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The Double-Edged Sword of State Constitutional Law

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I. BACKGROUND CONUNDRUMS

Judge Jeffrey S. Sutton on the Court of Appeals for the Sixth Circuit is perhaps this nation's most sophisticated expositor and articulate champion of state constitutional law. On multiple occasions he has taken the position that lawyers should be well aware that, on economic liberties like any other issue, they have two shots at striking down an unwelcome state law on constitutional grounds, one federal and one state. The conventional wisdom, he observes, often overlooks this double-barreled possibility by taking the view that the federal constitution is, pick your metaphor, the only game in town or the fount of all wisdom. As such its allure is so powerful that lawyers of

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all political stripes move heaven and earth to get into federal courts in order to present their case.

That tendency to prefer federal courts gained strength during the New Deal, when progressive litigants went into federal courts in order to uphold legislation that cut down on the scope of constitutional protection for economic liberties[1] or to expand federal power over all economic activities, not just the shipment of goods and the movement of people across state lines.[2] Making an issue into a federal case became a moral imperative for the progressive cause on questions such as the National Labor Relations Act,[3] the Agricultural Adjustment Act,[4] and the Motor Vehicle Acts,[5] all of which were intended to curb the traditional exercise of economic liberties. That move to federal courts had added urgency at the height of the civil rights movement (roughly speaking, in the 20 or so years after the end of World War II) when state courts, especially in the Old South, were firmly controlled by segregationists who did all they could to thwart such key federal decisions as *Brown v. Board of Education*.[6] One such illustration was the now forgotten case of *Naim v. Naim*,[7] in which the Virginia Supreme Court upheld a statute that forbade marriage between a white person and a person of the opposite sex of another race. Clearly some federal constitutional remedy was needed, but owing to the turmoil that followed *Brown*, the anti-miscegenation statutes did not fall until *Loving v. Virginia* received a hero's welcome

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[1] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[2] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[3] 29 U.S.C. §§ 151-169 (2012)
[4] Pub. L. No. 73-10, 48 Stat. 31 (1933) (replaced by the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31).
[5] Pub. L. No. 74-255, 49 Stat. 543.
[6] 347 U.S. 483 (1954).
[7] *See, e.g.*, Naim v. Naim, 87 S.E.2d 749 (Va. 1955).

in 1967.[8] Just several years before, in *New York Times Co. v. Sullivan*,[9] the United States Supreme Court had intervened by using First Amendment arguments to overturn an inflated $500,000 defamation award sustained by the Alabama Supreme Court that could have bankrupted the New York Times. State constitutional law did not seem to be a source of meaningful judicial relief. But it did seem to be the source of legal interventions that could undermine our free institutions.

That was then, and this is now, at a time when state courts do not display the manifestly bad behaviors of the past. But then again, who would have thought that during the 1880s the United States Supreme Court would be in-step with state courts on issues of race relations, so that the civil rights movement was frustrated at both the federal and state level? Yet now that the new era has come, the old reluctance to rely on the states and hence on state constitutions has largely disappeared. But the answer to Sutton's question of whether it is a salutary move to rely on state constitutions cannot be answered authoritatively unclear unless and until we know how state courts will exercise their new found constitutional powers.

On this score the picture is complex on all matters pertaining economic liberties because state constitutions do in some fundamental ways at least differ from the United States Constitution. The most obvious difference is that the United States Constitution, at least in its inception, was a constitution that afforded "few and defined"

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[8] Loving v. Virginia, 388 U.S. 1 (1967), overruling Pace v. Alabama, 106 U.S. 583 (1883), thus removing all racial restrictions on marriage. *Pace* was written by Justice Stephen J. Field, himself something of a libertarian, who held that the statute did not violate the equal protection clause because it proscribed identical punishments to the white and black members of the couple. Note that the decision makes a grim kind of sense on an equal protection ground, but offers no comfort to the state if both parties challenge the case as an infringement of basic liberties. At that point, police-power arguments have to be addressed, and none were mentioned in *Pace*.

[9] 376 U.S. 254 (1964).

powers to the central government.[10] In contrast, powers of the state governments were defined generically to cover all standard government activities, less those that the United States Constitution had vested in the federal government. That diffuse state power was exceedingly broad prior to the New Deal expansion of federal power. Yet those additional post-1937 federal powers were too broad to be read as *exclusive,* without stripping the states of any power to regulate routine economic matters. Accordingly, the political economy of the post-New Deal era therefore stressed *concurrent* powers, so that often the major inquiry was whether the federal government had, either expressly or impliedly, preempted the authority of the states.[11] In many areas, most notably in education, finance land-use, and consumer affairs, the states continue to exercise extensive powers side-by-side with the federal government. Courts must still confront cases in which federal and state power clash. But today, states often want the federal government to backstop state regulation.[12] Elsewhere, the federal government explicitly allows states a wide range of actions, so that states may, for example, increase the federal minimum wage but not reduce it. This cooperative form of federalism thus increases powers at both levels,[13] and thereby complicates the classical liberal

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[10] For the most famous articulation of that principal, *see* THE FEDERALIST NO. 45 (James Madison).

[11] For the standard tests, *see* Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[12] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where numerous state attorneys general supported the expansive reading of the phrase "waters of the United States." *See also*, the same federal-state alignment in *Rapanos v. United States*, 547 U.S. 715 (2006).

[13] For a defense of this view, see MALCOLM FEELEY & EDWARD L. RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE (2008); Symposium, *Federalism as the New Nationalism*, 123 YALE L.J. 1889. For doubts about this cooperative vision, see Richard A. Epstein & Mario Loyola, *Saving Federalism*, 20 NATIONAL AFFAIRS 3 (2014). That article addresses one key aspect of the problem: the ability of the federal government to condition grants that force states to conform to its

quest for limited government. In addition, it is clear that state constitutions intentionally confer certain management duties to state government, which in turn require them to exercise, at least in the first instance, their own best business judgment on how these institutions should operate. To take but one provision among hundreds, the Arizona Constitution now requires that the state set up everything from kindergarten common schools to high schools, normal schools, industrial schools and universities.[14] Thus it is no surprise that modern writers on state constitutions treat them as a fount of positive rights on such matters as education, worker rights, and environmental protection.[15] Yet at the same time, the Arizona Constitution also contains phrases dealing with due process of law (section 4), the right to petition and assembly (section 5), freedom of speech and press (article 6), privacy (section 8) and privileges and immunities (section 9). It is therefore highly difficult to sort out the warring tensions.

In this article, I shall trace out two potential conflicts that address matters fundamental to economic liberties, using pension reform and public education as the analytical lens. The first conflict is that between positive and negative rights and the second is that between the federal and state constitutions.

II. PENSION REFORM UNDER STATE CONSTITUTIONAL LAW

To see how these cross currents work, I shall start with a discussion of one of the major challenges that exists today at the state level,

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will. It does not address the other side, where states, with the blessing of Congress, extend their protections of positive rights.

