CURBING THE INCENTIVE FOR PENSION PADDING: CORRECTING THE EMPLOYER CONTRIBUTION MISMATCH

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ABSTRACT

An often overlooked issue in the debate over New York’s runaway pension costs is the practice of pension “padding” or “spiking,” whereby a public employee works overtime during his final years of employment, inflating his total compensation during his peak-earning years and, more significantly, distorting his pension calculation. In the most egregious examples, this practice results in some employees receiving pension benefits that exceed their salary during their final year of employment. While legal—and indeed protected for current employees by the nonimpairment clause of New York State’s Constitution—pension padding contributes to unsustainable pension costs and incentivizes structural abuse of the pension system. To date, most reform efforts have focused on limits to employee benefits, but these reforms fail to address the following fundamental mismatch: An employee’s benefits are calculated based on his final three years’ salary, whereas the employer’s costs are calculated based on the employee’s total lifetime salary. Whether as part of an implicit or explicit understanding between certain public employers and employees, or simply an overlooked quirk of New York’s pension system, employers lack the requisite incentive to reduce overtime while employees have every incentive to work overtime (maximizing their pay) during the years in which their pension benefits are calculated. Stated simply, employers do not bear the costs of their employees’ increased benefits. This article proposes an alternative reform that assesses employer contributions to the public retirement system on the same final three years’ salary that is used to calculate employee pension benefits, thereby aligning the interests of public employers with those of New York’s taxpayers. As an additional advantage, this reform could be immediately applied to all current public employees and survive a challenge under the nonimpairment clause.

I. INTRODUCTION

The share of public employer resources absorbed to support pension benefits has skyrocketed over the past decade, reaching between 20% and 30% of total payroll for most New York public employers.¹ Contributing to taxpayers’ frustration are reports of

¹ See About Employer Contribution Rates: Long-Term Expected Contribution Rates, N.Y. STATE AND LOCAL RET. SYS., https://www.osc.state.ny.us/retire/employers/employer_partnership/contribution_rates/expect
public employees receiving six-figure annual pension benefits, which in some cases exceed the employee’s final base pay. Together, these two phenomena have instilled a sense of urgency to fix the New York public retirement system.

The practice of pension “padding” or “spiking,” whereby a public employee is able to inflate his salary in his final years of employment and thus also his pension calculation, has drawn particular scorn. Concern over pension padding led to the passage of a 2010 law that limits the inclusion of overtime in the pension calculation for public employees hired subsequent to the law’s enactment. More recently, Governor Andrew Cuomo proposed eliminating overtime from the calculation completely. The purpose of the retirement system—“to provide an incentive to an employee to faithfully perform his duties over an extended period”—is being threatened by the response to its abuses.

The proposed reforms fail to address a fundamental mismatch in the way public pension benefits and employer contributions are calculated in New York. Whereas employees’ benefits are calculated based only on their final years of work, employers’ contribution rates are assessed against their entire payroll. Employees take advantage of the system by maximizing the portion of their lifetime salary that occurs in their final years of work, when benefits are calculated. Employers have similar incentives to create a back-loaded pay pattern, because employees at every career phase are included in payroll and therefore contribution costs, but only the final years’ compensation is used to determine employees’ benefits. By shifting a greater portion of the cost of employee

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2 See, e.g., Mary Williams Walsh & Amy Schoenfeld, Padded Pensions Add to New York Fiscal Woes, N.Y. TIMES, May 21, 2010, at A1 (describing a beneficiary of a pension whose base salary at retirement was about $74,000 and whose pension is about $101,000).
4 Danny Hakim & Thomas Kaplan, Cuomo Proposes to Curb Pensions in Public Sector, N.Y. TIMES, June 9, 2011, at A1. This initial proposal did not survive to be included in New York’s most recent legislation. See Danny Hakim et al., Cuomo, Admitting Setbacks, Says He Asked for the Moon, N.Y. TIMES, March 16, 2012, at A20. The attorney general also reached an agreement with the state comptroller to more aggressively pursue criminal charges against employees whose pension padding reaches to the level of corruption. See Nicholas Confessore, Accord With Comptroller Will Help Attorney General Pursue Corruption Cases, N.Y. TIMES, May 23, 2011, at A17.
6 See N.Y. STATE AND LOCAL RET. SYS., supra note 1.
7 See infra note 26 and accompanying text.
8 See infra notes 26–27 and accompanying text.
compensation from salary to pension benefits, employers are able to transfer part of their true costs to other employers in the system. Thus, not only do public employees benefit from pension padding, employers also benefit by shifting part of the burden of their employees’ compensation to the entire retirement system. The mismatch creates an incentive for both employees and employers to pad pensions.

This mismatch is best illustrated with a numerical example.\(^9\) Imagine a simplified universe with just two employers, each with a total budget of $90 available to pay three employees, who retire after their third year and receive a pension equal to half of their final year’s salary. If one employer chooses to pay each employee $30 per year and the second employer instead chooses to pay $20 each of the first two years but $50 in the final year, this second employer will have garnered an additional $10 per year of lifetime pension benefits for its employee, but both employers will still have the same pension contribution costs. An employer that allows pension padding benefits its employees at a cost to the other employers, and ultimately New York’s taxpayers.

Unlike many of the reforms currently being discussed that address the mismatch by changing the formula for employee benefits,\(^10\) the proposal in this article would correct this mismatch by assessing employer contribution rates on the same salary base as is used to calculate employee pension benefits.\(^11\) Each individual public employer would thus be incentivized to prevent work practices that lead to pension padding.

In addition to aligning incentives, this proposal addresses the legal impediments to installing reforms that address current employees. Whereas changes to the formula for existing employees’ benefits are barred by the nonimpairment clause of the New York State Constitution,\(^12\) using the contribution formula to provide incentives for public employers to avoid abusive pension practices would survive a nonimpairment clause challenge. Thus, unlike a change to the benefit formula, this reform could be implemented to effect existing workers.

Either the legislature or the comptroller could take up this idea independently, but the reform would be on stronger legal footing if the legislature passed a law that explicitly gives the comptroller

\(^9\) See infra Part II.B for a more in-depth analysis of this numerical example.
\(^10\) See infra Part IV.A for a discussion on these reforms.
\(^11\) See infra Part II.B.
\(^12\) N.Y. Const. art. V, § 7.
discretion to implement a new contribution assessment system. However, there are still significant hurdles to successfully implement pension padding reforms. Beyond garnering the political support for change, the greatest obstacle to this type of reform is the Triborough Amendment, which makes changing public sector collective bargaining agreements very difficult. In order to maximize the effect of changing the compensation incentive for government employers, courts or the legislature must recognize limits on Triborough’s protection of the status quo.

Part II begins with a brief overview of the New York retirement system and a more detailed description of the fundamental mismatch, including a numerical illustration. Part III looks back in time to locate the origins of the mismatch. Part IV considers alternative reforms that could address the mismatch, whereas Part V provides reasons why my proposal is superior, including an in-depth analysis of why it would survive a nonimpairment clause challenge. Part VI considers obstacles to reform, most significantly the Triborough Amendment, and Part VII concludes.

II. DESCRIPTION OF THE MISMATCH

A. Overview of the New York System

Like all state public retirement systems, the New York system is exempt from the federal scheme of the Employee Retirement Income Security Act and is instead regulated predominantly by state law.13 States vary considerably in regulating their public retirement systems and protecting worker benefits.14 As a result, each state handles the contribution to its pension funds differently. The most salient features of the New York system are described

13 Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1003(b) (2006) (“The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a governmental plan (as defined in section 1002(32)).”). However, in order to receive preferential tax treatment, state and local pensions must comply with the requirements of the Internal Revenue Code. See 26 U.S.C. § 401(a) (2006).

14 See Amy B. Monahan, Public Pension Plan Reform: The Legal Framework, 5 EDUC. FIN. & POLY 617, 617 (2010) (providing a survey of selected states’ legal approaches to pension benefits); see also PEW CRT. ON THE STATES, The Trillion Dollar Gap, PEW CHARITABLE TRUSTS 1, 4 (Feb. 2010), http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Trillion_Dollar_Gap_Underfunded_State_Retirement_Systems_and_the_Roads_to_Reform.pdf (demonstrating that the result of state regulation is that state pension systems are generally underfunded and identifying just ten states with funded levels greater than 91.5%).
below.

New York technically has eight different retirement systems. For simplicity’s sake, this Article will primarily refer to two of the state systems—the Employees’ Retirement System (“NYSERS”) and the Police and Fire Retirement System (“NYSPFRS”) (collectively referred to as the “New York State and Local Retirement System” or “NYSLRS”)—because together they are the largest and most uniform. The primary difference between NYSLRS and the other New York systems is that the state comptroller is the sole trustee of NYSLRS, whereas in the other systems the State or New York City comptroller account for just one seat on a board of trustees. However, unless otherwise indicated, all statements made about NYSLRS also apply to the other systems, except that a board of trustees instead performs the trustee’s role.

