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The Constitutional Dimension of Unilateral Change in Public-Sector Collective Bargaining

Stephen F. Befort
University of Minnesota Law School, befor001@umn.edu

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Introduction

The Great Recession that began in 2008 continues to wreak havoc with public-sector budgets. The National Association of State Budget Officers concluded that fiscal year 2010 "presented the most difficult challenge for states' financial management since the Great Depression. . . ."[1] That organization's annual report for 2010 estimated that states will face a total of $296.6 billion in budget shortfalls between fiscal years 2009 and 2012.[2]

While the severity of the current budget crisis may be unique, the fact of its occurrence is not. The most recent crisis constitutes the fourth such period in the last thirty years. In 1982, 1991, 2003–04, and now in 2009–11, state and local government units have experienced similar budget problems.[3] Each period followed close behind an economic downturn resulting in decreased tax revenues.[4]

With nearly every state required to maintain a balanced budget,[5] state and local governments have scrambled for ways to reduce costs. Not surprisingly, public employers frequently have taken aim at workforce costs, one of their most significant discretionary expenses.[6]

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*Gray, Plant, Mooty, Mooty, & Bennett Professor of Law, University of Minnesota Law School. The author thanks Mark Quade for his assistance in the preparation of this article.

1. NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES vii (June 2010), http://www.nasbo.org/Publications/FiscalSurvey/tabid/65/Default.aspx.

2. *Id.*

3. *See* Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 9–10 (2011).

4. Abby Goodnough, *States Turning to Last Resorts in Budget Crisis*, N.Y. TIMES, June 22, 2009, at A1; David E. Rosenbaum, *Quick Change; States Balance Budgets With Blue Smoke and Mirrors*, N.Y. TIMES, Aug. 24, 2003, sec. 4, at 4; NAT'L GOVERNORS ASS'N, THE STATE FISCAL CRISIS (Oct. 4, 2004), http://www.nga.org/nga/legislativeUpdate/1,1169,C_ISSUE_BRIEF%5ED_5080,00.html; Janet G. Stotsky, *Coping with State Budget Deficits*, BUS. REV., Jan./Feb. 1991, at 12; Steven D. Gold, *Federal Aid and State Finances*, 35 NAT'L TAX J. 373, 380–81 (1982).

5. Daniel Kadlec et al., *How to Balance a Budget*, TIME, Dec. 9, 2002, http://www.time.com/time/magazine/article/0,9171,1003856,00.html.

6. Salaries and wages alone constituted approximately 18.5% of all direct expenditures by the states during the 2001–02 fiscal year. U.S. CENSUS BUREAU, 2002 CENSUS OF

Governmental employers have resorted to layoffs, hiring freezes, wage freezes, and employee furloughs among other strategies in order to lower personnel expenditures.[7]

Sometimes, however, governmental entities have taken more drastic measures, such as unilaterally modifying the terms of existing collective bargaining agreements. In the private sector, such unilateral action would be deemed both a breach of contract remediable in arbitration and an unfair labor practice, subject to the jurisdiction of the National Labor Relations Board (Board). Indeed, the Board has ruled that economic necessity is no defense to such an unfair labor practice finding.[8]

Most public-sector jurisdictions with collective bargaining laws have adopted unilateral change principles similar to those in the private sector.[9] Unilateral change, nonetheless, is more prevalent in the public sector. Some of the reasons for this difference are statutory in nature, such as those resulting from the preemption of negotiated terms by a pre-existing statute.[10]

Other reasons for a broader unilateral change prerogative in the public sector relate to the constitutional structure of state government in which a legislature appropriates funds and an executive branch manages state employees. As former law professor and circuit court Judge Harry Edwards has stated, other public-sector labor law questions "pale by comparison to the problem of attempting to identify the real public 'employer'. . . ."[11] This article examines two of these constitutional dimensions. Part I discusses diffused management authority resulting from the separation of powers with particular reference to legislative authority over appropriations. Part II explores the legality of governmental lawmaking that modifies previously negotiated labor

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Governments, http://www.census.gov/govs/estimate/0200ussl_1.html; *see also* Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 266 (1987) ("Labor costs may be seventy percent of a city's budget.").

7. *See generally* Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Action?* 42 U. CONN. L. REV. 1139, 1143 n.16 (2010) ("[F]urloughs are mandatory time off work with no pay.").

8. Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063, 1064 (1973) ("Nowhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective.").

