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## Public pensions are protected in Constitution

**But some believe the contracts clause doesn't prevent the state from changing costly retirement plans.**

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From Sacramento

In Philadelphia, 224 years ago, some men tucked these words into the nation's new Constitution: "No state shall ... pass any ... law impairing the obligation of contracts..."

Those words, squeezed into a very long sentence in Article 1, Section 10, listing powers denied the states, became known as the "contracts clause." And it is playing havoc with modern-day public pension reformers, including Gov. Jerry Brown.

As widely interpreted — most importantly by the courts (or so we laymen are told) — the clause means that pensions promised state and local government workers on the day they were hired cannot be reduced without giving them a new compensating benefit.

In other words, some kid walks into a state office seeking a junior clerk job. He lands it. That constitutes a contract. The new hire is entitled to the pension benefit then in effect if he sticks around long enough to collect it — even if the subject of retirement perks never was discussed, as it surely would not have been.

"Employees are entitled to benefits in place during their employment," asserts the California Public Employees' Retirement System in a recent report.

"Promised benefits may be increased during employment, but not decreased, absent the employees' consent.... The courts have established that this rule prevents not only a reduction in the benefits that have already been earned, but also a reduction in the benefits that a member is eligible to earn during future service."

That's a jaw-dropper, I suspect, for most private-sector workers. They don't enjoy such constitutional protection. They're covered by a federal law that basically guards only the pension benefits they've already earned.

As too many of us know, there has been an epidemic of private pension butcheries in the last decade. Companies simply have announced that they're freezing benefits. Employees will get

what they've accrued — what they're vested in — but will earn no more in the future.

The company's new retirement plan will be a 401(k), where the financial risk is borne by the employee rather than the employer. Forget what, if anything, the worker was told when hired. The world has changed.

Naturally, this has created a great deal of pension envy among the vast majority of voters who don't work for a state or local government.

And it's at the heart of voter demands for public pension reform — with plenty of legitimate justification: The future liabilities of public pension systems are underfunded by hundreds of billions of dollars.

The deficit-ridden budgets of state and local governments need immediate relief from the escalating cost of pension contributions for current employees. And the long-term fiscal health of these governments requires a significant reduction in retirement benefits for future hires.

A poll in March by the Public Policy Institute of California showed that 74% of likely voters favored eliminating pensions and adopting 401(k)-type systems for new workers. And 57% thought pension plans should be reduced for current employees.

But the current employees' protection in the U.S. Constitution is fortified by a similar clause in the California Constitution: "A ... law impairing the obligation of contracts may not be passed."

Here's the worst kicker for private-sector taxpayers: There's a theory that current employees can't even be forced to contribute more into their pension plans.

Part of Brown's recent proposal to overhaul state and local government pensions is to require workers to pay a larger share of their retirement costs. Many already have agreed to through collective bargaining.

"One thing we know for sure under constitutional law," Brown told reporters, is "the employer can require higher contributions, and that is the most immediate and the biggest change that will make our pension plans more solvent."

Not so fast, says nonpartisan Legislative Analyst Mac Taylor. He's also certain, but in the opposite way of the governor.

The analyst, in a recent report, called it "a legal and collective bargaining minefield," adding that "our reading of California's pension case law is that it will be very difficult — perhaps impossible — for the Legislature, local governments or voters to mandate such changes."

Brown isn't buying it, according to his labor secretary, Marty Morgenstern.

"We think the legislative analyst is wrong," Morgenstern says. "Different people have different opinions about that. One never knows what the courts will do."

I called a constitutional law professor, John Eastman of Chapman University. He agrees with Brown.

His reading of two centuries of case law on the contract clause, Eastman says, is that public pension plans can be modified if there's "a real serious fiscal problem, a dire financial need — and the system is underfunded. Given the circumstances in California, I think we would meet the legal requirement."

He adds: "Guys in the Legislature made [pension] promises they cannot fund. Making sure that future generations of taxpayers are not held to that obligation is not a violation of the contracts clause."

You'd think.

Eastman is working with a conservative group to place a more drastic pension overhaul than Brown's on the California ballot next year.

Brown's plan — which analyst Taylor calls "bold" overall — would trim retirement benefits for future employees. Their retirement ages would be increased, and they'd be plugged into a 401(k)-pension mix.

The goal would be to replace 75% of their salaries — still generous by private-sector standards.

But the notion of not being able to alter pension plans for current workers — even force them to contribute more — is nuts. A lifelong contract shouldn't come with an entry-level job offer.

It's hard to believe that's what the Constitution's framers had in mind.