By law, the New York retirement system must be fully funded according to an actuarial valuation. In order to determine the amount of contributions needed, the trustee must ascertain the present value of the fund’s assets and liabilities. This means that

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16 NYSERS and NYPFRS cover a combined 679,217 active workers and 375,803 pensioners and retirees, equal to just fewer than half of the total of the city and state pensions systems combined. Id. The financing of the city funds, whose assets are pooled in a common city pension trust fund, “is arcane and complex compared to [the state systems].” Id. at 8.
17 N.Y. RETIRE. & SOC. SEC. LAW § 13(b) (McKinney 2013).
18 PEW CTR. ON THE STATES, supra note 14, at 39.
19 New York courts have interpreted the nonimpairment clause to mean that the state has a fiduciary duty to protect pension funds. See N.Y. STATE FIN. LAW § 98 (McKinney 2013); McDermott v. Regan, 82 N.Y.2d 354, 362, 624 N.E.2d 985, 989, 604 N.Y.S.2d 890, 894 (1993) (citing Sgaglione v. Levitt, 37 N.Y.2d 507, 510–11, 337 N.E.2d 592, 594, 375 N.Y.S.2d 79, 82 (1975); Sgaglione, 37 N.Y.2d at 512, 337 N.E.2d at 595, 375 N.Y.S.2d at 83 (construing N.Y. RETIRE. & SOC. SEC. LAW §§ 13, 313 (McKinney 2013)). Determining funded levels is not straightforward or universally agreed upon. The New York state pension systems are among the best funded in the nation, but the city systems tend to be significantly less funded. See Alicia H. Munnell et al., The Funding of State and Local Pensions in 2010, 17 CTR. FOR RET. RESEARCH AT BOS. COLL. 11 (May 2011), http://crr.bc.edu/briefs/the-funding-of-state-and-local-pensions-in-2010. As of April 1, 2011, the funded ratio of NYSERS was 90.2%, while the funded ratio of NYSPFRS was 91.9%. STATE OF NEW YORK OFFICE OF THE STATE COMPTROLLER, 2012 COMPREHENSIVE ANNUAL FINANCIAL REPORT 86 (March 31, 2012), https://www.osc.state.ny.us/finance/finreports/2012cafr.pdf [hereinafter NYSCAFR 2012]. The city pension funds are significantly less funded. See Munnell, supra note 19, at 11.
20 Determining the present value of a pension fund’s assets and liabilities requires making assumptions and projections for the future, the most important and controversial component of which is the selection of an assumed rate of return on investments. PEW CTR. ON THE STATES, supra note 14, at 53. Most public pension funds also use this rate as the discount rate for future liabilities. Id. at 35, 53. The most widely used rate across the nation is 8.0%, which is the rate used by all of the New York funds except NYSLRS. Id. at 35, 59. NYSLRS recently lowered its rate from 8.0% to 7.5%. See NYSCAFR 2012, supra note 19, at 86; see
the actuary annually determines the total amount of funding necessary to pay all expected benefits, including future benefits not yet earned, for all employees in the system.\textsuperscript{21} The present value of projected benefits is reduced by the market value of plan assets and the present value of all future employee contributions.\textsuperscript{22} The remainder is then allocated to each of the employers to produce the “normal contribution” rate necessary to keep the system funded.\textsuperscript{23} This rate is applied to an employer’s total payroll to determine its annual required contribution.\textsuperscript{24} It is worth emphasizing that the actuarial valuation step is distinct from the contribution step.

\textit{also N.Y. Retire. & Soc. Sec. Law § 13(i)} (establishing comptroller’s authority to determine average rate of return). For critiques that local governments should instead discount liabilities using a lower rate, such as the Treasury yield curve, which would increase the valuation of their liabilities and lower funded ratios, see Robert Novy-Marx & Joshua Rauh, \textit{Public Pension Promises: How Big Are They and What Are They Worth?}, J. Fin. (forthcoming Oct. 8, 2010) (suggesting that the discount rate used by most states is too high compared to a rate based on municipal bond yields or a Treasury yield curve), and Alicia H. Munnell et al., \textit{Valuing Liabilities in State and Local Plans}, 11 CTR. FOR RET. RESEARCH AT BOS. COLL. 4–6 (June 2010), http://crr.bc.edu/briefs/valuing-liabilities-in-state-and-local-plans (suggesting that pension liabilities should be discounted at the risk-free rate). In 2011, the Governmental Accounting Standards Board released two drafts for public comment that proposed continuing to value liabilities based on expected rates of return only up to the amount by which those liabilities are backed by plan assets, but discount the unfunded portion of plan liabilities at a lower rate, such as the state’s municipal bond yield. See Alicia H. Munnell et al., \textit{How Would GASB Proposals Affect State and Local Pension Reporting?}, 23 CTR. FOR RET. RESEARCH AT BOS. COLL. 1–2 (Nov. 2011, updated Sept. 2012), http://crr.bc.edu/briefs/how-would-gasb-proposals-affect-state-and-local-pension-reporting.

\textsuperscript{21} See McDermott, 82 N.Y.2d at 358–59, 624 N.E.2d at 987, 604 N.Y.S.2d at 892. The funds’ liabilities are calculated based on assumptions like the average retirement age, life expectancy, and final salary of past and future retirees.

\textsuperscript{22} Id. As a formula:

\[ PV(\text{Benefits}) - [PV(\text{Assets}) + PV(\text{Future Contributions})] = \text{Normal Contribution} \]

This type of plan is referred to as “defined benefit” because benefits are the independent variable and contributions are the dependent variable.

\textsuperscript{23} N.Y. Retire. & Soc. Sec. Law § 16 (McKinney 2013). Technically, there are unique contribution rates for each plan and category of public employee that the legislature has so designated and the contribution rate is applied to the payroll of members of that category. NYSCAPR 2012, supra note 19, at 84. This variation applies primarily to each of the different “tiers,” which correspond to when employees enter the system. \textit{Id.} For example, the contribution rate for NYSERS employees ranged from 21.5% for those employees in Tier 1, to 12.9% for Tier 5, for a blended average of 16.1%. See \textit{id}. There are also special plans for certain employees, such as Unified Court Peace Officers and Westchester County Criminal Investigators, which have their own rates. A helpful schematic of the flow of funds in the New York Common Retirement Fund, which encompasses NYSERS, is provided in Appendix B.

\textsuperscript{24} Expressed as a formula:

Employer Contribution Rate = Normal Contribution / Total Payroll, where Normal Contribution is a dependent variable calculated pursuant to note 22 above, and Total Payroll is the sum of payroll for all employers in each particular retirement plan.
B. The Mismatch

The fundamental problem with the pension system is the mismatch between the benefits each employee receives and the costs the employer must pay. Each year, employers contribute to the pension system based on the total salary paid to all employees. An employer’s total payroll will have some employees in each and every stage of a career—some who are nearing retirement, but also many in the beginning or middle of their careers.

Unlike the way employer contributions are assessed, an employee receives his pension based only on his years of greatest compensation—usually the final three years for New York public sector workers. An employee will thus prefer to receive as much of his total lifetime salary near the end of his career, when his pension is calculated. Each individual employer shares this desire. The employer wants to give its workers the greatest possible compensation at the minimum cost to itself. By allowing employees to shift more of their lifetime compensation to the years leading up to their retirement, the employer’s proportion of the amount it must contribute to the retirement system does not change. But its employees’ pensions will increase significantly. In the aggregate, pension padding causes the total obligations of the retirement system to swell and is thus partially responsible for the increase in taxpayer-funded employer contribution rates in recent years.

Still, pension padding is better understood as an issue of how some employers are forced to bear a disproportionate share of pension costs. One example of the discriminatory effect of the current distribution of payments is highlighted by the experience of charter schools that have opted to join the public retirement

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25 See generally N.Y. STATE, OFFICE OF THE COMPTROLLER, N.Y. STATE & LOCAL EMP’S: RET. SYS., YOUR RETIREMENT BENEFITS 17–21 (2011), http://www.osc.state.ny.us/retire/word_and_pdf_documents/publications/1800s/1835-generalprs.pdf (explaining the components of New York’s final average salary). In general, an employee’s final average salary is multiplied by a ratio, the numerator of which is the number of years the employee has worked and the denominator is a fixed number depending on the employee’s status and various other factors, but usually is between fifty and sixty. Id.

26 N.Y. RETIRE. & SOC. SEC. LAW § 443(a) (McKinney 2013).

27 Beginning in 2004, average contribution rates at both NYSERS and NYSPFRS increased from below 5.0% to 16.1% and 21.5% in 2012, respectively. NYSCAPR 2012, supra note 19, at 115, 117. Calculations by the Empire Center project that rates at NYSERS and NYSPFRS will continue to rise annually to 20% and 25% by 2016, respectively. McMATHON & BARRO, supra note 15, at 6. It is worth noting that funding levels, and thus employer contribution rates, are significantly impacted by investment performance and thus display a degree of cyclicality: rates were last in a similar range to today’s rates during the early 1980s. Id. at 3.
This decision has been disastrous for these schools because their teachers tend to have much shorter careers in government service and often do not even vest for pension benefits, but still must pay into the system the same proportion of payroll as regular public schools because of the way the contribution rate is assessed.

The incentive for pension padding is best illustrated with a simple numerical example. Imagine a retirement system with only two public employers, “Police” and “Fire,” each with three employees and one retiree at any given time. Each employee works three years, retires with a pension equal to half of his final average salary, and is replaced by a new first year employee. Imagine also that Police and Fire each have $90 in their budgets allocated for payroll. Finally, assume that there are no investment earnings but that the trustee of the pension fund, like in New York, must select a contribution rate for the employers to fund all of the pension benefits for retired employees.

