A Lost Generation but Renewed Hope

Oregon's Pension Crisis and the Road to Reform

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Scott Andrew Shepard. "A Lost Generation but Renewed Hope: Oregon's Pension Crisis and the Road to Reform." Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2017.

Abstract

Like a number of other states, Oregon has been hampered in its pension reform efforts since 1996 by its state supreme court's embrace of the "California Rule," a doctrine arising, in Oregon's case, from a misunderstanding of federal Contract Clause precedent. Under the misreading, states such as Oregon have been restricted from reducing pension benefits for government employees once they have been hired, even for work that lies in the future and may not be performed for decades and even where the benefit promises carried no time commitment. The Oregon Supreme Court has recently abandoned this position. However, it has been using its mid-1990s adoption of the rule as a means of suppressing the application of a set of state constitutional provisions designed to rein in pension spending, as well as later legislation aimed at drawing back some measure of unjustifiable pension-authority largesse in the late 1990s. The court must act swiftly now to reverse this legal position, revive Oregon's constitutional provisions, and permit legislative action that will undo the consequences of the court's long-term error. In the relative energy and foresight of its political branches and the belated but genuine recognition of error by the state court, Oregon can be a national beacon and guide sister states through the morass of pension reform.

JEL codes: H10, H11, H12, H3, H550, H71, H72, H74, H75, H77, J5, J58, K1, K12, K31

Keywords: pension reform, public pensions, California Rule, Contract Clause, state finances, government finance, public employees, public-employee unions, employee benefits, constitutional law, constitutional theory, fringe benefits

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This paper can be accessed at https://www.mercatus.org/publications/lost-generation-oregon-pension-crisis-reform

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Introduction

The State of Oregon prides itself on cutting-edge governance: it was the first state to decriminalize the use of marijuana,[1] the first to permit physician-assisted suicide,[2] and one of the first to enact a minimum wage that will eventually be nearly $15 per hour.[3]

The state has not proved quite as iconoclastic on the government-worker pension front; it is, like much of the rest of the country, burdened by a genuinely immense pension shortfall. The raw numbers—a recognized funding shortfall of about $22 billion dollars in 2017—may seem small when compared to those of the states carrying the greatest pension deficits, but in comparison to Oregon's gross receipts, the figure daunts. The Oregon Supreme Court has in particular failed to distinguish itself, subscribing for more than 20 years to a deeply erroneous reading of the Contract Clause of the United States Constitution (a reading it has recently, belatedly but expressly, "disavowed") that has thwarted a full generation of efforts to fix the pension problem before it reached its current overwhelming proportions. The state's pension oversight board, like that of very many other states, exacerbated the problem enormously in the late 1990s by making systematic payments in those flush years that left far too little in reserve for the lean years that the board should have known to expect later in the business cycle.

Nevertheless, the state does deserve some kudos of which reformers in other states can only daydream. Both its political branches and its polity, through the initiative process, have

[1] *See* Noelle Crombie, *Legal Marijuana in Oregon: A Look at the State's Pot History,* OREGONIAN, Nov. 7, 2014; Oregon Marijuana Decriminalization Act of 1973, OR. REV. STAT. § 167.207(3) (1973).
[2] *See* Oregon Death with Dignity Act, OR. REV. STAT. § 127.800–.897.
[3] *See* Ian K. Kullgren, *It's Official: Kate Brown Signs Minimum Wage Bill for $14.75 in Portland*, OREGONIAN, Mar. 2, 2016.

actively been trying to head off crisis since the mid-1990s, and therefore have laid some extraordinarily useful groundwork for current reform. Moreover, both the state supreme court and the pension oversight board have recognized and admitted the errors of the past and appear to stand ready to make whatever amends they can.

These structural efforts, long-standing and recent, will now allow the political branches, the courts, and the pension authorities—should they work together effectively and without falling into further error—to make significant short- and long-term progress toward reform and toward easing the state's pension crisis. The Oregon Supreme Court, having recognized its critical misreading of the Contract Clause, must now move honestly and forcefully to undo, so far as equity will permit, the deep damage caused by its mistake. It must recognize the revival, and in fact the uncurtailed validity, of a set of mid-1990s constitutional amendments whose application has thus far been blocked by the court's Contract Clause error. The political branches must take immediate advantage of the new world created by the court's belated right-headedness. They must first enact legislation to spur the court to fully flesh out the scope and ramifications of its volte-face on the Contract Clause question. They then must pass judicious, fairness-minded legislation designed to recoup from retirees and longtime government workers some portion of the unconstitutional overpayments they have received at the expense of their younger colleagues and the state's taxpayers for a generation and more, while respecting the reasonable reliance interests that these parties have built up over the years. The political branches should also take a few additional steps to guard against repetition of this cycle of funding boom-and-bust while bringing pension promises more closely into line with the sorts of benefits that taxpayers, who fund these promises, can themselves expect.

In section I of this article, I review the history of the Oregon pension system and the development of the present crisis. I review the changing contours of the pension system in Oregon; popular and legislative efforts to head off the state's increasingly serious funding crisis; and the Oregon Supreme Court's unfortunate history of applying faulty law, logic, economics, and political and constitutional theory in ways that have led directly to today's crisis conditions. I also review the court's belated realization and admission of the error of its ways in the 2015 *Moro v. State* case[4] and tally the present extent of the mess.

In section II, I summarize the further reform initiatives that have been proposed by a small team of state legislators—particularly state senators Betsy Johnson and Tim Knopp—who have taken the crisis, and attempts to respond to it, seriously. I also discuss the refusal to act in this area by Governor Kate Brown and the legislative assembly's majority leadership.

In section III, I review the primary reform options available, some original to this work and others already extant in some form in state government. In particular, I focus for the first time on why the state supreme court's retreat from its flawed Contract Clause theory, first espoused by the court in its 1996 *Oregon State Police Officers Association (OSPOA) v. State* decision,[5] must work to revive the state constitutional pension reform provisions suppressed by that decision. Ultimately, the Oregon Supreme Court must recognize that those constitutional provisions (the "Measure 8" provisions, named after the ballot initiative by which they were promulgated[6]) were always legally in force. And now—although the hour is late—they must be applied to the extent consistent with equity and the reasonable reliance interests of those retirees and longtime workers who have benefited from the overpayments extended to them as a result of

[4] *See* Moro v. State, 357 Or. 167 (2015); *infra* at section I.C.
[5] *See* Oregon State Police Officers Ass'n v. State, 323 Or. 356, 918 P.2d 765 (1996); *infra* at section I.A.
[6] Measure 8 (1994), *incorporated at* OR. CONST. art. IX, § 10–13.

the *OSPOA* decision and its later reverberations in the *Strunk v. Public Employees Retirement Board* decision of 2003.[7]

Inter alia, I also conclude that it would violate no constitutional norms, nor face any lingering objection from the supreme court, were Oregon to drop (with relevant notice) all pension benefits for prospective work done by current and future employees. Whereas such action would not represent anything like an optimal move—as it would yet further lay the burden of the pension funding crisis on younger government workers for the relative benefit of older workers—the fact of its constitutionality does underscore the safety, as well as the wisdom, of shifting all current and future workers to defined benefit pensions for all prospective work. I further describe a practical method of recognizing an appropriate assumed savings (i.e., discount) rate; propose a set of constitutional amendments designed to forestall a foreseeable repetition of the current difficulties; and advise the state to undertake a comparative-compensation study to establish just how much better retirees and long-term workers are going to do in retirement than their younger counterparts and to establish the difference in total compensation between government employees and other taxpayers. Finally, I consider and reject the options of floating pension bonds or hoping for a miracle of deliverance in the form of federal aid. That deliverance is unlikely in any event, but even if it were forthcoming, it would carry hard and heavy strictures and conditions that would cost Oregon much of its sovereignty as a state.

In section IV, I suggest that despite the mess that Oregon has made for itself, the state nevertheless has turned in a yeoman performance when compared to some other states. I then explore the ways in which Oregon can therefore offer a beacon in the night to light the way for those states through the pension-crisis swamp.

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[7] *See* Strunk v. Public Emps. Ret. Bd., 108 P.3d 1058, 1068 (2005); *infra* at section I.B.

I. History and Extent of the Crisis in Oregon

A. Background

The official base rate at which Oregon's public employers are obliged to contribute to their employees' pensions for the 2017–2019 biennium is 20.8 percent of payroll expenses.[8] This represents a nearly 20 percent increase over the required base contribution in the 2015–17 cycle.[9] Just as alarmingly, the state's official forecasters believe this base contribution rate will skyrocket to 30 percent of total payroll in the next few years. This percentage represents a near doubling in a few short years.[10] Before 2017, the state and its municipalities contributed about a billion dollars a year in employer contributions to public pension funding; that amount will rise by $885 million over the next two years[11] and by similar amounts in the two following biennia.[12]

These significant increases actually understate the structural funding deficit in which the state's pension funds now find themselves. In fact, the rate would immediately be rising to nearly 30 percent if not for the fact that increases have by law been "collared"—that is, spread over future years (in this case, through 2023).[13] While this collaring spreads the pain and decreases the volatility of changes in contribution base rates, it also increases the total amount necessary to

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[8] *See*, *e.g.*, Peter Wong, *Public Pension Costs Projected to Reach 30 Percent of Payroll*, PORTLAND TRIBUNE, Dec. 14, 2016.
[9] *Id*.
[10] *Id*.
[11] *See, e.g.,* Ted Sickinger, *Possible PERS Fix: Borrowing Money*, OREGONIAN, Oct. 13, 2016 [hereinafter Sickinger, *Borrowing*].
[12] *Id.*
[13] *See, e.g.,* Moro v. State, 357 Or. 167 at 183 ("To balance [the investment losses caused by the steep market plunge in the early months of the Great Recession, particularly in 2008], the board was required to increase employer contribution rates. But, based on the schedule for setting and implementing employer contribution rates, the next rate increase would not go into effect until July 2011. And not all the losses would show up in that rate schedule, because the board uses a 'rate collar,' which spreads out large rate increases over multiple biennia. In 2010, the board set the rates for the 2011–2013 biennium. The 'collared' system-wide average contribution rate set by the board for that biennium was 16.3%. Because that rate did not reflect all the 2008 losses, the unaccounted-for losses increased employer contribution rates in later biennia."); Ted Sickinger, *"This Is Becoming a Moral Issue": Oregon Officials Face Truth Behind State's Soaring Public Pension Costs*, OREGONIAN, Sept. 21, 2016 [hereinafter Sickinger, *Oregon Officials*] (collars spread, but increase, cost).

be contributed eventually and guarantees that periods of increased contribution will last longer.[14] In other words, the pension-contribution crisis has already irrevocably arrived in Oregon; the question now is only the extent and ramification of that crisis.

The proximate causes of these significant rate increases are twofold. First, as will be discussed in more detail later in this article,[15] the Oregon Supreme Court in 2015 struck down nearly the whole of the legislature's first effort at public pension reform since 2003, an effort that had passed into law in special legislative session in 2013.[16] This judicial override reinstated approximately $5 billion in benefits to current workers and retirees, thus adding $5 billion to the total pension funding shortfall.[17] Second, while the pension fund earned a return of a bit more than 2 percent in 2015, the state's fixed "assumed savings rate" was 7.75. (This "assumed savings rate" is the Oregon-specific term for the expected discount rate—or the average investment return rate that the state posits for itself—regardless of actual returns. In this article, it will be referred to as the "discount rate," which is a term common to the literature in this field.) In other words, the Public Employees Retirement System ("PERS") investments made *some* return, but that return was less than one-third of the rate of return that the pension authorities had predicted.[18] This mismatch between expectation and reality resulted in a further $3 billion

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[14] *Id.*

[15] *See infra* at section I.C.

[16] *See* SB 861 ("Relating to cost-of-living adjustments under the Public Employees Retirement System; and declaring an emergency") (2013); SB 622 ("Relating to public employee retirement; and declaring an emergency") (2013).

[17] *See* Sickinger, *Borrowing*.

[18] *See, e.g.,* Scott Andrew Shepard, *The Lead Lemming: Illinois on the Pension Crisis Brink*, ___ J. L. ECON. & POL'Y ___(forthcoming 2017) (current draft available at SSRN: https://ssrn.com/abstract=2921474) ("Because the rate-of-return includes a return for inflation, this discount rate is a nominal rate (i.e., it includes both the real return on investment and the result of inflation). When inflation is perceived as being particularly low, as it has been since 2008, nominal rates of return fall precipitately below historical averages. If pension funds *assume* a discount rate based on historical averages, this assumed discount rate proves not only irrelevant but straightforwardly disastrous: relying on it results in the sort of underfunding multiplication described in the text above.").

shortfall.[19] These twin blows added more than 50 percent to the previous PERS deficit. (The current total shortfall hovers between $21 and $22 billion.[20])

Although these setbacks gave definite immediacy to Oregon's pension problems, the foundations of the crisis spread back for decades. During World War II, the federal government enacted wage (and price) controls in an attempt to rein in inflation despite the massive wartime borrowing and spending increase.[21] Many employers, including the state of Oregon and its municipalities, skirted these wage controls—which were, given the inflation-stanching purpose, really wage ceilings[22]—by offering what have long been called fringe benefits (such as pensions and healthcare benefits), even though they now account for significant fractions of total employment expenses.[23]

These retirement benefits, payable by PERS, were first offered in 1945 as contractually protected employment benefits.[24] The pensions have three sources of funding. First, employees were for a time obliged to contribute 6 percent of their wages to the PERS fund. Second, employers are obliged to contribute "in an amount actuarially determined to be necessary when added to the employee member contributions to cover the cost of accrued and projected future[-]service retirement allowances payable to retired members."[25] The income earned by the fund as

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[19] *See*, *e.g.*, *Oregon PERS Unfunded Liability Swells to $21 Billion*, NEWSCHANNEL 21, KTVZ.COM (Mar. 30, 2016).
[20] *See*, *e.g.*, Taylor W. Anderson, *PERS Board Briefed on Pension Savings Options,* BEND BULL. (Nov. 19, 2016) [hereinafter Anderson, *PERS Board*].
[21] *See, e.g.,* Employee Benefit Research Institute, *History of Health Insurance Benefits* (Mar. 2002), https://www.ebri.org/publications/facts/index.cfm?fa=0302fact.
[22] *Id.*
[23] Consider that, as noted above, Oregon's present pension crisis has arisen because pension costs now come to fully *30 percent* of wages and are set to rise further. *See supra* p. 7. Adding ever-spiraling health care costs to this amount pushes the cost of "fringe" benefits up past half of wage costs, even before more genuinely fringe benefits, such as term life insurance, are added.
[24] *See, e.g., Strunk*, 108 P.3d 1058, 1068.
[25] *Strunk,* 108 P.3d at 1068.

a result of investments of the fund's capital by the Oregon Investment Council[26] contributes a third source of funding.[27] "Historically, PERS has depended heavily on investment income. Between 1970 and 2012, more than 72% of funding from PERS came from investment income."[28] The Public Employees Retirement Board (PERB) serves as trustee to the fund.[29]

PERS members presently fall into three different tiers. What is now Tier One membership was the only option available until 1996. Tier One members are guaranteed a rate of return equal to the state's assumed discount rate.[30] This amounts to a fixed—and in many years extremely generous[31]—cost-of-living-plus adjustment, as the discount rate (or expected rate of return on investments) is generally a number that includes both inflation and the real return on investment (which might best be understood as the hire cost of capital). As such, it was always designed to provide cost of living plus, and it has offered cost of living plus quite a lot in recent years of low inflation.[32] And often Tier One pension funding was even more generous than this basic explanation would suggest. Through the 1980s and 1990s, in flush years, the PERB paid to members and their accounts not just the already generous guaranteed-return rate, but the *actual* rate of return earned during those years, rather than saving that overage for use in subpar years.[33]

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[26] *See* OR. REV. STAT. 293.706.
[27] *See Strunk,* 108 P.3d at 1068.
[28] *Moro*, 357 Or. 167, 178.
[29] *See Strunk,* 108 P.3d at 1068 (citing OR. REV. STAT. 238.360(3)(b) (2001) (PERB shall arrange for actuarial services for PERS); ORS 238.605 (2001) (actuary shall prepare reports for PERB)).
[30] *See, e.g. Strunk,* 108 P.3d at 1068–69. As previously noted, this rate is currently set at 7.5 percent, down marginally from the 7.75 percent rate used from 2013 to 2015 and the 8 percent rate used before that. *See Moro*, 357 Or. at 178. These slight decreases have not materially responded to the fact that in 2015, the PERS fund earned returns of about 2 percent, or that it has averaged returns for the last decade of about 6 percent. *See supra* p. 7.
[31] *See Strunk* 108 P.3d at 1068–1071; *Moro,* 357 Or. at 178.
[32] Thomas Kenny, *Real Return v. Real Yield*, THE BALANCE (updated Apr. 20, 2017), https://www.thebalance.com/what-is-real-return-and-real-yield-417078 (last visited Jul. 18, 2017).
[33] At various times and for various retirees, PERS benefits have been determined by applying the most favorable formula that obtained to that class of employee. Employees who contributed before August 21, 1981 (almost all of whom had retired by 2017) had two options, one of which was the Pension Plus Annuity (PPA). This annuity "consists of the sum of an annuity component and a pension component. The annuity component is composed of the actuarial equivalent of the member's account balances at retirement. The pension component, funded by the

To put all of this another way, Tier One beneficiaries earned not only a guaranteed increase equal to the riskless return on investment (as would be earned on, for instance, long-term Treasury bills), but rather a guaranteed increase equal to the return hoped for as a result of risky investment. And not only were they guaranteed this risky assumed return (i.e, they received, without risk of loss, the risk-adjusted potential rate of return), but also in practice they were awarded the supernormal results when the year's investments—and risks—happened to pay off particularly well. All of this, in the *Moro* court's understated terms, "combined to produce 'atypical' retirement benefits exceeding those of public employees in other jurisdictions."[34] It also combined to create atypical unfunded liabilities for the taxpayers of Oregon, as the PERB

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employer, is equal to one percent of the member's final average salary (1.35 percent for legislators and police and fire employees) for each service year." *Strunk,* 108 P.3d at 1070.

