
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 74 | ISSUE 4 SUMMER 2022

THE CALIFORNIA SUPREME COURT UPHOLDS PENSION REFORM BUT AVOIDS CONFRONTING THE "CALIFORNIA RULE"

CAL FIRE LOCAL 2881 V. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, 435 P.3D 433 (CAL. 2019).

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* J.D., Rutgers Law School, 2022. Thank you to the *Rutgers Law Review* members for their hard work during the editing process. I am especially grateful to my parents for their constant encouragement, my husband for his loving support, and my sweet baby boy for making every experience an adventure.

I. INTRODUCTION

In *Cal Fire Local 2881 v. California Public Employees' Retirement System*,[1] the Supreme Court of California considered the constitutionality of a change effected by the California Public Employees' Pension Reform Act of 2013 ("PEPRA").[2] Among other changes, the change at issue was the elimination of the opportunity for public employees to purchase additional retirement service credit ("ARS").[3] Public employees accrue service credit while working as a California Public Employees Retirement System ("CalPERS") employee.[4] The more service credit a public employee has, the higher the retirement benefits.[5] Before PEPRA, public employees had the opportunity to purchase up to five years of ARS credit.[6] If taken advantage of, this would increase the public employees' pension benefits without having served those years.[7]

If the opportunity to purchase ARS credit was a vested right that public employees were entitled to, getting rid of that opportunity would be a breach of contract and, thus, invalid.[8] In that scenario, public employees would have constitutional protection. However, the Supreme Court of California decided that the opportunity to purchase ARS credit was not a vested right public employees were entitled to, and therefore, PEPRA did not violate California's contract clause.[9] Furthermore, the court reasoned that the legislature gave no indication that it intended for an employee's opportunity to purchase ARS credit to create contractual rights when it enacted PEPRA.[10]

This Comment will analyze that decision. To begin, this Comment will provide a summary of the procedural history and the relevant state constitutional and statutory provisions. Additionally, it will give a background of California's pension system and the related "California Rule." It will then discuss the court's analysis and conclusion that the statute did not violate the state constitution. Finally, this Comment will

1. 435 P.3d 433 (Cal. 2019).
2. *Id.* at 437.
3. *Id.*
4. CALPERS, A GUIDE TO YOUR CALPERS SERVICE CREDIT PURCHASE OPTIONS, 2–4 (2021), https://www.calpers.ca.gov/docs/forms-publications/service-credit-purchase-options.pdf.
5. *Retirement Benefits*, CALPERS, https://www.calpers.ca.gov/page/active-members/retirement-benefits (last visited July 20, 2022).
6. *Cal Fire*, 435 P.3d at 437.
7. *See id.*
8. *Id.*
9. *Id.*
10. *Id.*

conclude that the California Supreme Court correctly decided the case but should have taken the opportunity to modify the California Rule.

II. STATEMENT OF THE CASE

In California, state employees are members of the state pension system called CalPERS.[11] Through CalPERS, while employed and working, state employees and employers are required to make contributions to CalPERS.[12] Regular deductions from workers' paychecks, and contributions from the state, fund the state pensions.[13] Although there are some exceptions, "a state employee does not become eligible to receive a pension until [he or she have] worked for the state for at least five years and [have] attained the age of 50."[14] After meeting these requirements, state employees are eligible to retire and begin receiving monthly retirement benefits.[15] Although public employees typically do not have a vested right to the receipt of their pension until after five years of working for the state, the initial vested right is acquired at the inception of their employment.[16] Therefore, an employee is considered to have a "vested right" once meeting these requirements.[17] A "vested right" refers to a benefit whose repeal or other divestment is constrained by California's constitutional contract clause.[18]

Pensions are "calculated as a fraction of [an] employee's annual compensation near the end of [the employee's] career."[19] The fraction's size "is generally determined by the employee's years of public employment, known as 'service credit,' and [the employee's] age at retirement."[20] The greater a service credit may be—years the employee has been working—and the greater that the employee's retirement age is, then the larger the fraction is.[21] The larger the fraction, the greater the pension. Therefore, the three relevant numbers are: (1) the individual's compensation, (2) their age at retirement, and (3) their years of service.[22]

11. *Id.* at 438.
12. *Id.*
13. Jack Dolan, *The Pension Gap*, L.A. TIMES (Sept. 18, 2016), https://www.latimes.com/projects/la-me-pension-crisis-davis-deal/.
14. *Cal Fire*, 435 P.3d at 438.
15. *Id.*
16. *Id.* at 438 n.3.
17. *Id.*
18. *Id.*
19. *Id.* at 437.
20. *Id.*
21. *Id.*
22. *See id.* at 438–39 (providing example of the calculation).

O'Dea v. Cook established "[t]he rationale for the constitutional protection of statutory pension rights."[23] The *O'Dea* case "is recognized for rejecting the legal theory that public employee pensions constitute a gratuity."[24] The California Supreme Court held that where there is a pension statute, and services have been rendered, "the pension provisions become a part of the contemplated compensation for those services, and so *in a sense a part of the contract of employment itself*."[25] Thus, once services are rendered, the right to a pension is vested and any deprivation of that right is a breach of contract. The court's previous decisions have affirmed that the receipt of pension benefits receives constitutional protection through the contracts clause, because an employee's benefits are considered a portion of the employee's compensation which are paid at a later time rather than paid when the services of their employment are performed.[26] Therefore, rather than a gratuity, these benefits are earned compensation that come directly from a public employee's service.[27] The size of the pension is roughly proportional to the employee's time of service.[28] For example:

> Just as each month of public service earns an employee a month's cash compensation, it also earns [the employee] a slightly greater benefit upon retirement. In this way, pension benefits are, literally, earned by an employee's work. Upon retirement, this additional component of [the employee's] compensation is paid to the employee in the form of pension benefits.[29]

Before PEPRA was enacted, public employees could purchase ARS credit that would be applied to their retirement.[30] PEPRA, however, eliminated that option so that current public employees that had not purchased ARS credit were no longer presented with that option.[31] Cal Fire Local 2881, "a labor association whose members are employees of the California Department of Forestry and Fire Protection, . . . filed a petition for a writ of mandate against CalPERS challenging the elimination of ARS credit."[32] Plaintiffs argued "that the opportunity to purchase ARS credit was a vested right protected by the" California

23. *Id.* at 446; O'Dea v. Cook, 169 P. 366, 367 (Cal. 1917).
24. *Cal Fire*, 435 P.3d at 446.
25. *O'Dea*, 169 P. 366 at 367 (emphasis added).
26. *Cal Fire*, 435 P.3d at 447.
27. *Id.* at 447–48.
28. *Id.* at 448.
29. *Id.*
30. *Id.* at 437.
31. *Id.*
32. *Id.* at 441.

