibility" when engaging in judicial construction "is to carry out the intent of the Legislature to the extent possible." In addition—since the task of statutory interpretation here at hand involves the pension rights of legacy members of CCCERA, ACERA, and MCERA—we must keep in mind that "[p]ension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved." Thus, while our judicial construction "must be consistent with the clear language and purpose of the statute," it is also true that "[a]ny ambiguity or uncertainty in the meaning of pension legislation must be resolved in favor of the pensioner."

Id. (citations omitted).

124. *Id.* at 809. The key question concerned which items were "compensation earnable" under the statute to be included in the pension benefit. *Id.* at 809–24. Four items of potential pensionable compensation were at issue: in-service "leave cash outs" (payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off), terminal pay, on-call premium pay, and pay to enhance the retirement benefit. *See id.*

125. The appellate court found that certain exclusions were clarifications of pre-existing law and other exclusions changed the law. *Id.* at 810, 813–14. As to the latter, it determined that a contract existed. *Id.* at 821, 823–25. The Supreme Court of California agreed that the components of earnable compensation were part of an employee's contract right, but held that the modifications were justified to stem abuses of the pension system. Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85 (Cal. 2020).

126. *Alameda Cnty.*, 227 Cal. Rptr. 3d 787, *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020).

trary canons. *Marin Ass'n of Public Employees v. Marin County Employees' Retirement Ass'n*[127] was an almost identical case to *Alameda County* that had been decided earlier by a different division of the same district without resort to the remedial canon.[128] Yet the court skipped the same issue alleged in the complaint about whether the reforms were declarative of existing law.[129] Alternatively, it engaged in a purely constitutional inquiry and applied the avoidance canon.[130] In another California district involving a constitutional contest over pension reform, an appellate court in *Fry v. City of Los Angeles*[131] also omitted any reference to the remedial canon.[132] In ruling that there was no guaranteed contract right, the court of appeals did not liberally construe the prior pension provisions in favor of the employee.[133] To the contrary, the court utilized the opposite presumption by invoking the idea that legislative bodies generally make policies rather than contracts.[134] The appellate court relied on *Retired Employees Ass'n of Orange County, Inc. v. County of Orange*,[135] a 2011 decision by the California Supreme Court. In that case, the supreme court recognized for the first time this idea embodied in the unmistakability doctrine (outlined in the next section) in pension reform litigation.[136] In 2019, the Supreme Court of California reiterated the "no contract" canon and upheld

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127. Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 389 (Ct. App. 2016), *review denied*, S237460, 2020 WL 5667326 (Cal. Sept. 23, 2020) (mem.).

128. *Id.* The lawsuits stemmed from the same pension statute. The challenged changes to county retirement systems were enacted by the California Public Employees' Pension Reform Act of 2013 (PEPRA).

129. *See Alameda Cnty.*, 227 Cal. Rptr. 3d at 829 (mentioning the different approach in *Marin*).

130. *Id.* at 830 ("[T]he Marin court eschewed analysis of the many issues of statutory construction with which we have wrestled here, instead conducting a purely constitutional inquiry into the vested rights implications of AB 197."); *id.* (clarifying that *Marin* undertook a constitutional contracts analysis "without determining what the changes to section 31461 effected by PEPRA actually are. . . ."). The appellate court in *Marin* found that the modifications made to pensions in the reform statute were constitutionally permissible because what remained was still a "reasonable" pension. *Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d at 393.

131. Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694 (Ct. App. 2016).

132. *Id.*

133. *See id.* at 702–05 (holding there was no right to a board-determined subsidy). At issue was the construction of a charter amendment and two ordinances concerning the authority of the City Council and Board of Pension Commissioners to grant health insurance subsidies contributed by the city to firefighter and police retirees' insurance premiums. *Id.* at 697, 700, 704. A subsequent city ordinance froze increases and the employees sued challenging the change as an impairment of contract under the California Constitution. *Id.* at 700.

134. *Id.* at 702–704.

135. Retired Emps. Ass'n of Orange Cnty., Inc. v. County of Orange, 266 P.3d 287 (Cal. 2011).

136. *Id.* at 295.

pension reform in *Cal Fire Local 2881 v. Cal. Public Employees' Retirement System.*[137]

Despite the court's recent recitation of the "no contract" canon, the battle in California does not appear to have been won. The competition among canons was not argued or even acknowledged in *Cal Fire.*[138] Besides, the California Supreme Court has traditionally tied the remedial canon to the object of the legislation that is to benefit the pensioner.[139] This unifies the application of the canon with the codification of general interpretative instructions emphasizing a court's role in reading California statutes as they are clearly written and, if ambiguous, ascertaining the intent of the legislature.[140] Predictably, many of the cases applying the canon involved public pension beneficiaries. These were lawsuits by widows of deceased peace officers or firemen seeking to prove that their spouses had qualified to receive a pension.[141]

The court's first decision to apparently articulate the remedial canon in construing public pension legislation was *O'Dea v. Cook,*[142] involving the widow of a deceased policeman.[143] In that case, the

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137. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 450 (Cal. 2019).

138. The court also carved out an exception to the presumption against contract for public pensions statutes. *See infra* note 270 and accompanying text. A way to resolve the remedial and "no contract" canon under California law may be to argue that the rationale of the remedial canons was recognized in the creation of the exception to the "no contract" canon. This resolution, however, is not at all clear from the case law.

139. *See, e.g.*, Terry v. City of Berkeley, 263 P.2d 833, 835 (Cal. 1953); McKeag v. Bd. of Pension Comm'rs of City of Los Angeles, 132 P.2d 198, 200 (Cal. 1942) ("In ascertaining the intent and meaning of the charter provision, a liberal construction should be indulged in to carry out the beneficial purposes aimed at. . ." (internal quotations and citations omitted)); Neeley v. Bd. of Ret., 111 Cal. Rptr. 841, 844 (Ct. App. 1974) ("[T]his rule of liberal construction is applied for the purpose of effectuating the obvious legislative intent [citation] and should not blindly be followed so as to eradicate the clear language and purpose of the statute . . . .").

140. The California Supreme Court in *Ventura County Deputy Sheriffs' Ass'n v. Board of Retirement* explained:

> The function of the court in construing a statute "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . ." (Code Civ. Proc., § 1858.) Therefore, if a statute is unambiguous, it must be applied according to its terms. Judicial construction is neither necessary nor permitted. When statutory construction is necessary, the court's primary responsibility is to carry out the intent of the Legislature to the extent possible. (Code Civ. Proc., § 1859).

940 P.2d 891, 897 (Cal. 1997).

141. The issue concerned whether the employee's death was in the performance of his job. *See* Casserly v. City of Oakland, 12 P.2d 425, 425 (Cal. 1932) (liberally construing city charter granting pension to widow of fireman killed in performance of duty); Dillard v. City of Los Angeles, 127 P.2d 917, 920 (Cal. 1942) (remedial canon applied to place the widow of a deceased police officer, and her child, on the pension rolls); *see also* Lyons v. Hoover, 258 P.2d 4, 5 (Cal. 1953) (reciting remedial canon to assist in the correct calculation of the pension of a widow of a retired policeman receiving disability pension).

142. O'Dea v. Cook, 169 P. 366 (Cal. 1917).

143. *Id.* at 367.

court cited to the U.S. Supreme Court's decision in *Walton v. Cotton*,[144] which determined that grandchildren of Revolutionary War veterans were pension beneficiaries under federal law.[145] The Court in *Walton* did not enunciate the remedial canon *per se*. But the sentiment was the same in finding congressional intent to grant pensions based on gratitude for these soldiers and their families.[146] The liberal construction of pension law is deemed especially appropriate when the employee served in the military.[147] This favorable treatment for military service dovetails nicely with the rationale of other substantive canons that protect certain groups such as veterans.[148]

So, one could argue that the California Supreme Court has shifted from a broad to a strict construction of pension law. In the early twentieth century, the court reliably endorsed the remedial canon favoring employees in interpreting pension legislation.[149] Certainly, during the Great Depression, California's highest court was confident enough in the remedial canon to announce: "Courts are practically unanimous in holding that the words should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized."[150] Conversely, a century later, the court endorsed a restrictive reading.[151] There has not been an attempt to reconcile these (potentially) divergent interpretations of pension law, no doubt because the choice of canons has not been made an issue in the state's public pension decisions There is considerable confusion in the intermediate appellate courts, with only one in three public pension cases challenging reforms under the Contract Clause even mentioning the remedial

144. Walton v. Cotton, 60 U. S. 355 (1856).

145. *Id.* at 358.

146. *Id.*; *see also* Gibson v. City of San Diego, 156 P.2d 737 (Cal. 1945) (applying remedial canon in favor of fireman and member of the military to interpret timing of war service credit in city charter). The Supreme Court was also persuaded that grandchildren were pension beneficiaries because it was consistent with the construction of wills. *See Walton*, 60 U. S. at 358.

147. Cable v. State *ex rel.* Okla. Police Pension & Ret. Bd., 31 P.3d 392, 397 (Okla. Ct. App. 2001) ("The liberal construction of pension statutes is especially significant when addressing military service credit, because laws regarding 'employees who enter the armed forces in time of war or emergency are favored.' "); Quam v. City of Fargo, 43 N.W.2d 292, 295 (N.D. 1950) (quoting *Gibson*, 156 P.2d at 740); *see also* Raney v. Bd. of Admin. of Ret. Sys., 298 S.W.2d 729, 732 (Tenn. 1957) (liberally construing statute allowing credit for military service).

148. *See* Chadwick J. Harper, Note, *Give Veterans the Benefit of the Doubt:* Chevron, Auer, *and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931 (2019); discussion *infra* Part III.

149. *See supra* notes 139–145 and accompanying text.

150. Casserly v. City of Oakland, 12 P.2d 425, 425 (Cal. 1932) (pension statute).

151. *See supra* notes 135–136 and accompanying text; *infra* Part III.

canon.[152] Consequently, California has two lines of precedent supported by its highest court.

The dispute over these canons could be resolved by confining the remedial canon to non-constitutional cases. It was precisely this factual distinction that led the New Jersey Supreme Court in *Berg v. Christie*[153] to reject the remedial canon in resolving a constitutional contract challenge to its pension reform statute.[154] At issue was whether the suspension of cost-of-living allowances (COLAs) contravened a term of the contract conferred under an earlier enacted "non-forfeitable right" statute.[155] The retirees argued that the prior statute should be read pursuant to the remedial canon as a binding contract to continue receiving COLAs.[156] New Jersey courts have considered pension statutes to be remedial in character and deserving of a liberal construction "in favor of the persons intended to be benefited thereby."[157] The government advocated for a strict reading of the legislation via the "no contract" canon (unmistakability doctrine).[158] It maintained (and New Jersey's highest court ultimately agreed) that legislative intent to contract must be "clearly and unequivocally expressed."[159]

The Supreme Court of New Jersey took note of the tension between the canons[160] and emphasized that the choice of canon "profoundly affects" the result.[161] The court then proceeded to distinguish the remedial canon cases, explaining that they involved coverage issues under existing statutes.[162] Applying the "no contract" clear statement rule, considered in Section II.B, it held that the statute, which granted a non-forfeitable right for government employees to receive benefits "provided under the laws governing the retirement system or fund," did not include pension COLAs.[163] The New Jersey Supreme Court relied on precedent to justify its analysis and did not inquire into the underlying philosophy of the

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152. *See supra* notes 119–121 and 128–132 and accompanying text.
153. Berg v. Christie, 137 A.3d 1143 (N.J. 2016).
154. *Id.* at 1151.
155. *Id.* at 1147.
156. *Id.* at 1151.
157. *See id.*; *see, e.g.*, Klumb v. Bd. of Educ., 970 A.2d 354, 366 (N.J. 2009) (quoting Geller v. N.J. Dep't of Treasury, Div. of Pensions & Annuity Fund, 252 A.2d 393, 396 (N.J. 1969)).
158. *Berg*, 137 A.3d at 1151.
159. *Id.* at 1147.
160. *Id.* at 1151 ("In this appeal, there is disagreement on the very standard to be applied to whether a contract was formed that triggered a contractual right to ongoing COLAs."). The supreme court also noted that the court of appeals recognized "that there was a tension between, on the one hand, the principle of statutory construction that pension statutes are remedial legislation and, on the other, well-recognized case law expressing judicial hesitancy to find a contract created by a statute." *Id.* at 1150.
161. *Id.* at 1151.
162. *Id.*
163. *Id.* at 1147–48.

canons or articulate why the "no contract" canon was better suited to this situation.

3. Evaluation

State courts in California have haphazardly articulated three separate canons, including the remedial canon, in addressing Contract Clause challenges to state and local public pension reform. To the extent that a court remarked on the incongruence among canons, it did not decide which one should prevail. The chaos largely stems from the fact that the choice among contradictory canons has not (yet) been made an issue in the state's public pension decisions. Complicating the controversy further is that California has different lines of authority arguably espoused by its highest court.

Given the universal use of the remedial canon across state laws involving employment, competing canon controversies will be inevitable in the new pension cases contesting reforms under the Contract Clause. Blending the background of the New Jersey (and most California) remedial canon cases, the most common invocation of this background presumption is where no statutory change to pension benefits has taken place and, hence, there is no constitutional challenge to their reduction.[164]

A recurring issue with respect to the remedial canon, found in *Alameda* and elsewhere, will likely be whether statutory silence amounts to an ambiguity that triggers the canon.[165] The California

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164. *See* discussion *supra* Section II.A.2. The Supreme Court of Louisiana's 2016 decision and analysis in *Dunn v. City of Kenner* is illustrative. 187 So. 3d 404 (La. 2016). Comparable to the preliminary interpretation issue in *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*, 227 Cal. Rptr. 3d 787 (Ct. App. 2018), *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020), the court determined what types of pay were included in "earnable compensation" for purposes of calculating firefighters' pension contributions. Dunn v. City of Kenner, 187 So.3d at 406. But unlike *Alameda County*, there had not been a potential change in the law or any constitutional question raised. Thus, the dispute centered solely on questions of computation.

165. *See supra* notes 119–136 and accompanying text. The main issue in *Dunn*, discussed *supra* note 164, was whether the statute was clear or ambiguous for purposes of applying the remedial canon. 187 So.3d at 410. The state supreme court explained: Pension statutes, like those at issue in the case, are remedial in nature and "must be liberally construed in favor of the intended beneficiaries." Swift v. State, 342 So. 2d 191, 196 (La. 1977). Any ambiguity in such statutes must be resolved in favor of the persons intended to be benefited by those statutes. *Id.* Because the statute was silent on the types of pay at issue, the court of appeals concluded that it was ambiguous. *Dunn*, 187 So.3d at 407. While still affirming the result, the Louisiana Supreme Court disagreed. *Id.* at 411. Despite the disagreement over the statute's clarity, the state supreme court held that the appellate court reached the correct result in that the various types of pay must be included as earnable compensation. *Id.* at 416. It held that the statute was clear that the city must pay pension contributions on all of the kinds of compensation. *Id.* at 411 n.6. In deciding the statute was clear notwithstanding the lack of

Court of Appeals began with the language of the pension legislation and construed it in a manner to effectuate legislative intent.[166] Additionally, the court followed the rules of statutory construction codified by the legislature that list intent as the primary goal of statutory construction and text as the best evidence to ascertain intent.[167] So even in the face of an ambiguous statute where the remedial canon is potentially applicable, the canon is secondary to statutory purpose(s). This idea comports with Professor Watson's findings that the remedial canon is keyed to the goals of the legislation (and generally subordinated to other more specific interpretative principles).[168] Therefore, the remedial canon reliably reflects legislative intent. The legislative purpose is overriding, and the remedial canon and its concomitant rule of liberal construction is not permitted to eradicate legislative judgment.

B. *"No Contract" Canon (Unmistakability Doctrine)*

The "no contract" canon of construction (otherwise known as the unmistakability doctrine) is a special rule of government contracting that conserves the legislature's sovereign authority unless a yielding of such authority unmistakably appears.[169] It is axiomatic that exercises of sovereign authority include the power to regulate.[170]

In typical Contract Clause cases, the state or local legislature (or government-controlled entity) has made a promise and a subsequent government action has abrogated that commitment. In the employment law of government pensions, the original promise enumerates a certain kind and amount of pension or related benefits. The source of the promise (and its repudiation) is found in

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an express textual statement, the state supreme court relied in part on its own precedent in an analogous case. *Id.* at 410 (reviewing Fishbein v. State *ex rel.* L.S.U. Health Scis. Ctr., 898 So. 2d 1260, 1264 (La. 2005)).

166. *See supra* note 123 and accompanying text; *Dunn*, 187 So. 3d at 409–10 ("Legislation is the solemn expression of the legislative will; thus, the interpretation of legislation is primarily the search for the legislative intent. . . . The starting point for interpretation of any statute is the language of the statute itself." (citing other Louisiana Supreme Court cases)); LA. STAT. ANN. § 24:177(B)(1) (2006) ("The text of a law is the best evidence of legislative intent.").

167. *See* discussion *supra* Section II.A.1–2.

168. *See* discussion *supra* Section II.A.1. In a public pension reform case resolved under the state Pension Clause, the plaintiffs appeared to have argued the remedial canon at the trial level, but it was apparently not made an issue on appeal. Eddington v. Dallas Police & Fire Pension Sys., 508 S.W.3d 774, 779 (Tex. Ct. App. 2016), *aff'd*, 589 S.W.3d 799 (Tex. 2019).

