ALASKA SUPREME COURT EXTENDS CONSTITUTIONAL PROTECTION TO "FORMER MEMBERS" OF THE STATE RETIREMENT SYSTEM

METCALFE V. STATE, 484 P.3D 93 (ALASKA 2021).

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I. INTRODUCTION

In *Metcalfe v. State*,[1] the Alaska Supreme Court considered whether the legislature's repeal of section 39.35.350 of the Alaska Statutes,[2] which effectively terminated the right of former state employees who withdrew contributions to the State's retirement system to "buy back" credited service and restore themselves to their original benefit level, violated the state's constitution.[3] In particular, members of a class of former state employees, represented by Appellant Peter Metcalfe, argued that the repeal of section 39.35.350 violated the anti-diminishment clause of the Alaska Constitution, which provides that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired."[4] In finding that the repeal of this statute was a violation of the anti-diminishment provision, the court noted that the ability to buy back service is an accrued benefit that vests on an employee's first day of employment, regardless of whether they previously fully withdrew their contributions to the retirement system.[5]

This Comment will first provide the factual and procedural history of both the legislature's repeal of section 39.35.350 and the complaint leading to this case. It will then supply an overview of different state protections for pension benefits, showing how Alaska's constitutional protection for benefits vesting on the first day of employment provides a stronger level of protection than most other states.[6] This Comment will then review the court's holding, discussing both the majority and dissenting opinions, before arguing that the majority's analysis does not sufficiently capture the consideration needed to make the state's offer under section 39.35.350 irrevocable, and incorrectly declines to apply California precedent when it had done so in the past. The implication of this decision, this Comment will demonstrate, is that the Alaska legislature will be further bound by potentially unreasonable and

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1. 484 P.3d 93 (Alaska 2021).

2. ALASKA STAT. § 39.35.350(b) (2009) (repealed 2010) (providing that "[a]n employee may reinstate credited service associated with a refund by repaying the total amount of the refund").

3. *Metcalfe*, 484 P.3d at 95.

4. ALASKA CONST. art. XII, § 7; *Metcalfe*, 484 P.3d at 96–97.

5. *Metcalfe*, 484 P.3d at 98–99.

6. *See* Anna K. Selby, *Pensions in a Pinch: Why Texas Should Reconsider Its Policies on Public Retirement Benefit Protection*, 43 TEX. TECH L. REV. 1211, 1230–38 (2011) (describing the different jurisdictional approaches to protecting retirement benefits).

expensive retirement plan offerings that will create inevitable budgetary constraints.

II. STATEMENT OF THE CASE

Peter Metcalfe was employed by the State of Alaska and enrolled in the Public Employee Retirement System ("PERS") in 1980.[7] When he enrolled, he was a member of Tier 1, which provided the most generous benefits to any member.[8] Before and during the time he was enrolled, as well as when he left public employment in 1981 and withdrew his contributions, section 39.35.350 was in effect, providing that any former member who returned to employment with the state—and subsequently refunded any withdrawn contributions—would be placed back into PERS at their initial benefit level; they would also receive credit for previous service years.[9] A "former member" is statutorily defined by section 39.35.680(20) of the Alaska Statutes, which specifically includes a former employee that has received (or has requested to receive) a refund of the balance in their retirement account.[10]

In 2005, the Alaska legislature, acting to better ensure the financial health of the PERS system,[11] closed the three existing benefit tiers to new members, instead creating a defined contribution plan—referred to as Tier 4—that had less generous benefits than the other tiers.[12] Anyone who joined PERS after July 1, 2006, was automatically placed in Tier 4.[13] Additionally, the legislature repealed section 39.35.350, but did grant former employees a five year window to take advantage of the statute by returning to eligible employment and repaying their contributions to

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7. *Metcalfe*, 484 P.3d at 95–96.

8. *Id.*

9. *Id.* at 96; *see also* ALASKA STAT. § 39.35.350(b) (2009) (repealed 2010).

10. ALASKA STAT. § 39.35.680(20) (2022). As will be further explained, this is not to be confused with an "inactive member," which includes a former employee that has not yet received a refund of their contributions. *Id.* § 39.35.680(21).