Constitution's contract clause.[33] The trial court denied the petition and held that the California Constitution did not protect the opportunity, and even if it did, the elimination was a "permissible modification to the pension plan" because it was "materially related to the theory and successful operation of a pension system."[34] The California Court of Appeal affirmed on both grounds.[35]

III. BACKGROUND

A. State Constitutional Provisions

The U.S. Constitution is the law of the land. By contrast, "state constitutions are constrained by, and constitute integral parts of, the [F]ederal Constitution. Each of the constitutions form an interlocking, interdependent element of the other."[36] In creating its laws, however, the states are free to be stricter[37]—state constitutions "are often referred to as documents of limitation rather than documents granting powers."[38] As Professor Robert F. Williams puts it:

> As long as a state's constitution, or the legislative, executive, or judicial implementation of its provisions, do not contravene the [F]ederal Constitution or federal law under the Supremacy Clause, the states are free to devise their own arrangements for performing these federal functions as well as other ones reserved to them under our system of constitutional federalism.[39]

The California Constitution's contract clause is essentially the same as the United States Constitution's Contract Clause. In this instance, "[b]oth the United States and California Constitutions contain provisions that prohibit the enactment of laws effecting a 'substantial impairment' of contracts, including contracts of employment."[40] Moreover, "[t]he [F]ederal [C]ontract [C]lause restricts states from impairing their own contracts, as well as those between private

33. *Id.*
34. *Id.* (quoting Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 7 Cal. App. 5th 115, 115 (2016)).
35. *Id.*
36. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 18 (2009).
37. California v. Greenwood, 486 U.S. 35, 43 (1988).
38. WILLIAMS, s*upra* note 36, at 27.
39. *Id.* at 20.
40. *Cal Fire*, 435 P.3d at 441.

parties."[41] Because the two clauses are substantially similar, the same analysis is applied to claims brought under each clause.[42] *Cal Fire* does not raise any federal questions, so only the California Constitution and California state cases are relied upon in the case.

The plaintiffs in *Cal Fire* claimed that in revoking the opportunity to purchase ARS credit, the state breached its contract with public employees and thus violated the California Constitution's contract clause.[43] To determine whether a statute violates the contract clause, courts undertake a three-part analysis.[44] The first part of the analysis determines if a contractual relationship exits.[45] If "the statute at issue is ambiguous, the court looks to whether 'the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.'"[46] The second step is to:

> [D]etermine whether the state action constitutes a substantial impairment of a contractual relationship. An impairment occurs if it alters the contractual relationship between the parties and is substantial—for example, "where the right abridged was one that induced the parties to contract in the first place, or where the impaired right was one on which there had been reasonable and especial reliance.[47]

Lastly, even if a substantial state impairment is found, a court may render the change of the contract to be constitutional if it is justified by an important public purpose or if the change advances a public interest that is "reasonable and necessary."[48]

The plaintiffs claim "that the opportunity to purchase ARS credit was a vested right protected by the contract clause of the California Constitution."[49] This "vested right" plaintiffs claim was part of the terms and conditions of section 20909 of the California Government Code.[50]

41. *Id.* at 442; *see also* U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."); CAL. CONST. art. I, § 9 ("A . . . law impairing the obligation of contracts may not be passed[.]").

42. Retired Emps. Ass'n of Orange Cnty., Inc. v. County of Orange, 610 F.3d 1099, 1102 (9th Cir. 2010).

43. *Cal Fire*, 435 P.3d at 441.

44. Amy B. Monahan, *Statutes As Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1041 (2012).

45. *Id.*

46. *Id.* (quoting U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977)).

47. *Id.* (quoting Balt. Tchrs.' Union v. Mayor of Balt., 6 F.3d 1012, 1017 (4th Cir. 1993)).

48. *Id.* (quoting *U.S. Tr. Co.*, 431 U.S. at 25).

49. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 441 (Cal. 2019).

50. *Id.* at 444–45.

However, protection under the contract clause in regard to the terms and conditions of public employment is typically an exception rather than the rule.[51] In general, public employees do not possess constitutionally protected rights in the terms and conditions of their employment with the state.[52]

B. State Statutory Provisions

In the United States, many sates carry significant off-balance-sheet debt because of public employee pension liabilities that are underfunded.[53] To capture just how great this debt is, "if one assumes an unfunded liability of $3 trillion, every household in the United States would need to contribute $27,000 to achieve full funding."[54] California specifically "would need to contribute 17.7% of tax revenue to public employee pension funds over the next thirty years to fully fund the state's plans."[55]

In 1999, California enacted legislation that is arguably the reason for the *Cal Fire* case today. The legislation, signed by Governor Gray Davis, offered "the kind of retirement security normally reserved for the wealthy."[56] Proponents of this new legislation believed that it would not impose any new costs on California taxpayers.[57]

It was believed that the state employees' pension fund "would grow fast enough to pay the bill in full"—this turned out to be a billion-dollar miscalculation.[58] In 2016, state employee pensions costed California taxpayers $5.4 billion.[59] That was "more than the state [would] spend on environmental protection, fighting wildfires[,] and the emergency response to the [state's] drought."[60] The unanticipated cause of this dreadful miscalculation can be partly owed to the bursting of the dot.com bubble in 2000, as well as the housing market crash in 2008.[61] To fill the

51. *Id.* at 442 ("[T]he terms and conditions of public employment, unlike those of private employment, generally are established by statute or other comparable enactment (e.g., charter provision or ordinance) rather than by contract." (alteration in original) (quoting White v. Davis, 68 P.3d 74, 98 (Cal. 2003))).

52. *Id.*

53. Monahan, *supra* note 44, at 1031; *see generally* Darryl B. Simko, *Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint*, 69 TEMP. L. REV. 1059, 1060–62 (1996).

54. Monahan, *supra* note 44, at 1031 (providing statistics as of 2012).

55. *Id.* at 1031 n.8 (providing statistics as of 2012).