9. *See, e.g.*, Wilkes-Barre Twp. v. Pa. Labor Relations Bd., 878 A.2d 977, 985 (Pa. 2005) (finding unilateral alteration of contract terms to be an unfair labor practice); Educ. Minn.-Greenway, Local 1330 v. Indep. Sch. Dist. No. 316, 673 N.W.2d 843, 853 (Minn. 2004) (finding unilateral alteration of expired contract terms to be an unfair labor practice).

10. *See* Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1252–68 (1985).

11. Harry Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 903 (1973).

agreements. Finally, the article concludes by suggesting that some courts have construed these constitutional provisions in a manner that affords second-class status to public employees and their collective bargaining agreements.

I. The Legislative Appropriations Function

Virtually every state constitution contains a provision that vests exclusive authority over appropriations in the state legislature.[12] State bargaining laws, however, usually define an executive branch entity as the "employer" of state employees.[13] This diffusion of authority creates the potential for unilateral change if the legislature fails to appropriate all of the funds necessary to implement a contract negotiated by the executive branch.

A 2002 Florida decision, *Police Benevolent Ass'n v. State*, provides a classic illustration.[14] In this case, a union and the state executive branch negotiated a collective bargaining agreement covering state employees that provided for a five percent wage increase for fiscal year 2000–01. The legislature, however, appropriated only enough funds for a two and one-half percent increase.[15] The union argued that the state's conduct violated the fundamental right to bargain collectively guaranteed in the Florida State Constitution.[16] The Florida appeals court disagreed and held that, pursuant to the separation of powers doctrine, the legislature had the exclusive right to appropriate funds and was not bound to fund the economic terms negotiated by the executive branch.[17]

Many other courts have reached similar conclusions with respect to the state governmental level.[18] The Minnesota Supreme Court has held that even interest arbitration awards that order wage increases for state employees are unenforceable absent a sufficient legislative appropriation.[19]

Although less common, some state constitutions that vest appropriations authority in local bodies other than the employing entity

12. *See, e.g.*, CAL. CONST. art. IV, § 12(a); MINN. CONST. art. XI, § 1; W. VA. CONST. art. X, § 3.

13. *See* Befort, *supra* note 10, at 1246.

14. 818 So. 2d 584 (Fla. Dist. Ct. App. 2002).

15. *Id.* at 585.

16. *Id.* at 586 (referencing FLA. CONST. art. 1, § 6).

17. *Id.*

18. *See, e.g.*, Univ. of Alaska Classified Emp. Ass'n v. Univ. of Alaska, 988 P.2d 105, 108 (Alaska 1999); Cal. State Emp. Ass'n v. Flourney, 32 Cal. App. 3d 219, 234 (Cal. Ct. App. 1973); State v. State Troopers Fraternal Ass'n, 453 A.2d 176, 180 (N.J. 1982); *In re* Advisory Op. to the House of Representatives, 576 A.2d 1371, 1374 (R.I. 1990). *But cf.* Ass'n of Surrogates & Supreme Court Reporters Within the City of New York v. State of N.Y., 577 N.E.2d 10, 16 (N.Y. 1991) (state legislature's initial approval of a multi-year collective bargaining agreement for state employees bound the legislature to appropriate sufficient funds for the remaining years of the contract term).

19. Minn. Educ. Ass'n v. State, 282 N.W.2d 915, 918 (Minn. 1979).

also have led to court decisions upholding unilateral change. In *Philadelphia Federation of Teachers, Local No. 3 v. Thomas*, for example, the Philadelphia Board of Education (School Board) and the teachers' union had negotiated a two-year collective bargaining agreement that provided for wage increases in the second year of the contract.[20] Under the governing constitutional and statutory scheme, the School Board possessed no independent taxing authority and was dependent on the Philadelphia City Council (Council) for funding.[21] Due to fiscal difficulties, the Council reduced its appropriation to the School Board for the second year of the contract, and the School Board rescinded the second-year wage increases.[22] The Pennsylvania Commonwealth Court sustained the School Board's action, ruling that the dependent funding scheme made the contract severable in nature, with each year of the contract subject to an implied condition precedent that adequate funding be forthcoming.[23] Since this condition was not fulfilled, the second year of the contract never came into existence, and the School Board was not obligated to abide by the agreement.[24]

