Public Pension Benefits Under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants?

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Introduction

Public pension benefits are under siege. As Chief Legal Counsel to the Illinois Senate President, I have seen it first hand. In 2010, the Illinois General Assembly reduced the benefits offered to future employees, creating a “two-tier” system.¹ And, in the spring and fall of 2011, proponents of pension reform mounted an aggressive effort to cut the benefits of current employees. Despite significant lobbying and support from the Illinois business community, this effort failed to pass the legislature.²

Pension benefits are under siege for two reasons: opportunity and political motives. First, the 2008 stock market crash caused the existing public pension unfunded liabilities to skyrocket. Indeed, Illinois’ state pension system is the worst funded in the nation at 43%³. Rahm Emanuel’s statement after the 2008 election aptly describes the current climate: “You never want a serious crisis to go to waste...[because it] provides the opportunity...to do things that you could not

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do before."4 Thus, for proponents of pension reform, the window of opportunity is open.

Second, a legal calculus does not motivate changes portrayed as pension "reform." Rather, as Eden Martin of Chicago’s Commercial Club candidly explained, "[t]his is] not about the law at all, it’s about the politics and arm-wrestling over money."5 In January of 2011, Illinois enacted a significant income tax increase. However, the new revenue will simply allow the state to make its scheduled contributions to the pension system.6 This tax increase will not provide new money for politically popular programs or other priorities.

These two points are significant because they frame our larger discussion of whether the law provides states with a means to achieve a particular political objective: the unilateral reduction of public pension benefits to avoid painful tax increases, service cuts, or both. In Illinois, the answer is unequivocally "no."7

Many states, however, have cut the pension benefits of current or future employees, or even retirees. Indeed, over the last two years, forty-one of the fifty states enacted significant revisions to at least one state retirement plan.8 These changes typically came in the form of increased employee contributions for the same benefits, new eligibility requirements, the alteration of benefit formulas, or reductions in post-retirement cost-of-living adjustments (COLAs).9

These reform efforts, of course, have sparked legal challenges in at least ten states.10 The success of these challenges depends on how each state protects public pensions and, in turn, the applicability of the U.S. Constitution’s Contract Clause. Accordingly, in section I, this article discusses the different types of legal protection states provide to public pensions. Next, in section II, the article provides an overview of the Contract Clause and discusses pension reform litigation in Colorado, Minnesota, and New Hampshire against this background. Section III briefly responds to arguments made by one legal commentator that states should scale back robust protection for pension benefits by

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7. Madiar, supra note 1.
9. Id. at 1–3.
only protecting those benefits an employee accrues after each day of service, not the benefit terms that were in place when an employee joined a pension system. Finally, the article concludes with a prediction that courts in Colorado and New Hampshire are likely to invalidate pension reform efforts, but courts in Minnesota are likely to uphold reform efforts because of different state law protections.

I. State Legal Protection for Public Pensions

There are four different legal approaches to how states protect public pensions: (1) contractual; (2) proprietary; (3) promissory estoppel; and (4) gratuity. Generally, public employees in states characterizing pension benefits as contractual rights enjoy greater legal protection than in states that treat pension plans as a property interest or a gratuity.

A. The Contractual Approach

Most states follow the contractual approach based on court decisions or specific constitutional or statutory provisions. Under this approach, a contractual relationship exists between the state, as the employer, and a public employee regarding the statutory provisions granting pension benefits. These benefits generally receive the status of “vested” rights at one of four different points in the employment relationship: (1) when the employee begins employment or joins the pension system; (2) after each day of service provided by the employee; (3) when the employee satisfies the eligibility requirements to receive a pension; or

12. Id.
(4) when the employee retires and begins receiving pension payments.16

In Illinois, New York, and Arizona, for example, by joining a pension system, public employees obtain absolute “vested” rights in the pension plan, including later benefit increases added during their service.17 These rights cannot be unilaterally changed by the legislature under any circumstances, but the rights may be modified via legitimate contract principles (an offer, new consideration, and voluntary employee acceptance).18 Oregon takes a similar approach to vesting but permits unilateral benefit reductions that satisfy the U.S. Supreme Court’s three-part test under the Contract Clause, as described below.19

California, Washington, and many other states, in contrast, use a less restrictive or “limited vesting” approach.20 Under this approach, pension benefits still “vest” upon initial employment21 (or after substantial services are provided),22 but the legislature retains the right to make reasonable reductions or modifications to benefits before employees retire or qualify for retirement.23 These states generally allow unilateral benefit changes that are reasonable, bear some material relation to the pension system and its successful operation, and provide em-

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18. Madiar, supra note 1, at 34–37, 55–59 (Illinois law); id. at 8 n.69 (New York law); id. at 8 n.60 (Arizona law).