56. Dolan, *supra* note 13.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.*

gap between the prospected improved benefits projected in 1999 and the actual pension fund, the state needed to raise the payments it made by a total of $18 billion.[62] The state "pension fund has not been able to catch up."[63]

In 2003, by the enactment of section 20909 of the California Government Code, state employees and other members of CalPERS were granted the opportunity to purchase up to five years of ARS credit by making appropriate payments to their pension fund.[64] An ARS credit is "treated like [an] ordinary service credit upon an employee's retirement."[65]

Employees participating in CalPERS "could therefore receive pension benefits calculated on the basis of up to five years' more public employment than they actually worked."[66] Because ARS credits are not linked to actual service, they have been referred to as "air time."[67]

When section 20909 of the California Government Code was enacted, the opportunity to purchase ARS credit was viewed as particularly beneficial to employees who joined public service later in life or who left public service temporarily "and therefore had been unable to acquire sufficient service credit for a 'livable retirement income.'"[68] Under section 20909 of the California Government Code, there were several conditions that must be met for a public employee to take advantage of this benefit. First, the public employee must have served for at least five years.[69] Any time that was served prior to the employee's retirement meant that the employee could make a one-time election to purchase an ARS credit of one to five years.[70] Second, the public employee needed to pay a figure, calculated by CalPERS, which used payrate and other factors hinging on employer liability at the time of the request for service credit.[71] The employee would pay an amount equal to the increase in liability and it could be paid to CalPERS in one lump sum or it could be paid in installments by the employee.[72] Stated differently, "the employee was required to pay the present value of the increase in his or her pension

62. *Id.* CalPERS projected the improved benefits "would cause no increase in the state's annual pension contributions over the next [eleven] years." *Id.* The $18 billion was needed to fill the gap. *Id.*

63. *Id.*

64. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 437–39 (Cal. 2019).

65. *Id.* at 437.

66. *Id.*

67. *Id.* at 439.

68. *Id.* at 440.

69. *Id.* at 439.

70. *Id.* This was consistent with federal tax law. *Id.*

71. *Id.*

72. *Id.* (quoting CAL. GOV'T CODE § 21050(a) (West 2014)).

benefits that would result from the purchased ARS credit, at least to the extent that increase could be estimated from circumstances prevailing at the time the employee exercised the opportunity . . . ."[73] Third, in order for the public employee to accept an offer to purchase ARS credit, the public employee must: "(1) file a written election with the employee's pension board and (2) make appropriate payments to the retirement system."[74]

The California legislature foresaw that ARS credit may be "cost neutral" to public agencies because CalPERS required that employees pay the present value of any future benefits upfront.[75] Yet, it became known that the future cost of ARS credit could "exceed the purchase price."[76] In fact, CalPERS underestimated the actual cost of ARS credit by twelve to thirty-eight percent.[77] This meant that public employees were purchasing ARS credit at a price that was potentially much lower than the actual cost.[78] Therefore, if the credit price was much lower than the actual cost, purchasing ARS credit could have been a "lucrative investment" for a public employee.[79] This led to a deficit in the state's pension account.[80]

In late 2012, under PEPRA, laws regulating public employee pensions were significantly changed by the State of California.[81] Among other things, this legislation repealed the ability for public employees to purchase ARS credits.[82] PEPRA only applied to newly hired public employees—it did not change the rights of any employees who had already purchased ARS credit while the opportunity was available to

73. *Id.* at 439–40.
74. *Id.* at 450 (citations omitted).
75. *Id.* at 440.
76. *Id.*
77. *Id.*
78. *See* Alexander Volokh, *California Supreme Court Upholds Pension Reform Twice, But the "California Rule" Persists*, REASON FOUND. (Aug. 13, 2020), https://reason.org/commentary/california-supreme-court-upholds-pension-reform-twice-but-the-california-rule-persists/.
79. *Id.*
80. *See* Dolan, *supra* note 13.
81. *Cal Fire*, 435 P.3d at 437.
82. *See id.* Furthermore, PEPRA

> increased the age at which employees could claim equivalent pension benefits, set a cap on the total compensation on which pension benefits could be based, required employees to pay one-half of the cost of funding their pensions, and required the annual compensation used to calculate pension benefits to be determined by averaging over a three-year period, rather than using a single year.

Id. at 440.

them.[83] This legislative reform stemmed from Governor Brown's twelve-point plan for pension reform.[84] The Governor recommended the termination of ARS credit because:

> [T]he public employer assumes full risk of delivering retirement income based on those years of purchased service credit. Pensions are intended to provide retirement stability for time actually worked. Employers, and ultimately taxpayers, should not bear the burden of guaranteeing the additional employee investment risk that comes with airtime purchases.[85]

C. The "California Rule"

Integral to California's pension law is what is known as the "California Rule." In *Allen v. City of Long Beach*, the court established the parameters of the California Rule.[86] The California Supreme Court stated:

> An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible . . . . [But] [s]uch modifications must be reasonable . . . . To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.[87]

This rule "provides some of the strongest legal protections for public employee pensions in the nation."[88] Since state law prohibits the impairment of contractual obligations, the constitutional contract clause is implicit in the California Rule.[89] The general notion of the California Rule is that "a public employee is vested in the pension benefit promised at the start of employment such that those benefits cannot be reduced even for prospective service except under exceptionally limited

83. *Id.* at 440, 444.
84. *Id.* at 440.
85. *Id.* at 440–41 (quoting GOV'R OF THE STATE OF CAL., TWELVE POINT PENSION REFORM PLAN (2011), https://www.courts.ca.gov/opinions/links/S247095-LINK2.PDF).
86. Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955).
87. *Id.* (citations omitted).
88. Volokh, *supra* note 78.
89. *See Cal Fire*, 435 P.3d at 454.

circumstances."[90] Under this rule, "if a later statue makes the terms of employment *more* attractive, then that new arrangement becomes the new standard, which is protected against deterioration for the employee's entire working life with the state."[91] If deterioration is shown, California courts demand the state provide compensating advantages before upholding the pension reform.[92]

The rule is not widely adopted by other jurisdictions.[93] The California Rule has been interpreted to hold that a state retirement statute creates contracts as of the first day of employment.[94] The result of this rule is that "pension benefits for current employees cannot be detrimentally changed, even if the changes are purely prospective."[95] Therefore, "employees who began work with those pension rules would be contractually entitled to a continuation of those rules (or other rules at least as generous), and the government wouldn't be able to abolish those rules without offering compensating advantages."[96] The only option then is to limit changes in public employee pension benefits to new hires.[97]