[14] ARIZ. CONST. art. XI, *available at* http://www.azleg.gov/Constitution.asp.

[15] *See, e.g.*, Jeffery Sutton, *Courts as Change Agents: Do We Want More – Or Less?*, 127 HARV. L. REV. 1419(2014) (reviewing EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013)).

which derives from the unsustainable growth of pension obligations.[16] To frame the problem, it is important to note that there are two types of pension programs: defined contribution and defined benefits. These differ primarily in their assignments of which party takes the risk of fluctuations in market value in the retirement fund.

The overall situation is relatively tranquil under defined contribution plans, which are used for university professors under TIAA-CREF.[17] Under these arrangements, the employer's obligation is to pay a certain amount of money each year into a pension fund, which then vests in the employer when paid over. The employee then decides how to invest that money in both the short and long run. In practice, employees receive some assistance in investing their TIAA-CREF funds, often from TIAA-CREF itself. Most employees tend to invest in diversified portfolios whose financial assets are divided between stocks and bonds.

The key advantages of this system are two. First, since the benefits vest, on any job change the employee does not have to forfeit either the employer contributions or the subsequent appreciation to the fund. Hence the labor market is far more mobile than it is under defined benefit plans, where it is often uncertain whether or not the contributions made to date have generated accrued benefits, however defined. The second great advantage of the defined contribution plan is that it never goes insolvent. The rights are fully vested in the employee, who now chooses his or her investment and payout strategies. One common formula tends to increase the fraction of bond or

[16] For one useful compilation of this information, see Amy Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, U. ILL. L. REV. 117 (2015), from which much of this data is drawn.

17 For information on these plans, see TIAA-CREF, Defined Contribution/Retirement Plans, available at https://www.tiaa-cref.org/public/products-services/retirement/employer-sponsored/defined-contribution.

other fixed-income investments (e.g., real estate leases) as the employee gets older. The reasoning is that as the time to payout gets closer, the employee has fewer opportunities to offset bad years by getting higher yields in the next profitable period. The employee also has distribution options, which usually involve the selection of some type of annuity payment, which is keyed either to his or her life, or to a self-and-survivor annuity, usually tied to a spouse. Under this system, the employee has an exact knowledge of the amount of money available at any time. That information is *not* available, for example, in Social Security programs that list a set of options to the plan enrollee without giving any information as to the present value of the assets in the plan. In general, the consensus is that these plans perform well, which explains their increased popularity in the private sector.

Defined benefit plans operate on the reverse principle, such that no rights are necessarily vested in the employee at the time that the employer makes contributions to the fund. Instead, under these plans, the parties agree by contract that the worker shall upon retirement receive benefits in accordance with some preexisting formula that could be modified over the life of the plan. In effect, the employer takes the risk, up and down, from fluctuations in the portfolio of assets set aside to fund the future obligations, including those for retirement and disability. In those cases where the investment portfolio outperforms expectations, the employer can, over the deep grumbling of the employees, remove excess funds from the pool. But where the portfolio performance has been low on a cumulative basis, which has been the case for the last 15 or so years, the employer (including any public employer) is obligated to make up the difference from its own revenues, which for public employees comes from increases in tax revenues or in cutting other employer services.

In one sense, therefore, the problem is that which faced Wilkins Micawber in Charles Dickens' David Copperfield: "Annual income twenty pounds, annual expenditure nineteen [pounds] nineteen [shillings] and six [pence], result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery." Dickens was always weak on financial matters, for this quotation does not allow for borrowing or saving to even out any short-term imbalance. But the objection carries weight nonetheless in the area of pension, which involves the far greater challenge of figuring out how to balance the accounts over a generation, or indeed a lifetime, where more than a single shilling is at stake. At this point, it is not just a question of adding up pounds or dollars. It is a much more complex calculation that at a minimum requires that one take into account the future rate of earnings from a given fund over a long period of time, an analysis of future changes in the anticipated date of retirement, and a calculation of the expected lifespan of plan members and their beneficiaries. These judgments have to be made not just at the time of the distribution of the funds, when the revenues from a defined contribution plan are annuitized. They also have to be made continuously over the life of the fund, taking into account as well any changes in the legal environment. Clearly this task has gone astray, for at present, best estimates are that public employee pension funds contain about $2.8 trillion in assets, subject to an anticipated liability in present value terms of about $3.8 trillion.[18]

The situation is worse than it appears because the financial effects of the dislocations are likely to fall on future recipients even if at present all current retirees continue to receive their full pension benefits. But at the same time, the immediate ramifications for current state and municipal budgets are enormous because the applicable cuts must be made *today* in other government programs in order

[18] Alicia H. Munnell et al., *The Funding of State and Local Pensions: 2012-2016*, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE 1, 2–3 (2013), *available at* http://crr.bc.edu/wp-content/uploads/2013/07/slp_32-508.pdf: "In the aggregate, the actuarial value of assets amounted to $2.8 trillion and liabilities amounted to $3.8 trillion, producing a funded ratio of 73 percent."

to maintain employer contributions up to some acceptable level. Before the case settled, I worked on these issues for the City of San Jose in connection with its defense of Measure B, whose full title is Article XV-A Retirement, Public Employee Pension Plan Amendments—to Ensure Fair and Sustainable Retirement Benefits While Preserving Essential City Services.

It is still worth while to review the history of that proposal, which was adopted by the voters on February 8, 2012 and approved by the City Council on March 6, 2012.[19] The purpose of the Amendment was to make cuts in the pension benefits of future retirees—not to help the notorious top one percent, but in order to ensure sufficient funding for "services [that] are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers."[20] These programs had been subject to major cuts in order to fund pensions when the fund was about $1 billion in debt. But Measure B was struck down on *state* constitutional grounds as an impairment of the vested rights of contract. At this point, the dark side of state constitutional law bears on two questions. The first is how the large deficits accrued in the first place. The second is why the efforts to take steps to control them were thwarted by the assertion of state constitutional rights.

So why then the deficits? The answer to this question depends on the assumptions that are used to fund future liabilities. It is well known that the sum of money put into a pension program today will grow by the time that it will have to be paid out. But the question is at what rate. If one assumes that a balanced portfolio will grow at a

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[19] The full title is Article XV-A Retirement, Public Employee Pension Plan Amendments—to Ensure Fair and Sustainable Retirement Benefits While Preserving Essential City Services, which was adopted by the voters on February 8, 2012 and approved by the City Council on March 6, 2012.

[20] *Id.* at Section 1501-A FINDINGS.

high rate of interest—eight percent on accumulated investment is a common number—then a small amount of cash need be set aside in the early years. But if the actual rate of growth in pension fund assets is lower than the stipulated rate, the ultimate fiscal shortfalls could prove enormous, as the aggregate $1 trillion unfunded liability shows. The situation is not likely to get better soon when in recent years interest on long-term debt instruments has hovered around two percent and the stock market growth has been relatively low compared to around 15 years ago.