For a discussion of the three-part test, see Befort, infra note 60.


ployees with offsetting advantages. 24 Once employees retire or achieve eligibility, pension benefits are deemed absolutely "vested" and, depending upon the state, may or may not be reduced via the Contract Clause's three-part test. 25

Still other states—Hawaii and Michigan—only protect pension benefits that are "earned" after employees provide service. 26 These states mirror the approach found under ERISA whereby employees "accrue" vested rights after each day of service. These states, in turn, permit the legislature to change the pension benefits employees will "earn" via future service. 27

Finally, public employees in a host of states obtain vested contractual pension benefits only after becoming eligible to retire or upon actually retiring. 28 Prior to that point, the legislature is free to modify or revoke the pension plan available to its existing employees. 29 Thus, depending on the state, vested pension benefits could be reduced under the Contract Clause's three-part test. 30

B. The Proprietary and Promissory Estoppel Approaches

A handful of states safeguard employee pension benefits under either the proprietary or promissory estoppel approach. Connecticut, for example, ascribes to the proprietary approach. 31 Under the proprietary approach, 32 public employees obtain a property interest in

24. Id.
25. Compare Hammond, 627 P.2d at 1056–57 (limited vesting approach), with Nicholas v. State, 992 P.2d 262, 264–65 (Nev. 2000) (retired legislators who had their pension benefits increased four-fold had absolute vested rights that could not be impaired via unilateral action of the legislature). See also Allen v. Bd. of Admin., 665 P.2d 534, 536 (Cal. 1983) ("The scope of continuing governmental power [to alter vested pension rights for retired employees] may be more restricted, the retiree being entitled to the fulfillment of the contract which he already has performed without detrimental modification.").
26. Madiar, supra note 1, at 9–10. Florida courts appear to protect pension benefit rights in two ways: (1) as vested rights once an active employee meets retirement eligibility requirements, and (2) for "all rights and benefits already earned" via past service by an active employee who is not eligible to retire. Fla. Sheriffs Ass'n v. Dept. of Admin., 498 So.2d 1033, 1036–37 (Fla. 1986). The legislature, however, may unilaterally change the pension benefit rights that an active employee who is not eligible to retire may prospectively earn via future service. Id.
27. Madiar, supra note 1, at 9–10.
28. See, e.g., supra notes 15–16.
29. Id.
30. Id.
32. In addition, the U.S. Supreme Court uses the proprietary approach with respect to Social Security benefits. See Note, Public Employee Pension in Times of Fiscal Distress, 90 Harv. L. Rev. 992, 995–96 (1977) [hereinafter Harvard Note] (reviewing Supreme Court decisions).
statutory retirement benefits once they satisfy eligibility requirements; however, that interest is only protected from arbitrary legislative action by due process. In other words, the legislature may modify the pension benefits of public employees so long as there is a rational basis for doing so.

Minnesota adheres to the promissory estoppel approach whereby public employees have a protected interest in a pension program that is subject to unilateral changes by the legislature. The estoppel approach seeks to avoid injustice and focuses on the reasonableness of an employee’s reliance on the statutory benefit. The Minnesota Supreme Court has recognized that protecting the pension system’s fiscal integrity and avoiding an adverse impact on the state budget is a sufficient public purpose to impair the state’s pension obligations.

Consequently, pension benefits in states adopting either the proprietary or promissory estoppel approach lack meaningful legal protection outside of truly arbitrary action by the legislature. Court decisions from these states employ the unmistakability doctrine as a means to determine the reasonableness of employee reliance interests or the reasonableness of legislative changes. Under that doctrine, courts evaluate whether the statute at issue manifests “clear and unmistakable” intent to create a contract.

C. The Gratuity Approach

The gratuity approach stems from the U.S. Supreme Court’s 1889 decision in Pennie v. Reis, which established that public retirement benefits are “mere expectancies, created by the law, and liable to be revoked or destroyed by the same authority.” This theory represents the notion that the government grants benefits to retirees as a kind of voluntary gratuity, which forecloses any possibility of retirees claiming a protected right to receive benefits upon retirement.