169. United States v. Winstar Corp., 518 U.S. 839, 924 (1996) (Rehnquist, C.J., dissenting).

170. *Id.*

constitutions, statutes, and ordinances.[171] The application of the "no contract" canon makes it less likely that government employees will prove a prior contract for a set amount or kind of pension benefits.

The following examination provides an overview of the "no contract" canon (unmistakability doctrine) along with its application and evaluation in public pension reform litigation.[172]

1. Overview

The so-called unmistakability doctrine, or "no contract" canon, represents a tension between two fundamental constitutional ideas.[173] The original position amounts to an age-old theory of sovereignty that one legislature may not bind the next, both being equally supreme. This notion of absolute authority was promoted by Blackstone in his explanation of the English Parliament.[174] The opposing position specifies that legislative powers may be limited. This philosophy stems from the American experience with colonial charters and, subsequently, the adoption of the U.S. Constitution and state constitutions.[175] In federal law, the U.S. Supreme Court's Contract Clause jurisprudence shows that the latter idea has taken root in restrictions placed on state power.

The Court has attributed the modern unmistakability principle to an opinion issued by Chief Justice Marshall during the Founding Era.[176] The doctrine was refined in later cases that applied the

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171. Anenson et al., *supra* note 6, at 21 (also explaining that collective bargaining agreements can constitute contracts).

172. The forthcoming review of the U.S. Supreme Court's use of the "no contract" canon and its implications for contractual constraints on legislative freedom of action is not a complete history. It is meant to provide a suitable background to understand the modern public pension reform litigation analyzed in the next section.

173. *Winstar Corp.*, 518 U.S. at 872–73 (plurality opinion).

174. *See id.* at 872 (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765)); H.L.A. HART, THE CONCEPT OF LAW 145 (1961) (recognizing that Parliament is "sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra,* but also from its own prior legislation").

175. *See Winstar Corp.*, 518 U.S. at 872–73.

176. *Id.* at 873–74 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (holding that the Contract Clause barred Georgia's effort to rescind land grants made by a prior state legislature: "[t]he past cannot be recalled by the most absolute power"). The Court had previously pronounced that the unmistakability doctrine originated in the twentieth century. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (citing City of St. Louis v. United Rys. Co., 210 U.S. 266 (1908)); *Winstar Corp.*, 518 U.S. at 875 n.21 (plurality opinion) (citing Vicksburg S. & P. R. Co. v. Dennis, 116 U.S. 665 (1886); Memphis Gas Light Co. v. Taxing Dist. of Shelby Cnty., 109 U.S. 398 (1883); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854)) (tracking the twentieth century decisions back to an earlier era and citing so-called "classic Contract Clause unmistakability cases").

clause to state contracts in the early nineteenth century.[177] The application of the clause to state contracts over time produced a canon of construction that disfavored "implied government obligations in public contracts."[178] State cases appeared around the same time and mirrored the federal principle.[179] In *People* ex rel. *Cunningham v. Roper*, for example, the Court of Appeals of New York articulated that there must be "clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation."[180] The interpretative stance was strict construction and seemingly allowed only for express, and not implied, obligations.[181] After all, the Supreme Court pronounced that "nothing can be taken against the State by presumption or inference," and that overcoming the default rule had to be in "*terms* too plain to be mistaken."[182]

At least by the end of the Great Depression, however, circumstances counted as well to identify meaning.[183] Although, the Court indicated that the text of the legislation remains first and foremost.[184] In *Dodge v. Board of Education*,[185] the only public pension case considered by the Supreme Court, such circumstances included the environment of the statute's adoption.[186] Still, as is typical of

177. *See Winstar*, 518 U.S. at 874 (citing Providence Bank v. Billings, 29 U.S. (4 Pet.) 514 (1830); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837)).

178. *Id.*

179. Berg v. Christie, 137 A.3d 1143, 1152–53 (N.J. 2016) (calling it a long-held presumption citing state and federal cases dating to the nineteenth century) (citing Shiner v. Jacobs, 17 N.W. 613, 613 (Iowa 1883); People *ex rel.* Cunningham v. Roper, 35 N.Y. 629, 633 (1866)).

180. *Roper*, 35 N.Y. at 633; *see also* E. Saginaw Mfg. Co. v. City of E. Saginaw, 19 Mich. 259, 274 (1869) (declaring that nothing in the statutory language shows that it is meant to be perpetual and that "it is neither necessary nor usual to reserve the right of repeal in order that the Legislature may possess full power to do so"); Washington Univ. v. Rowse, 42 Mo. 308, 323 (1868) ("Every presumption will be made against its surrender, as the power was committed by the people to the government to be exercised, and not to be alienated."); Mott v. Penn. R.R. Co., 30 Pa. 9, 9 (1858).

181. *See, e.g.*, *Del. R.R. Tax*, 85 U.S. (18 Wall.) 206, 225 (1873).

182. *Winstar*, 518 U.S. at 875 (emphasis added) (quoting Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 446, (1862)).

183. Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937).

184. In *Dodge*, for instance, the Court declared it was of "first importance" to examine the language of the statute. *Id.* at 78.

185. *Id.*

186. *Id.* at 79.

a strong default rule,[187] neither the text nor the circumstances were enough to overcome the presumption against a contract.[188]

Forty years later, the Supreme Court clarified that relevant circumstances include the statute's "apparent purpose, context, legislative history, or any other pertinent evidence of actual intent."[189] As a result, while the Contract Clause has waxed and waned in importance throughout history,[190] the Court has held firmly to the "no contract" presumption.[191] For example, in *Bowen v. Public Agencies Opposed to Social Security Entrapment*,[192] decided in the late twentieth century, the Supreme Court described the unmistakability doctrine consistently with past pronouncements: "[S]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[193] In fact, in its plurality decision in *United States v. Winstar Corp.*,[194] commonly invoked in state pension cases applying the "no contract" canon, the Supreme Court underscored the canon's philosophy and corrected its historic pedigree.[195] The espoused purposes of the doctrine have been repeated in a few of the new public pension decisions.[196] They are to curtail contractual incursions on state sovereignty and, correspondingly, to avoid constitutional questions that would limit subsequent legislative power.[197] Consequently, the Court developed the canon's theoretical foundation, tied the canon to tradition, and set forth its policies. Yet the justic-

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187. *See* Tommy Tobin, *Far From a "Dead Letter": The Contract Clause and* North Carolina Association of Educators v. State, 96 N.C. L. REV. 1681 (2018) (commenting that "only one time in the thirty-seven years from 1940 until 1977 did the U.S. Supreme Court find state action unconstitutional as violating the Contract Clause") (citing Janet Irene Levine, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation,* 12 LOY. L.A. L. REV. 927, 938 n.75 (1979)).

188. *Dodge*, 302 U.S at 78–79.

189. U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977).

190. *See generally* ELY, *supra* note 9 (portraying the history of the Contract Clause from its origins to the present day).

191. *But see* David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 485–86 (1999) (claiming that what came to be known as the "unmistakability" doctrine was born in 1837 with *Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)—"a doctrine that stood more or less unchallenged for 150 years until it was gutted by the Supreme Court in *Winstar*").

192. Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986).

193. *Id.* at 52 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).

194. United States v. Winstar Corp., 518 U.S. 839 (1996). Notably, *Winstar* is not a Contract Clause case. While the Supreme Court relied heavily on Contract Clause jurisprudence, the issue concerned whether the federal government violated its contractual obligation.

195. *See id.* at 872–75.

196. *Id.* at 875; *see also* discussion *infra* Section II.B.2.b.

197. *Id.*; *see also* Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); Hugo Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972) (characterizing this "most familiar and fundamental princip[e]" as "so obvious as rarely to be stated").

es in *Winstar* disagreed about almost everything else.[198] The case spawned a cottage industry of scholarly commentary about when to apply the "no contract" canon, its implications, and the relationship of the canon to other government contract doctrines that are not relevant to this analysis.[199]

The Supreme Court's 2018 Contract Clause decision in *Sveen v. Melin*[200] was an opportunity to unify its position on the clear statement rule against contracts.[201] Nevertheless, the existence of a contract was not at issue in that case and the "no contract" canon remains a conceptual conundrum.[202] Accordingly, one might expect Supreme Court precedent to hardly influence the twenty-first century public pension reform controversies. But that expectation would be wrong.

2. Application

This section provides a comprehensive accounting of the "no contract" canon's application to constitutional controversies over state and local pension reform. There are nineteen such cases across fourteen states.[203] The following discussion describes the canon, identifies its sources and justifications, and analyzes what

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198. *See* James A. Bloom, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of* United States v. Winstar Corp., 85 WASH. U. L. REV. 1373, 1389 (2008) (commenting that the *Winstar* concurrence and dissent "agreed" that the unmistakability doctrine applies to all government contracts, while the plurality argued that the unmistakability doctrine applies only when the government's sovereign power is implicated).

199. *See, e.g.*, Alan R. Burch, *Purchasing the Right to Govern:* Winstar *and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245 (2000) (exploring the relationship between the express delegation doctrine, the reserved powers, and the unmistakability doctrine); Joshua I. Schwartz, *Liability For Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law,* 64 GEO. WASH. L. REV. 633, 633 (1996) ("The scope and rationale of each of these two doctrines, the sovereign acts doctrine and the unmistakability doctrine, have been far from clear."); Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The* Winstar *Case,* 2001 WIS. L. REV. 795 (outlining implications of *Winstar*).

200. Sveen v. Melin, 138 S. Ct. 1815 (2018).

201. *See id.* (involving statutory default rule retroactively revoking insurance policy beneficiary to policies bought before the statutes adoption); Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177 (2000) (analyzing post-*Winstar* decisional law and its impact on the unmistakability doctrine).

202. *See Sveen*, 138 S. Ct. at 1821. The Court's attention was directed to whether the retroactive statute constituted a "substantial" impairment of the contract. *See id.* at 1821–26 (declaring that the legislation did not substantially impair the insurance contract). For an article describing the Court's Contract Clause jurisprudence as essentially incoherent, see James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 437–45 (1982).

203. The cases are from the following states: Alabama, California, Colorado, Oregon, Illinois, Kentucky, Maine, Michigan, New Jersey, New York, New Hampshire, North Carolina, Rhode Island, and Tennessee. *See infra* Appendix. The Illinois decision was pursuant to the state Pension Clause and not the Contract Clause. *See infra* Appendix.

evidence is required to rebut the presumption that there is no contract.

a. *Sources*

Nearly all of the recent public pension reform decisions raising the "no contract" canon cite cases from the Supreme Court of the United States in addition to state precedent.[204] Reference to the Supreme Court is not surprising given that an overwhelming number of the public pension reform cases claimed violations of both the U.S. Constitution and state constitutions.[205] Though even courts that ruled solely on state constitutional Contract Clause challenges, such as *Fry v. City of Los Angeles*,[206] *Cal Fire Local 2881 v. Cal. Public Employees' Retirement System*,[207] and a trio of trial court cases from Rhode Island, depended on Supreme Court opinions.[208] The reason likely goes beyond intellectual authority. These states, like most, have judicial opinions declaring that federal and state law concerning the Contract Clause are the same.[209] Thus, setting aside the Supreme Court's repeated declarations that it will defer to state law on the issue of a contract (although affirming that fed-

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204. *See* discussion *infra* Section II.B.2.a. The one exception is *Moro v. State*, 351 P.3d 1 (Ore. 2015), but the majority still relied on federal cases to define the Contract Clause analysis as applying only to retrospective laws and for the latter parts of the constitutional test. *Id.* at 18, 38.

205. *See, e.g.*, Berg v. Christie, 137 A.3d 1143, 1151 (N.J. 2016); *Moro*, 351 P.3d at 18; Pro. Fire Fighters of N.H., 107 A.3d 1229, 1230 (N.H. 2014). Some cases were in federal court. *See, e.g.,* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014); Taylor v. City of Gladsden, 767 F.3d 1124, 1133–34 (11th Cir. 2014). For cases challenged under the federal constitution only, see *Cranston Firefighters v. Raimondo*, 880 F.3d 44, 47 (1st Cir. 2018), which assessed changes to a Rhode Island pension scheme. In *Maine Ass'n of Retirees*, it is unclear whether the contested reforms were grounded in only federal law as articulated in the opinion or both federal and state law as indicated in the Westlaw headnotes. 758 F.3d at 25.

206. Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 700 (Ct. App. 2016).

207. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019).

208. For California, see *Cal Fire*, 435 P.3d at 441–42; *Fry*, 199 Cal. Rptr. 3d at 700, 702. For Rhode Island, see *Rhode Island Public Employees' Retiree Coal. v. Chafee*, No. PC123166, 2014 WL 1577496 at *3 (R.I. Super. Apr. 16, 2014); *Rhode Island Council 94 v. Chafee*, No. PC 12-3168, 2014 WL 1743149 at *6 (R.I. Super. Apr. 25, 2014); and *Bristol/Warren Regional School Employees v. Chafee*, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142 at *7 (R.I. Super. Apr. 25, 2014).

209. *See, e.g.*, ELY, *supra* note 9, at 251 ("More than twenty states have treated the state contract clauses as equivalent to the federal provision."); Taylor v. City of Gladsden, 767 F.3d 1124, 1130–31 (11th Cir. 2014) (federal and Alabama law); *Pro. Fire Fighters of N.H.,* 107 A.3d at 1236; *Berg*, 137 A.3d at 1150–51; *see also Moro*, 351 P.3d at 18 (explaining that the state constitutional provision was adopted in 1857 and derived from the federal Contract Clause such that the state contract clause is interpreted in light of the U.S. Supreme Court's interpretation of the federal contract clause in 1857).

eral law ultimately answers the question),[210] the discussion below reveals how the opposite is happening.

The U.S. Supreme Court opinions cited most often are *United States Trust Co. v. New Jersey*[211] followed by *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*,[212] then *United States v. Winstar Corp.*[213] and *Dodge v. Board of Education*.[214] As indicated previously in Section II.B.1, *Dodge* is the sole public pension case in the Court's Contract Clause jurisprudence. Other references were to *Indiana ex rel. Anderson v. Brand*.[215]

Most of the state and federal courts facing constitutional Contract Clause challenges to public pension reform relied on these decisions to describe the clear statement canon and its policies.[216] They looked to Supreme Court authority for the invocation of the substantive canon, its strength as a clear statement rule, and an accounting of its underlying philosophy.[217] Only a few courts cited federal opinions for their factual settings, including what conditions would (or would not) overcome the presumption against contract.[218] If they did undertake a factual comparison, the analogous decision offered was usually *National Railroad Passenger Corp.*,[219] *Brand.*,[220] or *United States Trust Co. of New York*.[221]

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210. *See, e.g.*, Anenson et al., *supra* note 6, at 17 n.77; *infra* note 318. The first case to articulate that federal courts would make an independent judgment about the existence of a contract was *Ohio Life Insurance & Trust Co. v. Deolt*, 57 U.S. (16 How.) 416, 433 (1854). *See* Jefferson Branch Bank v. Skelly 68 U.S. 436, 443 (1862) (indicating rationale for federal law was to prevent a state from escaping the Contract Clause).

211. U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977); *see, e.g.*, *Cal Fire*, 435 P.3d 442–43.

212. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985); *see, e.g.*, Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 600 (6th Cir. 2016); Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 835–36 (E.D. Tenn. 2015); Justus v. State, 336 P.3d 202, 209 (Colo. 2014); Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645, 650 (N.C. Ct. App. 2019).

213. United States v. Winstar Corp., 518 U.S. 839, 860 (1996) (plurality opinion); *see, e.g.*, *Puckett*, 833 F.3d at 600; Pro. Fire Fighters of N.H., 107 A.3d at 1236.

214. Dodge v. Bd. Educ., 302 U.S. 74 (1937). *Winstar* and *Dodge* tie for second place. *See, e.g.*, *Frazier*, 151 F. Supp. 3d at 835; *Justus*, 336 P.3d at 214; *Berg*, 137 A.3d at 1152; *Lake*, 825 S.E.2d at 650; *cf. Cal Fire*, 435 P.3d at 446 (citing *Dodge* as an illustration of the former gratuity approach to pensions and not for the unmistakability doctrine standard).

215. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938); *see, e.g.*, Cranston Firefighters v. Raimondo, 880 F.3d 44, 48 (1st Cir. 2018) (distinguishing statutory language from contractual language in *Brand.*); *Justus*, 336 P.3d at 213 (Coats, J., concurring).

216. *See, e.g.*, Jones v. Mun. Emps.' Annuity & Benefit Fund., 50 N.E.3d 596, 605–06 (Ill. 2016) (using *National Railroad Passenger Corp.* for the rationale, effect, and strength of the presumption against contract).

217. *See* Am. Fed'n of Tchrs.—N.H. v. State, 111 A.3d 63, 69 (N.H. 2015) (relying on *National Railroad Passenger Corp.* for the order of the evidence in that the court should begin with the text of the statute); *supra* Section II.B.1.

218. *See, e.g.*, *Cranston Firefighters*, 880 F.3d at 49; *Justus*, 336 P.3d at 212.