This fiscal problem results in part from the powerful pressures placed on political officials and their budgetary staffs to use estimates that reduce the amounts of money that have to be set aside in any given year to fund these programs on an actuarially sound basis. Citizens are not shareholders, so that future fund liabilities are not set off against their current assets, as tends to happen in connection with corporate firms that more readily convert future liabilities to their present value. But the citizenry of any community, state or especially local, can exit the jurisdiction without having to pick up their pro rata share of future losses. Similarly, local officials are worried about the deficits that appear on their books today, and not those in future generations, so that they too have some incentive to inflate short-term gains while inviting long-term losses. The point here should not be overstated. Any governor or mayor who has to deal with the immediate decline in local services and with requests for higher taxes is bearing the brunt of what happens. But the sad truth, given the size of the problem, is that the rot can set in even before the local services are cut or the taxes are increased, so that the problem can with time snowball into a huge shortfall.

The basic public choice dynamic is of course not unknown to lawmakers and the actuaries who offer them advice. So the question then is what should be done about it. Oftentimes the stated legislation tries to forestall these problems by working actuarial standards into the law. On this score, the central question is whether any future payment program will be adequately funded today. That precise issue that arises with pension laws was faced 25 years ago with the long-term funding of automobile insurance funds on which, full disclosure, I worked as a consultant for Allstate Insurance in connection with the operation of the assigned-risk program that New Jersey had developed to deal with the consistent cost overruns in its automobile insurance market.[21] The Fair Automobile Insurance Reform Act of 1990[22] was passed in response to a breakdown in insurance markets for assigned risks. That statute came at the end of a complex process, in which the liability for future losses—just like the liability for future pensions—was kicked down the road.

The problem is simple to state, hard to solve. Drivers do not have equal risks. Some are much more dangerous than others. From the point of view of a rational insurance company—and these companies know how to calculate premiums—they have to charge individual drivers the expected value of their losses, which puts the coverage out of reach for some high-risk parties. But it is politically unacceptable to keep these drivers off the road (however great the safety benefits) so they are placed in assigned risks pools where they can obtain coverage at a subsidized rate. It is therefore necessary to assign, usually by rotation, those losing risks to the various carriers who do business in the state, usually in accordance with their market share. But to make this assigned-risk pool work, it is necessary to obtain subsidies from market-rate customers, which cannot be done in a competitive market when all the companies will bid the amount of the recoupment down to zero in an effort to gain favorable contracts.

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[21] For a more complete account of these issues, see Richard A. Epstein, *A Clash of Two Cultures: Will the Tort System Survive Automobile Insurance Reform?*, 25 VAL. U. L. REV. 173, 183 (1991).

[22] 1990 N.J. Sess. Law Serv. 8 (West) ("FAIRA"); 1990 Pa. Legis. Serv. 6 (Purdon); Proposition 103 (codified as amended at CAL. INS. CODE §§ 1861.01–1861.16 (West Supp. 1991)).

One way to handle this problem is for the state to pay a subsidy to every insurer that takes on assigned risk drivers, so that there need be no disruption of the voluntary market. But rather than put tax payments on-budget, in the run-up to FAIRA New Jersey formed a Joint Underwriting Association ("JUA") that bore the financial risks, and that JUA then used insurance carriers to do its paper and managing work for these risky policies. But the system quickly unraveled. The JUA had the power to impose a Residual Market Equalization Charge on all policies issued in the state, to cover the insurer losses. But the JUA neither raised rates nor imposed fees sufficient to offset the short-term losses, even though by law the JUA was required to set up "actuarially sound reserves"[23] that would allow JUA operations to run on a "no loss, no profit" basis.[24] As the deficits mounted, FAIRA found, without benefit of a hearing, that the insurance carriers had been guilty of mismanagement of the underwriting and claims process, so that it was appropriate to impose on them a $900 million extra fee for their neglect. FAIRA also allowed the legislature to use new insurance dollars to go against the past losses in earlier periods, which is an open invitation to financial ruin.

Notwithstanding these evident defects, the New Jersey Supreme Court in a lengthy opinion refused to allow any facial state-law constitutional challenge to this rickety scheme, leaving the insurers with the hopeless task of trying to win on costly as-applied challenges, where one ready response was that future rate authorizations might offset current shortfalls.[25] It is instructive that on these issues, the court relied heavily on the rational-basis test cases of the United

[23] N.J. STAT. ANN. § 17:30E-7(r) (West 1985).
[24] N.J. STAT. ANN. § 17:30E-3(o) (West Supp. 1990).
[25] State Farm Mut. Auto. Ins. Co. v. State, 590 A.2d 191 (N.J. 1991).

States Supreme Court.[26] It is also worth noting that the 1937 Tax Injunction Act[27] blocked any direct challenge in the federal courts so that no one had standing to challenge these taxes until long after the money was collected.

In the first instance, FAIRA looks like a case in which a strong system of constitutionally protected property rights could have been created and enforced in state courts. Nonetheless, its eager embrace of some sanitized version of the rational-basis test precluded the challenge. *State Farm* was an object lesson in the simple proposition that state courts are not temperamentally willing to impose any restrictions on state taxation and expenditures, no matter how transparent the legislative ruse. The situation is of course no different at the federal level, as there has been a supine judicial posture with respect to the financial irregularities of the Chrysler and GM bailouts,[28] and with the financial legerdemain in the judicial oversight of the federal government's notorious Third Amendment to the September 2008 financial bailout of Fannie and Freddie.[29] The pathological risks are the same at both the federal and the state levels.

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[26] *See id.* at 198 (citing Nebbia v. New York, 291 U.S. 502 (1934)).

[27] 28 U.S.C. § 1341: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The last clause suggests that this defense should be relatively broad, but historically the opposite has proved true. *See* Clark R. Calhoun & Timothy L. Fallaw, *Avoiding the TIA: Not Impossible, But Close*, TAX ANALYSTS Nov. 8, 2010, at 425, *available at* http://www.alston.com/Files/Publication/606933de-c4de-4c9b-b880-4c67e490d7fa/Presentation/PublicationAttachment/d3e983cc-3c3c-461e-8cdc-edf8961af634/Calhoun%20-%20STN%20Avoiding%20TIA.pdf.

[28] For my views, see Richard A. Epstein, *Political Bankruptcies: How Chrysler and GM Have Changed the Rules of the Game*, THE FREEMAN (2009), *available at* http://www.thefreemanonline.org/featured/political-bankruptcies-how-chrysler-and-gm-have-changed-the-rules-of-the-game/.

[29] For the painful details, see Richard A. Epstein, *The Government Takeover of Fannie Mae and Freddie Mac: Upending Capital Markets with Lax Business and Constitutional Standards*, 10 N.Y.U. J.L. & BUS. 379 (2014).