The most recent appropriations decision—a California decision grounded in a complex mix of constitutional and statutory provisions—may also be one of the most significant.[25] Facing projected budget deficits, then-California Governor Schwarzenegger issued an executive order on December 19, 2008, implementing a mandatory unpaid furlough of two days per month for state employees, including those represented by unions.[26] Several unions filed a lawsuit challenging the governor's authority unilaterally to cut state employees' earnings as established by various memoranda of understanding (MOU) through the implementation of such a furlough.[27] On February 19, 2009, after the unions filed the lawsuit, the state legislature passed a revision to the then-current 2008–09 budget and separately passed an initial 2009–10 budget for the fiscal year commencing July 1, 2009.[28]

The California Supreme Court held that neither the California Constitution nor state law granted the governor the authority to modify MOU provisions, even in the event of a fiscal emergency.[29] Instead, the court noted that the Dills Act governing collective bargaining for

20. 436 A.2d 1228, 1229–30 (Pa. Commw. Ct. 1981).
21. *Id.* at 1230.
22. *Id.*
23. *Id.* at 1233.
24. *Id.*; *accord* Sarasota Cnty. Sch. Dist. v. Sarasota Classified Teachers Ass'n, 614 So. 2d 1143 (Fla. Dist. Ct. App. 1993).
25. Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger, 239 P.3d 1186 (Cal. 2010).
26. *Id.* at 1192–93.
27. *Id.* at 1193. The California Constitution provides that the state legislature is to enact a budget bill by June 15 of each year. CAL. CONST. art. IV, § 12. subd. (c)(3).
28. *Schwarzenegger*, 239 P.3d at 1194–95.
29. *Id.* at 1218–19.

state employees dictates that the establishment and adjustment of salaries of represented employees are to be achieved through the collective bargaining process, and that the resulting MOUs trump any conflicting statutory provisions relating to the governor's powers.[30] The court held, in contrast, that the legislature retains ultimate control over any expenditures required by a MOU, and by reducing appropriations in the two budget bills, the legislature validly modified the MOUs and authorized the state to implement the reduction in employee compensation through the unpaid furlough program.[31]

The apparent bottom line of the *Schwarzenegger* decision is that the California legislature (but not the governor), through the budget-setting process, retains the right unilaterally to reduce the level of compensation for state employees as established in existing collective bargaining agreements.[32] Interestingly, the lawsuit did not include a challenge to the furlough program on Contract Clause grounds.

Three additional wrinkles in the appropriations jurisprudence deserve mention. First, the pertinent constitutional provisions vest state legislatures with power over the governmental purse but not the power to alter collective bargaining provisions generally. This distinction was at issue in *State of Florida v. Florida Police Benevolent Ass'n*.[33] In that case, the state executive branch negotiated a three-year collective bargaining agreement for peace officers that contained provisions governing attendance and leave policy.[34] In its general appropriations act for year two of the contract period, the legislature adopted a proviso seeking to amend the agreement by reducing the available leave periods.[35] In determining whether this unilateral change fell within the legislature's appropriations power, the Florida Supreme Court applied the following test:

> Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced. . . . Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement.[36]

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30. *Id.* at 1218.

31. *Id.* at 1220, 1226.

32. *But see* State of Illinois & AFSCME Council 31 (July 19, 2011) (Benn, Arb.) (ruling on contractual but not constitutional grounds that a state employer is bound by the terms of a collective bargaining agreement wage provision even in the absence of a sufficient legislative appropriation of funds). Arbitrator Benn's award is available at: http://www.state.il.us/ilrb/subsections/pdfs/ArbitrationAwards/State%20of%20Illinois%20&%20AFSCME,%20pay%20raises.pdf.

33. 613 So. 2d 415 (Fla. 1992).

34. *Id.* at 416.

35. *Id.*

36. *Id.* at 421.

On remand, the district court of appeal found that the legislative appropriations were sufficient to fund the leave benefits as negotiated and declined to give effect to the legislature's attempted alteration.[37]

Second, a number of courts have ruled that the executive is not free unilaterally to withhold funds following a valid legislative appropriation. In *In re Advisory Opinion to the House of Representatives*, for example, the Rhode Island Supreme Court responded in the negative to the question of "[w]hether the Governor may unilaterally reduce, impound and/or withhold from distribution more than $10 million of funds lawfully appropriated by the General Assembly to the individual cities and towns of the State of Rhode Island."[38]