Tier One members who started contributing after August 1981 were not eligible for the PPA but still had a choice between two other calculation methods: the Full Formula (which replaced the PPA) and money match. *See Strunk*, 108 P.3d at 1086. The Full Formula "first calculates a member's service retirement allowance by multiplying the member's final average salary by a factor set at 1.67 percent (2 percent for legislators, police officers, and firefighters) and then multiplying the resulting figure by the member's years of membership. That service retirement allowance then is funded using the actuarial equivalent of the member's account balances at retirement (the annuity component) and employer contributions required to make up the difference (the pension component)." *Id.* The Full Formula was then supplemented by a guaranteed annual minimum accrual for employees equal to the discount rate employed by the PERB. *Id.*

"Under the Money Match, a member's service retirement allowance is calculated by determining the sum of the actuarial equivalent of the member's account balances at retirement (the annuity component) and then adding a sum in an equal amount that is charged to the employer, i.e., the 'match' (the pension component). The resulting service retirement allowance therefore amounts to twice the actuarial equivalent of the member's account balances at retirement." *Id.* The effect here is to allow the employee to take advantage of years in which the actual return on investments exceeded the PERB-assumed discount rate. Member benefits are calculated according to both methods, and the higher result is used. *Id.*

[34] *Moro*, 357 Or. 167, 180 (*citing* Special Master's Report at 49). As the *Moro* court explained early in its decision,

> [W]e appointed Multnomah County Circuit Court Judge Stephen K. Bushong to act as special master. *See* SB 822, § 19(6) (authorizing the court to appoint a special master); SB 861, § 11(6) (same). As special master, Judge Bushong presided over an evidentiary hearing and prepared a thorough report containing his recommended findings of fact. *See* Special Master's Final Report and Recommended Findings of Fact (Apr. 30, 2014) (Special Master's Report). The parties have not materially challenged the special master's recommended findings, which we have adopted unless otherwise noted.

(*Id.* at 174.) These were "atypical" benefits indeed. As the *Strunk* court detailed, "By the late 1980s, members who retired with 30 years of creditable service received service retirement allowances equal to approximately 63 percent of their final average salaries. By the early 1990s, that figure had increased to 66 percent and, between 1996 and 2002, had increased to 85 percent. In 2000, the average PERS retired member with 30 years of creditable service retired at the age of 53 with a service retirement allowance equal to 106 percent of the member's final average salary." *Strunk,* 108 P.3d 1070.

continued for far too long to set employer contributions (discussed infra directly after this review of the three-tiered pension structure) on the increasingly false assumption that most employee retirement accounts were being not just fully funded, but overfunded.[35]

Tier Two members, or members who qualified for PERS between 1996 and mid-2003, lost the discount-rate-matching guaranteed rate of return that Tier One members enjoy. Instead, these members receive "equal credit" for the returns actually earned by the pension fund's investments for that year or the Full Formula[36] (at a rate of 1.67 percent multiplied by years worked), whichever is higher. Tier Three comprises members who became eligible after August 28, 2003.[37] This third tier arose as a result of a legislative compromise responding to the fact that PERS funding had fallen to a funding level of about 65 percent (comparable to modern levels).[38] Its benefits consist of a less generous version of the Tier Two Full Formula, without the money-match overpayment options that had caused such trouble in the years leading up to 2003, and at a rate of only 1.5 percent per year rather than 1.67 percent.[39] Additionally, members enjoy a cost-of-living increase of their benefits of up to 2 percent per year.[40]

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[35] *See Moro,* 357 Or. at 178–80 (quoting (at 180) the Special Master's even drier conclusion that "[t]he design and implementation of the Tier I Money Match program was an important, structural contributor to the system's financial challenges.").
[36] *See supra* note 33 (description of the Full Formula).
[37] *See Moro*, 357 Or. at 178. Tier Three is also known as the Oregon Public Services Retirement Plan. *See id.*
[38] *See Moro*, 357 Or. at 180.
[39] *Id.* at 182.
[40] *See Strunk,* 108 P.3d at 1070–71. The cost-of-living adjustment (COLA) is slightly more complicated than a straight 2 percent a year. Rather, 2 percent is the COLA cap, but in years in which the consumer price index rises by more than 2 percent, the extra increase is "banked" to be paid out in later years, with the result that in most years the 2 percent maximum is reached. *Id.*; Historical Inflation Rates: 1914–2017, http://www.usinflationcalculator.com/inflation/historical-inflation-rates/ (showing that inflation usually exceeds—and often far exceeds—2 percent; although inflation did not do so often during the Great Recession and has not done so consistently since 9/11, veteran workers will have "banked" significant rollover adjustments). *See also Moro*, 357 Or. 167, 184–85 ("First enacted in 1971, the pre-amendment COLA statute had three notable components: the COLA requirement in subsection (1); the COLA cap in subsection (2); and the COLA bank in subsection (3). *See* ORS 238.360 (2011); ORS 238A.210 (2011); *see also* Or. Laws 1971, ch 738, § 11 (enacting COLA).").

Another change made in the 2003 legislation, one that still applies to all government employees, regardless of tier, was the creation of the Individual Account Program (IAP). Under the IAP, the 6 percent contribution required of government employees (but often picked up by employers) was diverted from the PERS fund into individual employee accounts.[41] The funds in these accounts were and are invested by the PERB,[42] with all gains or losses from investment attributed to the individual account.[43] Upon retirement, the amount in the account (along with future returns to investment of remaining funds) are paid out by annuity to the retiree until the funds are depleted.[44] As the *Moro* court noted, "the IAP annuity can be viewed as a defined-contribution component of the member's retirement benefit and presents no risk of unfunded actuarial liability."[45] On one hand, the court failed to note that the IAP eliminated any source of employee contribution to the PERS general fund, reducing the sources of funding for all (Tier One through Tier Three) pensions to employer contributions and investment returns. On the other hand, as the court recognized, establishment of the IAP withdrew that 6 percent from the possibility of Full Formula funding, the money match, or later cost-of-living adjustments (or "COLAs, which tend to be increases").[46]

To fund these contractual promises, public employers in Oregon are required to contribute an amount prescribed by the PERB by its biennial establishment of an "actuarial valuation."

> [The] "Actuarial Valuation" . . . usually issues as of December 31 in odd-numbered years. Employers begin paying newly established contribution rates on July 1 of the following year. Employer contribution rates consist of two components: the employer's normal cost toward payment of members' service retirement allowances and the amount

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[41] *See Moro,* 357 Or. at 180–81.
[42] In effect, Oregon has instituted a defined contribution plan, one in which the employer directs the investments, for this portion of its pension program.
[43] *Moro*, 357 Or. at 180–81.
[44] *Id.*
[45] *Id.* at 181. This IAP had no effect whatever on employees who had already retired by 2003.
[46] *Id.* at 186.

> necessary to amortize any unfunded actuarial liability (UAL). The normal cost component of the employer contribution rate is based on the PERS actuary's best estimate of the amount needed to pay service retirement allowances to current members in the future. The adjustment of the employer contribution rate either for UAL or actuarial surplus is based on the difference between an employer's account balance and the projected future service retirement allowances payable to its employee members. If an actuarial surplus exists, then the employer pays less than the normal cost rate. If the employer has a UAL, then PERB adds an additional, amortized charge to the employer's normal cost rate.[47]

As the *Strunk* court noted, the highest base rate of employer contribution before 2001 was 11.84 percent.[48] That the rate has floated toward 20 percent in recent years and will rise to 30 percent in the near future illustrates the breadth and depth of the present funding crisis.

The oddities of this three-tiered system are apparent from the first. Most strikingly, the system radically favors (generally older) workers who started before 1996 and 2003—not just in expected ways, such as seniority pay bumps, but in deeply structural ways. Employees hired earlier simply get a significantly better pay-and-benefit package for every minute worked during their careers than do workers who were hired later at every equivalent minute of their climb up the seniority ladder. In other words, Tier One workers have always had, and will always accrue and then receive, Gold Plated benefits: in 1991, 2001, 2011, and through retirement. Tier Two workers, hired after 1995, get Silver Plated benefits forever; their junior colleagues—the Tier Three employees hired after 2003—can rise to nothing but Bronze. (And Bronze benefits are significantly more than a great many taxpayers are accruing because they are guaranteed, employer-funded benefits.)

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[47] *Strunk*,108 P.3d at 1069.

[48] *Id.* at note 17 ("Between 1977 and 2001, PERS employer contribution rates ranged from a high of 11.84 percent to a low of 9.15 percent of payroll. Between 1975 and 1997, the average normal cost for employers ranged between 7.09 and 9.33 percent of payroll, and the average rate at which employers paid amortized UAL during that same period ranged from zero to 3.24 percent of payroll. The three highest UAL rates occurred between 1975 and 1979.").

This system is manifestly unfair, and it may even raise federal civil rights objections.[49] In the broad run of cases, it would be unfair to take from veteran employees benefits that they have already legitimately earned. However, it is likewise unjust to require the same work at the same time from two different workers, paying the first worker structurally more than the second, explicitly because it has become unaffordable to pay the first worker's unexpectedly lavish benefits.[50] And yet this is where Oregon finds itself.

The fault here lies not primarily with the state legislature, which has been trying—however fitfully—to deal with this growing pension crisis for decades. Rather, the state supreme court issued a series of erroneous decisions that allowed the problem to develop and grow. A crisis was then guaranteed by PERB decisions that only exacerbated the crisis. Now the state supreme court has awakened to its earlier errors. It has not, however, entirely unwound the effects of its generation-long error and has thus left confusion in its wake.

B. Fundamental Mistakes

As noted earlier, the Oregon courts recognized the PERS benefits as protected portions of government employee contracts as early as 1945. This recognition moved the state firmly away from the gratuity theory of pensions, that is, a pension is a unilateral gift from the sovereign that can be withdrawn at any time.[51] As the Oregon Supreme Court rightly declared, according to this

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[49] Federal civil rights law forbids some employment decisions that have a disparate negative effect on workers distinguished by certain classifications, such as sex, race, and national origin. To the extent that newer intakes of government employees in Oregon are materially more diverse than older workers, Oregon's system of increasingly meager benefits packages for newer workers could raise civil rights concerns. *See* Shepard, *supra* note 18, at 25 note 98 (in draft version); Marc Joffe, *How Public Employee Pensions Make Income Inequality Worse*, FISCAL TIMES, Feb. 20, 2017.

[50] *See, e.g.,* Shepard, *supra* note 18, at 20–25 (in draft version) (discussion of four different theories of pension protection).

[51] *Id.* (gratuity discussion).

contract theory, "the adoption of the pension plan was an offer for a unilateral contract. Such an offer can be accepted by the tender of part performance,"[52] which is to say, by beginning work under the contract.

Not yet established by this 1973 decision, however, was the central question of how long the contract created by the PERS statutes lasted once it was accepted by an employee's taking a position and performing work. The PERS statutes did not state a term explicitly, the way a common employment contract might, of perhaps two or four years. Rather, it was open ended.

The answer to this question should have been that any statutorily established provisions would be enforceable as long as the statutes remained in place and for a minimal reasonable time thereafter—perhaps for a period sufficient for a motivated worker who no longer found the bargain appealing to seek other employment. At contract law, unspecified terms in contracts—whether they be unilateral or bilateral—are considered to extend for a reasonable period, which can be a somewhat fuzzy concept at the margin but never means "essentially *forever* once accepted by the counterparty or until a time wholly within the determination of that counterparty for ongoing services."[53] As a matter of "political law"—of legislative and political theory—legislatures are understood to retain their freedom of action in the future even when they constrain themselves in the present. On the one hand, a common way of putting it is that "legislatures generally do not intend to bind future legislatures"[54]—only constitutional enactment can bind future polities in this way.[55] On the other hand, of course, legislative actions can be

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[52] Taylor v. Mult. Dep. Sher. Ret. Bd., 265 Or. 445, 450, 510 P.2d 339 (1973).
[53] *See, e.g., Reasonable Time*, BLACK'S LAW DICTIONARY (2d ed. 1910), online version available at http://thelawdictionary.org/reasonable-time/ (last accessed Feb. 26, 2017) ("Period determined from trade practice, custom, trade practice, or from circumstances like those at issue, as the time required completing a transaction or contract without a specific maturity date.").
[54] *See, e.g., Moro*, 357 Or. 167, 216.
[55] *See, e.g.,* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation*, 91 CAL. L. REV. 1773 (2003).

understood to make binding contracts.[56] Courts should mediate these diverging considerations by finding statutory contracts where and to the extent—but only where and to the extent—that the legislature has clearly intended a contract. In other words, the statutes establishing PERS and thereby making the contract with Oregon state workers with regard to pensions and benefits were rightly recognized at law as a contract. These statutes, however, never should have been read as a contract that could not be ended or altered by later legislatures regardless of changing fiscal, political, or other circumstances.

Logic and economics both counsel for a similar, limited contractual result. An open-ended[57] contract should run for as long as it pleases both parties; if one party wants out, the contract should be wrapped up in a reasonable term, with renegotiation possible if both parties independently agree. Stealth perpetuity or one-side-only escape clauses do not make any sense. Circumstances change over time; contracting parties have to be flexible to changing facts—especially if one of those parties represents the whole polity of a state. These realities do injury to no parties. Whereas it would be unfair to take away benefits already earned, it does no harm to tell public workers that "investments are not making what they once did, which means that from the beginning of next year, all public workers will be offered only a smaller set of benefits for their work. If you do not care to continue to work under these conditions, you may of course find other work, and all pension benefits you have accrued up until now will be waiting when you qualify to receive them under the contract that has obtained until now and will obtain through the rest of this year." In fact, to do anything other would be to guarantee either endless financing crises or a situation in which older workers get relatively generous benefits paid for in part by

[56] *See, e.g. Moro*, 357 Or. at 195, 216; *see generally* the extended discussion of this question *passim* throughout the rest of section I of this article.
[57] None of this logic plays any role in the analysis of fixed-term contracts, but those have never been at issue here.

taxpayers who enjoy no such benefits and by later-employed workers who will only ever receive a far-diminished set of benefits.