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

220. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

For example, in *National Railroad Passenger Corp.*, private railroads sued the federal government for changing their reimbursement scheme with Amtrak.[222] The statute that allegedly constituted an unchangeable contract was enacted in an atmosphere of pervasive prior regulation.[223] According to the Supreme Court, these circumstances suggested that the railroads had no legitimate expectation that the regulation would cease.[224] The Court was also persuaded against a finding of contract because the same statute had an express reservation of the power to repeal.[225] In contrast, sometimes courts facing pension challenges distinguish U.S. Supreme Court cases finding government contracts on the basis of express contractual language.[226] *United States Trust Co. of New York* clearly conveyed a contract by the parties promising to "covenant and agree" in the statute.[227] Similarly, in *Brand*, the legislature used the very term "contract" twenty-five times in the statute.[228]

The new pension cases, however, did not rely on federal decisions alone. Indeed, perhaps due to the lack of any public pension cases from the Supreme Court docket for more than eighty years,[229] courts faced with Contract Clause challenges instead cite to decisions from other states. In applying the "no contract" canon, judges generally followed the results reached on equivalent reforms in those outside jurisdictions.[230] A few courts additionally relied on

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221. U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 17–18 (1977).

222. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 453.

223. *Id.* at 469.

224. *Id.*

225. *See id.*; *accord* Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52–54 (1986) (quoting *Nat'l R.R. Passenger Corp.*) (declaring that the "effect of these few simple words" has been settled since the *Sinking-Fund Cases,* 99 U.S. (9 Otto) 700, 25 L. Ed. 496 (1879)). Alternatively, the Court held that any purported contract right could be changed and was not unconstitutional. *Nat'l R.R. Passenger Corp.* 470 U.S. 475–78. Because contracts are property, challenges against the federal government fall under the Takings or Due Process Clauses. The latter allows contract changes that have a rational basis. *See* ELY, *supra* note 9, at 234–35.

226. *See* Cranston Firefighters v. Raimondo, 880 F.3d 44, 49 (1st Cir. 2018) (distinguishing *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1 (1977) and *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)).

227. *Id.* at 18.

228. *Id.* at 105 (counting the word in both the body and title of the statute). "Contract" was referenced in a prior statute as well. *Id.* The Court declared the statute was "couched in contract." *Id.*

229. *See* ELY, *supra* note 9, at 249 (noting the Supreme Court's "marked neglect" of the Contract Clause in general).

230. For instance, faced with the issue of whether cost-of-living allowances (COLAs) were part of the pension contract set forth in prior legislation, the Supreme Courts of Colorado, New Hampshire, and New Jersey relied on the result in out-of-state cases that held they were not. *See* Justus v. State, 336 P.3d 202, 208–09 (Colo. 2014) (citing Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 31 (1st Cir. 2014)); Berg v. Christie, 137 A.3d 1143, 1153 (N.J. 2016) (citing *Me. Ass'n of Retirees* and ruling that retirees' Contract Clause argument concerning COLA changes failed)); Am. Fed'n of Tchrs.—N.H. v. State, 111 A.3d 63, 73 (N.H. 2015) (citing *Me. Ass'n of Retirees*, 758 F.3d at 31; Scott v. Williams, 107

their own precedent in determining when the clear statement rule is overcome—or at least were not willing to overrule it.[231]

b. *Rationales*

The new pension cases are uniform in their basis for invoking the "no contract" clear statement rule. The primary reason given for the presumption is that the principal function of the legislature is to make policy and not contracts.[232] Of course, legislatures do both. But when the form of the purported agreement is a statute rather than a contract, it is likely that the political branch was operating in its government (sovereign) rather than its proprietary capacity. The search for meaning is tied to the presumed intent of the parties to the alleged agreement. As such, the presumption against contract serves the value of popular will because it reflects the choices made by the people who created the law.[233] This value is grounded not only in statutory interpretation but also in contract law.[234] In particular, similar to the unmistakability doctrine for legislative enactments, the law of contracts includes default rules that fill gaps when the parties have been silent or when the meaning of their words is unclear.[235] Thus, the resistance norms are

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So.3d 379, 388–89 (Fla. 2013)); Pro. Fire Fighters of N.H. v. State, 107 A.3d 1229, 1235–36 (N.H. 2014) (citing *In re* Enrolled Senate Bill 1269, 209 N.W.2d 200, 201–02 (Mich. 1973) and Scott v. Williams, 107 So.3d 379, 389 (Fla. 2013)); Bartlett v. Cameron, 316 P.3d 889, 895 (N.M. 2013); Wash. Educ. Ass'n. v. Wash. Dep't of Ret. Sys., 332 P.3d 439, 444–48 (Wash. 2014); *accord* Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 603 (6th Cir. 2016) (finding no contract that would make a COLA unchangeable in Kentucky and citing cases from Maine, Colorado, New Hampshire, and New Mexico). Although certain judges did discount the equivalency of reforms by recognizing potential distinctions in the language and circumstances of various state pension legislation. *See Puckett*, 833 F.3d at 611–12 (Stranch, J., concurring) (cautioning against reliance on decisions based on other state laws because of the potentially different language and circumstances). The Supreme Court of Arizona also reached a similar conclusion of contract (or lack of contract) by adopting the same meaning of a common word in the legislation. *See* Hon. Fields v. Elected Offs.' Ret. Plan, 320 P.3d 1160, 1166 (Ariz. 2014) (comparing and contrasting definition of "benefit" in other states for the purposes of interpreting a state constitutional pension clause).

231. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 433, 446–48 (Cal. 2019); Moro v. State, 351 P.3d 1, 19–20, 24 (Ore. 2015); *cf.* Anenson et al., *supra* note 6, at 24–25 (discussing case law in Colorado in which the state supreme court distinguished, and to some extent overruled, its precedent to reach the conclusion that legislation tightening public pension benefits was valid).

232. *See, e.g.*, *Puckett*, 833 F.3d at 611–12 (reviewing changes to Kentucky's public pension system); Cranston Firefighters v. Raimondo, 880 F.3d 44, 48 (1st Cir. 2018) (assessing changes to Rhode Island pension scheme); Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645, 650 (N.C. Ct. App. 2019).

233. HUHN, *supra* 30, at 16.

234. *Id.* (explaining that intent supports popular sovereignty for public enacted law and personal autonomy for the private law of contract).

235. Sunstein, *supra* note 2, at 453. The use of implied terms is a familiar part of contract law without which contracts would not be susceptible to construction. *Id.* Courts addressing

meant to follow the parties' expectations—whether private or public.

Justice Scalia's concurring opinion in *United States v. Winstar Corp.*,[236] one of the last Supreme Court cases to address the "no contract" canon, illustrates this point. As mentioned previously in Section II.B.1, the case is notable for its multiple opinions disputing when the unmistakability doctrine applies and what evidence is required to rebut it. Of the *Winstar* references, Justice Scalia's opinion, joined by Justices Kennedy and Thomas, is routinely cited in state and federal Contract Clause (including public pension) cases.[237] Justice Scalia grounded the doctrine in the private law of contractual intent.[238] He explained that there is a rule of presumed (or implied-in-fact) intent that a contracting party will not render performance impossible.[239] When the contracting party is the government, on the other hand, there is a "reverse presumption."[240] Scalia emphasized: "Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding."[241] Consequently, the resistance rule to the release of legislative power answers an empirical question.

All the same, the underlying philosophy of this canon of construction (as espoused by the courts) hints at a normative foundation as well. As a corollary to the functional account of legislative action, courts routinely declare the canon justified because one legislature generally does not bind another.[242] To do so would be to "surrender a fundamental prerogative of legislative power."[243] The risk is that the primary lawmaker in a democracy will give up the duty to enact laws by legislative vote. Whereas most courts simply allude to the "harsh ramifications" of a statutory contract,[244] others spell out the obvious repercussions for our representative form of

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constitutional contract issues that do not use the unmistakability doctrine use private law contract canons. *See, e.g.*, Borders v. Atlanta, 779 S.E.2d 279, 285 (Ga. 2015).

236. 518 U.S. 839 (1996). For an earlier discussion of *Winstar*, see *supra* notes 194–199.

237. *See, e.g.*, S. States Police Benevolent Ass'n, Inc. v. Bentley, 219 So.3d 634, 645 (Ala. 2016).

238. *See Winstar*, 518 U.S. at 920 (characterizing the "no contract" canon as stemming from "normal principles of contract interpretation").

239. *Id.*

240. *Id.* at 921 ("The requirement of unmistakability embodies this reversal of the normal reasonable presumption.").

241. *Id.* He found it "reasonable to presume *(unless the opposite clearly appears)* that the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts." *Id.* (emphasis in original).

242. *See, e.g.*, Moro v. State, 351 P.3d 1, 36 (Ore. 2015).

243. Berg v. Christie, 137 A.3d 1143, 1152 (N.J. 2016).

244. *Id.*

government. In *Frazier v. City of Chattanooga*,[245] the Eastern District of Tennessee explained that to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be "to limit drastically the essential powers of a legislative body."[246] It further declared that "the continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation."[247]

Because the effect of finding a public pension contract would be to reduce legislative power,[248] the "no contract" canon protects the sovereign powers of state and local governments. The idea is that legislation should not be read loosely to reduce long settled powers within the lawmaking branch of government.[249] Therefore, the judicial preference against changing the traditional powers of the legislative branch without a clear statement (express or implied) supports institutional stability[250] and, by extension, allocation of responsibility between courts and politically accountable bodies.[251] Put simply, the "no contract" presumption is an illustration of statutory interpretation grounded in the separation of powers doctrine.[252] The textual technique for implementing that value works as part of a broader meta-rule of non-interference with the customary divisions of power in the government.[253] The constitutionally-derived doctrine of separation of powers makes government more efficient through an effective division of labor and disperses power to reduce the risk of tyranny.[254] The unmistakability axiom can be envisioned as advancing both goals. Due to this customary

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245. 151 F. Supp. 3d 830 (E.D. Tenn. 2015).

246. *Id.* at 836 (quoting Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985)).

247. *Id.* For a much earlier elaboration on the implications of potential constraints on future legislative lawmaking, see *East Saginaw Manufacturing Co. v. City of East Saginaw*, 19 Mich. 259, 274 (1869).

248. Justus v. State, 336 P.3d 202, 207 (Colo. 2014); Jones v. Mun. Emps.' Annuity & Benefit Fund, 50 N.E.3d 596, 606 (Ill. 2016).

249. *See* Tyler, *supra* note 35, at 1426–27 (maintaining that legislation should not be read loosely to impact long settled divisions of power among the branches).

250. *Id.* at 1428; *see also* Sunstein, *supra* note 2, at 458 (arguing that it provides a check on the factional power or self-interested behavior of bureaucrats).

251. *See* Stephenson, *supra* note 35, at 38–39 (describing standard argument supporting substantive canons on grounds of advancing judicial modesty and inter-branch relations); discussion *infra* Part III.

252. Eskridge & Frickey, *supra* note 37, at 605.

253. *See* Eskridge, *supra* note 34, at 1023 (describing metarule to preserve the traditional separation of responsibilities in government).

254. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432–33 (1987). For a discussion of the competing purposes of the separation of powers doctrines, see W.B. GWYN, THE MEANING OF SEPARATION OF POWERS 127–28 (1965); and Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989).

arrangement, courts move cautiously when legislative indicators are vague.[255]

In addition to the institutional emphasis on separation of powers, a few courts assessing public pension reform have picked up a related reason for the default rule from the *Winstar* plurality: to avoid difficult constitutional questions.[256] Somewhat surprisingly given state budget troubles, no court facing pension contests has yet adopted the rationale set forth in the dissenting opinion in *Winstar*—to protect the public fisc.[257]

Another procedural value not found in the U.S. Supreme Court cases, but advanced by at least one state supreme court, determines that the "no contract" canon enables the government to act.[258] The Supreme Court of Washington in *Washington Education Ass'n v. Department of Retirement Systems*[259] additionally couched this prerogative as for the good of the employee. The court declared: "Surely the legislature can make the addition of [a COLA] subject to its right to amend or repeal the program in the future. To say otherwise would strongly disincentivize the legislature from providing additional benefits beyond a basic pension."[260]

c. *Description*

Given the reliance on a common core of federal cases, all of the courts described the "no contract" canon in similar terms. Indeed, they universally required that any purported contract and its terms be "clear."[261] A majority of them also added "unmistakable" to the description.[262] For example, the Oregon Supreme Court in *Moro v.*

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255. *See* Tyler, *supra* note 35, at 1421, 1426 (discussing judicial role in construing statutes as guardians of coherence and not prevailing political winds or social norms).

256. *See* Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 600 (6th Cir. 2016); Cranston Firefighters v. Raimondo, 880 F.3d 44, 48 (1st Cir. 2018) (assessing changes to Rhode Island pension scheme).

257. United States v. Winstar Corp., 518 U.S. 839, 937 (1996) (Rehnquist, C.J., dissenting) ("The wisdom of this principle arises, not from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government."). The reason is similar to the rationale for government immunities from civil actions. The financial savings goal is often weighed in the latter part of the Contract Clause analysis.

258. *See* Wash. Educ. Ass'n v. Dep't of Ret. Sys., 332 P.3d 439, 446 (Wash. 2014); discussion *infra* Part III.

259. 332 P.3d at 446.

260. *See id.*

261. *See, e.g.*, Moro v. State, 351 P.3d 1, 24 (Ore. 2015); Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 702 (Ct. App. 2016).

262. *See, e.g.*, Taylor v. City of Gladsden, 767 F.3d 1124, 1133–34 (11th Cir. 2014) (ruling that unless there is unmistakable intent, we presume no contract); Berg v. Christie, 137 A.3d 1143, 1154 (N.J. 2016); Petit-Clair v. City of Perth Amboy, No. A-2049-14T2, 2018 WL

State[263] mandated that the contract and its terms be both "clear and unmistakable."[264] When setting forth the so-called "unmistakability doctrine,"[265] the First Circuit Court of Appeals similarly required a "clear and unequivocal" legislative intent to contract.[266] The California Court of Appeals in *Fry v. City of Los Angeles*[267] correspondingly held that only a "clear and unambiguous" intent to enter an unchangeable contract would suffice.[268] The Supreme Court of California endorsed this view in *Cal Fire Local 2881 v. California Public Employees' Retirement System*,[269] although it circumvented the canon by allowing pension benefit terms to be contractual on an alternative ground pursuant to its prior precedent.[270]

A few courts elaborated that the plaintiff carries a "heavy burden,"[271] emphasizing the "high bar" to overcome the presumption.[272] Further, they explain that a judge will "proceed cautiously" to identify a contract and its terms,[273] with "all doubts resolved in favor" of a finding that there is no contract.[274] The First Circuit

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4262959 at *6, 9 (N.J. Ct. App. Sept. 7, 2018) (extending its high court decision applying the unmistakability standard for legislative intent to a municipal body).

263. 351 P.3d 1 (Ore. 2015).

264. *Id.* at 24.

265. Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29-30 (1st Cir. 2014); Prof'l Fire Fighters of N.H. v. State, 107 A.3d 1229, 1234 (N.H. 2014).

266. *Me. Ass'n of Retirees*, 758 F.3d at 30; Cranston Firefighters v. Raimondo, 880 F.3d 44, 48 (1st Cir. 2018); *see* Jones v. Mun. Emps.' Annuity & Benefit Fund, 50 N.E.3d 596, 605–06 (Ill. 2016) (clearly and unequivocally expressed intention).

267. 199 Cal. Rptr. 3d 694 (Ct. App. 2016).

268. *Id.* at 702.

269. 435 P.3d 433 (Cal. 2019).

270. *Id.* at 447–48. The court found that pensions provided in the employment context were automatically contractual. *Id.* But that the elimination of the provision at issue did not run afoul of the constitution because it was not tied to work performed. *Id.* at 448–49.

271. *Me. Ass'n of Retirees*, 758 F.3d at 29; Prof'l Fire Fighters of N.H. v. State, 107 A.3d 1229, 1233–34 (N.H. 2014); R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC123166, 2014 WL 1577496 at *3 (R.I. Super. Apr. 16, 2014); *see also* Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 705 (Ct. App. 2016) (ruling that current and retired police and fire employees did not carry their "heavy burden" of demonstrating a clear intent in the Delegation Ordinance to create a vested right to a Board-determined health insurance subsidy).

272. Berg v. Christie, 137 A.3d 1143, 1152 (N.J. 2016).

273. Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 836 (E.D. Tenn. 2015); Taylor v. City of Gladsden, 767 F.3d 1124, 1133–34 (11th Cir. 2014); Justus v. State, 336 P.3d 202, 209 (Colo. 2014); Prof'l Fire Fighters of N.H. v. State, 107 A.3d 1229, 1233–34 (N.H. 2014). While not articulating the canon to decide there was no Contract Clause violation for the repeal of a COLA, the Supreme Court of Washington in *Washington Education Ass'n v. Washington Department of Retirement Systems* declared generally that "this court is hesitant to infer contract rights from a statute." 332 P.3d 439, 443 (Wash. 2014) (citing pension and non-pension cases).

274. *Fry*, Cal. Rptr. 3d at 702; *see* Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 600 (6th Cir. 2016) (declaring that the statute must be "clear beyond any doubt") (citing *Winstar*); AFT Mich. v. State, 893 N.W.2d 90, 105 (Mich. Ct. App. 2016) (Saad, J., concurring in part and dissenting in part) (declaring that the law at issue "be susceptible to no other reasonable construction" except a contract), *aff'd*, 904 N.W.2d 417, 418 (Mich. 2017).