11. Brief of Appellee at 5, Metcalfe v. State, 484 P.3d 93 (Alaska 2021) (No. S-17157), 2019 WL 1124192, at *5.

12. *Metcalfe*, 484 P.3d at 96; *see also* Matt Miller, *Alaska Supreme Court Restores Access to Public Employee and Teacher Retirement Benefits*, ALASKA PUB. MEDIA (April 8, 2021), https://www.alaskapublic.org/2021/04/08/alaska-supreme-court-restores-access-to-public-employee-and-teacher-retirement-benefits/. Unlike a defined benefit plan, which had been in effect prior to the 2005 changes, a defined contribution plan does not promise retirees a set amount of benefits when they retire. *Types of Retirement Plans*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/retirement/typesofplans (last visited May 19, 2023). Instead, the employer makes defined contributions on the employee's behalf. *Id.*

13. *See* Brief of Appellant at 3, Metcalfe v. State, 484 P.3d 93 (Alaska 2021) (No. S-17157), 2018 WL 7572968, at *4.

PERS.[14] Metcalfe did not take advantage of this provision, instead filing this suit after learning of his ineligibility for retirement benefits.[15]

In his complaint, Metcalfe alleged that the repeal of the buy-back statute violated his rights under article XII, section 7 of the Alaska Constitution, which protects accrued benefits of a state retirement system from being "diminished or impaired."[16] The superior court initially dismissed the claims for contract damages and for declaratory and injunctive relief as time-barred.[17] The Alaska Supreme Court affirmed the dismissal of the contract damages yet reversed the dismissal of the declaratory and injunctive relief.[18] While holding the claims weren't time-barred, the court felt contract damages weren't the proper remedy, and that Metcalfe should pursue a judicial recognition of the constitutionally protected contract instead.[19] On remand, the superior court found the constitutional protections applied only to *members* of the State's retirement systems, and that repeal of the reinstatement right did not diminish an "accrued benefit."[20] As a result, Metcalfe was not entitled to constitutional protection against the repeal of section 39.35.350 since he was considered a "former member," and the buy-back provision in question was not an "accrued benefit."[21]

III. BACKGROUND

Central to Appellant's argument is the level of protection the Alaska Constitution affords to public retirees. The differences in state approaches to these protections are key in understanding former employees' rights, as well as the ability of legislatures to modify terms after initial employment starts.

A. The Gratuity Approach

Followed by only Texas and Indiana,[22] the gratuity approach to pension rights maintains that pensions are "mere expectanc[ies], created

14. *Metcalfe*, 484 P.3d at 96.
15. *Id.*
16. *Id.* at 95–96; ALASKA CONST. art. XII, § 7.
17. *Metcalfe*, 484 P.3d at 96.
18. *Id.*
19. Metcalfe v. State, 382 P.3d 1168, 1170, 1175 (Alaska 2016), *remanded to* No. 1JU1300733, 2018 WL 5732606 (Alaska Super. Ct. 2018), *rev'd*, 484 P.3d 93.
20. *Metcalfe*, 484 P. 3d at 97.
21. *Metcalfe*, 2018 WL 5732606, at *2–3.
22. *See* Ballard v. Bd. of Trs., 324 N.E.2d 813, 815 (Ind. 1975); Kunin v. Feofanov, 69 F.3d 59, 63 (5th Cir. 1995).

by the law, and liable to be revoked or destroyed by the same authority."[23] In these states, pensions are viewed as a voluntary gift by the state, and they are therefore liable to be curtailed if the state so chooses.[24] Unlike stronger forms of benefit protection that will be discussed below, this approach offers very little, if any, security to retirees that their benefits will not be changed. As such, it has been rejected by most states since the nineteenth and early twentieth centuries, when employers viewed pension plans under this approach as "truly discretionary and dependent on [their] continuing good will and financial solvency."[25] States have rejected the gratuity approach either on policy grounds or due to constitutional prohibitions on individual gifts by the state.[26]

B. The Contract Approach

Most states today recognize retirement benefits as a contract between the employer and the retiree; when it comes to questions regarding benefit entitlements, courts generally must consider both the scope of the contract as well as the particular state's laws concerning modifications of that contract.[27] Even among states following the contract approach, there is substantial deviation on when these retirement benefits "vest," with some states finding the contract terms are locked in place as soon as an employee begins working for the state, while others find that a particular level of benefits is not guaranteed until the employee meets the necessary requirements, such as length of service.[28]

In a select handful of states, a specific constitutional provision establishes the contractual nature of retirement benefits.[29] Because the contract is established by the state constitution, retirees challenging unlawful modifications to benefits do not need to rely on more general constitutional provisions preventing the impairment of all contracts.[30] This makes these provisions unique since, unlike other contract clause jurisprudence, these provisions do not have any analogous federal

23. Selby, *supra* note 6, at 1230 (alteration in original) (quoting Pennie v. Reis, 132 U.S. 464, 471 (1889)).

24. *Id.*

25. *See* Ronald H. Rosenberg, *Cutting Pension Rights for Public Workers: Don't Look to the Courts for Help*, 62 HOW. L.J. 541, 581 (2019).

26. Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC., FIN. & POL'Y 1, 4 (2010).

27. Rosenberg, *supra* note 25, at 591–92.

28. Selby, *supra* note 6, at 1232.

29. Rosenberg, *supra* note 25, at 597, 597 n.236.

30. *Id.* at 597–98.

precedent for guidance.[31] In Michigan, Louisiana, and Hawaii, the constitutional provision protects only "accrued benefits," prohibiting adverse changes to benefits that have already been earned.[32] However, these states allow prospective changes to pension plans that potentially disadvantage current employees who have not yet earned future benefit rights.[33] This is not the same in New York, Illinois, Alaska, and Arizona, whose constitutional protections include both benefits already earned, as well as those which will be earned in the future.[34]

If a state constitution does not explicitly provide a contractual right to retirement benefits, a contract may nonetheless still be found in statute or case law.[35] In these situations, a court will determine the legality of proposed changes or modifications by looking at either the U.S. Constitution's Contract Clause,[36] or a similar state constitutional provision preventing the impairment of contracts.[37] States following the "strict contract theory" give retirees the most protection by holding that the "terms of the contract" are locked in place as soon as the person begins employment.[38] However, a majority of states offering contractual protection do so under a "modified contract theory."[39] As exemplified in the California case of *Allen v. City of Long Branch*,[40] this approach gives

31. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 117 (2009) (distinguishing state constitutional rights provisions with no federal "analog").

32. Selby, *supra* note 6, at 1233–34.

33. *See* Monahan, *supra* note 26, at 10–11.

34. Selby, *supra* note 6, at 1233. Interestingly, while Alaska, like New York and Illinois, protects both past and future benefit accrual, the language of its constitutional provision is much more like those in Michigan and Hawaii, who specially mention "accrued benefits" in their constitutional provisions. *See id.* at 1233–34. Both the majority and dissent in *Metcalfe* agree that accrued benefits are to be defined broadly. *See* Metcalfe v. State, 484 P.3d 93, 97–98 (Alaska 2021); *id.* at 102 (Carney, J., dissenting). However, the legislative history of the Alaska Constitution's enactment does not shed any light on the intent behind Alaska's provision. *See* 7 ALASKA CONST. CONVENTION MINUTES OF THE DAILY PROC. 17 (1965) (showing no discussion of article XII, section 7). While a different interpretation among Alaska courts likely would not have influenced the outcome of *Metcalfe*, given the reinstatement provision in question was not a benefit which had to be gained through additional years of service, it certainly could make reform options in Alaska easier than it would be in New York or Illinois. *See* Monahan, *supra* note 26, at 7–11; *see also infra* Section VI.

35. *See* Rosenberg, *supra* note 25, at 591.

36. U.S. CONST. art. I, § 10 provides: "No State shall enter into any . . . Law impairing the Obligation of Contracts . . . ."

37. Monahan, *supra* note 26, at 5. To find an unconstitutional impairment under the Contract Clause, a plaintiff must show that a contract did in fact exist, that the state action constituted a "substantial impairment," and that any impairment was not justified by an important public purpose. *Id.* at 6.

38. Selby, *supra* note 6, at 1234.

39. *Id.* at 1235.

40. *See* 287 P.2d 765 (Cal. 1955).

states more latitude to change retirement plans by allowing "reasonable" modifications of pension rights as long as there is a "material relation to the theory of a pension system and its successful operation," and that any "disadvantage[s] to employees . . . be accompanied by comparable new advantages."[41] While not every state with a modified contract approach follows the "California Rule" to a tee,[42] these states all provide retirees with fewer guarantees than those that follow a strict contract theory.[43]

C. The Promissory Estoppel Approach

Minnesota protects retirement benefits through the theory of promissory estoppel, which finds an enforceable contract when "the promisor should have reasonably expected the promisee to rely on the promise and . . . the promisee did actually rely on the promise to his or her detriment."[44] In order to protect a retirement plan via promissory estoppel, Minnesota courts require the plaintiff to show: (1) a clear and definite promise; (2) the promisor's intent to induce reliance; (3) the promisee did in fact rely on the promise; and (4) enforcement of the promise is needed to prevent injustice.[45]

D. Due Process/Property Rights Approach

The final group of states view pension rights as property interests that can only be modified if the state first affords the retiree procedural due process protection.[46] This approach does not offer the same protections as a contractual approach because there is no contractual backing.[47] Many courts instead find that retirees do not have "investment-backed expectations," and thus modifications are not considered an unjust taking of private property.[48] Further, if a plaintiff can get over the hurdle of showing a "fundamental right protected by the Constitution" that has been deprived through "arbitrary" and

41. Selby, *supra* note 6, at 1235; *Allen*, 287 P.2d at 767.
42. *See* Selby, *supra* note 6, at 1235–38 ("Two states, however, have departed significantly from the traditional forms of retirement benefit protection.").
43. *Id.* at 1234–35.
44. Monahan, *supra* note 26, at 22 (quoting BLACK'S LAW DICTIONARY (8th ed. 2004)).
45. *Id.* at 23.
46. Selby, *supra* note 6, at 1236–37.
47. *See id.*; Monahan, *supra* note 26, at 24.
48. Monahan, *supra* note 26, at 27.