An Iowa decision carries this principle a step further. In *AFSCME/Iowa Council 61 v. State*,[39] interest arbitration awards established the terms of new labor agreements for units of state employees. The state legislature appropriated sufficient money to fund the awards, but the governor used a line-item veto to eliminate the wage increases provided by the awards.[40] The Iowa Supreme Court held that the arbitration awards became a binding obligation on the state once the legislature appropriated sufficient money to fund the awards.[41] Even though the court acknowledged that the governor's veto was not invalid as a matter of law, the court held that the executive does not have the power unilaterally to withhold contractually obligated funds that the legislature had already appropriated.[42]

Finally, another Florida decision has ruled that a legislative body has only one bite at the appropriations apple. In *Chiles v. United Faculty of Florida*, the legislature, after initially funding a collective bargaining agreement providing for a three percent pay raise, responded to revenue shortfalls by attempting to modify the agreement through the elimination of those raises.[43] The court held that the legislature's initial act of funding is the point in time in which the agreement becomes binding on all organs of the state.[44] The court explained that in this instance:

> [T]he legislature acted pursuant to its powers, appropriated funds for collective bargaining agreements, and thereby created a binding

37. State v. Fla. Police Benevolent Ass'n, 653 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 1995), *aff'd*, 688 So. 2d 326, 330 (Fla. 1997).

38. 576 A.2d 1371, 1371 (R.I. 1990); *see also* Barry v. Bush, 581 A.2d 308, 313 (D.C. 1990) (District of Columbia Mayor may not unilaterally reduce the Board of Education's fiscal year appropriations); Detroit Fire Fighters Ass'n v. City of Detroit, 537 N.W.2d 436, 440 (Mich. 1995) (executive branch may not impound funds appropriated by city council for an additional fire squad).

39. 484 N.W.2d 390 (1992).

40. *Id.* at 392, 395.

41. *Id.* at 395.

42. *Id.*

43. 615 So. 2d 671, 672 (Fla. 1993).

44. *Id.* at 672–73.

> contract. Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason. Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.[45]

As the *Chiles* court explained, once the legislature funded the collective bargaining agreement, further unilateral change was prohibited absent compelling circumstances that would pass muster under the Contract Clause of the Florida Constitution.[46]

The outcome in *Chiles* is in tension with the *Schwarzenegger* decision in which the California Supreme Court ruled that a downward revision of the state's initial 2008–09 budget appropriation lawfully permitted the furlough adjustment to the collective bargaining agreements in question.[47] At least three explanations for these differing outcomes are possible. First, the *Schwarzenegger* court appears to ground its result, at least in part, on a construction of the Dills Act. Thus, the second-bite unilateral change upheld in that decision may be premised on a legislative reservation of rights rather than on the legislature's constitutional authority over appropriations.[48] Second, the *Chiles* opinion specifically discussed the limitations on legislative modification imposed by the Contract Clause, while that issue was not mentioned in the *Schwarzenegger* decision. Finally, the two courts simply may have a difference of opinion on this issue.

II. The Legislative Lawmaking Function and the Contract Clause

The usual ban on unilateral change also may not apply when a governmental entity with lawmaking authority, most often a state legislature, enacts a statute or ordinance that attempts to alter the terms of an existing collective bargaining agreement. If that entity is not a statutory "employer" under the pertinent state labor-management statute,[49] the sole avenue for challenging such a modification is to proceed under state and federal constitutional provisions.[50]

The Contract Clause of the U.S. Constitution represents the principal constitutional check on such legislative action.[51] Although the Contract Clause literally proscribes any impairment of contract,[52] the

45. *Id.* at 673.

46. *Id.*

47. *See supra* notes 25–32 and accompanying text.

48. *See* Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger, 239 P.3d 1186, 1201 (Cal. 2010).

49. *See* Befort, *supra* note 10, at 1245–46 (indicating that most public-sector labor relations statutes do not include the state legislature within the definition of a covered public employer).

50. *See* AFSCME Council 6 v. Sundquist, 338 N.W.2d 560, 577 (Minn. 1983).

51. *See* Befort, *supra* note 10, at 1246.

52. U.S. CONST. art. I, § 10, cl.1 ("No state shall . . . pass any . . . law impairing the Obligation of Contracts. . . . ").

U.S. Supreme Court has long recognized that a state may modify a contract by legislation that is reasonable and necessary to serve an important public purpose.[53] This justification becomes more problematic, however, when a legislative body impairs one of its own contracts for the purpose of reducing its own financial obligations.