Court of Appeals in *Cranston Firefighters v. Raimondo*[275] aptly summarized the difficulty of surmounting the presumption: "A claim that a state statute creates a contract that binds future legislatures confronts a tropical-force headwind in the form of the 'unmistakability doctrine.' "[276]

d. *Rebuttal Evidence*

What constitutes a "clear" intent to contract in order to rebut the "no contract" presumption is critical and worthy of elaboration. Generally, courts reiterate the text and circumstances approach announced by the U.S. Supreme Court.[277] A few courts have declared a hierarchy of evidence with the language of the legislation being the best, or at least the first, step.[278] Likewise, one court of appeals questioned whether the circumstances would be enough alone to rebut the presumption.[279]

Other courts repeated the refrain that a pension contract may be express or implied but seemed to prefer the language of the legislation. More specifically, given their rationale, holdings, and factual background, some opinions might be read to mean that only express contractual text would overcome the presumption.[280]

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275. 880 F.3d 44 (1st Cir. 2018).

276. *Id.* at 48.

277. *See* discussion *supra* Section II.B.1; *cf.* Police Benevolent Ass'n of New York State, Inc. v. Cuomo, 343 F. Supp. 3d 39, 64–65 (N.D.N.Y. 2018) (declaring presumption that no benefits or related provisions of a collective bargaining agreement extend beyond the agreement unless expressly stated or implied from the circumstances); *accord* CNH Industrial N.V. v. Jack Reese, 138 S. Ct. 761, 767 (2018) (ruling that an expired collective bargaining agreement did not create right to lifetime retiree health care benefits).

278. *See* Am. Fed. of Tchrs. v. State, 111 A.3d 63, 69 (N.H. 2015); Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (post-1999 retirees); *accord* Dodge v. Bd. of Educ., 302 U.S. 74, 78 (1937) (declaring the text of the statute was of "first importance"). For example, adopting the "no contract" canon for the first time in 2014, *American Federation of Teachers v. State*, 111 A.3d 63, 69 (N.H. 2015) (explaining that they adopted the unmistakablility doctrine in *Professional Fire Fighters of New Hampshire v. State*), the New Hampshire Supreme Court in *Professional Fire Fighters of New Hampshire v. State*, declared that the statutory language is the first step to ascertain whether a contract exists and the scope of the obligation. 107 A.3d 1229, 1235–36 (N.H. 2014) (reversing the lower court determination that employees had a contract right to a fixed contribution rate).

279. *See* Cranston Firefighters v. Raimondo, 880 F.3d 44, 50 (1st Cir. 2018) (reviewing Rhode Island law). In *Berg v. Christie*, the Supreme Court of New Jersey separately analyzed the different kinds of rebuttal evidence indicating that the court would not evaluate them cumulatively. 137 A.3d 1143, 1155–62 (N.J. 2016).

280. Two New Hampshire Supreme Court cases illustrate the point. *Professional Fire Fighters of New Hampshire v. State* held that the government is not constitutionally prohibited from increasing member contributions to a state retirement system. 107 A.3d at 1235. The Supreme Court then set forth the text of the statute (that did not specify a contract) and simply concluded that there was no unmistakable intent to establish contribution rates as a contractual right that cannot be modified. *See id.* The next year in *American Federation of Teachers v. State*, the New Hampshire Supreme Court reiterated the clear statement standard for as-

Certain courts have outright declared that magic words like "contract" are required to overcome the presumption, [281] though none in the current set of constitutional cases has gone this far. With these rulings, legislative silence would defeat constitutional challenges to public pension reform.[282] Another court indicated that a contract would not exist by mere implication other than for a narrowly defined set of circumstances.[283] Relevant circumstances also have been confined to "the party claiming the contractual right" rather than extending more broadly to the history of the regulation.[284]

Nevertheless, the majority of courts view the language and circumstances potentially amounting to a contract in a less constricted manner. In reading the text itself, some courts have confirmed that key terms such as "contract" are not required.[285] In *Moro v. State*,[286] for example, the Supreme Court of Oregon unequivocally refuted the necessity of the statute listing words like "contract," "guarantee," or "promise."[287] Nonetheless, judges agree that mandatory language like "shall" is insufficient to constitute a contract.[288] Legislation using the word "vest" is usually not enough,

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certaining whether provisions in a public pension plan is an unchangeable contract. 111 A.3d 63, 69 (N.H. 2015). State employees claimed that prospective changes to their cost-of-living allowances (COLAs) and the definition of earnable compensation violated the state and federal constitutions. *Id.* at 66. The New Hampshire Constitution prohibits retrospective laws rather than contractual impairment, but the proscription has been read to duplicate the federal Contract Clause. *See id.* at 68–69 (citing N.H. CONST. pt. I, art. 23). The court again emphasized that its analysis begins (and seemingly ends) with the statutory language itself. *Id.* at 69.

281. *See* Budge v. Town of Millinocket, 55 A.3d 484, 490 (Me. 2012) (holding that contractual rights can arise only when the statute "used express language to create contractual rights."); Spiller v. State, 627 A.2d 513, 517–20 (Me.1993) (Wathen, J., dissenting) (criticizing the majority's apparent adoption of an "iron-clad requirement" that "the statute expressly state[ ] that it is a contract" as overly simple and blind to relevant factors).

282. *See supra* notes 280–81. The Supreme Court of Illinois appeared to require such magic words in *Jones v. Municipal Employees' Annuity & Benefit Fund*, albeit to aid employees. 50 N.E.3d 596, 605–06 (Ill. 2016).

283. Moro v. State, 351 P.3d 1, 21 (Ore. 2015). These circumstances happened to include public pension benefits, but the prospective changes were ultimately deemed constitutional because the court found that the obligations that the terms required were changeable. *See id.* at 36–37.

284. *Am. Fed'n of Tchrs.*, 111 A.3d at 72.

285. *See* Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014) (explaining that expressly using the language of contract or barring the future reduction of benefits already granted would prove unmistakable intent) (citing Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys., 173 F.3d 46, 60–61 (1st Cir. 1999)).

286. 351 P.3d 1 (Ore. 2015).

287. *Id.* at 24 (refusing respondents' assertion that the legislature can satisfy the clear statement standard only by expressly describing the statutory benefit as a contract, promise, or guarantee).

288. *Id.* at 36 ("The legislature's use of 'shall,' without more, is plainly insufficient to establish the irrevocability of an offer."); *see* Justus v. State, 336 P.3d 202, 211 (Colo. 2014); Frazier v. City of Chattanooga, 151 F. Supp. 3d 830, 837 (E.D. Tenn. 2015) ("The mere use of the word "shall" does not suffice to show a clear indication of intent to be bound.");

either, to create an implied contractual commitment.[289]

Furthermore, courts have been quick to utilize a plain language analysis to declare that pension "benefits" are not the same as "obligations." *Taylor v. City of Gladsden*[290] reflects this technique. In that case, the Eleventh Circuit Court of Appeals distinguished pension "benefits" from "obligations" like employee contribution rates that merely reduce plaintiffs' compensation by deducting from their future take-home pay.[291] Courts have additionally differentiated between "benefits" and "COLAs"—especially if the legislature granted the latter in a separate statute.[292] How the COLA operates also matters. Certain courts find that the COLA is less likely to be held contractual if it has a built-in mechanism for adjustment against the consumer price index with the base pension benefit as a floor that is protected against deflationary reduction. For instance, in *Berg v. Christie*, the Supreme Court of New Jersey held that the op-

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Dodge v. Bd. of Educ., 302 U.S. 74, 79–81 (1937) (finding "shall" is not enough to support a finding of contract in case in which public employees alleged a constitutional violation due to a state statute decreasing pension benefits). In *Moro v. State*, the mandatory language did assist the court in determining that COLAs were terms of the pension contract pursuant to precedent but that the term was not unchangeable. 351 P.3d at 28–29 (citing Strunk v. PERB, 108 P.3d 1058 (Ore. 2005)).

289. Am. Fed'n. of Tchrs. v. State, 111 A.3d 63, 70–71 (N.H. 2015) (citing Nat'l Educ. Ass'n–R.I. v. Ret. Bd., 172 F.3d 22, 26, 28 (1st Cir. 1999)). In particular, the court announced that there was no language (unmistakable or otherwise) indicating that once a member vests, a contract is created whereby none of the terms of the future benefit may be modified prospectively. *Id.* at 71; *accord* Van Houten v. City of Fort Worth, 827 F.3d 530, 535 (5th Cir. 2016) (reaching same result under the Pension Clause of the Texas Constitution). *But see* Bristol/Warren Reg'l Sch. Emps. v. Chafee, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142 at *9 (R.I. Super. Apr. 25, 2014) (adopting vesting under the pension statutory criteria as when the contract is formed). Courts and commentators have created confusion by using the term "vest" to mean different things. Anenson et al., *supra* note 6, at 17 n.73 (explaining how courts do not always distinguish between satisfaction of service and retirement eligibility).

290. 767 F.3d 1124, 1133–34 (11th Cir. 2014).

291. *Id.* at 1135 (construing Alabama law).

292. Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 602–03 (6th Cir. 2016) (reviewing Kentucky legislation) (distinguishing benefits from COLAs based on statutory language); Berg v. Christie, 137 A.3d 1143, 1155 (N.J. 2016). *Contra* R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC123166, 2014 WL 1577496 at *4 (R.I. Super. Apr. 16, 2014) ("Upon retirement, under Rhode Island law, COLAs and pension benefits are one and the same, providing retirees with a vested interest in the benefits which may not be altered retroactively."). For example, in *American Federation of Teachers v. State*, the New Hampshire Supreme Court declared: "Nowhere does the statutory language state that a retirement allowance includes COLAs." 111 A.3d 63, 73 (N.H. 2015). Not all judges, however, agree on the significance of a separate statute. The dissent in *Berg v. Christie*, approving the decision of the intermediate appellate court, claimed that the statute made a clear contractual promise sufficient to overcome the presumption. 137 A.3d 1143, 1163–64 (N.J. 2016) (Albin, J., dissenting). The issue was whether COLAs were part of the promise made in a 1997 statute that employees had a non-forfeitable right to receive pension benefits "under the laws governing the retirement system" and that their "benefits program" could not be reduced. *Id.* at 1163. The dissent found it obvious that COLAs, provided for in another statute, were part of these "laws." *Id.* at 1163–64. It also asserted that the "program" included base benefits, medical benefits (that were explicitly excluded), and COLAs. *Id.; see also id.* at 1157–58.

eration of the COLAs in relation to base pension benefits demonstrated that they were distinct and not one and the same.[293] Moreover, identical to Supreme Court precedent,[294] if the statute or other legislation contains a clause that expressly reserves the right to amend it, then the "no contract" presumption appears irrebuttable.[295] Another common resource for rebuttal of the presumption is the comparison of words in the statute at issue with other pension-related statutes.[296]

In circumstances where judges may find the presumption overcome, the types of evidence considered usually amount to the standard proof of legislative intent.[297] In particular, courts frequently examine prior versions of the text.[298] The previous laws were assessed not only for what they said in relation to the present enactment, but also for the existence of different pension provisions in the former law or laws. Indeed, the number of changes

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293. Berg v. Christie, 137 A.3d 1143, 1161 (N.J. 2016) (citing Me. Ass'n of Retirees v. Bd. of Trs. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 31 (1st Cir. 2014)) (accepting as "possible" the argument that "in setting the retirement-date pension amount as the floor below which a negative CPI [consumer price index] could not reduce the allowance, the Legislature arguably treated the base pension amount as the benefit, protected against deflationary reduction, and COLA increases as potentially temporary adjustments to that benefit" (internal citation omitted)). The government in *Maine Ass'n of Retirees* asserted (and the appellate court agreed) that the base pension benefit was distinct from the COLA because the applicable and former statutory provisions for COLAs described them as "adjustments" to the benefit and because COLAs are contingent on the extra system factors like the Consumer Price Index. *Id.* at 31. It underscored that the COLA formula itself distinguished between the COLA and the base pension amount. *Id.*

294. *See* Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 467 (1985) (remarking that a reservation of right to amend "is hardly the language of contract"); discussion *supra* Section II.B.1.

295. *See, e.g.*, *Me. Ass'n of Retirees*, 758 F.3d at 31 (ruling that the legislature's inclusion of an express right to amend the statutory provision at issue negates any potential contract). Although not utilizing the "no contract" canon in Contract Clause contests, the Washington Supreme Court has had several (pension and non-pension) cases developing the dimensions of when a reservation clause is enforceable. *See* Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys., 332 P.3d 439, 4445–46 (Wash. 2014). Basically, the clause must be crystal clear. *See id.*

296. *See, e.g.*, *Berg*, 137 A.3d at 1155–56 (ascertaining the meaning of terms in related statutes that are incorporated by reference and the common definition of key words across statutes). This is often called an intertextual argument. Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 800 (19991) (defining intertextualism and contrasting it with intratextualism where judges compare the words and their position in the same statute). *Berg* illustrates an intratextual analysis as well. *See id.* at 1157 (noting textual distinctions in the same statute between the phrases "pension retirement benefits" and "pension adjustment benefits").

297. *See* HUHN, *supra* 30, at 34–39 (listing evidence of intent as drawn from the text of the law, from previous versions of the text, from its drafting history, from official comments, or from contemporary commentary).

298. *See Me. Ass'n of Retirees*, 758 F.3d at 30–31 (examining Maine pension system); *Berg*, 137 A.3d at 1160–62 (reviewing prior enactments).

over the years to the pension-related provisions likely dooms a finding of contract.[299]

Courts also refer to the history of the text, including the historical background of the law as well as the sequence of events leading up to its enactment.[300] The order of events has been particularly persuasive for courts considering the constitutionality of public pension reform.[301] But in *Cranston Firefighters v. Raimondo*,[302] even the unique negotiating history that resulted in the pension statute was deemed inadequate.[303] There, the city police and firefighters had transferred their pensions to the state pension system after a negotiation resulted in special legislation to which they claimed a contractual interest.[304] The First Circuit Court of Appeals rejected the notion that these circumstances amounted to a contract and declared the negotiation equivalent to lobbying.[305]

In addition, as part of the history of the text, judges looked at the legislative (drafting) history of the law alleged to be a contract.[306] Other courts announced that legislative history was rele-

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299. *See* Taylor v. City of Gladsden, 767 F.3d 1124, 1129 (11th Cir. 2014) (reviewing Alabama law) (observing that the contribution rate had been amended six times over the course of several decades); Justus v. State, 336 P.3d 202, 212 (Colo. 2014) ("Modifications over the past half century reflect the legislature's unbridled management of the COLA."); *Berg*, 137 A.3d at 1161 (holding that the number of changes to the COLA over the years supported the presumption against contract). *Contra* R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC123166, 2014 WL 1577496 at *6, *1 (R.I. Super. Ct. Apr. 16, 2014) (treating COLAS and benefits the same despite apparent changes to pension legislation since the retirement system was created by legislation).

300. Independent of Contract Clause challenges, the U.S. Supreme Court has specified sources of evidence to determine government intent: historical background of the decision, the specific sequence of events leading up the decision, departures from normal procedures, legislative history, and testimony of official concerning the purpose of the action. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

301. *See, e.g.,* Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694, 703–04 (Ct. App. 2016) (considering the specific sequence of events leading up to the challenged City Council's Freeze Ordinance that froze the maximum health insurance subsidy at the rate in effect in 2011). In *Fry*, these events were prior enactments, such as the 2005 Charter Amendment and subsequent ordinance by which the Council set a subsidy amount, as well as the 2006 Delegation Ordinance that authorized the Board of Pension Commissioners to change the amount in their discretion. *Id.* at 703.

302. 880 F.3d 44 (1st Cir. 2018).

303. *See id.* at 50*; cf.* U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 17–18 (1977) (finding statutory contract in view of savings and loan crisis that precipitated covenant with bondholders).

304. *Cranston Firefighters*, 880 F.3d at 50.

305. *Id.* at 50–51.

306. *U.S. Tr. Co.*, 431 U.S. at 17–18 n.14. For example, in *Justus v. State*, the Colorado Supreme Court relied on legislative history in deciding whether the legislature intended to create an unchangeable COLA formula. *See* 336 P.3d 202, 211–212 (Colo. 2014) ("[T]he legislature did not create a contract right to a COLA in the 1994 COLA amendment because the 1993 legislative history indicated that no member of the General Assembly expressed intent to create an unchangeable COLA from that date forward." (citing House Finance Committee Hearing on SB 93–1324, 1993 Legis., at 5:6–10 (Colo. Mar. 24, 1993)). Without applying the "no contract" canon, the Supreme Court of Illinois in *Jones v. Municipal Employees' Annuity & Benefit Fund* relied on legislative history in the form of constitutional convention debates (as determined in a prior precedent) to interpret the state constitution's pen-

vant to the contract inquiry but failed to use it.[307] In at least one state, legislative history is not recorded.[308] Moreover, in *Berg v. Christie*, the Supreme Court of New Jersey conditioned the use of legislative history on the statute being ambiguous (although it resorted to the drafting history as an alternative argument).[309]

Commentary on the meaning of the text is another category of evidence bearing on the intent of the legislature in the latest pension reform cases.[310] In *Taylor v. City of Gladsden*,[311] the Eleventh Circuit Court of Appeals (reviewing Alabama law) noted that the official pension handbook acknowledged that the pension provisions could change.[312] Comparably, in *Borders v. City of Atlanta*,[313]

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sion clause. 50 N.E.3d 596, 605 (Ill. 2016) (citing McNamee v. State, 672 N.E.2d 1159 (Ill. 1996) (ruling that the constitutional pension clause creates contractual rights only to receive benefits and not to control funding)).