In this example, we are going to see how Fire can select a pay pattern that results in its employees receiving greater pension benefits even though it contributes the same amount to the system as Police. Assume that Police chooses to pay its employees $30 each year, whereas Fire pays its employees $20 each for the first two years, and $50 in the final year. In this scenario, when the third year employee of Police retires he will receive a $15 pension (equal to half of his final year of salary), whereas the retiring employee of Fire will receive a $25 pension (equal to half of his final year of salary). Therefore the trustee of the pension funds must select a contribution rate that will produce $40, the sum of $15 and $25. The table below summarizes the situation:

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<th>1st Year</th>
<th>2nd Year</th>
<th>3rd Year</th>
<th>Retiree</th>
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</thead>
<tbody>
<tr>
<td>Police</td>
<td>$30</td>
<td>$30</td>
<td>$30</td>
<td>$15</td>
</tr>
<tr>
<td>Fire</td>
<td>$20</td>
<td>$20</td>
<td>$50</td>
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29 See Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 642 (7th Cir. 2006) (explaining how final average salary plans discriminate in favor of workers who stay in the system for their entire careers). Generally, teachers must remain in the system for at least five or ten years before their right to a pension at retirement vests. N.Y. RETIRE. & SOC. SEC. LAW § 516(a) (McKinney 2013).
In order to select a contribution rate to produce $40, the trustee will look to the combined payroll of Police and Fire, $90 + $90 = $180. The rate will be equal to the quotient of the required funds over the total payroll, $40 / $180 = 22\%$. This rate is then applied to Police’s payroll, $90 \times 22\% = $20$, and Fire’s payroll, $90 \times 22\% = $20$. The result is that whereas Police was only able to provide its employee a total of $105 over the four years between the first year of work and first year of retirement, Fire was able to provide $115, even though both paid the same amount into the system and had the same total payroll. The natural tendency in such a system will be for employers to select pay patterns that resemble Fire’s.

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<tr>
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<th>1st Year</th>
<th>2nd Year</th>
<th>3rd Year</th>
<th>Retiree</th>
<th>Pension Contribution</th>
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<tr>
<td>Police</td>
<td>$30</td>
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<td>Fire</td>
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</tbody>
</table>

This is a classic “tragedy of the commons” in that actors are not forced to internalize the costs they impose on the system.

In order to correct this system, I propose that the pension contribution be calculated only over the same period in which the retirement benefit is calculated. In this simplified example, that would mean that the trustee would instead assess a contribution rate that would apply only to the third year salaries of each of Police and Fire, $30 + $50 = $80$. In order to collect contributions of $40, the trustee would now divide the required amount of funds by the combined third year only payrolls, $40 / $80 = 50\%$, and would apply it only to the third year of salary. As a result, Police would now only pay $30 \times 50\% = $15$ and Fire would pay $50 \times 50\% = $25$, meaning that each would have to internalize the pension cost of their own pay pattern.

C. Pension Padding in Practice

Given the current incentive structure, it should be unsurprising that many public employers enable pension padding. In most cases, there is nothing illegal about these practices and honest local employers acknowledge as much.\textsuperscript{30} “The system encourages police

\textsuperscript{30} New York law restricts certain lump sum payments, termination pay, and “any additional compensation paid in anticipation of retirement” from inclusion in an employee’s retirement benefit computation. N.Y. RETIRE. & SOC. SEC. LAW § 443 (McKinney 2013). The comptroller has used this provision to “look to the substance of the transaction” to void certain payments in employees’ benefits calculations. See Davies v. N.Y. State & Local Police
to take as much overtime as they can in the last year before retirement. That’s the way the system is structured’ . . . . “There’s nothing illegal or unethical about this.”

A series of news stories have identified some of the most egregious examples of pension padding in New York, including one state worker who received base pay of $74,000 per year and yet managed to achieve an annual pension of $101,333. The New York Attorney General provided the most detailed evidence of pension padding in a preliminary report in 2010. In that report, the Attorney General requested records from fifty public employers in NYSLRS who awarded some of the highest pension benefits. Of those fifty employers, twenty-eight evidenced either or both of two patterns that were considered clearly indicative of pension padding: (1) employees who worked at least forty hours of overtime in the years approaching retirement and no overtime in the previous period; or (2) employees whose overtime hours increased by at least 50% as they neared retirement. This study, admittedly small in scale, suggests that over half of New York employers engage in very significant pension padding.

Potentially overlooked in this study is smaller scale padding that likely pervades the system and yet receives less attention. My simplified example included only one year of retirement; in reality the costs of pension padding are magnified by the fact that the retired employee will receive a larger pension every year for the rest of his life. Thus, the total cost to the system can be huge. The New Hampshire Retirement System has estimated the cost of pension padding to be 9%–12% of total pension costs. Although pension


31 Walsh & Schoenfeld, supra note 2, at A1 (quoting David Simpson, a spokesman for the then mayor of Yonkers).


34 Id. at 3.

35 Id. at 4–7.

padding is fundamentally about the distribution among participants in the system, the incentives for abuse create a race to the bottom among employers that contributes to the larger issue of rapidly increasing pension benefits. Addressing pension padding would benefit the long-term affordability of New York’s retirement system.

III. ORIGINS OF THE RETIREMENT SYSTEM

That the mismatch creates such obvious incentives for abuse begs the question of how the current system came to be. Is the mismatch the product of an intentional design or capture by the public sector unions? Unfortunately, due to the scarcity of legislative history in New York and the “behind closed doors” nature of its politics, this is a difficult question to answer definitively. One view is that record-keeping and technological constraints from an earlier era limited the computation of an employee’s average compensation to his final years, a feature in almost all retirement systems.37 My research, however, suggests instead that the mismatch developed gradually over the course of the last century.

Prior to 1917, just under half of New York’s public servants were covered by individual employer plans, but none of these workers were organized into larger state- or city-wide systems.38 In 1917, the New York City Teachers’ Retirement System (“NYCTRS”) became the first such system,39 but was quickly followed by the New York City Employees’ Retirement System (“NYCERS”)40 and the New York State Employees’ Retirement System (“NYSERS”), which covered all state employees who previously had no retirement plan options.41 These unified systems seem to have been a response to insolvency concerns at many of the miscellaneous plans within New

38 ST. OF N.Y., SECOND REPORT OF THE COMM’N ON PENSIONS, LEGIS. DOC. No. 66, at 5 (1921) [hereinafter SECOND REPORT OF THE COMM’N ON PENSIONS].
39 See Act of May 1, 1917, ch. 303, 1917 N.Y. Laws 1027.
41 Act of May 11, 1920, ch. 741, 1920 N.Y. Laws 1805. See also SECOND REPORT OF THE COMM’N ON PENSIONS, supra note 38, at 23 (“The Commission believes that unless the State takes an active part in the establishment of a reasonable and sound policy for the retirement of employees in the cities and rural districts, pension legislation will continue to be largely sponsored by interested groups of employees who will seek benefits without adequate consideration of their cost. As the inevitable result of such legislation, taxpayers throughout the State will be called upon to shoulder an expense many times greater than that which would be involved in operating adequate retirement plans for protection against the loss resulting from superannuation and disability.”).
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York City.\textsuperscript{42} In 1922, concern about funding levels led the legislature to forbid any city or county from creating additional individual retirement systems and to reorganize all of the State plans that were exempted from the 1920 legislation into the NYSERS.\textsuperscript{43} Notably, even though the systems were not constitutionally required to be fully funded until 1940, in practice the system began the same, with the trustee determining and assessing a contribution rate necessary to keep the system fully funded.\textsuperscript{44}

At one level, one can trace the mismatch in today’s retirement system back to those first efforts to reorganize the State’s pension plans. As discussed above, the plans were fully funded and authorized an actuary to select a rate of contribution to be applied to total compensation.\textsuperscript{45} Like today’s system, contributions were assessed on total salary and employee pension benefits were determined by final average salary.\textsuperscript{46}

However, the mismatch was not nearly as stark or as misaligned as it would become. Firstly, benefits were broken down into two categories: an “annuity,” which was the actuarial equivalent of the employee’s accumulated contributions; and a “pension,” which was a defined benefit calculation based on final average salary, the category of the worker (e.g. mail clerks versus mechanics), and the worker’s years of service.\textsuperscript{47} These two components were designed to represent approximately equal halves of the employee’s total

\textsuperscript{42} ST. OF N.Y., REPORT OF THE COMM’N ON PENSIONS, LEGIS. DOC. NO. 92, AT 17 (1920) [hereinafter COMM’N ON PENSIONS] (“[T]he actuarial valuation [in New York City] showed that future benefits would cost far in excess of the income set aside for the support of the funds.”).

\textsuperscript{43} Act of Apr. 12, 1922, ch. 591, §§ 75, 80, 1922 N.Y. Laws 1509, 1509–10 (codified as N.Y. RETIRE. & SOC. SEC. LAW § 113(a) ( McKinney 2013)). See also N.Y. Pub. Interest Research Grp., Inc. v. City of New York, 89 Misc. 2d 262, 266, 390 N.Y.S.2d 784, 787 (Sup. Ct. New York County 1976) (“[T]he legislative intent in enacting subdivision a of section 113 was to halt the proliferation of local retirement systems whose indeterminate costs would only be felt in the future.”).

\textsuperscript{44} The committee that analyzed the creation of these early plans wrote that “the accruing liabilities of the State should be provided for as they are incurred;—in other words, that the State should meet annually the cost of the retirement allowances earned by the service rendered in the year.” COMM’N ON PENSIONS, supra note 42, at 21.