The gratuity approach was the prevailing view before states began adopting the contractual approach. Courts adopting the gratuity approach generally applied it to pension plans that require

34. Id.
36. Id. at 749–50.
37. Id. at 751–52.
38. See id. at 749–51; Pineman, 488 A.2d at 807, 809–10. For further discussion on the unmistakability doctrine, see infra text accompanying note 61.
40. 132 U.S. 464 (1899).
41. Id. at 471; see also Selby, supra note 11, at 1230 (quoting Pennie, 132 U.S. at 471).
42. Id.
43. Selby, supra note 11, at 1230.
employee contributions as a condition of employment, but not to plans in which an employee could voluntarily opt into and contribute to the plan. In Employee participation in a "voluntary" plan was deemed contractual and entitled to protection under the contractual approach. Today, only Arkansas, Indiana, and Texas appear to utilize the gratuity approach.

II. The Contract Clause and Its Scope

One issue common to all reform efforts is whether those reforms violate the Contract Clause of the U.S. Constitution or its state equivalent. This issue is paramount because pension benefits are essential components of compensation and largely determine whether public servants and their dependents may live with a modicum of economic independence upon retirement. Accordingly, it is important to briefly review the Clause and its scope.

On its face, the Clause provides in absolute terms that "No State shall . . . pass any . . . Law impairing the Obligation of Contract." Indeed, prior to the New Deal era, the Clause was considered an "absolute bar to any impairment" of contract. The U.S. Supreme Court, however, charted a new course in 1934 with its decision in Home Building & Loan Ass'n v. Blaisdell.

In Blaisdell, the Court upheld a Minnesota statute imposing a two-year moratorium on mortgage foreclosures to stop massive home

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48. See Cohn, supra note 44, at 40 (retirement plans assure employees "a measure of income upon retirement adequate to allow the annuitant to live in reasonable security.")
51. 290 U.S. 398, 426 (1934) (explaining that the Contract Clause's prohibition "is not an absolute one and is not to be read with literal exactness.")
losses during the Great Depression. The Court explained that the state could, under certain circumstances, exercise its essential reserved powers to advance the public welfare of its citizens without running afoul of the Contract Clause.52 Blaisdell established the basic standard that a state may substantially impair private contracts so long as the impairment is reasonable and necessary to serve an important public purpose identified by the legislature.53

In 1977, however, the Supreme Court clarified that state attempts to impair its own contracts, especially financial obligations, were subject to greater scrutiny and very little deference because the state's self-interest is at stake.54 As the Court bluntly stated:

A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.55 ... Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.56

As a result, public contracts may be impaired "only if it is 'reasonable and necessary to serve an important public purpose.'"57 An impairment is unreasonable if it targets a known problem that existed at the time of contract formation unless that problem has changed in kind, not merely in degree.58 Impairment is permitted only if there are no less drastic alternatives available for safeguarding the important public purpose.59

While the U.S. Supreme Court now employs a three-part test to determine Contract Clause violations,60 the test only applies if the state obligation is contractual. Long ago, to discern whether state statutory provisions constitute contractual obligations for Contract Clause purposes, the U.S. Supreme Court developed the unmistakability doc-

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52. Id. at 434–40.
54. Id. at 26 (when applying the Blaisdell standard to public contracts involving financial obligations, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").
55. Id.
56. Id. at 29.
60. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 458 U.S. 400, 411–13 (1982); see also Befort, supra note 57, at 30: [t]his test inquires: (1) whether state action in fact impaired a contractual obligation; (2) whether the impairment is substantial in nature; and (3) whether the impairment nonetheless is reasonable and necessary to serve an important public purpose."
trine. 61 Under this doctrine, it is presumed that a law does not create private contractual or vested rights, but merely declares a policy the legislature may revise at its discretion. 62 While the U.S. Supreme Court gives "great weight to the views of" state courts construing public pension benefits created under state law, whether a contract exists for Contract Clause purposes is a federal question. 63

As detailed below, Colorado, Minnesota, and New Hampshire rely heavily on the unmistakability doctrine as a means to uphold pension reform legislation. They also assert that, even if an impairment exists, reform efforts are reasonable and necessary to maintain a viable pension system.

A. Pension Reform Efforts Under Challenge

The application of the Contract Clause and unmistakability doctrine to the lawsuits in Colorado, Minnesota, and New Hampshire best illustrate how different state legal protections either facilitate or defeat reform efforts. The cases also raise the question whether cutting benefits is a reasonable and necessary means to protect the pension system when, for decades, the state failed properly to fund the system.