307. The First Circuit Court of Appeals in *Maine Ass'n of Retirees v. Board of Trustees of the Maine Public Employees Retirement System* indicated that legislative history was part of the circumstances available to rebut the presumption. 758 F.3d 23, 30 (1st Cir. 2014) (citing R.I. Bd. of Corr. Offs. v. Rhode Island, 357 F.3d 42, 46 n.3 (1st Cir. 2004)) ("[A] litigant seeking to overcome the hurdle of the unmistakability doctrine may rely on not only the words used [in the statute] but also apparent purpose, context, and any pertinent evidence of actual intent, including legislative history." (internal quotation marks omitted)). Nonetheless, it indicated that such history was not relevant to its decision. *Id.* at 26 ("The district court provided a thorough review of the legislative history of MePERS and its predecessors, . . . and we need not repeat it here to answer the narrow question before us[.]") (Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps.' Ret. Sys., 954 F. Supp. 2d 38, 41–46 (D. Me. 2013)). The California Supreme Court in *Cal Fire* also agreed that legislative history could constitute an implied intent to contract. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 446 (Cal. 2019). As did the trial court in Rhode Island, R.I. Pub. Emps.' Retiree Coal. v. Chafee, No. PC123166, 2014 WL 1577496 at *4 (R.I. Super. Ct. Apr. 16, 2014), though neither court had occasion to use it. *See Cal Fire*, 435 P.3d at 446; *R.I. Pub. Emps.' Retiree Coal.*, 2014 WL 1577496, at *4 ("In addition to the statutory language, the relationship between the parties may be examined to determine the apparent purpose, context, and any pertinent evidence of actual intent, including legislative history, in support of a contractual relationship." (internal quotation and citation omitted)).

308. *See* Cranston Firefighters v. Raimondo, 880 F.3d 44, 50 (1st Cir. 2018) (assessing changes to a Rhode Island pension scheme). In *Moro v. State*, the Supreme Court of Oregon considered what it called "legislative history" to ascertain whether cost-of-living allowances (COLAs) were terms of the pension contract, but what it actually examined was the history of the COLA laws and not the drafting history of a particular law that purportedly constituted a contract. 351 P.3d 1, 30–32 (Ore. 2015).

309. Berg v. Christie, 137 A.3d 1143, 1159 (N.J. 2016). Relying on a non-pension, non-Contract Clause precedent, the New Jersey Supreme Court found this type of evidence to be inapplicable "unless there is some ambiguity on the face of the statute itself." *Id.* (citing DiProspero v. Penn, 874 A.2d 1039, 1048–49 (N.J. 2005)). In the alternative, it held that the legislative history was wanting as well. *Id.* at 1159. It examined a committee statement accompanying the statute that failed to refer to COLAs as contracts and a transcript of a legislative hearing on the pension system conducted primarily by those who never passed on the bill. *Id.* at 1159–60.

310. HUHN, *supra* 30, at 39.

311. 767 F.3d 1124 (11th Cir. 2014).

312. *See id.* at 1134 (reasoning that an official handbook reviewed by the employees before deciding on the plan explicitly stated that the contribution amount is subject to change by the Alabama legislature).

313. 779 S.E.2d 279 (Ga. 2015).

the Supreme Court of Georgia relied on the plan enrollment materials that gave notice that the pension plan provisions could be altered.[314] In contrast, courts have not found persuasive similar contemporary materials declaring that pension provisions *are* contracts.[315]

3. Evaluation

Unlike the remedial canon that has received so much scholarly attention (and criticism), the "no contract" canon has received very little, if any, consideration. Perhaps due to its narrowness in applying solely to Contract Clause challenges involving legislation—making the canon both method and doctrine—it has been overlooked in the canons literature.[316] The foregoing analysis has sought to fill this space. Among other things, it identifies the canon's origins, underlying philosophy, and the extent to which courts apply it.

Ironically, federal law supplies the source of authority for the description and strength of the canon qua clear statement rule.[317] This may be unexpected given the U.S. Supreme Court's insistence on deference to the state law of contract even in federal constitutional Contract Clause claims.[318] The canon is also treated as precedent (not merely methodology) in both federal and state courts considering whether pension law constitutes a contract.[319] It is notable too that following federal law further, state courts have stretched the "no contract" canon to cover contract existence *and* interpretation (including what the terms require).[320] Arguably, at least in those states that do not use the canon, federal courts could

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314. *Id.* at 285–86 (concluding that the plan enrollment materials that were set by state legislature explicitly provided for changes so the employees consented to prospective changes in their contribution rates). Notably, the court invoked the default rules of private contract law and not the "no contract" canon for government contracts. *See id.* at 285.

315. *See* Cal Fire Local 2881 v. California Pub. Emps.' Ret. Sys., 435 P.3d 433, 454 (Cal. 2019) (CalPERS publication).

316. Yet other constricted canons like the equity canon, and especially the *Chevron* canon, have had their fair share of critique. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017) (providing an overview of arguments opposing the *Chevron* canon).

317. *See supra* Section II.B.2.a.

318. *See supra* note 210. While the question of contract under the federal Contract Clause is one of federal and not state law, Me. Ass'n of Retirees v. Bd. Of Trs. Of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23, 29 (1st Cir. 2014), federal courts "accord respectful consideration and great weight to the views of the state's highest court." Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (internal quotation marks omitted).

319. *See supra* Section II.B.

320. *See, e.g.*, Moro v. State, 351 P.3d 1, 36–37 (Ore. 2015); *see also* Anenson et al., *supra* note 11, at 55.

violate the *Erie* doctrine when applying the federal unmistakability doctrine to determine whether a contract exists under the Contract Clause of a state constitution.[321] In applying the "no contract" canon, though, federal and state courts have looked to persuasive authority from other jurisdictions dealing with the same type of pension reform in addition to their own precedent.[322]

Judges have endorsed the twin rationales of legislative intent and separation of powers. So, the legislative authority-accepting edict may be seen as a normative as well as a descriptive assumption about the legislative process.[323] The canon not only helps figure out what statutes are trying to achieve but also answers broad institutional questions about the relationship between courts and legislatures.[324]

The majority (but certainly not all) of the new constitutional cases use the "no contract" canon in construing legislation to discern the existence of a pension contract.[325] In most of those cases, employees did not overcome the assumption against unchangeable legislative agreements. This is true despite the availability of a broad list of rebuttal evidence that could include purpose, context, and legislative history.[326] Although a few courts emphasized text as the essential indicator of contractual intent, implied-in-fact contracts are possible in theory. Again, in outlining the sources of proof outside of the text itself, those sources were unlikely to overcome the presumption against contract. Indeed, if anything, other types of evidence worked in favor of the government employer. In particular, all but one court (a trial court) took statutory changes to mean a lack of contractual intent.[327] Supplemental commentary on the statutory provisions additionally worked against the employee. In a kind of "heads-I-win, tails-you-lose" scenario, courts found advice that the pension benefits were not contracts persua-

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321. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts must resolve issues not governed by positive federal law—that is, statutes, treaties, and the Constitution—according to state law); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) (arguing that *Erie* requires federal courts to apply state rules of statutory construction when interpreting state law).

322. *See supra* Section II.B.2.a.

323. *See supra* Section II.B.2.b.; *infra* Part III.

324. *See* Shapiro, *supra* note 21, at 924; *supra* Section II.B.2.b.

325. *See infra* Appendix; Anenson et al., *supra* note 11, at 27–37.

326. *See supra* Section II.B.2.d.

327. *See supra* Section II.B.2.d. While many courts considered the history of statutory changes leading up to the alleged statutory contract, the *Berg* court took the analysis one step further by declaring that the reform statute itself indicated the lack of an intent to contract. Berg v. Christie, 137 A.3d 1143, 1162 (N.J. 2016).

sive, whereas similar advice that they were contracts was disregarded.[328]

Legislative history was almost universally available to rebut the presumption against contractual intent.[329] Courts considered this evidence, which it has been the subject of heated debate in scholarly circles.[330] Legislative history is the most common evidence of intent.[331] Without it, proving a clear and unmistakable contract would be even more difficult.

A few state supreme courts allow the employment context to automatically rebut the presumption.[332] In doing so, these courts were following precedent.[333] But it did not affect the outcome. They either determined that the pension reform provision at issue was not a term of the contract or, if a term, it was not unchangeable.[334] Hence, the general complaint described in Part I about "loose canons" that apply irrespective of their environment does not seem to hold.[335]

Probably the most stringent reading of the "no contract" canon is in those cases where a clear contract could not exist if the government proposes a possible alternative interpretation. The Supreme Court of New Jersey in *Berg v. Christie* underscored that a Contract Clause challenge to public pension reform is not an ordinary statutory interpretation case.[336] It found both sides made "reasonable" arguments that were in some respects "equally persuasive,"[337] but that its job was not to choose which argument more likely reflected the legislative intent.[338] Rather, the court declared that it was the plaintiffs' burden to prove that the intent to contract was unmistakable, which they failed to do.[339] Thus, the supreme court ruled that the retired government employees could not pre-

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328. *See supra* Section II.B.2.d.
329. *See supra* Section II.B.2.d.
330. *See, e.g.*, Shapiro, *supra* note 21, at 956 n.177 (outlining legislative history debate).
331. *See* HUHN, *supra* note 30, at 38 (clarifying that as a bill becomes law, each step in the legislative process is documented); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997) (listing types of legislative history by importance, beginning with committee reports, markup transcripts, committee debate and hearing transcripts, and transcripts of actual floor debate).
332. *See, e.g.*, Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 446–48 (Cal. 2019); Moro v. State, 351 P.3d 1, 21 (Ore. 2015).
333. *Cal Fire*, 435 P.3d at 446–48; *Moro*, 351 P.3d at 21; *accord* Krishnakumar, *supra* note 25, at 826 (empirical study concluding that the U.S. Supreme Court's own precedents are "the unsung gap-filling mechanism that the justices turn to when confronted with unclear statutory text").
334. *See, e.g.*, *Cal Fire*, 435 P.3d at 447–53; *Moro*, 351 P.3d at 36–37.
335. *See* discussion *supra* Part I and *infra* Part III.
336. Berg v. Christie, 137 A.3d 1143, 1158 (N.J. 2016).
337. *Id.*
338. *Id.*
339. *Id.* at 1158–59.

vail on their Contract Clause claim.[340] Similarly, two plausible opposing arguments negated a pension contract in *Cranston Firefighters v. Raimondo*.[341] In construing a Rhode Island pension scheme, the First Circuit Court of Appeals declared that the ambiguity inherent in the different reading meant that the language failed to indicate a statutory contract.[342]

Finally, application of the clear statement rule is not entirely uniform. Most courts apply it at the beginning of the interpretative exercise, but a minority of courts invoke the canon only if the language of the statute is ambiguous.[343]

C. *Constitutional Avoidance Canon*

The constitutional avoidance canon evades the undesirable consequence of interpreting a statute in opposition to the U.S. Constitution or a state constitution.[344] There are two versions of the avoidance canon: the unconstitutionality canon and the doubts canon.[345] The former version avoids an interpretation that would render the statute unconstitutional.[346] The latter version avoids constitutional concerns even when the broader interpretation would not be invalid.[347] Both versions influenced the public pension reform cases.

1. Overview

The unconstitutionality canon originated shortly after the "no contract" canon in a case authored by Justice Joseph Story in

340. *Id.* at 1162.

341. 880 F.3d 44, 48–49 (1st Cir. 2018) (endorsing prior decision in *Parker* wherein the word "due" could mean currently due because the employee had retired and the benefits were payable or vested and payable in the future).

342. *Id.* (assessing changes to a Rhode Island pension scheme).

343. *See* R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149, at *5 (R.I. Super. Ct. Apr. 25, 2014) (conditioning canon on ambiguity); *accord* Borders v. Atlanta, 779 S.E.2d 279, 285 (Ga. 2015) (conditioning private law contract canons on textual ambiguity and explaining that if canons do not resolve the ambiguity then the issue is for the jury).

344. *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (reviewing Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015)).

345. Eskridge, *supra* note 34, at 1020–21.

346. *Id.*

347. *Id.* at 1021; Sunstein, *supra* note 2, at 459 (explaining that the doubts canon is construed so as to steer clear of constitutional doubt).

1814.[348] It matured in the late nineteenth century.[349] The U.S. Supreme Court created the doubts canon almost a century later in 1909,[350] although it was popularized in 1936 by Justice Brandeis in a concurring opinion.[351] Both versions of the avoidance canon had their genesis in the federal courts and were later followed by the state courts.

The avoidance canon arose with the power of judicial review after the adoption of the U.S. Constitution.[352] As a result of the extraordinary authority to strike down legislation, judges gave assurances that they would not exercise it unless they had no reasonable alternative. Similar to the "no contract" canon, courts described the avoidance canon as a means of effectuating legislative intent and furthering separation of powers.[353] Unlike the remedial canon, which has antecedents in English law, and like the unmistakability doctrine, the avoidance canon is American-made.

Even earlier than the avoidance canon itself, courts construed statutes during the first fifty years after the founding so as to avoid nullifying actual or potential constitutional conflicts under the "clear case" standard of review.[354] This standard of proof was trans-

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348. *See* Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156); Barrett, *supra* note 31, at 139, 140–41 n.144 (listing cases as early as 1800 intimating the canon).

349. *See* Barrett, *supra* note 31, at 139, 142 (tracing the avoidance canon to early treatises and case law).

350. *See* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997) (identifying the genesis of the doubts canon).

351. *See* Nagle, *supra* note 350, at 1495–96; Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

352. *See* Barrett, *supra* note 31, at 139 (citing G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 178, at 246 (1888)) (describing avoidance canon as "[a] presumption of much importance in this country, but, of course unknown in England, where the courts cannot question the authority of Parliament, or assign any limits to its power").

353. *See id.* at 143 (mentioning that the avoidance canon often supports legislative intent). For cases illustrating the separation of powers rationale, see *State v. Lubee*, 45 A. 520, 521 (Me. 1899) (" 'It is but a decent respect,' says Mr. Justice Washington in *Ogden v. Saunders*. . . 'due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation is proved beyond all reasonable doubt.' "); *State v. Brockwell*, 193 S.E. 378, 379 (N.C. 1936) ("This principle is founded upon a proper respect for the intelligence and good faith of a co-ordinate department of the state government, which derives its authority from, and is responsible to, the people of the State, as is the case with the judicial department."); and *State v. Ide*, 77 P. 961, 962 (Wash. 1904) ("We have mentioned these well-established rules because we believe that they should always be kept in mind when the court is called upon to declare invalid an act of the lawmaking body, a co-ordinate and independent department of the government.").

354. *See* Barrett, *supra* note 31, at 140 ("[T]he 'very clear case' rationale is the most common formulation of the general proposition that courts should avoid striking down statutes for unconstitutionality."). According to Professor (now Justice) Amy Coney Barrett, the first case adopting the rule appears to be from 1796. *See id.* (quoting Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796)).

formed forty years later into "beyond a reasonable doubt."[355] Though technically not an assumption, courts often combine the standard and canon whereby the standard is the measure of evidence needed for rebuttal.[356]

The constitutional avoidance canon has been subject to intense debate.[357] Scholars have supported the canon on the grounds that it gives constitutionally protected interests an added measure of breathing space.[358] Professor Cass Sunstein, in particular, has endorsed the canon because it provides implicit interpretive instructions to the legislature.[359] In his view, the aim of the canon is to capture an actual or hypothetical legislative judgment.[360] As a general matter, the avoidance norm tracks an understanding about how a legislature would want courts to interpret legislation: that statutes should be construed to avoid constitutional invalidity and not to figure out the precise meaning in a particular case. Accordingly, the canon can be justified as an accurate reflection of a preference for validation rather than invalidation.

Most of the legal community, however, is more critical. Exceeding even the criticism of the remedial canon, scholars condemn the avoidance canon on authority or rule of law grounds.[361] A few

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355. Both federal and state law seemed to spring from an opinion by Justice Washington in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827); *cf.* Ogden v. Saunders, 25 U.S. (2 Wheat.) 213, 294 (1827) (Thompson, J., concurring) (articulating the "clear" standard).

356. In *Indiana ex rel. Anderson v. Brand*, one of the commonly cited U.S. Supreme Court cases in public pension reform litigation, Justice Black in dissent cited the beyond a reasonable doubt standard. 303 U.S. 95, 110 (1938) (Black, J., dissenting) (concluding that "the record does not disclose beyond a reasonable doubt" that the state statute "surrendered its sovereign, governmental right to change and alter at will legislative policy related the public welfare.").

357. *See* Krishnakumar, *supra* note 25, at 834 (calling the avoidance canon one of the most famous substantive canons). For a sampling of the literature, see, for example, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997) (calling the avoidance canon suboptimal given game theory analysis); Katyal & Schmidt, *supra* note 344, at 2129–53 (evaluating the use of the avoidance canon in recent Supreme Court cases); Harry H. Wellington, Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 S. CT. REV. 49, 49–50, 73 (faulting a specific application of the avoidance canon).