\textsuperscript{46} See Act of May 3, 1920, ch. 427, § 1700(9), 1920 N.Y. Laws 1056, 1057 (regarding NYSERS); Act of May 11, 1920, ch. 741, § 50(14), 1920 N.Y. Laws 1805, 1807 (regarding NYSERS).

retirement benefits, meaning that half of an employee’s pension benefit came out of his own salary.\textsuperscript{48} In contrast, the oldest employees in the system today contribute nothing at all and most NYSERS employees contribute only 3\% of their salary for their first ten years of work,\textsuperscript{49} leading to total employee contributions in 2012 of about $273 million, compared to about $4.585 billion in employer contributions, a ratio of greater than 16:1.\textsuperscript{50}

More importantly, contrary to the postulation that technological constraints limited record-keeping to a short span of years, these early systems averaged members’ final salaries over five or ten years.\textsuperscript{51} Only in 1969 were these calculations revised down to the final three years of compensation.\textsuperscript{52} At around the same time, the legislature began creating many special sub-plans for specific employee groups, such as sheriffs and correction officers.\textsuperscript{53}

Thus, while the mismatch existed in the original iteration of New York’s retirement systems, it was not nearly as significant. Any portion of compensation that could be deferred to late in the employee’s career in order to take advantage of the mismatch would be averaged over five or ten years, significantly limiting the incentive for abuse. On top of that, the fact that roughly half of an employee’s retirement benefit—the annuity—was essentially a defined contribution plan that did not vary based on salary, further eroded the incentive for pension padding. If the original formula were still in place, there would be some limited incentive for pension padding, but its force would be minimal due to these mitigating factors.

Beginning in the 1970’s, the legislature began to try to narrow the mismatch incentive for new employees by capping the final average salary factor such that earnings in any included year could not exceed the average of the previous two years by more than 20\%,\textsuperscript{54}

\textsuperscript{48} \textit{COMM’N ON PENSIONS}, \textit{supra} note 42, at 22. Interestingly, the commission report anticipated a system in which both employee and employer contributions would vary based on actuarial changes, but this never seems to have made it into legislation. \textit{Id.} at 29–30.

\textsuperscript{49} \textit{See} E.J.\textsuperscript{\textsuperscript{‘}}\textsuperscript{\textsuperscript{M}}\textsuperscript{\textsuperscript{C}}\textsuperscript{\textsuperscript{M}}\textsuperscript{\textsuperscript{A}}\textsuperscript{\textsuperscript{H}}\textsuperscript{\textsuperscript{O}}\textsuperscript{\textsuperscript{N}}, \textit{DEFUSING NEW YORK’S PUBLIC PENSION BOMB 6} (2006), http://www.empirecenter.org/Documents/PDF/sr04-06.pdf.

\textsuperscript{50} \textit{See} NYS\textsuperscript{\textsuperscript{S}}\textsuperscript{\textsuperscript{C\textsubscript{\textsuperscript{A\textsubscript{\textsuperscript{F}}\textsubscript{\textsuperscript{R}}\textsubscript{\textsuperscript{2012}}\textsubscript{\textsuperscript{,} supra} note 19, at 128.

\textsuperscript{51} \textit{See} Act of May 3, 1920, ch. 427, § 1700(9), 1920 N.Y.\textsuperscript{\textsuperscript{L}}\textsuperscript{\textsuperscript{A\textsubscript{\textsuperscript{W}}} Laws 1056, 1057 (regarding NYCERS); Act of May 11, 1920, ch. 741, § 50(14), 1920 N.Y.\textsuperscript{\textsuperscript{L}}\textsuperscript{\textsuperscript{A\textsubscript{\textsuperscript{W}}} Laws 1805, 1807 (regarding NYSERS).

\textsuperscript{52} \textit{See} Act of Mar. 30, 1969, ch. 178, § 1(9), 1969 N.Y.\textsuperscript{\textsuperscript{L}}\textsuperscript{\textsuperscript{A\textsubscript{\textsuperscript{W}}} Laws 829, 830 (as codified at N.Y.\textsuperscript{\textsuperscript{R}}\textsuperscript{\textsuperscript{ETIRE. & SOC. SEC. LAW § 443(a) (McKinney 2013)); N.Y. EDUC. LAW § 501(11)(b) (McKinney 2013).}

\textsuperscript{53} \textit{See} E.J.\textsuperscript{\textsuperscript{‘}}\textsuperscript{\textsuperscript{M}}\textsuperscript{\textsuperscript{C}}\textsuperscript{\textsuperscript{M}}\textsuperscript{\textsuperscript{A}}\textsuperscript{\textsuperscript{H}}\textsuperscript{\textsuperscript{O}}\textsuperscript{\textsuperscript{N}}, \textit{supra} note 49, at 6.

\textsuperscript{54} \textit{N.Y. RETIRE. & SOC. SEC. LAW § 302(9)(d) (McKinney 2013). The threshold was reduced to 10% for Tier IV employees in 1976. \textit{Id.} § 512(a).
and by excluding from final average salary certain compensation paid in anticipation of retirement.\textsuperscript{55} Because changes to the benefit formula only affect future employees, members are referred to according to their “tier,” determined by the formula in place on the date they joined the system.\textsuperscript{56} As of 2011, there are still 11,022 active NYSLRS members from Tier I who will have no cap on final average salary calculation when they retire.\textsuperscript{57}

The formula for final average salary remained mostly the same for Tier III and IV members, although a 3% employee contribution was reintroduced for the first ten years of membership in NYSERS beginning with Tier III.\textsuperscript{58} In 2009, the legislature passed a new set of laws to address pension padding, creating Tier V.\textsuperscript{59} State Police and Fire members hired after the effective date are limited to only include overtime up to 15% of their annual wages,\textsuperscript{60} and new members of NYSERS are subject to an overtime cap of $15,000.\textsuperscript{61} In addition, both now contribute 3% of their annual wages to the pension fund for the entirety of their careers.\textsuperscript{62} Although Tier V was less than two years old, Governor Cuomo began his term calling for the creation of a Tier VI that would completely exempt overtime from the pension calculation and would increase employee contributions to 6% annually.\textsuperscript{63} In March 2012, he signed legislation that returned the final average salary calculation to five years.\textsuperscript{64} The bill also created a range of employee contribution rates of between 3%–6%, depending on income level, and which also included adjustments to the vesting period, retirement age, and other features of the benefit formula, though all of which will only affect public employees hired subsequent to the legislation’s effective date.\textsuperscript{65}

\textsuperscript{55} Id. § 431. This change only became effective for those public employees hired after the date of enactment; in this case, July 27, 1976, the start date of Tier III. See NYSCAFR 2012, supra note 19, at 38.

\textsuperscript{56} See NYSCAFR 2012, supra note 19, at 38.

\textsuperscript{57} See id. at 106. Tier I includes all those employees who entered the system before June 30, 1973.

\textsuperscript{58} McMahon & Barro, supra note 15, at 17. Tier III and IV includes all employees hired between July 27, 1976 and January 1, 2010.

\textsuperscript{59} Id. This legislation only applies to members of the three state retirement systems, not the city systems.

\textsuperscript{60} N.Y. Retire. & Soc. Sec. Law § 1203 (McKinney 2013).

\textsuperscript{61} Id. § 501(24).

\textsuperscript{62} Id. § 1204.

\textsuperscript{63} Hakim & Kaplan, supra note 4.


This history, however incomplete, suggests that none of the narratives—intentional design, mistaken design, or union capture—can account for the whole story on its own. Rather, each has played a role. There were intentional and reasonable considerations for migrating the responsibility for pension benefits from small, local government employers to large systems. There are also good reasons why an employee should receive a pension based on some form of his final or highest salary, for example, because those are the years immediately before retirement and will be the basis of which the employee will plan his retirement. On the other hand, there never seems to have been any deliberation on the decision to assess employers based on their total payroll, probably because the early incentives for abuse were less apparent. Over the years, possibly due to the political influence of public sector unions, features of the system were changed, moderately enough that it may not have seemed intentional at the time, but significantly enough that the incentive to pension pad became ubiquitous. The political system responded by moderating the scale of pension padding. These responses have missed the core problem and, more importantly, have only addressed prospective employees.

IV. ALTERNATIVE REFORM OPTIONS

A. Past New York Reforms

As the previous section described, the mismatch at the heart of the New York retirement system developed over decades and has been gradually mitigated in recent years for new employees. Despite the potential for these reforms to lessen the severity of pension padding, the tier solution suffers from two problems. First, because each change has focused on the calculation of employee benefits, application of the reform to existing members would violate the nonimpairment clause, which is why each law has instead only been applied to prospective members.66

Second, the reforms skirt the core mismatch and instead create arbitrary distinctions as to what is and is not acceptable pensionable income. The purpose of a public retirement system is “to provide an incentive to an employee to faithfully perform his duties over an extended period.”67

Providing additional

66 See infra Part V.
compensation triggered by retirement is considered beneficial because it encourages older workers to retire and creates room for the advancement of younger workers. Overwhelmingly, public pension plans have sought to achieve this goal by providing employees with a pension calculated relative to their final or highest pay years.

The reforms embodied in the previous tiers address the fundamental mismatch at its periphery, either by increasing the years over which the final average salary is calculated or limiting the forms of compensation that are included in “salary.” Increasing the years over which the final average salary is calculated has no distortionary effects, but it can never completely correct the fundamental mismatch unless the employee’s entire career is used. However, as mentioned above, public pensions were designed to provide employees a pension based on the peak of their career, and not based on their median income.

Limiting the types of wages that are included in the final average salary calculation not only fails to get to the heart of the issue, but also introduces arbitrary distinctions and distortionary incentives. Current New York law only allows employees’ total compensation to increase up to a threshold amount—10% over the average of the prior two years. There is no principled reason why salary increases of 9% are legitimate, but an increase of 11% is too much. If employers are allocating compensation to employees at the end of their career with the implicit or explicit intent to raise their pensions and yet do not bear that cost, that is an abusive practice. This sentiment is probably the motivation behind Governor Cuomo’s proposal to eliminate overtime from the pension calculation altogether. However, reforms based on distinctions in the form of compensation are likely to be no less arbitrary than those based on a threshold amount. Why should overtime pay not count if it is a consistent feature of that employee’s job?

