

The Impairment of Public Sector Collective Bargaining Agreements

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Stephen F. Befort, [Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause](#), 59 **Buffalo L. Rev.**1 (2011).

The great recession has hit state and local governments nationwide very hard. Many have turned to the unions that represent their employees for wage, benefits and work rule concessions in an effort to reduce expenditures. When they have been unable to secure such concessions, they have resorted to unilateral action abrogating their collective bargaining agreements. Their actions have taken many forms. Some are redressable under the contract's grievance and arbitration procedures or in unfair labor practice proceedings before the state public sector labor relations agency. However, in many cases such redress is not available, leaving the only avenue an action alleging an unconstitutional impairment of contract.

[Stephen Befort](#)'s article, "Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause," tackles head on the extremely important and timely topic of when unilateral modifications of public employee collective bargaining agreements in response to fiscal crises constitute an unconstitutional impairment of contract. Befort first provides a brief background on the development of public sector labor law and public sector collective bargaining. He observes that where unilateral modification of public employees' collective bargaining agreements is accomplished through legislation, public sector labor relations acts are of little utility because the legislature is not the employer. Consequently, the only generally available avenue of contest is under the Contract Clause of the Constitution. Befort then provides useful and detailed background to the development of Contract Clause jurisprudence in general.

Befort observes that "[w]hile the severity of the 2009-10 budget crisis is relatively unique, the existence of public sector budget crises are not." (P. 9.) He catalogues four periods of public sector budget crises over the past 30 years: 1982, 1991, 2003-04 and 2009-10. He examines the Contract Clause challenges to legislative enactments that abrogated collective bargaining agreements during each cycle. He provides detailed discussion of each case that arose in each cycle. From this exhaustive description, he derives an array of what he finds to be the most significant factors used by the courts. These include the severity of the fiscal crisis, foreseeability of the fiscal emergency at the time of entering into the contract, the substantiality of the impairment of the contract, the availability of alternatives to modifying the collective bargaining agreement, whether the impairment operates prospectively only or retroactively, and whether the burden of the fiscal crisis is spread among a large number of constituents or is disproportionately placed on the employees.

Befort critiques the courts' approaches on three grounds. First, he finds that many courts have been overly deferential to the judgments of state legislatures. He persuasively urges that such deference is inconsistent with the Supreme Court's decision in [United States Trust Co. of N.Y. v. New Jersey](#), 431 U.S. 1 (1977), where the Court opined that deference must be circumscribed when a court is reviewing a state's impairment of its own contracts because a state can always find uses for extra money where that money is obtained by impairing its contractual obligations instead of raising taxes. The Court thus required state action which impaired its own contracts to be reasonable, in the sense that the parties

did not foresee at the time of contracting the possibility of the changed circumstances, and necessary in the sense that there were no less drastic alternatives available. Befort demonstrates how a number of courts reviewing impairments of public employee collective bargaining agreements have fallen short of the *U.S. Trust* standard.

Befort further critiques the courts' approaches, discerning that some courts have treated collective bargaining agreements as less worthy of protection than bonds. Befort argues that these courts too easily approve impairments that are prospective only, failing to recognize that a multi-year contract must be treated as an integrated whole. Indeed, it is common for unions and employers to backload wage increases to reduce the immediate fiscal impact while ending up with an increased base by the end of the contract's term. Finally, Befort perceptibly points out that courts have inappropriately opined that public employees owe an extra duty of loyalty which commands from them greater sacrifice for the public interest than from other citizens.

Befort complements his critique with his recommended framework for analysis of impairment issues in public sector collective bargaining agreements. He urges that courts be true to the Supreme Court's analysis in *U. S. Trust* by undertaking a de novo review of whether the impairment was reasonable and necessary to serve an important government purpose. He urges that to be reasonable, the impairment must be in response to an emergency that could not have been foreseen at the time of contracting. To be necessary, the state must demonstrate that it considered alternatives to impairing the contract and had reasonable grounds for rejecting the alternatives. Finally, he calls on courts to determine whether the state has distributed the burden of responding to the fiscal crisis broadly and equitably.

Although public sector employment has received renewed attention nationally, legal scholarship in this area remains sparse. Stephen Befort's article provides a welcome scholarly analysis to an extremely timely topic.

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