The conflict between PEPRA taking away the opportunity to purchase ARS credit and the California Rule is that the statute abolished the opportunity even for existing employees.[98] Employees who had already taken advantage of the benefit and purchased ARS credit were able to keep what they had bought, but those who had not taken advantage of this opportunity lost their chance.[99] Based on the California Rule, this seemed strictly prohibited. However, despite criticism urging the court to take the opportunity to reexamine the California Rule, the California Supreme Court in *Cal Fire* did not take the opportunity

90. Brett A. Overby, *California Supreme Court May Soon Decide the Fate of the "California Rule"*, CAL. PUB. AGENCY LAB. & EMP. BLOG (Feb. 3, 2020), https://www.lcwlegal.com/news/california-supreme-court-may-soon-decide-the-fate-of-the-california-rule/. For example, "if an employee started working for the state when the employee pension contribution rate was [five] percent, a hypothetical statute raising that contribution rate to [ten] percent several years later would count as an impairment of the state's contractual obligation." Volokh, *supra* note 78.

91. Volokh, *supra* note 78.

92. *Id.*

93. Twelve states have chosen to adopt the California Rule: Alaska, Colorado, Idaho, Kansas, Massachusetts, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Vermont, Washington. Tyler Bond, *What Is the California Rule and Why Does It Matter?*, NAT'L PUB. PENSION COAL. (May 21, 2018), https://protectpensions.org/2018/05/21/california-rule-matter/.

94. Monahan, *supra* note 44, at 1032.

95. *Id.*

96. Volokh, *supra* note 78.

97. Monahan, *supra* note 44, at 1032.

98. Volokh, *supra* note 78.

99. *Id.*

because it decided the ability to purchase ARS credit was not a vested right, which therefore precluded its reexamination.[100]

IV. THE COURT'S ANALYSIS

A. Majority Opinion

The Supreme Court of California, affirming the lower court's ruling, held that "the opportunity to purchase ARS credit was not a benefit of employment protected by the constitutional contract clause" and, thus, PEPRA's elimination of the opportunity did not violate the constitution.[101] The majority begins its discussion by briefly discussing the similarities between the United States and California Constitutions and that both prohibit the enactment of laws that substantially impair contracts, stating that the term "vested right" refers to the "terms and conditions of public employment that are protected from impairment by the constitutional contract clause."[102] After laying this foundation, the court reaffirmed the general rule that constitutional "protection of the terms and conditions of public employment historically [have] been the exception, rather than the rule."[103] These terms and conditions are "unlike those of private employment" in that they are "generally [] established by statute or [another] comparable enactment . . . rather than by contract."[104] For this reason, the court stated: "public employees have generally been held to possess no constitutionally protected rights in the terms and conditions of their employment."[105]

It is also well established that "public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority."[106] Policies

100. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 454 (Cal. 2019). Since *Cal Fire*, the California Supreme Court decided in *Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n*, 470 P.3d 86 (Cal. 2020), whether a statutory amendment made by PEPRA impaired the employees' vested rights protected by the contract clause. *Id.* at 92–93. The court held the public employees had no express contractual right and, thus, similarly to *Cal Fire*, the contract clause was not violated. *Id.* at 127. The court, again, declined to reexamine and revise the California Rule. *Id.* at 127. The court, in light of *Alameda County Deputy Sheriff's Ass'n*, dismissed and remanded *Marin Ass'n of Public Employees v. Marin County Employees' Retirement Ass'n*, 473 P.3d 312 (Cal. 2020), which dealt with the same issues posed in *Cal Fire* and *Alameda County Deputy Sheriff's Ass'n.* Thus, as of today, the California Rule is still in full effect.

101. *Cal Fire*, 435 P.3d at 441.

102. *Id.* at 441–42.

103. *Id.*

104. *Id.* at 442 (quoting White v. Davis, 68 P.3d 74, 98 (Cal. 2003)).

105. *Id.*

106. *Id.* (quoting Butterworth v. Boyd, 82 P.2d 434, 439 (Cal. 1938)).

or statutes created by the legislature, unlike contracts, are intrinsically subject to revision and repeal.[107] Although collective bargaining by public employees has led to the making of express contracts, the majority of states that have seen an increase in public employment agreements "h[ave] not altered the fundamental principle that the terms and conditions of public employment, to the extent those terms and conditions derive from legislative enactments, are not generally protected by the contract clause from repeal or revision at the discretion of the legislative body."[108]

The plaintiffs invoked two exceptions to the general rule permitting legislative modification of statutory terms and conditions of public employment. First, constitutional protection by the contract clause will be afforded when "the statute or ordinance establishing the benefit and the circumstances of its enactment *clearly evince a legislative intent* to create contractual rights."[109] Second, protection may extend to "certain benefits of public employment by *implication*, even in the absence of a clear manifestation of legislative intent."[110] A third argument made by the plaintiffs was that a unilateral contract was created by the legislature which was accepted by the employees' work.[111]

1. Clearly Evinced Legislative Intent to Create Contractual Rights

As for the first exception, the court adopts the same principle as that of the United States Supreme Court.[112] In assessing a claim by parties which asserted that the State of New York and the State of New Jersey impaired the rights of the parties under the Federal Contract Clause, the U.S. Supreme Court in *U.S. Trust Co. of N.Y. v. New Jersey* recognized that "a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[113] In that case, the U.S. Supreme Court held that the intent to make a contract was clear from the statutory language and the purpose of the covenant was to invoke the constitutional protection of the Contract Clause.[114] The same principle was recognized by the California Supreme Court in *Retired*

107. *Id.*
108. *Id.* at 442–43.
109. *Id.* at 443 (emphasis added).
110. *Id.* (emphasis added).
111. *Id.* at 449.
112. *Id.* at 443.
113. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17 n.14 (1977).
114. *See id.* at 17–18.