In *United States Trust Co. v. New Jersey*, the Supreme Court invalidated a New Jersey statute that retroactively repealed a covenant between the state and certain bondholders that limited the use of revenues pledged as security for rail passenger transportation purposes.[54] In striking down the statute, the Court adopted a heightened standard for scrutinizing laws that impair public contracts, stating that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[55] Additionally, it noted that "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."[56] The impairment of public contracts is constitutional, the Court stated, only if "reasonable and necessary to serve an important public purpose."[57] The Court noted that an impairment is "reasonable" only if the parties did not foresee at the time of contracting the possibility of changed circumstances[58] and is "necessary" only if there are no less drastic alternatives available for safeguarding the public interest.[59]

The courts have struggled to apply the *United States Trust Co.* standard in cases challenging unilateral alterations of collective bargaining agreements. Over the past thirty years, more than twenty published decisions have applied Contract Clause analysis to unilateral government actions.[60] Most of these courts properly applied the principles established by the Supreme Court in *United States Trust Co.* to restrict the permissible scope of self-serving legislative modifications. A significant and apparently growing minority of decisions, however, have afforded substantial deference to such modifications even though they occurred in a context in which the legislative body was hardly a disinterested observer.

The majority approach is illustrated by the Second Circuit's opinion in *Ass'n of Surrogates & Supreme Court Reporters Within the City of New York v. State of New York* (*Surrogates I*).[61] In 1989, the New York judiciary requested $972.9 million in order to expand to

53. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434, 438 (1934).
54. 431 U.S. 1, 9–14 (1977).
55. *Id.* at 26.
56. *Id.* at 30–31.
57. *Id.* at 25.
58. *See id.* at 31–32.
59. *See id.* at 29–31.
60. *See generally* Befort, *supra* note 3.
61. 940 F.2d 766 (2d Cir. 1991).

better cope with the state's "exploding drug crisis."[62] The state, unfortunately, also was facing a budget deficit at the time. The New York legislature ended up reducing the judiciary's budget request by $69.1 million but, nevertheless, approved the judiciary's requested expansion. In order to pay for the newly created positions, the legislature imposed a lag payroll scheme for certain nonjudicial employees of the court system, which conflicted with the employees' collective bargaining agreements.[63] A "lag payroll statute" essentially operates as an involuntary loan to a public employer by delaying the point in time at which employees receive payment of wages or salaries already earned.[64] The Second Circuit found that the impairment caused by the lag payroll was substantial, focusing on the effect it would have on individual employees.[65] The court refused to examine the governmental fiscal crisis without also regarding the "personal fiscal crises that the lag payroll would create."[66]

The Second Circuit in *Surrogates I* also held that the lag payroll statute in question did not pass muster under the *United States Trust Co.* reasonable and necessary test. The *Surrogates I* court was skeptical of the necessity of a lag payroll plan during what it described as that year's "perennial 'fiscal cris[i]s.'"[67] The court read the necessary requirement narrowly to mean that it must have been essential to implement this particular plan due to the absence of any other possible alternatives. The court found, however, that there were alternatives to a lag payroll plan, albeit politically unpopular ones, like raising taxes or shifting money from other governmental programs.[68] The court

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62. *Id.* at 769.

63. *Id.* at 769–70.

64. *Id.* at 769. The legislature delayed payment of employees' salaries until two weeks after those salaries had been earned. *Id.*

65. *Id.* at 772. The court noted:

> For instance, a 25-year-old employee would not be repaid her lagged wages until she leaves the state's employ—perhaps 45 years, should she devote her entire career to governmental service. The affected employees have surely relied on full paychecks to pay for such essentials as food and housing. Many have undoubtedly committed themselves to personal long-term obligations such as mortgages, credit cards, car payments, and the like—obligations which might go unpaid in the months that the lag payroll has its immediate impact.

See also Univ. of Haw. Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999) ("Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.").

66. *Surrogates I*, 940 F.2d at 772.

67. *Id.* at 774.