In addition, arbitrary distinctions become areas of abuse. As long as the core incentive survives, any individual employer and its employees will agree to collective bargaining agreements that

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68 See Comm’n on Pensions, supra note 42, at 58–59 (“Without a retirement system, the tendency is for department heads to retain on the payroll superannuated and disabled employees[,] the avenues of promotion become blocked and the younger and more efficient employees are tempted to leave the service.”).

69 N.Y. Retire. & Soc. Sec. Law §§ 512(a), 608(a) (McKinney 2013). The threshold was reduced from 20% beginning with Tier III employees. See Id. §§ 443(a), (f), 302(9)(d).

70 See Hakim & Kaplan, supra note 4.
benefit themselves at the expense of the system. For example, if overtime were completely eliminated from the pension calculation, we may expect that the next generation of collective bargaining agreements will instead have more graduated base pay patterns. The effect would be the same. Those who adopted such pay patterns would give their employees greater pension benefits at the expense of the larger system.

**B. Greater Home Rule**

One alternative idea that may be worth considering is to devolve the retirement system from the state level back down to local governments. Rather than changing contribution rates, this idea would realign local employers’ incentives for pension padding by making them directly responsible for their own retirement systems. I am not aware of any state in the nation that has moved in this direction. Part of the reason why can be gleaned from New York’s history. The statewide retirement system was created because localized public pension plans were not using actuarially prudent systems; essentially, they were not putting enough aside for retirement.  

Shortly thereafter, the creation of independent retirement systems in New York was restricted in order “to halt the proliferation of local retirement systems whose indeterminate costs would only be felt in the future.” Even if mandated by law, there might be a similar concern today that small employers would not set aside adequate funds.

A second drawback to greater home rule for retirement plans is that many small local government employers would have to evaluate financial investments, which would likely entail hiring professional staff. Having a centralized pension fund allows for less replication of investment manager positions, creating an economy of scale. Empirically, there is some support for this conclusion. Between 1994 and 2004, plans with assets of $500 million or less produced average returns of 9%, whereas those with between $500 million and $1.5 billion produced 9.9%, and those over $1.5 billion produced 10.2%.  

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71 See COMM’N ON PENSIONS, supra note 42, at 17 (referring specifically to the experience of New York City).

72 *N.Y. Pub. Interest Research Grp.*, 89 Misc. 2d at 266, 390 N.Y.S.2d at 787.

expenses of only 0.26% of assets, whereas small funds spent almost double that amount, 0.48%.74

C. Reforms from Other States

As mentioned above, most states have taken a similar tact—as has New York—in reforms to address pension padding in recent years, increasing the years over which final average salary is calculated or excluding percentage increases in the pension formula.75 A few states have also chosen to transition away from defined benefit plans altogether, instead instituting defined contribution plans similar to private sector 401(k) or hybrid plans, which also eliminate the incentive for pension padding.76 However, two states—Georgia77 and New Hampshire78—recently enacted legislation that maintain the defined benefit structure and yet still address the problem at its root, by charging the relevant local employers for the additional costs the system would otherwise bear due to pension padding.

In the New Hampshire law, if the average final compensation of a member exceeds 125% of his average base pay for the three highest years of service, then the retirement system charges a special assessment to the employer equal to the actuarial cost of additional pension benefits that will be due to the employee.79 “Average final compensation” is the compensation earned during the employee’s highest three years of service, including items such as overtime,

74 Id.
75 In 2010 and 2011, fourteen states lengthened the period over which final average salary is averaged to calculate the pension benefit base. See Ronald K. Snell, Nat’l Conference of St. Legislatures, Pensions and Retirement Plan Enactments in 2011 State Legislatures (Jan. 2012), http://www.ncsl.org/documents/employ/2011EnactmentsFinalReport.pdf. “In most cases, the change was from [an employee’s] highest [thirty six] months to the highest [sixty] months (three years to five years).” Id. According to a 2009 survey of state pension plans, 7% used between one and two year averages, 58% used three years, 4% used four years, 26% used five years, and 5% used seven or eight years. Peter A. Diamond et al., Problems with State-Local Final Pay Plans and Options for Reform, 12 CTR. FOR RET. RESEARCH AT BOS. COLL. 2 (Aug. 2010), http://crr.bc.edu/wp-content/uploads/2010/08/slp_12-508.pdf.
76 Michigan, Utah, and Rhode Island have enacted plans in the past two years that have some defined contribution feature. Snell, supra note 75, at 1. For example, Rhode Island now offers a defined contribution plan for new public employees and has changed the plan for existing employees into a hybrid plan with a reduced defined benefit component and an individual member account component. Id.
holiday and vacation pay, sick pay, longevity or severance pay, cost of living bonuses, and other additional pay for extracurricular activities. By contrast, the New Hampshire Retirement System has administratively defined “base pay” so as to include only “a member’s annualized hourly rate or contracted salary,” excluding all other payments. The New Hampshire law uses the difference in the two definitions of pay as a proxy for pension padding and charges back to the employer any excess compensation greater than 25% of base pay.

Like my proposal, New Hampshire’s HB 1645 tries to address pension padding by changing the incentive structure for local employers who are in the best position to monitor work schedules. However, HB 1645 suffers from the same arbitrariness mentioned with regard to the tiers and, as a result, is vulnerable to strategic behavior. Part of the arbitrariness comes from the 25% threshold to trigger the special assessment. Twenty-five percent is clearly an excessive amount of pension padding, but that is no reason to accept lower amounts, which can still be very costly across the entire system. The distinction between “final compensation” and “base pay” is also arbitrary. The categories excluded from “base pay” have historically been areas of pension-padding abuse, but there is little intrinsically different about them. Instead, employers are likely to respond to the special assessment by shifting special payments, like overtime, to a more graduated base pay scale, as one such presentation to a group of local employers already suggested.

Georgia’s bill is a little more straightforward. At the same time as enacting for new employees a pensionable compensation cap equal to 105% of the prior year’s compensation, the legislature introduced for existing employees an analogous “supplemental employer contribution” equal to the actuarial cost of such

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80 For employees who did not attain vested status by January 1, 2012, “average final compensation” no longer includes severance pay, end of career longevity payments, or pay for unused sick or vacation time. N.H. REV. STAT. ANN § 100-A:1(XVII)(b)(4) (2013). These employees also have their compensation averaged over their highest five years of service. Id. § 100-A:1(XVII)(b)(2).

81 Id. §§ 100-A:1(XVII)(a), (XVIII).

82 N.H. RET. SYS., EXPLANATION OF HB 1645, SECTION 33 & 34 125% CALCULATION FOR EMPLOYERS (2009), http://www.nhrs.org/News/Files/August_11_2008_Explanation_of_HB_1645_Section_33_34_5.pdf.

increases.\textsuperscript{84} Like New Hampshire’s, Georgia’s legislation creates an incentive for local employers to prevent pension padding. The selection of a 5\% threshold and that the calculation is only performed with regard to the final year of service are both somewhat arbitrary and leave room for abuse, but Georgia’s legislation comes as close to addressing the underlying mismatch as any state legislation in the nation.

Although similar legislation would be a welcome change in New York, I believe my proposal—to assess the employer contribution rates based only on those portions of the employer’s salary that will be used to calculate employee benefits—is a superior reform. My proposal does not rest on arbitrary distinctions as to what kind of pay counts for the pension benefit. It also does not rely on arbitrary caps on what is and is not fair padding. In terms of addressing the mismatch between the average final salary calculation and the contribution rate, this is the only way that the mismatch can be completely eliminated for current employees. Like New Hampshire’s and Georgia’s recent reforms, my proposal would not impair workers’ state constitutionally protected right to their pension benefits.

V. Benefits of Changing the Formula on the Employer Contribution Side

A. Reforms That Change the Contribution Method Can Be Implemented for Current Employees

More so than any other state, New York law protects pension obligations owed to public sector employees.\textsuperscript{85} Although New York’s protection of pension benefits is broad, it is not unlimited: “The Constitution does not, in terms or otherwise, preserve naked pension rights \textit{qua} rights but, rather, the benefits of the contractual relationship.”\textsuperscript{86} There are two important distinctions necessary to


\textsuperscript{86} Mutterperl v. Levitt, 89 Misc. 2d 428, 431, 393 N.Y.S.2d 837, 839 (Sup. Ct. Albany
understand why my proposal does not run afoul of the nonimpairment clause. First, courts are much more circumspect of legislative changes that negatively impact the funded level of retirement plans, as opposed to those that are collection neutral. Second, the courts differentiate between changes to the pension benefit formula itself and changes to the input data that goes into the formula. To the extent that changing the employers’ incentives affects their staffing and thus has an indirect effect on the pensions of public employees, those staffing decisions are input data, and not a change to the formula itself. Before returning to these two distinctions in more detail, it is helpful to understand the historical development of New York’s constitutional protection against impairing a public pension promise.

i. The History of the Nonimpelement Clause

Most commentators note that, historically, public pensions were characterized as gratuities that could be eliminated or amended by the legislature, from time to time, as it deemed necessary. Even before New York’s constitutional amendment of 1938, there is some evidence that was not the case. Looking back to the committee report that recommended the creation of a state retirement system, part of the reason to create a statewide system was that local retirement plans were believed to be underfunded and thus that “taxpayers throughout the State will be called upon to shoulder an expense many times greater than that which would be involved in operating adequate retirement plans.” The implication of this statement is that even back in 1920, it was assumed that pension benefits were contractually strong enough that the State would honor them even if the local government employer sponsoring the plan could not.