Employees Ass'n of Orange County, Inc. v. County of Orange.[115] There, the court held that contractual rights could be created "when the language or circumstances accompanying [enactment of the resolutions] clearly evince a legislative intent to create private rights of a contractual nature."[116] The Californian county in that case entered into a series of express contracts with its employees, in the form of MOUs, relating to their terms and conditions of employment.[117] The agreements, however, did not expressly address the retiree benefits for which the plaintiffs sought constitutional protection.[118] The board of supervisors subsequently ratified the agreements.[119] The court reaffirmed the rule that public employment is a "creature of statute,"[120] but the rule has "limited force where . . . the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship."[121] The California Supreme Court concluded that legislation in California can potentially create contractual rights if its passage is coupled with statutory language or circumstances that "clearly ' . . . evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body].'"[122] However, "[a] contractual right can be implied from legislation in appropriate circumstances."[123]

In *Cal Fire*, the California Supreme Court reasoned that it was "critical to [the] *Retired Employees* holding that the legislative enactment on which the implied contractual rights were premised was a resolution approving an express contract of employment."[124] The majority distinguishes *Cal Fire* from *Retired Employees* by illustrating that the board's ratification of the contract in *Retired Employees* "provided the [required] clear manifestation of intent to create contractual rights" because it was a resolution approving an express contract of employment.[125] The court found the existence of the MOUs critical to its conclusion because an implied contractual right could have been created;

115. 266 P.3d 287, 289 (Cal. 2011).
116. *Id.*
117. *See id.* at 289–90. The term "MOU" refers to what is known as memoranda of understanding.
118. *Id.*
119. *Id.* at 290.
120. *Id.* at 295.
121. *Id.* at 293, 296 (noting that statutes which announce policies rather than create contracts are "inherently subject to revision and repeal").
122. *Id.* at 296 (citing Valdes v. Cory, 139 Cal.App.3d 733, 786 (1983)).
123. *Id.*
124. Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 444 (Cal. 2019) (citing Ret. Emps. Ass'n of Orange Cnty., Inc. v. County of Orange, 266 P.3d at 287).
125. *Id.*

the implied relationship between the employees and the county was governed by a contract.[126] Alternatively, in *Cal Fire*, there was no such occurrence in connection with the opportunity to purchase ARS credit; there was no negotiation between the legislature and public employees, nor a ratification of an express or implied contract.[127]

The plaintiffs argued that section 20909 of the California Government Code was an affirmative commitment by the legislature promising employees an indefinite opportunity to purchase ARS credit prior to their retirement for services provided, so long as they "(1) work[ed] for the five-year period and (2) thereafter ma[de] the required payments to CalPERS."[128] Section 20909 of the California Government Code states in pertinent, "[a] member may elect to receive this additional retirement service credit at any time prior to retirement by making the contributions as specified in [s]ection 21050 and 21052."[129] The court disagreed with this interpretation.[130] Rather than a commitment to maintain the opportunity to purchase ARS credit for the duration of the employment, the court believed this portion of section 20909 of the California Government Code, when read in context, established that the opportunity to take advantage of purchasing ARS credit was not complete until the required payments were made as well as the remaining provisions of section 20909 of the California Government Code.[131] The court found unconvincing the plaintiff's contention that the legislature clearly evinced its intent to create a contract.[132] The court reasoned, "[t]o convert 'this straightforward reading of this statutory phrase [into a] promise by the [l]egislature *not to modify or eliminate* the option to purchase service credit' would fly in the face of 'the legal presumption against the creation of a vested contractual right.'"[133]

126. *Id.*
127. *Id.* at 444–45.
128. *Id.* at 445.
129. CAL. GOV'T CODE § 20909 (West 2014).
130. *Cal Fire*, 435 P.3d at 445.
131. *Id.* The remaining provisions include:

> T]he requirement of written notice, the maximum number of years available for purchase, the minimum service time required before a purchase can be made, the requirement to purchase in whole-year increments, the limitation to one purchase event, restrictions on the applicability of ARS credit for nonpension purposes, and the type of employees eligible to make the purchase.

Id.
132. *Id.*
133. *Id.* at 446 (quoting Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 212 Cal.Rptr.3d 471, 479–80 (Cal. Ct. App. 2016)). The court added that the plaintiffs provided

2. Implied Contractual Rights

After discussing and holding that there was no indication that the legislature intended to create a contractual right to purchase ARS credit, the court then addressed the plaintiffs' "alternative argument that the opportunity to purchase ARS credit [was] entitled to the same type of constitutional protection as public employee pension rights."[134] The California Constitution "protects an implied contractual right for California's public employees to receive statutory pension benefits because those benefits constitute deferred compensation," but the majority explains that the opportunity to purchase ARS credit was not deferred compensation.[135]

As mentioned in section II, the court in *O'Dea v. Cook* recognized the constitutionally protected contractual right to pension benefits afforded to public employees upon retirement.[136] The case is "recognized for rejecting the legal theory that public employee pensions constitute a gratuity"[137] and finding that where "services are rendered under . . . a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself."[138] Upon retirement, pension benefits are paid to the employees as an additional component of his or her compensation.[139] This ruling was recognized again in *Kern v. City of Long Beach* where the California Supreme Court held that "the right to a pension vests upon acceptance of employment."[140] The California Supreme Court reasoned that:

> [P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. Since a pension right is 'an integral portion of contemplated compensation' it cannot be destroyed, once it has vested, without impairing a contractual obligation.[141]

"no text, legislative history, or other evidence" to make "ARS credit an irrevocable feature." *Id.*

134. *Id.*
135. *Id.* at 446, 448.
136. *Id.*
137. *Id.*
138. O'Dea v. Cook, 169 P. 366, 367 (Cal 1917).
139. *Cal Fire*, 435 P.3d at 444, 448.
140. Kern v. City of Long Beach, 179 P.2d 799, 801 (Cal. 1947) (en banc).
141. *Id.* at 802 (citation omitted).

The majority in *Cal Fire* reemphasized the rule but recognized that *Kern* did not discuss the manifestations of legislative intent to confer contractual rights, but instead, found that a contractual right to receive pension benefits is implied because they constitute deferred compensation.[142]

The *O'Dea* and *Kern* decisions are used to explain how pension benefits are earned by the public employees' service and is thus compensation received not at the time of performance but at a later time. Taking away a public employee's pension by a government body would be a contract violation.[143] As the majority states, "[g]iven their character as deferred compensation, the receipt of legislatively established pension benefits is protected by the contract clause, even in the absence of a manifest legislative intent to create contractual rights."[144]

The court in *Cal Fire* laid that foundation to contrast "deferred compensation" entitled to protection by the contract clause with the opportunity to purchase ARS credit.[145] The court held that the opportunity to purchase ARS credit was not a form of deferred compensation and thus not entitled to contract clause protection.[146] The option to purchase ARS credit did not flow from a public employee's work like that of pension benefits.[147] Instead, it was an *option* that each individual employee had, and if not taken advantage of prior to the employee's retirement or termination, the opportunity expired.[148] Further, in contrast to pension benefits, "public employment did not increase the amount of ARS credit that an employee could purchase or in any other way affect his or her opportunity."[149] Any public employee who elected to purchase ARS credit simply chose the number of years, up to five, he or she wanted to purchase.[150] The court found that "[t]he opportunity to purchase ARS credit was not different in form from a variety of other optional benefits offered to public employees in connection with their work[,]"[151] yet the court "never suggested that