As has already been established, Oregon managed to get both of these unsustainable results. This is because the Oregon Supreme Court slid almost accidentally into a position functionally at odds with the copious counsel of law, theory, philosophy, economics, and logic. The court declared in 1991 that

> [q]uite clearly, the legislature has established an elaborate pension scheme for public employees. Equally clearly, Oregon judicial decisions deem the statute to contain a unilateral contract offer for a pension benefit, the essential terms of which cannot be changed to the employee's detriment once he or she has undertaken work for the public employer.[58]

Two things stand out about this declaration. First, this passage is susceptible to two interpretations. It could be understood to suggest that once an employee has begun work for the state, the contract under which the employee works cannot be changed for that employee *for work already performed*; it could also be understood to forbid any change in contract *at any time during the employee's employment with the state.* Second, the assertion appears in the decision unmoored from any citations demonstrating *why* it is so clear that "the essential terms of [the PERS contract] cannot be changed to the employee's detriment once he or she has undertaken work for the public employer," thus leaving no direct referential indication as to its meaning.

The decision reached in this 1991 opinion implicitly favors the first, preferred reading, in that it strikes down only that portion of the 1991 law that applies state income taxes to pension benefits *already earned as of the time of passage of the statute.*[59] Yet the textual ambiguities seem to have sown the seeds of serious error in the court's next two pension cases.

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[58] Hughes v. State, 314 Or. 1 (1992), 838 P.2d 1018, 1030 (1992).
[59] *See Hughes*, 838 P.2d at 1038.

At the 1994 general election, the people of Oregon passed a popularly initiated constitutional amendment in three parts, which appeared as Measure 8 on that year's ballot.[60] That proposed amendment specified (1) that after January 1, 1995, government employees would be obliged to pay 6 percent of their income to help fund their pension benefits and (2) that after that date, their government employers would be forbidden from picking up that 6 percent.[61] It further proscribed guaranteed minimum payments to government employee accounts[62] and forbade unused sick leave to be used to calculate retirement benefits for any employees retiring after January 1, 1995.[63]

Despite popular support for the Measure 8 provisions, the court struck down all three in their entirety. Along the way, the court first misinterpreted *Hughes v. State* to have endorsed the position that once government employees had been hired, they were entitled to the best contract

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[60] *See* Oregon State Police Officers' Ass'n v. State, 918 P.2d 765, 768, 323 Or. 356 (1996) [hereinafter *OSPOA*].

[61] The text of this ballot measure, incorporated upon ratification into Article IX, section 10 of the Oregon Constitution, required that

> [Section 10. Retirement plan contributions by governmental employees. (1) n]otwithstanding any existing State or Federal laws, an employee of the State of Oregon or any political subdivision of the state who is a member of a retirement system or plan established by law, charter or ordinance, or who will receive a retirement benefit from a system or plan offered by the state or a political subdivision of the state, must contribute to the system or plan an amount equal to six percent of their salary or gross wage.
> 2. On and after January 1, 1995, the state and political subdivisions of the state shall not thereafter contract or otherwise agree to make any payment or contribution to a retirement system or plan that would have the effect of relieving an employee, regardless of when that employee was employed, of the obligation imposed by subsection (1) of this section.
> 3. On and after January 1, 1995, the state and political subdivisions of the state shall not thereafter contract or otherwise agree to increase any salary, benefit or other compensation payable to an employee for the purpose of offsetting or compensating an employee for the obligation imposed by subsection (1) of this section.

[62] The text is as follows:

> [Section 11. Retirement plan rate of return contract guarantee prohibited.] (1) Neither the state nor any political subdivision of the state shall contract to guarantee any rate of interest or return on the funds in a retirement system or plan established by law, charter or ordinance for the benefit of an employee of the state or a political subdivision of the state.

Incorporated at OR. CONST. art. IX, § 11.

[63] The text is as follows:

> [Section 12. Retirement not to be increased by unused sick leave.] (1) Notwithstanding any existing Federal or State law, the retirement benefits of an employee of the state or any political subdivision of the state retiring on or after January 1, 1995, shall not in any way be increased as a result of or due to unused sick leave.

Incorporated at OR. CONST. art. IX, § 11.

provisions adopted at any time during their service for the whole of their service. The court also misapplied the federal Contract Clause entirely. These errors have had massive ramifications for the present ill health of the PERS fund and still remain largely uncorrected.

The first provision of Measure 8 (which was incorporated into the Oregon Constitution at Article IX, Section 10, and was referred to as Section 10 by the court in *OSPOA*, so will for convenience be called Section 10 here as well) was *explicitly* prospective: on its own terms, it required employees to themselves pay 6 percent of their salaries toward their pension benefits after January 1, 1995. Therefore, Section 10 must have passed the test set by *Hughes* under any moderately careful reading, as *Hughes* also very explicitly held that the legislation under consideration there failed only "as it relate[d] to PERS retirement benefits accrued or accruing for work performed before the effective date of that 1991 legislation."[64]

Instead, the *OSPOA* court cited the potentially ambiguous language of the *Hughes* court, scooped up a state appellate-court opinion that predated—but was not cited in—*Hughes* for the proposition that "it is without question that petitioner has a statutory and contractual right to receive retirement benefits computed at the most favorable rate applicable under laws in effect at any time during his judicial service,"[65] and made its ruling. The court ignored that the *Hughes* decision, which postdated this inferior-court determination, implicitly overruled its holding by allowing the 1991 legislation to affect government worker benefits after the date of its enactment. The court also failed to discover that the inferior court's assertion had no support in the case it

[64] *Hughes*, 838 P.2d 1038.
[65] *OSPOA*, 918 P.2d at 773 (quoting Bryson v. PERB, 45 Or. App. 27, 30, 607 P.2d 768, *rev. den.* 289 Or. 107 (1980)). The court noted that the *Bryson* court cited to *Taylor*, but the *Bryson* decision provides no pin cite for this proposition and no analysis of *Taylor*, which in any case provides no support whatever for the proposition for which it is cited in both *Bryson* and *OSPOA*.

cited as precedent or anywhere else,[66] failed to heed a dissent which called some of its errors to its attention,[67] and failed to apply the economic or jurisprudential analysis detailed above.

To sustain its result—to invalidate these new state constitutional provisions—the court had to look beyond state law or previous state constitutional provisions, all of which would have been trumped, prospectively, by these newly adopted state constitutional provisions. In short, the court had to find some federal grounds on which to strike down the state constitutional provisions under the Supremacy Clause.[68] For this task, it chose the federal Contract Clause.[69] Its analysis and application of that clause proved just as flawed as its interpretation of the state's PERS contract.

The Contract Clause, which appears as the first clause of Article I, Section 10, states that "[n]o State shall pass . . . any Law . . . impairing the Obligation of Contracts."[70] The *OSPOA* court claimed, with essentially no analysis, that "[t]he most basic purposes of the Contract

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[66] *OSPOA*, 918 P.2d at 773; *Bryson*, 45 Or. App. at 30, 607 P.2d at 769 (citing *Taylor*).

[67] A dissent by Justice Gillette tried mightily to wake the majority to its errors. As he explained,

> Plaintiffs seek to transform what is, *at best*, an express contractual right of *limited duration* into an implied absolute contractual right by virtue of traditional pension law. The lead opinion performs that transformation. . . . But that opinion does so only by ignoring the cardinal principle that this court long ago created to assure that legislative enactments would be deemed to be contracts only in those circumstances in which the legislature intended them to be such. This court most recently reiterated that principle in *Hughes*. . . . *The state never has claimed that any of the substantive Sections of Ballot Measure 8 should be applied retroactively, thereby depriving any public employee of any benefit that the employee already has worked for.*

OSPOA at 792–94 (emphases in original).

[68] The *OSPOA* court asserted that because it had disposed of the question before it on federal constitutional grounds, it had no need to consider whether Measure 8 violated state law or state constitutional provisions. Justice Fadeley wrote a concurrence to claim that Measure 8 violated the Oregon Constitution, but this cannot be true, at least with regard to *prospective* application of the three provisions of Measure 8. Such a holding would mean that the whole of Oregon's polity is subject forever to any contracts granted by the Oregon legislature in the past, for all time, even if not explicitly eternal, because the Oregon state Contract Clause forbade any future amendments to the Oregon Constitution that by their terms explicitly changed *prospective* contractual relations between Oregon and its counterparties. But this argument is simply a subset of a much larger, and wholly untenable, argument that *older* constitutional provisions have the power to override *newer* constitutional provisions that contradict the older provisions. This cannot be law because it would render unconstitutional (somehow) the very process of constitutional amendment itself. Later constitutional amendments *must* work prospectively to thwart the effect of previous provisions of the government that the constitution constitutes, to say nothing of mere *statutory* enactments of that government, or else all government must forever assume precisely the form of its initial construction.

[69] *See OSPOA*, 918 P.2d 765.

[70] U.S. CONST. art. I, § 10, cl. 1. The 18th century followed a general German rule about the capitalization of nouns.

Clause, as well as the notions of fundamental fairness that transcend the clause itself, point to these simple principles: the state must keep its promises, and it may depart from them only for a significant and legitimate public purpose."[71] This statement is true as far as it goes, but it essentially goes nowhere at all.

It is well-settled and long-settled constitutional law that the federal Contract Clause does not provide a federal requirement that states continue statutory arrangements with contracting counterparties for prospective work not yet performed, the only proposition for which the *OSPOA* court deployed it (as the dissenting opinion cited above notes[72]). As Amy B. Monahan, a University of Minnesota Law School professor who has elsewhere addressed this question, has explained, "In reviewing federal constitutional challenges, the federal courts have clarified that '[a]lthough federal courts look to state law to determine the existence of a contract, federal rather than state law controls as to whether state or local statutes or ordinances create contractual rights protected by the Contract Clause.'"[73] In particular, her study in this area unearthed a federal District of Oregon case subsequent to *OSPOA* that undertook the federal Contract Clause analysis that the *OSPOA* court ignored and concluded that "[t]he Contract Clause does not prohibit

[71] *OSPOA*, 918 P.2d at 776.
[72] *See supra* note 67; *OSPOA,* 918 P.2d 791–94.
[73] *See* Amy Monahan, *Statutes as Contracts*, 97 IOWA L. REV. 1029, 1045 (2012) (quoting San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 737 (9th Cir. 2009)). As she summarized later in that paper,

> Under federal law, state laws are presumed to be noncontractual absent clear and unambiguous evidence that the legislature intended to bind itself. If a contract is found to exist, the state may impair it only when reasonable and necessary to serve an important public purpose. Although the U.S. Supreme Court has acknowledged that public employees have a contractual right to the payment of salary earned by performing services in exchange for a promised salary, the Court has never held that a pension statute creates a contract. Additionally, authority exists at the federal level for the position that prospective changes to contracts should not be considered substantial impairments of the contract.

Id. at 1046. Monahan was specifically talking in her paper about the California rule, which is an analog to the *OSPOA* court's determination that statutory grants of benefits to government employees guarantee the continuation of those benefits undiminished throughout the whole, potentially generations-long service of any given employee.

legislation that operates prospectively."[74] With regard to the exact issue at hand, the court explained that, per federal law, "[i]f the State of Oregon is to be bound to provide employees a set level of benefits in perpetuity, such a legislative intent must be clear. Here it is not."[75]

This result cannot be surprising. Oregon is hardly the only state that has written statutes that serve as contracts for employees or for general or independent contractors, a terminal date for which has not been set. Were the federal Contract Clause to forbid the alteration of any such contracts for so long as the contractual counterparties might wish to continue to take advantage of them, then state and municipal government would long since have ground to a halt nationwide. This is exactly the result that Oregon now sees playing out in the wake of the *OSPOA* decision. The ill effects have been well-nigh cataclysmic; but for *OSPOA*, all employees would have become, in effect, Tier Two employees as of 1995 for work not yet performed (i.e., for the more than 20 years of work between 1995 and today), which would have (1) undone the massive injustice of paying—since 1996—similarly situated employees different amounts for the same work performed and (2) saved PERS and the state many billions of dollars.[76]

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[74] Robertson v. Kulongoski, 359 F. Supp. 2d 1094, 1100 (D. Or. 2004) (citing U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977)).
[75] *Id.*
[76] The analysis of Section 11 (forbidding use of a guaranteed minimum to government employees) and Section 12 (forbidding use of accrued sick days in determining final pension payments) follows, effectively, the analysis of Section 10. The one minor distinction to be made is that these later sections did not on their own terms apply only to benefits earned on or after January 1, 1995. As the *OSPOA* dissent indicated, though, no one in Oregon state government had ever tried to apply these constitutional amendments retroactively, and striking the provisions down entirely instead of permitting their prospective application partook of the same error as seen above. *Cf.* Measure 8, provision four *incorporated at* OR. CONST. art. IX. § 13 ("If any part of Sections 10, 11 or 12 of this Article is held to be unconstitutional under the Federal or State Constitutions, the remaining parts shall not be affected and shall remain in full force and effect."); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329–30 (2006). In this last case, the court clarifies these fundamental rules when finding *any* provisions, much less constitutional provisions, thus:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion). It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921). Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid

C. Compounding Interest I: The 2003 Reform Attempt

As alluded to previously, by 2003 the generosity of Tier One benefits, the money match formula, overgenerous funding decisions by the PERB, and the consequences of the *OPSOA* court's fundamental misunderstanding of the federal Contract Clause and of constitutional theory generally had forced PERS's funding level down to about 65 percent.[77] In response to this crisis, Oregon's political branches reached agreement under which a third class of government employees was created.[78] This category of employment has alternatively been called Tier Three or the Oregon Public Service Retirement Plan (OPSRP).[79] This third tier of employment benefits, along with certain attempted adjustments to Tiers One and Two, came before the Oregon Court in the case of *Strunk v. PERB*.[80]

In *Strunk,* the state supreme court appeared to have grown aware of the error it had made in *OPSOA*, at least initially. It recognized, as indeed it must have done, that the *OPSOA*

> [c]ourt [had] invalidated the amendments as unconstitutional impairments of that contract. In reaching that conclusion, the court concluded that each of the statutory PERS provisions at issue—that is, the provisions permitting employer "pick-up" of the employee's contribution, guaranteeing an assumed earnings rate, and providing for inclusion of unused sick leave in benefit calculations—constituted terms of the PERS contract that applied even to work yet to be performed.[81]

> to the extent that it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985); see also Tennessee v. Garner, 471 U.S. 1 (1985); United States v. Grace, 461 U.S. 171, 180–83 (1983).

The *OSPOA* court ignored these basic rules.

[77] *See supra* p. 12.

[78] *See, e.g., Moro*, 357 Or. at 178.

[79] *See Moro*, 357 Or. at 178 n.7 ("Although OPSRP has a different name and appears in a different ORS chapter, *see* ORS chapter 238 (setting out Tier One and Tier Two benefits) and ORS chapter 238A (setting out OPSRP benefits), all three categories are PERS members, *see* ORS 238.600(1) ("The Public Employees Retirement System consists of this chapter and ORS chapter 238A.").

[80] *See Strunk v. PERB*, 108 P.3d 1058 (2005).

