IX

REMARKS AT WEDNESDAY MORNING SESSION

By Amy B. Monahan

Professor at University of Minnesota Law School and 2013 ALI Young Scholars Medal Co-Recipient

President Roberta Cooper Ramo presided and The Honorable Goodwin Liu, Chair of the ALI Young Scholars Medal Committee, introduced Professor Monahan.

President Ramo: Thank you very much. This is a great day for us in many ways, and we go from the completion of one project a little bit early, showing our ultimate flexibility, to the presentation of The American Law Institute Young Scholar lecture by Amy Monahan. So if Amy and Justice Goodwin Liu would make their way up, and we could not have a more interesting follow-up than her topic, which is hardly hot at all these days, and that is "The Law and Politics of Public Pensions." So let me welcome to the stage Justice Liu and Amy Monahan.

Let me say while we are getting our technology in order and everybody is changing places, as I think most people in this room know, one of the great innovations of the last few years has been the establishment of The American Law Institute Young Scholars Medal. Both the process of selecting the person and encouraging nominations has turned out to be a heroic task, and we have been very fortunate for this round and actually for the next round to have persuaded Justice Goodwin Liu of the Supreme Court of California to chair our Committee. He chaired the Committee when it selected Amy as our winner, and he has, happily, agreed to chair it for the next round.

Justice Liu, as many of you know, is a formidable intellect himself. He is a professor at Berkeley. He has been a Rhodes Scholar. He has written on many legal topics. Let me introduce our Council member, Justice Goodwin Liu. (*Applause*)

Justice Goodwin Liu (CA): It gives me great pleasure to chair the selection committee for the ALI Young Scholars Medal. At the outset, let me say to Gerhard Casper that the powers vested in me do not permit me to award you a Young Scholars Medal, (*laughter*) but if you would like a medal, you may apply. (*Laughter*) You will need a letter of support from one of the law deans here, and you can send us your materials.

Last year, at this Meeting, I had the honor of announcing the two medal recipients from the last round of selection, Professor Adam Levitin of the Georgetown University Law Center and today's honored guest, Professor Amy Monahan of the University of Minnesota Law School.

But before I reintroduce these very impressive individuals to you, I would like to recap the nature of the award and the selection process.

As many of you know, the ALI first awarded the Young Scholars Medal a few years ago in an effort to recognize early career academics who are engaged in practical scholarly work with real potential to influence law reform. The idea was to select one or two scholars who had been full-time academics for at least three and not more than 10 years and who are within 15 years of having received their law degrees. The honorees are given the opportunity to speak at an ALI Annual Meeting and to convene an ALI conference on issues related to their work.

You may recall that the first selection committee in 2011 was chaired by our good friend and distinguished luncheon speaker today, Willy Fletcher. That year, the Young Scholars Medal was awarded to NYU Law Professor Oren Bar-Gill and to Professor Jeanne Fromer, then at Fordham, now at NYU.

The Young Scholars Medal is awarded every two years, and last year we completed the second cycle of selection. It began in the spring of 2012 when I sent a letter on behalf of our 15-person selection committee to all the law deans throughout the country asking for nominations. We got 44 candidates spanning a very wide range of subject matters and analytical methods. Our Committee eventually narrowed that pool to nine finalists, and for each of these candidates we considered his or her most substantial work.

This typically meant reviewing 150 to 200 pages of writing for each candidate, and after allowing ample opportunity to review these files and after very thoughtful and robust discussion, our Committee selected Professors Levitin and Monahan from a pool of very outstanding finalists.

This process was very time consuming and engaging. I would like to name each Committee member and take a minute just to recognize them for their hard work. The Committee was comprised of Kate Bartlett from Duke Law School; Anne Cohen from the Debevoise firm; Christine Durham from the Utah Supreme Court; Jack Jacobs

from the Delaware Supreme Court; Michele Kane from the Walt Disney Company; Bob Klonoff from Lewis and Clark; Alan Morrison from George Washington University Law School; Barrington Parker from the Second Circuit; Tony Scirica from the Third Circuit; Stuart Singer from Boies, Schiller; Henry Smith from Harvard Law School; Kate Stith from Yale; Jon Tigar from the U.S. District Court for the Northern District of California; and our President, Roberta Ramo. Thank you one and all for the tremendous service.

