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Stare Decisis and the Status of California's Super Pension Contract

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STARE DECISIS AND THE STATUS OF CALIFORNIA'S SUPER PENSION CONTRACT

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A fundamental principle of law is that courts stand by their decisions. Under the principle of stare decisis, judicial action strives for stability and coherence by setting precedents for the future in deciding current cases. This Article presents an original inquiry into the overruling expression and criteria for stare decisis in the public pension reform context of California's constitutional contract law. While there is a lively debate among commentators and judges about the role of stare decisis theory and doctrine in federal law, our study extends that conversation to state law for the first time. We develop a new decision-making framework by synthesizing state and federal decisions to provide a fresh perspective on the perennial problem of whether cases should be settled or settled right. Utilizing the proposed decisional model, we analyze if the Supreme Court of California should retain or repudiate its super pension contract. This contract—commonly called the "California Rule"—is the primary obstacle to pension reform under the Contract Clause. The rule has contributed to the state's pension crisis by granting protection of future accruals on the first day of government employment. Because the California Rule has been widely adopted in other jurisdictions that are similarly struggling to manage debilitating pension debt, the foregoing evaluation of precedent's durability has important and far-reaching implications.

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> *It is an established rule to abide by former precedents, . . . to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion, . . . [unless] the former determination is most evidently contrary to reason.*
>
> – WILLIAM BLACKSTONE
> 1 COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765)

> *Stare decisis is the preferred course, because it promotes the even-handed, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process . . . . Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.*
>
> – Payne v. Tennessee
> 501 U.S. 808, 827–28 (1991) (citations omitted)

> *[T]he doctrine of stare decisis is a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. But the policy is just that—a policy—and it admits of exceptions in rare and appropriate cases.*
>
> – Samara v. Matar
> 419 P.3d 924, 932–33 (Cal. 2018) (quotations and citations omitted)

INTRODUCTION

Stare decisis is a process of decision-making by which courts consult prior cases. Since the founding, judges have wrestled with the inevitable "jurisprudential tug of war" between a case precedent being settled or settled right.[1] It is a dilemma that has garnered national attention.[2] The debate has spotlighted the federal courts and the constitutional decisions of the U.S. Supreme Court.[3] Largely unnoticed, however, is the doctrinal drama playing out across the several states.

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1. Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1843 (2013) [hereinafter Kozel, *Constitutional Method and the Path of Precedent*].

2. *See* Daniel B. Rice, *Repugnant Precedents and the Court of History* 4–5 (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2022-05, 2021), https://ssrn.com/abstract=3920497 [https://perma.cc/7KPP-HE7Z] ("[S]cholars and jurists are hotly debating precedent's proper role."). In overturning abortion rights, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), is the latest U.S. Supreme Court decision to spark the debate.

3. *See, e.g.*, Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 88–89 (2020) (asserting that an emerging "weak" tradition of stare decisis is dangerous to the system of precedent); Richard M. Re, *Precedent*

This is the first article to extend the study of stare decisis to California and its controversial public pension law.[4] California has several pension systems that collectively hold more assets than any other state in the country, including the largest system itself,[5] with an equally outsized pension debt.[6] Its influential pension law precedent has reached almost every corner of the United States, affecting a quarter of the U.S. population.[7]

Government pension protection in California has fluctuated between two extremes: unprotected and overprotected. At the turn of the twentieth century, a public sector worker with a promised pension had no legal protection if those pension benefits were later reduced or even eliminated.[8]

His granddaughter, on the other hand, entering the government workforce a generation later would have a guaranteed pension for

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as Permission, 99 TEX. L. REV. 907, 919 (2021) [hereinafter Re, *Precedent as Permission*] (comparing the "binding" and "permission" models of precedent used by U.S. Supreme Court justices).

4. *See* T. Leigh Anenson et al., *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. 337, 371 (2021) [hereinafter Anenson et al., *Constitutional Limits*] ("The much criticized 'California rule' that safeguards pension benefits on the first day of employment was once the darling of the Western states."); Sasha Volokh, *How Flexible Is the "California Rule" for Public-Employee Pensions?*, WASH. POST (Sept. 27, 2016, 3:49 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/27/how-flexible-is-the-california-rule-for-public-employee-pensions/ [https://perma.cc/6FV9-RQKU].

5. California Public Employees' Retirement System (CalPERS) is the largest (public or private) pension fund in assets in the United States. 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, 320 (2007). California public pension systems include CalPERS, California State Teachers' Retirement System (CalSTRS), University of California Retirement System (UCRS), and sixty-nine independent pension systems. *See Pension Tracker*, BILL LANE CTR. W., https://web.archive.org/web/20220123142434/https://www.pensiontracker.org.

6. *See* Grant Suneson, *Retirement Warning Signs? Pension Crisis Hits States. Here's the Biggest, Smallest Funding Shortfalls*, USA TODAY (Dec. 11, 2020, 7:01 AM), https://www.usatoday.com/story/money/2020/12/11/every-states-pension-crisis-ranked/115099952/ [https://perma.cc/Z8P3-CYAC] (estimating that California has the largest pension shortfall in the country). The market basis (3.25 percent) for the pension debt collectively in California public pensions is $1.003 trillion and the actuarial basis (7 percent) is $310.3 billion. *See Pension Tracker*, *supra* note 5 (statistics for 2019, the most recent year available). Pension Tracker does not provide detailed information on the University of California Retirement System, UCRS.

7. ALEXANDER VOLOKH, FEDERALIST SOC'Y, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS: THE CONTRACT CLAUSE AND THE CALIFORNIA RULE 5 (Dec. 31, 2013) [hereinafter VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS], https://fedsoc.org/commentary/publications/overprotecting-public-employee-pensions-the-contract-clause-and-the-california-rule [https://perma.cc/5CFB-EXS3].

8. *See* Pennie v. Reis, 22 P. 176, 177 (Cal. 1889) (finding a police officer's widow had no contract for the death benefit when the benefit was eliminated before her husband's death), *aff'd*, 132 U.S. 464, 471 (1889). The transition from the gratuity to the contract approach was part of a broader trend in public and private pension law. *See* Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 994–1003 (1977); *infra* Section III.A.2.c.

life.[9] She would have the contractual right not only to the pension promised upon entering employment, but also the right to keep any increases in those benefits over the course of her career.[10]

The Supreme Court of California created this radical rule of pension protection in *Allen v. City of Long Beach*.[11] Decided in 1955, the effect of the ruling in *Allen* meant that public pension benefits were contracts that formed on the first day of employment and could rarely be reduced without offering a new benefit.[12] Thirty years later in *Legislature v. Eu*,[13] the court explicitly announced this first-day-until-forever rule.[14] These decisions elevated public pensions benefits into the constitutional pantheon of rights. The Contract Clause declares: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[15] Thus, the California Supreme Court put pensions on a pedestal above other employment benefits and even compensation.[16] This tension continues today.

State and local government employers in California have a lot of leeway with respect to modifying other job conditions.[17] They can decrease salaries, discharge employees, purge positions, and reduce mandatory retirement ages.[18] Government employers can even abolish fringe benefits like parking and vacation allowances.[19] Yet they cannot cut an employee's pension.[20] This so-called "California Rule" of public pensions runs counter to general contract law and the doctrine of employment at will.[21] It additionally privileges the pensions of public sector employees over the pensions of their counterparts in the private

9. *See infra* Part I.

10. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 12–13 (citing cases and discussing the "ratchet effect" of the California Rule).

11. 287 P.2d 765 (Cal. 1955).

12. *See id*. at 766–67.

13. 816 P.2d 1309 (Cal. 1991).

14. *See id*. at 1331–32 (recognizing "the collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those then offered").

15. *See* U.S. CONST. art. I, § 10; CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed.").

16. *See infra* Section III.A.2.

17. *See infra* Section III.A.2.

18. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 12–13; *infra* Section III.A.2.c.

19. *See infra* Section III.A.2.

20. *See infra* Part I.

21. *See infra* Section III.A.2.b; *see also* Anenson et al., *Constitutional Limits*, *supra* note 4, at 378 ("California jurisprudence on the timing of contract formation has been so instrumental in other jurisdictions that this tenet is known as the 'California Rule.'").

sector.[22] And notably, the court's approach to pensions has been inconsistent with its Contract Clause jurisprudence in non-pension cases.[23]

It has been sixty-five years since the California Supreme Court invented the California Rule with its corresponding contradictions. Two recent cases that challenged the constitutionality of pension reform, however, gave the court an opportunity to change its mind.[24] While the supreme court surprisingly upheld reforms, it avoided overruling the most criticized aspect of California law: that upon hiring, pension benefits are forever frozen in time and thus protected from decline.[25]

Although the court has stood by its decision on the timing and duration of a public pension contract (for now), other jurisdictions originally influenced by California precedent are moving away from this approach.[26] Courts outside of California are retreating from the idea that government employees have a right to earn benefits on terms no worse than the best terms in effect at any time during their career.[27] This Article considers the status of the California Rule—what it calls the super pension contract.[28] It explores whether the California Supreme Court should abandon this judge-made rule of public pension law and determines that it should (at least in part).[29]

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22. *See infra* Section III.A.2.c.

23. *See infra* Section III.A.2.b.

24. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019); Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85 (Cal. 2020) (upholding modifications to compensation earnable variable to determine pension benefits under the Contract Clause).

25. *See* T. Leigh Anenson & Jennifer K. Gershberg, *The Legal and Ethical Implications of Public Pension Reform: Analyzing the New Constitutional Cases*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 130–31, 136 (2022) [hereinafter Anenson & Gershberg, *Pension Law and Ethics*] (analyzing new California Supreme Court cases); Anenson et al., *Constitutional Limits*, *supra* note 4, at 378–82 (analyzing *Cal Fire*); *infra* Section III.A.1.d.

26. *See* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1036, 1071 (2012) [hereinafter Monahan, *The California Rule*] (tracing the adoption of the California rule across twelve states); *infra* Section III.A.2.d.

27. *See infra* Section III.A.2.d.

28. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 377 ("Public sector pensions are somehow sacrosanct—a kind of 'super' form of compensation.").

29. *See id*. at 387.

> An important takeaway from the foregoing analysis of the constitutional cases is that many of the barriers to pension reform are judge-made. This means that these rules can (perhaps) be more readily changed than resorting to a constitutional amendment. What is more, even in following precedent, courts appear willing to uphold reforms in what may be considered an indirect manner. Both realities have consequences for lawmakers

The analysis proceeds in three parts. Part I provides a primer on government pension law in California and its intersection with the state (and federal) constitution.[30] There is a paucity of research on state court decision-making even as state courts are eclipsing the U.S. Supreme Court in defining constitutional values within their own states and throughout the country.[31] Indeed, state courts of last resort are playing an increasingly significant role in interpreting and enforcing both state and federal constitutions.[32] The California Supreme Court's creation and continuation of the super pension contract is a prime example of a pathbreaking series of decisions given the U.S. Supreme Court's "marked neglect" of the Contract Clause.[33] One of the specific contributions of this Article is presenting an overall jurisdictional picture of constitutional pension law and placing the California Rule within it.[34]

Part III advances and applies the foregoing framework of stare decisis to California's public pension contract law and Contract Clause jurisprudence. It balances the costs and benefits of continuity and change among various dimensions. These conflicting considerations include rule of law norms, institutional legitimacy, decisional economy, reliance interests, jurisprudential coherence, justice, policy, and democratic values. Significantly, the investigation offers new evidence of the repudiation (and retention) of California law in other jurisdictions. The assessment additionally examines California's recent landmark cases and reconsiders the holdings of earlier decisions on alternative grounds.

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contemplating more comprehensive initiatives that apply to all members as opposed to only those newly entering the retirement system.

Id.

30. *See id*. at 342 (examining a dataset of almost fifty cases challenging public pension reform under the Contract Clause and explaining that it is "not always obvious whether the grounds of decision stemmed from the state or federal constitution").

31. *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1630–39 (2010) [hereinafter Devins, *State Constitutionalism*]; *see also* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 3 (2016) ("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.").

32. Devins, *State Constitutionalism*, *supra* note 31, at 1635 ("[T]he California Supreme Court now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.").

33. ELY, JR., *supra* note 31, at 58, 249.

34. *See* T. Leigh Anenson et al., *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 16–17 (2014) [hereinafter Anenson et al., *Reforming Public Pensions*] (explaining that constitutional challenges to pension reform have not "congealed into a clear conceptual framework").

California has been a poster child of the national pension crisis.[35] Along with state and local budget troubles, the pension problem is wreaking havoc on the government's present ability to deliver essential services and future capacity to pay down spiraling pension debt.[36] With California's pension systems in peril, there is not enough attention centered on changing the state's case law. It has been a decade since Amy Monahan published her seminal research reviewing the California Rule.[37] This Article aims to fill that gap. In the end, we conclude that the Supreme Court of California should partially overturn precedent finding that a public pension contract is created on the first day of employment in which benefits endlessly increase (but never decrease) until retirement.

I. A PRIMER ON CALIFORNIA PENSION LAW

A preview of California's constitutional pension doctrine is crucial to undertaking a multi-layered perspective of precedent and its implications for the sustainability of the California Rule. Nonetheless, any synopsis of California jurisprudence would be incomplete without mapping it against the background law in other jurisdictions.

It would be difficult to overstate the level of complexity and confusion such a comparison entails.[38] Obviously, there will be variations

35. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 146 (noting that California "is notoriously one of the worst states in the country for troubled pension plans"); *see also* Sarah Krouse, *The Pension Hole for U.S. Cities and States Is the Size of Germany's Economy*, WALL ST. J. (July 30, 2018, 1:41 PM), https://www.wsj.com/articles/the-pension-hole-for-u-s-cities-and-states-is-the-size-of-japans-economy-1532972501 [https://perma.cc/5LD4-DXAA] (estimating that the liabilities of public defined-benefit pension plans in the U.S. are in the trillions of dollars).

36. *See* T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View from Equity*, 50 U. MICH. J.L. REF. 251, 270 (2017) [hereinafter Anenson, *Public Pensions*] ("The dire financial situation in several states, especially California, led one analyst to conclude that 'bankruptcy or the complete cessation of all state functions save paying benefits to retirees is not unthinkable.'" (quoting Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 434 (2012)); Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 84 (2013) ("[California] which once boasted of the most comprehensive and inexpensive higher education systems in the nation, is now finding it impossible, for example, to continue to offer sufficient community college slots for all students.").

37. *See generally* Monahan, *The California Rule*, *supra* note 26 (examining the development of the California rule and how California courts have improperly infringed on legislative power as well as allowed a rule that is inconsistent with contract and economic theory).

38. Anenson et al., *Constitutional Limits*, *supra* note 4, at 342–44 (describing the many difficulties of analysis). Some states lack a legal framework for determining benefits protections. *See* PEW CHARITABLE TR., LEGAL PROTECTIONS FOR STATE PENSIONS AND RETIREE HEALTH BENEFITS 6 (2019) [hereinafter PEW CHARITABLE TRS., LEGAL PROTECTIONS], https://www.pewtrusts.org/-/media/assets/2019/05/prs_legal_protections_for_state_and_local_pension_and_retiree_medical_benefits_brief_final.pdf [https://perma.cc/X5P7-9AYQ] (identifying thirteen states that

among the patterns and practices of decision-making in fifty separate states.[39] Though the real kicker is an absence of agreement concerning the conceptual structure, doctrinal expression, and philosophical foundation of Contract Clause claims in the context of government pensions.[40] Moreover, pension reform litigation is one of the highest profile and hot button issues in state law.[41] The resulting dynamic makes it hard to pinpoint precisely where the law stands at any given time because it is a moving target.[42]

To further complicate matters, state law is related to federal law in a couple ways. First, U.S. Supreme Court decisions interpreting and applying the federal Contract Clause influence how state courts treat the identical clause under state law.[43] The Court, however, rarely hears Contract Clause claims so it has not provided much guidance.[44] Like California law discussed below, state constitutional protections can

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lack legal authority for protecting the rate of future accrual and twenty-seven states that lack legal authority for protecting cost-of-living adjustments).

39. Anenson et al., *Constitutional Limits*, *supra* note 4, at 344 ("Adding to the complexity of these controversies is the growing volume of cases from different jurisdictions that makes any arrangement of public pension jurisprudence an increasingly tough task."); *see also id*. at 396–400 diagrams 1–7 (charting variances in results, reasoning, and approaches to contract formation across forty-eight decisions in twenty-two states).

40. *See id*. at 343–44; *see also* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 120 (noting that legal scholarship about government pensions is incomplete because scholars write on it infrequently). Vocabulary is even a problem. Courts have created confusion with multiple meanings of "vest," "accrue," and "earn." Anenson et al., *Constitutional Limits*, *supra* note 4, at 344 n.28.

41. *See* ELY, JR., *supra* note 31, at 2–3 ("[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."); Kenneth T. Cuccinelli et al., *Judicial Compulsion and the Public Fisc – A Historical Overview*, 35 HARV. J.L. & PUB. POL'Y 525, 540 (2012) ("Public sector pensions will be the litigation flashpoint in this cycle of austerity."); *see also* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 118 (surveying almost fifty cases in the last six years including several landmark state supreme court decisions).

42. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 122 (noting the "absence of a uniform taxonomy" on Contract Clause claims); ELY, JR., *supra* note 31, at 1 (explaining that "the criteria for invoking the contract clause remain uncertain"); *see also* Anenson et al., *Constitutional Limits*, *supra* note 4, at 343 (noting that courts are circumventing precedent without expressly overruling it); *id*. at 341 (a dozen public pension reform cases reached the state supreme courts between 2014 and 2019).

43. *See* ELY, JR., *supra* note 31, at 251 ("More than twenty states have treated the state contract clauses as equivalent to the federal provision."). The true degree of convergence between federal and state constitutional law, however, is unknown and appears to be changing. Anenson et al., *Constitutional Limits*, *supra* note 4, at 369.

44. *See* ELY, JR., *supra* note 31, at 58, 249 (commenting that the Contract Clause was among "the most litigated provisions of the Constitution" throughout the nineteenth century); *see also* Anenson et al., *Constitutional Limits*, *supra* note 4, at 369 (noting that the Supreme Court has not heard a Contract Clause case involving public pension benefits for more than eighty years (citing Dodge v. Bd. of Educ. of Chi., 302 U.S. 74 (1937))).

also be read above the floor set by the U.S. Constitution.[45] Second, the current federal constitutional paradigm defers in part to state law on the existence and scope of a contract.[46] Consequently, Contract Clause cases targeting reductions in retirement benefits prove puzzling for students and scholars as well as problematic for judges and the bar. The rest of this part attempts to bring some order out of the chaos to clarify how California law fits into the constitutional conundrum.

To prevent pension reform under the Contract Clause, federal (and most state) law requires proof that the state or local government "substantially impaired" a "contract" "without justification."[47] Federal doctrine frames the justificatory structure as an intermediate scrutiny test.[48] To pass the test, reforms must be reasonable and necessary to accomplish an important government purpose.[49]

California does not strictly follow the federal three-part test. For example, the Supreme Court of California treats (almost) all pension benefits as contracts.[50] Any statute granting such benefits initiates constitutional protection regardless of the statutory language and notwithstanding the presumption against finding a contract that is used to interpret legislative texts in federal Contract Clause controversies.[51] The supreme court has attempted to reconcile these inconsistencies in interpreting statutes by maintaining that benefits are a form of deferred compensation.[52]

While perceiving pension benefits as contracts is not too unusual, the California Supreme Court took one additional step and held they

45. *See* ELY, JR., *supra* note 31, at 58.

46. The issue of whether there is a contract is one of federal and not state law, *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), but federal courts "accord respectful consideration and great weight to the views of the State's highest court" in applying the federal Contract Clause, Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992) (quoting Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 100 (1938)); s*ee also* Monahan, *The California Rule*, *supra* note 26, at 1045 (noting that no federal court has ruled against a state finding that a contract existed).

47. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 21.

48. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240–44 (1978).

49. *See, e.g.*, U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17, 20–21 (1977).

50. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 443 (Cal. 2019); Anenson et al., *Constitutional Limits*, *supra* note 4, at 380–81.

51. *See Cal Fire Loc. 2881*, 435 P.3d at 446 (admitting that "our cases" have found a pension contract without discerning a legislative intent to do so); discussion *infra* Sections III.A.1.a–b (explaining the "no contract" canon of construction); discussion *infra* Section III.A.2.b.

52. *See Cal Fire Loc. 2881*, 435 P.3d at 447; Anenson et al., *Constitutional Limits*, *supra* note 4, at 381.

are (almost) always *and* forever contracts.[53] If that was not enough to safeguard employee retirement income, the court declared the contract formed on the first day of employment.[54] What is more, instead of protecting pension benefits as they are earned each day like salary and other fringe benefits, the court decreed the contract qua constitutional right cannot be reduced without an equivalent new benefit.[55] In so ruling, the court made public pension law an outlier to the state's own employment and contract law.[56] Its super pension contract broke new ground and was initially adopted in several other states.[57]

The invention of the California Rule was a revolutionary idea.[58] One would expect the supreme court to have offered ample (or any) justifications under contract or constitutional law or at least articulated why, as a matter of policy, it was treating private and public sector workers differently. But the court has never fully explained itself.[59]

History is important here. Judge-made law is replete with (un)happy accidents.[60] And essentially, the California Rule was a historical accident. The rule has a bright side and a dark side. On the bright side, the Supreme Court of California assumed a leadership role as the country was moving from zero security for pension benefits to more protective approaches based in contract, property, or equity-based reliance.[61] No doubt the path of the law was influenced by

53. *See* Allen v. City of Long Beach, 287 P.2d 765, 766–67 (Cal. 1955) (invalidating legislation that prospectively increased employee contributions and other changes); Legislature v. Eu, 816 P.2d 1309, 1332 (Cal. 1991) (invalidating constitutional amendment adopted by initiative that terminated the accrual of pension benefits for incumbent state legislators serving after its enactment).

54. Dryden v. Bd. of Pension Comm'rs, 59 P.2d 104, 106 (Cal. 1936); Kern v. City of Long Beach, 179 P.2d 799, 803 (Cal. 1947); *see also* Monahan, *The California Rule*, *supra* note 26, at 1054–56 (explaining that the right to a pension is contractual and vests on the first day of employment).