[81] *Id.* at 1075 (citing *OSPOA*, 323 Or. at 372–79, 918 P.2d 765). The *Strunk* court's treatment of *OSPOA* remained gingerly throughout. Later in the opinion, in dealing with the question of whether the employees' 6 percent "contributions," if picked up by their employers, could then be shunted into individual accounts that did not qualify for minimum guarantees or matching, the court asserted that

> *OSPOA*, however, stands for only the proposition that the legislature promised members that the permissible employer pick-up of member contributions, assumed earnings rate for Tier One members, and unused sick-

Yet the court also went out of its way to note that "if certain circumstances are met, 'one legislature may bind a succeeding legislature to a particular course of action.'"[82] In the normal course of events,

> legislative enactments may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state. It is also equally well established that the intention of the Legislature thus to create contractual obligations, resulting in extinguishment to a certain extent of governmental powers, must clearly and unmistakably appear. The intention to surrender or suspend legislative control over matters vitally affecting the public welfare cannot be established by mere implication.[83]

The court aimed what appears by some lights to be another implicit swipe at the *OSPOA* court's conclusory assertion that Measure 8 had violated the federal constitution, by reminding itself of the Oregon Supreme Court's usual order of analysis: considering state law claims before federal claims (and statutory claims before constitutional ones).[84]

When it was driven to defend the *OSPOA* result, the *Strunk* court did so only with regard to Section 11 of Article IX of the Oregon Constitution (that is, the second provision of Measure 8 of 1994),[85] the provision that forbade the state to guarantee a rate of return on pension investments to individual employee contributors.[86] And because the political branches in their 2003 reform efforts had constructed legislation designed (reasonably enough) in response to the dictates of *OSPOA*, that defense was both convoluted and a matter of dictum.

> leave accrual provisions of the PERS statutory scheme were promissory and applied even to work yet to be performed. However, nothing about the court's interpretation of the statutory provisions at issue in *OSPOA* mandates a conclusion different from the one that we have reached after analyzing the text and context of ORS 238.300 (2001).

Id. at 1086–87. The *Strunk* court very neatly there sidestepped the question of whether the *OSPOA* decision still constituted good law, as well as demurring to refer to it as such even as a matter of dictum.

[82] *Id.* (citing *Hughes* at 13, 838 P.2d 1018).

[83] *Id.* (quoting Campbell et al. v. Aldrich et al., 159 Or. 208, 213, 79 P.2d (1938).

[84] *See id.* (citing State v. Kennedy, 295 Or. 260, 262, 666 P.2d 1316 (1983)).

[85] *See supra* note 76.

[86] *Id.*

One of the immediate accelerants of the 2003 crisis was the decision by the PERB to pay into all employee retirement accounts in the late 1990s not the guaranteed return, but a figure based on the actual returns earned by PERS investments during those years of high cotton, returns that reached a maximum of 20 percent in 1999.[87] This "generosity" to government employees constituted a startling application of fiduciary duty, given the economic and financial maxim that good times do not last forever. In fact, the good times ended very quickly, with the bursting of the dot-com bubble and the financial ramifications of the 9/11 attacks. When the markets fell, so did PERS receipts, while the program's guaranteed return to Tier One employees remained fixed. The result was a spectacularly fast deterioration of PERS funding.[88]

Given this locus of the emergency, then, the legislature quite reasonably looked to draw back some of that windfall from Tier One members without running up against the wall that Measure 8 had hit. In the eyes of the court, Section 11 of "Measure 8 had presented an all-or-nothing scenario, in *eliminating in its entirety* the legislative promise that Tier One members would receive annual crediting to their regular accounts in an amount not less than the assumed earnings rate."[89] As the *Strunk* court recognized, the 2003 legislation very carefully attempted not to undermine the guaranteed payment to Tier One employees at all. Rather, it developed a complicated scheme by which to lower some future contributions to Tier One employees while still guaranteeing those employees no less than what the guarantee would have provided them had they been credited with that amount all along, but drawing back into the PERS fund some of the late-1990s overpayment largesse.[90]

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[87] *See Strunk*, 108 P.3d at 1100 and *passim*.
[88] *Id.*
[89] *Strunk*, 108 P.3d at 1091. Never mind, as noted previously, the tradition that courts strike down only those portions of provisions that are actually unconstitutional. *See supra* note 76.
[90] This drawback process is described in some detail in *Strunk*, particularly at 108 P.3d 1100–101.

The *Strunk* court ultimately struck down this effort, asserting that "Tier One members' regular account balances currently reflect annual earnings credits that often exceeded the assumed earnings rate. Those prior earnings crediting decisions, whether or not they are deemed to have been overly generous in hindsight, are now final. To the extent that those final crediting decisions are reflected in Tier One members' regular account balances, no less than the assumed earnings rate must be credited annually to those account balances until retirement."[91] In other words, the *Strunk* court at the last hurdle relied on the *OSPOA* conclusion, but perhaps—as all the throat clearing throughout the decision suggests—because the *OSPOA* decision was not directly challenged by the 2003 legislation. At any event, the faulty *OSPOA* conclusion that the federal Contract Clause protects prospective, as-yet-unearned pension benefits in an open-ended employment contract with government employees received no more examination than it had in 1996—which is to say none at all.

D. Compounding Interest II: The 2015* Moro *Decision

So the problem compounded: incautious wording in *Hughes*, misinterpreted to support a serious misconstruction of the federal Contract Clause in *OPSOA*, then exacerbated by shortsighted overgenerosity in the late 1990s and ratified by both the legislative efforts to accommodate *OPSOA* and the *Strunk* court's ultimate failure to repudiate it. Enough of the political branches' 2003 reforms passed muster under the state supreme court's interpretations, when matched with a few years of good returns in mid-decade, to push a further crisis a few more years down the road.[92] (Essentially, the reforms that got through were the creation of the Tier Three, Bronze

[91] *Strunk* at 1093–94.
[92] *See Moro*, 357 Or. at 182 ("The 2003 reforms helped to stabilize PERS. Before the 2003 legislation, PERS's liabilities were growing by about 12% per year. After the 2003 legislation, PERS's liabilities grew by about 3 to 4%

level of benefits for Oregon's 21st-century government hires[93] along with a devil's bargain to exempt most employees from paying anything toward their own pensions in exchange for having that 6 percent contribution moved out of the guarantee, money match, and COLA structures into accounts that merely tracked actual investment returns.[94]) When those few years of good returns fell away again, rather dramatically, toward the end of the decade,[95] "collaring" stepped in to spread (and therefore initially to hide, while ultimately back-loading) the impact.[96] Despite all of this, by 2013 the political branches found it necessary to propose further changes to the system—and, of course, met resistance from government employees in the courts.[97]

By 2013, hemmed in by bad precedent and the fixed, massive obligations occasioned by those bad supreme court decisions, the political branches had few options. "Approximately 60 [percent] of the unfunded actuarial liability" by then swamping the system "was owed to retired members." Attempting to make some dent in this massive cost, the 2013 legislation primarily targeted the COLAs of up to 2 percent for PERS members. As enacted, it would have applied to all PERS members, including both those who had already retired and those who had not yet

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per year. Additionally, between 2003 and 2007, the fund's investments consistently earned well over the anticipated rate of return. After being only 65% funded in 2003, PERS was 98% funded by December 2007 and had about $1.5 billion in unfunded actuarial liability.").

[93] *See supra* pp. 12–13.

[94] *Id.*; *Moro*, 357 Or. at 181 ("[M]ember contributions are placed into a separate IAP account that funds an IAP annuity. Although the IAP contributions are also invested, there is no guaranteed rate of return on those investments, even for Tier One members. *Strunk*, 338 Or. at 164. Further, the IAP annuity is not paid for the life of the member, and it is not subject to a COLA. *Id.* The IAP annuity consists only of the money that exists in the member's IAP account at the time that the member retires. Because the member receives only his or her contributions and the investment income from those contributions, the IAP annuity can be viewed as a defined contribution component of the member's retirement benefit and presents no risk of unfunded actuarial liability.").

[95] *See, e.g., Moro*, 357 Or. at 172 (the PERS fund lost 27 percent of its value with the onset of the Great Recession in 2008); 183 ("Those losses left the fund substantially underfunded. By December 2008, one year after determining that PERS was 98% funded, the board determined that PERS was only 71% funded and had about $16.1 billion in unfunded actuarial liability.").

[96] *See supra* p. 7.

[97] *See, e.g., Moro*, 357 Or. at 184 ("The legislature responded to the effect of the recent recession on PERS with statutory amendments in 2013.").

retired. The 2013 legislation also would have, in brief, significantly reduced the extant formula for all PERS members for all future years[98] while making compensatory payments for the 2014–2019 period to those members already retired.[99]

In *Moro v. State*, the court struck down most—but, centrally, not all—of this COLA adjustment in a way that effectively overruled its *OSPOA* mistake.[100] The court struck down the adjustment as applied to all benefits already earned, including necessarily all those of all PERS members who had already retired, but it permitted the adjustment to be applied to all benefits of all members that had not yet been earned as of the passage of the legislation.[101] The court wrote that

> insofar as the [COLA adjustments] apply retrospectively to benefits earned before the effective dates, the COLA amendments impair the PERS contract and violate the state Contract Clause. Petitioners, however, have no contractual right to receive the pre-amendment COLA for benefits that they earned on or after the effective dates of the amendments—that is, benefits that are generally attributable to work performed after the amendments went into effect. In the absence of specific contract rights outside the PERS statutes, the COLA amendments do not violate the state or federal Contract Clauses when applied to benefits earned on or after the effective dates.[102] . . . PERS members who have worked for participating employers both before and after the relevant effective dates are entitled to a COLA rate that is blended to reflect the different COLA provisions applicable to benefits earned at different times.[103]

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[98] *Id.* at 186 ("During its regular legislative session in 2013, the legislature passed SB 822, which reduced the COLA cap from 2% to 1.5% for 2013 and then imposed a graduated COLA cap based on a member's total annual retirement benefit beginning in 2014. SB 822, §§ 1–9. SB 822 reduced the COLA cap, but the COLA was still based on the Portland CPI and could still be banked. After passing SB 822, the legislature revisited the issue during a special session in September 2013. In that special session, the legislature passed SB 861, which made more dramatic changes to the COLA system beginning in 2014, replacing the graduated COLA cap of SB 822 before it went into effect. SB 861, §§ 1, 4. SB 861 converts the COLA benefit to a fixed COLA that is not based on the Portland CPI and is no longer subject to a COLA cap or COLA bank. The fixed annual COLA available under SB 861 is also graduated, although it is generally lower than the previous COLA caps, providing a 1.25% COLA on the first $60,000 of the retirement benefit and a 0.15% COLA on all benefits above $60,000.").

[99] *Id.* ("To soften the impact of those changes, SB 861 also provides for supplemental payments for retired members to be paid from 2014 to 2019. Under SB 861, the board may provide retired members with an annual payment of 0.25% of their yearly retirement benefit, but not to exceed $150. Further, members receiving less than $20,000 per year in retirement benefits will receive a separate annual payment of 0.25% of their yearly retirement benefit, which can total up to $50. The supplemental payments, unlike the COLA, are not added to the service retirement allowance or OPSRP Pension[.]").

[100] *Id.* at 174, 196–220.

[101] *Id.*

[102] *Moro*, 357 Or. at 173.

[103] *Id.* at 174.

The court reached this conclusion first by recognizing explicitly that the state Contract Clause cuts down only legislation—or that part of legislation—that has retrospective effect.[104] To determine whether a statute that changes an existing open-termed contract with government workers or contractors may stand, the court must determine "(1) is there a contract?; (2) if so, what are its terms?; (3) what obligations do those terms require?; and (4) has the state impaired an obligation of that contract?"[105] Because the state, or one of its instrumentalities, is necessarily a party to all government worker contracts, the analysis extends to consider the unique position of government.

On the one hand, enforcing state contracts binds the state to its previous promises, which were made to advance its previous policy goals. Requiring the state to meet those obligations can prevent or hinder the state's pursuit of its current policy goals by limiting funds available to pursue those goals. On the other hand, the state would be unable to pursue its current policy goals if it were unable to bind itself at all—that is, if it were unable to make any enforceable promises to other parties.[106]

In working out these competing considerations, the court looks to ensure that the state is not contracting out its police powers and applies a general canon of construction against finding that statutes have created contracts, particularly contracts that bind future polities in unnecessary ways.[107] A contractual obligation will thus "not be inferred from legislation that does not unambiguously express an intention" to create that obligation.[108] (This proposition is sometimes

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[104] *Id.* at 194.
[105] *Id.* (quoting *Strunk*, 338 Or. at 170 (citing *Hughes*, 314 Or. at 14)).
[106] *Id.*
[107] *Id.* at 195, 226 ("[L]egislatures generally do not intend to bind future legislatures. An irrevocable statutory offer—particularly one that could involve potentially decades of new and significant financial liabilities—would deviate widely from that general presumption.")
[108] *Id.* (quoting *Hughes,* 314 Or. at 14).

referred to as the "unmistakability doctrine," and it applies not only to the question of whether any contract has been formed, but what contractual provisions have been offered.[109])

And then, as it must—having addressed Contract Clause and sovereignty theory squarely, the *Moro* court abandoned its *OSPOA* (and in effect, though not expressly, its *Strunk*[110]) positions fairly categorically.[111] "The PERS contract binds a participating employer to compensate a member for only the work that the member has rendered and based on only the terms offered at the time that the work was rendered, even if the employer changed that offer over time."[112] Hence, the only way that prospective changes could be barred by the Contract Clause would be if the PERS contract itself included an unambiguous, express promise[113] not to change the contract terms once they had been accepted by government employees beginning their work.[114]

The *Moro* decision, however belatedly, properly recognized the retroactive versus prospective distinction in Contract Clause and sovereign-contracting jurisprudence.

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[109] *Id.* at 202.
[110] The *Moro* court refused to disavow *Strunk* for the proposition that the COLA, as well as its size and (where applicable) the COLA bank, are all terms of the PERS contract for purposes of retroactive immutability. *See, e.g., Moro* at 213 ("respondents ask us to disavow our analysis of the COLA provision in *Strunk*"), 217 ("We therefore reject respondents' reading of the legislative history of the COLA provisions and conclude that nothing to which we have been directed by respondents undermines our prior conclusion in *Strunk* that the COLA is a term of the PERS offer."), and preceding pages. The *Moro* court effectively and at length, however, disavowed *Strunk* for the proposition that the legislature was in any way precluded from making *prospective* changes to the COLA. *See generally id.* 192–222. The court does make serious efforts, though, to highlight the points in *Strunk* upon which it did not err. *Id.* 222–26 (focusing on the *Strunk* court's rulings with regard to the IAP and noting its efforts to distance itself from *OSPOA*, though not on the issue of prospectively applicable COLA legislation).
[111] *See id.* at 225 ("*OSPOA* prohibited prospective amendments based on a particular view of pension plans that is not supported by *Taylor* and is inconsistent with our earlier decision in *Hughes*, with our later decision in *Strunk*, and with the analysis set out above. As a result, we go a step further than we did in *Strunk* and disavow the reasoning that we applied in *OSPOA*.").
[112] *Id.* at 201 (citing Corbin, 1 CORBIN ON CONTRACTS § 3.16 at 387 ("The employee accepts the offer by merely continuing to render the specified service, and becomes entitled to the promised salary in proportion to the work actually done.")).
[113] *Id.* ("Even under the reasoning of *Hughes* and *Strunk*, participating employers may nevertheless be required to continue to offer the pre-amendment [] benefit if the irrevocability is an express term of the contractual rights that the employees accrued before the effective dates of" the legislation purporting to alter those benefits.).
[114] *Id.* at 201–202.

