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Newsroom

Yelnosky on Pension Reform

Professor Yelnosky penned an Op-Ed in Sunday's ProJo on the constitutionality of R.I.'s pension reform law -- and WPRI blogged a Christmas Eve follow-up.

From the PROVIDENCE SUNDAY JOURNAL: "Pension law may be unconstitutional", an Op-Ed by Professor Michael Yelnosky

- Read [Ted Nesi's Blog](#) at WPRI discussing this Op-Ed.
- Read other RWU Law-related coverage of the [pension reform battle](#).



Dec. 23, 2012: A reader of these pages could be excused for concluding that the state will no doubt prevail in the lawsuits brought by the thousands of current and retired public employees affected by the 2011 Rhode Island Retirement Security Act.

In his Dec. 9 column, Harvard Law Prof. Noah Feldman asserted that “it is well established that what a legislature may do by law, it may also undo,” and “even when benefits are created by contract . . . [a state may ignore those obligations in the face of] a looming fiscal crisis.” On the same day a Journal editorial, “Time for talk is over,” said that “Rhode Island is operating under a crucial pension reform that became law last year. It is legal. . . . [T]he people [have the right] to make reforms through their elected representatives.” But these opinions gloss over some real legal issues.

Looking at the case brought by retired state employees will help interested observers better assess the likelihood that some or all of the pension law will be struck down. The “Contract Clause” of the Rhode Island Constitution (in the same language as the U.S. Constitution) prohibits the state from passing “any law impairing the obligation of contracts.” The retirees assert that the pension law does just that by reducing the annual pension benefits they earned during a career of state employment — benefits set forth in Rhode Island law.

First, there is no dispute that under the new law those benefits will be substantially reduced. Over the next 20 years the average retiree's income will be reduced by about 25 percent. The retiree's purchasing power, given inflation, will be reduced even further. (Just for comparison, Republicans in Congress have been threatening to throw us all off "the fiscal cliff" rather than raise taxes on the richest Americans by 2 to 4 percentage points on taxable income over \$250,000).

Rhode Island lawmakers heard from non-partisan researchers and even from a partisan — Daniel Kinder, a lawyer who regularly represents management in labor disputes — that even though the right to a pension with an annual cost-of-living adjustment was set forth in a statute, courts likely would conclude that a subsequent statute eliminating the COLA for already retired employees would constitute impairment of a contract for purposes of the Contract Clause. Last month a state court in Colorado so ruled. Second, while everyone agrees the Contract Clause permits a state legislature to impair contracts under some circumstances, the recent commentary on this page does not account for what the courts have said about the limits on legislative action imposed by the Contract Clause. The U.S. Supreme Court has written that "the Contract Clause . . . must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate. . . power."

More to the point, the court explained in another case that less deference to a legislature's declaration of necessity is due when the state is a party to the contract it is seeking to alter by statute "because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." In that 1978 case the court concluded that New York and New Jersey could not revoke statutory protection of the financial interest of certain of their bondholders even though the states altered the bond contracts because of a change in legislative priorities prompted in part by fiscal challenges. Drastic impairment of the bondholders' interests was not constitutional because a more moderate course would also have served the states' purposes.



I am not predicting that the plaintiffs will win their cases. I write because the commentary on these pages does not take the plaintiffs' arguments seriously. Some might wish it were not so, but judicial review of the pension reform law is the next step unless these cases

are settled. If we are going to have an informed public debate about the desirability of settlement talks, a more balanced description of the legal landscape seems in order.

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For full story, click [here](#).

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