55. *Allen*, 287 P.2d at 766–67 (adding new advantage requirement to California Rule).

56. *See infra* Section III.A.2.

57. *See infra* Section III.A.2.

58. The development of the California Rule began in *O'Dea v. Cook*, 169 P. 366, 367 (Cal. 1917), and essentially ended in *Allen*, 287 P.2d 765, spanning the course of forty years.

59. Monahan, *The California Rule*, *supra* note 26, at 1069.

60. *See* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 16 (Cambridge Univ. Press 2012); T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 461, 477 (2008) (discussing historical separation of law and equity).

61. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 15–17; *see also* Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMPAR. LAB. L. & POL'Y J. 5, 26 (2011) (estimating that private pension plans denied benefits to more than 90 percent of participants prior to federal regulation under ERISA).

considerations of fairness and the desire to temper harsh results.[62] Early California cases involving widows or unlucky employees that had their pensions terminated on the verge of retirement illustrate this possible motivation.[63]

On the dark side, some of those decisions could have been reached on narrower grounds.[64] Leading decisions developing the super pension contract involved forfeiture rather than the reduction of benefits.[65] Faced with the repeal of the pension system or other circumstances in which workers or beneficiaries entirely lost their pensions enabled the court to speak in a majestic, Marshall-esque fashion. Noble impulses could have led the court away from its usual closely reasoned judgments.[66] The justices did not foresee future disputes over detailed reforms, including the issue of freezing future accruals. In fact, the impetus for finding that pensions are protected as contracts stemmed from the state constitutional prohibition against gifts to public sector employees.[67] The ban on gifts provided the impetus for pensions to be something more than a reward for past service. The court's initial opinion was tentative in "sensing" that pensions may be

62. *See infra* Section III.A.2.c (comparing progression of private and public pension protection); *see also* Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC., FIN. & POL'Y 617, 620 (2010) [hereinafter Monahan, *Legal Framework*] (noting that pensions remain gratuities in Indiana for compulsory plans).

63. *See* O'Dea v. Cook, 169 P. 366, 367 (Cal. 1917) (preventing the elimination of the pension of a police officer's widow where the new law was enacted after the officer's injury but before his death); Dryden v. Bd. of Pension Comm'rs, 59 P.2d 104, 105 (Cal. 1936) (ruling that police officer's widow who filed for the pension late only loses payments to date and does not waive her right to the entire pension); Kern v. City of Long Beach, 179 P.2d 799, 800 (Cal. 1947) (protecting the pension of a fire fighter where the city abolished his pension after he filed for retirement following twenty years of service and thirty-two days before he satisfied the condition to receive his pension); *see also* T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause*, 54 U. MICH. J.L. REF. 147, 204 (2020) [hereinafter Anenson & Gershberg, *Clashing Canons*] ("[E]quity judges developed maxims and other assumptions to protect widows and other defenseless parties.").

64. *Kern*, for example, is consistent with protecting past accruals as earned each day of work. Monahan, *The California Rule*, *supra* note 26, at 1056. For other possible grounds of the *Kern* decision, see *infra* Sections III.A.1, III.B.4.

65. *See generally* Legislature v. Eu, 816 P.2d 1309 (Cal. 1991); *Kern*, 179 P.2d 799; Wallace v. City of Fresno, 265 P.2d 884 (Cal. 1954); Packer v. Bd. of Ret., 217 P.2d 660 (Cal. 1950); *Dryden*, 59 P.2d at 105; *O'Dea*, 169 P. at 367; *see also* Pennie v. Reis, 22 P. 176, 177 (Cal. 1889), *aff'd*, 132 U.S. 464, 471 (1889) (due process challenge).

66. For example, the supreme court in *Kern* declined to consider the scope of acceptable pension changes because it found no precedent in which it was permissible to "destroy" pension rights and worried that benefit provisions would become a "snare for the unwary." 179 P.2d at 802–03. In *Eu*, the court likewise was concerned about employees losing benefits on the "eve of entitlement." 816 P.2d at 1332–33.

67. *See Kern*, 179 P.2d at 801; *see infra* Section III.A.1.

contracts—a supposition that solidified over a series of cases into the current contract on stilts.[68]

Compounding the problem is that, with one exception, none of the major decisions involved the advantage of an intermediate appellate decision. Largely filed as mandamus actions, the cases were either heard as a matter of first impression or on appeal directly from the trial court.[69] In the only outlier, the supreme court squandered an opportunity for reflection and adopted the appellate decision per curium.[70]

The absence of sustained analysis from below, along with the newness of the issue, may also explain the imprecision about the grounds for the California Rule. In key cases that shaped the rule, the supreme court was not clear whether it even decided the disputes under the Contract Clause or, if so, whether the source was the state or federal clause.[71] The original opinions to the contract-upon-hiring edict were not founded in the constitution at all; they were matters of statutory construction.[72]

Other irregularities also demonstrate that the foundation of the court's souped-up pension contract is not solid. *Allen v. City of Long Beach*,[73] credited with creating (completing) the California Rule,[74] is a prime example. Unpacking the decision shows how the substance of the rule was built with straw and not bricks. Specifically, two parts of the California Rule adopted in *Allen*—pensions are contracts and are formed on the first day—emerged from dicta.[75]

68. *O'Dea*, 169 P. at 367 (remarking that pensions are "in a sense" part of the employment contract).

69. *See Eu*, 816 P.2d at 1312 (mandamus in supreme court); *Kern*, 179 P.2d at 800 (same); *Packer*, 217 P.2d at 660 (same); *see also Wallace*, 265 P.2d at 884 (skipping intermediate appellate court); Allen v. City of Long Beach, 287 P.2d 765, 766–67 (Cal. 1955) (same).

70. *See Dryden*, 59 P.2d at 104–05.

71. *See Eu*, 816 P.2d at 1330–31, 1335 (failing to delineate whether the decision was exclusively grounded in the federal Contract Clause or both state and federal law); *Allen*, 287 P.2d at 766–67 (failing to declare whether it was a constitutional challenge); *Kern*, 179 P.2d at 803 (failing to clarify whether the decision was grounded in the state or federal constitution); *Wallace*, 265 P.2d at 886 (same); *Packer*, 217 P.2d at 665 (same); *infra* Section III.A.1.b.

72. *See generally O'Dea*, 169 P. 366; *Dryden*, 59 P.2d 104; *see also Kern*, 179 P.2d at 801 (citing *O'Dea* as statutory construction); *infra* Section III.A.1.b.

73. 287 P.2d 765, 766–67 (Cal. 1955).

74. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 7.

75. *See* Monahan, *The California Rule*, *supra* note 26, at 1046 (explaining that California's concept of pensions as compensation was automatically extended into the first-day rule). For the (potentially) contractual nature of pension benefits, see *O'Dea*, 169 P. at 367. For first-day protection of pensions, see *Dryden*, 59 P.2d at 105; *infra* Section III.A.1.b.

The most problematic aspect of the rule about protecting future accruals was also inadvertent.[76] The *Allen* court's adoption of the "pension contract on the first day" (double) dicta did not bar it from ruling that covered benefits accrued daily (as earned).[77] The earned-each-day outlook sees the situation as a series of promises as opposed to treating the employment relationship as a single promise spanning an employee's entire career.[78] The justification for the multiple-contracts position is that the employee accepts the offer for pension benefits daily through work.[79] A rationale for the solitary-contract position is that, because acceptance takes time to complete, the employer is estopped from revoking the promise until it can be accepted.[80]

Failing to acknowledge that it had a choice, the court adopted the sole-contract option by implication and allowed cuts to be constitutional if the statute substituted a new advantage.[81] The comparable benefit requirement was not exactly pulled rabbit-like from a hat, but almost. It came about as an (over)simplification of a prior case that upheld a reduction in benefits because the reform offset a disadvantage with an advantage.[82] So the court converted "a" reason into "the" reason to satisfy constitutional guarantees. Transforming facts into law, the court introduced the offset element, and the California Rule was complete.

The supreme court made its *implicit* selection (to freeze future accruals on the first day without an accompanying new benefit)

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76. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 8 (explaining that the first-day rule was not explicitly stated, but rather, had to be deduced from the fact that the reforms were prospective).

77. *Allen*, 287 P.2d at 766–67.

78. *See* RESTATEMENT (SECOND) OF CONTS. § 31 (AM. L. INST. 1981) (delineating offers proposing a single contract versus series of contracts).

79. *See* Rachel Arnow-Richman, *Foreword: The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 3 (2003) (explaining the traditional view that "the execution of each unit of work by the employee marks the commencement of a new agreement under new terms"); Anenson et al., *Constitutional Limits*, *supra* note 4, at 384 (clarifying the traditional employment at-will view in the context of government pensions); *infra* Section III.A.1.

80. *See* RESTATEMENT (SECOND) OF CONTS. § 45 (AM. L. INST. 1981) (offer irrevocable if acceptance takes time to complete and the offeree is trying to complete it); Anenson et al., *Constitutional Limits*, *supra* note 4, at 384; *infra* Section III.A.1.

81. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 12.

82. *Allen* relied on *Wallace v. City of Fresno*, 265 P.2d 884 (Cal. 1954), to determine whether the reform was valid, 287 P.2d at 767. *Wallace* characterized *Packer v. Board of Retirement*, 217 P.2d 660 (Cal. 1950), as validating reforms that provide a new benefit to offset any reduction, 265 P.2d at 886. *Packer*—the only case (or at least one of the few cases) to uphold pension reform in the California Rule trajectory—applied *Kern*'s reasonableness requirement. 217 P.2d at 662. The supreme court emphasized that the reform could have given greater benefits under certain circumstances and that it left the pension "substantially unchanged." *Id.* at 664.

explicit in *Legislature v. Eu*[83] three decades later.[84] Not even the huffing and puffing of the Great Recession that exposed fundamental weaknesses in government pensions blew the California Rule down.[85] Indeed, in recent decisions, the Supreme Court of California managed to uphold pension reform without jettisoning its super pension contract.

In *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*,[86] decided in 2020, the court connected its own Contract Clause criteria to the federal ends-means inquiry.[87] The court carved out an exception to the new benefit mandate for reducing pension benefits after the first day of employment.[88] The court softened the requirement by analyzing it under the intermediate scrutiny test and not under the element of substantial impairment (that the court does not seem to recognize as a separate criterion).[89] A previous decision the year before in *Cal Fire Local 2881 v. California Public Employees' Retirement System*[90] avoided addressing the first-day-future-accrual formula by declaring that the benefit eliminated was not a term of the pension contract.[91] The court reasoned that the legislature had removed a feature of the pension system that was not a form of deferred compensation earned by work.[92] In both *Alameda* and *Cal Fire*, the reform measures that withstood constitutional challenges purged pension abuses.[93]

83. 816 P.2d 1309 (Cal. 1991).

84. *Id.* at 1331–33; *infra* Section III.A.1.b.

85. *See* Katie Marriner & Andrea Riquier, *These Public Pension Systems Used to Have Too Much Money. Now They're in Crisis. What Happened?*, MARKETWATCH (June 29, 2021), https://www.marketwatch.com/story/these-public-pension-systems-used-to-have-too-much-money-now-theyre-in-crisis-what-happened-11624472487 [https://perma.cc/S4S3-Z5RA] (reporting how three public pensions in Kentucky, Pennsylvania, New Jersey that were overfunded two decades ago are now in trouble).

86. 470 P.3d 85 (Cal. 2020).

87. *See infra* Section III.A.1.d.

88. *See infra* Section III.A.1.d.

89. *See infra* Section III.A.1.d.

90. 435 P.3d 433 (Cal. 2019).

91. *Id.* at 450.

92. *Id.* at 448–49.

93. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 160. Pension abuses are loopholes that allow employees to collect payments based on an artificially inflated base compensation figure. *Id.* at 156 n.320. The California Supreme Court had granted review in a third case involving the same statutory reform as *Alameda*, but dismissed the appeal based on that decision. *Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n*, 473 P.3d 312, 312 (Cal. 2020); *infra* Section III.A.1.d.

Nationally, California's super public pension contract is a minority view that has been contracting (pun intended) over time.[94] Many states recognize that pensions provided by statutes can be contracts.[95] Although unlike California, they are not *automatically* contracts (so long as the benefits are connected to compensation).[96] Moreover, there are diverse approaches as to *when* these contracts are formed with benefits protected: first day, last day, somewhere in between.[97] Furthermore, for those states embracing the first day rule a la California, most protect only past and not future accruals.[98] Protecting past accruals validates reforms that operate prospectively.[99] Protecting future accruals comparable to California's approach, in contrast, *in*validates those same reforms. Accordingly, California law offers some of the strongest public pension protection in the country.[100] Akin to the Hotel California, government employers that check in by offering benefits can never leave. Nor can legislatures easily adjust their pension policies, to the detriment of government employees.[101]

We next survey the theory and doctrine of stare decisis before operationalizing a highly nuanced version of the doctrine not previously recognized in scholarship or the wider debate about pension

94. *See* discussion *infra* Section IIIA.2.d.; *see* PEW CHARITABLE TRS., LEGAL PROTECTIONS, *supra* note 38, at 6–7, figs.3–4 (detailing four approaches in addition to states that have no ruling and showing that most states (sixteen) do not protect the rate of future accrual pursuant to a contract or other theory).

95. *See* Monahan, *Legal Framework*, *supra* note 62, at 638–39; *see* Anenson et al., *Constitutional Limits*, *supra* note 4, at 341 (analyzing forty-eight decisions challenging pension reform under the Contract Clause across twenty-two states); *id*. app.; *see also* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 16–17 (outlining different approaches to government pension protection based in contract, property, and estoppel).

96. *See* Anenson & Gershberg, *Clashing Canons*, *supra* note 63, app. at 215–16 (showing overwhelming majority of courts applied the no contract canon to presume statutes providing benefits are not contracts in survey of pension reform litigation from 2014–19); *infra* Sections III.A.1., III.A.4.

97. Anenson et al., *Constitutional Limits*, *supra* note 4, at 375–76 (noting that contract formation can be a career lifetime apart); *id*. at diagram 7; PEW CHARITABLE TRS., LEGAL PROTECTIONS, *supra* note 38, at 5–6 figs.2–3.

98. Many jurisdictions safeguarding past accruals also do so later in the employee's career. PEW CHARITABLE TRS., LEGAL PROTECTIONS, *supra* note 38, at 5 fig.2 (counting eighteen states).

99. At least one of the dozen out-of-state decisions that once followed the California Rule have since determined that public pension benefits are something earned over time and not guaranteed for the future. *See infra* Section III.A.2.d.

100. Nevada appears to go farther than California in protecting public pensions. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 23 n.119 (advising that Nevada has even broader protection by allowing retirees to keep favorable changes that went into effect after service ended (citing Pub. Emps.' Ret. Bd. v. Washoe County, 615 P.2d 972, 973–74 (Nev. 1980))); Nicholas v. State, 992 P.2d 262, 264 (Nev. 2000) (prohibiting any adverse changes after retirement).

101. *See infra* Section III.A.4.

reform. Our analysis is meant to help the California Supreme Court reassess, rehabilitate, and (maybe) roll back part of its public pension law.

II. STARE DECISIS THEORY AND DOCTRINE

The controversy surrounding government pension and constitutional law in California provides an ideal opportunity to take stock of what we know about precedent.[102] Stare decisis is a fundamental and distinguishing feature of the common law legal system.[103] It has been a source of law since the sixteenth century.[104] Indeed, the concept of stare decisis is old enough to be rendered in Latin. The literal translation, "standing by the thing decided," supports the "core idea" that courts must begin with prior precedent.[105] Courts have adhered to this pattern of judicial behavior even in California—a state with an extensive codification of private law.[106] Courts treat prior decisions as a presumption—a default setting of continuity.[107] Justice Brandeis famously provided the rationale: "Stare decisis is usually the wise

102. *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. 67, 67–68 (2006) (claiming that American judges and lawyers "lack of any detailed theoretical understanding of precedent"). Our goal is to provide a concise overview of precedent as a jurisprudential concept and as a doctrine to engage scholars, judges, and practitioners.

103. State v. J.P., 907 So. 2d 1101, 1109 n.2 (Fla. 2004) (noting that stare decisis has been a fundamental tenet of Anglo-American jurisprudence for centuries); *see also* Sellers, *supra* note 102, at 68 ("[M]any American lawyers see the practical, untheoretical, common-sense elaboration of the law by judges, through precedent, as one of their system's primary virtues.").

104. *See* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 41 (2d ed. 2008); *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 661 (1999) [hereinafter Lee, *Stare Decisis in Historical Perspective*] (explaining that legal historians have not been able to pinpoint when "case law precedent gained currency in the English common law," but generally agree that it was somewhere between the eighteenth and early nineteenth centuries).

105. Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84 (2000) ("This core idea is simply that courts must start with their own precedent, even if there are varying ideas about the binding nature of that precedent.").

106. *Id.* at 100 n.86 (explaining that the common law method of precedent was adopted even in California "whose private law is more codified than some nations"). Influenced by John Norton Pomeroy, California courts expressly adopted this view in 1888, and in 1901, the California legislature confirmed it by statute. *See id.* (citing John Norton Pomeroy, *The True Method of Interpreting the Civil Code*, 3 W. COAST REP. 585 (1884)); *see also* Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617, 619–20 (1994) (discussing John Pomeroy's influence on California courts and his belief that judges should interpret the civil code using common-law precedent and customs).

107. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1724 (2013). For an early California case articulating the presumption, see Hart v. Burnett, 15 Cal. 530, 601 (1860) (citing 1 KENT, COMMENTARIES ON AMERICAN LAW 476 (1826)).

policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."[108]

Whether the presumption is overcome is a question of policy.[109] The Supreme Court of the United States often repeats the refrain that "[s]tare decisis is not an inexorable command; rather it is a principle of policy and not a mechanical formula of adherence to the latest decision."[110] State courts agree.[111] The Supreme Court of California declared that the "policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case."[112] Thus, answering the question of abrogation entails a cost-benefit analysis. In the classic formulation, judges weigh the costs of unsettling the law against the benefits of error correction.[113]

Because "[s]tare decisis is not rocket science,"[114] the indeterminacy involved in the cost-benefit calculus causes controversy and receives a fair share of criticism.[115] Striking the right balance demands

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108. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

109. *See, e.g.*, Helvering v. Hallock, 309 U.S. 106, 119 (1940). In one of the California Supreme Court's earliest explanations of stare decisis, it declared:

> If, after fully considering a former decision, a Judge is convinced that it is wrong, it becomes simply a question of public policy, whether proprietary rights have grown up to such an extent that it will produce more of evil than of good to restore the law to its integrity.

Houghton v. Austin, 47 Cal. 646, 667 (1874). *But see* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 423 (2018) (arguing that judges do not mean it when they say that precedent is a principle of policy).

110. Sellers, *supra* note 102, at 76 n.168, 87 (explaining that these phrases now appear in nearly all cases concerning precedent, usually attributed to *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but they appeared in Justice Frankfurter's opinion in *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and in numerous subsequent cases).

111. *See, e.g.*, People v. Petit, 648 N.W.2d 193, 199 (Mich. 2002); 20 AM. JUR. 2D *Courts* § 125, Westlaw (database updated Nov. 2022) (explaining that the rule of stare decisis is a judicial policy).

112. Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 63 (Cal. 1988); *see* County of Los Angeles v. Faus, 312 P.2d 680, 684–85 (Cal. 1957) ("The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each instance by the discretion of the court.").

113. Barrett, *supra* note 107, at 1716.

114. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176 (2006); *see also* Randy J. Kozel, *Special Justifications*, 33 CONST. COMMENT. 471, 486 n.68 (2018) [hereinafter Kozel, *Special Justifications*] (concluding that "the doctrine of stare decisis does not itself warrant stare decisis effect").

115. *See* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404 (1988) (calling stare decisis "inherently subjective" and concluding that "few judges, including Supreme Court Justices, can resist the natural temptation to manipulate it"); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 644–45 (2000) ("The Supreme

a method of decision-making that "is structured enough to provide stability and coherence, but flexible enough to allow improvisation and growth."[116] To achieve these competing aims, state and federal courts have developed standards to express the tipping point along with the factors identified earlier to weigh in the balance.[117] Such guidelines help judges manage this delicate balance.[118]

Although the factors have remained more or less the same, the U.S. Supreme Court has articulated different standards over time (and within the Court itself). Expression of the trigger for overruling has ranged from mere error to error plus and back again.[119] The error plus activation to abrogate precedent came to be known as the "special justification" standard. Recently, in the momentous *Dobbs v. Jackson Women's Health Organization*,[120] a majority failed to endorse the "special justification" standard although the dissent repeated the test and narrowed the focus to changes in fact or law.[121]

As with many areas of law, the Supreme Court's vision of stare decisis has been influential in the states.[122] Several state courts of last resort have adopted the more-than-mistake mandate as the stare

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Court's doctrine of . . . stare decisis . . . has been . . . variously condemn[ed] . . . as a 'backwater of the law,' 'a mask hiding other considerations . . . ,' and a matter of 'convenience, to both conservatives and liberals,' whose 'friends . . . are determined by the needs of the moment.'" (citations omitted)).

116. Farber, *supra* note 114, at 1183–84; *see* Re, *Precedent as Permission*, *supra* note 3, at 945 (offering a more rule-like test for stare decisis that structures the factors in tiers).

117. *See* Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENT. 341, 342–45 (1985) (listing the "normal" factors to be considered in determining whether to overrule a case).

118. Stare decisis, no less than other doctrines, must confront the inevitable tension between stability and change. *See* T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 692–707 (2018) [hereinafter Anenson, *Equitable Defenses*].

119. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 73–75 (2008) (noting that the conservative majority is split on whether error or error plus is the standard for stare decisis). Judges adopted the error standard of stare decisis at the time when their idea of the law was to discover and not to make it. *See* Price, *supra* note 105, at 101–02. Mistake alone was sufficient because cases were evidence of the law and not the law itself. *Id*.

120. 142 S. Ct. 2228 (2022).