These early warning signs tell us all that we need to know about the prospects of getting judicial oversight over the funding of state and local pension plans, which also depend on funding long-term programs in ways that meet all relevant actuarial standards. The public choice risks for underfunding are sufficiently high that these plans cry out for some judicial oversight on the ground that the political process is heavily weighed to the protection of present claims against future long-term solvency. In addition, as in the New Jersey FAIRA case, the relevant statutes call for the use of actuarially sound administrative procedures to insure long-term solvency.[30]

Yet, as Professor Amy Monahan reports in her study, the few cases that have sought to open the investment strategies of these pension funds to judicial investigation have hit a blank wall for all of the usual reasons.[31] Thus in *Kosa v. Treasurer of the State of Michigan*,[32] the state defaulted on its constitutional obligation to make payments into its retirement fund the year in which the liabilities were accrued, much as under the New Jersey insurance scheme. Accordingly, when the state unilaterally changed its accounting methods to reduce the required level of its own contributions, the Michigan Supreme Court punted on the issue, holding that acceptable so long as both methods are in principle capable of achieving the desired long-term equilibrium. But this is all bravado. The payments were reduced under immediate fiscal pressures, which amounts to an open confession that

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[30] Thus the South Carolina statute provides: "The General Assembly shall annually appropriate funds and prescribe member contributions for any state-operated retirement system which will insure the availability of funds to meet all normal and accrued liability of the system on a sound actuarial basis as determined by the governing body of the system." S.C. CONST. art. X, § 16.

[31] Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117.

[32] 292 N.W.2d 452 (Mich. 1980), *discussed in* Monahan, *supra* note 30, at 149–50.

these opportunistic changes could not meet the plan's long-term financial objectives. The willingness to credit state pronouncements in the face of serious financial objections creates the kind of lax scrutiny that is an open invitation to a fiscal short fall.

Similarly in *Professional Fire Fighters of New Hampshire v. New Hampshire*,[33] the court sidestepped yet another constitutional mandate for the use of sound actuarial practices to determine plan liabilities.[34] In this instance, the perverse doctrine of standing to block challenges to a series of legislative practices became tantamount to a virtual negation of the constitutional protection.[35] More specifically, the legislature adopted a statute that overrode the independent actuary's determination that the high rates of return postulated for the investment were unduly rosy, thereby knocking out the case for additional contributions. It also changed the governance structure of the board, by replacing public employees with public employers, so as to make sure that there would be no backsliding. The argument that there was no present harm to potential recipients effectively immunizes a state constitutional provision from all review. In this regard, the imposition of the standing requirement has the same misguided effect as it had in the first of the standing cases, *Frothingham v. Mellon*,[36] where it prevented any systematic challenge to ultra vires government behavior. Here too there is no effective enforcement of the applicable funding constraints.

The final case that Monahan mentioned was *Musselman v. Governor*,[37] which was intended to force Michigan to make adequate pro-

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[33] 167 N.H. 188, (N.H. 2014).

[34] N.H. CONST. pt. I, art. 36-a.

[35]On which, *see* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT, chs. 6–7 (2014).

[36] Massachusetts v. Mellon, 262 U.S. 447 (1923).

[37] 533 N.W.2d 237 (Mich. 1995).

vision for funding its healthcare benefits. Normally a writ of mandamus is available for that purpose, but in this instance it was denied on the ground that the writ was not available to force the legislature to make appropriations for any of its programs. The net effect on the funding side is that the obligations in question were knowingly underfunded.

The second half of the pension problem relates to the question of whether, and when, individual state employees have their pension rights *vested* under the law. This question is distinct from the above issue, because these rights can vest even if no adequate provision has been made for funding the obligation. What happens is that the employees now bring suit to prevent the state from reducing the level of benefits owing in these cases. In dealing with these issues, the appropriate point of departure is the standard practices that private employers adopt in the voluntary market. To be sure, there is immense variation on this question, as the distinction between defined benefit and defined contribution plans shows. But amid this variation one point does remain clear: the time at which pension rights under a defined benefit plan vests is deferred until some period of service has expired, and even then there are no vested benefits for services yet to be rendered. The situation under public plans in some cases reflects this point of view that the rights are not vested irretrievably, unless the state has unmistakably indicated its intention to so do. Thus in the 2014 version of *Professional Fire Fighters of New Hampshire v. New Hampshire*,[38] the New Hampshire court unanimously held that "legislative changes increasing the contribution rates paid by members of the New Hampshire Retirement system" did *not* violate the Contracts Clauses of either the United States or the New Hampshire Constitutions.[39] The legislative change in question did not reduce the

[38] *See*, Prof'l Fire Fighters of N.H. v. State of N.H., 107 A.3d 1229 (N.H. 2014).
[39] *Id.* at 1231.

vested period below the prior "ten years of creditable service" but did increase the employee contribution from all classes of employees.[40] The point taken in this case was that flexibility was preserved on the ground that the earlier legislation did not unmistakably prevent the state from making this interpretation.[41] But even if one followed the preferred rule of ordinary interpretation, it seems as though any employer would retain flexibility with respect to the vesting of rights for work that has yet to be done.[42] These contracts are not financial obligations in which the money has already been paid over so that the only question is their timely repayment. Quite the opposite, to the extent that both sides of the agreement are fully executory, the usual rule is that each party can modify its position as it sees fit unless there is some specific impairment in question. On that view, it follows that the decision to cut back future contributions

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[40] "[F]or Group I members the rate increased from 5 percent to 7 percent; for Group II permanent fire fighter members the rate increased from 9.3 percent to 11.80 percent; and for Group II permanent police members the rate increased from 9.3 percent to 11.55 percent." *Id.* (citing Laws 2011, 224:172; RSA 100-A:16, I(a) (Supp. 2010) (amended 2011)).

[41] *Id.* at 5. In *United States v. Winstar Corp.*, 518 U.S. 839, 859 (1996), the United States Supreme held that this doctrine meant "that the Government could not be held to a promise to refrain from exercising its regulatory authority in the future unless that promise was unmistakably clear in the contract," which the Supreme Court then rejected. *Id.* at 881-87. Ironically, the New Hampshire Supreme Court wrote as if the doctrine had been accepted, when it quoted this passage: "A requirement that the government's obligation unmistakably appear thus served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." *Prof'l Fire Fighters of New Hampshire,* 107 A.3d 1234 (N.H. 2014). This quotation refers to the government's position in favor of the doctrine, which was rejected by the Court in favor of the rule of ordinary interpretation. *Winstar Corp.*, 518 U.S. 896 (1996).

[42] For discussion, see Richard A. Epstein, *The Upside Down Law of Property and Contract: Of Fannie Mae, Freddie Mac, and San Jose Pensions*, 93 NEB. L. REV. 869 (2014).

under existing, but open-ended contracts, is part of the ordinary discretion reserved to any employer, and thus survives without needing any resort to the unmistakability doctrine invoked in *New Hampshire Fire Fighters*.