142. *See Cal Fire*, 435 P.3d at 447–48.
143. *Id.* at 442.
144. *Id.* at 447.
145. *Id.*
146. *See id.* at 448–49.
147. *See id.* at 448.
148. *Id.* at 448–49.
149. *Id.* at 449.
150. *Id.*
151. *Id.* For example, public employees are usually offered the opportunity to purchase different types of health insurance and disability insurance, or create spending accounts for expenses like medical or childcare paid with pre-tax income. *Id.*

[those] type[s] of benefit[s] [were] entitled to protection under the contract clause."[152]

3. Additional Arguments Presented by Plaintiffs

The plaintiffs also argued that the opportunity to purchase ARS credit was protected by the contract clause because it constituted "an offer of a unilateral contract term for which performance is tendered by beginning and continuing employment."[153] By definition, "[a] unilateral contract is one that is accepted by performance."[154] It is "a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation."[155] An offer such as this "can be revoked or modified prior to acceptance."[156] The court disagreed with plaintiffs by reasoning that even if they treated "section 20909 [of the California Government Code] as constituting an offer of a unilateral contract, the offer was revocable until accepted by the *actual purchase* of ARS credit; it did not require the state to make the opportunity to purchase ARS credit available for the duration of the careers of existing employees."[157] In order for a public employee to accept an offer under section 20909 of the California Government Code, a written election must be filed with the employee's pension board, and then the employee must make the appropriate payments to the retirement system.[158] Thus, for those public employees who did not accept the offer by filing a written election and making the appropriate payments, the legislature properly revoked the offer.[159] These requirements, and nothing less, would satisfy the performance by a public employee guaranteeing the benefit.[160]

The plaintiffs further argued that a contractual right should be recognized because they reasonably expected the opportunity to purchase ARS credit to be available to them for the duration of their employment because it was already in effect for ten years.[161] The court disagreed with this argument as well. It stated:

> We have never held that statutory terms and conditions of public employment gain constitutional protection merely from the fact

152. *Id.*
153. *Id.*
154. *Id.*
155. L.A. Traction Co. v. Wilshire, 67 P. 1086, 1088 (Cal. 1902).
156. *Cal Fire*, 435 P.3d at 449.
157. *Id.* (emphasis added).
158. *Id.* (citation omitted); CAL. GOV'T CODE §§ 20909 (a)–(b) (West 2014).
159. *Cal Fire*, 435 P.3d at 450.
160. *Id.*
161. *Id.*

> of their existence, even if they have persisted for a decade. Such a rationale would directly contradict the general principle that such terms and conditions are not a matter of contract and are generally subject to legislative change.[162]

The court also disagreed with the plaintiffs that if an employee exercised the opportunity to purchase ARS credit, it would have increased their pension benefit which meant the *opportunity* was a vested right.[163] In response, the court stated that it has never held "that a particular term or condition of public employment is constitutionally protected solely because it affects in some manner the amount of a pensioner's benefit."[164] The court relied on *Miller v. State* where the mandatory retirement age was lowered during the plaintiff's employment and in light of this alteration his pension benefit would be lower than he had expected when taking the job.[165] Nevertheless, the *Miller* court held that despite the impact on his pension benefit, he did not have a vested right to receive maximum pension benefits, but just the right to a pension based on the system.[166] As the majority in *Cal Fire* stated, he did not have "a vested right to retire according to the mandatory age in effect at the time he joined state service."[167] Similarly, "although the purchase of ARS credit does increase the amount of a pension benefit . . . it does not affect the amount of the pension benefit that represents deferred compensation."[168] Rather than compensation for work, "the increase in pension benefits from the purchase of ARS credit is a return of, and perhaps a return on, the funds used to make the purchase."[169]

In further support that the opportunity to purchase ARS credit was not entitled to constitutional protection, the court distinguished *Miller* and *Cal Fire* from *Olson v. Cory*.[170] In *Olson*, the California Supreme Court held that state judges are entitled under the contract clause to receive, for the duration of their term, the contracted-for-benefits established by statute for their position at the outset of their term.[171] This was characterized as "[p]romised compensation."[172] In the *Olson* case, a

162. *Id.*
163. *Id.* at 451.
164. *Id.*
165. Miller v. State, 557 P.2d 970, 971 (Cal. 1977).
166. *Id.* at 975.
167. *Cal Fire*, 435 P.3d at 451.
168. *Id.* at 452.
169. *Id.*
170. *Id.* at 451–54; *see also* Olson v. Cory, 636 P.2d 532 (Cal. 1980).
171. *Olson*, 636 P.2d at 537.
172. *Id.* at 535.

group of former and current California judges challenged an amendment to a statute that reduced their cost-of-living increases.[173] The legislation was found unconstitutional on two grounds: (1) that the statute violated the constitution's prohibition against the reduction of an elected state officer's salary during his or her term of office,[174] and (2) that the statute violated judicial officers' vested rights under the contract clause.[175] Although the court in the *Olson* decision acknowledged that public employment is not held by contract and therefore is not protected by the contract clause, the court distinguished the *Olson* case by recognizing that there was a right to compensation for their terms as judges.[176] This was compensation that the judges were entitled to because they had a *defined term*.[177] *Olson* treated the statutory employment benefits available to a judge at the beginning of his or her term as a contract for the length of the term.[178]

The plaintiffs in *Cal Fire* claimed an entitlement to ARS credit for the *duration of their careers in public service*.[179] *Olson* is distinguishable from *Cal Fire* because "[p]laintiffs and the other employees affected by PEPRA's elimination of the opportunity to purchase ARS credit do not have discrete terms of service."[180] The court was unwilling to extend its holding in *Olson* to "all of the terms and conditions of a public employee's employment, without regard to the significance of those benefits."[181]

4. The "California Rule"

Lastly, the court declined to address the California Rule. It stated that because it found that the opportunity to purchase ARS credit was not a vested right, reexamination of the California Rule would be improper.[182] As discussed earlier, "[u]nderlying the California Rule is the constitutional contract clause, which prohibits state laws that impair contractual obligations."[183] The court explained that "[b]ecause we conclude that California's public employees have never had a contractual right to the continued availability of the opportunity to purchase ARS