However, there was plenty of ambiguity surrounding the solidness of these promises and, in 1935, the Court of Appeals in Roddy v. Valentine said in dicta that where an employee has complied with all of the requirements of his contract but has not yet reached the point of retirement, those benefits “can hardly be
deemed contractual, [and that] there seems to be no doubt that it is subject to change or even to revocation at the will of the Legislature.”

In response to Roddy, New York passed a constitutional amendment known as the nonimpairment clause that guaranteed the contractual nature of a pension promise. The record of the Constitutional Convention indicates that the amendment was meant to foreclose the dicta in Roddy. In emphasizing that the contractual relationship begins when the employee joins the system, the record indicates that the pension “reward or benefit is part of the compensation which he accepts in lieu of the greater rewards of private employment.”

Since the adoption of the nonimpairment clause, New York courts have clarified the scope of its protection. Under no circumstance can the legislature change the definition of what is included in compensation or the formula that translates an amount of compensation into a benefit allowance for an employee after that employee has joined the retirement system. This rule is essentially why all of the changes mentioned in Part III(A) applied only to new tiers. The prohibition extends to changes in the actuarial assumptions for retirement benefits. In short, the nonimpairment clause “fix[es] the rights of the employees at the time of commencement of membership . . . and thus prohibits unilateral action by either the employer or the Legislature that impairs or diminishes the rights established by the employee’s

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90 Id. at 231, 197 N.E. at 262 (citation omitted).
91 N.Y. CONST. art. V, § 7 (“After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.”).
92 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1405 (1938) [hereinafter CONSTITUTIONAL CONVENTION].
93 See, e.g., Kranker v. Levitt, 30 N.Y.2d 574, 575, 281 N.E.2d 840, 841, 330 N.Y.S.2d 791, 792 (1972) (holding that statute eliminating inclusion of cash payments for accumulated vacation credits would be unconstitutional if applied retroactively); In re McCaffrey v. Bd. of Educ., 48 A.D.2d 853, 854, 368 N.Y.S.2d 863, 866 (App. Div. 2d Dep’t 1975) (holding that if statute changes the time over which final average salary is calculated, existing employee has contractual right to use the old formula if it results in a larger pension); Kleinfeldt v. New York City Emp.’s Ret. Sys., 73 Misc. 2d 310, 316, 341 N.Y.S.2d 784, 791 (Sup. Ct. New York County 1973) (holding that legislation that would have limited the percentage increase in pensionable income to 20% for existing workers violated nonimpairment clause), aff’d, 43 A.D.2d 914, 352 N.Y.S.2d 886 (App. Div. 1st Dep’t 1974), modified, 36 N.Y.2d 95, 324 N.Y.2d 865, 365 N.Y.S.2d 500 (1975).
94 See Birnbaum v. N.Y. State Teachers’ Ret. Sys., 5 N.Y.2d 1, 9, 152 N.E.2d 241, 245, 176 N.Y.S.2d 984, 990 (1958) (holding Teachers’ Retirement System was not allowed to adopt new mortality table to compute the annuities due on retirement to persons who became members before such a change).
ii. The Nonimpairment Clause Forecloses Reforms That Would Jeopardize the Funding Level of the Retirement System.

Many of the legislative schemes the New York courts have struck down as impairing employees’ pension benefits have been “so-called ‘pension raid’ statutes where the legislature has viewed the pension fund as a resource in tackling state and municipal economic crises.”96 In these cases, the city or state has argued that the failure to allow changes for existing employees threatened bankruptcy of the entire system:

The answer to that argument must be that if the people intended to decree, by the constitutional amendment, that [changes to the benefit formula] adopted by the system after one has become a member are not to be applied in the computation of the annuity of such person, we are not at liberty to hold otherwise simply because the system may become bankrupt as a result.97

Subsequent courts have continued to find such arguments unpersuasive.98

Perhaps most illustrative of this vein of nonimpairment was the court’s decision in McDermott v. Regan, where the legislature was rebuffed in its attempt to change the funding method of New York State and Local Retirement System (NYSLRS) from an aggregated cost method, which requires funding some benefits before they accrue, to a projected unit credit method, which would have allowed the state to find a “surplus” in the pension fund and dramatically reduce the amount that employers would have been required to pay into the system.99 In contrast, changes to the way or pattern in which employers contribute to the system have been allowed when they were not a threat to the funding level.100 This distinction dates

96 Bentley, supra note 87, at 780.
97 Birnbaum, 5 N.Y.2d at 11, 152 N.E.2d at 247, 176 N.Y.S.2d at 992.
98 See, e.g., Kleinfeldt, 73 Misc. 2d at 316, 341 N.Y.S.2d at 791 (holding that a law that capped possible increases in pensionable pay between years violated the nonimpairment clause).
100 See, e.g., Bd. of Educ. v. N.Y. State Teachers’ Ret. Sys., 199 A.D.2d 760, 760–61, 762,
back to the Constitutional Convention that approved the amendment, which noted that, “[s]o long as the benefits are not diminished or impaired there is no barrier to improvement in the systems.”

My proposal fits with the latter set of cases because the funding level of the retirement system would be unchanged. The system would still require the same total annual contributions from employers to keep the system fully funded under the aggregated cost actuarial determination. The only difference would be that the distribution of that cost to individual employers would be determined on the basis of how much each employer costs the system, as opposed to being based on their entire annual payroll. The solvency of the retirement system and the strength of the pension promise would be unaffected.

iii. The Nonimpairment Clause Protects the Pension Formula, But Not Its Inputs

The second key distinction is between the formula that translates an employee’s compensation into his pension benefit and the employer’s right to hire, fire, and negotiate salaries. Whereas the pension benefit formula is entirely protected once an employee enters the system, courts have been clear that the underlying inputs are outside of the nonimpairment clause’s protection. “The Legislature may try to negotiate a lower salary; but any law which attempts to modify the formula rather than the input data is an attempt to modify a contractual right guaranteed by the Constitution.”

Courts have consistently upheld this line between the pension formula and the inputs to that formula. Courts faced with this

905 N.Y.S.2d 432, 432, 433 (App. Div. 3d Dep’t 1993) (upholding legislation allowing deferral of schools’ payments to the pension fund so as to amortize payments over a period of years); Guzdlek v. McCall, 193 Misc. 2d 759, 762–63, 771–72, 749 N.Y.S.2d 827, 830, 836 (Sup. Ct. Albany County 2002) (upholding legislation allowing the fund to pay administrative expenses out of fund returns when returns were high enough that employer contribution rates were zero percent).

101 CONSTITUTIONAL CONVENTION, supra note 92, at 1406.

102 These underlying employment decisions are instead governed by collective bargaining agreements. See infra Part VI.

103 Kleinfeldt, 73 Misc. 2d at 314, 341 N.Y.S.2d at 789.

104 See, e.g., Hoar v. City of Yonkers, 295 N.Y. 274, 279, 67 N.E.2d 157, 159 (1946) (holding that, at a time when the pension benefit was calculated on the basis of an employee’s final years of salary, a retiring fireman was owed pension based on his final salary of $2,625 and not his highest salary of $3,000); People ex rel. Devery v. Coler, 173 N.Y. 103, 109, 65 N.E. 956, 957 (1903) (holding that a police chief’s continued employment was unrelated to his right
question have concluded that the nonimpairment clause “protects only the benefits of membership in a retirement system; other employment conditions, though they may be protected by statute, resolution or individual or collective bargaining agreement, are not within its coverage.”

The hoped for result of my proposal is that once individual employers bear the true cost of their pension promises, these employers will try to constrain the current pattern of employees earning much higher compensation in the years over which their pension benefits are calculated. If successful, retirement benefits may decline for many future retirees as employers find ways to reduce pension padding. Notably, however, no change is anticipated in the pension benefit formula itself. The only change will be to the underlying inputs—the determination of employees’ compensation, most importantly in the allocation of overtime—that courts have clearly stated are not protected by the nonimpairment clause.

B. How Can This Proposal be Implemented?

A closely related question to the nonimpairment issue is how—or rather, who—can implement this type of reform. The reason these two issues are related is because the courts, primarily in three decisions, have decided that the nonimpairment clause also encompasses an allowance for the trustee of each retirement system to exercise its fiduciary duty to protect the funds. In interpreting the case law, it is worth noting that there are essentially three possibilities. Either the legislature must pass new legislation that the Governor signs; the trustee of the system (in the case of NYSLRS, the State Comptroller) could make the change by administrative discretion; or both could be required.

Beginning in Sgaglione v. Levitt, the Court of Appeals laid out a
two-part inquiry for when the legislature can mandate a change to the system without deferring to the trustee’s discretion and still survive a nonimpairment challenge. First, “in light of the contemporaneous statutes in force when the constitutional amendment was adopted,” the court determined that a certain flexibility resides in the legislature with regard to changing “the manner of paying contributions, to fund deficiencies in actuarial reserve, and to authorize the investment of the funds.” Even in these areas of flexibility, the court still urged a “[c]lose examination [of any] radical change” to the integrity and security of the sources of the fund. Sgaglione occurred during New York City’s fiscal crisis and challenged a bill that required the state comptroller to invest in the bonds of the Municipal Assistance Corporation. The court held that robbing the pension fund of the discretion of the independent comptroller in this area was an impairment that risked radical change to the integrity of the system. Like Sgaglione, McDermott v. Regan was another case in which the legislature attempted to mandate a new method of funding that would implement a “radical change” in the integrity of the funds, and as such was again struck down by the courts.