121. *Id.* at 2262–65 (2022) (outlining five factors in the stare decisis calculus); *see id*. at 2307 (Kavanaugh, J., concurring) (consolidating considerations into three factors); *id*. at 2334 (Breyer, Sotomayor, & Kagan, JJ., dissenting). Once a leading authority on stare decisis, HUHN, *supra* note 104, at 42; Farber, *supra* note 114, at 1194 ("Discussing stare decisis today without mentioning *Casey* is like presenting Hamlet without Hamlet—or, some might say, Harry Potter without the evil Voldemort."), a majority of the Court in *Dobbs* characterized *Planned Parenthood v. Casey*'s stare decisis analysis as "novel" and insisted it gave insufficient attention to legal error. *See Dobbs*, 142 S. Ct. at 2272.

122. *See* Perry v. State, 741 A.2d 1162, 1194–95 (Md. 1999) (Cathell, J., dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992), for the proposition that "stare decisis is not an inexorable command").

decisis test and recited the "special justification" admonition.[123] All the same, the error-plus standard of stare decisis has yet to leave a legacy in California.[124] The Supreme Court of California has recognized that "[p]revious decisions should not be followed to the extent that error may be perpetuated."[125] Moreover, the court has not identified a precise ground or minimum standard for overturning precedent.[126] It has instead left the analysis open.[127] The court has underscored the power of precedent by allowing repudiation in the "rare and appropriate case," while listing factors (including mistake) to bear on that decision.[128]

All in all, courts do not overrule past decisions lightly. And when they do, judges search for consensus. The proof necessary to warrant repudiation of the prior decisional rule is both deep and wide. Evidence encompasses the court's own cases, decisions in other jurisdictions (state and federal), scholarly publications and, where relevant, the view of the American Law Institute as set forth in the *Restatements*.[129] Judicial commitment to copious citations is consistent across the country, including California.[130] In overturning its own precedent, the California Supreme Court has cited the critical commentary of scholars and the *Restatement*.[131] It has also relied on persuasive

123. *See, e.g.*, State v. Hickman, 68 P.3d 418, 426 (Ariz. 2003); Commonwealth v. Reid, 235 A.3d 1124, 1168 (Pa. 2020) ("And we have recognized that changing course demands a special justification—over and above the belief that the precedent was wrongly decided—in matters involving statutory, as opposed to constitutional, construction.").

124. California law is clear that stare decisis will not be applied to sustain and perpetuate a principle of law by a clearly erroneous decision or series of decisions. *See, e.g.*, People v. Mendoza, 4 P.3d 265, 285 (Cal. 2000); *accord* State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004) (commenting that stare decisis bends when there has been an error in legal analysis).

125. County of Los Angeles v. Faus, 312 P.2d 680, 685 (Cal. 1957) ("Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result.").

126. *See* People v. Lopez, 453 P.3d 150, 169 n.19 (Cal. 2019) ("The policy [of stare decisis] is just that—a policy—and it admits of exceptions in rare and appropriate cases . . . .").

127. *See Faus*, 312 P.2d at 684–85 (articulating that the application of stare decisis must be decided in each instance by the discretion of the court); *supra* note 109.

128. Samara v. Matar, 419 P.3d 924, 932–33 (Cal. 2018). One opinion did mention the special justification standard without further analysis. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 802 (Cal. 2001); *see also* People v. Partida, 122 P.3d 765, 774 (Cal. 2005) (Baxter, J., concurring and dissenting in part) (using terms as relevant to statutory construction).

129. *See* Sellers, *supra* note 102, at 87.

130. *See* Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 63–68 (Cal. 1988) (analyzing the following developments in overturning precedent: rejection by other state courts, scholarly criticism, 1980 Report of the National Association of Insurance Commissioners, additional legislative history, adverse consequences, analytical difficulties).

131. *Samara*, 419 P.3d at 932–33; Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n, 291 P.3d 316, 322 (Cal. 2013) (commenting on our precedent's "divergence from the path followed by the Restatements").

authority in other state and federal jurisdictions (including the U.S. Supreme Court) that has disagreed, distinguished, or abandoned the decisional rule.[132] California's highest court has additionally looked to later decisions of the lower courts as well as its own subsequent cases.[133]

In summary, the burden of persuasion is apparently (albeit implicitly) tied to a burden of production with reliance on primary and secondary sources of law. This makes overruling precedent somewhat of a popularity contest regardless of any imprecision about making out a prima facie case or the factors bearing on that decision. The next section applies the preceding precepts and principles of precedent to the California Rule of public pensions. Precisely, we amplify the California Supreme Court's formulation of stare decisis to inform whether it should adhere to or abandon the super pension contract (in whole or in part).

III. THE ROLE OF STARE DECISIS IN THE RETENTION OR REPUDIATION OF THE CALIFORNIA RULE

Should the California Supreme Court repudiate precedent creating a super pension contract? In attempting to answer that question, this part integrates theory and practice by applying the following framework of stare decisis. First, we begin with the presumption of following precedent identified above.[134] This default rule is not only historically-grounded, but also continues as a consistent part of contemporary state and federal court doctrine.[135] Academics may not universally agree on this paradigm.[136] But at the very least, scholars who have taken sides on all aspects of stare decisis—structure, expression, philosophical foundation—support the starting point of taking cases

132. *See* People v. Lopez, 453 P.3d 150, 169 n.19 (Cal. 2019) (overruling precedent per the guidance of the U.S. Supreme Court); Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 678 (Cal. 1995) (overruling precedent due to a "tide of critical or contrary authority from other jurisdictions"); *Faus*, 312 P.2d at 684 (noting the decisional rule was "followed in only a few other states").

133. *In re* Jaime P., 146 P.3d 965, 966 (Cal. 2006).

134. *See supra* Part II.

135. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND THE PRINCIPLES WE LIVE BY 234–35 (2012) (describing U.S. Supreme Court overruling practice as a rebuttable presumption of correctness); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001) ("American courts of last resort recognize a rebuttable presumption against overruling their own past decisions."); *supra* Part II.

136. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994) (arguing for the abandonment of stare decisis in constitutional cases).

seriously.[137] Departure from the status quo requires a reasoned explanation for that decision.[138]

Second, we retain the structure of stare decisis as a balancing test. Although the California Supreme Court has described the doctrine as a general rule with an (open-ended) exception, the court has acknowledged that it undertakes a policy analysis that implicitly endorses balancing.[139] As a practical matter, perceiving precedent as a procedural paradigm that focuses on the decision-making process makes sense for California.[140] The state's stare decisis doctrine already emphasizes an open-ended analysis with no serious arguments to exclude or elevate certain criterion.[141] Allowing courts to examine a full spectrum of factors (without privileging any of them) guarantees that no issues are overlooked or unconsciously considered.[142] For this reason, we believe the so-called "doctrinal soup" method is a superior tool for determining the weight that state precedents ought to carry.[143] Regardless of expression, this form of evaluation best captures what judges in California (and elsewhere) are doing.[144]

Third and finally, we evaluate the costs and benefits of overruling the California Rule by identifying conflicting considerations that are

137. *See* Farber, *supra* note 114, at 1176 (arguing for a version of stare decisis in federal constitutional law in which rulings are not overturned except for "strong reasons"); Nelson, *supra* note 135, at 4, 7 (identifying a standard of stare decisis that turns on the degree of error like departing from "demonstrably wrong" decisions).

138. *See* Vasquez v. Hillery, 474 U.S. 254, 266 (1986) (instructing that overruling precedent requires "articulable reasons"). William Cranch wrote in the preface of his reports of early U.S. Supreme Court decisions: "Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." Price, *supra* note 105, at 91–92 (quoting William Cranch, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (William Cranch ed., 1804), *reprinted in* 5 UNITED STATES REPORTS, at iii, iii–iv (1883)).

139. *See, e.g.*, People v. Lopez, 453 P.3d 150, 168 (Cal. 2019) (calling stare decisis a policy); Houghton v. Austin, 47 Cal. 646, 667 (1874) (describing stare decisis as a cost-benefit analysis).

140. GERHARDT, *supra* note 119, at 198 (commenting that "any theory that requires justices to prioritize sources in a particular matter will be difficult, if not impossible, to implement").

141. *See supra* Part II.

142. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 100 (2018) (contending that the Court's "mundane" stare decisis factors "may obscure the central consideration" warranting repudiation); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 109 (2008) (arguing that the Justices should "be[] honest with themselves and with us about the considerations that drive them").

143. *Accord* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1035 (2018) (articulating a deliberative democracy view of precedent in which judicial reasoning is the key to constraining arbitrary power). We realize our schema can be criticized as "throwing qualitatively different factors into a big doctrinal soup." Re, *Precedent as Permission*, *supra* note 3, at 945; *cf. id.* (suggesting a step-by-step structured approach to stare decisis).

144. *See, e.g.*, Samara v. Matar, 419 P.3d 924, 932–33 (Cal. 2018).

common to the cases and captured in the literature. The cost concerns comprise the reasons for respecting precedent in the first place.[145] The benefits are countervailing factors that assist judges in determining when the regard for precedent might be overcome.[146] These criteria are internal and external to stare decisis goals.[147] An "all-things-considered" examination best reflects an appreciation of stare decisis as a form of reasoning within a pluralistic model of law and offers a comprehensive understanding of what is at stake.[148] Advancing an overarching theory and structure of stare decisis better explains the retain-repudiate dilemma in California's government pension law.[149] Setting forth a full account of the ingredients influencing stare decisis also confers content and clarity to California jurisprudence. Accordingly, the doctrinal architecture developed below is better descriptively, functionally, and normatively. It has the added advantage of requiring no drastic revision to California law.

A. Benefits of Overruling Precedent

Stare decisis does not require adherence to precedent at all costs. When the costs substantially outweigh the benefits, a court may disavow the prior rule. Thus, the presumption of settled law can be rebutted. Courts and commentators recognize the following factors that favor overruling: rule of law norms (magnitude of the error, quality of the reasoning, changing facts or conditions, workability), jurisprudential coherence, justice and policy, and democratic values.[150]

145. *See infra* Section III.B.

146. *See infra* Section III.A.

147. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989) (explaining that adherence to precedent permits judges "to avoid having to rethink the merits of particular legal doctrine").

148. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (describing constitutional law through multiple modes of analysis); GERHARDT, *supra* note 119, at 148 (describing precedent's dual role as a mode of reasoning and a medium to see other modes of reasoning); *infra* Section III.A. *But see* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 14, 107–39 (2017) [hereinafter KOZEL, SETTLED VERSUS RIGHT] (advocating a "second-best" theory of stare decisis that seeks to minimize judicial ideologies by eliminating factors such as the magnitude of the error and the quality of prior reasoning).

149. *See infra* Section III.B.

150. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (listing factors of stare decisis as the quality of the past decision's reasoning, the workability of the rule it established, its consistency with other related decisions, and developments since the decision was handed down).

1. Rule of Law

Rule of law norms straddle both sides of the stare decisis line.[151] Frederick Schauer connects precedent with the goal of establishing coherence among diverse details.[152] Yet it has long been recognized that "even a judge such as Dworkin's mythical Hercules will be unable to fit all precedents into a single, coherent theory."[153] Inevitably, mythical or mortal judges will find it necessary to reject some precedents as mistaken.[154] An advantage of overruling precedent from a rule of law standpoint, then, is superior rule replacement.[155] To be sure, Justice Frankfurter professed that an ironclad requirement of adherence to precedent in all cases would transform the doctrine of stare decisis into an "imprisonment of reason," requiring the perpetuation of error in future cases.[156] Similarly, the Supreme Court of California declared: "Although the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction."[157]

a. Magnitude of the error

The U.S. Supreme Court has declared that "precedent is to be respected unless the most convincing of reasons demonstrates that

151. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (Amy Gutman ed., 2d ed. 2018) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error."); *infra* Section III.B.1 (detailing additional values).

152. Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMMENT. 437, 447 (2018) (citing RONALD DWORKIN, LAW'S EMPIRE (1986)).

153. Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1354–55 (1990) (noting that the requirement of total consistency is impossible to satisfy unless judges regard some precedents as mistaken (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 119 (1978) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY])).

154. Aware of this reality, Justice Frankfurter declared: "[T]here comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases." New York v. United States, 326 U.S. 572, 575 (1946).

155. *See* Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., concurring in part and dissenting in part) ("I think it my duty to depart from [these cases], rather than to lend my support to perpetuating their constitutional error in the name of stare decisis."); Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1862 (explaining that entrenching error impairs the soundness of the legal regime).

156. United States v. Int'l Boxing Club of N.Y., 75 S. Ct. 259, 266 (1955) (Frankfurter, J., dissenting); Payne v. Tennessee, 501 U.S. 808, 842–43 (1991) (Souter, J., concurring) (explaining that when the court has confronted a wrongly decided precedent "we have chosen not to compound the original error, but to overrule the precedent").

157. Cianci v. Superior Ct., 710 P.2d 375, 387 (Cal. 1985).

adherence to it puts us on a course that is sure error."[158] The California Supreme Court has echoed the same sentiment.[159] Early American views of the law were Blackstonian.[160] Back then, cases embodied evidence of the law and not the law itself.[161] This led to the understanding that in overturning precedent, "subsequent judges do not pretend to make new law, but to vindicate the old one from misrepresentation."[162] Even though the law is no longer "up there" in the heavens (but "out there" in the courts),[163] the magnitude of the mistake is still treated as a prerequisite to overruling.[164]

The story of the California Rule began in error and loomed larger upon retelling. The initial, intelligible idea of pensions as deferred compensation beginning on the first day of work extended to the unfamiliar image that at-will public sector employment included the protection of future accruals absent a new advantage.[165] Amy Monahan called this last component of California's super pension contract a "bombshell."[166]

It is puzzling that in the collection of cases amounting to the California Rule, not once did the court interpret the statute providing pension benefits to ascertain its meaning.[167] Specifically, it never examined whether the alteration at issue impaired benefits that were part of

158. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010).

159. *See, e.g.*, People v. Guerrero, 748 P.2d 1150, 1157 (Cal. 1988) ("[T]his court can and should reconsider patently erroneous cases . . . ."); *In re* Estate of Duke, 352 P.3d 863, 877 (Cal. 2015) (declaring that stare decisis should not shield court-created error from correction).

160. *See supra* Part II.

161. *See* Price, *supra* note 105, at 101–02; *supra* Part II.

162. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Philadelphia J.B. Lippincott & Co. 1876) (1765); *see* Sellers, *supra* note 102, at 72 (noting that Chancellor Kent summarized the consensus that judges are bound to follow their decisions unless it can be shown that the law was misunderstood) (citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475 (O. W. Holmes, Jr. ed., 12th ed. 1873)).

163. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436, 538 n.114 (citing S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .")).

164. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008) ("The value of the doctrine of precedent is not simply that it ensures respect for past decisions but also that it ensures that bad decisions are not repeated."); Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 WASH. U. L. REV. 449, 449 (2021) ("[T]he phenomena of reproducing mistakes matter in the legal system whose lifeblood is words and that heavily relies on the principle of stare decisis.").

165. *See supra* Part I.

166. Monahan, *The California Rule*, *supra* note 26, at 1060.

167. *See supra* Part I; *infra* Section III.A.4.

a pre-existing contract.[168] The source case for considering pensions as contracts is *O'Dea v. Cook*[169] that only suggested a contract because gifts were forbidden under the state constitution.[170] Citing U.S. Supreme Court cases, the California Supreme Court in *Kern v. Long Beach*[171] instructed that contract existence should be discerned from the language of the legislation and its judicial construction.[172] The court then paid lip service to that requirement.[173] *Packer v. Board of Retirement*[174] piggybacked on *Kern* to reach an identical conclusion by noting the similarities between the Los Angeles city charter and the Long Beach charter.[175] *Allen* actually involved the same city charter as *Kern* so the court rubber stamped *Kern*'s conclusion on the contract issue.[176] In *Legislature v. Eu*, the court conjured the legislative purpose in providing pensions out of thin air. Without consulting the text or legislative history, the court assumed the state government intended to treat legislators the same as other employees whereby benefits would extend beyond their initial term of office.[177]

In a previous study, we found that most courts apply the opposite assumption.[178] They use the unmistakability doctrine (no contract canon) to construe statutes providing for government pension benefits.[179] The no contract canon furthers the values of legislative will and separation of powers by presuming that the legislature makes policy and not binding contracts.[180] More perplexing, there is case law in California approving the remedial canon to construe pension

168. Anenson et al., *Constitutional Limits*, *supra* note 4, at 348 ("The typical enunciation of the canon is that employees must prove that the prior statute evidences a 'clear and unmistakable' intent to enter an unchangeable contract for pension benefits." (citation omitted)).

169. 169 P. 366, 367 (Cal. 1917).

170. *Id.* In *Dryden v. Board of Pension Commissioners*, the Supreme Court emphasized that the statute says "shall" although it had already declared the existence of a contract before undertaking that interpretation. 59 P.2d 104, 106 (Cal. 1936).

171 179 P.2d 799 (Cal. 1947).

172. Kern v. City of Long Beach, 179 P.2d 799, 800 (Cal. 1947).

173. *See supra* note 51.

174. Packer v. Bd. of Ret., 217 P.2d 660 (Cal. 1950).

175. *See id.* at 662; *see also id.* at 661 n.2 (listing legislative text in footnotes).

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

177. Legislature v. Eu, 816 P.2d 1309, 1333 (Cal. 1991).

178. *See* Anenson & Gershberg, *Clashing Canons*, *supra* note 63, app. at 215.

179. *See id.* at 179.

180. *Id.* at 174; *see* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 442 (Cal. 2019) (explaining that the canon furthers a legislature's "principal function" which is "to make laws that establish the policy of the [governmental body]" (quoting Retired Emps. Ass'n of Orange Cnty. v. County of Orange, 266 P.3d 287, 295 (Cal. 2011))).

legislation.[181] The remedial canon calls for the liberal construction of statutes to effectuate their beneficial purpose.[182] One might wonder whether the court pictured pensions as old-age support.[183] So it gave the statute an expansive reading in line with the remedial purpose of pensions even as this picture of pensions seemingly contradicts the court's expressed view of them as deferred compensation.[184] The foundational precedent to the California Rule—*O'Dea v. Cook*—illustrates this dichotomy. There the court sensed a contract yet also invoked the remedial canon.[185]

A compromise position could be that legislative provisions *in the employment context* receive the opposite presumption.[186] This is essentially the position the court has now taken.[187] But even a contrary default rule would involve interpreting the statute from which the supposed contract sprung. Notably, the supreme court decisions developing the rule were not out of touch with the social circumstances of the parties to the litigation and pushed the envelope of pension protection.[188] By freezing future accruals in *Allen*, however, the California Supreme Court lost its way and moved outside the bounds of contract and constitutional law. A simple oversight has since ballooned into the present pension bomb.

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181. *See, e.g.*, Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 227 Cal. Rptr. 3d 787, 804 (Ct. App. 2018), *rev'd on other grounds*, 9 Cal. 5th 1032 (Cal. 2020); *see also* Anenson et al., *Constitutional Limits*, *supra* note 4, at 350 (noting that California is representative of the confusion surrounding competing canons in public pension-Contract Clause disputes). The California Supreme Court repeatedly endorsed the remedial canon in the early twentieth century. *Id.* at 351; *see* Casserly v. City of Oakland, 12 P.2d 425, 426 (Cal. 1932) (interpreting public pension statute) ("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.").

182. *See* Anenson & Gershberg, *Clashing Canons*, *supra* note 63, at 160–61; *see also* Anenson et al., *Constitutional Limits*, *supra* note 4, at 352–56 (comparing the no contract canon versus the remedial canon).

183. Anenson et al., *Constitutional Limits*, *supra* note 4, at 371 n.74; *see also id.* at 351 (explaining that state courts tend to apply the canon to construe work-related legislation, including employee benefits).

184. *See* Anenson & Gershberg, *Clashing Canons*, *supra* note 63, at 206 ("[T]he 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.").

185. O'Dea v. Cook, 169 P. 366, 367 (Cal. 1917); *infra* Section III.A.4. *See generally* Anenson & Gershberg, *Clashing Canons*, *supra* note 63 (analyzing competing canons in government pension reform litigation).

186. Beermann, *supra* note 36, at 51.

187. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 351 (finding that the California Supreme Court recognized the no contract canon in Contract Clause-government pension controversies for the first time in *Retired Employees Association of Orange County, Inc. v. County of Orange*, 266 P.3d 287, 295 (Cal. 2011)); *supra* Part I.

188. *See supra* Part I.

Like the Supreme Court of California, other courts commonly classify pension benefits as unilateral implied-in-fact contracts.[189] The difference in protection between past and future accruals can be explained by contract duration.[190] The distinction rests on whether judges view the pension contract as a series of daily contracts or as an agreement for an entire term of employment.[191] Despite the fact that government employees in California (like many states) are at-will, pension contracts are conceived as one long-term contract rather than multiple contracts.[192] The universal view espoused in the *Restatement of Contract*, the *Restatement of Employment*, and major contract treatises view at-will employment from a daily contract perspective.[193] The legal effect entitles employers to change the plan prospectively and employees to receive a proportionate share of benefits for work performed.[194] There is a minority view of at-will employment

189. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 447–48 n.12 (Cal. 2019) (indicating that its approach is consistent with public pensions being unilateral implied-in-fact contracts as in *Moro* and other out-of-state cases); Moro v. State, 351 P.3d 1, 20–23 (Or. 2015) (explaining that the pension agreement is a unilateral contract because the offer of benefits invites employees to accept by providing current service for the employer rather than by promising to provide some service in the future).

190. For an alternative view of at-will employment in general, see Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 434 (2016) [hereinafter Arnow-Richman, *Modifying At-Will Employment Contracts*]; *see also* Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1516–17 (2014) (criticizing a unilateral contract approach in theorizing employment at will and arguing for a bilateral contract approach more consistent with mainstream contract law); *accord* 19 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 54:38 (4th ed. 2001) (noting that the unilateral approach is "limited" in dealing with pensions).

191. *See* 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.33, at 300 (rev. ed. 1993) ("[A]n offer [can be] made in such terms as to create a power to make a series of separate contracts by a series of separate acceptances.").

192. *See* CAL. LAB. CODE § 2922 (2022) (stipulating that employment for longer than one month without a specified term can be terminated at the will of either party on notice to the other); Kern v. City of Long Beach, 179 P.2d 799, 802 (Cal. 1947) (explaining how public employment provides no right to tenure in the job).