1. Colorado

Colorado's pension reform litigation presents a showdown over whether the Contract Clause even applies. To understand the current litigation, one must start with the history of pension litigation in Colorado. In 1959, the Colorado Supreme Court in the McPhail case adopted the contractual approach to pension expectations and held that public servants obtain "vested" contractual pension rights once they fulfill the age and service requirements to retire, even if they continue to work. 64 Once these rights vested, they were "not subject to a unilateral change of any type whatsoever." 65 The court observed that a "cardinal principal of justice and fair dealings between government and man, [is that] the parties shall know prior to entering into a

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62. Id.


64. See Police Pension & Relief Bd. of the City & Cnty. of Denver v. McPhail, 338 P.2d 894, 700 (Colo. 1959); Police Pension & Relief Bd. of the City & Cnty. of Denver v. Bills, 368 P.2d 681, 683-84 (Colo. 1961). These decisions further afford "partial" vesting to the pension plan terms of current employees who make contributions to the plan, but have not achieved eligibility to retire. Bills, 368 P.2d at 584-85. For these employees, the legislature may unilaterally cut pension benefit rights so long as the change is balanced by an offsetting benefit, is actuarially necessary, or strengthens the plan. Id.

business relationship the conditions which shall govern that relationship." Accordingly, the court struck down an ordinance repealing a COLA provision applicable to retired police officers as a state Contract Clause violation. While it appears the 1959 McPhail decision remains controlling, a more recent appellate court decision has stated that only "substantial adverse change[s]" to vested pension rights are unconstitutional.76

In 2010, Colorado passed comprehensive pension reform legislation impacting current employees and retirees.68 The legislation, supported by various stakeholders including public-employee unions, was heralded as a bipartisan success.69 Retirees and current employees eligible to retire (collectively referred to as "retirees") challenged the unilateral reduction of the COLA formula rate.70 The retirees sued under the Contract Clause of the U.S. and Colorado Constitutions to retain the higher COLA rate that was in place when they retired or became eligible to retire.71 Colorado caselaw appeared to support their position.

Although Colorado’s pension reform litigation centers on whether the McPhail rule continues to control, a 2002 Colorado Supreme Court decision may have indirectly modified it. In Estate of DeWitt, the court held that the Contract Clause of the U.S. and Colorado Constitutions only protects a contract affording a plaintiff "a vested right."72 Not surprisingly, in the current litigation, the state seized upon this aspect of the DeWitt decision as a basis for dismissing the current COLA reduction lawsuit.73 At trial, the state argued that the retirees must show that the pension plan they retired under contained clear language establishing that the COLA formula rate was a "vested

70. Second Amended Complaint, Justus et al., supra note 47, at 7-9.
71. Id. at 9-11.
72. In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002). The case involved a Contract Clause challenge to a statute that retroactively blocked a prior designation of a spouse as a beneficiary under an insurance contract after the completion of divorce proceedings. Id. at 852-53.
73. Id. at 858-59. The statute at issue essentially allowed the insurance proceeds to become part of the deceased spouse’s estate rather than automatically the property of the divorced spouse by virtue of the prior beneficiary designation. Id. at 855-60.
right. To support this argument, the state noted that the COLA formula rate was changed by the legislature several times over the past forty years. This fact, the state claimed, demonstrated that the COLA was not intended to be a "vested" pension right for retirees.

In 2011, the trial court agreed with the state and dismissed the retirees’ Contract Clause claim for failing to prove the previous COLA formula rate was a vested contractual right. The court reached this conclusion without referencing or discussing the Colorado Supreme Court’s holding in McPhail. The trial court’s decision is now pending on appeal.

2. Minnesota

Like Colorado, Minnesota enacted pension reform legislation in 2009 and 2010 affecting retirees. The legislation stemmed from pension investment losses inflicted by the 2008 stock market crash and the legislatures’ historical underfunding of the pension system.

As in Colorado, the legislation also sparked a lawsuit from retirees challenging the legislature’s unilateral reduction of the COLA formula rate. As mentioned previously, Minnesota courts have not adopted the contractual approach to pension benefits but rather the promissory estoppel approach. As a result, the pension benefit rights of public servants do not begin with a presumption of contractual protection.

Accordingly, the Minnesota litigation centers on whether the COLA provision contains language manifesting intent by the legislature to provide retirees with a fixed COLA formula rate immune from unilateral change. In other words, Minnesota public servants must overcome a presumption that statutes do not create contract rights by pointing to clear statutory language to the contrary. Even if they do, they must show that the COLA reduction was a substantial impairment that was not reasonable and necessary.