In contrast, Guzdek v. McCall concerned a legislative change that allowed the comptroller discretion to not require an “administration contribution”—necessary to pay the administrative expenses of the system—in years in which the financial performance of the fund was so great that no normal contribution from employers was required at all. When challenged under the nonimpairment clause, the court used the Sgaglione framework and reasoned that administrative contributions fall within the limits of the legislature’s reserved authority. Next, the court found that the statute neither created an “inappropriate level of risk in the management” of funds nor deprived the fund of the comptroller’s independent judgment.

In applying the framework from these three cases, there should be no doubt that a statute that gives the trustees of the various retirement systems discretion to adopt a contribution rate based on

107 Sgaglione, 37 N.Y.2d at 512, 337 N.E.2d at 595, 375 N.Y.S.2d at 83.
108 Id.
109 Id. at 512–13, 337 N.E.2d at 595, 375 N.Y.S.2d at 83–84.
110 McDermott, 82 N.Y.2d at 358, 361, 363, 624 N.E.2d at 986, 988, 990, 604 N.Y.S.2d at 891, 893, 895.
112 Id. at 764, 768–69, 749 N.Y.S.2d at 831, 834.
113 Id. at 769, 749 N.Y.S.2d at 835.
my proposal would not pose any constitutional problem. Such a law would be very similar to the case in Guzdek. Determining the contribution formula is within the area where the legislature has flexibility to make decisions. In addition, such a law would pose no risk to the integrity of the fund and also would allow the comptroller a degree of discretion.

If the legislature were instead to pass a law *mandating* such a change, the analysis would be the same for all except the last point. Given that the importance the courts attach to the trustee’s independent judgment seems to be most closely intertwined with maintaining the funding integrity of the system and guaranteeing the contract with the employee from his date of entry into the system, it seems very likely that the legislature could unilaterally make the change and still survive a constitutional challenge.

Lastly, the trustee (at least in the case of the comptroller for the NYSLRS) could legally implement this reform if the legislature does not expressly stipulate that the contributions must be collected in some other way. Currently, the closest the law comes to specifying how the comptroller should assess contributions is the following: “The comptroller shall certify annually the rates expressed as proportions of payroll of members, which shall be used in computing the contributions required to be made by employers to the pension accumulation fund.”114 Although this provision does refer to the rates being expressed “as proportions of payroll,” it does not say that the rate must be applied to *total* payroll.115 If the comptroller were to invoke his authority to “adopt . . . rules and regulations for the administration and transaction of the business of the retirement system and for the custody and control of its funds”116 to implement the contribution system advocated for in this article, it seems plausible that this change would be tolerated by the existing statutory framework.

VI. OBSTACLES TO REFORM AND POTENTIAL DRAWBACKS

A. Challenges Posed by Collective Bargaining and the Triborough Amendment

The purpose of closing the mismatch between contribution assessment and benefit calculation is to change the incentive

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114 N.Y. RETIRE. & SOC. SEC. LAW § 11(c)(2) (McKinney 2013).
115 Id.
116 Id. § 11(a).
structure for public employers in their work and pay decisions. However, because around three quarters of all public employees in New York are unionized, most of these work decisions are governed by collective bargaining agreements (“CBAs”). For example, a CBA may require that all overtime assignments be offered to employees in order of seniority. As long as there is such a pre-existing CBA in place, employers will be largely unable to respond to the reformed incentive structure and thus there will be little change in the incidence of pension padding. For this reason, the New Hampshire legislation described above, HB 1645, does not apply so long as employment is governed by a CBA that predates HB 1645’s effective date. Any reform in New York that focuses on employer incentives should include a similar phase-in.

In New York, the CBA problem is exacerbated by the Taylor Law and its accompanying Triborough Amendment. The Taylor Law granted public sector employees collective bargaining rights in 1967 in exchange for largely prohibiting public sector strikes. What started as the “Triborough Doctrine” developed from a case shortly thereafter that prevented unilateral changes by employers to mandatory subjects of collective bargaining, including scheduled pay increases. In developing the Triborough Doctrine, courts grappled with what constitutes a “mandatory subject,” but always recognized that some provisions were non-mandatory. In 1977, the Court of Appeals in BOCES v. PERB heard another case involving scheduled incremental pay increases during the time

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118 See supra Part IV.C.
120 See generally Public Employees’ Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 2013) (declaring that it is New York public policy and the Act’s purpose to promote “harmonious and cooperative relationships” between the government and governmental employees by granting public employees the right to organize, requiring state actors to negotiate with public employee organizations, encouraging the development of procedures and a public employment board to assist in resolving disputes, while continuing the prohibition against strikes by public employees).
123 Ibid.
after a CBA had expired.\footnote{Id. at 755, 363 N.E.2d at 1177, 395 N.Y.S.2d at 441.} This time, the Court of Appeals overruled the \textit{Triborough} decision and determined that such pay increases were non-mandatory and, thus, were not protected by the status quo protections of the Triborough doctrine.\footnote{Id. at 758–59, 363 N.E.2d at 1177–78, 395 N.Y.S.2d at 443.}

The \textit{BOCES} decision was perceived as a threat to the public employees’ unions, who successfully lobbied the legislature to pass the Triborough Amendment.\footnote{McMahon \& O’Neil, supra note 122, at 3; see also Letter from N.Y. State Sch. Bds. Ass’n, dated Jul. 13, 1982, Bill Jacket, L. 1982, ch. 280 ("Rather than reflecting any merit in the bill, the Legislature’s approval was manifestly its way of appeasing public employee unions angered by Executive and Legislative rejection of their protracted and expensive campaign [to repeal the 1976 pension reforms that created Tier III."). For a detailed review of the legislative history of the Triborough Law, see Melissa M. McGuire, Note, \textit{The Effect of New York’s Triborough Law on Public Sector Labor Negotiations}, 48 Alb. L. Rev. 459, 482–83 (1984).} The Triborough Amendment effectively overruled \textit{BOCES} by making it an improper employer practice “to refuse to continue all the terms of an expired agreement until a new agreement is negotiated.”\footnote{N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 2013); see also Cobleskill Cent. Sch. Dist. v. Newman, 105 A.D.2d 564, 565, 481 N.Y.S.2d 795, 796 (App. Div. 3d Dep’t 1984) ("[T]he Legislature, in enacting the amendment, purposely acted to alter the \textit{Rockland} rationale.").} Whereas the Triborough \textit{Doctrine} originally meant that certain provisions of a CBA had to be kept in place until a new CBA was negotiated, the Triborough \textit{Amendment} extends the status quo to the entire CBA.

The Triborough Amendment exacerbates the phase-in problem described above because, even if employers attempt to respond to incentives to reign in pension padding, the public sector unions can refuse to renegotiate employment terms, knowing that the law protects the status quo. The Triborough Amendment could allow unions to refuse to negotiate and, therefore, derail the effect of the reforms contemplated with my proposal.

One way to address this concern would be to legislatively overturn the Triborough Amendment, or at least create an exception to its scope for areas that have interplay with the pension padding problem—for example, overtime practices.\footnote{In suggesting that the Triborough Amendment be modified, I join a chorus of state reports and civic organizations. \textit{See, e.g.}, McMahon \& O’Neil, supra note 122, at 1; \textit{Thomas R. Suozzi \& Cassie M. Prough, N.Y. State Comm’n on Prop. Tax Relief, Final Report to Governor David A. Paterson} 70–71 (2008), http://fiscalpolicy.org/wp-content/uploads/2008/12/CPTR_Final_Report_12012008.pdf; Danny Hakim, \textit{Even Without New Contracts, Many Public Employees Get Raises}, N.Y. Times, Apr. 11, 2012, at A18 (quoting local legislators who support repeal of the Triborough Amendment).} Under this scenario, if a CBA expired after the effective date of the pension reform legislation and a new CBA was not forthcoming, the

\begin{footnotesize}
\begin{enumerate}
\item \footnote{Id. at 755, 363 N.E.2d at 1177, 395 N.Y.S.2d at 441.}
\item \footnote{Id. at 758–59, 363 N.E.2d at 1177–78, 395 N.Y.S.2d at 443.}
\item \footnote{McMahon \& O’Neil, supra note 122, at 3; see also Letter from N.Y. State Sch. Bds. Ass’n, dated Jul. 13, 1982, Bill Jacket, L. 1982, ch. 280 ("Rather than reflecting any merit in the bill, the Legislature’s approval was manifestly its way of appeasing public employee unions angered by Executive and Legislative rejection of their protracted and expensive campaign [to repeal the 1976 pension reforms that created Tier III."). For a detailed review of the legislative history of the Triborough Law, see Melissa M. McGuire, Note, \textit{The Effect of New York’s Triborough Law on Public Sector Labor Negotiations}, 48 Alb. L. Rev. 459, 482–83 (1984).}
\item \footnote{N.Y. CIV. SERV. LAW § 209-a(1)(e) (McKinney 2013); see also Cobleskill Cent. Sch. Dist. v. Newman, 105 A.D.2d 564, 565, 481 N.Y.S.2d 795, 796 (App. Div. 3d Dep’t 1984) ("[T]he Legislature, in enacting the amendment, purposely acted to alter the \textit{Rockland} rationale.").}
\end{enumerate}
\end{footnotesize}
employer would no longer be restricted by the old CBA’s rules that relate to the allocation of overtime. When the legislature enacts new laws, the courts have recognized the need to prevent an impasse in the collective bargaining system from undermining the legislative intent of reform.131

There is also precedent for judiciary-created exceptions to the otherwise wide sweep of Triborough’s domain. The Triborough Amendment has been interpreted to allow the parties to a CBA to negotiate certain terms outside of the post-expiration status quo protection with language that explicitly “sunsets” provisions at the expiration of the agreement.132 Overtime and other provisions that allow pension padding could be granted presumptive status as being subject to one-time sunsets at the expiration of all CBAs in place prior to the reform’s effective date. This one-time exception would allow employers to renegotiate CBAs in response to the changes imposed by the new assessment system. No matter whether the exception comes from the legislature or the courts, intransigence in the collective bargaining process should not be allowed to undermine the impact of reforms to the retirement system.