173. *Id.* at 536.
174. *Id.* at 539–41.
175. *Id.* at 536.
176. *Id.* at 535.
177. *Id.* at 538; *see also* Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 453 (Cal. 2019).
178. *Olson*, 636 P.2d at 536–37.
179. *Cal Fire*, 435 P.3d at 450.
180. *Id.* at 453.
181. *Id.* at 454.
182. *Id.*
183. *Id.*

credit, the question of whether PEPRA worked an unconstitutional impairment of protected rights does not arise."[184] There was no contractual right being violated and therefore the California Rule does not apply.[185]

B. Concurrence

Justice Kruger concurred with the majority but wrote to expand on "why the opportunity to purchase additional retirement service (ARS) credits was not an employment benefit that vested by implication."[186] Justice Kruger explained that "not every statute or ordinance providing an employment benefit . . . constitutes an implied offer for a unilateral contract, and thus not every future benefit is the subject of a vested right[.]"[187] The opportunity to purchase ARS credit was distinguishable from monetary compensation because "[m]onetary compensation, whether received periodically for work performed during the period or deferred until retirement in the form of a pension benefit, is the central consideration for which public employees . . . enter and continue in employment."[188] Importantly, there is an implied contractual promise as to monetary compensation because "neither party could reasonably understand a deferred compensation offer to be revocable at will after employment."[189] That implied contractual promise was not present when it came to the opportunity to purchase ARS credit.

Justice Kruger reasoned that:

> [T]he parties could not reasonably have understood that opportunity as an offer that could be accepted simply by employment in a participating California Public Employees' Retirement System agency. . . . [A] party looking at this arrangement would understand that the ARS purchase option was not offered in exchange for any period of public service but rather in exchange for the statutorily mandated purchase price.[190]

184. *Id.*
185. *Id.*
186. *Id.* (Kruger, J., concurring).
187. *Id.* at 455.
188. *Id.*
189. *Id.*
190. *Id.* at 455–56.

There was an offer, but the acceptance was *purchasing* the credit, not working and staying on the job.[191]

For the above reasons, Justice Kruger agreed with the majority that "[n]o implied unilateral contract arose simply from an employee's entering or continuing in public service during the period the ARS program was in force. As a consequence, the contract clause of the California Constitution did not protect the right to purchase ARS credits from later alteration or revocation."[192]

V. ANALYSIS AND IMPLICATIONS

This case reemphasized the fact that state pension rights are almost always a creature of statute, not contract. The reminder is significant because with the state's immense pension debt, the legislature must be able to make changes that help the state ease its debt. However, because the majority did not take the opportunity to modify the California Rule, if a change in pension plans is deemed to disadvantage employees, a comparable new advantage is required. Thus, the California courts will likely continue to see cases similar to *Cal Fire*.

A. The Court Correctly Found There Was No Contract and Thus No Violation of the Contract Clause

The court made it clear that for there to have been a violation of the California Constitution's contract clause, there had to have been a contract to begin with. The opportunity to purchase ARS credit was not a "vested right" and therefore, the legislature could alter or eliminate the opportunity.[193] The court followed precedent by stating "public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority."[194] Further, the "fundamental principle that the terms and conditions of public employment, to the extent those terms and conditions derive from legislative enactments, are not generally protected by the contract clause from repeal or revision at the discretion of the legislative body," was not disrupted.[195]

Nothing in section 20909 of the California Government Code suggests that the legislature intended to create a contract with public employees or a promise "*not to modify or eliminate* the option to purchase service

191. *Id.* at 456.
192. *Id.*
193. *Id.* at 437 (majority opinion).
194. *Id.* at 442 (quoting Butterworth v. Boyd, 82 P.2d 434, 439 (Cal. 1938)).
195. *Id.* at 442–43.

credit."[196] Like in *Retired Employees*, there was no express contract of employment or negotiations, but rather a policy that could be amended or repealed.[197] If the court would have found a legislative intent, it would "fly in the face of 'the legal presumption *against* the creation of a vested contractual right.'"[198] Further, reading in an intention would have invited more cases of this nature into the courthouse.

As for an implied contractual right, it would not make sense to find the opportunity to purchase ARS credit to be deferred compensation as it is quite literally time *not* worked. The opportunity to purchase ARS credit does not "flow directly from a public employee's service."[199] Rather than the number of years a public employee had worked, "the factor that determined the benefit received through the purchase of ARS credit was simply the number of years of ARS credit an employee purchased."[200] Being required to work at least five years before being able to purchase ARS credit was just one of several requirements, having nothing to do with deferred compensation. The court further points out that there are many optional benefits offered to public employees for purchase.[201] Elements of public employee compensation other than pension benefits may be entitled to implied contractual protection but ARS credit is not one.[202] A public employee's retirement pension flows directly from the employee's service and "their magnitude is roughly proportional to the time of that service."[203] The opportunity to purchase ARS credit was an option not connected to service.

The court also correctly points out that even if this was a unilateral contract, the offer was revoked by the legislature.[204] Accepting a job as a public employee is not an acceptance of all possible benefits. Instead, meeting all of the requirements under section 20909 of the California Government Code, including the purchase of the ARS credit, would constitute an acceptance.[205] The required performance was the filing of

196. *Id.* at 446.

197. *Id.* at 444–45; *see also* Retired Emps. Ass'n. of Orange Cnty., Inc. v. County of Orange, 266 P.3d 287 (Cal. 2011).

198. *Cal Fire*, 435 P.3d at 446 (quoting Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 212 Cal.Rptr.3d 471, 480 (Cal. Ct. App. 2016)).

199. *Id.* at 448.

200. *Id.* at 449.

201. *Id.* (listing health insurance benefits, life and long-term disability insurance, and certain flexible spending accounts).

202. *Id.* at 448 (including salary payments which have been earned).

203. *Id.*

204. *Id.* at 450.