Nevertheless, the distinction as applied to the 2013 reforms—application that never considered the status of the Measure 8 provisions—effectively added $5 billion (or nearly one-third) to the now-current pension funding shortfall (from about $16 billion to about $22 billion).[115]

E. The Bills All Come Due: The Crisis at Hand

Whatever the incipient and immediate causes of the present funding crisis, a solution to it has to come from somewhere. The voters of Oregon seem little interested in a solution based on increased taxes. Despite the 2016 elections representing a continuing consolidation of Republican representation and control in state legislatures across the country,[116] Oregon remained firmly in the blue column, electing the incumbent Democratic governor to a first term of her own.[117] At the same time, Oregon left Democrats in control of all but one statewide office and in nearly overwhelming control of each house of the state legislature.[118] This outcome followed a 2014 cycle in which the state was the only one in the country entirely to buck a strong pro-Republican trend.[119] Nevertheless, the voters of Oregon rejected a ballot measure to impose what would effectively have functioned as the state's first comprehensive sales tax by a nearly 60–40 percent margin in an election in which most other ballot measures passed by healthy

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[115] *See, e.g.*, *Oregon PERS Unfunded Liability Swells*, *supra* note 19; *Moro*, 357 at 191; Wong, *supra* note 8; Sickinger, *Borrowing* ("Lawrence Furnstahl, a member of the pension system board and chief financial officer at Oregon Health & Science University, noted that 80 percent of the pension system's existing liabilities represent benefit payments to retirees and older workers that have already been earned. The Oregon Supreme Court's 2015 decision essentially said those accrued benefits are untouchable, so most of the liability is fixed."). The sustained portions saved less than half a billion dollars. *Id.* ($390 million for removing the tax offset for non-Oregon-resident retirees).

[116] *See, e.g.,* K. K. Rebecca Lai, Jasmine C. Lee & Karl Russell, *In a Further Blow to Democrats, Republicans Increase Their Hold on State Governments*, N.Y. TIMES (Nov. 11, 2016).

[117] *See, e.g.,* Chris Lehman, *Oregon Elects Kate Brown as Governor*, OPB.ORG, Nov. 8, 2016.

[118] *See, e.g., Oregon Results*, OREGONIAN (Nov. 10, 2016), *available at* http://gov.oregonlive.com/election/ (last accessed July 18, 2017).

[119] *See, e.g.,* Taylor W. Anderson, *In Face of Republican Tide, Oregon Shifts Left*, BEND BULL., Nov. 6, 2014.

margins.[120] This rejection occurred despite the fact that supporters of the measure sold it as an opportunity to significantly improve very popular public services such as education and healthcare.[121] If the Oregon polity, surely one of the bluest in the union in the past couple of cycles, still remained so averse to significant tax increases in 2016 the odds are small that it will come around to the idea in time to address the state's pension problems.

II. Current Reform Efforts

The dimensions of the post-*Moro* crisis rocketed back into the state's headlines in the fall of 2016, as Rukaiyah Adams, the vice-chair of the Oregon Investment Council, with the support of her colleagues and the state's pension professionals, made the following statement:

> "My call to the Legislature and to the governor is for leadership on this, and I mean right now," Adams said during last Wednesday's joint meeting of the Oregon Public Employees Retirement System board and the citizen panel that oversees its investments. "This is becoming a moral issue. We can't just talk about numbers anymore."[122]

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[120] *See, e.g., Oregon Results*, OREGONIAN (Nov. 10, 2016), *available at* http://gov.oregonlive.com/election/ (last accessed July 18, 2017).

[121] *See, e.g.,* Hillary Borrud, *Oregon Corporate Tax Measure 97 Defeated: Election 2016 Results*, OREGONIAN, Nov. 8, 2016. The text of Measure 97 provided that "[a]ll of the revenue generated from the increase in the tax created by this 2016 Act shall be used to provide additional funding for: public early childhood and kindergarten through twelfth grade education; healthcare; and, services for senior citizens. Revenue distributed pursuant to this section shall be in addition to other funds distributed for: public early childhood and kindergarten through twelfth grade education; healthcare; and, services for senior citizens." OREGON GENERAL ELECTION BALLOT MEASURE 97, § 3 (2016). Of course, funding for these services includes funding for the salaries, benefits, and pensions of government employees working in these areas (although this was certainly not part of the pro–Measure 97 campaign). The terms cannot in any good-faith way be stretched to include pension funding for already-retired employees who could not provide any future service, but it is unclear whether such etiquette was considered. At all events, there is significant evidence that a material section of the Oregon electorate fully expected these increased tax revenues to be used to fund the cavernous state budget deficit and the PERS funding shortfall. *See, e.g., id.* ("Measure 97 opponents . . . said lawmakers could spend the revenue as they wanted simply by passing budget bills"); *Editorial: A Silence Surrounds PERS Reform*, ALBANY DEMOCRATIC HERALD, Sept. 30, 2016 ("The silence from the leadership [about how to fix the pension crisis] is helping to fuel the theory that the real purpose of Measure 97 . . . is to fund these growing PERS liabilities [though t]hat's not how the measure is being pitched to voters"); Sickinger, *Oregon Officials*; Letters to the Editor, *Oregon Pensions and Measure 97: "I Can No Longer Keep Quiet,"* OREGONIAN, Sept. 27, 2016 (reader expressions to similar effect); Ted Sickinger, *PERS: Five Things to Know About Oregon's Pension Problem*, OREGONIAN, Dec. 1, 2015 ("Unions are backing a ballot measure to raise taxes on large corporations that they claim could raise $2.5 billion per year. That's enough to pay the pension bill and then some.").

[122] Sickinger, *Oregon Officials*.

Response to this call, for all its urgency, has taken on a predominantly—although not entirely—partisan cast. The governor and the majority leadership of each house of the state legislature, who have not acted to find a solution in this area, have said that they are out of ideas,[123] have asked state business leaders to take the lead,[124] and have perhaps hoped for *deus ex machina* solutions like Measure 97 or financially incoherent pension-bond schemes[125] to fix the problem for them. Once Measure 97 was defeated, the legislative leadership agreed to hold hearings about the pension crisis in the 2017 legislative session,[126] but it has made no commitments to take action and seems to be making little effort to develop proposals.

Various individual legislators, including particularly a pair of state senators, have taken the helm. Senators Betsy Johnson (a Democrat) and Tim Knopp (a Republican) established, in the summer of 2016, an ad hoc, unofficial PERS reform committee designed to begin public proceedings to develop new ways of meeting the crisis. Through their efforts and those of fellow legislators, a variety of ideas have been floated for consideration in this term. These have included the following: (1) changing the formula by which pension compensation is determined; (2) disallowing sick and vacation leave, and capping salaries used, in such

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[123] *Id.* (Governor Brown, Senate Majority Leader Peter Courtney, and House Speaker Tina Kotek "insist there are no more money-saving moves that could be both legally viable and economically significant.").

[124] *See, e.g.,* Taylor W. Anderson, *Oregon Business Leaders Call for Reform*, BEND BULL., Dec. 6, 2016 ("Gov. Kate Brown told the group they need to lead the way, but she said PERS reform can't be the only cost-saving measure on the table. . . . 'This is my challenge to you: come up with ideas and proposals,' Brown said. 'Bring these solutions that restore fairness and balance to our tax system.'").

[125] *See infra* at section III.H. Another such scheme of Governor Brown's is "a plan to restructure the Oregon Treasury's investment management division that could potentially save fees paid to Wall Street firms." Sickinger, *Oregon Officials*. This proposal has been defeated three times by legislatures with enormous Democrat majorities and, even if approved and successful as hoped, would raise no more than a billion dollars over 20 years. It is thus effectively irrelevant as a solution to the present crisis.

[126] *See* Dear Colleagues Letter from Senators Kathleen Taylor and Tim Knopp to colleagues (undated) (seeking reform proposals from Senate colleagues) [hereinafter Dear Colleagues Letter], https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/95149; Ted Sickinger, *Oregon Lawmakers to Consider Money-Saving PERS Proposals*, OREGONIAN, Feb. 2, 2017 (confirming legislative willingness to take up the issue); Ted Sickinger, *Pension Reforms Back on the Table for 2017 Legislative Session,* OREGONIAN, Jan. 10, 2017 (noting governor's continuing hesitancy to address the issue).

determinations; (3) making changes to the retirement age; (4) using market rates to calculate the Tier One guarantee; (5) requiring employees to pay their own contributions again; and (6) shutting down the pension program altogether for future work (largely as an intellectual framing exercise, it seems).[127]

Of these ideas, two became concrete legislation introduced at the beginning of the 2017 legislative session. The first of these bills addresses the fact that Oregon is the only state in the union that effectively requires no contribution from employees toward the state's retirement fund.[128] Whereas employees have had—nominally, at least—6 percent of their salaries withheld for retirement, that withholding has not been dedicated to funding PERS since 2003; rather, it has been put aside in supplementary retirement accounts for employees.[129] For more than two-thirds of state employees, that nominal 6 percent payment has been picked up by local employers, so that the vast majority of workers make no contribution to the state's retirement funds and their specific employers make the sole contribution to their supplemental accounts.[130] The bill would require employees to pay the 6 percent into the PERS fund rather than into IAPs, although it would continue to allow employers to pick up the payment.[131] The bill would also adjust the pension calculation model by capping salaries that could be used for this purpose at $100,000.[132]

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[127] *See* Letter from Dexter A. Johnson, Legislative Counsel Committee, to Sen. Betsy Johnson (Aug. 31, 2016) (on file with author and available by request from the offices of Sen. Betsy Johnson or Sen. Tim Knopp) [hereinafter Letter from Dexter A. Johnson].
[128] *See* S. 560, 79th Oregon Legis. Assemb. (2017) (hereinafter S. 560); *supra* at section I.C (discussing the 2003 bargain that pushed employee contributions into IAPs and then allowed employers to pick up those contributions).
[129] *See* S. 560, 79th Oregon Legis. Assemb. (2017) (hereinafter S. 560); *supra* at section I.C; Ted Sickinger, *PERS: Lawmakers Look for Pension Reform Ideas in Salem*, OREGONIAN, Sept. 24, 2016.
[130] *See* S. 560, 79th Oregon Legis. Assemb. (2017) (hereinafter S. 560); *supra* at section I.C; Ted Sickinger, *PERS: Lawmakers Look for Pension Reform Ideas in Salem*, OREGONIAN, Sept. 24, 2016.
[131] *See* S. 560.
[132] *Id.*

The other bill proposes to adjust the pension calculation model by using a five-year average, rather than a three-year average, to determine "final compensation," a measure designed to minimize opportunities for salary spiking.[133]

A departing member of the Oregon Investment Council, Kat Durant, also made a series of proposals on her way out. In addition to ideas that materially duplicate those already suggested, Durant proposed requiring that the discount rate be reduced significantly for all purposes in order to force a real reckoning with the crisis in its fullness; requiring the state by law to make regular debt payments; moving all elected officials to a fixed, defined contribution pension fund to minimize conflicts of interest; increasing the retirement age for government workers across the board to 67; and attempting to stop COLA increases for current retirees.[134]

Sen. Knopp and the majority leader of the Senate Committee on Workforce, Sen. Kathleen Taylor (a Democrat), have sought additional proposals from their colleagues and intend to take up the issue later in the 2017 session.[135]

III. The Way Forward

Some of the ideas that relevant political actors are now considering are self-evidently wise; others require more analysis; and some must straightforwardly be rejected. The analysis previously undertaken in section II, meanwhile, suggests some important developments and proposals that appear not yet to have been considered by parties addressing Oregon's pension crisis, most particularly developments and proposals arising from the as-yet-unexplored question of the current status and effect of the Measure 8 provisions. What follows is not a complete and

[133] *See* S. 559 (79th Oregon Legis. Assemb., 2017); Catherine Saillant, Maloy Moore & Doug Smith, *Salary "Spiking" Drains Public Pension Funds, Analysis Finds*, L.A. TIMES, Mar. 3, 2014 (describing salary spiking).
[134] Editorial, *Lots of PERS Ideas, but None Good Enough for the Governor*, BEND BULL., Dec. 10, 2016.
[135] *See* Dear Colleagues Letter.

systematic evaluation of every proposal that has been raised, but rather a set of proposals and analysis arising from the work undertaken in this article.

A. Constitutional Revival?

As previously noted, in *Moro* the Oregon Supreme Court recognized explicitly what it had ignored in *OSPOA,* that the federal Contract Clause has *no prospective effect*.[136] In fact, the court explicitly disavowed *OSPOA*.[137] Left unaddressed in *Moro* or elsewhere, however, is the meaning of these developments for the Measure 8 provisions. As the provisions remain in the Oregon Constitution, and no grounds have ever existed for thwarting their application, they are now either entirely operative or simply waiting to be revived.

There can be no doubt that the Measure 8 provisions remain a part of the state constitution. They have never been repealed, either expressly or by necessary implication of any subsequent constitutional amendment.[138] It is a rare thing for a court to find a state constitutional

[136] *See Moro*, 357 Or. at 192 ("The state Contract Clause, Article I, section 21, of the Oregon Constitution, states that '[n]o . . . law impairing the obligation of contracts shall ever be passed[.]' OR. CONST., art. I, § 21. That provision was adopted in 1857 and derived from the federal Contract Clause, Article I, section 10, clause 1, of the United States Constitution. *See* Eckles v. State of Oregon, 306 Or. 380, 389, 760 P2d 846 (1988) (tracing the history of the state Contract Clause). As a result, we have interpreted the state Contract Clause as being consistent with the United States Supreme Court's interpretation of the federal Contract Clause in 1857. *See id.* at 389–90 (inferring from the history of the state Contract Clause that 'the framers of the Oregon Constitution intended to incorporate the substance of the federal provision, as it was then interpreted by the Supreme Court of the United States')"); 193 ("It has been clear since 1827 that the [federal Contract] Clause applies only to laws with retrospective, not prospective, effect" (quoting Breyer, J. [now Justice Breyer]).); 192–222 (general discussion of the court's revised understanding of the Oregon state Contract Clause, explicating this amended position).

[137] *Id.* at 225. The *Moro* court's exact words were that "we . . . disavow *the reasoning* that we applied in OSPOA." *Id.* But as has been considered, the *OSPOA*'s only possible ground for blocking the application of a duly approved state constitutional amendment was the federal Constitution, *see supra* p. 21 [re: previous state constitutional provisions]. Further, its sole and unexamined ground for using the federal Contract Clause for that purpose was based entirely on the proposition that the federal Contract Clause would forbid *prospective* application of the Measure 8 provisions, Sections 10 through 12 of Article IX of the Oregon Constitution. *See supra* p. 21–23. Having explicitly disavowed the operative reasoning of *OSPOA*, the court has implicitly but necessarily disavowed the holding as well.

[138] *See* OR. CONST. art. IX, §§ 10–13. The only other portion of the Oregon Constitution that deals with pensions or pension reform in any way is Article XI-O of that document, incorporated in 2003. Article XI-O permits the state government to borrow up to 1 percent of the market value of "the real market value of all of the property in the

amendment unconstitutional under federal law, by the very nature of the enterprise. It is even rarer for a court to have found a state constitutional amendment unconstitutional on fatally flawed grounds that it then abjures. But where, as here, such a case has arisen, constitutional theory dictates that the amendments have *some* continuing vitality. Uncertainty arises only in determining the elasticity of that vitality, the means of reestablishing that vitality, and the full ramifications of that vitality.

Three theoretically viable alternatives are available for deciding the question of "elasticity," or *when* the Measure 8 provisions became operative again. The most constitutionally appropriate position would be to conclude that Measure 8, because ruled unconstitutional on mistaken grounds, has remained vital since its incorporation into the Oregon Constitution. This position would make all unblended Full Formula–determined payments[139] and all employee failures to themselves pay their 6 percent contribution into the PERS fund (as well as some meaningful, blended application of the Section 12 provisions) technically unconstitutional (though, as considered later, such a conclusion would not require roving bands of state troopers to invade the retirement homes of Oregon's former state workers, seizing dinette sets and impounding family cars). A second choice would be to find that the provisions had revived on the day that *Moro* was delivered—the day on which the Oregon Supreme Court expressly disavowed the reasoning of its previous decision. A third position would be to permit nonenforcement to continue until an appropriate plaintiff has driven the question back through the courts, reached the Oregon Supreme Court, and received the determination required by the *Moro* court's conclusion.

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state" to fund government pensions, but it in no wise undermines or supersedes any of the provisions of Article IX. *See* OR. CONST. art. XI-O.

[139] These have continued in significant number since 1995. *See, e.g., Strunk*, 108 P.3d 1058, 1070, n. 18; *Moro*, 357 Or. 167, 179–85.