Last year, we were treated to a brief lecture by Professor Levitin, who, as you will recall, gave an arresting account of the tenuous legal underpinnings of our systems for establishing title to mortgages and for transferring those rights. We learned how MERS, a private mortgage registry, emerged in the run-up to the foreclosure crisis as a device to facilitate securitization of mortgage-backed debt but at the expense of clarity of mortgage title. And Professor Levitin traced the implications of this uncertainty for foreclosure litigation, for efficient pricing in the $13 trillion housing finance market, and ultimately for the rule of law when courts are confronted with a legal infrastructure that is on the one hand weak but on the other hand too big to fail. I wanted to tell Adam: please let us know if you have fixed this problem, (*laughter*) and let us know what else you are going to do next.

This year, today, we will hear from our other medal recipient, Professor Amy Monahan. Professor Monahan began her academic career at the University of Missouri School of Law in 2004. She joined the University of Minnesota law faculty in 2009 and now holds a chaired professorship there.

In a single decade, she has authored more than 20 articles, symposium pieces, and book reviews focusing on tax and employee-benefits law. In particular, she has been an influential scholar on healthcare reform and public-sector pensions, two issues that could not be more important for all levels of government—local, state, and federal. She is probably one of the few people inside the Beltway or out who has actually read the 906 pages of the Affordable Care Act [the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Recon-

ciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010)]—that is the abridged version—and she is publishing a coauthored book next year with Oxford University Press called *Will Obamacare Deliver? The Challenges of Pursuing Universal Coverage Through an Employer-Based System.* Her expertise on healthcare reform earned her a seat on the National Academy of Sciences Institute of Medicine Committee on Determination of Essential Health Benefits.

In the area of public pensions, Professor Monahan has been similarly prolific and influential. She wrote an article in 2012 called "Statutes as Contracts? The 'California Rule' and Its Impact on Public Pension Reform" [97 Iowa L. Rev. 1029 (2012)], which critiques the rule developed by my court, before my time, that treats statutes establishing state retirement systems as creating contractual obligations insulated from subsequent legislative changes. And I think, as I reminded you last year, Amy, our Governor, Jerry Brown, once bemoaned the fact that state pension obligations are more sacred than even marriage, because at least you can get out of a marriage. (*Laughter*) As you can imagine, this is a topic of immense interest to state governments struggling with tight budgets, and because of her expertise, Professor Monahan has regularly advised state governments and also advises the Municipal Finance Task Force of the Federal Reserve Bank.

Since winning the Young Scholars Medal, Professor Monahan has not slacked off. In addition to her book on Obamacare, she has written two more articles on public pensions, which are forthcoming. One is titled "State Fiscal Constitutions and the Law and Politics of Public Pensions" [University of Illinois Law Review, Forthcoming; Minnesota Legal Studies Research Paper No. 14-24 (May 13, 2014)], and the other is called "Who's Afraid of Good Governance? State Fiscal Crises, Public Pension Underfunding, and the Resistance to Governance Reform" [Florida Law Review, Forthcoming 2014, with Thomas J. Fitzpatrick IV; Federal Reserve Bank of Cleveland, Working Paper No. 12-23 (November 2012)].

We are very fortunate to have Amy here to speak to us about her work. So ladies and gentlemen, please join me in honoring Amy Monahan. (*Applause*)

Professor Amy B. Monahan (MN): Thank you, Justice Liu, for that kind introduction. It remains an honor to be here today. I said my thanks last year, but I will just again thank the Committee and the ALI. I know well how much work is involved in reading all of those submissions, and I truly appreciate it and am really grateful for this honor.

I will share one story. When I was telling my eight-year-old son that I was going to Washington, D.C., and he was asking why, lots of questions, I said, "Well, I won an award." "What award was that?" And I said, "Oh, it's the Young Scholars Medal," and he paused for a minute and he looked at me and said, "Mom, I don't think you're very young." (*Laughter*)

I assured him it was all relative, but I am grateful to still have "young" in the title of an award that I am given.