"outrageous" state action, the state need only demonstrate a rational interest for the modification to be considered lawful.[49]

IV. THE COURT'S ANALYSIS

On appeal, the Alaska Supreme Court reversed the superior court's decision and found that that the repeal of section 39.35.350 and its buy-back provision impermissibly impaired an accrued benefit of retirees.[50] In its decision, the majority noted that this kind of provision was considered an accrued benefit that vested as soon as Metcalfe became employed with the State because it was part of the "bargained-for consideration" that induced him to take public employment, that the repeal of the statute diminished this accrued benefit in violation of article XII, section 7 of the Alaska Constitution, and that his status as a "former member" of PERS did not distinguish his entitlement to promised benefits.[51] The dissent disagreed, instead arguing that Metcalfe could not have an accrued benefit protected by the Alaska Constitution because he fully withdrew his contributions and no longer had money left in the system.[52] Further, the dissent cited California precedent to show that this type of benefit is not the kind of "deferred compensation" that is normally protected by the constitution, nor did it induce the same kind of reliance that is typically protected from impairment.[53]

A. The Majority Opinion

Justice Maassen, writing for the majority, began the court's discussion by noting how retirement benefits are a form of "deferred compensation," which is "an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment."[54] Citing the court's prior decision in *Hammond v. Hoffbeck*, the majority said that these rights vest immediately upon enrollment in the State's retirement system.[55] The majority also noted that past decisions of the court have defined the term "accrued benefits" broadly to include not just actual monetary benefits,

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49. *Id.* at 26 (quoting Walker v. City of Waterbury, 601 F. Supp.2d 420, 424 (D. Conn. 2009), *aff'd*, 361 Fed. Appx. 163 (2d Cir. 2010)).

50. Metcalfe v. State, 484 P.3d 93, 95 (Alaska 2021).

51. *Id.* at 98–99, 101.

52. *Id.* at 103 (Carney, J., dissenting).

53. *Id.* at 104.

54. *Id.* at 97 (majority opinion) (quoting Hammond v. Hoffbeck, 627 P.2d 1052, 1056–57 (Alaska 1981)).

55. *Id.* (citing *Hammond*, 627 P.2d at 1057).

but the entire package of benefits and its practical effects on PERS members.[56]

The court next turned to section 39.35.350, finding that the repeal of this statutory provision was an impermissible impairment of an accrued benefit of the retirement system.[57] It is considered an accrued benefit, the majority noted, because a prospective employee could reasonably rely on this provision before beginning employment with the State.[58] Therefore, this benefit became protected from impairment by the Alaska Constitution as soon as Metcalfe began employment and enrolled in PERS.[59] Additionally, the court found that the ability to buy back credited service is a "retirement benefit[]," rather than an "employment benefit" that only active employees could exercise, because it affects the "whole complex of provisions" that make up the retirement benefits package.[60]

The majority did note that Alaskan courts have often looked to California law in the past when interpreting their own constitutional provisions, but they nonetheless declined to follow California precedent set in *Cal Fire Local 2881 v. California Public Employees' Retirement System*.[61] In *Cal Fire*—a case challenging the repeal of an almost identical statute allowing public employees to purchase up to five years of service credit—the California Supreme Court held that this right was not entitled to contractual protection because it was not "deferred compensation" that public employees earn for completed work, unlike other, more basic pension rights, such as monetary benefits.[62] The Alaska Supreme Court reasoned that California law views the terms of public employment as "statutory" unless clearly demonstrated otherwise, while in Alaska, all public benefits are contractual per the Alaska Constitution, accruing immediately when an employee begins his or her work rather than when they complete a certain amount of service.[63]

After concluding the reinstatement right was an accrued benefit that vested immediately upon employment, the majority next turned to the

56. *Id.* at 97 n.25 (citing Sheffield v. Alaska Pub. Emps.' Ass'n, 732 P.2d 1083, 1087 (Alaska 1987); Duncan v. Retired Pub. Emps. of Alaska, Inc., 71 P.3d 882, 887 (Alaska 2003)).

57. *Id.* at 98.