68. *Id.* at 773; *see also* Chiles v. United Faculty of Fla., 615 So. 2d 671, 673 (Fla. 1993) ("The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must

ultimately concluded that the legislature had not shown that it was necessary to "plac[e] the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state."[69]

The Fourth Circuit Court of Appeals took a distinctively different approach to the Contract Clause issue in *Baltimore Teachers Union v. Mayor of Baltimore*.[70] In that case, the court found that Baltimore's furlough plan[71] constituted a substantial impairment of contract rights, but ultimately held that the plan was permissible as a legitimate exercise of the state's sovereign powers.[72]

The Fourth Circuit adopted a broader reading of the *United States Trust Co.* test, reasoning that "at least some deference to legislative policy decisions to modify these contracts in the public interest must be accorded."[73] Thus, according to the Fourth Circuit, the ability to raise taxes or shift funds from one governmental program to another does not automatically preclude a finding of necessity. "Were these the proper criteria," the court stated, "no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be."[74]

The Fourth Circuit also found that the City tailored the plan "as narrowly as possible to meet its unforeseen [budget] shortfalls."[75] Before enacting the furlough plan, Baltimore abandoned previously negotiated pay raises and resorted to measures such as layoffs, job eliminations, and early retirement programs.[76] Only when the State proposed further cuts in state aid did the City resort to the furlough plan.[77] The court accordingly held that the plan was "necessary."[78]

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demonstrate that the funds are available from no other possible reasonable source."); Op. of the Justices, 609 A.2d 1204, 1211 (N.H. 1992) ("The legislature has many alternatives available to it, including reducing non-contractual State services and raising taxes and fees. Although neither of these choices may be as politically feasible as the furlough program, the State cannot resort to contract violations to solve its financial problems.").

69. *Surrogates I*, 940 F.2d. at 773. The court went on to query, "[i]f a state government could so cavalierly disregard the obligations of its own contracts, of what value would its promises ever be?" *Id.* at 774; *see also* Mass. Cmty. Coll. Council v. Massachusetts, 649 N.E.2d 708, 716 (Mass. 1995) (legislatively adopted furlough program constituted a substantial impairment of state employee rights as established by collective bargaining agreements which could not be justified as reasonable).

70. 6 F.3d 1012 (4th Cir. 1993).

71. "Under the [Baltimore] plan, full-time city employees, except for firefighters . . . lost the annual equivalent of 2.5 days of pay, or .95% of their gross annual salary, and Baltimore saved approximately $2 million, which it does not intend to refund." *Id.* at 1014.

72. *Id.* at 1015.

73. *Id.* at 1019.

74. *Id.* at 1020.

75. *Id.* at 1021.

76. *Id.*

77. *Id.* In this context, the court concluded that the furlough plan was a moderate course of action that was preferable to further layoffs. *Id.*

78. *See id.* at 1020–21.

The Fourth Circuit further held that the plan was "reasonable" under the circumstances.[79] The plan was designed to "deal with a broad, generalized economic or social problem."[80] The plan extended to all City employees as opposed to a narrow group such as in *Surrogates I*,[81] and the plan was discontinued at the first opportunity.[82] Finally, the court noted that the plan "affected reliance interests not wholly unlike those of private entities in regulated industries, which contract [is] subject to future, additional regulation."[83] On this latter point, the court stated that "[p]ublic employees—federal or state—by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public servants might well be called upon to sacrifice first when the public interest demands sacrifice."[84]

Four recent decisions similarly illustrate the diversity of judicial viewpoints. This set of cases, however, appears to signal a growing trend toward treating governmental impairments more deferentially.

In *Buffalo Teachers Federation v. Tobe*, the Second Circuit Court of Appeals ruled that unilateral action imposed by a legislatively-created fiscal authority passed the reasonable and necessary test.[85] The court gave substantial deference to the governmental action stating, "we find no need to second-guess the wisdom of picking the wage freeze over other policy alternatives."[86]

In contrast, the Eighth Circuit Court of Appeals ruled in 2008 that the City of Benton, Arkansas, violated the Contract Clause when it unilaterally reduced employer health care premium contributions for retired city employees.[87] The court in that case examined the City's plea of financial exigency on a *de novo* basis[88] and concluded that the City's evidence fell short of establishing the existence of an "unprecedented emergency" sufficient to warrant the City's unilateral action.[89]

The Fourth Circuit Court of Appeals in a 2010 decision upheld a County's furlough plan that unilaterally reduced work schedules by eighty hours during the 2009 fiscal year.[90] The Fourth Circuit construed

79. The court noted that "the amount of the reduction was no greater than that necessary to meet the anticipated shortfall . . . [and] the plan did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales." *Id.* at 1020.

80. *Id.* at 1021 (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 235 (1973)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. 464 F.3d 362, 371–72 (2d Cir. 2006).