So thank you for the opportunity to speak to you today. Given the limited amount of time, I am not going to present a traditional academic paper. Instead, what I am going to try to do is give you a broad overview of this area of law, and that is the law with respect to public pensions. It is a hard topic to try to condense into 15 minutes, but I am going to do my best.

I entitled the talk "The Law and Politics of Public Pensions" because this is very much a story of the two. It is hard to disentangle them.

So first, just to start by giving a little bit of background on public pensions. When we use the term "public pensions," we are referring to traditional defined-benefit pension plans that cover state and local employees. A lot of people are covered by these plans. Over 27 million employees receive retirement benefits through these arrangements, and it is important to keep in mind, as we talk about the policy issues here, that about a quarter of these workers do not participate in Social Security because either the state or the city has opted out of Social Security coverage, so these plans clearly play a big role in retirement security for many Americans.

And you probably are familiar with the fact that, on the whole, these plans are not in good financial shape. By conservative estimates, state and local plans are underfunded by a trillion dollars, and when I say conservative I mean that is the low number. Depending on what assumptions you use, that liability may in fact be significantly higher, so there is a real concern that there is not enough money in these plans to pay benefits that have been promised.

And I want to be clear about why that trillion-dollar funding gap matters, and that is because there are really only two likely responses to underfunding. The first is you put more money into the plan, so you find a way to increase your contributions to make up the funding gap.

There are many issues with this solution. One of them is that most states and cities are not sitting around wondering what to do with all of their excess revenues. Budgets are tight, and increasing contributions typically raises the concern of crowdout, so if you have to dramatically increase pension contributions, you risk crowding out other essential government services, which is a concern.

And the second concern, and I think this one probably does not get enough attention in the discussion, is that there are significant issues of intergenerational equity. So to the extent that you have been underfunding your pension plan and then are making up the contributions later, you are essentially shifting current compensation costs to future generations, which is not how pension funding is supposed to work.

The ideal way it is supposed to work is, if you have a teacher who works in 2014, the state should not only pay that teacher's cash compensation but also put money into the pension plan to pay for the pension benefits that he or she earned in 2014. To the extent that you are underfunding the pension, you are shifting part of that teacher's compensation cost to people in the future.

Now sometimes it makes sense to spread governmental costs across generations, for example if you are talking about big capital-improvement projects. If you are talking about compensation expenses, it does not make sense, it is not something that we try to do, and there

is a real risk here of systemically underfunding pensions, so that what you are doing is pushing compensation costs to future generations who have not benefited from that teacher or that firefighter's service.

Now the other most likely response to underfunding is one that has gotten a lot of attention, and that is to reduce benefits. That is what many states and cities have either been talking about or have been doing. And, of course, one reason for that is a very practical one, which is, if you do not have enough money, option number two seems like it might be the only option, and of course there are huge concerns with reducing benefits just as there are with increasing contributions.

Remember, a quarter of these employees do not participate in Social Security, so there are real retirement-security concerns with reducing benefits, and obviously there are just straightforward fairness concerns. If you have worked a certain number of years in reliance on getting a certain pension benefit and that is taken away retroactively, there are obviously significant fairness issues there.

So now I want to shift to talk about what role law plays in this setup, and to do that I want to go through the life cycle of pension funds.

The first step, of course, is you have to get enough money into the plan, so you have to make your annual contributions. Nearly every state and city has some law on the books that says pension plans shall be funded annually on an actuarially sound basis, which sounds really good. The problem is these laws, as they are currently written, are almost without exception ineffective, and there are really two reasons for that.

One is that the funding standard is incredibly vague. I don't know if we have any actuaries in the room, but even actuaries have no idea what "actuarially sound" means. Even if we could come up with a working definition of it, basically there are so many assumptions that go into calculating pension contributions that it is really easy to manipulate how much money you have to put in the plan.