193. *See* 1 WILLISTON & LORD, *supra* note 190, § 5:11 (concerning offers contemplating a series of performances); RESTATEMENT (SECOND) OF CONTS. § 31 (AM. L. INST. 1981); RESTATEMENT OF EMP'T LAW § 3.04 (AM. L. INST. 2015); *see also* RESTATEMENT OF EMP'T LAW § 2.06 (AM. L. INST. 2015) (endorsing majority view that binding policy statement is revocable or modifiable by employee continuing to work); *cf.* 15 WILLISTON & LORD, *supra* note 190, § 45:17–18 (outlining the right to compensation for part performance when a contract is divisible into multiple performances).

194. *See* 19 WILLISTON & LORD, *supra* note 190, § 54:51 (citing cases demonstrating that discharged employees have a right to a proportionate or pro rata share of benefits, including pensions, for work performed). Although contract and employment law mandate payment for work already performed, there appears to be disagreement on the basis for the recovery (contract or *quantum meruit*). *See id.* § 54:35.

requiring a new benefit as consideration to change the contract terms.[195] But California does not follow that view of employment nor has it attempted to rationally reconstruct its offset element for public pensions on that basis.[196] As such, the first-day-future-accrual rule has been the elephant in the room for the last sixty-five years since the *Allen* decision.

Not even the California Supreme Court's newest decisions explain future accrual protection from a contract law standpoint.[197] Its emphasis in *Cal Fire* that the California Rule accords with ordinary contract principles is, at best, only partly true.[198] What is accurate is that pensions can be conceived as contracts. To reiterate, the error is the requisite contract duration.[199] The mistake is highlighted by the court's reference in *Alameda* that its decision is consistent with the Oregon Supreme Court's opinion in *Moro v. State*.[200] As explained below, Oregon is one of the jurisdictions that has fully retreated from the California Rule's safeguard of future accruals.[201] Instead, Oregon doctrine protects only past accruals on a pro-rata basis.[202] Like California, the *Moro* court equated pension benefits with salary because both are part of the compensation package.[203] Unlike California, the Supreme Court of Oregon reasoned that because employees repeatedly accept their employers' continuing offer of salary for each day they work, employees also repeatedly accept their employers' pension

195. *See* W. David Slawson, *Unilateral Contracts of Employment: Does Contract Law Conflict with Public Policy*?, 10 TEX. WESLEYAN L. REV. 9, 22 (2003) (endorsing this view). *But see* Arnow-Richman, *Modifying At-Will Employment Contracts*, *supra* note 190, at 429–30 (criticizing the requirement of additional consideration in the form of an offsetting benefit as well as the idea that continued employment constitutes consideration in favor of a reasonable notice requirement).

196. *See* Asmus v. Pacific Bell, 999 P.2d 71, 78–81 (Cal. 2000) (indicating that California follows the majority rule of employment at will).

197. For a review of decisions earlier than *Cal Fire* and *Alameda*, see Monahan, *The California Rule*, *supra* note 26, at 1077 (noting the court has never justified the protection of future accruals).

198. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 455 (Cal. 2019) (Kruger, J., concurring) (claiming the California Rule is consistent with "ordinary contract law principles").

199. Anenson et al., *Constitutional Limits*, *supra* note 4, at 384–85 (explaining the issue was whether pension benefits are one contract or a series of them).

200. Moro v. State, 351 P.3d 1, 50–51 (finding offer for COLA is revocable each day).

201. *See infra* Section III.A.2.d.

202. *See Moro*, 351 P.3d at 23 (finding that pension benefits are continuing offer accepted daily as work performed); *id.* at 31 (clarifying that the question was whether the offer of a specific COLA is irrevocable upon hiring or whether the offer is revocable each day); Anenson et al., *Constitutional Limits*, *supra* note 4, at 383–84 (analyzing *Moro*).

203. *See Moro*, 351 P.3d at 20–21.

benefit offers by continuing to perform.[204] Employees thereby earn additional contractual rights to benefits for that additional work.[205] This latter view is consistent with the employment-at-will doctrine and, as analyzed below, the law of private pensions.[206]

Certainly, the idea that pensions are a form of deferred compensation is correct but fixing benefits on the first day of employment is inconsistent with the presumption contained in California's at-will doctrine of government employment (not to mention the no contract canon for reading statutes). It is also elementary that a legal contract cannot be altered by only one side.[207] With respect to retirees and their beneficiaries, the California Rule could be defended under classic contract law. The completion of service could be conceived as a condition precedent that is satisfied upon retirement.[208]

b. Quality of the reasoning

There is similarly a benefit to overruling badly reasoned decisional rules.[209] The U.S. Supreme Court has emphasized that many of the purposes of stare decisis would be undermined by "continued adherence to a rule unjustified in reason."[210] Oliver Wendell Holmes, editing Chancellor James Kent's *Commentaries* in the late nineteenth century, referred to "hasty and crude decisions" that "ought to be examined without fear, and revised without reluctance, rather than to have the character of the law impaired, and the beauty and harmony

204. *See id.* at 20–22 (citing treatises by Corbin and Williston, as well as the Restatement of Contracts).

205. *See id.* at 22. The court further explained that if two employees have the same salary and PERS benefits, the employee who works longer will have a contractual right to a larger retirement under PERS. *See id.* at 33.

206. *See infra* Section III.A.2.c.

207. The magnitude of the mistake is established in part from the discussion in the following sections of the flawed legal reasoning as well as the rule's inconsistencies with related areas of California and federal law. *See infra* Sections III.A.1.b., III.A.2.c–d.

208. CAL. CIV. CODE § 1436 (2022); 13 WILLISTON & LORD, *supra* note 193; RESTATEMENT (SECOND) OF CONTS. § 224 (AM. L. INST. 1981).

209. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citations to cases omitted) ("[W]hen governing decisions … are badly reasoned, this Court has never felt constrained to follow precedent." (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944))); Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n, 291 P.3d 316, 322 (Cal. 2013) (noting that reconsideration of a poorly reasoned opinion is appropriate).

210. Moragne v. States Marine Lines, 398 U.S. 375, 405 (1970); Montejo v. Louisiana, 129 S. Ct. 2079, 2089–90 (2009) (listing one of the factors to consider in stare decisis is whether the prior decision was well-reasoned).

of the system destroyed by the perpetuity of error."[211] The California Supreme Court endorsed Holmes's position early in the state's history.[212] Even in more modern cases, the court has had no qualms about overruling precedent based on the concern that no "satisfactory rationalization has been advanced" for the decision.[213] Related to "plainly inadequate rational support" is when judges follow dicta without an adequate explanation.[214] Chief Justice John Marshall expressed the view that dicta "may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision."[215] In *Hart v. Burnett*,[216] the California Supreme Court repeated Marshall's admonition.[217]

The California Rule of government pensions had inauspicious beginnings in emerging from triple dicta.[218] The supreme court relied on dictum in deciding that pensions were contracts, determining those contracts began on the first day of employment, and protecting future accruals.[219] Additionally, the decisions culminating in the rule in *Allen* and *Eu*, among others, were not well-considered.[220] To reiterate, these

211. Sellers, *supra* note 102, at 72 (citing KENT, *supra* note 162, at 477); *see also Payne*, 501 U.S. 808 at 834 (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes" would undermine the Court's legitimacy).

212. *See, e.g.*, Houghton v. Austin, 47 Cal. 646, 667 (1874) (citing KENT, *supra* note 162, at 477); Hart v. Burnett, 15 Cal. 530, 601–02 (1860) (citing Chancellor Kent).

213. Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942).

214. Trope v. Katz, 902 P.2d 259, 266 (Cal. 1995) (declaring that reliance on the decisional rule was undermined because it was dictum).

215. Cohens v. Virginia, 19 U.S. 264, 399 (1821). For issues involving precedential scope, see Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 459 (2018) (summarizing the "ratio decidendi view," the "legally salient facts account," and the "predictive theory").

216. 15 Cal. 530, 601–02 (1860).

217. *Hart*, 15 Cal. at 598; *see also* W. Landscape Constr. v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 67 Cal. Rptr. 2d 868, 870 (Ct. App. 1997) (explaining that the doctrine of stare decisis "extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion").

218. *See supra* Part I.

219. *See* Monahan, *The California Rule*, *supra* note 26, at 1055–56, 1067 (examining O'Dea v. Cook, 169 P. 366, 367 (Cal. 1917) (pensions are contractual dicta); Dryden v. Bd. of Pension Comm'rs, 59 P.2d 104, 105 (Cal. 1936) (first day dicta); and Legislature v. Eu, 816 P.2d 1309, 1331 (Cal. 1991) (citing dictum from Carman v. Alvord, 644 P.2d 192, 195 (Cal. 1982) for the protection of future accruals)). Concerning *Dryden*, Monahan notes that the supreme court adopted the appellate decision without writing its own and the three decisions referenced by the lower court do not support a first-day finding that pension protection begins upon employment. *Id.* at 1056 (citing Dryden v. Bd. of Pension Comm'rs, 51 P.2d 177, 177–78 (Cal. Dist. Ct. App. 1935); *supra* Part I).

220. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 386 n.315 (finding *Kern* and *Allen* decisions ill-considered).

decisions either did not mention the constitution or failed to identify whether the source was the state or federal Contract Clause.[221] Antecedent decisions in *O'Dea* and *Dryden* were matters of statutory construction and did not turn on the constitution.[222] And *Kern*'s rationale ricocheted in reliance on those two early opinions. The supreme court explained that pensions vest upon the happening of a contingency to make the pension payable, yet still fast forwarded the marker to the first workday.[223]

Moreover, in *Allen*, the first-day-until-forever rule was not explicitly stated.[224] Rather, it must be deduced from the fact that the reforms operated prospectively.[225] The California Supreme Court extended the concept of a pension contract formed on the first day *onward until retirement*. Furthermore, in *Kern*, the rule was unnecessary because the case could have been decided on grounds of an implied duty of good faith and fair dealing or estoppel.[226] Finally, as already indicated, neither the *Allen* decision nor the decisions on which it is purportedly founded analyzed legislative intent to contract or identified the relevant obligations.[227]

No doubt the faulty reasoning in the originating opinions made it hard to quarantine the rule.[228] The continued lack of justification undermines the stare decisis goals of generality and integrity of the law. The unprincipled origins and current state of the California Rule (especially the conception of government employment as a single contract) is a factor weighing in favor of overruling the law. At the very least, the California Supreme Court should own (or disown) the super

221. *See supra* Part I. Failing to list the source of law is not unusual. State judicial opinions are not always clear whether the grounds of the decision are under the federal or state constitution. ELY, JR., *supra* note 31, at 251; Anenson et al., *Constitutional Limits*, *supra* note 4, at 342 (citing recent case examples).

222. *See supra* Part I.

223. Kern v. City of Long Beach, 179 P.2d 799, 803 (Cal. 1947).

224. *See* Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955).

225. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 8.

226. *See* RESTATEMENT OF EMP'T LAW § 3.05 (AM. L. INST. 2015). *See generally* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377 (2008); discussion *infra* Section III.B.4. Other early cases could also have been reached on alternative grounds. *See supra* note 63 and accompanying text.

227. *See* Monahan, *The California Rule*, *supra* note 26, at 1051–59, 1076 (making the point in describing the evolution of California pension law); *supra* Part I; *supra* Section III.A.1.a.

228. *See* Farber, *supra* note 114, at 1183 (noting that part of precedent is to give credence to the reasoning of prior decisions and to take seriously their generative force as starting points for future analysis).

pension contract in the next constitutional challenge to public pension reform.

c. Facts or conditions changed

A common reason for departing from a prior decision is that the facts or conditions have changed since the earlier ruling. The California Supreme Court has declared that it is "our duty not to follow decisions that we are convinced are erroneous and obsolete."[229] The premise of following precedent is that like cases will be treated alike so that cases with the same facts will be decided the same way.[230] If there are relevant factual distinctions, or circumstances have changed, a precedent does not apply.[231]

The mistaken or outmoded factual premise underlying the California Rule was the viability of political pension promises. Arguably, the exposure of massive unfunded liabilities in pension funds once flush with cash has also caused a shift in values and priorities. The pension problem is part of a worldwide debate on retirement security that is not going away anytime soon.[232]

Undeniably, public pension systems are attempting to weather a perfect storm.[233] They are struggling to maintain solvency for several reasons.[234] The economic downturn of the past decade exposed poorly constructed benefit plans and unrealistic investment expectations.[235] Even a stock market rebound will not salvage fundamental troubles,

229. County of Los Angeles v. Faus, 312 P.2d 680, 684 (Cal. 1957); *see* Jonathan L. v. Superior Ct., 81 Cal. Rptr. 3d 571, 591 (Ct. App. 2008) (deciding to overturn precedent on the ground that "the law's growth in the intervening years has left [the case]'s central rule as a doctrinal anachronism discounted by society" (quoting Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992))).

230. *See* DUXBURY, *supra* note 164, at 162 (noting the benefits of deciding cases consistently on the same facts).

231. *See* Note, *Constitutional Stare Decisis*, *supra* note 153, at 1346 (listing a change of conditions as one of the justifications to overrule precedent); *see also* Corinna Barrett Lain, *Mostly Settled, but Right for Now*, 33 CONST. COMMENT. 355, 370 (2018) (explaining that investigating factors such as a precedent's factual underpinnings "provides an important outlet for extra-legal context to find expression in the law"). Research has shown that the definition of factual change is not clear-cut, especially differentiating facts from values. *See* Steven Semeraro, *We're All Originalists Now . . . Or Are We?: Bostock's Misperceived Quest to Distinguish Title VII's Meaning from the Public Expectations*, 49 HOFSTRA L. REV. 377, 428–35 (2021); *infra* Section III.A.3.

232. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 148.

233. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 340 ("[T]he pension problem has made headlines in every major newspaper in the country." (citing Krouse, *supra* note 35 (estimating that the liabilities of public defined-benefit pension plans in the U.S. are in the trillions of dollars)).

234. For a list of other factors contributing to the demise of public pensions, see Anenson et al., *Constitutional Limits*, *supra* note 4, at 339 n.3.

235. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 47.

including the demographics of an aging population.[236] There is, as well, a lack of accountability concerning basic standards of ethical and fiduciary behavior in the management of the pension funds.[237]

There are also moral hazard problems as outlined by Jack Beermann and Maria O'Brien Hylton.[238] Politicians overpromise benefits to their supporters on the supply side while labor unions aggressively seek increased benefits on the demand side.[239] The result of taxpayers being bound to irresponsible commitments is aggravated by difficulty in measuring the problem.[240] Future generations will bear the brunt of past excesses; they will face higher payment obligations and reduced government services as states direct their limited funds to retirees' pensions.[241] Without an ability to change course and adjust the allocation of resources, California's fantasy of free education that began in the late 1960's, among other things, is facing hard realities.[242]

d. Workability

The flaws in a rule's application or confusion as to its meaning are another reason to reconsider precedent. Akin to changed circumstances, the workability of a decisional rule assesses the current situation since the initial decision. A survey of American law has found that "American judges find it easiest to overturn old precedents, when experience has proved them to be unworkable."[243] Both the U.S. Supreme Court and California Supreme Court adhere to this view.[244]

On the surface, there would be no advantage to overturning the California Rule based on workability. California's first-day rule of

236. *See id.* at 10–11 ("Pension receipt among retirees is expected to continue to grow as aging baby boomers, who account for a disproportionate share of the population, retire sooner and live longer than previous generations.").

237. *See generally* Anenson, *Public Pensions*, *supra* note 36, at 251 (developing an equitable theory of fiduciary law for the administration of public pensions).

238. *See* Beermann, *supra* note 36, at 3; Hylton, *supra* note 36, at 413.

239. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 35–37, 39–42.

240. *See id.* at 42–43 (noting a lack of transparency and uniformity of reporting).

241. *See id.* at 37.

242. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 378–79 ("Pension costs have been devastating to essential government services, and even the California dream of an affordable education is in peril.").

243. Sellers, *supra* note 102, at 88; *see also* Note, *Constitutional Stare Decisis*, *supra* note 153, at 1346 (surveying federal constitutional law).

244. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citations to other cases omitted) ("[W]hen governing decisions are unworkable … 'this Court has never felt constrained to follow precedent.'" (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944))); Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 679 (Cal. 1995) (repudiating precedent in part due to the confusion and uncertainty regarding a rule's scope of application).

public pension law that effectively blocks reductions until retirement is clear and easy to apply by the lower courts. Undeniably, the precept takes the form of a "rule" and not a "standard."[245] However, the suggested correction—that the accruals be protected as earned daily—is also a "rule" in the jurisprudential sense. It too would be consistent in application, predictable, and perceived as objective.[246]

Besides, the supreme court's avoidance of either reversing or reaffirming the California Rule may produce more confusion.[247] The court resolved the issue about whether the government must—or only should—provide a new benefit and considered the necessity of an offset under the justification element.[248] But the application will be interesting and require more litigation to answer, as will the court's compensation analogy to ascertain contract terms.[249]

There may also be lingering ambiguity over language in the supreme court decisions that employees are entitled to a reasonable *pension* or that employers must make a reasonable *modification*, or whether these two things are one and the same. The California Court of Appeals in *Marin* observed that the modification at issue was permissible because what remained after eliminating certain items of earnable compensation for calculating benefits was still a reasonable pension.[250] Reading the tea leaves of that opinion, it seems that the appellate court appeared to equate the reasonableness of the change with the lack of substantial impairment.[251] The California Supreme Court recently endorsed the result, initially accepting and then

245. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

246. Farber, *supra* note 114, at 1200 (explaining the benefits of rules in discussing how precedents should be perceived as standards and not rules).

247. *See supra* Section I.A.1.d.

248. *See supra* Part I.

249. Linda Ross & Jon Holtzman, *California Supreme Court Limits the Scope of Pension Rights, Remains Unclear on Future Application*, PUBLIC CEO (Aug. 7, 2020), https://www.publicceo.com/2020/08/california-supreme-court-limits-the-scope-of-pension-rights-remains-unclear-on-future-application/ [https://perma.cc/74KN-WVVH] (arguing that the recent decisions leave future reform "on legally uncertain ground"); *see* Hipsher v. L.A. Cnty. Emps. Ret. Ass'n., 272 Cal. Rptr. 3d 664, 676 (Ct. App. 2020) (applying *Alameda* test and upholding partial forfeiture of pension for commission of felony within scope of employment).

250. Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 206 Cal. Rptr. 3d 365, 392–93 (Ct. App. 2016). For an in-depth discussion of the *Marin* case, see John R. Dorocak & James Estes, *The California Rule on Modifying Public Employees' Protected Pension Rights: Reasonable Pension or Reasonable Modification?*, 39 U. LA VERNE L. REV. 268, 273–77 (2018).

251. *See Marin Ass'n of Pub. Emps.*, 206 Cal. Rptr. 3d at 386–92; Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 136 n.172.

dismissing the appeal based on its decision in *Alameda*.[252] The *Alameda* decision, by contrast, determined the same issue of reasonableness under the intermediate scrutiny standard.[253]

Relatedly, it is uncertain whether substantial impairment is a separate element of a Contract Clause claim to prevent public pension reform.[254] *Alameda* could be read to give different answers. The court explained that the key issue was whether the modification "constitutes a substantial and unjustified impairment of employees' pension rights."[255] The conjunction "and" in the sentence could be read to require a substantial *impairment*.[256] The supreme court likewise reiterated that employees have a right to only a "substantial *or* reasonable *pension*," indicating perhaps that all modifications must merely be justified.[257] The lack of exactitude about whether an impairment of contract must also be substantial could stem from the fact that the early decisions developing the California Rule dealt with repeals and forfeitures.[258] For the same reason, the extent of alignment with federal Contract Clause doctrine remains an open question.

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252. *Marin Ass'n of Pub. Emps*., 206 Cal. Rptr. 3d at 369 (granting review); Marin Ass'n of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n, 473 P.3d 312 (Cal. 2020) (dismissing appeal). The *Alameda* lawsuit stemmed from the same pension reform statute at issue in *Marin*. The supreme court ruled that the "earnable compensation" definitional changes constituted contractual modifications but were nonetheless justified. Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85 (Cal. 2020). It held that the government's purpose in prohibiting certain items that artificially inflated benefits beyond work ordinarily performed was a reasonable response to stem abuses of the pension system. *Id.* at 93–94, 127.

253. *See Alameda Cnty. Deputy Sheriff's Ass'n*, 470 P.3d at 93; *Alameda Cnty. Deputy Sheriff's Ass'n* at 128 (Cuéllar, J., concurring); *see also* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 30 (noting uncertainty about how California Contract Clause jurisprudence relates to federal law). Even under federal law, there is an overlap between substantial impairment and the means prong of the intermediate scrutiny test. The U.S. Supreme Court has announced that the extent of impairment is also "a factor in determining reasonableness." U.S. Trust Co. of N.Y. v. New Jersey, 97 S. Ct. 1505, 1520 (1977).

254. *Cf.* Moro v. State, 351 P.3d 1, 37–38 (Or. 2015) (raising but not deciding whether the impairment must be substantial). The California Supreme Court decision in *Allen II* could be read as turning on the substantial impairment element. *See* Allen v. Bd. of Admin., 665 P.2d 534, 537–38 (Cal. 1983) (finding no Contract Clause violation when employees' expectation of pension amount was unreasonable and excessive).

255. *Alameda Cnty. Deputy Sheriff's Ass'n*, 470 P.3d at 107; *see* Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955) (concluding that the reforms "substantially decreased" pension rights" without offering any new advantages); Wallace v. City of Fresno, 265 P.2d 884, 887 (Cal. 1954) (reasoning that the employee had obtained "substantial rights" at the time of reform).

256. *See infra* Section III.A.2.c (showing that California non-pension Contract Clause cases mirror federal Contract Clause doctrine).

257. *Alameda Cnty. Deputy Sheriff's Ass'n*, 470 P.3d at 126 (quoting Kern v. City of Long Beach, 179 P.2d 799, 803 (Cal. 1947)) (emphasis added).

258. *See supra* Part I.

Consequently, the Supreme Court of California clarified some aspects of the Contract Clause standard in its most recent decisions and left others in limbo. From the standpoint of workability, it would be easier to jettison the new benefit requirement entirely (and save it for past accruals) and protect contracts daily.[259] Otherwise, like the Cat in the Hat attempting to get the stain out of mother's dress, the California Supreme Court may merely be substituting one problem for another.