These vesting issues have come to the fore in San Jose California, where the vested rights—that is, those vested from the time of hiring—have precluded the changes that were introduced in Measure B, which was approved by the voters. In dealing with this issue, the trial judge, Patricia Lucas, relied heavily on well-established California precedents that treat these rights, under the so-called "California rule," as vested as from the date of initial employment: "courts in California and the twelve other states that have adopted California's precedent have held not only that state retirement statutes create contracts, but that they do so as of the first day of employment. The practical result of this rule is that pension benefits for current employees cannot be detrimentally changed, even if the changes are purely prospective. Thus, the only readily available option for changing employee pension benefits in these states is to limit such changes to new hires." [43] This rule had its origins in the 1945 decision in *Kern v. City of Long Beach*,[44] where it was invoked in order to prevent the termination of benefits to Kern one month before he was due to retire after 20 years of service.

The California Supreme Court responded to that hiring abuse with a massive case of overkill by holding that "the right to a pension vests upon acceptance of employment."[45] But Measure B bore no resemblance to the *Kern* strategy insofar as it sought to reduce benefits only to the extent that it was necessary to fund the other essential

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[43] *See* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1032 (2012).

[44] Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947).

[45] *Id.* at 801.

civil service. Under a general rule that requires that these contract modifications be made in good faith, this adjustment surely passes muster because there was no attempt to wipe out the pension claims that had already accrued, only to trim them to the point where other essential services could be adequately supplied. Trustees are often forced to choose among multiple claimants, and rarely does any trustee immunize one class of beneficiaries from all cuts. The steeper the financial cuts in any given program, the larger the marginal dislocation. Finding an interior solution therefore tends to substitute in cuts that necessarily do some harm for those that today necessarily bring out far greater harm. It is manifestly impossible for any court to fine-tune the level of cuts made, which is why the exercise is normally judged under a good-faith standard, which is common in many, but by no means all, contract arrangements.[46]

In this case, however, the question need not be left to implication, for the San Jose Charter contains an explicit provision to "amend or otherwise change" retirement plans, or in Section 1503 to "repeal or amend" any retirement system.[47] But that section itself has received a very narrow interpretation so that, as stated in *Betts v. Board of Administration*,[48] "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."[49] The upshot of this construction is that a power that

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[46] For the most famous articulation of the good-faith standard, see *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

[47] *See* SAN JOSE, CAL., CITY CHARTER, art. XV, § 1500 (1965) (amended Nov. 2, 2010) ("Subject to other provisions of this Article, the Council may at any time, or from time to time, amend or otherwise change any retirement plan or plans or adopt or establish a new or different plan or plans for all or any officers or employees . . . ."); SAN JOSE, CAL., CITY CHARTER, art. XV, § 1503 (1965) ("However, subject to other provisions of this Article, the Council shall at all times have the power and right to repeal or amend any such retirement system or systems, and to adopt or establish a new or different plan or plans for all or any officers or employees.").

48 582 P.2d 614 (Cal. 1978).

[49] *Id.* at 617; *see* Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955).

was reserved to confer on San Jose the ability to manage its own affairs is read to mean that no changes that it can make can leave the employees any worse off than they were before the changes took place. At this point, no meaningful reform is possible because all wholesale cuts in pension benefits are precluded as a matter of law, which is the position that the court took in *San Jose Police Officers' Association v. City of San Jose*.[50]

Now the worm has turned because the Officers held that the effort to undermine the vested rights in this case was a violation of the federal Contracts Clause. "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." [51] At this point, the California Constitution, if it has any role to play to all, is used to frustrate any opportunities to put the state pension system back on rational grounds. Indeed, this decision is not unique. The situation is sufficiently confusing that this question should be asked: does the decision of the California courts to interpret, alter and amend a provision of the Charter so narrowly impair the rights reserved by the City under the Charter—rights which normal conceptions of the police power often hold to be nonwaivable in any event?

The verdict on this case is still out, but it is clear from the decision of the Illinois Supreme Court in *Kanerva v. Weems*[52] that state constitutions can be used to vest rights against the state in ways that are clearly antithetical to the general efforts to create a system of more

[50] No. 1-12-CV 225926 (Super. Ct. Santa Clara Cnty. Dec. 20, 2013) (unreported tent. decision), available at https://www.sanjoseca.gov/DocumentCenter/View/25342.

[51] *Betts*, 582 P.2d at 617. The decision does not stand alone. *See also* Allen, 287 P.2d at 765, *cited in* San Jose Police Officers' Ass'n, No. 1-12-CV-225926 at 7–8.

[52] 13 N.E.3d 1228 (Ill. 2014).

limited and responsive government. At issue in that case was the proper interpretation of Article XIII, § 5 of the 1970 Illinois Constitution, which reads "[m]embership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." The Illinois Supreme Court treated this clause as though it were subject to no exceptions, notwithstanding the perilous financial position of the state, and then decided that this powerful interpretation covered both the pension and healthcare system under the state, invoking the rule that the provision should be "liberally construed in favor of the rights of the pensioner."[53]

The dark side of state constitutional law should now be clear, at least to this extent. The interpretation of state constitutions is subject to the same vagaries as the interpretation of the federal constitution. It is ironic that the protection afforded to these contracts is far stronger than that which is likely to be found under the federal Contracts Clause, which often carries with it a large police power exception. Indeed, there is at least a respectable argument that the systematic disregard of the "alter and amend" provisions means that the state's judicial decision in *San Jose Police Officers* might violate the federal Contract or Takings Clauses, at least if these apply to judicial actions—a topic on which there is today much confusion.[54] The point here should be clear enough. The advocates of both limited government and big government can seek to use the contracts clause to their private advantage. The double-edged sword is all too apparent, given the short shrift that some, but not all, state courts, give to the

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[53] *Id.* at 1239.

[54] Please *see Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 560 U.S. 702 (2010), on which my views are found in Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the* Ius Naturale *and* Stop the Beach Renourishment, 6 DUKE J. CONST. L. & PUB. POL'Y 37 (2011).

protection of the state's interest in the enforcement of its own charter provisions and pension arrangements.

III. PUBLIC EDUCATION UNDER STATE CONSTITUTIONAL LAW

A similar line of argumentation applies to the question of education. On this point it is clear, as noted, that state constitutions often impose affirmative obligations on their state governments to run education programs. But much depends on how these obligations are interpreted, and often it is in a way that can make government even bigger than it would otherwise be. The leading set of cases in this regard are the three decisions in *Serrano v. Priest*,[55] in which the California Supreme Court held that it was improper to rely heavily on local property taxes to fund public education in the state. In dealing with this issue in 1971, the California Supreme Court quickly rejected any argument that this result was required by article IX, section 5 of the California Constitution, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . ."[56] The point does not seem unreasonable given that the last clause—"at least six months in every year"—contemplates that some districts may go above any minimum level if their finances permit it, even if others do not. Rather than fight the particulars of this state constitutional provision, *Serrano I* found that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution applied to state education, particularly to efforts to allow education to turn on the wealth of individual school districts.[57]

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[55] Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (*Serrano II*); Serrano v. Priest, 569 P.2d 1303 (Cal. 1977) (*Serrano III*).