The easiest example of that is, obviously, how much money you put into a pension plan today depends in part on the rate of return that you assume your pension-plan assets are going to earn over the next many years, so an easy way to reduce your pension contribution is just to say I assume pension-plan assets are going to earn 10 percent. That is a nice way to lower your contribution than if you had assumed a five percent rate of return, so you've got vague, manipulable funding standards.

Even if we could solve that problem, we also have an enforcement problem. When participants have challenged contribution laws and claimed that the government has not complied with the relevant contribution laws, courts have often found that those participants lacked standing, because they cannot show any harm resulting from the failure to put enough money in the plan, and also problems with remedies, so even where a court has found that the contribution requirements have been violated, it is not clear that there is a remedy available. In many states, for example, only a legislature has constitutional authority to allocate money from the Treasury, and so while the law looks good on the books it thus far has been very ineffective in making sure that money gets into the plan.

So the next step is governance. Once the money is in the plan, we want to make sure that we take good care of it, for lack of a better explanation. Justice Liu mentioned a governance article that I wrote, I actually co-wrote it with an economist at the Federal Reserve, and we looked at how plans do with respect to governance, and the short answer is that there is a pretty shocking failure to even adopt best practices for governance, let alone to follow them. So when we talk about governance best practices, this would be things like the rules regarding how pension-fund assets can be invested, trustee training and expertise, and the like. Fiduciary duties are obviously part of that.

Many states and cities do not even bother to adopt best practices. Even when they do, and even where those standards are clearly violated, again you see a distinct lack of enforcement. So even in cases where there are clear breaches of fiduciary duty, you don't see a lot of successful litigation on those matters.

And then we come to the end of the pension lifecycle. We put enough money in the plan each year, we govern it well, then you are going to pay out benefits. That is the last step, and so the law has something to say here about the extent to which those benefit payouts are protected. Remember one of the possible responses to underfunding is to reduce benefits. The law, of course, has something to say about your ability to do that.

This is an area of state law, so it varies tremendously by state. Most often it is common-law protection rather than statutory protection, but you see wide variation among the states. Some are very protective of pension benefits and some are not protective at all.

The other point I want to make about this is that it is often uncertain the extent to which governments can change pension benefits. So even if you take a state that has the highest level of protection for pension benefits, so I will use Illinois as an example—I will not use California, because Justice Liu is sitting right next to me—but we will take Illinois. They have a state constitutional provision protecting pension benefits. They say pension benefits are contractual and shall not be impaired. And you might know Illinois is having some pension issues and thinking about this.

Even when you have specific language in the constitution that says pension benefits are contractual and they cannot be impaired, you always have the potential to argue that the state can constitutionally impair the contract under its police power. A state as a sovereign government cannot contract away its ability to act to protect the health, safety, and welfare of its citizens, so even in a state that looks like you cannot touch pension benefits, when things get bad enough, there is actually the possibility that you can, and that adds to the uncertainty.

So hopefully you get the idea here that law, I think, is not doing as much as it could in this area to help achieve the policy outcome that we want.

In my remaining time left, I want to talk just a little bit more about the contribution issue, in part because that is where my current work lies, and also because I think if you can solve the contribution

problem, it would go a long way to alleviating concerns with the other pieces of the equation.

So why is it that we cannot seem to get enough money in pension plans on an annual basis? There is good evidence that that is true, and I think this really is a political problem. So first, I am going to focus on the state level. We start off with very constrained state budgets. Every state has a balanced-budget requirement, meaning that they cannot use debt to finance their operations, generally speaking. So you cannot debt finance, and in many states the ability to raise revenue is limited. There is some provision in place that makes it hard to raise taxes, so you are operating within a highly constrained budget environment.

Well, the neat thing about playing with your pension-funding requirements, let's say by assuming a 10 percent rate of return and therefore artificially lowering your pension contribution, is that it is essentially moving debt off the balance sheet. Pension debt doesn't count for purposes of your balanced-budget requirement, so it is sort of a nice, convenient way to free up more money in this otherwise constrained budget environment.