2. Jurisprudential Coherence

Precedential conflict weakens stare decisis as a unifying force in the law.[260] Internally, stare decisis functions to ensure rule consistency within a particular legal area.[261] Externally, it operates to unify other related bodies of law.[262] Jurisprudential coherence comprises both dimensions and can be framed four ways in considering whether to overturn the California Rule: subsequent decisions on constitutional challenges to public pension reform in California, other state decisions on employment, contract, and non-pension Contract Clause, federal pension law, and out-of-state decisions on public pensions.

a. Subsequent decisions

A legacy of the Marshall Court is the idea "that precedent undermined by subsequent decisions may be peculiarly susceptible to reversal."[263] Likewise, California's highest court in *Samara v. Matar*[264] recognized that the subsequent shifts in direction and re-tilling of a decisional rule is a strong indication that it should be overruled.[265]

259. Ross & Holtzman, *supra* note 249, at 4 (asserting that *Alameda* contains dicta indicating that future accruals may no longer be protected).

260. *See* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 128 (discussing the coherence or community-reinforcing function of stare decisis); *see also* DUXBURY, *supra* note 164, at 158 (noting that stare decisis means that judges give an implicit seal of approval in assessing the same problem).

261. Farber, *supra* note 114, at 1178–79.

262. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018). One reason the *Dobbs* majority gave for nullifying *Roe v. Wade* was that it distorted unrelated legal doctrines. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2316 (2022).

263. Lee, *Stare Decisis in Historical Perspective*, *supra* note 104, at 687; *see* Agostini v. Felton, 521 U.S. 203, 235–38 (1997) (indicating that the Court's capacity of error correction may be enhanced when a precedent has been eroded by subsequent authority); Sellers, *supra* note 102, at 88 ("American judges find it easiest to overturn old precedents, when . . . a long line of subsequent precedents has gradually undermined their foundations.").

264. 419 P.3d 924 (Cal. 2018).

265. *Id.* at 932–33; *see also* Barrett, *supra* note 107, at 1732 ("The emergence of splits about the scope of a holding may reflect significant dissatisfaction with the holding itself.").

As discussed earlier, the California Supreme Court upheld public pension reform in two recent decisions by either evading the critical components of the California Rule or carving out an exception to the rule.[266] Again, the possibility of a substantial impairment element also remains in flux.[267] Yet overall, subsequent decisions standing alone are not a strong factor in favor of overruling. The remaining coherence factors, though, show that it might be better to reimagine government pensions as daily contracts and fix the public pension problem at once.

b. California decisions in related areas of law

The Supreme Court of California has also overturned precedent when it is proven inconsistent with other related bodies of state law.[268] Pension law is part of employee benefits law, which is a subset of employment law, which is an aspect of contract law.

The conventional wisdom of employment contract law is that at-will employees are paid for work performed daily.[269] A corollary to this long-standing rule is that these agreements can be modified or terminated for any non-prohibited reason.[270] California, and other jurisdictions that originally followed its lead, changed this fundamental rule of employment in the government pension context without explanation.[271]

The supreme court seemed to be accounting for the fact that salary is paid in the present and pensions are paid in the future. In *Kern*, for example, the court explained that the Contract Clause protects the salary earned by employees without tenure.[272] It was also concerned with capturing deferred compensation like retirement benefits that accrue over time.[273] As the court acknowledged, employees earn "some" pension rights as they work.[274] *Kern* involved a forfeiture of benefits just before retirement. Thus, in defining pension protection, the court was caught between two extremes: full protection or no protection.[275] It

266. *See supra* Part I; *supra* Section III.A.1.d.
267. *See supra* Section III.A.1.d.
268. *See, e.g.*, *Samara*, 419 P.3d at 933 (repudiating the decisional rule in part by noting tension between the rule and the court's other case law).
269. *See supra* Section III.A.1.a.
270. *See supra* Section III.A.1.a.
271. *See supra* Part I; *supra* Sections III.A.1.a.–b.
272. Kern v. City of Long Beach, 179 P.2d 799, 802 (Cal. 1947).
273. *Id.* at 803.
274. *Id.*
275. *Id.*

correctly chose the former.[276] The disconnect came later in *Allen* where the court did not face the same either-or dilemma yet ruled as if it did.[277]

Along with the divergence between present and future pay, the California Supreme Court's approach to the Contract Clause differs in deciding non-pension versus pension controversies. In non-pension cases, it applies the federal Contract Clause analysis.[278] As a result, the supreme court has unconsciously split its constitutional contract cases onto two separate paths. Nonetheless, as already explained, it fused that division somewhat in *Cal Fire* and *Alameda*.[279]

c. Federal law

In determining the durability of precedent, the California Supreme Court has additionally checked the consistency of its decisions with federal law.[280] The evolution of public pension law from non-protected gratuities to protected contracts tracked the same development in private pension law.[281] The shared idea that pensions are a form of deferred compensation, however, does not answer the question of whether past accruals are protected as earned or whether and when future accruals are protected.[282]

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276. *Id*. at 804.

277. *See* Allen v. City of Long Beach, 287 P.2d 765, 767–68 (Cal. 1955).

278. *See*, *e.g*., Sonoma Cnty. Org. of Pub. Emps. v. County of Sonoma, 591 P.2d 1, 3–6 (Cal. 1979) (finding U.S. Supreme Court decisions instructive on case challenging government action to invalidate COLA wage increases of public agency employees as violative of the California Contract Clause); Fourth La Costa Condo. Owners Ass'n v. Seith, 71 Cal. Rptr. 3d 299, 316 (Ct. App. 2008) ("The same analysis is applicable to the state constitution's contract clause . . . [a]s the United States Supreme Court has interpreted the federal contracts clause.").

279. *See supra* Part I.

280. Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 63 (Cal. 1988) (advising that intervening changes in federal constitutional law matter in testing the premises of earlier decisions).

281. For public pensions, see Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251, 255–63 (1956). For private pension law, see Dana M. Muir, *An Agency Costs Theory of Employee Benefit Plan Law*, 43 BERKLEY J. EMP. & LAB. L. 361, 367–68 (2022); Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, ABA EMP. BENEFITS COMM. NEWSL. (Summer 2014), https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/issue-summer-2014/page01/ [https://perma.cc/XMT3-U4XH] (calling the enactment of ERISA the "coup de grâce" of the gratuity theory of private pensions); Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1048–49 n.175 (2018) (tracking gradual transition to compensation theory of private pensions).

282. *See* Muir, *supra* note 281, at 368 (noting that commentators have generally agreed and the U.S. Supreme Court has implicitly accepted the deferred compensation concept of private pension law); *supra* Part I; *supra* Section III.A.1.a.

Federal regulation of private pensions under the Employee Retirement Income Security Act of 1974 (ERISA) does not require an employer to offer a new benefit to reduce benefits for work not yet performed.[283] Like employment at will, it protects accrued benefits as earned.[284] Therefore, the California Supreme Court has given state and local public sector employees more protection than their private sector (or federal government) counterparts whose pensions are regulated under federal law.[285] Even Social Security benefits can be lowered or eliminated retroactively with a rational basis.[286]

All three elements of California's Contract Clause jurisprudence relating to public pensions are atypical in comparison with federal Contract Clause jurisprudence (and state constitutional law on other subjects).[287] As examined already, California doctrine applies the opposite presumption as federal law to determine whether there is a statutory contract.[288] The U.S. Supreme Court has also indicated that future changes to compensation would be constitutional in finding that a state government violated the federal Contract Clause by retroactively reducing commissions that had already been earned by an employee.[289] It is additionally not clear whether substantial impairment is an independent requirement in public pension cases.[290] Plus California doctrine adds an offset requirement that is only negated by the

283. *See* Eric M. Madiar, *Public Pension Benefits Under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants*?, 27 A.B.A. J. LAB. & EMP. L. 179, 187 (2012); Stuart Buck, *The Legal Ramifications of Public Pension Reform*, 17 TEX. REV. L. & P. 25, 36 (2012) (citing federal precedent construing statutory contract claims under ERISA).

284. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1054 (prohibiting reduction in accrued benefits by plan amendment even if not yet vested); MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW § 11:3 (6th ed. 2019) (calling prohibition "anti-cutback" rule); *see also id*. ("Benefits begin to accrue when an employee becomes a participant in the plan."); ERISA, 29 U.S.C. § 1054(a)(1)(A)–(C) (2014) (anti-backloading standard).

285. Admittedly, ERISA was enacted after the *Allen* decision froze future accruals.

286. Monahan, *The California Rule*, *supra* note 26, at 1045–46 (explaining that Social Security is considered a property right only and such that earned benefits can be reduced so long as the government acts with a rational basis).

287. *See supra* Part I; *supra* Sections III.A.1.b., III.A.2.b.

288. *See supra* Part I; *supra* Section III.A.1.

289. *See* Mississippi *ex rel.* Robertson v. Miller, 276 U.S. 174, 178–79 (1928) (ruling that federal Contract Clause prohibits state from retroactively changing salary or other compensation of government employee for services already earned through work). Recall that the Supreme Court does defer to state law on the contract issue. *See supra* Part I.

290. *See supra* Part I; *supra* Section III.A.1.d.; *cf.* Sonoma Cnty. Org. of Pub. Emps. v. County of Sonoma, 591 P.2d 1, 7–8 (Cal. 1979) (relying on federal law as instructive in applying substantial impairment element in determining state Contract Clause violation for denial of COLA wage increases).

justification element of federal law, although it tests the policy objectives of the reform in a more targeted way.[291]

d. Out-of-state decisions

Out-of-state decisions are trending away from California's super pension contract. Some states have rejected the California Rule outright.[292] Other states have expressly accepted the rule.[293] Still other states provide similar first-day-until-forever protection under state constitutional pension clauses but have not affirmatively adopted the California Rule.[294]

In 2012, Amy Monahan tracked the adoption of the California Rule in a dozen jurisdictions.[295] Notably, these decisions adopted the super pension contract in whole or in part without discussion.[296] And three of those states no longer followed California law.[297] In the remaining states, Monahan pointed out that none had ruled on the protection of future accruals.[298] We have found further erosion of the rule in the decade since Monahan wrote. Our investigation shows that one additional state has abandoned at least some aspects of the rule.[299]

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291. *See supra* Part I.

292. Monahan, *The California Rule*, *supra* note 26, at 1074–75 (citing cases from Maine, New Jersey, and Connecticut).

293. Alaska, Idaho, Nebraska, Nevada, Oklahoma, Pennsylvania, and Vermont continue to follow the California Rule. *See* Duncan v. Retired Pub. Emps. of Alaska, Inc., 71 P.3d 882, 889 n.26 (Alaska 2003); Nash v. Boise City Fire Dep't, 663 P.2d 1105, 1109 (Idaho 1983); Calabro v. City of Omaha, 531 N.W.2d 541, 552 (Neb. 1995); Pub. Emps.' Ret. Bd. v. Washoe County, 615 P.2d 972, 974 (Nev. 1980); Taylor v. State & Educ. Emps. Grp. Ins. Program, 897 P.2d 275, 279 (Okla. 1995); City of Allentown v. Loc. 302, Int'l Ass'n of Fire Fighters, 512 A.2d 1175, 1181 (Pa. 1986); Burlington Fire Fighters' Ass'n v. City of Burlington, 543 A.2d 686, 690 (Vt. 1988).

294. Illinois and Arizona constitutional provisions, for example, expressly protect public pensions as contracts. ILL. CONST. of 1970, art. XIII, § 5; ARIZ. CONST. art. XXIX, §§ 1C, D. Although not evidenced in the constitutional text, the decisional law has found that these state clauses protect future accruals on the first day of employment. *See* Jones v. Mun. Emps.' Annuity & Benefit Fund of Chi., 50 N.E.3d 596, 603 (Ill. 2016); Fields v. Elected Offs.' Ret. Plan, 320 P.3d 1160, 1166 (Ariz. 2014); Hall v. Elected Offs.' Ret. Plan, 383 P.3d 1107, 1117–18 (Ariz. 2016). Though some justices in Arizona have been vocal in their disagreement. *See Hall*, 383 P.3d at 1123 (Bolick & Trebesch, J.J., dissenting in part and concurring in part) (likening the first-day-until-forever rule followed in Arizona as "a work of legal fiction to which the likes of John Grisham could only aspire").

295. Monahan, *The California Rule*, *supra* note 26, at 1071 (citing cases from Alaska, Colorado, Idaho, Kansas, Massachusetts, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Vermont, and Washington).

296. *Id*.

297. *Id*. at 1071–73 (noting that three states that followed the California rule have modified it: Oregon, Colorado, and Massachusetts).

298. *Id*. at 1082.

299. *See* Singer v. City of Topeka, 607 P.2d 467, 476 (Kan. 1980) (finding benefits protected after reasonable period); Phillip Moderson, Comment, *Following a Dangerous Precedent: The*

Additionally, none except one of the remaining six states that supposedly continue to follow the rule has revisited its public pension doctrine since the Financial Crisis.[300] Our studies of public pension reform litigation over the past decade demonstrate that post-recession pension law is dynamic and in flux.[301] With growing recognition of the predicament confronting pension systems, more state courts may reconsider their position in the future.

In the states that have changed the California Rule, some are retreating slowly with small shifts in doctrine. For instance, Massachusetts finds that contract protection can occur later than the first day and Washington analyzed the new benefit mandate under the substantial impairment element (rather than the intermediate scrutiny standard) of the U.S. Contract Clause.[302] Greater swings occurred in Colorado that converted the presumption from contract to no contract in interpreting statutes.[303] It is uncertain if these jurisdictions protect past and/or future accruals because the decisions determined there was not a contract.[304] Oregon has moved all the way to the federal pension standard of protecting past accruals as contracts on the first day and each day.[305] Switching to the daily contract concept would be the least disruptive way to change California law with the most impact.[306] Considering contract and other protections like property or promissory estoppel,

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California Rule and the Kansas Pension Crisis, 64 U. KAN. L. REV. 1121–31 (2016) (calling for the Supreme Court of Kansas to abandon the first-day rule).

300. *See* Nash v. Boise City Fire Dep't, 663 P.2d 1105, 1109 (Idaho 1983); Bauers v. City of Lincoln, 586 N.W.2d 452, 459 (Neb. 1998); Nicholas v. State, 992 P.2d 262, 264 (Nev. 2000); Taylor v. State & Educ. Emps. Grp. Ins. Program, 897 P.2d 275, 277 (Okla. 1995); Newport Twp. v. Margalis, 532 A.2d 1263 (Pa. Cmwlth. Ct. 1987); Burlington Fire Fighters' Ass'n v. City of Burlington, 543 A.2d 686, 689 (Vt. 1988). Only Alaska has post-crisis cases. *See* Metcalfe v. State, 484 P.3d 93, 98–99 (Alaska 2021) (distinguishing *Cal Fire*'s definition of deferred compensation due to express language of Alaska Pension Clause).

301. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 344–45; *supra* Part 1.

302. Dullea v. Mass. Bay Transp. Auth., 421 N.E.2d 1228, 1235 (Mass. App. Ct. 1981) (allowing retraction of more generous plan in place for only a short time); Colo v. Contributory Ret. Appeal Bd., 638 N.E.2d 54, 56–57 (Mass. App. Ct. 1994) (suggesting pensions are contracts at time of employment but central point is what plaintiff reasonably expects when hired); Lenander v. Wash. State Dep't of Ret. Sys., 377 P.3d 199, 210–11, 213 (Wash. 2016); *see also* Cloutier v. State, 42 A.3d 816, 825–26 (N.H. 2012) (citing California cases but articulating new benefit requirement to judge element of substantial impairment).

303. Justus v. State, 336 P.3d 202, 210 (Colo. 2014). New Hampshire also changed to reading statutes with a presumption of no contract. Pro. Fire Fighters v. State, 107 A.3d 1229, 1235–36 (N.H. 2014) (adopting unmistakability doctrine for the first time); Am. Fed'n of Teachers v. State, 111 A.3d 63, 69 (N.H. 2015).

304. *See supra* notes 302–303.

305. *See* James v. Clackamas County, 259 P.3d 995, 999 (Or. Ct. App. 2011); Moro v. State, 351 P.3d 1, 31 (Or. 2015).

306. *See supra* Section III.A.1.a.

protecting accrued benefits (past accruals) upon employment like California (as opposed to later in time or under certain conditions) also happens to be the majority view.[307] But California is among the minority of states safeguarding future accruals—an approach that has been shrinking over time.[308]

3. Justice and Policy

The dimension of justice and policy in overruling precedent asks whether the existing rule has caused unjust or undesirable consequences.[309] Decisions that have unacceptable outcomes[310] or that are "contrary to the public sense of justice"[311] undermine the aim of institutional legitimacy advanced by stare decisis.[312] After all, "[p]recedents have ethical foundations, as well as doctrinal and factual ones."[313] Overruling such decisions will enhance public acceptance and strengthen (not weaken) public respect for courts.[314]

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307. PEW CHARITABLE TRS., LEGAL PROTECTIONS, *supra* note 38, at 5 fig.2 (showing slightly less than half the states and more than double any other approach protects accrued benefits).

308. In total, eleven states safeguard future accruals on the first day (but not necessarily all via the Contract Clause). *Id.* at 6 fig.3. More than double that number (twenty-six) protect future accruals at a later time with thirteen states having no specific ruling. *Id.*

309. *In re* Jaime P., 146 P.3d 965, 968 (Cal. 2006) ("We have recognized that reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration."); Parkman v. Sex Offender Screening & Risk Assessment Comm., 307 S.W.3d 6, 10 (Ark. 2009) ("It is necessary . . . to uphold prior decisions unless great injury or injustice would result." (quoting Cochran v. Bentley, 251 S.W.3d 253, 265 (Ark. 2007))).

310. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (identifying the key reason for overruling was "the demonstration, over time, that [the relevant precedent] has unacceptable consequences"); Propeller Genesee Chief v. Fitzhugh, 53 U.S. 433, 458–59 (1851) (reasoning that when an erroneous precedent "if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it").

311. Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) ("The jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself." (quoting Peter L. Szanton, *Stare Decisis; A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959))). More recently, the Supreme Court indicated that precedents may be repudiated if they are "inconsistent with the prevailing sense of justice" or incompatible with the "deep commitment" of society. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

312. *See infra* Section III.B.2.

313. Rice, *supra* note 2, at 55; *see also id.* at 7 (recounting the ethical argument identified by Philip Bobbitt as a fixture of in judicial decision-making) (citing BOBBITT, *supra* note 148, at 125).

314. *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1033 (2007) ("[T]he social science evidence the Court relied on [in *Brown v. Board of Education*] seems better understood as an effort to maximize public acceptance than as a forthright account of the constitutional principles . . . .").

Early in our nation's history, Chief Justice Marshall opined upon the powerful and pervasive effect of judicial lawmaking. He explained: "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."[315] The Supreme Court of California occupies a similar strategic role in society. Its opinions make law and shape the destinies of almost 40 million Californians.[316] As the premier legal institution in California, the supreme court cannot avoid confronting the moral element of its decisional law or its impact.[317] This is no less true in deciding whether to stand by, or overrule, a prior decision. A perfect precedent, like the legend of El Dorado, is often sought but never found.[318] In recognition of the inevitable impermanence of precedent, the Supreme Court of California has emphasized a stare decisis policy of flexibility.[319] A California court of appeals declared: "The law is not, nor should it be, static. It must keep pace with changes in our society since it was never intended for the doctrine of stare decisis to be cast in iron."[320] As a result, the supreme court has acknowledged that overruling may become necessary when the prior decision is "unsound" or potentially produces "inequitable results."[321] It has discarded doctrine that did not apply equally to similarly situated persons or actions.[322]

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315. Samuel Enoch Stumpf, *The Moral Element in Supreme Court Decisions*, 6 VAND. L. REV. 41, 41 (1952) (discussing when "the moral and ethical convictions of the judges, or of society as understood by the judges, begins to move into the reasoning of the [U.S. Supreme] Court" (quoting O'Donoghue v. United States, 289 U.S. 516, 532 (1933))).

316. *See QuickFacts California*, U.S CENSUS BUREAU (July 1, 2022), https://www.census.gov/quickfacts/CA [https://perma.cc/R6ML-4M7Z] (39.6 million).

317. *See* CAL. R. CT. 8.500(b) (granting discretionary appellate review "when necessary to secure uniformity of decisions or to settle an important question of law").

318. So-called "super precedents" may have achieved this status. *See* Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1293 (2008) ("Nothing becomes a superprecedent . . . unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.").

319. *See, e.g.*, People v. Cuevas, 906 P.2d 1290, 1301 (Cal. 1995).

320. Butcher v. Superior Ct., 188 Cal. Rptr. 503, 507 (Ct. App. 1983).

321. Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 673 (Cal. 1995) (noting "inequitable results" as a factor in abrogation); Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 66 (Cal. 1988) (noting potential "adverse social and economic consequences" even if the court was not able to verify them); *accord* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part) (explaining the "special justification" to overrule a constitutional precedent typically entails considering whether the decisional rule has caused "significant negative jurisprudential or real-world consequences"). Sometimes, instrumental and ethical outcomes overlap. KOZEL, SETTLED VERSUS RIGHT, *supra* note 148, at 111 (noting the dispositive change from *Plessy* to *Brown* was not empirical reality, but "the opinions and values through which reality is perceived and understood").

322. *See Freeman & Mills.*, 900 P.2d at 678, 680; Peterson v. Superior Ct., 899 P.2d 905, 917 (Cal. 1995).

a. Unjust

California's super pension contract violates the ethical ideal of equal treatment under law by treating new hires differently from existing government employees.[323] Under the current legal regime, the safest (least risk of litigation) reform measure is reducing benefits to new employees or failing to guarantee them at all by offering a different kind of pension.[324]

Also unjust, or at least impolitic, about the current California Rule is that pensions of workers in the public sector are more secure than in the private sector.[325] The different treatment might be explained because the lore of government service once enabled employees to earn less in wages in exchange for a more secure retirement.[326] But that may no longer (or always) be the case.[327] Again, the Supreme Court of California has never provided a justification for these anomalies. There is also a contradiction in the California Rule itself by treating contracting parties differently.[328] Lastly, regardless of ethics, placing public pensions on a pedestal above the pensions of most other workers is objectionable on policy grounds.