[56] *Serrano I*, 487 P.2d at 1248.

[57] "We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide

The interpretation was surely revolutionary at the time. Although the point is rarely mentioned today, any successful interpretation of the clause has to give equal stress to the words "equal" and "protection," where the latter term was used in its ordinary sense at the time, noting that all persons were entitled to the equal protection of the criminal and civil law against their selective enforcement. The protection probably extended to those cases where the state engaged, often on grounds of race, in differential prosecution of various offenders, or in the alternative on differential insulation for certain individuals from prosecution on the basis of race. Under the applicable constitutional law of the time, it is highly unlikely that the equal protection guarantee was seen as having anything whatsoever to do with the distribution of government benefits—a development that took place only much later, and most emphatically with *Brown*.

The argument that the Equal Protection Clause was ever intended to revolutionize the funding of public education was always a stretch, and when the issue came before the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*,[58] a divided Court held that there was no obligation of any state to redistribute resources across local county and municipal lines. The California Supreme Court refused to follow those decisions. Thus stymied on its reading of the federal constitution, in *Serrano II* it announced that it read California's Equal Protection Clause in line with its earlier reading of the federal constitution, before *Rodriguez* came

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disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause." *Id.* at 1244.

[58] 411 U.S. 1 (1973).

down. In so doing, the court did not read the positive grants of power over the educational system to create the rights in question, even though it might have had the power to do so.

At this point, it should be clear that one of the ironies of our federalist system is that the identical clause could be interpreted in opposite fashions by the United States Supreme Court and various state supreme courts. The double-dip theory of state constitutionalism, however, does not give us any clue as to which of these interpretations should be preferred and why. If *Serrano I* and *Serrano II* are regarded as constitutional mistakes, then the opportunity afforded for state experimentation is a negative and not a positive. Indeed, one way to read the Equal Protection Clause of the Fourteenth Amendment is as a break on state power, which is supposed to be enforced by appropriate congressional legislation. But it is a mistake, I think, to tie any uneasiness with *Serrano* to the Equal Protection Clause, because it is perfectly clear that state supreme courts can use clauses similar to article IX, section 5 of the California Constitution to achieve that same end.

Many states have chosen to rely on specific grants of powers to their legislatures to reach the result in *Serrano.* For these purposes, I shall confine my attention to the single, but exhaustive, Kentucky Supreme Court decision in *Rose v. Council for Better Education, Inc.*,[59] which imposed its own extensive program of financial equalization through the lens of Section 183 of the Kentucky Constitution, enacted in 1891, which provides: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." The leverage for the massive judicial intervention was the term "efficient," which according to *Rose*, in the Kentucky constitutional sense, was defined as a system that required

[59] 790 S.W.2d 186 (Ky. 1989).

"substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students."[60] "Efficient" was also interpreted in light of expert evidence to require that the educational system must be adequate, uniform and unitary, such that "students must be given equal educational opportunities, regardless of economic status, or place of residence"—whereby "efficient" involves "pay and training of teachers, school buildings, other teaching staff, materials, and adequacy of all educational resources."[61] At no point does "efficiency" in this account carry with it the usual economic meaning of extracting maximum social value out of scarce resources.

In dealing with these two issues, the case for or against equalization should not depend on the particular clause used to impose the fiscal duties upon the state. The decisions in both *Serrano* and *Rose* are dubious from the general perspective of limited government, under which it is the function of government to provide for public goods, rather than to redistribute wealth among its various citizens. The issue in this regard is actually very complicated because *any* system of state-funded education, no matter where done and how implemented, necessarily has some powerful redistributive consequences that can neither be ignored nor eliminated. Let any individual school district have rich and poor neighborhoods, then prima facie it looks as though families in the first group necessarily subsidize the education of those in the second group.

The size of any such subsidy is difficult to specify in the abstract, for it depends at least in part on the number of children in the two groups who attend public school, and the differential costs in providing those services, assuming that there is (as there is not) some way

[60] *Id.* at 191–92.
[61] *Id.* at 210–11.

of standardizing the benefit packages received. On this score, moreover, it is not clear exactly what is to be equalized. Richer students live in nicer homes and their parents are prepared to pay for nicer schools. Does school equalization require all amenities to be equalized, or just those issues—assuming we can identify them—that pertain exclusively or predominantly to the quality of education provided? Poorer students are likely to have more behavioral problems and special needs. They are likely to have greater need for school lunches and other support services. Do these costly services have to be supplied as well, even if it means a higher per capita expenditure in poor rather than rich districts? The situation is complicated when large numbers of students use either private or religious schools. It is made still more difficult by trying to factor in the extensive amount of federal cash support—and the onerous burdens of federal regulations—on the operation of various school systems, both public and private. The effort to create state funding for the issue is one that will redress district-wide grievances, but it is an open question as to just how far that equalization should go in light of the multiple difficulties in running these vast systems. The California system prior to *Serrano I*, and the Kentucky system prior to *Rose*, had both built in previously some measure of state equalization payments, which makes it hard to believe that either the Equal Protection Clause, or any general state mandate to introduce, fund and support public schools, can be read with sufficient precision to tell what level of subsidies ought to exist, and why.[62] Indeed, one position that looks very much beyond the pale is one that requires absolute equality in expenditures

[62] As a side note, the ruling in *Serrano I* led to the adoption of Proposition 13, commonly known as the Jarvis-Gann Amendment, in 1978, which disrupted real estate taxation in California over the next forty years. Jarvis-Gann was upheld against federal constitutional challenge in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). Its role as a response to *Serrano I* is discussed in Isaac Martin, *Does School Finance Litigation Cause Taxpayer Revolt?* Serrano *and Proposition 13*, 40 LAW & SOC'Y REV. 525 (2006).

across districts, which could easily ignore the different costs of school construction, student needs, and faculty hiring in different districts. The Equal Protection Clause does not read as if it confers a generalized ratemaking authority on courts. And the specific state constitutional provisions restricting public school systems do not turn over vast levels of authority to impose those restrictions either. Nor do they appear to allow courts to impose on state legislatures the extensive obligation to require additional taxation. Institutionally, the point here is that if there is no workable theory of remediation, the highly expansive reading of entitlements ought to be curtailed, leaving matters up to the legislature, as imperfect as that is.