B. Local Governments Would Not Encounter Further Financial Challenges as a Result of My Reform Proposal

The question must be asked whether my proposal would be overly financially burdensome to local governments and other public employers in New York, many of which are already nearing collapse.133 This concern is misplaced for three reasons. First, my proposal would have no effect on the total amount of employer

131 In re City of Yonkers v. Yonkers Fire Fighters, Local 628, 20 N.Y.3d 651, 658, 988 N.E.2d 481, 484–85, 965 N.Y.S.2d 746, 749 (2013) (“Under the Union’s interpretation of the statute, the Legislature would have been creating a loophole whereby a union, by the simple expedient of refusing to reach agreement on a new CBA, could ensure the continuation of non-contributory pension benefits to new hires, conceivably ad infinitum.”); see also In re City of Oswego v. Oswego City Firefighters Ass’n, Local 2707, 21 N.Y.3d 880, 881–82, 988 N.E.2d 499, 500, 965 N.Y.S.2d 764, 764–65 (2013) (citing the rationale of the Yonkers court and holding that the statute does not allow the firefighters to keep their “non-contributory retirement benefit plan[s]”).

132 See In re Prof’l Staff Congress-City Univ. of N.Y. v. N.Y. State Pub. Emp’t Relations Bd., 7 N.Y.3d 458, 468, 857 N.E.2d 1108, 1113, 824 N.Y.S.2d 577, 582 (2006) (recognizing New York State Public Employment Relations Board’s Sunset Doctrine); but see Richard E. Casagrande et al., Public Sector Bargaining in New York: Examining PERB’s Sunset Doctrine in a New Light, 59 ALR L. REV. 481, 484 (1995) (arguing that the Sunset Doctrine should be narrowed to only allow an opt-out when the “union clearly and unequivocally waives its section 209-a(1)(e) rights”).

contributions over the retirement system, but would instead only result in a different distribution of those costs among employers. Second, under current law, employers have an option to delay a portion of their annual contribution and amortize the deficiency over time, which provides a sensible financing scheme to mitigate the concern that employers’ contribution requirements will fluctuate because of the timing of employee retirement.\textsuperscript{134} Finally, curbing the persistence of pension padding will cause total pension obligations to decline over time, and thus should ultimately alleviate the fiscal strain on public employers.

Changing the base on which the employer contribution is assessed should not lead to any increase in the total amount of contributions collected in the New York system. Thus, there should be no concern that, overall, public employers will have their fiscal situations negatively impacted. The reform will have only a distributional effect.

However, those employers that allow the most significant pension padding will see their contribution obligation increase proportionately, which could compound what is already a difficult fiscal environment. Still, the impact should not be of such an extreme magnitude that this concern should take priority over the need to correct the pension funding mismatch. While there are some employers that engage in more or less pension padding than the median, the investigation by the Attorney General suggests pension padding is relatively wide and evenly spread.\textsuperscript{135} In addition, the majority of current public employees joined the system after the introduction of the 10% cap on the amount by which an employee’s pensionable salary can increase for his final years of work,\textsuperscript{136} meaning that 10% should be the outer boundary by which any individual public employer will see its contributions increase as a result of my proposed reform.

For an individual employer to increase its contributions to the system by 10% is non-negligible, but modest compared to the increases employers have already absorbed due to poor investment returns and the demographics inherent in the scale of pension benefits promised to the current generation of retirees.\textsuperscript{137} In 2010,

\textsuperscript{134} See N.Y. RETIRE. & SOC. SEC. LAW §§ 19-a(c)(1), (d)(1) (McKinney 2013) (allowing employers to amortize contributions over ten years to the extent that their employer contribution rate exceeds the “graded contribution rate,” which starts at 9.5%).
\textsuperscript{135} PENSION PADDING, supra note 33, at 4.
\textsuperscript{136} See N.Y. RETIRE. & SOC. SEC. LAW §§ 512(a), 608(a) (McKinney 2013).
\textsuperscript{137} Between 2003 and 2012, annual contributions for NYSERS and NYSPFRS employers
Curbing the Incentive for Pension Padding

the state legislature provided the Comptroller with the discretion to allow local employers in NYSERS and NYSPFRS to amortize contributions to the fund over ten years to the extent their required contribution rates exceed 9.5% or 17.5%, respectively. This provision was necessary to prevent local employers from being bankrupted by their increasing pension contributions. Similarly, it can absorb some of the impact individual employers may feel as a result of being forced to bear the cost of pension padding.

Because the proposal to rebalance the contribution formula makes the employer’s contribution depend on how much salary that employer is paying to employees for years that will be determinative in their pension calculation, there is a related issue that each employer’s contribution requirements will vary much more year-to-year based on when their employees are retiring. This could be particularly burdensome for small employers that are less likely to have a steady cycle of new and old employees. For example, the Town of Arietta, which has a population of 304, likely only has a few public employees. In many years, Arietta will probably have no pension contribution obligation because no employee will have retired in the previous three years. However, when one or two employees do near retirement, their contribution obligations will be abnormally large. This concern could be addressed by a revised amortization provision that would allow employers to smooth their contributions over time.

Lastly, it is worth emphasizing that if this proposal is effective at correcting the incentive mismatch identified in Part I, eliminating pension padding will reduce the total costs of retirement benefits for the system. Over the long term, not only will my proposal not burden local employers, but it will eventually lead to lower pension costs.

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138 N.Y. RETIRE. & SOC. SEC. LAW §§ 19-a(c)(1), (d)(1), 319-a(c)(1), (d)(1) (McKinney 2013).
VII. CONCLUSION

Through a combination of intentional design, haphazard development, and political influence, pension padding has become a significant feature of the New York retirement system. At its heart, the system suffers from a mismatch between the way employer costs are assessed and the way employee benefits are calculated. The result is that employers share the incentive for pension padding.

The proposal advanced in this article is to remove that incentive by equalizing the contribution and benefit formula calculations. With the incentives correctly aligned, local employers should monitor their employees on a micro-level and thus minimize pension padding. While the distributional effects of the reform will be felt immediately, the system will also ultimately benefit by restraining the growth in public sector pensions, and thus taxpayer contributions. In addition, because this proposal avoids the nonimpairment restriction, its effect will be felt even among current workers. It is thus somewhat unique among proposals to reduce public pension padding, and should be strongly considered by the New York Legislature and retirement system trustees.
APPENDIX A: SCHEMATIC OF NEW YORK CITY AND STATE RETIREMENT SYSTEMS

New York State Comptroller
N.Y. Retr. & Soc. Sec. Law § 13

New York State Entities
Governed by N.Y. Retr. & Soc. Sec. Law

State Employees' Retirement System

State Police and Fire Retirement System

New York City Comptroller

New York City Entities
Governed by NYC Code Title 13 and N.Y. Retr. & Soc. Sec. Law

Board of Education
Trustees
8d. of Trustees of NYC Ed. Retr. System
13 Education Policy appointees, Chancellor of NYC
Dept. of Ed., and Two Employee Representatives

Police Department
Trustees
8d. of Trustees of NYC Police Pension Fund
NYPD Commissioner, City Comptroller, 1 Mayor-appointed,
Commissioner of Finance, 8 Union Representatives **

Fire Department
Trustees
8d. of Trustees of NYC Police Pension Fund
NYPD Commissioner, City Comptroller, 1 Mayor-appointed,
Commissioner of Finance, 8 Union Representatives **

City Employees' Retirement System
Trustees
8d. of Trustees of NYC Employees' Retirement
City Comptroller, 1 Mayor-appointed, Public Advocate,
Borough Presidents (1/5 voted), 3 Employee Representatives

City Teachers' Retirement System
Trustees
Teachers' Retirement Bd.
Pres. Bd. Ed., City Comptroller, 2 Mayor-appointed,
3 TRS appointees

* The Comptroller's role as investment advisor is up for renewal annually. NYC Code § 13-703.
** The Union Representatives only account for half of the total votes because the other board member have more votes.
**Taxpayers**

**Employer Contribution Rate**
(as percentage of payroll)
- NYSERS -- 16.3%
- NYSPFRS -- 21.6%

**Employee Contributions**
3% for first 10 years of employment **

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**New York State**
(Required by State Constitution to pay benefits if CRF becomes insolvent)

**New York Common Retirement Fund (CRF)**
Estimated value of $150.3 billion

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**Pension Benefits**
Formula = Yrs of Service x 2% x Final Average Salary
- $31,960 for new ERS retirees
- $68,240 for new PFRS retirees (averages)

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**Investment Earnings**
(Assumed to be 7.5% of CRF assets for actuarial purposes of calculating employer contribution rates)

- $8.1 billion
- $4.6 billion
- $273 million
- $7.9 billion

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All figures are for fiscal year 2012 as reported in NEW YORK STATE OFFICE OF THE COMPTROLLER, 2012 COMPREHENSIVE ANNUAL FINANCIAL REPORT.
* 2% for employees retiring between 20-30 years of service; less than 20 years the rate is 1.67%; over 30 years the rate is 3.5% (for ERS and TRS). Tier 6 legislation change these rates slightly for new employees.
** For ERS Tiers 3 and 4.