Of these three, the first option does most honor to constitutional theory and to the voters of Oregon. The *OPSOA* decision was an ill-considered error. That error has caused the will of the voters of Oregon to be thwarted for 20 years without justification and thus has resulted in the financial mess in which PERS and the state and its municipalities find themselves today. This crisis never should have been—and many of the consequences of the error cannot in any way be undone. This first option, though, recognizes that the Measure 8 provisions were, *as a matter of law* (matters of equity and practicality will be considered later), never inoperative, and therefore it offers the greatest scope for minimizing the ill effects of the Oregon Supreme Court's *OSPOA* decision.

Both the first and second options (i.e., that the Measure 8 provisions were revived *sua sponte* upon the publication of *Moro* and the court's disavowal of *OSPOA*) also minimize opportunities for chicanery or (less cynically) unintentional bias. If the Measure 8 provisions have *already* been revived, then all parties have natural incentives to have the court say so as soon as possible and to give full content and meaning to the recognition of its significant error. But if the third option obtains, then parties who have reason to wish the *OSPOA* decision were a sustainable one, and who would like to see the Measure 8 provisions repressed as long as possible, have every reason to delay the court's formal revival of the provisions as long as possible. At the outside, this could even involve the Oregon Supreme Court's refusing to hear any cases raising the issue of Measure 8 revival.[140] (Because the *OSPOA* decision ultimately relied on a question of federal law, the plaintiffs could appeal the Oregon court's refusal to hear the case to the United States Supreme Court, but that court almost never takes such cases, and it

[140] The court would do this by refusing to grant certiorari on any question raising the Measure 8 issue.

takes very few of the cases referred to it at all.[141]) Even shy of this result, a new lawsuit would take at least a couple of years to work through the courts at the normal pace and thus would extend for those extra years the Oregon court's error while compounding its financial ramifications.

Of course, it is one of the oddities of this unique situation that the parties cannot know until the Oregon Supreme Court actually decides something about the Measure 8 provisions just *what* it is going to decide, and so those parties having an interest in extending the reach and ramifications of the court's *OSPOA* decision will have some *ex ante* inclination to slow-roll the decision. This inclination will be informed and chastened, however, by the knowledge that the Oregon court, in making its decision, will have an obligation to look neutrally to the future and to make the decision that minimizes the opportunities for either chicanery or subconscious dispositional bias in the future. This consideration will urge it to adopt one of the first two elasticity options.[142] (There are other indications that the court will not be eager to compound its error or to set up incentives for factions in the political branches to game the system against speedy error correction. The court has already expressly disavowed the logic of *OSPOA* and any other potential grounds for repressing the Measure 8 provisions;[143] further, it was at pains in

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[141] *See, e.g.,* Kedar S. Bhatia, *Likelihood of a Petition Being Granted*, DAILYWRIT BLOG, Jan. 10, 2013 (the likelihood that cert will be granted on a paid brief (i.e., non–*in forma pauperis* briefs, which are usually submitted by parties not represented by counsel, often imprisoned criminals) stands at about 4 percent).

[142] Alternatively, those favoring suppression of the Measure 8 provisions might take hope from the fact that the *OSPOA* court expressly failed in its decision to address the questions of whether previous state constitutional provisions or state laws might be drawn into service to keep those provisions from being enforced. *See OSPOA*, 918 P.2d 765, *passim.* This, though, is a forlorn hope. The *Moro* analysis precluded the state Contract Clause from having had the power to thwart Measure 8 on the same grounds that the federal Contract Clause will not do that work. *See Moro*, 357 Or. at 192. Meanwhile, it makes no sense even to talk about earlier state constitutional provisions having the power to negate *later* constitutional amendments, far less the possibility that mere statutes, whenever enacted, might thwart constitutional provisions. *See supra* note 68 (lengthy consideration of this issue). The only argument that could conceivably succeed is one asserting that explicit promises had been made in statutory contracts to all PERS workers that after their hire, the provisions included in Measure 8 would never be enacted in ways that would affect them, even for work not yet undertaken (i.e., prospective work). And the facts of the situation simply belie this argument.

[143] *See supra* note 142.

Moro to underscore the ways in which *Strunk* diverged from *OSPOA*, while carefully failing to mention the portion of *Strunk* that has effectively been disavowed along with *OSPOA*.)

As has just been recognized, there will eventually have to be a suit to the Oregon Supreme Court that tests the question of reviving the Measure 8 provisions and that allows the court to determine the date, scope, and ramifications of that revival. When that case is heard, though, how it gets to the court and what happens before are decisions that lie in the hands first of the legislature and then of the municipalities and (perhaps) the people of Oregon.

The first opportunity for recognized revival lies with the Oregon legislature. Armed with *Moro*, the legislature could move legislation this year predicated on the fact that *OSPOA* is bad law and revive the Measure 8 provisions. The preferred content of such legislation is considered later in this article, but wise legislation would be written in the alternative to account for the various possible conclusions the court might reach as to the time of revival and the scope of revival's effects.

Writing such legislation in an airtight way, however, would prove extremely difficult and would, if designed for immediate implementation (an exigency that the seriousness of the situation prescribes), create the potential need to unwind several of its provisions depending on how the Court ruled. The political branches would, therefore, be well served to include in any such legislation—or perhaps as the sole pension-regarding act of this legislative session—a measure passing to the Oregon Supreme Court in its original jurisdiction the tasks of revisiting (in order to void) *OSPOA* and detailing the scope and ramifications of the revival of the Measure 8 provisions.[144]

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[144] The jurisdiction of the Oregon Supreme Court was originally established by Article VII of the admission constitution of 1859. This original Article VII remains in the present iteration of the state constitution, carrying this note:

Direct certification would have the effect of most rapidly maximizing certainty while minimizing litigation costs.[145] A failure of the legislature to act, either by new legislation or by special certification of a question to the Oregon court, cannot stop the question of Measure 8 revival from ultimately getting before the court unless the court simply refuses to take a Measure 8 case. Action remains likely because any plaintiff that has faced negative ramifications from the suppression of the Measure 8 provisions is free at any time to bring an action to require their revival. This group of potential plaintiffs includes every municipality and school district in Oregon, as well as the trade organizations that represent those organs of government. It may also include any Oregon taxpayers—all of whose taxes have been increased by the repression of the Measure 8 provisions over the years and who face nonspeculative obligations as a result of their continued nonobservance.[146]

The ramifications of the revival of the Measure 8 provisions, of course, depend in large part on the court's eventual determination of the date of revival. The preceding analysis demonstrates that important constitutional, ethical, and practical considerations favor a finding either that the provisions have in fact always been in legal force or that they came back into force

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> Original Article VII, compiled below, has been supplanted in part by amended Article VII and in part by statutes enacted by the Legislative Assembly. The provisions of original Article VII relating to courts, jurisdiction and the judicial system, by the terms of section 2 of amended Article VII, are given the status of a statute and are subject to change by statutes enacted by the Legislative Assembly, except so far as changed by amended Article VII.

OR. CONST. art. VII (Original), NOTE. Section 6 of the original Article VII limited the Oregon Supreme Court to the task of "revis[ing] the final decisions of the Circuit Courts." ART. VII (Original), § 6. Per the note, though, this provision was relegated by the revised Article VII to the status of statute—which means that it can be superseded by subsequent statute. Any legislature therefore has the power to certify any question, on any terms, to the Oregon Supreme Court by statute. The legislature could therefore either seek a declaratory or advisory decision in this matter by statutory provision or grant the Oregon Supreme Court original jurisdiction over any cases that arise under new pension reform legislation to determine the legality and application of that legislation and all previous state pension statutes or constitutional provisions.

[145] One of the objections that Governor Brown had raised to attempting any further reform was the cost of litigation. *See, e.g.,* Claire Withycombe, *Lawyers Who Challenged PERS Reforms Awarded $900,000 in Fees,* DAILY ASTORIAN, Oct. 27, 2016.

[146] *See, e.g.,* Gruber v. Lincoln Hospital District, 285 Or. 3, 7, 588 P.2d 1281 (1979) (Taxpayer standing is recognized in Oregon so long as the plaintiff can allege and prove a factual basis for the belief that he or she will have to pay proportionally more for goods and services than would be the case if the law were obeyed.).

upon the publication of *Moro*. Further considerations focused on the history of attempted pension reform in Oregon support a court conclusion that, as a matter of law, the provisions remained always in force. First, there was never any legitimate reason not to enforce them. Second, the passage of Measure 8, coupled with the legislative efforts of 2003 and 2015, illustrate a state whose polity and representatives have persevered with Yankee ingenuity and yeoman persistence to reform the PERS system in reasonable and measured ways, only to be overruled by the state's supreme court. A legal determination that the provisions were always in effect frees the political branches to undo, insofar as possible at this late date, the destructive results of these court errors.

A legal determination that the Measure 8 provisions were always the law of the land neither need nor would result—as those who support maximum possible pension payouts regardless of fiscal considerations will no doubt argue—in closing the public fisc to hundreds of thousands of retired government employees, abandoning them to misery and poverty. The same legislature and polity that have made these previous measured attempts at reform will be the motive actors in any future reforms, obviating this concern at a stroke. Moreover, as a practical matter, recapture of all the overgenerous payments that have been made over the past 20-plus years, however illegitimately, is practically as well as ethically and politically impossible.

What recognition of the continuing legal effect of the provisions *would* do, rather, is give the political branches an opportunity to cut spiraling pension costs in ways that emulate—perhaps precisely—attempts that have been properly enacted and improperly struck down in the past. The 2003 legislation, for instance, was in part explicitly and carefully designed to moderate some COLA payments to some retirees who had been granted a financially insupportable windfall in the late 1990s.[147] That effort was defeated by the *Strunk* court, whose decision

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[147] *See supra* p. 26.

required full COLA payments as promised for all funds already earned by current and retired workers and no changes to future COLAs designed to redress the inequitable overpayments of previous years. But a recognition that significant amounts of the payments to retirees made over the last 22 years have been straightforwardly unconstitutional, and therefore could not have been legitimate payments for work performed after 1995, should permit the political branches to fashion extremely equitable remedies such as COLA freezes for retirees and still-working Tier One members to redress, belatedly and in part, the windfall that these retirees and members have enjoyed for more than a generation.

At the very least, though—even if the court went with the third elasticity option—the revival of the Measure 8 provisions would have definitive, real-world results. First, the Full Formula guarantee would be terminated prospectively for all current employees who were still entitled to it. Second, all employees would be obliged to make—and all government employers would automatically be freed from picking up—the standard 6 percent employee contribution to PERS, a contribution that some 70 percent of employees are not currently making.[148] Finally, a blended use of stored sick-leave days would begin, with sick days not counted toward pension calculations for that period of work completed after the date on which the Measure 8 provisions were revived. Moreover, those changes would occur automatically, even if the legislature does nothing at all. This option gives those parties who are urging the political branches to act swiftly to make needed reforms significant leverage that would otherwise have been lacking against political leadership in the governor's office and in both houses of the legislature that thus far failed to find a solution.[149] The parties that have claimed to be out of ideas because their primary

[148] *See supra* p. 35.
[149] *See supra* p. 34 and *passim* (governor and majority leaders of both houses admitting that they had no ideas, asking public to come forward with their own). After these comments, the leadership did agree to hold hearings on the pension reform issue. *See id.*

constituencies are benefited the status quo can no longer hold that position: something is going to happen, no matter what. Meanwhile, a decision—the most appropriate decision—that the Measure 8 propositions have always been legally valid and that equitably appropriate adjustment must therefore proceed forthwith, will hang over them in very real form. These facts should spur the parties to participate in the legislative process in a meaningful way sooner than might otherwise have been the case.

Although the balance of argument stands very much in favor of finding that, as a matter of law, the Measure 8 provisions were always in effect, there nevertheless remains some possibility that the Oregon court will instead go with the third elasticity option—finding that revival occurs only on the day on which its next Measure 8 decision is published. Any legislation that the political branches enact should be designed to allow the easiest possible and fullest possible accommodation of any of the three possibilities. With that concern in mind, how should the political branches fashion this legislation? Various options are considered in the following subsections, including analysis of some ideas that are already floating around Salem.

B. Reviving the Drawback

One option that arises if the Oregon Supreme Court makes the right choice and concludes that the Measure 8 provisions were never constitutionally invalid or out of force would be to revisit the 2003 efforts to draw back some of the overgenerous largesse that the PERB passed on to retirees in the late 1990s, resulting in Oregon's retirees being some of the most generously compensated in the country while throwing the PERS fund into its current crisis.[150] Although the accounting for this drawback would likely prove fairly taxing and the politics would surely be

[150] *See supra* p. 26 and *supra* note 34.

fraught, the concept itself is straightforward. New legislation could cancel the COLAs for any retirees and the employer contributions for any current workers—and this should include most of the remaining members of Tier One and Tier Two—who have enjoyed excessive payments since 1995 until such time as those overpayments have been recouped. Similarly, legislation might recoup additional moderate sums from these retirees and from the accounts of still-working Tier One and Tier Two workers by stopping the state income tax payment offset or other benefits for these workers, or for those with higher pension benefits, as seems equitable.

Of course, a great many of the PERS members who have benefited from these overpayments for 22 years will already have passed away; many—probably most—others will not continue to collect pension benefits long enough to permit anything like full recoupment of their benefit overpayments by this method. Nevertheless, a COLA stoppage and other similar, muted drawback efforts are probably as much recoupment as is equitable or politically feasible. A complete stoppage of pension benefits, or a radical, speedy reduction of those benefits, would leave tens of thousands of retirees in potentially dire straits for which they could not reasonably have planned. This approach would do no equity and solve no problems because then as a political necessity the legislature would find itself scrambling to fashion new social programs to do the work that the state pension program had initially been designed to do, and to very little effect. Recouping overpayments slowly from the people who have enjoyed the lagniappe for more than a generation—especially those who enjoy public pensions far larger than any that most taxpayers can reasonably imagine for themselves—is not only equitable, it is the *only* just choice. Already, too heavy a burden has been placed on younger workers—who will never enjoy the "normal" benefits that had been granted to Tier One and Tier Two workers, much less enjoy anything like the sloshing overpayments of the fat years of the 1990s—and on the taxpayers,

almost none of whom will ever get within hailing distance of a defined benefits pension themselves, particularly those working in the private sector who pay public pension costs. Impoverishing longtime government workers and current retirees overnight after a career of government service because the courts have erred, though, cannot be justified.

C. Abolition of Prospective Pensions

One of the reforms that Senators Knopp and Johnson have asked the Oregon Legislative Counsel Committee to review is the abolition of all pension benefits for prospective government employee work. The response of counsel was tentative: it worried that the Oregon Supreme Court might find that the basic promise of a pension program of some sort (leaving aside the contours of that program) was an irrevocable promise, even with regard to work not yet performed.[151]

Public employees are likely to argue that the contract right to receive a defined benefit based on some combination of salary and years of service is explicitly irrevocable as the essential foundation of PERS. Note that the 2005 case of *Strunk v. PERB*, which was not disavowed by *Moro*, concluded that the "1981 Legislative Assembly promised each eligible member that, at retirement, the member would be entitled to receive a service retirement allowance calculated under the formula that yielded the highest pension amount." This suggests an argument that the right to receive a defined benefit pension is an explicitly irrevocable term of the PERS contract.