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323. *See generally* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25 (specifying when, and under what circumstances, policy makers could ethically enact reforms).

324. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 34 (recommending that California should limit reforms to new hires unless the judicial ruling regarding the California Rule is overturned); *see also* Jean-Pierre Aubry & Caroline V. Crawford, *State and Local Pension Reform Since the Financial Crisis*, 54 CTR. FOR RET. RSCH. B.C. (2017), https://crr.bc.edu/briefs/state-and-local-pension-reform-since-the-financial-crisis/ [https://perma.cc/8AUB-GCRT] (finding that states with the strongest legal protections were more likely to limit the cuts to new hires). In *Alameda*, the California Supreme Court indicated that equalizing benefits between different groups could be proper justification for reform. Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020). Legal challenges could be made on other grounds as well. *See* Wrzesien v. State, 380 P.3d 805, 807 (Mont. 2016) (pertaining to a lawsuit over allocation of employer contributions between defined benefit and defined contribution plan participants on equal protection and substantive due process grounds).

325. *See supra* Section III.A.2.c.

326. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 49 (explaining that pensions are a recruitment and retention tool for government service); *see also* Kern v. City of Long Beach, 179 P.2d 799, 803 (Cal. 1947) ("[O]ne of the primary objectives in providing pensions for government employees . . . is to induce competent persons to enter and remain in public employment.").

327. Public sector employment packages are so good that some analysts have found that they exceeded private sector packages. *See* Hylton, *supra* note 36, at 422 (citations omitted); *see also* Philip Armour et al., *How Reliant Are Older Americans on State and Local Government Pensions?* (Univ. of Mich. Ret. & Disability Rsch. Ctr., Working Paper No. 2019-399, 2019), https://mrdrc.isr.umich.edu/publications/papers/pdf/wp399.pdf [https://perma.cc/Z7D6-YUKR] (challenging the idea that public pension participants are on the lower end of the economic scale).

328. *See supra* Section III.A.2.b.

b. Undesirable

The California Rule is undesirable for several reasons. As an initial matter, the rule locks in legislative policy.[329] The lack of flexibility for future legislatures to reform the law has had grave consequences in California.[330] Public pensions are in the midst of an upheaval.[331] As discussed earlier, financial tremors in government pensions are causing a political quake shaking the foundations of government.[332]

The inability to adjust to emerging circumstances is doubly detrimental because the government is operating in the capacity of an employer. The goal of economic efficiency was key to the creation of at-will employment that protects only what is earned through work.[333] Because of California's super pension contract, state and local employers are even less efficient (if possible) in effectively managing

329. Monahan, *The California Rule*, *supra* note 26, at 1077; *see also* Dorocak & Estes, *supra* note 250, at 296–99 (providing policy arguments against and in favor of the California Rule).

330. In 2004, before the financial crisis, CalPERS was in relatively good shape. *See* Lahey & Anenson, *supra* note 5, at 320 (analyzing 2004 pension data and concluding that California public pension were in relatively good health). After the crisis, unfunded liabilities were enormous. *See* Howard Bornstein et al., *Going for Broke: Reforming California's Public Employee Pension Systems*, 2010 STAN. INST. FOR ECON. POL'Y RSCH. POL'Y BRIEF, https://siepr.stanford.edu/publications/policy-brief/going-broke-reforming-californias-public-employee-pension [https://perma.cc/RC9F-CESB] (studying California's three largest pension plans and applying a risk-free rate of 4.14 percent rather than rate of return assumptions of 8 percent, 7.75 percent, and 7.5 percent and finding unfunded liabilities several times larger than reported); Liz Farmer, *Stock Market Helps State Pension Debt Hit 10-Year Low, but Crisis Still Looms Large*, FORBES (Sept. 23, 2021, 10:15 AM), https://www.forbes.com/sites/lizfarmer/2021/09/23/stock-market-helps-state-pension-debt-hit-10-year-low-but-crisis-still-looms-large/?sh=673cf2bc3d87 [https://perma.cc/E9HE-EC45]; Aaron Brown, *Pension Funds' Silver Lining Has a Touch of Gray*, BLOOMBERG (Oct. 5, 2021, 4:00 AM), https://www.bloomberg.com/opinion/articles/2021-10-05/the-pension-fund-silver-lining-has-a-touch-of-grey [https://perma.cc/UNT7-B48S] (discussing resulting benefit differences between old and younger workers).

331. For a listing of ongoing liabilities in California, see *supra* note 6. All states have large funding gaps. BOB WILLIAMS ET AL., AM. LEGIS. EXCH. COUNCIL, UNACCOUNTABLE AND UNAFFORDABLE 2016, at 2 (2016), https://www.alec.org/app/uploads/2016/10/2016-10-13-Unaccountable-and-Unaffordable.pdf [https://perma.cc/X8F5-V2B8]; *see also* PEW CHARITABLE TRS. THE STATE PENSION FUNDING GAP: 2018, at 4 fig.2 (2020), https://www.pewtrusts.org/-/media/assets/2020/06/statepensionfundinggap2018.pdf [https://perma.cc/LC7L-VQLR] (listing state by state pension debt); *supra* Section III.A.1.c.

332. *See* Ike Brannon, *California's Pension Woes Are Made Worse by Moving Emergency Services In House*, FORBES (Feb. 28, 2021, 11:50 PM), https://www.forbes.com/sites/ikebrannon/2021/02/28/californias-pension-woes-are-made-worse-by-moving-emergency-services-in-house/?sh=1937fb703629 [https://perma.cc/6U2N-HTNA]; *see also* Nathan H. Jeppson et al., *Defining and Quantifying the Pension Liabilities of Government Entities in the United States*, 29 J. CORP. ACCT. & FIN. 98 (2018) (estimating public defined-benefit pension liabilities to be more than $5 trillion); WILLIAMS ET AL., *supra* note 331, at 2 (calculating pensions liabilities near $5.6 trillion, equaling $17,427 pension debt per capita).

333. *See* JAMIE D. PRENKERT ET AL., BUSINESS LAW: THE ETHICAL, GLOBAL, AND DIGITAL ENVIRONMENT 51–37 (18th ed. 2021).

their workforce.[334] Inefficiency exacerbates underfunding in light of the political economy of government employment.[335] Public pension debt, in turn, "jeopardizes the fiscal solvency of states, the nation's long-term financial health, and the retirement benefits of public workers."[336]

In the short-run, of course, employees and retirees are disadvantaged by pension reform because reductions lead to a smaller anticipated or agreed-upon benefit amount.[337] Certain government employees in California are especially vulnerable because they do not have Social Security.[338] In the long-run, however, employees may benefit from reform if the measures improve the financial condition of the pension plan and obviate the government's need to repudiate benefits altogether.[339] The bankruptcies of California cities like San Diego are a reminder that the risk of insolvency is real.[340] With most reforms focused on new hires, the financial condition may worsen without needed contributions.[341] And there is no federal remedies or insurance

334. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 23–24 ("The inability of legislatures to respond to economic emergencies under the first-day rule is one reason why some court decisions appear to be liberalizing this line of authority."); VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 16–17 (predicting that the rule incentivizes overgenerous pensions and, by freezing pensions in times of retrenchment, exacerbates underfunding given the political economy of government employment).

335. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 53; *see supra* Section III.A.1 (discussing research of Beerman and Hylton).

336. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 340; Anenson, *Public Pensions*, *supra* note 36, at 269–71 (discussing the micro- and macroeconomic effects of pension failure); *see also* Richard E. Mendales, *Federalism and Fiduciaries: A New Framework for Protecting State Benefit Funds*, 62 DRAKE L. REV. 503, 508 (2014) (explaining that the unsustainability of government pensions will cause "higher funding costs for public employers sponsoring the plans, higher general borrowing costs for states and municipalities with insufficiently funded plans, and ultimately higher borrowing costs for states regardless of how adequately their benefit plans are funded").

337. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 133–34.

338. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 3 (noting that California teachers do not contribute to Social Security); Legislature v. Eu, 816 P.2d 1309, 1332 (Cal. 1991) (emphasizing that legislators could join Social Security and that most did).

339. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 150.

340. *See, e.g.*, *How San Diego Avoided Bankruptcy*, SAN DIEGO UNION-TRIB. (July 14, 2012, 12:00 PM), https://www.sandiegouniontribune.com/news/politics/sdut-how-san-diego-avoided-bankruptcy-2012jul14-htmlstory.html [https://perma.cc/L3FF-6LKZ] (comparing three California cities that declared bankruptcy due in large part to outsized pension debt); John M. Broder, *Sunny San Diego Finds Itself Being Viewed as a Kind of Enron-by-the-Sea*, N.Y. TIMES (Sept. 7, 2004), at A14, https://www.nytimes.com/2004/09/07/us/sunny-san-diego-finds-itself-being-viewed-as-a-kind-of-enronbythesea.html [https://perma.cc/C763-YF8A] (reporting on $1.15 billion pension deficit).

341. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 14.

program to assist employees in the event of plan failure.[342] Thus, protecting the pro rata share of earned benefits enables California employers to save money and potentially salvages a sustainable retirement system for its employees.[343]

Furthermore, due to the rigidity of the California Rule, courts are finding ways around it. Judges are reticent to test the legislative policy objectives of statutory reforms under the balancing test.[344] Like *Cal Fire*, new cases across the country are determining that certain benefits are not "terms" of an alleged contract.[345] The effect of these decisions is worse for employees than changing the contract duration because there is not even protection for accrued benefits earned to date. Finally, strong unions such as the California Teachers Association can carry on bargaining for favorable pension terms and not simply leave benefits to statutory provisions (or judicial interpretations of them).[346]

Changing the California Rule to facilitate reforms will also benefit state residents.[347] Reforms will allow more money to be put toward needed public services that have been funneled away to pay down runaway pension debt.[348] As we previously warned, the legal barriers to reducing benefits will result in tax hikes such that all state residents share the burden of failing plans.[349] Unlike private pensions that are

342. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 135; *see also* Debra Brubaker Burns, Note, *Too Big to Fail and Too Big to Pay: States, Their Public-Pension Bills, and the Constitution*, 39 HASTINGS CONST. L.Q. 253, 275–93 (2011) (calling for a federal bailout and state bankruptcy).

343. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 147. With pension funds increasingly investing in marginalized debt to raise returns and safeguard against insolvency, retirement security for government workers comes at the expense of other vulnerable groups. *See* Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE L.J. 773 (2022).

344. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 162 (concluding that "very few courts facing constitutional challenges in recent litigation completed this stage of analysis.").

345. Anenson et al., *Constitutional Limits*, *supra* note 4, at 345, 347 (noting that a vast majority of constitutional challenges based on the Contract Clause fail on the contract element concentrating in part on whether the reforms were terms of the contract).

346. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 442 (Cal. 2019) (explaining the growing prevalence of collective bargaining by public employees); *see also* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 39–42 (analyzing debate over whether governments should ban collective bargaining in public sector employment).

347. *See* Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 137 (concluding that public pension reform "assists governments and taxpayers more than it injures them").

348. *Id.* at 151–52.

349. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 6; Steve Forbes, *The Public Pension Crisis: Are Your Taxes Going to Go Up?*, FORBES (Oct. 12, 2021, 6:00 AM), https://www.forbes.com/sites/steveforbes/2021/10/12/the-public-pension-crisis-are-your-taxes-going-to-go-up/?sh=4245efe56a59 [https://perma.cc/Q99K-2LTU].

governed by federal law and must be insured,[350] public pensions must use government revenue if obligations exceed contributions and investment income.[351] Taxpayer flight to avoid higher taxes will then reduce the tax base.[352] In California, the adverse impact of government pensions on state finances and the population at large motivated the political branches to take action by proposing and enacting pension reform legislation.[353]

4. Democratic Values

Caleb Nelson reminds us that "the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy."[354] Stare decisis fosters democratic values by aligning judicial interpretation and enforcement of the law with legislative judgment.[355] The U.S. Supreme Court recently denounced mistaken rulings as short-circuiting the democratic process.[356] The California Supreme Court recognized that a salient factor for overruling precedent is when the error in the prior opinion "is related to a 'matter of continuing concern' to the community at large."[357] In the wake of state and local budget crises and spiraling pension debt, including city bankruptcies, the continuation of the super pension contract is of utmost concern to the social welfare of California residents.[358]

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350. *See* Anenson, *Public Pensions*, *supra* note 36, at 251.

351. *See The Other Pension Crisis*, WALL ST. J. (Aug. 18, 2006, 12:01 AM), https://www.wsj.com/articles/SB115585985889438916 [https://perma.cc/NG5H-PPNG] ("Public pensions only have one source of money—the taxpayer.").

352. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 152.

353. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 440–41 (Cal. 2019); Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 146–47 ("The adverse impact of government pensions on state finances led then-Governor Jerry Brown to stake out a plan to fix failing plans that the California legislature later enacted into law.").

354. Nelson, *supra* note 135, at 62.

355. *Id.* at 61–62 (asserting that following precedent brings "the law enforced in court closer to the collective judgments that our representatives have authoritatively expressed"); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1506 (2013) [hereinafter Kozel, *Precedent and Reliance*].

356. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

357. People v. Anderson, 742 P.2d 1306, 1331 (Cal. 1987) (quoting United States v. Reliable Transfer Co., Inc., 95 S. Ct. 1708, 1715, n.15 (1975)); *see* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 673 (Cal. 1995) (overruling decision allowing a claim for bad faith breach of contract independent of tort duties for noninsurance contracts).

358. *See* SAN DIEGO UNION-TRIB., *supra* note 340 ("The list of municipal bankruptcies is expected to grow as more cities speed toward a financial cliff that San Diego was able to avoid but not without a significant sacrifice to basic services, such as public safety, libraries and parks."); Monica Davey et al., *Detroit Ruling on Bankruptcy Lifts Pension Protections*, N.Y. TIMES (Dec. 3, 2013), https://www.nytimes.com/2013/12/04/us/detroit-bankruptcy-ruling.html [https://perma.cc/YHT9-258H] (noting that the federal court ruling that pensions are not protected in bankruptcy "is

The fact that early public pension decisions did not use the no contract canon or explain its absence in reading legislation does not promote democratic values.[359] Democracy is best protected by restricting the limited constitutional powers to each branch. For these reasons, the Supreme Court of New Jersey (the only state supreme court to directly confront the issue of clashing canons) in *Berg v. Christie*[360] gave a ringing endorsement of the no contract canon in reading public pension legislation.[361]

The Supreme Court of California in *Cal Fire* acknowledged that statutes primarily evidence "policies [that], unlike contracts, are inherently subject to revision and repeal."[362] The court nevertheless explained that it reversed the presumption in government pension statutes because benefits are a form of deferred compensation.[363] Perhaps because it ultimately determined that the reform was not a term of the contract,[364] the court did not examine legislative intent about contract duration. In other words, there was no inquiry into what the obligations of the purported pension contract were.[365] *If* the provision of pension benefits provided as part of an employment relationship is an exception to the assumption that legislatures make policy and not contracts, it logically follows that the contract should be daily and not for the duration of an employee's career.[366]

It is axiomatic that interpreting statutes according to the intent of the makers of the law supports the value of popular sovereignty.[367] The Supreme Court of California's historic failure to account for

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likely to resonate in Chicago, Los Angeles, Philadelphia and many other American cities where the rising cost of pensions has been crowding out spending for public schools, police departments and other services").

359. *See* Anenson et al., *Constitutional Limits*, *supra* note 4, at 350–52 (examining California's controversy over conflicting canons in public pension law); *supra* Sections III.A.1.a.–b.

360. 137 A.3d 1143 (N.J. 2016).

361. *Id.* at 1151–52; *see also* Anenson & Gershberg, *Clashing Canons*, *supra* note 63, at 202 (dating no contract canon to the early republic) (citing United States v. Winstar Corp., 518 U.S. 839, 872–75 (1996)).

362. Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 442 (Cal. 2019).

363. *Id*. at 447; *supra* Part I. The California Supreme Court indicated that an express reservation of right to amend would be accepted by the court. *Cal Fire Loc. 2881*, 435 P.3d at 443–44 (recognizing an express or implied contract can be found if the statute clearly manifests such legislative intent); Packer v. Bd. of Ret., 217 P.2d 660, 662 (Cal. 1950) (noting that the charter lacked an express reservation to amend).

364. *Cal Fire Loc. 2881*, 435 P.3d at 450.

365. *Cf.* Moro v. State, 351 P.3d 1, 36–37 (Or. 2015) (applying the no contract canon to the obligations inquiry and finding it was not overcome); *id*. at 20 (noting that the parties agreed that pension benefits are contracts).

366. *Accord id.* at 41.

367. HUHN, *supra* note 104, at 16.

legislative purpose in providing pension benefits is the very antithesis of democracy.[368] It may even amount to a dereliction of judicial duty that is, itself, a constitutional violation of separation of powers.[369] Collectively, the foregoing four factors strongly support overruling California's super pension contract and principally the idea that benefits are a single career-long contract.

B. Costs of Overruling Precedent

The potential impact of rejecting precedent is significant. Doing so could undermine rule-of-law norms (stability, consistency, generality), the integrity of the judicial branch as an institution, decisional economy, and reliance interests.[370] Justice Harlan captured these considerations when he reasoned that courts should respect precedent due to the importance of giving the public a "clear guide," the value of helping individuals "to plan their affairs," the benefits of "expeditious adjudication," and "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgements."[371] Likewise, the Supreme Court of California emphasized that the doctrine of stare decisis "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law."[372]

1. Rule of Law (Redux)

The U.S. Supreme Court has confirmed that stare decisis "is a foundation stone of the rule of law."[373] The rule of law, as opposed to the rule of individuals (particularly the idiosyncratic value judgments

368. Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1894–95.

369. Monahan, *The California Rule*, *supra* note 26, at 1070, 1082.

370. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) (recognizing these interests and teasing out another advantage as restraining "judicial hubris" by respecting "the judgement of those who have grappled with important questions in the past").

371. Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

372. Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 62–63 (Cal. 1988).

373. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (explaining that the "greatest purpose" of stare decisis is to serve the rule of law); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (finding that the notion of the "rule of law" makes respect for precedent indispensable).

of individual judges), serves important values.[374] These related legal norms include stability (reliability), consistency (uniformity), and generality.[375]

The need for generality is apparent in administrative and legislative regulation. Yet it is also essential for judicial action. Stare decisis fosters generality because it encourages judges to recognize that each case is part of the main body of law and not an island onto itself.[376] By advancing directives that are binding for the future, "courts can offer some semblance of what has been called the law of rules, which is one aspect of the rule of law."[377] The creation of generally applicable legal rules is furthered when like cases are treated alike. The aspiration of equal treatment applies to cases that are adjudicated at the same time as well as over time.[378] Justice Douglas remarked that "there will be no equal justice under law if a . . . rule is applied in the morning but not in the afternoon."[379]

Stable, though, does not mean rigid.[380] Consistent does not mean fixed; general does not mean absolute. The purpose of precedent is not to provide permanency; rather, it is to prevent the law from being arbitrary.[381] Some measure of predictability is the goal: "The point of stare decisis is not to freeze judicial mistakes, but rather to make sure that change happens for the right reasons."[382]

Horizontal stare decisis, in which courts abide by their own decisions, is not the only mechanism for doctrinal stability either.[383] Although overturning the California Rule would impact doctrine

374. *See* People v. Birks, 960 P.2d 1073, 1077 (Cal. 1998) (explaining that the stare decisis values of "certainty, predictability and stability in the law are the major objectives of the legal system").

375. *See* GERHARDT, *supra* note 119, at 198 ("Stability, uniformity, predictability and consistency have enormous normative appeal on and off the Court."); *see also* People v. Cuevas, 906 P.2d 1290, 1300 (Cal. 1995) (articulating rule of law values in stare decisis analysis).

376. Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1858 ("The knowledge that a decision will serve as a precedent . . . encourage[es] judges to view individual cases as reflecting recurring problems that require generalizable, forward-looking solutions.").

377. Farber, *supra* note 114, at 1179 (internal citations and quotations omitted).

378. Price, *supra* note 105, at 118 n.160.

379. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

380. *See* Farber, *supra* note 114, at 1202 (reminding us that "there is a difference between stability and rigidity" by comparing the storm-resistant qualities of oaks and willows).

381. Kozel, *Special Justifications*, *supra* note 114, at 489 ("The doctrine of stare decisis responds by treating legal rules as continuous rather than episodic."); Farber, *supra* note 114, at 1183 (capable of building a continuing body of law "rather than merely a succession of one-time rulings").

382. Kozel, *Special Justifications*, *supra* note 114, at 481.

383. Barrett, *supra* note 107, at 1712.

horizontally, there is also vertical stare decisis to consider in an overall rule of law analysis. Vertical stare decisis enhances reliability and uniformity by lower courts following precedents of higher courts.[384] Moreover, looking holistically at the California judicial system, there are additional features to keep case law stable. These characteristics include prohibiting advisory opinions,[385] discretionary standards of supreme court review,[386] the number of justices,[387] and the constraint that the California Supreme Court rule only on the issue presented.[388]

Generally, reversing a precedent will have ramifications on the rule of law. Specifically for California, however, replacing the super pension contract (presumably with a better rule) should not create confusion. Besides, the recommended changes of repudiating the freeze on future benefits would not wipe out the California Rule entirely. It would merely move the law toward a middle ground and finish the work already begun by the California Supreme Court toward coherence in state employment and constitutional law.

2. Institutional Legitimacy

Related to the values embodied in the rule of law is institutional legitimacy.[389] Justice Thurgood Marshall declared that stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by preserving the presumption "that bedrock principles are founded in the law rather than in the proclivities of individuals."[390] Relatedly, then-Professor Amy Coney Barrett explained:

> One of the stated goals of stare decisis . . . is institutional legitimacy, both actual and apparent. If the Court's opinions change with its membership, public confidence in the Court

384. *See id*. at 1730.

385. *See* People *ex rel.* Lynch v. Superior Ct., 464 P.2d 126, 127 (Cal. 1970).

386. *See* CAL. R. CT. 8.500(b); *see also* JUD. COUNCIL OF CAL., HOW CASES COME TO THE SUPREME COURT 3 (2022), https://www.courts.ca.gov/documents/casescome.pdf [https://perma.cc/BNW9-S5E3] (noting that the supreme court only hears about 5 percent of petitions).