358. Shapiro, *supra* note 21, at 941.

359. Sunstein, *supra* note 2, at 456.

360. *Id.*

361. For power problems, see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834–35 (2001), which calls for the abandonment of the avoidance canon on separation-of-powers grounds; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S. CT. REV. 223, 228, which criticizes the enforcement of the nondelegation doctrine through the use of the avoidance canon; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983), which argues that the avoidance canon creates a "judge-made penumbra" with a similar prohibitory effect as the Constitution; and Frederick Schauer, Ashwander *Revisited*, 1995 S. CT. REV. 71, 94–95, which criticizes the avoidance canon as being disguised judicial activism. For rule of law issues, see Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L.

judges (either in their decisions or extrajudicial writings) have also taken aim at this canon, usually complaining that it is a form of judicial activism.[362] Yet despite these long-standing complaints, state and federal judges still apply the canon of constitutional avoidance with remarkable regularity. In fact, as analyzed below, the avoidance canon is a repeated incantation by judges faced with constitutional challenges to public pension reform.

2. Application

There are ten public pension reform cases across eight states where judges have invoked the constitutional avoidance canon.[363] In all but one case, courts applied the unconstitutionality and not the doubts canon.[364] Courts also almost unfailingly invoked the canon at the beginning of the interpretative exercise.[365] The effect of the canon's application is that judges basically assume that the statute at issue is constitutional.[366] As such, the canon appears to operate as a burden allocator. For example, the Supreme Court of Arizona in *Fields v. Elected Officials' Retirement Plan*[367] declared: "We presume that the statute is constitutional, and a 'party asserting its unconstitutionality bears the burden of overcoming the presump-

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REV. 1, 12 (1996), which analyzes the Supreme Court's invocation of the avoidance canon and concludes that it "has neither determined how much ambiguity is required to apply the canon, nor has it suggested guidelines, factors or circumstances to include in an ambiguity analysis."

362. *See* Reno v. Flores, 507 U.S. 292, 314 n.9 (1993) (describing the avoidance canon as "the last refuge of many an interpretive lost cause"); Clay v. Sun Ins. Off. Ltd., 363 U.S. 207, 213–14 (1960) (Black, J., dissenting) (reproaching the Court for "carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme," and insisting that "there are times when a constitutional question is so important that it should be decided even though judicial ingenuity would find a way to escape it"); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* FELIX FRANKFURTER: THE JUDGE 30, 45 (Wallace Mendelson ed., 1964) (warning that the avoidance canon risks judicial rewriting of statutes); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 284–86 (1985) (fearing aggrandizement of the court via interpretation). These studies have focused on the federal bench, especially the Supreme Court.

363. The cases include seven majority opinions and one dissent from the following states: California, Colorado, New Hampshire, Michigan, New Jersey, North Carolina, and Washington. *See infra* Appendix. Two Arizona Supreme Court decisions also used the canon, but to interpret the state Pension Clause. *Id.*

364. *See* Pro. Fire Fighters of N.H. v. State, 107 A.3d 1229, 1233 (N.H. 2014) ("When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.") (citing Bd. of Trs., N.H. Jud. Ret. Plan v. Sec'y of State, 7 A.3d 1166, 1233 (N.H. 2010)). The Supreme Court of New Hampshire actually articulated both versions of the avoidance canon. *See Bd. of Trs., N.H. Jud. Ret. Plan*, 7 A.3d at 1171.

365. *See, e.g.*, *Pro. Fire Fighters*, 107 A.3d at 1233 (N.H. 2014).

366. *See, e.g.*, Berg v. Christie, 137 A.3d 1143, 1162 (N.J. 2016) (The statute "enjoys a presumption of constitutionality"); Wash. Educ. Ass'n v. Wash. Dept. of Ret. Sys., 332 P.3d 439, 443 (Wash. 2014) ("This court presumes that statutes are constitutional as enacted.").

367. 320 P.3d 1160 (Ariz. 2014).

tion.' "[368] Seen in this light, the assumption of constitutionality does not appear to do anything more than what the procedural law already requires; that is, the plaintiff must prove the case. [369]

All the same, in many decisions applying the avoidance canon, courts elevated the burden of proof to "beyond a reasonable doubt" as opposed to a mere "preponderance of the evidence."[370] Other courts set alternative burdens like "inescapable," which are perhaps as high.[371] Certain courts articulateded the traditional burden as requiring the constitutional violation be "clear"[372] or at least "free from all reasonable ambiguity."[373] This standard appears closest to the burden for overcoming the "no contract" canon.[374]

The rationales of the avoidance and "no contract" canon also overlap. Following the U.S. Supreme Court's lead in *United States v. Winstar Corp.*,[375] the Supreme Court of New Jersey in *Berg v. Christie*[376] listed constitutional avoidance as one of the two purposes of the unmistakability principle.[377] This symmetry makes sense because the avoidance canon applies to all constitutional claims while the unmistakability doctrine is restricted to one reason that the leg-

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368. *Id.* at 1164 (quoting Eastin v. Broomfield, 570 P.2d 744, 748 (Ariz. 1977)); *accord* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1112 (Ariz. 2016) (addressing whether a change to a state pension plan violated the Pension Clause of state constitution).

369. Some courts do not specify what level of proof is necessary to overcome the presumption of constitutionality. *See Hall*, 383 P.3d at 1113; *Berg*, 137 A.3d at 1162.

370. *See, e.g.*, Justus v. State, 336 P.3d 202, 208 (Colo. 2014) ("We begin with the presumption that a statute is constitutional; we uphold the statute unless it is proved to be unconstitutional beyond a reasonable doubt.") (citing E–470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1041 (Colo. 2004)); *Wash. Educ. Ass'n*, 332 P.3d at 443 ("This court presumes that statutes are constitutional as enacted. The challenging party, in this case the respondents, must establish that there is no reasonable doubt that the statute violates the constitution." (internal quotations and citations omitted)). North Carolina appellate courts likewise "presume[] that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found [to be] unconstitutional beyond a reasonable doubt." Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645, 650 (N.C. Ct. App. 2019) (quoting N.C. Ass'n of Educs. v. State, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016) (citations omitted)). The North Carolina Supreme Court first articulated the reasonable doubt standard in 1936 without citation. *See* State v. Brockwell, 183 S.E. 378, 379 (N.C. 1936).

371. *See* Pro. Fire Fighters of N.H. v. State, 107 A.3d 1229, 1233 (N.H. 2014) (holding that the legislation "will not be declared to be invalid except upon inescapable grounds").

372. *See* AFT Mich. v. State, 893 N.W.2d 90, 104 (Mich. App. 2016) (Saad, J., dissenting) ("I begin with the established principle that legislative enactments are presumed to be constitutional absent a clear showing to the contrary.").

373. Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 388 (Ct. App. 2016) ("The party asserting a contract clause claim has the burden of 'mak[ing] out a clear case, free from all reasonable ambiguity,' [that] a constitutional violation occurred." (citations omitted)), *review denied*, S237460, 2020 WL 5667326 (Cal. Sept. 23, 2020) (mem.).

374. In fact, in *Marin Ass'n of Public Employees*, the appellate court used the avoidance canon for a Contract Clause challenge without citing any other canons. *See id.* at 388–89.

375. 518 U.S. 839, 875 (1996) (plurality opinion); *see supra* Section II.B.2.

376. 137 A.3d 1143 (N.J. 2016).

377. *Id.* at 1153.

islation is unconstitutional: it violates the Contract Clause.[378] In applying both canons, the *Berg* majority explained the relationship by stating that "the Legislature's view that its prior [pension statute] did not prevent future [changes] is relevant to our consideration."[379]

Most of the public pension opinions do not elaborate on the philosophy of the avoidance canon, but the same theory of preserving separation of powers and legislative intent can be found in each state's earlier decisions.[380] The Supreme Court of New Hampshire did suggest a separation of powers rationale in its latest public pension decision. In *Professional Fire Fighters of New Hampshire v. State*,[381] the court explained: "The constitutionality of an act passed by the coordinate branch of the government is to be presumed . . . and the operation under it of another department of the state government will not be interfered with until the matter has received full and deliberate consideration."[382]

Concerning court recognition of conflicts among the canons, in only one case where lawyers raised the remedial canon did a court acknowledge the contradiction between it and the avoidance canon. In *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*,[383] the California Court of Appeals opined that it was the employees' burden to prove a constitutional violation in the form of a prior contract despite observing that the remedial canon requires the opposite presumption.[384] Although the court pointed out the incongruence between these two canons, it never resolved the issue. The courts that have cited the "no contract" canon and the avoidance canon, which both operate against a contract for pension benefits, have not distinguished between them.[385]

3. Evaluation

The constitutional avoidance canon is a presumption that provides a default answer as to whether a statute is valid. In this regard, judges in the new pension cases do more than fill in a gap

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378. Note, of course, that the "no contract" canon applies to the former legislation while the avoidance canons applies to the later reform legislation.
379. *Berg*, 137 A.3d at 1162.
380. *See, e.g.*, State v. Brockwell, 193 S.E. 378, 379 (N.C. 1936).
381. 107 A.3d 1229 (N.H. 2014).
382. *Id.* at 1233 (quotation marks, citations, and brackets omitted).
383. 227 Cal. Rptr. 3d 787 (Ct. App. 2018), *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020).
384. *See id.* at 804.
385. *See, e.g.*, Berg v. Christie, 137 A.3d 1143, 1162 (N.J. 2016) (indicating that both canons operate to presume there is no statutory contract to pension benefits).

left open by statutory silence. But it is difficult to tell how far a court is willing to push the statutory language to escape unconstitutionality. Approximating the unmistakability doctrine, courts seem to require the legislature to speak with particularity in order to achieve a result contrary to the constitution.

As set forth in Section II.C.2, there are a variety of different standards for rebutting the presumption of constitutionality. Some courts state no standard at all whereas others require proof beyond a reasonable doubt.[386] Certain courts describe the standard as "inescapable" or, as with the "no contract" canon, specify simply that the showing be "clear."[387] Consequently, the avoidance assumption can carry different degrees of strength. Because it is often invoked in conjunction with the "no contract" canon, the canon of constitutional avoidance appears to be of secondary weight. The avoidance canon usually appears as part of the background discussion at the beginning or end of the opinion and rarely makes it into the analysis.[388]

Because courts sometimes invoke the avoidance canon even without the "no contract" canon, the former seems to serve as a substitute for the latter. For those states or courts that fail to employ the "no contract" canon, the avoidance canon has more teeth.[389] This is particularly apposite with the "clear" standard for rebuttal. When courts use both canons, however, the "no contract" canon does the heavy lifting.

Courts appear to have a relatively uniform understanding of why they are applying the avoidance canon: to save as much law as possible from nullification. There are oblique references to the canon's foundation in the separation of powers concept with some courts treating the canon as a proxy for legislative intent.[390] No doubt extolling on its philosophy seems unnecessary for such a wide-ranging canon (applicable to all legislative provisions being challenged as unconstitutional) because it is an established part of the interpretative lexicon. As a final point, akin to the "no contract" canon, most courts begin with the avoidance canon.[391] Oth-

386. *See* discussion *supra* Section II.C.2.
387. *See* discussion *supra* Section II.C.2.
388. *See, e.g.*, Berg v. Christie, 137 A.3d 1143, 1162 (N.J. 2016) (citing avoidance canon at end of analysis). *Compare* Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1113 (Ariz. 2016) (citing avoidance canon at the beginning of discussion) *with id.* at 1131 (Bolick, J., dissenting in part and concurring in part) (citing same canon at the end of the decision).
389. *See* discussion *supra* Section II.C.2.
390. *See* discussion *supra* Section II.C.2.
391. *See* discussion *supra* Section II.C.2.

ers do not apply it unless the language is ambiguous such that the plain meaning rule prevails.[392]

III. CHOOSING AND COMMUNICATING CANONS

The foregoing analysis demonstrates that canons are a pervasive feature of the public pension law landscape. Given the continuing national pension crisis as well as the impact of methodology on the constitutionality of reforms, it is high noon for these dueling canons of construction. The previous examination provides a necessary framework with which to answer important doctrinal, jurisprudential, and theoretical questions. For example, which canons, if any, are appropriate as interpretative aids in construing public pension legislation? If their use is justified, when are they properly applied? In other words, how should courts employ a canon or canons? What are (or should be) the limitations of the canon(s)? What values do canons serve? Are they justified on judicial authority and rule of law grounds?

The central aim of this study is to make it easier to understand the actual dynamics of the interpretative process. A detailed documentation should provide a clear background against which legislatures and courts can do their work. It should also increase candor and transparency in the interpretation of legislation involving public pension benefits. It should additionally clarify the condition of contract obligation in the constitutional analysis.[393]

A. *Importance of Canon Choice*

As an initial matter, it is worth emphasizing that the choice of canons can be outcome determinative. In a majority of the courts studied, the "no contract" canon applies at the beginning of the analysis and a clear statement (albeit an implicit one) is required to negate its application.[394] So, too, with the constitutional avoidance canon.[395] Most courts assume statutes are constitutional at the start of the interpretative enterprise and this assumption is overcome only with a level of clarity that is beyond a reasonable doubt.[396] Clarity also negates the remedial canon, but a liberal con-

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392. *See* discussion *supra* Section II.C.2.

393. *See* ELY, *supra* note 9, at 1 (explaining that "the criteria for invoking the contract clause remain uncertain").

394. *See* discussion *supra* Section II.B.

395. *See* discussion *supra* Section II.C.

396. *See* discussion *supra* Section II.C.

struction is not even available unless the legislative enactment is ambiguous.[397] Thus, determining whether the written law is clear or ambiguous precedes the possibility of resort to the remedial canon.[398]

The difference in operation between the remedial and "no contract" canon is illustrated in *Berg v. Christie*. In its decision, the majority acknowledged that both sides had made reasonable arguments, which meant that the plaintiffs could not meet the unmistakable intent standard.[399] The fact that there were two equally good interpretations presumably made the statute ambiguous.[400] Had the remedial canon been applicable, it would have supported an opposing construction in favor of a contract. So, choosing the right canon is decisive. It allows judges to put their thumb on the scale. With the "no contract" and avoidance canons, that scale is weighted in favor of constitutionality and against a pension contract with unchangeable terms.

B. *Suggested Canon Hierarchy*

In deciding between the remedial canon and the "no contract" canon, the Supreme Court of New Jersey in *Berg v. Christie* traced the tradition of the clear statement rule back to the early nineteenth century.[401] The majority may have felt compelled to solidify the foundation of the "no contract" canon given that the remedial canon was a viable alternative.[402] Remember the pedigree of the remedial canon. It not only has English roots but also appeared in venerable sources such as Blackstone.[403] The historical foundation of the unmistakability doctrine was obviously indispensable to the U.S. Supreme Court as well because it corrected the canon's ori-

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397. *See* discussion *supra* Sections II.A.2–3; Watson, *supra* note 53, at 245 (discussing cases outside the public pension context that are inconsistent on whether courts begin with the presumption or only use the remedial canon after a finding of ambiguity). Only a few courts express a trigger of ambiguity for the avoidance or "no contract" canon. *See* discussion *supra* Sections II.B.3, II.C.3.

398. *See* discussion *supra* Section II.A.

399. Berg v. Christie, 137 A.3d 1143, 1158–59 (N.J. 2016). The court clarified: "This is not an ordinary statutory interpretation case, so our task here is not to determine which textually based argument is more likely than not the actual intent of the Legislature." *Id.* at 1158. The same would be presumably true of the canon of constitutional avoidance. For most courts, it too applies without a condition of ambiguity. *See supra* Section II.C.

400. *See id.* at 1158–59 (explaining that all parties made many reasonable arguments and that "one is already outside the realm of unmistakable clarity needed to find a statutory contract right" if there is ambiguity).

401. 137 A.3d at 1152 (N.J. 2016) (citing Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 551 (1837)).

402. *See id.* at 1150–51; Section II.A.2.

403. *See* discussion *supra* Section II.A.1.

gins in *United States v. Winstar Corp.*[404] According to the Court, the emergence of the doctrine dates to the early republic.[405] Tradition, of course, is a key rule of law ethic and advances the value of social cohesion.[406] It is to be expected that courts highlight a canon's history. Though pedigree does not necessarily resolve the choice. All of the canons have an ancestry, even if the avoidance and "no contract" canons came later as unique American inventions.

The source of the canon should likewise be considered in any potential hierarchy. The "no contract" and avoidance canons are constitutionally inspired by the principle of separation of powers.[407] In fact, the former canon is based on inter-branch (judiciary and the legislature) as well as intra-branch (legislature to subsequent legislature) relations.[408] Although all three canons are sensitive to the democratic primacy of the legislature,[409] the constitutional basis of the unmistakability doctrine should defeat the remedial canon that is tied to the particular purposes of the legislation.

Arguably, too, the remedial canon should be replaced because it does not help with the preliminary question of whether the pension statute or ordinance constituted a contract.[410] Relatedly, careful of the canon's free-wheeling potential, courts have already limited application of the remedial canon selectively to one part of a statute and not another.[411] Indeed, under the private pension law of the Employment Retirement Income Security Act, whether the legislative language should be strictly or liberally construed depends on the particular provision at issue.[412] Thus, courts are cognizant of choosing a canon of statutory construction that best fits the situation.

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404. *See* discussion *supra* Section II.B.1.

405. *See Berg*, 137 A.3d at 1152; discussion *supra* Section II.B.1.

406. *See* HUHN, *supra* note 30, at 49; T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 668–89 (2017) (discussing the value of tradition).

407. *See* discussion *supra* Sections II.B.2.b, II.C.1.

408. *See* discussion *supra* Sections II.B.1–2.b.