58. *Id.*

59. *Id.* at 98–99.

60. *Id.* at 99 (quoting *Sheffield*, 732 P.2d at 1087).

61. *Id.* at 99–100 (citing Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433 (Cal. 2019)).

62. *Cal Fire Loc. 2881*, 435 P.3d at 437.

63. *Metcalfe*, 484 P.3d at 99–100.

superior court's claim that, because Metcalfe was a "former member," he was not entitled to protection under article XII, section 7.[64] Although this constitutional provision specifically governs "[m]embership in employee retirement systems,"[65] the majority argued it actually protects anyone with a "vested right to a benefit *generated* by membership in the State's public retirement systems."[66] As the court explained:

> The benefit Metcalfe is claiming is one that was promised would be available to him *only* if he first became a "former member." To say that he cannot claim the benefit *because* he is a former member is plainly to render the State's promise illusory and to diminish or impair the promised benefit.[67]

Therefore, according to the majority, Metcalfe's constitutional protections did not expire simply because he left public employment and cashed out his benefits.[68]

B. The Dissenting Opinion

Justice Carney, writing for the dissent, began her opinion by casting doubt on whether the right to completely cash out retirement contributions, and later buy back into the system at a specified benefit tier, is an accrued benefit protected by the constitution.[69] Like the majority, the dissent defined the term "accrued benefits" broadly to encompass the entire package of benefits, and not just monetary amounts, but stated that someone without contributions in the retirement system does not have any accrued benefits that can be impaired in the first place.[70] Justice Carney agreed with the majority that Alaska precedent has definitely determined that benefits vest when employment begins, but stated that this does not automatically mean a benefit is an *accrued benefit* entitled to constitutional protection.[71]

The dissent argued that employee retirement plans are meant to induce employees to take *and keep* a job with the State over time.[72] That is why prior cases have recognized that the constitution specifically protects "system benefits offered to retirees when an employee is first

64. *Id.* at 100–01.
65. ALASKA CONST. art. XII, § 7.
66. *Metcalfe*, 484 P.3d at 101.
67. *Id.*
68. *See id.*
69. *Id.* at 102 (Carney, J., dissenting).
70. *Id.*
71. *Id.* at 103.
72. *Id.*

employed *and as improved during the employee's tenure*."[73] The benefit at issue in this case—the ability to buy back service time and return to an initial benefit tier—did not induce Metcalfe to continue his employment with Alaska, or even keep his money in the PERS fund.[74] Therefore, the dissent did not believe this particular benefit was not an accrued benefit subject to constitutional protection, since it did not align with the goals of the PERS system.[75]

Justice Carney also cited *Cal Fire* to demonstrate that a benefit which allows a former employee to buy years of service they did not earn through work was not a form of deferred compensation.[76] Similarly, the right to return to PERS at a specific benefit level—which is not tied to the amount of time an employee worked or the amount of funds they contributed to the system—is not deferred compensation, and thus, not constitutionally protected as an accrued benefit.[77]

Finally, the dissent made the distinction that "former members" are excluded from PERS membership by statute.[78] They emphasized the meaning of "[m]embership" in the Alaska Constitution, finding that constitutional protection is only afforded to actual members, not former members.[79] As they point out, past decisions of the court have only dealt with members of the employee retirement system; to the dissent, it made no sense that someone who has "clearly disavowed any intention to regain membership" should be given the same constitutional protection as members.[80]

V. ANALYSIS

A. *The Majority Opinion Does not Capture the Consideration Needed to Make the State's Offer Irrevocable*

Consideration is a required element of contract formation.[81] To constitute adequate consideration, a promise must be bargained for,

73. *Id.* (quoting Duncan v. Retired Pub. Emps. of Alaska, Inc., 71 P.3d 882, 888 (Alaska 2003)).
74. *Id.* at 103–04.
75. *Id.* at 104.
76. *Id.*
77. *Id.*
78. *Id.* at 104–05; *see also* ALASKA STAT. § 39.35.680(22)(C)(i) (2022) (describing that "member" does not include "former members").
79. *Metcalfe*, 484 P.3d at 105.
80. *Id.* at 104–05.
81. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

meaning the promisee must give up something in exchange for the promise.[82] Only then is that promise considered enforceable.[83]

The majority argued that Metcalfe's initial employment with the State was sufficient consideration to hold the State's offer under section 39.35.350 open in perpetuity.[84] However, this proposition does not align with Alaska's statutes, which separately define "former member[s]" as those who have left the retirement system and completely cashed out their benefits.[85] This statutory term carries no weight if the court can simply argue that someone's status of being a PERS member at one point is sufficient consideration to extend this offer to employees indefinitely. As some commentators have noted, the employment context itself is an important (if not the most important) element of the irrevocability of a contract for retirement benefits; if the benefit is not tied to services rendered, without some other form of consideration on the part of the employee, the required elements are not present to enforce the promise.[86]