387. CAL. CONST. art. VI, § 2. There are seven justices (one chief justice and six associate justices) who are elected for twelve-year terms. *Id*.

388. Barrett, *supra* note 107, at 1730–34.

389. Rice, *supra* note 2, at 54–55 (calling institutional legitimacy one of the first principles of stare decisis).

390. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986); People v. Cahill, 853 P.2d 1037, 1091 (Cal. 1993) (Kennard, J., dissenting) (quoting *Vasquez*, 474 U.S. at 265–66); *see* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (considering the actual and perceived integrity of the judicial process).

> as an institution might decline. Its members might be seen as partisan rather than impartial and case law as fueled by power rather than reason.[391]

Addressing this last concern, Alexander Hamilton famously defended an independent judicial branch because binding precedent will help to restrain "an arbitrary discretion in the courts."[392] At minimum, stare decisis constrains courts by requiring judges to consider how a similar case was decided in the past as a condition to making the present decision.[393] Accordingly, judges often contemplate the effect on institutional legitimacy in deciding whether to depart from precedent.[394]

Institutional legitimacy encompasses judicial reputation and public confidence in the legal system.[395] The late Justice Powell wrote that "restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights."[396] A court's institutional influence is weakened if it views decisions as little more than a "restricted railroad ticket, good for this day and train only."[397] Still, a court has more than one passenger and everyone knows that

391. Barrett, *supra* note 107, at 1725–26 (citing primary and secondary authorities).

392. Hamilton argued that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." THE FEDERALIST NO. 78, at 442 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see* Nelson, *supra* note 135, at 9–10 (discussing the historical context for Hamilton's conception of "arbitrary discretion").

393. Price, *supra* note 105, at 115.

394. Farber, *supra* note 114, at 1183 ("The willingness of judges to defer in this way to their predecessors—and their expectation of similar deference from their successors—transforms the Court from an ever-changing collection of individual judges to an institution . . . ."); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 600 (1987) ("If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decision making environment may generally strengthen that decision making environment as an institution.").

395. Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, l980 WIS. L. REV. 467, 484 (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 n.170 (1988) ("[A] general failure to adhere to precedent in constitutional cases would weaken the legitimacy of the federal judiciary by weakening the popular acceptance of judicial decisions." (citing Judge Richard Posner, Address at the Harvard Society of Law and Public Policy (Nov. 16, 1986), *in* Jeffrey Levy, *Posner Portrays Judges as Decoders*, 83 HARV. L. RECORD, Nov. 21, 1986, at 5, 13).

396. Powell, *supra* note 373, at 289–90.

397. Smith v. Allwright, 321 U.S. 649, 649 (1944) (Roberts, J., dissenting) (denying that precedent is a "restricted railroad ticket, good for this day and train only").

subsequent schedules (however steady) are subject to change.[398] The legal community and the public at large understand that judicial decisions do not last forever.[399] A desire for decisions to be stable does not amount to a belief that they are set in stone.[400]

The public response to the California Supreme Court's acceptance of government pension cases is illustrative. In anticipation of the new rulings, there was widespread discussion about whether the California Rule would (and should) be overruled.[401] As such, only when cases are in constant upheaval (because stare decisis was eliminated or unduly loosened), will the judiciary not exhibit the kind of "restraint in decisionmaking and respect for decisions" that enhances its role in a democracy.[402]

The U.S. Supreme Court once indicated that controversial cases deserve more deference because of the risk they pose to judicial reputation.[403] But is that true? Recall that in Georgian England, a too-strict sense of stare decisis (resulting in too-little reformation) had its own repercussions on public perception.[404] As is clearly the situation with government pensions in California, contentious issues could mean that

398. Kozel, *Precedent and Reliance*, *supra* note 355, at 1460 ("The explanation cannot be that judicial overrulings are breaches of promise.").

399. Barrett, *supra* note 107, at 1728 ("Court watchers embrace the possibility of overruling, even if they may want it to be the exception rather than the rule."); *see also id*. at 1729 (surmising that if the public believes that political preferences caused a court to disavow precedent, then they also likely think those same preferences caused the initial decision).

400. *See* DUXBURY, *supra* note 164, at x ("[T]he doctrine of precedent, properly conceived, must allow the possibility of a court of last resort overruling as well as following its earlier decisions, for the doctrine requires that the court not only keep the law on track, but put it back on track when previously it has made mistakes."). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–79 (2022) (criticizing *Casey*'s emphasis on a strong stare decisis in the context of controversial issues).

401. *See* Maura Dolan, *'Pension Spiking' Is Not Protected by California Law, Top Court Rules*, L.A. TIMES (July 30, 2020, 6:41 PM), https://www.latimes.com/california/story/2020-07-30/california-supreme-court-pension-spiking [https://perma.cc/S6L6-SKZ2]; Wes Venteicher, *Will Pensions Be on the 'Chopping Block' in Recession? California Supreme Court to Hear Case*, SACRAMENTO BEE (May 3, 2020, 4:50 AM), https://www.sacbee.com/news/politics-government/the-state-worker/article242390791.html.

402. *Cf.* Powell, *supra* note 373, at 288 ("[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is.").

403. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (reasoning that public controversy hurts legitimacy as a factor to stand by the decision); *see also* Farber, *supra* note 114, at 1197 (*Casey* may have been less about *institutional* stature and more about the perception of *individual* judges in assuring the public that they were not pre-committed).

404. *See supra* Part II; DUXBURY, *supra* note 164, at 127 ("Before 1966, the House of Lords had distinguished some of its own precedents to the point where they were effectively stripped of authority."); Sellers, *supra* note 102, at 86 (discussing extreme stare decisis that once bound English courts to foreclose the reconsideration of past decisions).

the court is preventing the political process from reaching a different conclusion.[405] Therefore, when societal stakes are high, getting the law right is critical.[406]

Furthermore, in deciding divisive issues, the federal bench may face more risk to its reputation than the state bench. In contrast to their federal counterparts, California judges are elected (after appointment by the governor to an initial term) and serve a finite number of years.[407] Once elected, Californians need not be unduly concerned that their justices have undisclosed commitments to the governor who appointed them.[408] Collectively, the method of judicial retention, along with limited tenure, may promote the perception that a judicial decision to disavow the California Rule is grounded in principle and not politics.[409] At least the elected justices should be aligned with popular will, if not necessarily under democratic control.[410]

It is ultimately an empirical question whether the legitimacy of the California Supreme Court would suffer by reversing course on the

405. State constitutional provisions, however, are easier to amend than the U.S. Constitution. *See infra* Part III.C (explaining direct democracy measures available by voter initiative to amend the California constitution).

406. *Accord* Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1894–95 (finding it paradoxical that more controversial decisions get more precedential weight).

407. California judges are appointed by the governor, confirmed by the Commission on Judicial Appointments, and confirmed by the public at the next general election. CAL. CONST. art. VI, § 16; Devins, *State Constitutionalism*, *supra* note 31, at 1645–47, tbl.1 (showing that California originally elected their judges through a partisan method when they joined the Union in 1850 and changed to a governor appointment method in 1934 with a retention election).

408. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("No misconception [of judges as politicians] could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve").

409. *See id*. at 636 ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government."). The risk of electoral defeat when the justices run unopposed though is almost nil. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 492 (2010) [hereinafter Devins & Mansker, *Public Opinion*] (noting that incumbent justices win around 99 percent of the time in states like California that use retention elections); *see also id.* at 491–92 (calling the California Supreme Court politically insulated).

410. The ability of voters to amend the California Constitution through direct democracy initiatives provides a measure of state court accountability. Devins & Mansker, *Public Opinion*, *supra* note 409, at 492 (noting that California allows voters to place constitutional amendment proposals on the ballot) (citing CAL. CONST. art. XVIII, §§ 3–4); Devins, *State Constitutionalism*, *supra* note 31, at 1689 (citing example of where the California Supreme Court mandate of same-sex marriage was overturned by voter amendment). Californians are not above recalling members of the judiciary either. *Id*. at 1655 (discussing the ouster of state supreme court justices who voted against the death penalty).

contractual duration qua new benefit rule of public pension law.[411] If the rate of overturning precedent in state supreme courts tracks federal law, then the rate of reversal for the California Supreme Court's precedent is no doubt quite low.[412] If studies of federal judges are any indication, public confidence in the judiciary is fairly high and easily exceeds the political branches.[413] In any event, a crisis of confidence is unlikely to result from overturning California's super pension contract. The California Rule has never been justified and, in reversing course, the supreme court will offer good reasons that are aired openly in a published opinion.[414]

Consequently, considering the entire judicial decision-making environment, changing the duration of a government pension contract should not sound the death knell of the Supreme Court of California as a source of impersonal and reasoned judgements. In fact, esteem for the highest court of our nation's most populous state may rise with the change in public sentiment on public pension reform.[415]

3. Decisional Economy

Another justification for upholding precedent is efficiency.[416] Stare decisis conserves judicial resources by saving time in the

411. There is next to no research on legitimacy and political accountability and state court decision-making or public opinion and state supreme court decision-making. *See* Devins, *State Constitutionalism*, *supra* note 31, at 1636–37; Devins & Mansker, *Public Opinion*, *supra* note 409, at 457. There are other ways besides precedent that aid integrity. *See* Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373, 375 (2018) (examining other practices of the Supreme Court on the importance of impersonality that reinforces institutional integrity).

412. *See* GERHARDT, *supra* note 119, at 10, 205 app. tbl.1 (surveying U.S. Supreme Court cases from 1789–2004 and finding 162 express reversals averages out to be less than one overruling per term); Kozel, *Precedent and Reliance*, *supra* note 355, at 1471–72 (citing U.S. Supreme Court cases indicating the court had overruled 33 decisions in 20 terms).

413. *See* Devan Cole, *Gallup Poll: Supreme Court Approval Rating Falls to 49% After Hitting 10-Year High in 2020*, CNN (July 28, 2021, 4:35 AM), https://www.cnn.com/2021/07/28/politics/supreme-court-gallup-poll-approval-rating-low/ [https://perma.cc./JEN3-HPDF]; *cf. Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/Congress-Public.aspx [https://perma.cc/3VQE-78BB] (showing sixteen to twenty three percent Congressional approval rating for 2022); *see also* Devins & Mansker, *Public Opinion*, *supra* note 409, at 457 (noting that there are "next to no opinion poll data on voter attitudes towards state supreme court decisions").

414. *See supra* Part II; *supra* Section III.A.1.b; *infra* Section III.C.

415. *Cf.* Devins & Mansker, *Public Opinion*, *supra* note 409, at app. 505 (showing California Supreme Court followed public opinion for legalizing marijuana for medical use).

416. *See* Taylor v. Sturgell, 553 U.S. 880, 903 (2008) ("[S]tare decisis will allow courts swiftly to dispose of repetitive suits . . . ."); State v. Ferguson, 796 A.2d 1118, 1138 n.18 (Conn. 2002) (declaring that stare decisis is justified because "it saves resources and it promotes judicial efficiency").

decision-making process when a similar issue arises again.[417] Cardozo explained the value of precedential shortcuts: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[418]

Having every issue decided from scratch, however, is different from changing a few ingredients (among many others) in an existing recipe.[419] California's contractual challenge of freezing future benefits upon hiring is only one aspect of its public pension law. Fixing the problem would be a minor tweak with a major impact. Therefore, changing the California Rule would not amount to "reinventing the legal wheel" in Contract Clause-public pension reform litigation.[420]

In fact, the court is creating inefficiencies by avoiding whether to reaffirm or repudiate the super pension contract.[421] The dueling courts of appeals' opinions in *Alameda* and *Marin* illustrate the point.[422] There was enough ambiguity in supreme court precedent that intermediate appellate courts struck out on their own to fill the gaps and clarify the law.[423] The California Supreme Court has thus far upheld reforms that reduced pension benefits by ruling that one was not a term of the

417. *See* Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015) (explaining that stare decisis reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation); People v. Ewoldt, 867 P.2d 757, 776 (Cal. 1994) (Mosk, J., dissenting) (discussing how stare decisis makes judicial work easier by not reexamining the merits of every relevant precedent); Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924) (finding that stare decisis "expedites the work of the courts by preventing the constant reconsideration of settled questions").

418. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); *see* Fallon, Jr., *supra* note 151, at 584 ("[I]t would overtax the Court and the country alike to insist . . . that everything always must be up for grabs at once.").

419. On a system-wide basis, *both* vertical and horizontal precedent lessen the number of issues in litigation. *See* Barrett, *supra* note 107, at 1711–13. Horizontal precedent is the only concern here because the California Supreme Court would be reversing a portion of its former decisional law. *See supra* Section III.B.1. Although the workload of the California Supreme Court is massive, it is not so substantial that the decisional economy of the court's entire docket would be at risk.

420. *See* Lee, *Stare Decisis in Historical Perspective*, *supra* note 104, at 654 ("[T]he policy of judicial economy dictates adherence to precedent in order to economize the resources involved in reinventing the legal wheel in each case.").

421. *See id.* at 653 (noting that stare decisis "furthers the goal of stability by enabling parties to settle their disputes without resorting to the courts"). Decisional economy is related to rule of law because it facilitates coherence. Farber, *supra* note 114, at 1177 ("Unless most issues can be regarded as settled most of the time, coherent discussion is simply impossible.").

422. *See supra* Section III.A.1.d.

423. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 971 (2016) [hereinafter Re, *Narrowing Precedent*] (arguing that it is legitimate for intermediate courts of appeal to narrow precedent from below when it is ambiguous).

contract and the other passed the intermediate scrutiny test.[424] Hence, the court has managed to avoid a frontal collision with the California Rule and the status of California's super pension contract remains an open question. Supporters may claim that the court's approach is merited by the conservative process of precedent.[425] Overall, though, it may be more productive (and timesaving) at this point to simply address the future accrual protection issue.

4. Reliance

One of the universal justifications of stare decisis is reliance.[426] Obviously, judicial decisions have consequences. Some gain while others lose. Even beyond the immediate parties to a lawsuit, following precedent allows people to order their lives with confidence and to settle future disputes without litigation.[427] Justice Scalia said it succinctly: "The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law."[428] Chief Justice Roberts likewise emphasized how overruling precedent can "jolt . . . the legal system."[429] As a result, following precedent safeguards the reliance interests of all stakeholders—litigants, general public, and government.[430]

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424. *See* Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 454 (Cal. 2019); Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 93 (Cal. 2020); *supra* Part I.

425. Some commentators would support the proposition that courts should be reticent to disavow a case unless the decisional rule failed to pass a kind of least restrictive means test. Note, *Constitutional Stare Decisis*, *supra* note 153, at 1354–55, 1361 (endorsing Dworkin's idea that the court must consider alternatives to overruling) (citing DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 153, at 122)).

426. Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) (arguing that stare decisis should have the most force in cases in which reliance interests are particularly strong); Barrett, *supra* note 107, at 1730 (finding the protection of reliance "one of the classic concerns of stare decisis"); Kozel, *Precedent and Reliance*, *supra* note 355, at 1459 ("Among the most prevalent justifications for deference to judicial precedent is the protection of reliance interests.").

427. *See* DUXBURY, *supra* note 164, at 162 ("When courts decide consistently on the same facts they . . . provide us with important information for the purposes of organizing our individual affairs.").

428. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

429. *See* Kozel, *Precedent and Reliance*, *supra* note 355, at 1491 (citing *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005) (statement of John Roberts, J.)).

430. *See* Sellers, *supra* note 102, at 68 **(**"[T]he concept of precedent in the United States is simply the recognition that judicial decisions have the force of law and must be respected, not only by the litigants in particular cases, but also by the government, the public, lawyers and (in most cases) by the courts themselves.").

Given the overriding importance of reliance in the stare decisis calculus, there is an ongoing conversation about the requisite degree of reliance, whose reliance interests should be considered, and what kinds of disruptions should count (most).[431] Randy Kozel delineates two kinds of reliance interests at risk with a departure from precedent: specific and systemic.[432] *Specific* reliance is backward-looking and concerns the actors involved.[433] *Systemic* reliance is forward-looking.[434] It considers the transition costs to society from repudiating prior precedent.[435] Kozel relates that there could be systemic effects even when the specific transactional impact is narrow in scope.[436] Courts, including the Supreme Court of California, have recognized both kinds of reliance interests in evaluating whether to overrule a previous decision.[437] Nevertheless, they tend to emphasize specific reliance interests.[438]

a. Specific reliance

In cases of contract, property, and lately, liberty, judges have treated the specific reliance interests of litigants with special deference.[439] Because contracts and other commercial activities depend on autonomy and stability, these economic precedents inherently exhibit strong reliance interests.[440]

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431. *See* Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1856–57. Societal reliance seems the most controversial. *See* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 93 (2003) (criticizing societal reliance as a factor to adhere to precedent).

432. Kozel, *Precedent and Reliance*, *supra* note 355, at 1461 (dividing stakeholder expectations into ex ante effects on the litigating parties and disruption and transaction costs to society); *see also* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 453–64 (2010) [hereinafter Kozel, *Stare Decisis*] (delineating specific from broader-based reliance).

433. Kozel, *Stare Decisis*, *supra* note 432, at 453.

434. *See* Kozel, *Precedent and Reliance*, *supra* note 355, at 1486.

435. *Id.* at 1486–87.

436. *Id.* at 1491.

437. *See, e.g.*, Trope v. Katz, 902 P.2d 259, 269 (Cal. 1995) ("[A] party urging us to overrule a precedent faces a rightly onerous task, the difficulty of which is roughly proportional to a number of factors, including the age of the precedent, the nature and extent of public and private reliance on it, and its consistency or inconsistency with other related rules of law.").

438. Kozel, *Precedent and Reliance*, *supra* note 355, at 1465 (citing cases).

439. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (describing contract and property rights as "concrete" reliance interests); Lawrence v. Texas, 539 U.S. 558, 577 (2003) (advising that court exercises caution before overruling a precedent recognizing a constitutional liberty interest if there has been individual or societal reliance on the existence of that liberty); *see also* Price, *supra* note 105, at 94–99 (discussing how property reliance interests weighed heavily against overturning precedent in the 19th century even if courts applied a more lenient version of precedent in other subjects (citing state cases from Pennsylvania and New York)).

440. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) ("[R]eliance interests are important considerations in property and contract cases, where parties may have acted

Consider *Lochner*'s legacy. The now infamous case enlarged employee contract rights at the expense of government authority to regulate for the benefit of workers and the public welfare.[441] The U.S. Supreme Court effectively overruled the *Lochner* line of jurisprudence that had arguably created its own version of a super contract right during the New Deal period.[442] The Court, however, did not officially write *Lochner*'s obituary until almost a century later.[443] Presumably, the Court was hesitant to announce the rejection because it disrupted commercial activities and curtailed contract rights in relation to government power.[444]

California's law of stare decisis also recognizes the need for predictability in property and contract transactions.[445] Likewise, the California Supreme Court remains reticent to reverse itself on a contract issue of constitutional proportion involving retirement security. Despite variations in the degrees of reliance by individual employees (and retirees),[446] these groups generally have strong reliance interests in maintaining the California Rule.[447] The lack of savings for retirement, of course, is a nationwide problem.[448] What is more, some

in conformance with existing legal rules in order to conduct transactions."); Abbott v. City of Los Angeles, 326 P.2d 484, 495 (Cal. 1958) ("[J]udicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error.").

441. Lochner v. New York, 198 U.S. 45, 53, 64–65 (1905) (invalidating a New York state statute limiting the number of hours bakers were permitted to work on the grounds that it violated "the right of contract"). Government action was deemed unconstitutional on grounds of the substantive Due Process Clause and not the Contract Clause. Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021).

442. There was a sudden shift by the New Deal Supreme Court in its 1937 *West Coast Hotel Co. v. Parrish* opinion that constructively overruled *Lochner*. *See* Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 860 n.10 (2005).

443. Planned Parenthood v. Casey, 505 U.S. 833, 861–62 (1992).

444. *See id.* at 957 (Rehnquist, C.J., dissenting) (maintaining that litigants could have argued that erroneous decisions such as *Plessy v. Ferguson* and *Lochner v. New York* had resulted in societal reliance).

445. *See, e.g.*, City of Berkeley v. Superior Ct., 606 P.2d 362 (Cal. 1980), *cert. denied*, 449 U.S. 840 (1980) (noting that judicially formulated rules of property and contract law deserve special weight).

446. Retirees will be impacted more than employees given that employees still have time left to work and make up some of the lost benefit. Reforms can also affect current employees differently depending on when they were hired. *See* Anenson, *Public Pensions*, *supra* note 36, at 266–68.

447. *See id.* (ascertaining three aspects of the government employment relationship: hardship, hidden action, and vulnerability).

448. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 60 n.369 (citing authority noting the low level of personal savings).

California government employees do not contribute to Social Security.[449] Without adequate pensions, workers are vulnerable to loss of income during retirement.[450]

It is possible that reliance may be minimal because employees could change jobs to find another employer who will honor pension obligations.[451] Then again, with pervasive pension reforms, "public sector employees may have nowhere to go."[452] The lack of mobility for government employees is particularly pronounced because many public pension plans have extended forfeiture periods that encourage long service to a degree not seen in the private sector.[453]

The absurdity of the current rule, however, is that employers can still terminate employees or reduce salaries.[454] Job insecurity effectively eliminates the possibility of a pension before statutory vesting or reduces the benefit amount.[455] Moreover, reliance interests take account of *reasonable* expectations.[456] Saving the super pension contract law, with spiraling state debt and constant criticism, may be too good to be true from a foreseeability standpoint.[457] As such, in the present environment, employee reliance interests may be open to debate.[458]

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449. *Id*. at 57; Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 252 (2004) (discussing pensions, personal savings, and Social Security as the "three-legged stool" of retirement).

450. *See* Booth v. Sims, 456 S.E.2d 167, 188 (W. Va. 1994) ("Scores of thousands of little people have organized their lives around government pensions . . . ."); 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.").

451. *See* Monahan, *Legal Framework*, *supra* note 62, at 618 (emphasizing that offering defined benefit plans may determine who enters public service and how long they stay).

452. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 148.

453. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 53 (explaining the mobility penalty of defined benefit plans); Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 205 (discussing the mobility risk of public sector pensions in comparison to private sector pensions).