75. Id.
76. Id.
77. Id. at 4.
78. Id. at 9.
82. Amended Complaint, Swanson, supra note 47, at 2–3.
83. See supra notes 35–37.
84. Id.
85. See Order and Memorandum, supra note 80, at 16–17, 20.
In 2010, a Minnesota trial court ruled against the plaintiffs in all three respects: (1) the COLA statute did not contain a binding promise fixing benefits; (2) the COLA reduction was not a substantial impairment; and (3) the reduction was a reasonable and appropriate exercise of legislative authority to maintain the integrity of the pension system. The court noted that the legislature had historically changed the COLA formula rate. The court further noted that to address the pension system’s fiscal instability, the legislature had discretion to cut benefits in lieu of increasing taxes or plan contributions. In sum, Minnesota’s approach to safeguarding pension benefits not only facilitates the legislature’s ability unilaterally to cut benefits, but it also establishes the unmistakability doctrine as a significant obstacle to stating a Contract Clause claim. The trial court’s decision was not appealed.

3. New Hampshire

New Hampshire’s pension reform effort, like Colorado’s, face a challenge that pits the unmistakability doctrine against a prior judicial determination that pension benefits are contractual and vest when employees attain permanent employment status. Like other states, New Hampshire reduced pension benefits because of growing unfunded liabilities from investment losses and insufficient state and local contributions. In particular, the New Hampshire legislature, inter alia, increased the employee contribution rate by a range of 2 to 2.5% and altered actuarial assumptions to reduce the state’s contributions to the pension system.

These changes allowed the state to address a sizable budget deficit. They also prompted a legal challenge in July of 2011 from police, firefighters, teachers, and other public employees. The employees argue that the increased employee contributions for the same level of benefits violate the Contract Clause of the New Hampshire and U.S. Constitutions. Moreover, they note that the New Hampshire Supreme Court has held that retirement benefits are “a substantial part

86. Id. at 3–4, 16–25.
87. Id. at 23.
88. Id. at 24.
93. Id. at 3.
of an employee’s compensation and become vested upon the commencement of permanent employee status.^{94}

The state, however, contends that the unmistakability doctrine applies and the employees cannot point to any clear statutory language affording them any vested contract rights.^{95} In response, the employees assert that the doctrine is of no importance because the New Hampshire Supreme Court has already construed pension statutes as creating vested contractual rights once employees achieve permanent status.^{96} Indeed, in 2010, a New Hampshire trial court rejected the state’s unmistakability doctrine argument in a case involving a unilateral legislative reduction of the formula used to determine judicial pensions.^{97} The trial court explained that the doctrine “must be considered with” (and yield to) the New Hampshire Supreme Court’s conclusion that pension benefits are vested rights for employees with permanent status.^{98}

The issue of whether employee contribution rates are vested pension rights is an issue of first impression in New Hampshire. Given New Hampshire’s adoption of the contractual approach, and the decisions from other state courts considering the issue, it is likely that public employees will prevail. Indeed, at the time this article goes to press, a New Hampshire trial court found the unilateral increase in employee contribution rates unconstitutional as “a substantial modification” of employees’ pension benefit rights under the U.S. and New Hampshire Constitutions for employees who had at least ten years of service as their rights have vested.^{99} In addition, the New Hampshire Supreme Court recently held that its contractual approach, at least in the context of judicial pensions, mirrors California’s “limited vesting” approach.^{100} These developments further indicate an even greater likelihood of success by public employees.

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94. Plaintiffs’ Mem., supra note 91, at 15 (quoting State Emps’ Ass’n of N.H., 448 A.2d at 972).
98. Id.
III. A Comment on Recent Scholarship Favoring Pension Benefit Cuts

One consequence of recent pension reform efforts has been renewed interest in the prevailing legal approaches states use to define pension benefits, especially the contractual approach. This is well underway in Illinois, and harkens back to earlier academic criticisms of the contractual approach.

Professor Amy Monahan of the University of Minnesota Law School argues that states providing robust contractual protection should revisit legal precedent and only safeguard those benefits an employee has accrued through past service. Her view captures the position of those currently seeking to cut pension benefits.