The situation is further clouded because it seems clear that redistribution of wealth is not the only consequence that will flow from the radical restructuring of state funding. Once the funding goes to the State, then most of the control over local education on such matters as the selection of textbooks and the organization of curriculum will necessarily migrate to the center of the state. That shift of power has two serious downsides: first, it negates the benefits of local knowledge, and second, it weakens the exit options of individual taxpayers that otherwise constrain misbehavior by local governments. The increased funds therefore need not work any improvement in the overall operation of schools, and there is pretty good empirical evidence that the overall level of school performance has not improved since the massive infusion of state and federal funds into public education programs since *Serrano I* was decided in 1971.[63]

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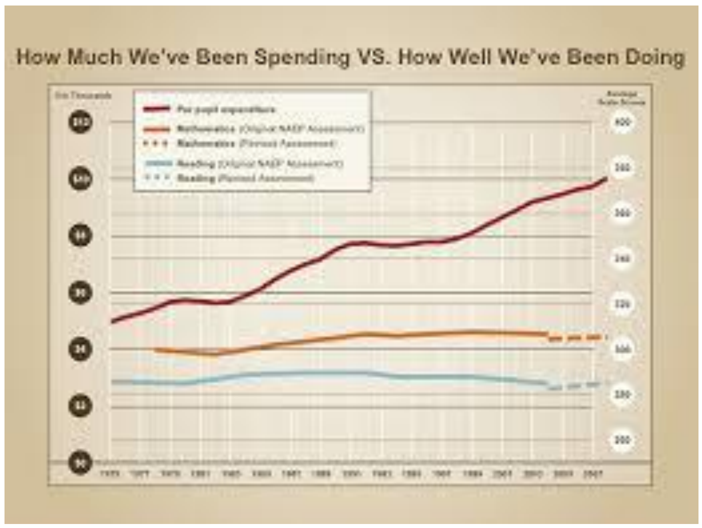
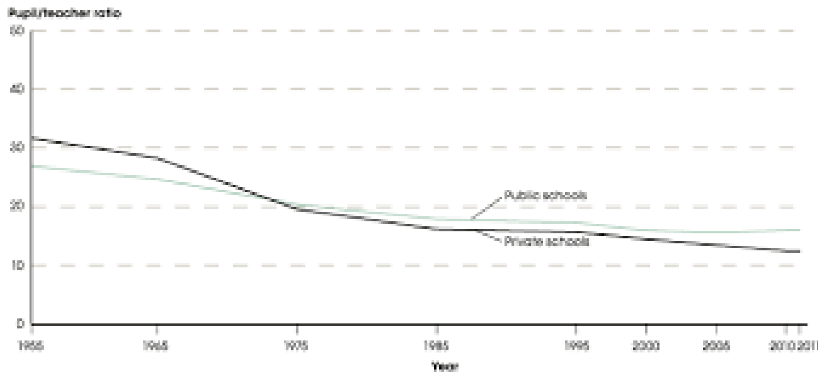
[63] For a balanced account of these issues, see ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (2009).

Look at these graphs that relate performance to funding and class size and decide for yourself:[64]



[64] The first graph is available here: http://www.huffingtonpost.com/bill-gates/bill-gates-school-performance_b_829771.html. The second is available here: https://nces.ed.gov/programs/coe/indicator_clr.asp.



The punch line from these two graphs is that higher expenditures and smaller classes have not done much to improve the system of public education. The question then arises of how best to explain the changes. On this score the first point to note is that finances are only a very small part of the overall picture. What goes on in the classroom and larger society makes a huge difference as well. One serious problem is that students who come to school today often come from single-parent households or broken families, so that schools have to pick up a larger share of the basic caring function for nutrition and health matters, for example. These students from unstable or vulnerable family environments also tend to miss classes and have some serious personal issues, not necessarily of their own making. Family instability often leads to frequent moves that put additional strains on the overall operation of the educational system. Gone are the days when in public schools the return rates from year-to-year were high—in my own instance at P.S. 161 in Brooklyn, over 90 percent each year, even in large classes.

Next there is the heavy regulatory burden, which has mushroomed exponentially since *Serrano I* was decided. Whatever the topic, there is more oversight from both state and federal governments. Dear Colleague letters from the Department of Justice and the Office of Civil Rights impose extensive compliance costs on schools, as issues of race, sex, and disability are always raised to the top of the agenda, where they divert energy from teaching and resources from public administration.[65] If the mandate for an efficient public education system could bind the federal program, the aggregate data would point to their prompt elimination.

That state of affairs is exceedingly difficult to remedy at the state level, given that state rules cannot preempt federal rules. But there is one thing that can be done on the state level that could transform the basic operation of public schools: declare public unions unconstitutional under state law. Ironically, this is a hard argument to make under the state Equal Protection Clauses, which have generally been rate to mandate massive redistribution. But they can be made with much greater ease under specific state constitutional guarantees that talk about the need to have "efficient" public school systems, for the simple reason that any system that entrenches a monopoly union cannot be efficient by the normal economic tests that prefer competition, even among branches of government, to monopoly institutions. The simple argument here is that the general view of the public trust translates into a constitutional norm that "public resources [shall not] be given to private use, without just compensation." [66] The acceptance of union representation of teachers amounts to a violation of the public trust by giving away public assets in exchange for services of higher quality that could be acquired at a lower price, as is made evident by this basic chart that compares public school and charter school teachers:[67]

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[65] I discuss these in Richard A. Epstein, *Civil Rights Enforcement Gone Haywire: The Federal Government's New School-Discipline Policy*, 14 EDUC. NEXT 29, (2014), 29, *available at* http://educationnext.org/civil-rights-enforcement-gone-haywire/.

[66] For development of the theme, see Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987).

[67] Note that the longer term of service of public school teachers is no clear sign of better educational skills, for it is consistent with retention because of serious job protections.

Less and more

Teachers at charter schools, none of whom are unionized, tend to be younger, less experienced and lower paid, and also work more days per year.

	Average traditional public-school teacher	Average charter school teacher
Age	43	34
Experience	15 years	5.4 years
Annual workdays	185	200
Salary	$49,621	$38,149

Note: Data is from 2008-2009 school year, the most recent available.

Source: Indiana Department of Education

The basic principle of a public trust is that it requires that the state never give away assets to private parties unless they receive an equal value in return. That is never the case with respect to public school teachers who are protected by a collective bargaining agreement that allows them to obtain supra competitive wages, judged in this instance against the charter school benchmark. What is striking about the current law on the *Serrano* standards is that it for the most part speaks only of various funding obligations. It talks about the redistribution of funds across districts, but it never once notes that one of the reasons why higher expenditures on public education have not resulted in improved levels of student performance is that the increased strength of the public teachers union has siphoned off in the form of monopoly rents the increased revenues that were intended to equalize education. Unless and until the courts look at allocative efficiency as well as wealth redistribution, they will never be able to get to the bottom of the current situation, where higher revenues have not translated into improved performance for students. A frontal assault on the entire union structure is consistent with the general framework that should be applicable to our basic constitutional structure.