Because the buy-back provision at issue is not directly tied to continued employment, the minimum consideration needed to make this offer irrevocable is that Metcalfe kept his money in the system. In other words, he must have remained an "inactive" member rather than cashing out his contributions and becoming a "former" member. As the dissent correctly explains, the Alaska Constitution specifically references "*[m]embership* in employee retirement systems . . . ," and its statutes exclude former members from the definition of "membership."[87] However, the statutes do unambiguously include "inactive" members in this definition.[88] Therefore, the necessary consideration for constitutional protection of retirement benefits is being considered a "member," which at the very least includes remaining an inactive member by leaving contributions in the PERS system. The majority notes that the benefits at issue only became available to Metcalfe once he became a former member (although they do not acknowledge his potential status as an "inactive member"), and therefore it would be incorrect to say he had no

82. *See id.*

83. *See id.*

84. *See Metcalfe*, 484 P.3d at 100 ("[C]onsideration for that benefit, like every other benefit of the system, was simply the 'employee's assumption and performance of the duties of his [or her] employment.'" (quoting Hammond v. Hoffbeck, 627 P.2d 1052, 1056 (Alaska 1981))).

85. *See* ALASKA STAT. § 39.35.680(20) (2022).

86. *See* T. Leigh Anenson, et al., *Constitutional Limits on Public Pension Reform: New Directions in Law and Legal Reasoning*, 15 VA. L. & BUS. REV. 337, 368 (2021) (describing the employment context and its relation to contractually protected pension benefits).

87. *Metcalfe*, 484 P.3d at 105 (Carney, J., dissenting); ALASKA CONST. art. XII, § 7 (emphasis added); ALASKA STAT. § 39.35.680(22)(C)(i).

88. ALASKA STAT. § 39.35.680(22)(B)(ii).

constitutional claim to buy back service time *because* he is a former member.[89] However, this argument misses the point that without sufficient consideration on the part of the retiree (i.e., keeping money in the system), this "promise" lacks the required elements to make it irrevocable.

This kind of consideration makes sense given the structure and operation of pension plans themselves. Like most retirement plans, the employer invests member contributions to benefit the entire fund. In fact, pension plans receive most of their annual income from investments.[90] When members, like Metcalfe, withdraw the entirety of their contributions, it prevents the State from being able to invest that money to strengthen the overall fund. Nonetheless, for members who enrolled in Alaska's system before the 2005 changes, the State still owes them a defined benefit upon retirement, regardless of the overall health of the fund.[91] Under the majority's analysis, Metcalfe loses nothing by withdrawing the balance of his contributions, because he has the option in perpetuity to simply buy back into the system, yet the State is forced to give up its investment capital. This kind of one-sided consideration does not create an enforceable contract.

The majority does correctly note that section 39.35.350 explicitly permits employees to buy back into the pension system by repaying the total amount they were refunded.[92] However, this benefit itself was not part of the "whole complex of provisions"[93] that made up this irrevocable benefit package. Rather, this was simply an employment offer that became irrevocable upon acceptance of new employment—again, unlike an employee that left employment but kept their money in the system, who has provided the necessary consideration to keep the State's offer open.[94] In their brief, Appellants argue that the buy-back provision essentially amounted to an option contract that allowed employees to

89. *Metcalfe*, 484 P.3d at 101.

90. *State and Local Backgrounders: State and Local Government Pensions*, URBAN INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-government-pensions (last visited May 20, 2023).

91. *See* Miller, *supra* note 12 (discussing how Alaska offered retirees a defined benefit plan prior to 2005); *see also Types of Retirement Plans*, *supra* note 12 (describing defined benefit plans).

92. *Metcalfe*, 484 P.3d at 100 n.52.

93. *Id.* at 97 (quoting Metcalfe v. State, 382 P.3d 1168, 1174 n.18 (Alaska 2016)).

94. *See* Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1049 (2012) [hereinafter *Statutes as Contracts*] (describing how under California law, a law setting out the conditions for state payment amounts to an offer that must be accepted by actual performance).

spend time as a former member.[95] Nonetheless, the more convincing argument is made by Appellees in their brief, who demonstrate that this option contract is only irrevocable for inactive members who have provided sufficient consideration needed to enforce this option.[96]

B. The Majority Incorrectly Declines to Apply California Precedent

As both the majority and dissent note, Alaskan courts often look to California when interpreting article XII, section 7 of the Alaska Constitution.[97] However, the majority in this case declined to apply California precedent from *Cal Fire*, arguing that unlike Alaska, the starting point for California courts is that the terms and conditions of public employment are "statutory rather than contractual," absent manifest or implied legislative intent showing otherwise.[98] Therefore, California precedent cannot be relied upon to determine "which rights are vested in the first place."[99] Although the majority correctly notes that protections for public employment benefits in California are derived from a different source than those in Alaska, its logic in shunning California precedent altogether is misguided.