Professor Monahan reasons that because some states adopting the contractual approach view pension benefits as a form of deferred compensation, the government, as an employer, should be entitled unilaterally to change how benefits accrue for current public servants through future service. As support, she notes that pensions are already contingent upon an employee’s salary level and length of service, which are generally subject unilaterally to change by an at-will employer. Accordingly, she rhetorically asks, “how can individuals

101. Madiar, supra note 1, at 41–74.
102. See Cohn, supra note 44, at 68–69 (criticizing the contractual approach in favor of the proprietary approach); Harvard Note, supra note 32, at 1003–05 (endorsing the proprietary approach over the contractual approach); Dwyer, supra note 17, at 587 (advocating that Pennsylvania courts adopt California’s “limited vesting” approach or Connecticut’s proprietary approach); Andrew C. Mackenzie, Spiller v. State: Determining the Nature of Public Employees’ Rights Under Pensions, 46 Me. L. Rev. 355, 375 (1994) (endorsing Connecticut’s proprietary approach).
105. Monahan Pension Article, supra note 103, at 642–43.
106. Id. Professor Monahan also claims that federal Contract Clause jurisprudence supports this view because some courts have held that the Clause does not apply to “prospective changes to a contract.” Monahan California Article, supra note 103, at 2; see also id. at 2 n.17, 11 n.79 & 42 n.276. This claim lacks merit because the Contract Clause applies to both executed and executory contracts. Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 429 n.8 (1933). It is also well understood that the Contract Clause’s prohibition applies to a statutory provision that impacts an existing contract,
have a reasonable expectation of future benefit accruals if they cannot have a reasonable expectation regarding the factors that determine the amount of that benefit. 107

Professor Monahan’s view obviously reflects the long creeping shadow of the employment-at-will doctrine whereby pension benefit rights exist on a day-by-day basis and are subject unilaterally to change or termination at any time. 108 Her view, however, fundamentally misapprehends (and ignores) why courts use the deferred compensation analogy to protect public benefits as vested contractual rights.

The deferred compensation analogy exists as a means to achieve a specific objective. That objective was best explained long ago: “Whether it be in the field of sports or in the halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game.” 109 The deferred compensation analogy, in turn, is used by courts as a way to avoid the limitation found in most state constitutions that public servants cannot receive “gifts” or “extra compensation” for past services. 110 This fundamental point must be kept firmly in mind.

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107. Monahan Pension Article, supra note 103, at 641.


In other words, pension benefits are analogized to deferred compensation as a legal means to hold government employers accountable to the offer they made to employees without running afoul of state constitutional limitations. The analogy is not invoked to cloak the terms of a public pension plan with the gloss of the employment-at-will doctrine.\(^{111}\)

As a result, there is no strength to Professor Monahan's claim that "it is consistent with the theory of pensions as a form of deferred compensation [only] to protect pension benefits already accrued" by past service.\(^{112}\) Professor Monahan's claim fails because it seeks to transform a means into an end itself and jettisons the fundamental principle that the rules of the game for contracting parties are not to be changed midstream.

Accordingly, it is difficult to fathom how Professor Monahan's position truly protects or reflects the reasonable expectations of pension plan participants.\(^{113}\) This is especially hard to comprehend when public employees have diligently and faithfully paid their contributions while their government employers have failed to pay their required share.\(^{114}\) Indeed, for decades, states have treated pension systems as a credit card to pay for government services and avoid tax increases or service cuts.\(^{115}\)

**Conclusion**

Public pensions are under siege because the current fiscal climate in most states presents a political opportunity for change. For lawmakers, it is simply politically more palatable unilaterally to cut pension benefits for public employees and retirees than to raise taxes, cut services, or both. The success of pension "reform" will largely depend on whether the pension benefits are protected under the contractual, proprietary, promissory estoppel, or gratuity approach. Minnesota's adoption of the promissory estoppel approach provides states with the means to achieve this objective without triggering scrutiny and invalidation under the Contract Clause. The adoption of the contractual approach by Colorado and New Hampshire, however, make it more likely that pension reform efforts will be found unconstitutional.

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111. See, e.g., Lauderdale v. Eugene Water & Elec. Bd., 177 P.3d 13, 18–21 (Or. Ct. App. 2008). Under the contractual approach, pension benefit rights vest "in toto" at the time the employee begins working for the employer and are therefore deemed "already earned" or "vested." Id. at 20. Indeed, the Lauderdale court held that "[a]n employer's ability to change an at-will employee's current compensation cannot meaningfully be compared to an employer's ability to change vested post-employment benefits." Id. at 21.

112. Monahan Pension Article, supra note 103, at 842.

113. Monahan Pension Article, supra note 103, at 843–44.

114. Madiar, supra note 1, at 1.

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