Public employees might also argue that the right to receive a pension is implicitly irrevocable because it takes time to complete the years of service necessary to accrue the full promised retirement benefit. Public employers, on the other hand, would likely argue that retirees

[151] *See* Letter from Dexter A. Johnson at 3.

will receive all pension benefits that were serially and continually accrued through work performed before the change, so the irrevocability exception does not apply.[152]

Counsel's caution is understandable; the Legislative Counsel Committee has many bosses of widely divergent interests, and therefore it has a duty of particular care and reticence. This concern, though, is unwarranted. Counsel's first concern has been considered extensively already in this article. Although the *Moro* court did not disavow parts of its *Strunk* opinion on the basis of the arguments presented to it by petitioners,[153] it did recognize, by explicitly disavowing *OSPOA*, that the political branches in Oregon could set any pension conditions they pleased with regard to work not yet performed, including, as it were, a zero option.[154]

Counsel's second concern raises the issue of the *Taylor v. Multnomah Co. Deputy Sheriff's Retirement Board* precedent, which also survived *Moro*, but this concern is also unwarranted. Whereas the *Moro* court embraced *Taylor* for the proposition that the legislature may not unilaterally withdraw benefits that that employees have begun to accrue but that take time to complete,[155] the court there was referring to a unilateral contract provision that had been accepted by performance, which performance—for, essentially, reasons of a vesting period—had not fully triggered a distribution obligation on the part of the employers. Under the current rules, a government employee, while becoming a PERS member upon employment by the state, must continue in employment for six months before any contributions vest and thus ever become due. What *Taylor* stands for is the proposition that once an employee has begun work, the employee may not be denied the benefits applicable to the work already done by having the program end

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[152] *Id.* at 3–4.
[153] *See supra* p. 31, note 110.
[154] *Cf. Adding up the "Zero Option" Will Take Time*, N.Y. TIMES, Nov. 22, 1981 (the "zero option" was an arms-control negotiating position embraced by the Reagan administration and then countenanced by Soviet Premier Gorbachev at the Reykjavik Summit in 1986).
[155] *See Moro*, 357 Or. at 224.

before vesting can occur. Future legislation can avoid a *Taylor* problem in either of two ways: (1) by grandfathering in already employed workers who have worked for fewer than six months, if they hit that six-month target, by granting them six months of benefits at that time (even if this is the last six months of pension benefits they will then ever receive, the program having been abolished); or (2) by waiving the vesting period for employees who have worked for less than six months at the date of program abolition, granting them benefits for the period actually worked as of that day, as though there had never been any vesting requirement. *Taylor* does not, however, create any bar even to total program termination for *prospective* work. To understand *Taylor* any other way after the *Moro* decision must be to unravel *Moro* and cast Oregon Supreme Court jurisprudence back into the morass from which the *Moro* court was obviously eager to extricate itself (even if not fully to recognize all of the implications of that extrication).[156]

This interpretation of *Taylor* clarifies the picture greatly. It would probably be a great mistake to deny prospective pension benefits to all government employees for all future work unless the necessity became dire, or unless it were demonstrated that the average government employee was earning more *without any pension benefits* than, say, the average Oregon taxpayer earned annually from all sources.[157] On the other hand, narrowly and carefully tailored pension curtailment for some workers who have already accrued relatively extravagant defined benefit pensions to be satisfied out of the public fisc might well prove equitable—more equitable, certainly, than further paring away the benefits of younger workers. More obviously and generally justified, though, is the next proposal under general consideration at the capitol.

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[156] *Cf. Moro* at 224 ("OSPOA prohibited prospective amendments based on a particular view of pension plans that is not supported by *Taylor*.").
[157] *See infra* at III.F (call for a relative-compensation study to be commissioned by the legislature).

D. Move to a Defined Contribution Plan

After the *Moro* ruling, Senator Knopp recognized that "[t]he only long-term solution to eliminating crippling PERS liability is to establish a market-based fair retirement plan for new public employees that mirrors retirement plans found in the private sector."[158] The shift that Knopp contemplates here is a move from a defined benefit pension system like what Oregon has now (particularly for Tier One and Tier Two employees), under which the state is obliged to make certain fixed, predetermined payouts to retirees during their retirement (determined according to the various calculations detailed previously[159]), to a defined contribution system in which the state makes certain fixed, predetermined payouts into a retiree's individualized retirement account regularly during the employee's term of employment.

A number of benefits arise from this shift, from the state's (and ultimately the taxpayers') point of view. First, the payments must be made when due, rather than being shifted off to future generations. This approach may seem painful to present taxpayers, but the long-term effect is to ensure a more honest government, in that politicians cannot make promises that their (unrepresented) descendants end up paying for generations later, long after the promisors have reaped the political benefits of making unfunded promises, only to have retired from the scene when payment becomes due. This inability to promise now and pay later has a corollary benefit of thwarting the impulse to make extravagant pension promises, because the payments come due immediately rather than being foisted off on future generations.

Of course, the political branches have an obligation to act within the constitutional constraints that the Oregon Supreme Court has imposed, but even under those constraints, Oregon could well afford to be even bolder on this front than Knopp has proposed. He suggests

[158] *See, e.g.*, *Oregon PERS Unfunded Liability Swells*, *supra* note 19.
[159] *See supra* note 33.

establishing defined contribution plans for new employees, but under the *Moro* opinion the shift can occur immediately for all employees, for all work performed after the date of the legislation.

The long-term effects of this move to a defined contribution plan are clear. The shorter-term effects are more mixed. On the one hand, on the downside for the state and its taxpayers, there will be a period during which they continue to pay off previous generations' unfunded extravagance while also funding present contributions to the defined contribution accounts. On the other hand, cogently addressing "legacy" underfunding problems while ensuring against further unfunded promises and taking responsibility for current obligations should result in increased borrowing facilities at cheaper rates, which itself should allow for some "collaring" and spreading of this double-payment period—all without the possibility of simply kicking the can down the road to yet more generations.[160]

E. Revise the Discount Rate (Assumed Savings Rate), While Spreading, if Necessary, the "Recovery" Period

Policymakers in Oregon (as well as those in most other states with pension crises) are aware that as bad as things look now, they're really a good deal worse. Oregon's discount rate has been falling slowly over the past few budgeting biennia, from 8 percent to 7.75 percent[161] to 7.5 percent,[162] and it likely will fall incrementally again in coming years.[163] The rate remains, however, far too optimistic. Various experts suggest that the appropriate method of determining the true liability generated by a pension fund is to use a riskless rate of return (i.e., discount rate,

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[160] *See infra* at III.E (further discussion of the extended-collaring proposition).
[161] *See Moro*, 357 Or. at 178, 183 n. 11 (Decrease of discount rate from 8 percent to 7.75 percent raised employer contributions by about 2.5 percent of payroll.).
[162] *See* Wong, *supra* note 8.
[163] *See* Sickinger, *Oregon Officials*.

or assumed-savings rate in Oregon's unique terminology) matched against the present value of the liabilities, or a rate marginally higher than the riskless rate used to discount ultimate liabilities—in short, a rate of something between 4 and 6 percent.[164] Using inappropriately high rates makes the fundamental error of assuming—against all logic and odds—that the state's investments are going to turn out better than those of the average investor in the markets over the same period.

Consider: if investors wish to be *certain* (or as certain as humanly possible) of a given rate of return, then they must invest in "risk-free" assets, such as US government bonds. They will be paid off under almost any foreseeable circumstances. If investors wish to achieve higher returns, they can take the risk of investing in the markets, where the average return may be higher but the risk of *losing* money, or of making less than the risk-free amount, is reasonably high, too. Every year, the state of Oregon assumes that it will get the higher, *risky* rate of return, even though it sometimes will not get that rate. The problem is this: if regular investors seek the risky rate of return but get less, then they have to eat the loss and reckon with the fact that they have less to invest in the coming year. These investors will either get a lower total return or will be required to take on additional risk—a bigger gamble. But this feedback does not apply to the state of Oregon; its obligations remain the same—*fixed*—without regard to how well it does in

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[164] *See, e.g.,* Robert Novy-Marx & Joshua D. Rauh, *The Liabilities and Risks of State-Sponsored Pension Plans*, 23 J. ECON. PERSPECTIVES 191, 193, 195, and *passim* (2009) (risk-free rate most appropriate, matched against the present value of the liabilities, known as the "accumulated benefit obligation"); JOHN A. TURNER ET AL., DETERMINING DISCOUNT RATES REQUIRED TO FUND DEFINED BENEFIT PLANS (Mar. 2015), *available at* http://www.actuaries.org/oslo2015/papers/PBSS-Turner&GO&McC&B-P.pdf (preferred "rule would be to select a discount rate that is less than the expected rate of return on assets but greater than the risk free rate, with the discount being greater the higher the percentage of the portfolio invested in equity and the longer the duration of the liabilities"); Alicia H. Munnell, *Appropriate Discount Rates for Public Plans Is Not Simple*, MARKETWATCH.COM (Oct. 5, 2016) (6 percent). *See also* Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FINANCE 1211 (2011) (determining public debt using accumulated benefit obligation method); Alicia H. Munnell et al., *The Funding of State and Local Pensions 2012–2016*, 32 STATE AND LOCAL PENSION PLANS: ISSUE IN BRIEF (2013) (same).

the markets. Hence, for coherent planning and accounting, it must match its obligations to a *riskless* (i.e., fixed and unchanging) rate of return. To do otherwise is to assume the benefits of risk-taking without accounting for the inevitable times when the risks do not pan out. This mismatch between fixed obligations and risky return assumptions is one of the drivers of Oregon's pension crisis, and it must be corrected.

Recognizing a realistic rate of return will be hard; every quarter-point reduction in the assumed discount rate in Oregon will add $400 million in biennial contribution obligations by employers.[165] These are hard and heavy tidings, but all parties would be better served by recognizing the full extent of the problem and responding as fulsomely and coherently as possible at one stroke than by struggling to fix the problem only to know that any fix is in reality only a temporary patch, given the unacknowledged funding gap that lies inescapably a few years down the road.

Objections can be raised to any effort simply to shift the rate drastically downward. As the gap in expert opinion about an appropriate current rate suggests, well-informed minds can differ to some extent as to the appropriate rate. One likely reason that the PERB and lawmakers have not already moved more aggressively toward a more realistic discount rate is the effect that realizing the depths of the crisis will have on short-term employer contribution rates. The thinking may well be that current lawmakers have quite enough on their plates with the problems they have been forced to recognize, and that this rate-based sleeping dog must be allowed to rest for as long as possible. But this approach is just inefficient: no good can come from willfully refusing to admit to a problem that everyone knows is there, while willful ignorance casts away

[165] *See* Sickinger, *Oregon Officials*.

the opportunity to fix the problem once and for all by setting a financially sound and practically realistic rate.

There are, however, ways of deflecting some of the pain into later years while still coming fully to grips with the problem and fixing the mechanism today. One method would be to modify in the short term a feature that has already been built into the funding system. The current system "collars out" employer contribution increases over a three-biennium cycle, thus spreading the pain (while, admittedly, increasing the total cost) of dealing with the already recognized funding crisis. Because moving to a legitimate, risk-appropriate discount rate will result in a massive one-time recognition of a very real funding deficit, lawmakers would have a legitimate reason to set up a special, one-time, long-term collaring-out of the costs associated with the deficit realization caused by this shift. Perhaps the legislation that corrects the discount rate could also authorize an "extended, supplemental collaring" of that unique deficit realization, of perhaps 10 biennial cycles (20 years). This dual move would spread the pain forward while admitting—and allowing for wisest and earliest comprehensive resolution of—the true depth and breadth of the pension funding problem today.

F. Relative Total Compensation Study

Regardless of anything else that the Oregon Supreme Court decides or that the political branches enact, one thing should be universally agreed: government employee compensation ought to bear some relationship to general taxpayer compensation, and long-serving government employees ought not, to the extent correctible at this relatively late date, enjoy inflation-adjusted and years-of-service–adjusted compensation wildly higher than that which their junior colleagues can expect throughout their careers.

Right now, though, it is hard to know whether the average taxpayer is earning more or less than the average government worker in total career-arc compensation (including pay and all benefits, on an average annualized basis or a per-hour basis). Union representatives of government employees are not shy about asserting that government workers are underpaid and particularly vulnerable,[166] whereas one of the conclusions that might be reached from the resounding defeat of Measure 97 in 2016 is that 60 percent of Oregon taxpayers, at least, do not believe that the relationship between government employee compensation and their own after-tax take is one that should be further adjusted in favor of government workers.[167]

Filling this lacuna in knowledge is particularly urgent now that the disavowal of *OSPOA* opens the door to adjustments to already-earned benefits as a drawback of compensation that may have been transferred unconstitutionally. Equity as well as law must dictate how much recovery occurs, at what speed, and from whom. But equity cannot do its work unless and until the political actors and the public have a far better sense of where equity lies—of how relatively generous past, present, and potential future pension systems are and will turn out to be, as against one another and as against the net compensation that Oregon's taxpayers take home now and will take home under various drawback and prospective pension schemes. Only with this knowledge can anything like real equity be achieved for all members of Oregon society.

As it happens, the state has already undertaken some of the work necessary to establish this vital data. The state commissioned a study from Portland State University's Center for

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[166] *See, e.g.*, Anderson, *PERS Board* ("'To say that child welfare workers who are understaffed and caring for the most vulnerable kids in the state, or teachers who have 30 kids in their classroom, that the way to balance the budget is that they are going to retire into poverty, that seems like not the choice we should be making,' said Brian Rudiger, executive director of Service Employees International Union, Local 503.").
[167] *See supra* p. 34 and note 121.

Public Service in 2012 to examine government employment costs.[168] Although this report fudged, somewhat, the issue of the different compensation structures applicable to Tier One, Tier Two, and Tier Three employees,[169] that study, along with some privately funded efforts,[170] can provide a basis and a starting point on which the state can build to determine the relative total-compensation and pension-benefit expectations for Tier One, Tier Two, and Tier Three government employees and for taxpayers, respectively. Then coherent discussions about pension fairness can knowledgeably proceed.

G. Further Constitutional Amendments

Given that the most recent PERS reform was defeated almost *in toto* by the Oregon Supreme Court's interpretation of the state's constitution, the straightest route to reform might be through that barrier by means of constitutional amendment. Although straight, such a road would prove both steep and long; the amending process in Oregon is fairly attenuated. Moreover, it is not clear that the court's current position, when twinned with a revival of the Measure 8 reforms from the date of incorporation, bears much useful emendation.

There are three routes to constitutional amendment in Oregon. The most archetypically West Coast approach is the ballot initiative.[171] An initiative will be placed on the ballot "only by a petition signed by a number of qualified voters equal to eight percent of the total number of

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[168] *See* Robert Winthrop et al., *Total Employer Cost of Compensation Study—Phase 2.0*, REPORT (Portland State University, Center for Public Service), Sept. 2012.
[169] *Id.* at 62 ("In 2003, Oregon PERS was restructured from the old Tier 1/2 plan to a new OPSRP plan and the two plans have different employer contribution rates. To take into account this change, the research team made a methodological choice, assuming that top step employees' PERS costs would be calculated on the Tier 1/2 (an assumption that older employees are still on this plan) and entry step employees' PERS costs would be calculated on the newer, Tier III/OPSRP plan.").
[170] *See, e.g.*, Andrew G. Biggs & Jason Richwine, *Overpaid or Underpaid? A State-by-State Ranking of Public-Employee Compensation* (AEI Economic Policy Working Paper 2014-04, 2014).
[171] *See* OR. CONST. art. IV, § 1.

votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition."[172] The petition must be filed four months before the election in which the amendment will be voted on, and then it must win a majority of the popular vote.[173]

The state legislature may itself initiate ballot amendments upon an affirmative vote by each chamber.[174] Again the polity then must agree by popular vote in a single election, which may be a special election called by the legislature.[175] As state constitutional amendment processes go, this one is not terribly onerous,[176] and with the special-election component, it could be fairly speedy. The problem here is one of willpower. As previously considered, Oregon's political leadership has explicitly declared PERS reform above its collective pay grade.[177]

Finally, Oregon's constitution, like those of many other states, makes oblique provision for a constitutional convention. As one has never been called and it is not even clear *how* to call one, it is probably reasonable to set this option aside.[178]

Even if a constitutional amendment were more plausible, it is not at all clear what sort of amendment would prove useful in the present crisis—assuming that the Oregon Supreme Court does recognize that its *OSPOA* decision was *always* wrong and that as a matter of the law,

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[172] *See* OR. CONST. art. IV, § 1(2)(c).
[173] *See* OR. CONST. art. IV, §1(2)(e).
[174] *See* OR. CONST. art. XVIII § 1.
[175] *See* OR. CONST. art. XVII.
[176] *See, e.g.,* Shepard, *supra* note 18 at § IIIA. (Illinois' more onerous constitutional amendment process described).
[177] *See supra* at 34.
[178] *See* OR. CONST. art. XVIII, § 1. The section provides in the negative that "[n]o convention shall be called to amend or propose amendments to this Constitution, or to propose a new Constitution, unless the law providing for such convention shall first be approved by the people on a referendum vote at a regular general election. This article shall not be construed to impair the right of the people to amend this Constitution by vote upon an initiative petition therefor." Left unclear by this early petition-driven amendment (it was adopted on June 4, 1906, the second ultimately successful constitutional-amendment ballot petition ever undertaken and—along with another that had come to the ballot in a slightly earlier petition process—the first to be adopted by the polity of the state) is how the question of a constitutional convention should get on the ballot. The Oregon Supreme Court is likely to fill the gap, should the issue ever arise, by permitting both methods of ballot access—legislative and popular action—but the fairly important question remains open.

sections 10 through 12 of Article IX have been in force since January 1, 1995. Were the court to make some other decision, the voters might then initiate and pass an amendment saying something like "and we meant it all along," establishing that the Measure 8 provisions must at law be recognized as valid from the day of their incorporation into the Oregon Constitution (actual equitable ramifications having been considered repeatedly in this text). Such an amendment would almost certainly meet a challenge from government employees and their unions, who would argue that the new amendment, by insisting on the permanence of the Measure 8 provisions, really worked a retroactive alteration of contract. (If the question is rightly decided the first time, the court will have explained why, legally, a mistaken opinion could not have had the effect of thwarting the incontestable meaning of duly enacted constitutional provisions.) What would happen next is hard to say, and it is too speculative to worry too much about now.