In *Cal Fire*, the court explicitly notes that California precedent has uniformly recognized pension benefits as contractually protected, and notes that in this case as well, they view pension benefits not just as contractual, but as vesting on the first day of employment (just like Alaska).[100] Nonetheless, the California court still views the ability to purchase service credit separately from "deferred compensation," as it is a benefit not earned through years of service.[101] Because of this, the court

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95. Brief of Appellant, *supra* note 13, at 14.

96. Brief of Appellee, *supra* note 11, at 21–22.

97. *Metcalfe*, 484 P.3d at 98; *id.* at 104 (Carney, J., dissenting); *see also* Hammond v. Hoffbeck, 627 P.2d 1052, 1057 (Alaska 1981) (holding that Alaska courts follow California's approach in allowing reasonable modifications to the retirement system "for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system") (quoting Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955)).

98. *Metcalfe*, 484 P.3d at 99.

99. *Id.*

100. Cal Fire Loc. 2881 v. Cal. Pub. Emps.' Ret. Sys., 435 P.3d 433, 446–48 (Cal. 2019); *see also* T. Leigh Anenson & Jennifer K. Gershberg, *Clashing Canons and the Contract Clause*, 54 U. MICH. J. L. REFORM 147, 183 (2020) (noting how the California Supreme Court in *Cal Fire* "circumvented the canon [of statutory construction] by allowing pension benefit terms to be contractual on an alternative ground pursuant to its prior precedent"); *Statutes as Contracts*, *supra* note 94, at 1036 ("California courts have not only held that public pensions create a contract but also that the contract is formed on the employee's first day of employment.").

101. *Cal Fire Loc. 2881*, 435 P.3d at 437.

finds this provision should not fall under contractual protection in the first place.[102] The majority in *Metcalfe* is right to say that Alaska differs from California in that they view all pension benefits as contractual, but as explained previously, this buy-back provision should not be considered a "contractual" benefit for former members that have completely cashed out their contributions and have no money left in the retirement system.[103] Like Alaska, the California court in *Cal Fire* recognizes that the "whole complex of provisions"[104] are contractually protected,[105] but still explains why the legislative provision at issue is not deferred compensation and thus does not fall within Contract Clause protection.[106] The *Metcalfe* majority stopped short of explaining why, even though the starting point for viewing pension benefits in both states is different, California precedent should not be considered. Both states view pension benefits and correlated rights as contractually protected beginning on the first day of employment, but California has squarely rejected the notion that the ability to buy service time, which is not earned through years of service, is "deferred compensation."

If the buy-back provision at issue in *Metcalfe* is not to be considered deferred compensation, as the California court would argue, the *Metcalfe* majority's argument essentially falls apart. They originally argue that deferred compensation is contractually protected because it is part of the "bargained-for consideration" that induced Metcalfe to take up employment with the State in the first place.[107] However, if it is not considered a form of deferred compensation, and thus not part of the agreement that encouraged Metcalfe to work for the State over other potential employers, then Metcalfe would have no reasonable expectation of receiving these benefits. Without this reasonable expectation to these benefits, there remains little support for holding that they are contractually protected.[108]

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102. *Id.*

103. *See Metcalfe*, 484 P.3d at 99.

104. *Id.* at 97.

105. *See Cal Fire Loc. 2881*, 435 P.3d at 448 ("We have consistently recognized that elements of public employee compensation other than pension benefits also may be entitled to this type of implied contractual protection.").

106. *Id.* at 448–49.

107. *Metcalfe*, 484 P.3d at 97; *see also* Hammond v. Hoffbeck, 627 P.2d 1052, 1056 (Alaska 1981).

108. *See* Monahan, *supra* note 26, at 32 (describing how courts focus on "reasonable expectations" in determining rights are contractually protected).