205. *Id.* (stating that accepting an offer includes: (1) having served at least five years; (2) filing a written election with the employee's pension board; and (3) making appropriate payments to the retirement system).

the written election and making the necessary payments, not accepting a public service job.[206] The offer could be revoked "as to all public employees who had yet to make a written election and the required payments."[207] Further, "[t]he opportunity to purchase ARS credit was *conditioned on* public employment, but it was not offered *in exchange for* public service."[208]

B. The Court Could Have Addressed and Modified the California Rule

Because the court determined that the opportunity to purchase ARS credit was not protected by the contract clause, and thus, the opportunity to purchase ARS credit could be altered or eliminated at the discretion of the legislature, the court did not address whether something of equal value needed to be added—the policy under the California Rule.[209] The *Cal Fire* court's decision left intact the California Rule, which requires the elimination of a public employee benefit be replaced with something valuable in exchange.[210] However, at the same time, the decision allows state agencies to reduce the "dramatic pension deficits."[211] The court could have, and should have, used the opportunity to reduce the protection afforded pension rights by more dramatically modifying the California Rule.[212]

First, under the California Rule, the legislature can modify an employee's pension rights if those modifications "bear some material relation to the theory of a pension system and its successful operation."[213] The California Rule was triggered in this case because the elimination of the opportunity to purchase ARS credit was a benefit that, if purchased, had "some material relation" to the pension system and its elimination was a way to lessen the state's retirement debt.[214] Thus, the court could have modified the rule. Arguably, any statute pertaining to public employee benefits is related to California's pension system and its

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 450–54.
210. *California Supreme Court Holds that Opportunity to Purchase Airtime Credit Was Not a Right Protected by the Contract Clause and Therefore Could be Eliminated by the Legislature*, CAL. PEACE OFFICERS ASS'N (Mar. 7, 2019), https://cpoa.org/california-supreme-court-holds-that-opportunity-to-purchase-airtime-credit-was-not-a-right-protected-by-the-contract-clause-and-therefore-could-be-eliminated-by-the-legislature/.
211. Amelia Dantzer, *California Court Upholds Change on Public Pensions; Allows Public Benefit Rule to Remain*, 36 EMP. ALERT 10.9 (2019), tinyurl.com/2pev7uxw.
212. *See id.*
213. Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955).
214. *Id.*

successful operation due to the extreme debt California's pension is facing.

As pointed out by the California Business Roundtable, the "California Constitution vests '[t]he legislative power . . . in the California Legislature.' It is the [l]egislature, therefore, that 'possesses the ultimate authority to establish or revise the terms and conditions of state employment.'"[215] The amicus brief argued that although the legislature has the authority over the terms and conditions of state employment, the California Rule "makes it virtually impossible for the [l]egislature to control pension benefits for current employees. Indeed, the [California] Rule bars the [l]egislature from ever reducing the rate at which current employees earn pension benefits for future services, no matter how small the change or how dire the circumstances."[216]

Although the court has clearly established that statutes create contractual rights only "when the statutory language or circumstances accompanying its passage 'clearly " . . . evince a legislative intent to create [them,]'"'[217] the California Rule ignores that establishment. In *Cal Fire*, the court could have taken the opportunity to modify the California Rule by holding that, absent legislative intent, pension benefits not acting as deferred compensation may be altered for the successful operation of the pension system. Since it was established in *Cal Fire* that some pension benefits are not like deferred compensation,[218] any benefit of that type should be allowed to be altered like any contract absent a constraining provision.

Second, even though the court in *Cal Fire* found there was no vested right, and thus did not need to address the California Rule,[219] the California Supreme Court has held that *stare decisis* is "flexible," and "should not shield court-created error from correction."[220] The California Rule poses a continued obstacle for the state to address its severe pension debt. The court should have taken the opportunity to modify the rule because when an "error [in the prior opinion] is related to a matter of continuing concern to the community at large," the California Supreme

215. Brief for Respondent at 33, Cal Fire Local 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019) (No. S239958), 2018 WL 2060020, at *33 (citing CAL. CONST. art. IV, § 1; Pro. Eng'rs. in Cal. Gov't. v. Schwarzenegger, 239 P.3d 1186, 1201 (Cal. 2010)).

216. *Id.*

217. Retired Emps. Ass'n of Orange Cnty v. Cnty of Orange, 266 P.3d 287, 296 (Cal. 2011) (quoting Valdes v. Cory, 139 Cal.App.3d 733, 786 (1983)).

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

219. *See id.* at 437–38.

220. Estate of Duke v. Jewish Nat'l Fund, 352 P.3d 863, 877 (Cal. 2015) (quoting Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 673 (Cal. 1995)).

Court has allowed flexibility with *stare decisis*.[221] The Supreme Court of California has demonstrated an increased willingness to reconsider prior cases when decisions have had "adverse social and economic consequences."[222] As stated in an amicus brief, "[w]hen examining whether a decision is 'contrary to the general law,' this Court looks at cases that 'have expressly acknowledged, but declined to follow,' that decision, and at cases that have 'implicitly rejected' it."[223] That is certainly the case here. The California Rule has made it virtually impossible for the state to reform its pension system, which has led to a looming fiscal crisis.

Lastly, cases like *Cal Fire*, and the cases relied on in its opinion, will continue to be filed anytime the legislature makes alterations to the retirement system. The court should have held in *Cal Fire* that unless a benefit is deferred compensation or there is an express contract, the legislature can alter or eliminate a pension benefit. Not every impairment of a pension right automatically violates the California Constitution's contract clause or the Federal Contract Clause, as the California Rule assumes.[224] The court could have established that in its decision.

VI. CONCLUSION

In *Cal Fire Local 2881 v. California Public Employees Retirement System*, the California Supreme Court upheld a change to public employee's pensions effected by the enactment of the California Public Employees' Pension Reform Act of 2013. The legislation eliminated the opportunity for public employees to purchase additional retirement service credit. The court found no violation of the California Constitution's contract clause. The court was correct in its analysis because the prior statute providing the opportunity to purchase additional retirement service credit did not create a vested right of a contractual nature. Further, the opportunity to purchase additional service credit was not a form of deferred compensation. The court erred, however, by not taking the opportunity to reexamine and modify the California Rule. Therefore, this great obstacle continues to prevent the healthy reformation of the California pension system.

221. *Freeman & Mills, Inc.*, 900 P.2d at 673 (alteration in original) (citing People v. Anderson, 742 P.2d 1306, 1331 (Cal. 1987)).

222. Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58, 66 (Cal. 1988).

223. Brief for Respondent at 49, Cal Fire Local 2881 v. Cal. Pub. Emp.'s Ret. Sys., 435 P.3d 433 (Cal. 2019) (No. S239958), 2018 WL 2060020, at *49 (citing *Moradi-Shalal*, 758 P.2d at 63).

224. *Id.* at *41.