A more plausibly needful use of the amendment process would be to tie the legislature and the PERB to the mast of good behavior once the political branches have moved decisively and comprehensively to remedy the state's pension system. The mistakes that the legislature, the PERB, and the courts have made over the past decades are painfully clear now, but however hard-won any lessons, they are often soon forgotten. While it would be a mistake to think that the current crisis is the only sort of crisis that could occur, it would be well to constitutionalize some fundamental restraints against moves that all political branches are far too prone to making, such as promising today to provide services tomorrow, to get votes the day after, while pushing payment forward onto future generations. Doing so would constitutionalize the accidental or temporal features of the stable pension system soon to be enacted (one would hope). Such an amendment might (1) forbid reinstitution by the state of defined benefit pensions; (2) forbid use

of notional discount rates in calculating defined contributions; (3) constitutionalize the proposition that no state statute or contract for an open-ended period (i.e., one that does not include an expressly fixed date term in its provisions) can bind the representatives or polity of the state beyond a reasonable period; and (4) establish similar essential and not overly detailed safeguards against future ills.

H. Pension Bonds

The Oregon governor and legislative majority leadership have hinted at their desire to issue pension bonds to fill the funding gap in the coming years.[179] The idea is that the state could borrow at a fixed percentage, invest the borrowed money to earn a higher rate of return than the cost of the capital, and then fund the pensions with the float.[180] Various critics have suggested that borrowing cannot solve the state's pension crisis, even as a matter of law: constitutional constraints would keep the state from borrowing anything near the amount that would be necessary, even if the state could crowd out all other borrowing and raise the costs of hiring capital.[181]

The pension-bond route is also both ethically and financially inappropriate because it passes the real costs (and certainly the risks) onto future generations. Any such proposal—and the amount expected to be realized from the maneuver—should include a provision that the state

[179] *See, e.g.,* Sickinger, *Borrowing*.
[180] *Id.*
[181] Article XI-O of the state constitution permits the state government to borrow up to 1 percent of the market value of "the real market value of all of the property in the state" to fund government pensions, but no more. *See* OR. CONST. art. XI-O. As the Legislative Fiscal Office of the Oregon state legislature has indicated, that value has been set at about $500 billion, meaning that the whole constitutional borrowing facility for state pensions is only $5 billion, $2 billion of which has presently been floated and remains unsunk, leaving only $3 billion. As the discussion in section I.A of this article indicates, the total annual pension funding obligation, if fully realized, would reach about $3 billion *per year*. The idea of borrowing $3 billion in order to reinvest it and then use the arbitrage to fund the state's pension underfunding suffers as much from pointlessness as from imprudence. Meanwhile, the effort would crowd out all other, more regular types of state and municipal borrowing. *Id.*

buy insurance to guarantee that the returns on the investments made with the borrowed money do not fall below the interest rate on the bonds plus the costs of issuing the bonds and investing the borrowed money. The cost of this insurance could potentially be very high, especially given the paucity of proven real returns from investment-bond borrowing in Oregon (less than $500 million dollars over an 11-year period from 2003 to 2014, or less than $40 million per year).[182] And this insurance would be necessary merely to ensure that taxpayers remain at the *same* level of risk and overall financial liability that they had faced before the pension bonds were issued. Given the narrow historical returns from such moves, it is not at all clear that the risk insurance would not cost more, and perhaps far more, than the expected returns to be generated by a borrow-and-invest scheme. All of this is just another way of saying that the present expected risk from the maneuver outweighs the present expected benefit.

High theory is not really necessary to establish this position, though. As Oregon Senate Minority Leader Ted Ferrioli rather elegantly put the point: "No responsible family would take out a second mortgage on their house and gamble the money in the stock market hoping to make more than the mortgage payment each month."[183] By the same logic, this policy has to be fatally flawed. If it weren't, there would be no difficulty whatever in meeting state budgets: the state could just borrow truly massive amounts of cash, invest that cash in ways that will (reliably) create greater returns than the bonds cost, and finance government spending that way.[184] Although issues of scale underscore the irresponsibility of this method of public finance, they do

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[182] *See* Sickinger, *Borrowing*.
[183] *See, e.g.*, Sickinger, *Borrowing*.
[184] *Cf. id.* ("'If it was free money, everyone would be doing it,' said Jean Pierre Aubry, associate director of State and Local Research at the Center for Retirement Research at Boston College. 'It may save you a little, but it's a lot of risk.'").

not undermine the underlying moral or economic message. Pension bonds are both irresponsible and impossible under present conditions.

I. The Siren Song of Federal Aid

Oregon must gird itself to solve its pension problems on its own. Federal aid is unlikely to be forthcoming, and even if forthcoming, it is likely to carry conditions of the sort that should make it not worth the taking.

Other scholarly efforts have been made to demonstrate the unattractive conditions that are almost sure to come attached to any successful petition for direct federal assistance to states in their efforts to sort out their pension problems.[185] In short, direct federal assistance—which at all events is likely to be oblique rather than to take the form of a cash injection—will almost certainly come with strictures that surrender significant tranches of state sovereignty to the federal government or to federally created and supervised bodies or institutions.[186]

The strictures would likely be more onerous, and the benefits less fulsome, for Oregon than for many other states, should it find itself shaking its can at the base of Capitol Hill. For while Oregon's pension funding is very much in crisis, the crisis is far more manageable, and state officials have left themselves far more room for maneuver (particularly after the *OSPOA* retreat by *Moro*, and all that that retreat entails) than have those in many other states. It is almost inconceivable that Oregon would be the *first* state to seek federal assistance, and by the time it moves, the federal government may well find itself beseeched from every corner of the union, each supplicant in a unique state of fiscal disrepair. Oregon may well find the federal government short of both bailout funds and patience, and its conditions grown even

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[185] *See, e.g.*, Shepard, *supra* note 18, at § IV.
[186] *Id.*

more punitive than those exacted from earlier beggar states, some of them in far deeper trouble than Oregon.[187]

IV. Oregon Lighting the Way

As deep as the hole is that Oregon has dug for itself, and as much effort and pain as escape will take, the state's political branches have thus far conducted themselves with reasonable fiscal discipline and restraint, at least when compared with the most serious pension-funding delinquents such as Illinois, California, and New Jersey. (The PERB and the state supreme court have shown less restraint and less wisdom, but each has made recent efforts at mending course and now has the opportunity to do much more to set things right.) Each of these states could—and must, really—learn valuable lessons, and take needed guidance, from the path toward wisdom that Oregon has (and must continue to) tread and the knowledge it has accumulated. And while the hope of federal intervention and cash infusion is either chimerical or ultimately pernicious, Oregon's pension reform history does suggest one way in which relatively modest federal action could assist the laggard states in constraining their crises.

A number of states have taken the same wrong turn—presuming, for one reason or another, that their statutory pension benefits, once offered, may never be reduced for any employee who begins work during the statute's effectiveness, whether for work already performed or work as yet undone—that misinformed the *OSPOA* decision in 1995 and led so directly (if not entirely) to the present crisis. Because one of the states embracing this treacherous position is Oregon's behemoth neighbor to the south, the erroneous *OSPOA* decision is more broadly known nationwide, almost inevitably, as the California Rule.[188]

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[187] *See, e.g.*, *id.*
[188] *See* Monahan, *supra* note 73.

This judicial misunderstanding is not a localized West Coast disease; states that have adopted the rule are represented across the country.[189] Not surprisingly, given the effects in Oregon of a generation's implementation of the *OSPOA* ruling, many of these states find themselves borne down under their own pension crises.[190] What the Oregon saga demonstrates, though, is that all is not lost for these states. There is no doubt that the California Rule has no perch in federal law or in the federal constitution, so that state constitutional provisions like those of Measure 8 must trump any state judicial assertion of the rule. Even without such a provision, though, Oregon demonstrates how a state might extricate itself from the California Rule. As in Oregon, the California court adopted its eponymous rule almost accidentally, by misreading and overextending incautiously crafted pension-law precedent in insupportable ways.[191] Other states' applications of the rule hang similarly in the air, grounded not in federal law nor compelling precedent nor express state statute nor necessary implication of the state government-worker pension system nor sound political philosophy nor creditable legal theory nor economic coherence, nor, in the end, anything.[192] The path forward, then, is simply to recognize, as the Oregon Supreme Court has done, both the error and the incoherence involved in reaching and enforcing its version of the California Rule.

This is, as a matter of judicial-branch theory, the simplest of tasks: an error, perhaps careless but not malign, and grounded, as it happens, in nothing, should be a fairly easy thing to

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[189] *Id.* at 1071 (listing Alaska, Colorado, Idaho, Kansas, Massachusetts, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Vermont, and Washington as states that have adopted, at least for a time, the California Rule; Shepard, supra note 18, at note 107). Illinois has gotten into the same mess, its supreme court having adopted an equivalent of the rule.

[190] *See, e.g.*, Shepard, *supra* note 18 (describing Illinois's severe difficulties); Monahan, *supra* note 73 at 1071; Erick M. Elder & Gary A. Wagner, *Can Public Pensions Fulfill Their Promises? An Examination of Pennsylvania's Two Largest Public Pensions* (Mercatus Working Paper, Mercatus Center at George Mason University, Apr. 15, 2015) (describing Pennsylvania's severe difficulties).

[191] *See* Monahan, *supra* note 73, at 1050–70.

[192] *Id.* at 1071–73.

correct. The relevant states' supreme courts must simply be on the lookout for the next pension case that gives them the opportunity to review their adoption of the California Rule, grant *cert*. in that case, and retreat from the position. Such decisions will in a stroke grant the respective state assemblies immense additional opportunity to address, and to tame, their pension crises. Not all states will have, as Oregon does, a built-in opportunity and solemn constitutional obligation to disavow their mistakes backward across the preceding generation, but thoughtful and careful analysis may discover similar, if less substantial, methods of doing the work of generational equity without running afoul of federal or state Contract Clause constraints. (One such method, particularly in the most hard-pressed states, or states in which the misapplication of the California Rule has done the most damage, may be for the courts carefully to consider the "substantial government interest" exception written into Contract Clause jurisprudence, which allows in some critical instances for retroactive contract modification where such substantial government interests warrant the modifications. Such a substantial government interest might well be thought to arise in cases in which a serious pension crisis has arisen because of long application, at grievous expense, of a flawed and erroneous legal theory, especially were other related real-world considerations to counsel for such a determination.)

However straightforward this process may be as a matter of judicial theory, though, it may prove quite galling as a matter of judicial *practice*. Nobody likes to admit error, and judges are no less human and foible-filled than the rest of us.[193] It may be that the political branches will have to step in to push them to do the right thing. State legislatures can do this by enacting pension reform legislation predicated on a state-judicial retreat from the California Rule, thus teeing the question up for their courts squarely and unavoidably; the state solicitors general must

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[193] *Cf.* James Madison, *Federalist No. 51* (1788) ("If men were angels, no government would be necessary.").

then insist that the courts either abandon the rule or explain why they are not doing so. (Whether the best tactic here is to go in hard and strong, expressly confronting the error and demanding a *volte face*, or instead finessing the issue and leaving the judges ways to save face, is a determination that will in practice depend on a wide variety of inside-baseball factors and will differ state by state.)

Congress can also—and without any cost to the federal fisc—assist both the legislatures in presenting the questions and the state supreme courts in reaching the right decision by attaching to almost any piece of legislation a provision that merely clarifies that, in so many words, "neither the federal Contract Clause nor any other federal legislation or regulation offers any bar to state legislation or administrative action altering the terms or programs under which pension or other benefits are offered to government employees, whenever employment may have commenced, for work not yet performed as of the date of enactment of the benefit modifications." (Congress might optimally include such a statement in a package with some of the other inexpensive and well-considered pension reform assistance measures floating around Capitol Hill.[194]) That legislation, necessarily subordinate to the federal Contract Clause, could not alter the clause or the United States Supreme Court's interpretation of it, but the Supreme Court has never allowed for any doubt about the inapplicability of the Contract Clause to compensation for prospective performance for government workers under open-ended employment contracts.[195] The federal legislation would, however, both underscore and clarify the issue for confused state courts and offer prospective plaintiffs trying to undo their states' own *OSPOA* mistakes grounds on which to take the issue directly to federal court, thereby increasing the odds of a U.S. Supreme Court grant of certiorari and definitive pronouncement on the question. Such action could itself provide great

[194] *See, e.g.,* Public Employee Pension Transparency Act, H.R. 4822, 114th Cong. (2016).
[195] *See supra* note 73, note 136.

assistance to some of the states deepest in crisis, all without any cost to the federal fisc or any sacrifice of state sovereignty to the federal government.

Conclusion

Oregon stands at a crossroads. Its pension crisis is bleak, and full and accurate accounting of the situation would make it much bleaker still. But because of the long-standing and repeated efforts of its polity and its political branches, and a long-delayed but much appreciated recognition of error by the state's supreme court, avenues have opened down which matters may be improved rapidly and to a greater extent than yet appreciated.

In the *Moro* decision, the Oregon court abjured the only basis on which it found the 1994 Measure 8 provisions unconstitutional. Those provisions remain in the constitution and, by the court's own tacit admission, have *always* been in force. This means that for more than 20 years, retirees have accumulated and earned inappropriately generous pension provisions—and continue to do so. All government employees should be paying 6 percent of their salaries toward their pension benefits, and guaranteed matching and sick-day pension spiking should long have been things of the past.

It would serve neither justice nor wisdom to shut off pensions to retirees or drastically to curtail future payments to current employees to draw back these unconstitutional overpayments, but it would likewise serve neither justice nor wisdom—nor law—to continue to oversubsidize older workers at the expense of younger government workers and taxpayers.

Even if the current legislature does nothing, recognition of the continuing vitality of the Measure 8 provisions will have beneficial effects from the moment that the courts recognize the meaning of *Moro*. But the legislature, awarded this belated but substantial opportunity to address

the pension crisis in ways much less painful and more equitable than would otherwise be available, must act quickly to take fullest advantage of it with the least collateral dislocation. This article details a number of suggestions for immediate action—as well as some warnings against ideas such as pension-bond issues.

Meanwhile, Oregon's efforts, and particularly the Oregon Supreme Court's retreat from its untenable *OSPOA* ruling, offer a model by which many of the states in the deepest pension crises may begin to alleviate their own problems.