454. *See* Kern v. City of Long Beach, 179 P.2d 799, 802 (Cal. 1947) (acknowledging the fact that having a protected pension right does not prevent its loss from conditions subsequent like termination of employment before completion of the requisite service period under the plan).

455. *Id.*; *see* Monahan, *The California Rule*, *supra* note 26, at 1080–81 (suggesting that the crux of the problem may be long vesting periods).

456. *See* Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992); *see also* Trope v. Katz, 902 P.2d 259, 269 (Cal. 1995) (analyzing "the nature and extent of reliance").

457. *See* Kozel, *Precedent and Reliance*, *supra* note 355, at 1460 (questioning why specific reliance is considered fundamental to stare decisis from a fairness standpoint); *see also* Powell, *supra* note 373, at 289 ("The inevitability of change touches law as it does every aspect of life.").

458. *See* Barrett, *supra* note 107, at 1732 ("If . . . affected litigants and judges below have not overwhelmingly acquiesced in a decision, that itself is a signal that its resolution may not be permanent and that interested parties should rely upon it advisedly."); *see also* Re, *Narrowing*

And employees and retirees who are more adversely affected than others could claim estoppel to protect reliance interests or make out a contract claim for damages.[459] In a few states, an estoppel-based approach is the primary protection against benefit reductions.[460]

b. Systemic reliance

Systemic reliance measures the effect of overturning precedent on the legal and social environment.[461] It is a systemic, rather than a transactional, point of view.[462] A bare majority of the U.S. Supreme Court recently refused to count some of these reliance concerns.[463] But Kozel emphasizes, and we agree, that these broader interests are important and worthy of consideration.[464] Stakeholders include public bodies and private residents.[465]

Judicial concern tends to concentrate on legislative reliance interests in enacting legislation.[466] In fact, the Supreme Court of California

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Precedent, *supra* note 423, at 947 ("[T]he presence of ambiguity in a higher court precedent is a warning that interested parties should hedge their bets rather than rely on reasonably disputable readings.").

459. *See, e.g.*, Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 92 (Cal. 2020) (also seeking remedies for breach of contract and equitable estoppel); *see also* James W. Ely, Jr., *Still in Exile? The Current Status of the Contract Clause*, 8 BRIGHAM-KANNER PROP. RTS. J. 93, 109–11 (2019) (distinguishing impairment from breach of contract claims); AMAR, *supra* note 135, at 239 ("[An] equitable principle, prominent in judicial decisions stretching back hundreds of years, directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law."); *supra* note 226 and accompanying text.

460. *See* Christensen v. Minneapolis Mun. Emps. Ret. Bd., 331 N.W.2d 740, 748 (Minn. 1983); Booth v. Sims, 456 S.E.2d 167, 172, 181 (W. Va. 1994). It would not solve the problem to mitigate the specific reliance interests of government employees by overruling part of the California Rule prospectively (i.e., restricting the new rule to statutes enacted after the repudiation). While it is more common in state than federal courts, and not unheard of in California, *see Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58, 69 (Cal. 1988), retroactive overruling for non-retirees is the only way to reduce massive unfunded liabilities. *See generally* Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276 (2020).

461. Kozel, *Precedent and Reliance*, *supra* note 355, at 1486–87.

462. *Id.* at 1491.

463. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239 (2022) (questioning the "intangible" reliance interests of generations of women).

464. Kozel emphasized that because "[e]ven if the prospect of change is foreseeable, its occurrence can be disruptive." *Precedent and Reliance*, *supra* note 355, at 1495; *see also id*. at 1487–88 (likening general reliance to a retroactive tax in apportioning the cost of legal system progress).

465. DUXBURY, *supra* note 164, at 123 ("The costs generated by the overruling of a precedent . . . might be significant: public bodies and private citizens might have to invest heavily to understand and conform to the new ruling . . . ."). Pension boards are sometimes parties to the litigation. *See, e.g*., Legislature v. Eu, 816 P.2d 1309, 1312 (Cal. 1991).

466. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 244 (2006) (refusing to overrule in part because the decisional rule promoted considerable reliance among legislatures who depended upon it when drafting other statutes).

declared: "The significance of stare decisis is highlighted when legislative reliance is potentially implicated."[467] Notwithstanding, legislative expectations would not be undermined by changing the California Rule. On the contrary, replacing the single-contract approach with a series-of-contracts approach would give the California legislature the needed flexibility to enact necessary reforms and manage outsized pension debt without litigation.[468]

There would be no disruption of the executive branch either in changing the California Rule. Public pension reform often originates in the governor's office. The recent California Supreme Court cases concerned challenges to legislation stemming from then-Governor Brown's plan of pension reform.[469] Relaxing the rigidity of the California Rule by leveling the contractual cliff with a daily contract approach would encourage the governor to propose additional measures to restructure pension benefits (and would increase the likelihood that the laws would withstand constitutional challenge).[470]

Along with government actors, overturning precedent may cause disruption costs associated with California residents' shared understanding of the law.[471] Once upon a time, most citizens did not know about the public pension problem.[472] The contribution of academic writing and news reporting was to publicize the pension bomb ready

467. Sierra Club v. San Joaquin Loc. Agency Formation Comm'n, 981 P.2d 543, 552 (Cal. 1999); People v. Martinez, 903 P.2d 1037, 1044 (Cal. 1995) (explaining that the court is "particularly reluctant to disturb any judicial construction of a statute which has been in existence for a significant period of time and upon which the Legislature may have relied in enacting and shaping other provisions").

468. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 11 ("The gravity of the current crisis has pushed pension reform . . . to the front of the public policy agenda in each state capital."); KEITH BRAINARD & ALEX BROWN, NAT'L ASS'N OF STATE RET. ADM'RS, SPOTLIGHT ON SIGNIFICANT REFORMS TO STATE RETIREMENT SYSTEMS 2 (2018), https://www.nasra.org/files/Spotlight/Significant%20Reforms.pdf [https://perma.cc/2JQH-3ER5] (showing 116 reforms to state pension systems from 2007–2018).

469. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 160 (noting that the two most recent California Supreme court decisions upheld challenges to the same pension reform statute); *supra* Section III.A.3.

470. Repudiating the California Rule would make it easier to maintain fund solvency and enable a more efficient (less disruptive) administration of the public pension fund itself.

471. Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1855 (discussing the societal appreciation of the legal backdrop against which citizens arrange their lives).

472. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 42 ("[S]cholarly interest in public pension liabilities is a recent phenomenon and coincides with a series of financial setbacks suffered by economies worldwide.") (citing Lahey & Anenson, *supra* note 5, at 320).

to explode.[473] In any event, to the extent that public expectations change, reliance is beneficial and not detrimental.[474]

In summary, specific reliance interests in the short-run (assuming the absence of alternative remedies), are strong and weigh against changing the California Rule. By contrast, general reliance interests point in the opposite direction and would not be undermined by alteration. The remaining cost factors (rule of law, institutional legitimacy, and decisional economy) do not prevent rejecting the single-contract approach created on the first day of employment and replacing it with a series-of-contract approach that allows reforms to prospective service.

C. Striking an Appropriate Balance

The California Supreme Court will have a decision to make once voters or the legislature make a major change to pension benefits, like modifying the formula.[475] Echoing Justice Brandeis's famous phrase, the court must decide whether government pension law should be settled or settled right.[476] Based on our weighing and balancing of the above determinants of stare decisis doctrine, we recommend "righting" public pension contract law and, by extension, the Contract Clause of the state (and federal) constitution.

While no decision is beyond judicial recall,[477] overruling precedent requires careful consideration. Prior decisions must be consulted

473. *See* Katie Benner, *The Public Pension Bomb*, CNN MONEY (May 12, 2009, 12:51 PM), https://money.cnn.com/2009/05/12/news/economy/benner_pension.fortune/ [https://perma.cc/7B47-WS55] ("[S]tates nationwide have shortchanged the retirement programs . . . ."); Monahan, *The California Rule*, *supra* note 26, at 1033 n.19 (citing news stories of public pension shortfalls from the L.A. Times and San Francisco Chronicle).

474. *See, e.g.*, Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 967 (2008) ("[I]t does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news.")

475. *See* Jon Holtzman & Linda Ross, Commentary, *Pension Reform: In the Wake of the Supreme Court's Landmark Cal Fire Decision, Is the Glass Half Empty or Half Full?*, PUBLIC CEO (Mar. 12, 2019), https://www.publicceo.com/2019/03/commentary-pension-reform-in-the-wake-of-the-supreme-courts-landmark-cal-fire-decision-is-the-glass-half-empty-or-half-full/ [https://perma.cc/PM4C-LTKW] (maintaining that pension watchers should not blame the court because reforms to date have been modest at best and have not squarely presented the issue of abrogating the California Rule).

476. Barrett, *supra* note 107, at 1714; *see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

477. Farber, *supra* note 114, at 1202–03 ("[N]o one prior decision can be completely sacrosanct."). *But see* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1206 (2006) (discussing the stability of super precedents).

(at least as a starting point) for future cases. Costs and benefits must be weighed and analyzed. On the cost side of the ledger is the specific reliance interests of government employees and retirees. These are not insubstantial. In spite of this, the California Supreme Court has found that "[n]either the fact that rights have vested nor the number of persons claiming those rights puts a decision beyond reversal."[478] Besides, protecting the pro-rata share of benefits earned to date will curtail lost retirement income.

To the extent that partial protection is not enough to prevent harm under the circumstances, actual as opposed to abstract reliance interests can be protected under alternative doctrines of estoppel, unjust enrichment, or by a contract claim for damages.[479] Retirees should remain fully sheltered by the California Rule. For those working, reform legislation could minimize the brunt of adjudicative change by fully vesting existing employees at the time of the decision.[480] If feasible, California government workers that do not have Social Security could also be permitted to join the system as an additional precaution to preserve retirement security.[481] Because almost all the controversial California Rule cases stem from amendments to local plans, consolidating systems (if feasible) may help to defray costs and lessen adverse employee impact in the future.[482]

A notable feature of American stare decisis is that it never regressed into the rule rigidity reflected in the case law of England.[483] Precedent also has less force when the decisional rule has constitutional implications.[484] The California Supreme Court has indicated

478. 16 CAL. JUR. 3D *Courts* § 278, Westlaw (database updated Nov. 2022) (citing City of San Francisco v. Spring Valley Water Works, 48 Cal. 493 (1874); Hart v. Burnett, 15 Cal. 530, 609 (1860)).

479. *See supra* Sections III.B.4, III.A.1.

480. Monahan, *The California Rule*, *supra* note 26, at 1081–82 (suggesting immediate vesting along with pension reform as a new advantage under the California Rule).

481. Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 57–60 (recommending that states join Social Security if feasible as additional relief against the economic risk of old age).

482. *Id.* at 61.

483. *See supra* Part II.

484. *See* People v. Birks, 960 P.2d 1073, 1077 (Cal. 1998) ("[W]e are the final arbiters of the meaning of the California Constitution. If we have construed that document incorrectly, only we can remedy the mistake."); 1 CAL. AFFIRMATIVE DEF. *Stare decisis* § 14:62 (2d ed. 1995) ("[N]umerous decisions hold that stare decisis compels less deference to precedent when constitutional principles are applied . . . ."); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022); Neal v. United States, 116 S. Ct. 763, 768–69 (1996) (demonstrating the same principle in federal law). The issue of contract existence and duration in the Contract Clause is found only by reading a statute providing pension benefits, which itself is informed by the common law of contract. *See* Anenson, *Equitable Defenses*, *supra* note 118, at 684–85 (finding that the U.S.

that constitutional doctrine deserves less deference than statutory sources of law even though state constitutions change more often than the federal Constitution[485] and California citizens play a direct role in amending the constitution through voter initiatives.[486] Regardless of the wisdom or precise intensity of stare decisis, the California Supreme Court has recognized that "settled" does not merely mean counting the number of decisions following the rule. Rather, the court has emphasized that the quintessential question is whether the public and profession consider it beyond debate.[487] And the contentious and much criticized California Rule is clearly not beyond debate.[488] In its seminal *Eu* decision, the supreme court blocked a voter initiative that reformed pension benefits to make public servants more accountable.[489]

On the benefit side of the ledger, the biggest concerns are error correction, coherence, and consequences.[490] Although rule-of-law norms cut both ways in theory, in reality, they weigh most heavily in favor of repudiating the California Rule. The super pension contract was born in secret and clothed in dicta.[491] Nor has it ever been justified by reason.[492] The rule has little to no network effects in the related

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Supreme Court reads statutes in light of a general common law of equity); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 504–25 (2006) (finding that the Supreme Court resorts to common law sources to provide the substance missing from federal law).

485. *See* People v. Birks, 960 P.2d 1073, 1077 (Cal. 1998) (explaining that the force of stare decisis on issues of state constitutional interpretation are not as great as on questions of statutory construction); Devins & Mansker, *Public Opinion*, *supra* note 409, at 459 n.16 (tallying that as of 2009, California's constitution was amended 518 times).

486. CAL. CONST. art. XVIII, § 4 (declaring that an amendment to the state constitution can be passed by a majority of voters in a California election); *see* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2088–93 (2010) (recognizing direct democracy responses to unpopular court rulings).

487. Houghton v. Austin, 47 Cal. 646, 668 (1874) (citing Hart v. Burnett, 15 Cal. 530, 607 (1860)).

488. *See* Monahan, *The California Rule*, *supra* note 26, at 1076–79 (asserting that theory and public policy support the idea that government workers are only entitled to the benefits they have accrued during their employment similar to the at-will rule of private sector employment); Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 29 (more or less endorsing the same view); Buck, *supra* note 283, at 57–58 (relying on federal precedent construing statutory contract claims under ERISA); VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 11 (calling the right to earn future benefits a "bad idea"). *But see* Madiar, *supra* note 283, at 192–94 (criticizing the idea that contract protection should only extend to work that has accrued on grounds of employee expectations).

489. Legislature v. Eu, 816 P.2d 1309, 1331–36 (Cal. 1991).

490. Kozel, *Constitutional Method and the Path of Precedent*, *supra* note 1, at 1862 ("[E]ntrenching erroneous decisions impairs the soundness of the legal regime").

491. *See supra* Part I; *supra* Section III.A.1.b.

492. *See supra* Part I; *supra* Section III.A.1.

state common law.[493] Fixing the level of future accruals on the first day of work contradicts not only fundamental principles of state contract and employment law, but also breaks rank with federal employee benefits legislation.[494] Whereas it is not the first time a top court has heralded an "accidental revolution,"[495] rather than retreating from the error earlier by subtler methods than outright overruling (to better align public pension law with traditional notions of contract law and statutory construction), the California Supreme Court doubled down and (initially) took part of the country with it.[496] Now, however, jurisdictions are trending in the daily contract direction.[497] The Supreme Court of California has justified overturning precedent when "[t]he former rule was contrary to logic, unrealistic, and followed in only a few other states."[498] It has also abrogated doctrine subject to severe scholarly criticism when precedent had "lost touch with the traditions of contract law."[499]

It is true that in recent decisions, the supreme court appears to be attempting to square the circle of Contract Clause jurisprudence. The court has acknowledged the no contract canon of construction for interpreting legislation contested under the Contract Clause and created an exception for employment-related benefits, as well as relaxed the new benefit alternative by fastening it to the federal ends-means analysis.[500] As a result, future reforms beyond pension abuses may survive constitutional challenge by failing the deferred compensation analogy or running the gauntlet of the intermediate scrutiny test.[501] Nevertheless, the court's current concept of contract duration would require costly litigation in almost every case of benefit cuts. And many types of reforms have already been tested and rebuffed as Contract Clause violations that would serve as precedents.[502]

493. *See supra* Section III.A.2.b.

494. *See supra* Section III.A.2.c.

495. *See* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 207–08 (2012).

496. *See* VOLOKH, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS, *supra* note 7, at 4–5.

497. *See supra* Section III.A.2.d.

498. County of Los Angeles v. Faus, 312 P.2d 680, 684 (Cal. 1957).

499. *See* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 678 (Cal. 1995) (citing STEPHEN S. ASHLEY, BAD FAITH ACTIONS 28 (1994)).

500. Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Emps.' Ret. Ass'n, 470 P.3d 85, 108 (Cal. 2020).

501. *See supra* Part I.

502. *See* Anenson et al., *Reforming Public Pensions*, *supra* note 34, at 30–31, 47–48.

Even though the supreme court has been understandably keen to tout compliance with contract law, it could better emphasize and reorient contract (and employment) law by simply shifting the vision of pension benefits from one career-long contract to a series of them (with a lock on changes at retirement). Its decision in *Kern* and earlier cases supports such a ruling.[503] With the exception of *Allen*'s implied protection of future accruals, and *Eu*'s later express endorsement of that approach, the supreme court could otherwise stand by its one-hundred-year legacy of public pension law.[504] Thus, the court could fertilize the deep roots of government pension protection planted one hundred years ago and trim the overweening branches to grow the California Rule into a coherent and justifiable body of doctrine. The U.S. Supreme Court has instructed that "[w]hen vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine 'has failed to deliver the "principled and intelligible" development of the law that stare decisis purports to secure.'"[505]

The consequences of continuing to provide precedential force to the single contract aspect of the California Rule are immense.[506] Anything less than a full accounting of the costs of continuing the super pension contract would be California dreaming. Rather than leaving an errant and undesirable legacy, the Supreme Court of California could return to the role of pathbreaker of pension rights (and legislative power) by clarifying constitutional contract law through doctrinal revision.[507] Further, leadership would demand repositioning public pension jurisprudence openly rather than slouching toward coherence slowly and surreptitiously.[508] The court has discarded doctrine similar to the California Rule that it formed to follow a national trend, but

503. *See* Monahan, *The California Rule*, *supra* note 26, at 1056–58 (noting that the *Kern* court suggested that only earned and not prospective benefits could be protected).

504. *See supra* Part I.

505. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022) (quoting June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2152 (2020) (Thomas, J., dissenting).

506. Anenson & Gershberg, *Pension Law and Ethics*, *supra* note 25, at 148 ("Winter is coming for public pension plans."); *see also supra* Section III.A.3.b.

507. Devins, *State Constitutionalism*, *supra* note 31, at 1684 (recognizing the California Supreme Court as a pathbreaking court for leading on new legal issues).

508. *See* GERHARDT, *supra* note 119, at 147–49 (promoting an ongoing discussion of precedent as a mode of developing the law and not constricting it); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 47 (1959) ("[S]tare decisis requires that a court consider prior decisions and then choose whether to follow, distinguish, or overrule them. Merely to ignore a prior decision is hardly to heed the summons of the policy of stare decisis.").

accidentally expanded too far.[509] Like the ship of the Argonauts, California's constitutional pension doctrine could preserve its shape though some of its materials altered during the voyage.[510]

Again, to mediate between stability and error correction, the court could retain its many and continuous precedents about pension contract formation on the first day and reject the single contract concept without a new benefit (most of the time) that raises the stakes of reform on both sides. Replacing the current all-or-nothing rule with pro-rata protection is more even-handed and represents a middle ground. Calibrating the California Rule in the way described is both conceptually coherent and normatively desirable.[511] Karl Llewellyn appreciated that precedent setting is both a backward and forward-looking activity.[512] Significantly, the California Supreme Court has a "special responsibility accompanying the power [of accepting or rejecting precedent] to commit to the future before we get there."[513]

CONCLUSION

For better or worse, government pension law in the United States has been a model of fluidity and diversity—a true melting pot. In what was once the Wild West, a showdown over retirement security is taking place. California courts pioneered the expansion of contract protection for public sector pensions in the middle of the twentieth century. The creation of the California Rule—what this Article has called the super pension contract—caused a doctrinal earthquake that has had aftershocks throughout the country. While the Supreme Court of California upheld pension reform to correct seismic shortfalls in recent

509. *See, e.g.*, Peterson v. Superior Ct., 899 P.2d 905, 906 (Cal. 1995) (overruling the doctrine of strict liability for landlords and hotel proprietors whose tenants are injured by products on their premises).

510. JAMES WILSON, LECTURES ON LAW (1804), *reprinted in* 1 THE WORKS OF JAMES WILSON 353–54 (Robert G. McCloskey ed., Harv. Univ. Press 1967).

511. *See* GERHARDT, *supra* note 119, at 34–35 ("Applying precedents requires interpreting them, interpreting them frequently entails modifying them, and modifying them often entails extending or contracting them."); *see* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (explaining the likelihood of discarding a decision that "has unacceptable consequences, which can be judicially avoided (absent overruling) only by limiting [the precedent] in a manner that is irrational or by importing exceptions with no basis in law").

512. DUXBURY, *supra* note 164, at 4; *see* KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76 (Paul Gewirtz ed., Michael Ansaldi trans. 1989) ("[O]ne who works over a line of cases in retrospect recognizes that something new has been created. And can it have been old at the very moment it was created?").

513. Schauer, *supra* note 394, at 573.

cases, the unusual first-day-future-accrual rule remains intact. The court created this dramatic doctrine through a series of decisions beginning in the mid-twentieth century. Unlike today, it was a time of booming economies, bountiful government spending, and almost fully funded pensions.[514] Should California's highest court now overrule its super pension contract? The answer has enormous economic and social significance.

This Article has attempted a resolution, along with providing key considerations to assist judges in thinking through the problem. It summarized the major debates surrounding stare decisis (including an analysis of the new stare decisis inquiries made by the Supreme Court in *Dobbs v. Jackson Women's Health Organization*) and extended the dialogue to state courts and state law, a phenomenon largely ignored in the literature on precedent. It also developed a decision-making framework to accommodate an array of factors for a more comprehensive coverage of the issues and values at stake. Outcomes are important, but so are reasons. The revised rubric better informs California's stare decisis doctrine. Because retaining or repudiating precedent is a prudential inquiry, the analysis has weighed the costs and benefits of overruling a critical component of California's public pension law. On balance, the study found that the California Supreme Court should correct the California Rule at its earliest opportunity. The court should partially repudiate precedent to protect only the past accruals of employees as daily contracts earned through work. For retirees and their beneficiaries, the court should adhere to the rule in its entirety.

514. PEW CHARITABLE TRS., LEGAL PROTECTIONS, *supra* note 38, at 1 (noting the public retirement systems, which were almost fully funded in 2000, now have a deficit of more than one trillion dollars); Jeppson et al., *supra* note 332, at 98 (estimating public defined-benefit pension liabilities to be more than $5 trillion).