409. *See* discussion *supra* Sections II.A.3, B.3, C.3.

410. *Cf.* Samantar v. Yousaf, 560 U.S. 305, 320 (2010) (explaining that the common law canon helps courts interpret statutes that clearly cover the field and does not assist in answering the antecedent question).

411. *See* Standard Oil of Conn., Inc. vs. Adm'r, Unemployment Comp. Act, 134 A.3d 581, 608–09 (Conn. 2016) (ruling that not all portions of a statute are intended to have remedial effect and that the application of the canon should be restrained in order to effectuate the legislative compromise); Reisch v. State, 668 A.2d 970, 977 (Md. Ct. App. 1995) (explaining that the remedial portion of the statute may be liberally construed while the other provisions must be strictly construed); discussion *supra* Section II.A.1.

412. *Compare* IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986) (using the remedial canon to assist in interpreting Section 1399 of ERISA) *with* Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 233, 226 (3d Cir. 2010) (finding that ERISA is a remedial statute but not examining congressional intent because the meaning of Section 510 is clear).

There are scholars, however, who would likely endorse the remedial canon in public pension reform litigation.[413] For example, even though he did not assess competing canons in particular, Professor Jack Beermann questioned the presumption against contract in the government employment relationship.[414] He has argued for a more protective contract right to pensions for government employees than other academics studying such employee benefits.[415] His principal point is that the pension crisis is a "human crisis."[416] Beermann's rationale largely stems from the presumed reliance of employees making a modest income, especially those who are not able to participate in Social Security.[417]

With the individual impact of public pension reform in mind, the best evaluation of the canon controversy may be to contextualize the remedial canon. It is a meta-canon in that it is not statute-specific or even directed at a particular field. A more tailored version may fare better in confronting the "no contract" canon. Arguably, the heart of the remedial canon in the public pension context is sensitivity to the retirement security of a potentially disadvantaged group.[418] The remedial canon, viewed in this light, connotes a public pensioner canon. There are long-settled canons that protect vulnerable groups like veterans and Native Americans.[419] The Indian canon can be traced to Chief Justice John Marshall who resolved an ambiguity in favor of the less powerful "unlettered people."[420] This canon bears a resemblance to how courts treat con-

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413. *See generally* Donald C. Carroll, *The National Pension Crisis: A Test in Law, Economics, and Morality*, 50 U.S.F. L. REV. 469 (2016) (framing the debate about the pension crisis from a moral perspective).

414. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 51–52 (2013) (discussing state constitutional law and questioning the use of this textual canon when the government is acting as an employer).

415. *Id.* at 85. The issue is whether pensions should be protected from reduction for work not yet performed (prospective) or whether they should only protect work already performed like in the private pension world (with ERISA as the appropriate analogy) or other employment at will contracts. Monahan, *supra* note 92, at 1078–79; *see also* Anenson et al., *supra* note 6, at 29 (more or less endorsing the same view). To date, courts have given different answers to when a contract is formed: first day, last day, and somewhere in between. *Id.* at 22–27.

416. Beermann, *supra* note 414, at 85–86.

417. *Id.* at 85 (concluding that government workers "have structured their finances and made career choices and personal decision in reliance on their pension expectations").

418. *See* discussion *supra* Section II.A.

419. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 686–87 (1993) (asserting that the Court will not interpret a statute to abrogate the treaty rights of Indians unless "Congress clearly express[es] its intent to do so").

420. Barrett, *supra* note 31, at 151 (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 386 (1993)). Because the dispute in that case was between two private parties, Marshall did not actually apply the canon. Patterson v. Jenks, 27 U.S. (2 Pet.) 216, 229 (1829). Marshall's opinion that popularized the canon though was *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 541

tracts of adhesion and even rules of contract construction such as construing contracts against the drafter.[421] Similarly, equity judges developed maxims and other assumptions to protect widows and other defenseless parties.[422] One might ask, therefore, whether government employees should be a protected class for purposes of statutory interpretation.

While not specifically addressing the canon question, our previous research is instructive. It underscored three aspects of the government employment relationship concerning pension benefits: hardship, hidden action, and vulnerability.[423] First, plan failure would result in severe hardship to recipients.[424] Employees in the worst-funded plans lack the federal safety net of Social Security.[425] Further, unlike the private sector, the federal government does not oversee state and local pensions nor are there any insurance programs to provide benefits when the plans fail.[426] As Amy Monahan's research also illustrates, there is no effective recourse either to compel compliance with funding requirements to avoid plan failure or to force legislatures to appropriate funds, raise taxes, or incur debt in the event of insolvency.[427] Of course, reducing pension and related benefits does not mean eliminating them. The idea is that the magnitude of the loss falls disproportionately on participants rather than the costs being spread across the general public

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(1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001). *See id.* at 582 (M'Lean, J., concurring) (using the phrase "unlettered people").

421. Barrett, *supra* note 31, at 151–52. The Indian canon began in treaty interpretation and later evolved to statutory interpretation. *Id.*

422. *Cf.* Anenson, *supra* note 59, at 40 ("If used correctly and consistently, however, canons limit appellate discretion similar to the way that equitable maxims constrain trial court discretion.").

423. *See* T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View From Equity*, 50 U. MICH. J.L. REFORM 251, 266–68 (2017) (developing an equitable theory of fiduciary law for the administration of public pensions).

424. *Id.* at 266 ("Failing to provide the promised retirement benefits when due results in financial devastation—or the very real possibility of such destitution—to pension plan participants and their families."); Dana M. Muir, *Decentralized Enforcement to Combat Financial Wrongdoing in Pensions: What Types of Watchdogs Are Necessary to Keep the Foxes Out of the Henhouse?*, 53 AM. BUS. L.J. 33, 67 n.212 (2016) ("Lack of retirement plan coverage strongly correlates with poverty of individuals in their fifties.").

425. Anenson et al., *supra* note 6, at 6–7 (comparing fifty state-defined benefit pension plans for teachers and finding that the non-Social Security plans are at an even greater risk of not being able to meet promised benefit payments); *see also* Beermann, *supra* note 414, at 20 (commenting that about one in four public employees do not contribute to Social Security).

426. Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 314 (2007).

427. Amy B. Monahan, *When a Promise is note a Promise: Chicago-Style Pensions*, 64 UCLA L. REV. 356, 362 (2017); Amy B. Monahan, *Who's Afraid of Good Governance? State Fiscal Crises, Public Pension Underfunding, and the Resistance to Governance Reform*, 66 FLA. L. REV. 1317, 1322 (2014) (qualitative study of the funding and governance provision of twelve public pension plans).

(usually in the form of increased taxes or decreased government services).[428] Second, as we have previously advised, public pensions are "shrouded in secrecy."[429] There is a lack of transparency as to the health of the plans and no uniform standards across plans.[430] Moreover, critics object to overly optimistic actuarial assumptions that minimize underfunding so that participants cannot effectively evaluate the plans and the security of a government's retirement promises.[431] For these reasons, Beermann compares public pension recipients to victims of Bernie Madoff's Ponzi scheme, except on a lower end of the economic scale.[432] Third and relatedly, pension plan participants are vulnerable due to the opacity of their plans.[433] Employees are not always financially literate and, in any event, will be unable to assess the danger to their estimated pension savings.[434] There is also a mobility risk because many plans have extended forfeiture periods to encourage long service to a degree not seen in the private sector.[435] As a practical matter, too, it will be difficult to

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428. *See* Anenson, *supra* note 423, at 270 ("Taxpayers will share the burden of plan insolvency when states raise taxes to cover pensions."). In my prior research, we explained how a seemingly small 1.5% cost-of-living allowance (COLA) reduction in one state had a serious financial impact on pension participants. Anenson et al., *supra* note 6, at 33. Retirees who received a pension of $33,254 in 2009 would lose more than $165,000 in benefits over a twenty-year period. *Id.* Moreover, studies suggest that eliminating a two percent compounded COLA reduces lifetime benefits by at least fifteen percent and that eliminating a three percent COLA reduces benefits by up to twenty-five percent. *Id.*

429. Anenson, *supra* note 423, at 267.

430. *See* Anenson et al., *supra* note 6, at 42–48 (discussing public pension reporting problems with transparency, uniformity and accuracy); Lahey & Anenson, *supra* note 426, at 329–31 (highlighting lack of uniformity as an obstacle to public pension reform and advocating the adoption of the Uniform Management of Public Employees Retirement Systems Act (UMPERSA) or minimum universal disclosure rules akin to it); Daniel J. Kaspar, *Defined Benefits, Undefined Costs: Moving Toward a More Transparent Accounting of State Public Employee Pension Plans*, 3 WM. & MARY POL'Y REV. 129, 153–56 (2011) (proposing federal legislation that requires states to adopt a uniform standard for the reporting and valuation of pension funding).

431. Anenson, *supra* note 423, at 282–83 ("There is a growing consensus among economists and other scholars that private sector actuarial standards should be used to give an adequate representation of the default risk."); *see also id.* at 283 n.193 (collecting law, economics, and finance literature supporting this position); Anenson et al., *supra* note 6, at 46–88 (noting that current reporting methods understate taxpayer liability).

432. Beermann, *supra* note 414, at 85–86 (commenting on the unreasonable high actuarial assumptions creating false expectations among plan participants).Whether public pension participants truly are on the lower end of the economic scale has been challenged in a recent study. *See generally* Philip Armour, Mihcael D. Hurd & Susann Rohwedder, *How Reliant are Older Americans on State and Local Government Pensions?*, U. Mich. Ret. & Disability Rsch. Ctr., Paper No. 2019-399 (Sept. 2019), https://mrdrc.isr.umich.edu/publications/papers/pdf/wp399.pdf [https://perma.cc/HC44-TLR3].

433. Anenson, *supra* note 423, at 267–68.

434. *Id.* at 268.

435. Anenson et al., *supra* note 6, at 53 (explaining the mobility penalty of defined benefit plans as opposed to defined contribution plans such as the 401k).

find an equivalent job in another state with a retirement system that is not in jeopardy.[436]

So, these three criteria help to explain why the remedial canon is used in the interpretation of employee benefits. But there are distinctions between pensioners and other disadvantaged groups. Namely, there has been no historic discrimination as happened with Native Americans. Government employees, unlike veterans, are not putting their lives on the line (with the exception of first-responders). Pensions are simply part of their compensation, though a deferred form of it. At bottom, the dispute appears to center on which picture of public pensions one is drawing: pensions as welfare-enhancement (old-age support) versus pensions as part of a worker's total wage package.

Still, picking the most appropriate portrayal does not (necessarily) solve the clashing canons problem. The "no contract" canon has a legitimate basis in government power.[437] One might characterize it as a collision between canons that protect power and those that protect rights.[438] Yet again, the remedial canon begs the question of whether employees have contract rights at all. It is invoked only after a finding of legislative intent to construe legislation liberally. The "no contract" canon determines legislative intent. Accordingly, the unmistakability doctrine should precede and prevail over the remedial canon in determining the existence (and terms) of a contract.[439] The canon against a contract comes earlier in the analysis and, in any event, is normatively more compelling in light of the public pension experience.

C. *Procedural Values*

Because the "no contract" canon is (and pursuant to this analysis, should be) the prevailing paradigm for statutory construction in the new pension cases, it is necessary to consider the values this canon serves and preserves. There is a surprisingly scant amount of doctrinal or theoretical research on the canon. The presumption against contract operates as a legislative power conservation canon and also supports Professor Shapiro's suggestion that "close ques-

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436. Anenson, *supra* note 423, at 268.

437. *See* discussion *supra* Section II.B.2.b.

438. *See* Eskridge, *supra* note 34, at 1084–93 (finding that the Supreme Court prefers canons of construction that preserve procedural values such as federalism rather than substantive values like nondiscrimination).

439. There are also other theories like estoppel that may better address the reliance claims of negatively impacted employees under a given set of circumstances. Anenson et al., *supra* note 6, at 33.

tions of construction should be resolved in favor of continuity and against change."[440] He argued that the status quo as an ideology is sound because it probably best reflects what statutes mean to achieve, respects existing rights, and retains the relationship between the judiciary and the political branches of government.[441]

Additionally, based on the course of dealing between the branches, presumptive activity related to legislative contracts can even be seen as improving the law-making process.[442] To begin with, by narrowing the scope of a statute, a legislature is not afraid to make law.[443] It is willing to legislate because courts will not go too far.[444] Moreover, narrow construction of statutes against contracts leads a legislature to express itself clearly in the future.[445] Having legislatures adopt well-considered measures promotes elector accountability and the institutional function of responsible government.

Furthermore, the assumption of no contractual intent is underscored by legislative reliance interests. Supreme Court opinions favoring retention of legislative power in federal law have spanned more than two hundred years of statutory innovation.[446] As discussed previously, authority for the same interpretative stance under state statutes extends to the prior century.[447] The Supreme Court has explained: "Past practice does not, by itself, create power, but 'long-continued' practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ."[448] In particular, established judicial practice becomes part of the interpretative envi-

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440. Shapiro, *supra* note 21, at 925. Shapiro endorsed canons of statutory construction and other background assumptions as representing this judicial philosophy. *Id.* Shapiro's study of background assumptions and other canons of construction did not include the "no contract" canon.

441. *Id.* at 941–45.

442. The demand for legislative clarity, so the argument goes, also fosters a greater level of transparency and accountability in the legislative process. *See* Stephenson, *supra* note 35, at 2; Sunstein, *supra* note 2, at 458–59 (urging acceptance of canons that promote superior lawmaking).

443. Shapiro, *supra* note 21, at 934 (explaining that many canons have the effect of narrowing the scope of a statute and are less controversial than those that extend it).

444. *Id.* at 941.

445. Sunstein, *supra* note 2, at 458 (discussing casual, ill-considered, or interest-driven measures).

446. *See* discussion *supra* Section II.A.

447. *See* discussion *supra* Section II.B.1.

448. Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)); *see* Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1785 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent[.]"); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 486 (1991) (declaring "that Congress legislates with knowledge of our basic rules of statutory construction").

ronment in which the legislature acts.[449] In *Dodge v. Board of Education*,[450] the single public pension case considered by the Supreme Court, it recognized legislative reliance. The Court noted that other pension legislation had been construed by the state supreme court to negate a contract and found that the state legislature had these rulings in mind when it adopted the statute under review.[451] Even so, each state has its own history with the canon and there may be minimal reliance, if any. For example, the California Supreme Court did not recognize the unmistakability doctrine until 2011.[452] In consequence, only legislation enacted after that time could be seen as supporting a reliance interest.[453]

Nevertheless, regardless of the timing of acceptance, reliance may be worth considering because the "no contract" canon is both a rule of interpretation and a doctrine. In fact, some justices on the U.S. Supreme Court have called it a defense.[454] As a doctrine, it is treated as precedent contrary to an overwhelming number of canons in federal law.[455] State judges tend to follow methodology case-by-case and give canons precedential effect anyway.[456] But aside from one's perspective on the merits of methodological *stare decisis*,[457] the "no contract" canon is both legal rule and reasoning.

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449. *See, e.g.*, Frank H. Easterbrook, *The Case of Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999) (explaining that legislatures pass statutes against deeply embedded 'norms of interpretation and defense,' which frame the social understanding of such statutes, just as rules of grammar and diction do."); Antonin Scalia, *Assorted Canard of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990) (supporting settled canons as acquiring "a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language"); *see also* Barrett, *supra* note 31, at 160–61 (describing how textualists convert long-standing potentially illegitimate substantive canons into linguistic canons without subscribing to the position).

450. 302 U.S. 74 (1937).

451. *Id.* at 80–81.

452. Retired Emps. Ass'n of Orange Cnty., Inc. v. County of Orange, 266 P.3d 287, 295 (Cal. 2011); *supra* Section II.B.2.c.

453. Dodge, *supra* note 24, at 1584 ("The retroactive application of changed canons to statutes enacted before the changes may result in interpretations that are different from the ones the enacting Congresses would have expected."); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1983 (2005) (discussing the negative effects of reliance on interpretative regime change).

454. United States v. Winstar Corp. 518 U.S. 839, 861 (1996) (plurality opinion).

455. Gluck, *supra* note 22, at 1756. The most notable exception would be the *Chevron* canon.

456. *Id.*

457. *Compare* Gluck, *supra* note 22, at 1757 (positing that there are expressive and fairness values attendant to having judges agree to consistent methods) *with* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 153–57 (2017) (arguing against methodological *stare decisis* even for narrow canons like *Chevron*). Professor William Dodge adopts a middle ground. While acknowledging that courts have the authority to develop and change canons, he advises that they need to justify the decision on normative grounds, explain the need for change using the factors that courts consider in overruling precedents, and mitigate transition costs. Dodge, *supra* note 24, at 1644–53.

Precedent's primary goal of stability in the law should extend to this assumption.

In conclusion, due to the procedural values associated with the constitutional structure,[458] the derivation of the unmistakability doctrine and its deployment to determine the existence of a contract can be seen as a legitimate judicial function. The legislative authority-saving scruple that guides statutory interpretation appears to enhance rather than undermine the structural interests imposed under the federal and state constitutions. The assumption against contract may be justified under principles of precedent, as a matter of legislative intent, and as facilitating inter-branch comity grounded in the principle of separation of powers.