As of this writing, there is no court that has had the temerity, or good judgment, to push hard down this road. But there are signs that the log jam may be breaking on this issue. In the recent decision in *Vergara v. California*,[68] Judge Rolf M. Treu struck down three provisions of the California Education Code as inconsistent with the Equal Protection Clause of the California Constitution. The doctrinal analysis rested on a bare recitation of key passages from *Brown* and *Serrano*, coupled with obligatory references to the two provisions of the California Constitution that were put to one side in *Serrano*. From those passages, he concluded that the state has a compelling state interest to supply education to all students within the state on equal terms, which translated into the use of a strict-scrutiny standard.[69] The decision seems correct given the enormous impact that California teachers unions have exerted in both electoral and legislative politics.[70]

Doctrine was not the purpose of this exercise. Instead the judge targeted three provisions of the California Education Code. Section 343929.21(b) was a provision that guaranteed permanent employ-

68 No. BC484642 (Cal. Super. Ct. Aug. 27, 2014).

[69] *Id.* at 8–9.

[70] Troy Senik, Op-Ed., *The Teachers Union That's Failing California: Why Are State Schools in Trouble? Start with the California Teachers Assn.*, L.A. TIMES (May 18, 2012), http://articles.latimes.com/2012/may/18/opinion/la-oe-senik-california-teachers-association-20120518.

ment to newly hired teachers after a stated two years of service; Section 44934, 44928(b)(a) 7(2) and section 44944 imposed strong restrictions on the ability of the School District to fire ineffective teachers; and Section 44955 imposed a strict Last-in-First Out ("LIFO") rule on dismissals in the event of an economic contraction. All of these statutes were declared unconstitutional.

The logic of this decision reveals the conscious conflation of liberty with equality interests. The basic charge was that the protective barriers used to surround teachers were certain to compromise "the basic equality of educational opportunity." The difficulty with that inequality argument is that a uniformly corrupt system of protective legislation does not discriminate against any particular group of students. What it does is lower the quality of education below that which all students should receive. In order to get to that point, Judge Treu quickly transformed his inquiry from one of the equality of educational opportunities, to one about the *quality* of those opportunities, which he found sorely lacking. In making this judgment he relied on evidence offered by the defendant (and sponsored in part by the Gates Foundation, which has been active in this area) that the single largest determinant of student success is the quality of instruction—and not the number of dollars spent within the system. These difficulties are especially acute with the bottom five percent of teachers, who are the prime beneficiaries of the overall system of legal protections against dismissal. As the plaintiff's expert testified, "a single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom."[71] Similarly, "students in LAUSD [Los Angeles Unified School Districts] who are taught by a teacher in the bottom 5% of competence lose 9.54 months

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[71] Vergara, No. BC484642 at 4.

of learning in a single year compared to students with average teachers."[72] I have not reviewed the data behind these statistics, and the numbers indeed sound large, but the basic point shines through. Inferior instruction by cosseted teachers can nullify much of the purported gains from the wealth transfer system initiated by *Serrano* and similar decisions.

Armed with this general conclusion, Judge Treu then attacked each of the three provisions on sensible social and economic grounds. The early tenure requirement in essence gives teachers tenure before the public school evaluation of their first two years of work can be completed. There is in effect no sensible probation period. The protections against unjust dismissal are far beyond those offered to other public employees, all of which meet the normal due process standards. The LIFO rule is a per se rule that means that the most recently hired teachers must be the first to be fired, regardless of their value to the school system. On a routine basis, within a lockstep wage structure, this rule requires the dismissal of new teachers with lower salaries and greater skills than their senior colleagues. The net effect is that these hiring teachers necessarily prejudice the students who receive inferior instruction from this skewed hiring system that could never survive in any competitive industry. The decision in *Vergara* did insist that seniority be irrelevant to hiring decisions. But it did insist that this system was constitutionally defective because it did not follow the rule in other states, where the Board of Education is allowed to take seniority into account, without being able to rely on it exclusively. The California provision of course solidifies the loyalty of the senior teachers for the union and thus has a corrosive effect on internal governance along with its negative consequences on instructional quality and its additional charge on budget.

[72] *Id.*

The union attacks on *Vergara* have been fierce. What is striking about them is that they all take dead aim at the Eli Broad and Gates Foundation, as well as Student Matters, the group that sponsored the *Vergara* litigation, on the grounds that these are groups of billionaires that are intent on taking over the entire system: "the essence of *Vergara versus California* [is] the corporate reformers' legal assault on teachers' due process rights. *Vergara* is one more insidious attempt by the billionaires to impose a simplistic competition-driven ideology on complex issues of policy and practice."[73] What is never offered is a substantive defense of the underlying statutes against the charges in question.

As noted, I regard the *Vergara* decision as a sensible first step in an effort to break the union monopoly that constitutes the greatest threat to superior education in California and elsewhere. It is important to note that education in this regard is not exempt from the usual observation that gains in allocative efficiency should be implemented before extensive programs of redistribution are applied. That applies to both political and constitutional remedies of the basic problem. It also gives a clear guide to both constitutional adjudication and political reform—if this path is taken and cases like *Vergara* are not consigned to political oblivion. But even here the irony is that the arguments in question do not depend on the state, as opposed to the federal, versions of the Equal Protection Clause. They work equally well, or equally badly, under both. But the further irony is that the other state constitutional provisions that do require the creation of public school systems actually offer an easier path to that result by noting that the state cannot act in good faith to create a uniform, fair and effective public school system if it countenances the

[73] John Thompson, *LA School Board Member Steve Zimmer Stands with Students Against 'Vergara Fiction*,' HUFFINGTON POST (Mar. 31, 2014, 3:21 PM), http://www.huffingtonpost.com/john-thompson/la-school-board-member-st_b_5064570.html.

use of monopoly power against the student population whom they are under a duty to serve.

IV. Conclusion: Putting the Pieces Together

We are now in a position to survey both the opportunities and pitfalls of state constitutional law in the domain of economic liberties, and I dare say everywhere else. These provisions are the very model of a double-edged sword. State constitutional provisions could provide needed protection for private property, economic liberties and prudent public expenditures on such topics as pension and education if they are pressed into service for those ends. But just as the federal constitution is subject to the radically different interpretations from the classical liberals and progressives, so too state constitutions are prey to just that ambiguity. Unfortunately, in most cases where state courts are dominated by progressive judges, their results will lead just in that direction. That result is evident in cases dealing with pensions, where the judges adopt an upside-down structure: they are powerless to prevent excesses of spending that violate every known principle of actuarial soundness, but all too willing to tolerate early vesting of pension rights that are inconsistent with the usual rules on delayed vesting of contract rights. Similarly, with respect to state education, they leap to impose major financial transfers of dubious value while allowing teachers unions to dominate the classroom where they impose a systematic threat to educational quality. The recent *Vergara* decision represents the early sign of a possible return to saner principles, but that litigation has a long way to go. The perils that befall it are great, which is the case with all efforts to use state constitutions to remedy the defects of the modern federal constitutional law. The reason why this paper is called "The Double-Edged Sword of State Constitutional Law" is that the power to deviate from federal norms is, as often as it is not, used to make a bad situation worse.