VI. IMPLICATIONS

For the Alaska legislature, the *Metcalfe* decision has profound implications on their policy making abilities. With the rise in unfunded pension liabilities,[109] constitutional provisions like that in Alaska, coupled with court decisions making it harder for the legislature to amend pension plans, pose a significant obstacle for state governments who wish to get their budgets and retirement plans in order.[110]

Despite the Alaska Constitution's ratification in 1956, Alaskan courts have had little to go on in terms of intent when interpreting the scope of the anti-diminishment clause.[111] In *Metcalfe*, the court cemented a rigidity that does not allow for practical changes to the retirement system as the state changes, a result likely not intended when the constitution was adopted over sixty years ago.[112] Because of this inflexibility, the Alaskan government has locked itself into very generous promises with approximately 78,000 PERS members that they must now hold out in perpetuity, should those retirees wish to return to public employment.[113] This poses a significant obstacle to the legislature's ability to fiscally plan for the future; even though they are able to limit benefits for new prospective employees, they now have to contend with

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109. *See* UNACCOUNTABLE AND UNAFFORDABLE: UNFUNDED PUBLIC PENSION LIABILITIES EXCEED $5.8 TRILLION, ALEC 1–3 (2020) [hereinafter UNACCOUNTABLE & UNAFFORDABLE], https://alec.org/wp-content/uploads/2021/06/2020-UAUA_Final_R1.pdf (stating the five states with the highest unfunded pension liabilities per capita are New Jersey, Hawaii, Connecticut, Illinois, and Alaska).

110. Accordingly, three of the five states with the highest unfunded pension liabilities per capita as of 2020—Hawaii, Illinois, and Alaska—protect retirement plans via constitutional provision. Rosenberg, *supra* note 25, at 597–98 n.236; *see* UNACCOUNTABLE & UNAFFORDABLE, *supra* note 109, at 3. Of the five states with the highest total unfunded pension liabilities as of 2020—Ohio, New York, Texas, Illinois, and California—New York, Texas, and Illinois protect retirement plans via a constitutional provision. Rosenberg, *supra* note 25, at 597–98 n.236; *see* UNACCOUNTABLE & UNAFFORDABLE, *supra* note 109, at 2; *see also* Rosenberg, *supra* note 25, at 599 ("[I]n these states with strong pension-protecting constitutional norms, until these strong constitutional sections are amended or repealed, the policy choices available to state legislatures and executives will be restricted by the language and the interpretation of the state's constitution.").

111. *See* 7 ALASKA CONST. CONVENTION MINUTES OF THE DAILY PROC. 17 (1965) (showing no discussion of article XII, section 7); *see also* CONST. CONVENTION OF ALASKA, COMM. PROPOSAL NO. 12, COMMENTARY ON THE ARTICLE ON GENERAL AND MISCELLANEOUS PROVISIONS 1 (1955) (explaining only that article XII, section 7 was intended to assure state and municipal employees their benefits would not be diminished when Alaska became a state).

112. *See* GERALD A. MACBEATH, THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE 19 (1997) (explaining that when the constitution was written, Alaska had a small population, but is now a "diverse and complex polity").

113. Miller, *supra* note 12.

promises that may have been made decades ago, even as unfunded liabilities continue to grow.[114] It also detracts from funding for other state programs and debts that have to be set aside to contend with ongoing pension requirements.[115]

Alaska is unique in that the term "accrued benefits" in its constitution has been interpreted differently than it has in states with similar language. While Alaska defines the term to protect all benefits from the time the employee enrolls in the PERS systems, Michigan and Hawaii, which also use the term "accrued benefits" in their respective constitutions, only protect benefits that have already been earned.[116] Thus, reform options in Alaska may be easier than other states, as Alaskan courts could change their interpretation of "accrued benefits" rather than require a constitutional amendment. However, as can be seen in the *Metcalfe* decision, the Alaska Supreme Court seems to be moving in a direction of *more* protection for retirees.

VII. CONCLUSION

In *Metcalfe*, the Alaska Supreme Court struck down the repeal of an Alaska statute that permitted former retirees of public employment, who cashed out their pension benefits, to buy back into the PERS system and be returned to their initial benefit level. The court found the provision in question was an "accrued benefit" of the retirement system, protected from impairment via the anti-diminishment provision of the Alaska Constitution. However, the court did not fully analyze the necessary consideration needed to make the State's offer irrevocable, which at the very least should have required retirees to keep their money in the retirement system. Further, the court incorrectly declined to follow California precedent when it had often done so in the past, even though both California and Alaska view pension benefits as a contractual promise beginning on the first day of employment. As a result, the court effectively locked the State into generous promises made to thousands of retirees decades ago, preventing the legislature from making statutory changes needed to ensure the integrity of a retirement system that continues to be jeopardized by increasing unfunded liabilities.

114. *See* UNACCOUNTABLE & UNAFFORDABLE, *supra* note 109, at 1 (detailing a $900 billion increase in unfunded liabilities).

115. *See id.*

116. Monahan, *supra* note 26, at 9–10.

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