86. *Id.* at 372.

87. AFSCME, Local 2957 v. City of Benton, 513 F.3d 874 (8th Cir. 2008).

88. *Id.* at 878.

89. *Id.* at 882.

90. Fraternal Order of Police v. Prince George's Cnty., 608 F.3d 183 (4th Cir. 2010).

the collective bargaining agreements at issue as incorporating the County's Personnel Law, which expressly authorized the adoption of a furlough plan upon the County Executive's determination that such a plan was required in order to respond to a shortfall in revenue.[91] The court therefore concluded that since the furlough plan was authorized by the collective agreements, no impairment resulted and an analysis of the reasonable and necessary factors was not required.[92]

Finally, in *United Auto Workers v. Fortuño*, several labor unions challenged a Puerto Rico law that sought to eliminate a $3.2 billion deficit by freezing wages and benefits for a two-year period.[93] Although the plaintiffs' complaint alleged that the law unreasonably impaired existing labor agreements when less drastic alternatives were available, the First Circuit Court of Appeals never reached the merits but disposed of the case on procedural grounds.[94] The court began its analysis by determining that plaintiffs in a Contract Clause challenge should bear the burden of proof in showing that the challenged legislation was not reasonable and necessary to serve an important societal purpose.[95] Although acknowledging that this allocation of proof burden was in some tension with the *United States Trust Co.* court's admonition against complete deference, the First Circuit explained that this allocation was appropriate in order to preserve a state's ability to deal with financial exigencies without being subject to costly, but unsubstantiated, legal challenges.[96] Invoking the *Iqbal/Twombly*[97] line of cases, the court then ruled that the plaintiffs had failed to plead sufficient facts to state a plausible claim that the legislation was not reasonable and necessary.[98] The court stated that the complaint merely alleged conclusory statements, and failed to describe the specific provisions allegedly impaired, the extent of the impairment, why the law was excessively drastic, or the alternative measures available for resolving the budgetary problem.[99]

Conclusion

The state and federal constitutional provisions discussed in this article provide for a system of checks and balances that complicate col-

91. *See id.* at 190–91.
92. *See id.* at 188–89.
93. 633 F.3d 37, 39–40 (1st Cir. 2011).
94. *Id.* at 42.
95. *Id.* at 40.
96. *Id.* at 43.
97. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
98. *United Auto Workers*, 633 F.3d at 40–41 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Iqbal*, 129 S. Ct. at 1949)).
99. *Id.* at 46–47.

lective bargaining relationships in the public sector. On the one hand, the legislature's constitutional authority with respect to appropriations and lawmaking provides governmental entities with helpful safety valves for responding to financial emergencies. On the other hand, this authority heightens the potential for unilateral change and the uncertain status of contractual promises.

With respect to the appropriations function, the principal policy problem is the potential for unpredictable, mid-term unilateral change. To avoid this scenario, states should structure their budgetary processes so as to ensure, to the extent constitutionally possible,[100] that the appropriations term and the collective agreement term coincide. Put another way, legislative approval of collective bargaining agreements should be for the duration of the agreement rather than in a piecemeal fashion.

As for the legislature's lawmaking function, a major concern is that the apparent growing level of judicial deference to modifications by legislatures represents an assessment that public-sector collective bargaining agreements are not as worthy of protection as other types of governmental contracts.[101] This view is an undesirable vestige of the discredited notion that public employees owe a duty of "extra loyalty" to the state.[102] In the end, a governmental body should be sustained in impairing its contract obligations to its employees on the same basis as other self-serving impairments—that is, only when such impairment is reasonable and necessary to serve an important governmental purpose.[103]

These proposals admittedly reduce to some extent the government's ability to respond to emergency situations. But, they do so by treating collective bargaining agreements in a fashion similar to other governmental contracts, thereby promoting both predictability and fairness.

100. Some state constitutions require their state legislature to adopt an annual appropriations bill. *See, e.g.*, CAL. CONST. art. IV, § 12, subd. (c)(3). In those states, it may not be possible to synchronize multi-year agreements with the appropriations cycle.

101. *See, e.g.*, Balt. Teachers Union v. Mayor of Balt., 6 F.3d 1012, 1021 (4th Cir. 1993) ("[P]ublic servants might well be called upon to sacrifice first when the public interest demands sacrifice.").

102. *See* Befort, *supra* note 3, at 50–51.

103. *Id.* at 52–55.