D. *Rule of Law Norms*

Another area of concern, however, is whether courts are competent in deploying canons of statutory construction. More specifically, is the "no contract" canon sound on rule of law grounds? Esteemed scholars like William Eskridge insist that canons can provide predictability and put Congress and citizens on notice as to the meaning of the law.[459] On the other hand, Karl Llewellyn's famous critique still lingers. His main complaint was that canons obscured analysis and allowed judges to rationalize results reached on other grounds.[460] Llewellyn's criticism was part of his assault on formalism and his endorsement of legal realism. His objection was not so much to the canons themselves but to how judges used them without articulating the real grounds for their decisions. Succinctly, his argument was that courts applied canons as a "crude version of formalism."[461]

Two other risks related to Llewellyn's criticism have implications for the "no contract" canon in public pension reform litigation.[462] First, courts may be inconsistent in their invocation of these statu-

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458. *See* Barrett, *supra* note 31, at 128 (observing that the historical acceptance of certain canons of construction does not settle legitimacy but does suggest they are consistent with constitutional limits on judicial power).

459. *See, e.g.*, Eskridge, *supra* note 66, at 678–82 (justifying canons on grounds that they make law more predictable and objective); *see also* ESKRIDGE, *supra* note 27, at 20–21 (explaining that canons are an interpretative regime that provide the vocabulary of statutory interpretation and concluding that they are neither good nor bad in the abstract).

460. *See* Eskridge, *supra* note 64, at 1100 (discussing Karl Llewellyn's "nasty list" showing that every canon has a counter-canon negating it); *see generally* Llewellyn, *supra* note 64 (arguing against covert canons that conceal legal reasoning).

461. Sunstein, *supra* note 2, at 452.

462. *See* Schacter, *supra* note 35, at 650 (describing a competency critique that judges lack skills and resources to create and use certain kinds of normative canons).

tory default rules.[463] Second, the judicial practice of presumptions may lead to an unacceptable degree of uncertainty in the law.[464] As shown in Part II, it is difficult to discern *when* a presumption applies. For example, does it operate at the beginning of the interpretative exercise or is it activated only by a finding of ambiguity? Specifically, are the assumptions displaced or rebutted?[465] Courts have reached different conclusions, but the "no contract" canon (as well as the avoidance canon) is almost uniformly applied at the beginning of the analysis.[466]

The more substantial problem seems to be discerning whether the legislation is "clear" as opposed to "ambiguous" for a successful rebuttal. Distinguishing between when the language is plain versus equivocal is an enduring source of conflict for all canons. Much depends on how ambiguity is defined.[467] And having to determine which interpretative modes can be used, if any, to discern clarity adds to the difficulty. For example, should courts consider only textual evidence or should they include extra-textual (extrinsic) sources? Confusion regarding this antecedent issue yields results that are somewhat uncertain. In the new public pension reform cases, differing levels of courts had opposing views as to whether a statute was clear or ambiguous.[468] Judges on the same court also diverged on this fundamental issue.[469] A certain degree of disagreement is normal (and even desirable) in making tough decisions. Hard cases require judgment.[470] The goal is not to eliminate uncertainty entirely but to eliminate a degree of uncertainty that would be unacceptable.

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463. Anenson, *supra* note 59, at 47; *supra* Part I.

464. Anenson, *supra* note 59, at 47; *see also supra* Part I.

465. *See* Eskridge, *supra* note 66, at 680 n.17 (commenting that the order in which canons are considered may affect the results).

466. *See* discussion *supra* Sections II.B–C. Starting with the assumption appears inconsistent with the majority of scholarly commentary that conditions a canons application on a sufficient degree of interpretative doubt. *See* Daniel Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292 (1989) (asserting that judicial construction is legitimate only when the statutory text and legislative intent are ambiguous); Sunstein, *supra* note 2, at 437 (insisting on a sufficient degree of interpretative doubt in order to elicit the canons); Young, *supra* note 48, at 1606 (emphasizing that some boundary is necessary to trigger application of an interpretative presumption).

467. *See* Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 24 (2010); Gluck, *supra* note 22, at 1836; Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENV'T L. REV. 87, 110–11 (2016) (advising that it is unclear what factors create ambiguity in agency discretion cases).

468. *See* discussion *supra* Section II.A.2 (remedial canon).

469. *See* discussion *supra* Sections II.A.2–3 (remedial canon), II.B.2.c–d ("no contract" canon); *supra* notes 274, 292.

470. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975).

It is important, nonetheless, to prevent a clear-ambiguous "side show" from becoming the main event. Otherwise, judicial resources may be devoted improperly to debating gatekeeper findings about ambiguity and not directed at the crucial issue of statutory meaning.[471] Findings of ambiguity can be manipulated and unsatisfying to litigants. Helping judges to understand the threshold inquiry into ambiguity would best curb judicial discretion. Even though courts consistently begin with the text in applying the unmistakability doctrine, they should not be so inflexible that the definition of words dictates the outcome in spite of other evidence that might bear on the issue.[472] Real life does not usually fit neatly into a fixed formula.

There are rule of law values at stake other than crystal clarity and consistency too—ones that require litigants to know that judges will actually listen to their claims and take them seriously.[473] Maintaining a "soft" rather than "hard" border builds moral credibility and social legitimacy.[474] The presumption against contract promotes procedural values of institutional power, but it should also be applied in a way that affords pension participants a full and fair hearing of their claims. This should help to prevent misguided results and promote more deliberative judicial decision-making in public pension cases.

In cases applying the "no contract" canon, the upshot is that most courts have allowed all available evidence to rebut the presumption. As a result, the "circumstances" beyond the text included context, history, and structure.[475] Even legislative history, for the most part, was considered.[476] And the statute's etiology that embod-

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471. Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Interpretation*, 120 YALE L.J. ONLINE 47, 59 (2010); *see* Farnsworth et al., *supra* note 467, at 1; *see also Ambiguity in Legal Interpretation: A Debate*, U. CHI. L. SCH. FAC. BLOG (Apr. 23, 2010, 11:45 AM), http://uchicagolaw.typepad.com/faculty/2010/04/ambiguity-in-legal-interpretation-a-debate.html [https://perma.cc/QJ6S-L8H7] (judges and scholars commenting on Farnsworth et al., *supra* note 467).

472. *See* ESKRIDGE, *supra* note 27, at 28–29 (arguing that plain meaning analysis should consider the larger statutory context); *see generally* Leib & Serota, *supra* note 471 (criticizing one-size-fits-all approach to statutory interpretation); discussion *supra* Section II.B.2.d. In articulating the sequence of analysis for the private law contract canon to resolve the constitutionality of public pension reform in *Borders v. Atlanta*, the state supreme court declared that the trigger of ambiguity is resolved by the contract alone. 779 S.E.2d 279, 285 (Ga. 2015).

473. *See* H.L.A. HART, THE CONCEPT OF LAW 205 (1997) (identifying "consideration for the interest of all who will be affected" as one of three judicial virtues that are the hallmark of an acceptable opinion).

474. Leib & Serota, *supra* note 471, at 52.

475. *See* discussion *supra* Section II.B.2.d.

476. *See* discussion *supra* Sections II.B.2.d–B.3; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 965 (2013) (finding that legislators view legislative history as the most important drafting and interpretative tool besides the text).

ies the wider context of the law was vital.[477] Relying on precedent, some courts have found *ipso facto* a clear contract (presumption rebutted) in the employment setting.[478] So while canons are often assumed to operate outside context or legislative intent,[479] this conception does not accurately reflect the canonical jurisprudence of public pensions as it has developed in the case law across the United States. In the future, courts should enumerate the available sources of consideration as this would provide helpful direction.[480] Identifying the relevant types of evidence would increase predictability and uniformity. The naming of sources would benefit lower courts tasked with interpreting pension statutes, litigants who act under them, and legislators who negotiate and draft the laws themselves.[481] The bottom line is that many courts are flexible in how the unmistakably clear contract requirement is satisfied. As established in Section II.C.3, the avoidance canon, operating in conjunction with the "no contract" canon, does not add much to the analysis.

Despite the breadth of evidence available to establish a contract, however, case outcomes show that the resistance to a statutory contract is especially acute in public pension reform litigation.[482] In certain cases, in spite of employees not needing to produce express language, they do have to point to language that is essentially incapable of any other interpretation.[483] Again, if too strict, a guideline may become a substitute for good judgment. After all, judges should not be blindfolded to keep probative evidence out of

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477. *See* discussion *supra* Section II.B.3.

478. *See* discussion *supra* Section II.B.2.d; *supra* notes 332–333 and accompanying text. The presumption was rebutted largely without reading the statute. Anenson et al., *supra* note 11, at 46–47.

479. *See* discussion *supra* Part I.

480. Best practices in outlining the available criterion was exhibited by *Maine Ass'n of Retirees v. Board of Trustees of the Maine Public Employees Retirement System*, 758 F.3d 23, 30 (1st Cir. 2014).

481. *See, e.g.*, Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 496 (2015) (explaining that "the existing research suggests that the lower courts' patterns of behavior do reflect—in a loose way—patterns in the Supreme Court"). If state courts get too out of hand, state legislatures can always insert interpretative directions into the text of pension statutes to better guide judges in deciphering the law. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (comparing interpretative preferences of legislatures with judicial canons). Still, while the codification of instructions may increase the probabilities of a certain construction, it is no panacea for the complex problem of interpretation. *See generally* Romero, *supra* note 100, at 211 (analyzing the effectiveness and desirability of statutory provisions that direct courts to interpret a statute in a particular way). Clearer substantive provisions—like using the word contract—would likely better control judicial interpretation and application. *Id.*

482. *See* Anenson et. al, *supra* note 11, at 37–47; Appendix. Fourteen of eighteen "no contract" canon cases decided under the Contract Clause resulted in decisions favorable to the government and upholding reforms.

483. *See* discussion *supra* Section II.B.2–3.

view.[484] Notwithstanding the academic uproar over canons of construction, everyone agrees that they should be helpful tools and not the beginning and end of the analysis. In summary, subjecting substantive canons to critical evaluation in the new constitutional cases challenging public pension reform provides a valuable perspective and helps to legitimize the process of their development.

CONCLUSION

This Article is the first in-depth examination of substantive canons that judges use to interpret public pension legislation. The resolution of constitutional controversies concerning pension reform under the Contract Clause will have a profound influence on government employment. Employees want retirement security and no doubt believed their promised pensions were unassailable.[485] The government does not necessarily want to break faith with its employees but fears the after-effects of failing to reform. Already grappling with mounting budget deficits, the escalating public pension costs of state and local governments jeopardize the public fisc and have a dire impact on essential public services.[486]

Given what is at stake, the practical importance of the Contract Clause has never been potentially greater than since the Great Depression.[487] The same import may be attached to the substantive canons, particularly the "no contract" canon (unmistakability doctrine) commonly invoked to determine whether pensions are contracts. Contrary to a recent study finding that substantive canons

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484. Leib & Serota, *supra* note 471, at 60; J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81 (2000).

485. *See* Puckett v. Lexington–Fayette Urban Cnty. Gov't, 833 F.3d 590, 604 (6th Cir. 2016) (expressing sympathy for retirees who gave years of dedicated and honorable service as well as acknowledging the likelihood that they actually believed their cost-of-living allowances would not be reduced); Booth v. Sims, 456 S.E.2d 167, 188 (W. Va. 1995) ("Scores of thousands of little people have organized their lives around government pensions . . . .").

486. Anenson et al., *supra* note 6, at 34 ("Growing obligations raise the specter of more taxes and fewer public services, including state funding of education."); *see id.* at 34 n.201 (citing study showing that state aid to cities and counties has decreased in the last several years); Kenneth T. Cuccinelli, II, E. Duncan Getchell, Jr., & Wesley G. Russell, Jr., *Judicial Compulsion and the Public Fisc—A Historical Overview*, 35 HARV. J.L. & PUB. POL'Y 525, 540 (2011) ("Public sector pensions will be the litigation flashpoint in this cycle of [state and local government] austerity.").

487. ELY, *supra* note 9, at 58 (explaining that the Contract Clause "would have profound influence throughout the nineteenth century and would be among the most litigated provisions of the Constitution").

rarely make any difference in resolving cases,[488] this canon has been outcome determinative.[489]

Yet substantive canons remain difficult to understand. For the three canons routinely employed in pension law, there has been remarkably little research on their history, evolution, or effect in that context. This study spotlights the methodology that underlies these diverse and complicated judgments. Illuminating actual judicial practices lets us better comprehend when, how, and why these canons function. It puts us in a position to choose the most appropriate canon(s) and to otherwise offer improvements on their operation. It also allows us to relate the role of canons to other kinds of legal reasoning. Significantly, studying these canons fills a void in state statutory interpretation and contributes to a better understanding of state court enforcement of the Contract Clause that has received scarcely any attention.[490]

While this Article focuses on public pension legislation, it was written for multiple audiences. Examining conflicting canons of construction in the interpretation of government pension law contributes to the debates among scholars studying constitutional law, federal courts, and those with expertise in employee benefits. The analysis has implications for constitutional law, statutory interpretation theory, and pension doctrine and policy. The research likewise facilitates better decision-making by judges and the lawyers who practice before them. It further assists policy-makers engaged in the delicate task of crafting reform measures.

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488. *See* Krishnakumar, *supra* note 25, at 829–32 (studying 296 U.S. Supreme Court decisions over a six-year period).

489. *See supra* notes 399–400 and accompanying text.

490. ELY, *supra* note 9, at 3 ("It is important to remember that state courts did much of the heavy lifting in interpreting and enforcing the contract clause. They are an integral, if too often overlooked, part of the story."). A premise of this article is that state law and methodology are important in their own right and not just as an aid in the development of federal legisprudence.

APPENDIX: PUBLIC PENSION REFORM CASES BY CANON OF CONSTRUCTION: 2014–2019[491]

FEDERAL AND STATE CASES (2014–2019)	AVOIDANCE CANON[492]	"NO CONTRACT" CANON (UNMISTAKABILITY DOCTRINE)[493]	REMEDIAL (PURPOSE) CANON
S. States Police Benevolent Ass'n, Inc. v. Bentley, 219 So.3d 634 (Ala. 2016)		X	
Taylor v. City of Gadsden, 767 F.3d 1124 (11th Cir. 2014) (Alabama legislation)		X	
Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys, 435 P.3d 433 (Cal. 2019)		X	
Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Employees' Ret. Ass'n, 227 Cal. Rptr. 3d 787 (Ct. App. 2018), *rev'd on other grounds*, 470 P.3d 85 (Cal. 2020)	X		X
Fry v. City of Los Angeles, 199 Cal. Rptr. 3d 694 (Ct. App. 2016)		X	
Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365 (Ct. App. 2016), *review denied*, S237460, 2020 WL 5667326 (Cal. Sept. 23, 2020) (mem.)	X		
Justus v. State, 336 P.3d 202 (Colo. 2014)	X		
Puckett v. Lexington-Fayette Urban Cnty. Gov't, 833 F.3d 590 (6th Cir. 2016) (Kentucky legislation)		X	
Me. Ass'n of Retirees v. Bd. of Tr. of the Me. Pub. Emps. Ret. Sys., 758 F.3d 23 (1st Cir. 2014) (Maine legislation)		X	
AFT Mich. v. State, 893 N.W.2d 90 (Mich. Ct. App. 2016) (dissent)	X		

491. The table shows cases that recited, but not necessarily relied on, the designated canon.

492. For cases citing the avoidance canon decided pursuant to the Pension Clause of the state constitution, see *Hall v. Elected Officials' Retirement Plan*, 383 P.3d 1107 (Ariz. 2016); and *Fields v. Elected Officials' Retirement Plan*, 320 P.3d 1160 (Ariz. 2014).

493. For a case citing the "no contract" canon decided pursuant to the Pension Clause of the state constitution, see *Jones v. Municipal Employees' Annuity & Benefit Fund*, 50 N.E.3d 596 (Ill. 2016).

Am. Fed'n of Tchrs. v. State, 111 A.3d 63 (N.H. 2015)		X	
Pro. Fire Fighters of N.H. v. State, 107 A.3d 1229 (N.H. 2014)	X	X	
Berg v. Christie, 137 A.3d 1143 (N.J. 2016)	X	X	X
Petit-Clair v. City of Perth Amboy, No. A-2049-14T2, 2018 WL 4262959 (N.J. App. Sept. 7, 2018)		X	
Lake v. State Health Plan for Tchrs. & State Emps., 825 S.E.2d 645 (N.C. Ct. App. 2019)	X	X	
Moro v. State, 351 P.3d 1 (Ore. 2015)		X	
Cranston Firefighters v. Raimondo, 880 F.3d 44 (1st Cir. 2018) (Rhode Island legislation)		X	
Bristol/Warren Reg'l Sch. Emps. v. Chafee, Nos. PC 12-3167, PC 12-3169, PC 12-3579, 2014 WL 1743142 (R.I. Super. Ct. Apr. 25, 2014)		X	
R.I. Council 94 v. Chafee, No. PC 12-3168, 2014 WL 1743149 (R.I. Super. Ct. Apr. 25, 2014)		X	
R.I. Pub. Emps.' Retiree Coalition v. Chafee, No. PC123166, 2014 WL 1577496 (R.I. Super. Ct. Apr. 16, 2014)		X	
Frazier v. City of Chattanooga, 151 F. Supp. 3d 830 (E.D. Tenn. 2015) (Tennessee legislation)		X	
Wash. Educ. Ass'n v. Wash. Dep't of Ret. Sys., 332 P.3d 439 (Wash. 2014)	X		