Second, there really is no political payoff for being the person that stomps their feet about putting enough money in the pension. If you are a politician, you want to be reelected, and you have the choice between spending on current constituent needs versus putting money in the pension that is going to be used to pay benefits decades in the future when you are not in office. There really is no political payoff for doing that, for responsible pension funding. I argue essentially it is almost irrational for a politician to really go after strong pension-funding discipline.

Now these kinds of political pressures are nothing new, but usually there is some force working against these political inclinations, and evidence suggests that this is not true for pensions. You would think workers might complain. If you were a worker in Illinois, you might go to your state legislature and say, "You better fund the pension plan, because I want to make sure there is enough money for me."

We do not really see that happening, and the reason why is that if workers were to say, "No, I want you to actually fund the pension benefits properly" the response is going to be, "Okay. Well, we only have X dollars for compensation, so if you want me to put more money in the pension plan, that means less cash compensation or less generous health benefits." The concession has to come from somewhere, and so the idea is that workers sort of play along with the pension-funding myth so that their current compensation and other benefits do not take a hit. This is contributed to by the fact that workers think their benefits are protected. So if you are in Illinois, you might think, well, it doesn't matter because the state has an obligation to pay out those benefits anyway. It remains to be seen whether that is true. But we do not have an obvious counterforce to politicians' inclination to underfund pensions.

And then to top it all off, funding needs for pension benefits are countercyclical, so when the economy is doing well, state revenues are up, so are pension-fund assets, and if asset values go up, contribution needs decrease because your rate of return is getting you more.

The flip side of that is you get a market downturn, as we have experienced in recent years, state revenues are down, pension-fund assets are down, contribution levels increase, and this further exacerbates the problem. At exactly the time the pension fund needs the most money, there is less money available. So it is not a pretty picture.

So I just want to end with a brief look at whether law can solve the political problem that I have just outlined, and I think it can. So my answer is yes, with costs. So how could we do it?

One, of course, is you have to have a specific funding standard. It cannot be vague language about actuarially sound. You actually are going to have to come up with a formula that is not discretionary, that does not let decisionmakers choose from among various options. Lawyers are probably not best suited to do that, but of course there are plenty of people who can come up with a definitive funding standard.

And essentially, and this is the controversial part of this, essentially what you have to do is remove legislative discretion. You could

do that a number of ways. You could have a self-executing provision in the state constitution that automatically appropriates the money to the pension plan. You could do it through statutory provisions in various ways, but that is essentially what we are talking about here. When we talk about law solving the political problem, it would be by removing legislative discretion. I think you also, if it is not a self-executing provision, you are going to have to try to specify standing and remedy to overcome those problems.

Now if we just stopped here, this might be a little bit frightening, right, you have this very strict pension-funding requirement with no discretion, and you might have a market downturn where things are really tight and it actually makes sense, in a given year, not to put the full contribution in. I think that needs to be acknowledged, so I think you do want some flexibility in these legal standards, but it has to be limited flexibility. One option is just to have something like a supermajority override, where in any given year if more than two-thirds of the legislature chooses something different, they can reduce the pension contribution, or constrain them even further and say, when certain triggers are present, you can reduce the pension contribution. So maybe you look at the ratio of state revenue to the required contribution and allow some wiggle room, with the idea that any shortfall has to be made up in a very specific period of time—have a specific repayment schedule so this does not just get us back into our existing problem.

So that, hopefully, gives you a sense of what I am working on and the bigger picture, which is that I think law can and should do a much better job of reaching the desired public-policy outcome in this area, and I will look forward to your questions. Thank you very much for your time. (*Applause*)

President Ramo: So questions. Would you go to the microphone, please.

Mr. Brian F. Spector (FL): Question. Who is best suited to write the standards—economists, actuaries—and what kind of standards do you have in mind if it is a defined-benefits program?

Professor Monahan: This is a tough question to answer. Those of you who are not familiar with pension funding, there is a bit of a dispute between actuaries and financial economists about the right way to discount pension liabilities and calculate required contributions. I do not have a perfect answer to that. I think ideally you get them both to the table.

You could potentially borrow from funding standards for private plans, not that those are perfect, but that might be a starting point. GASB would be one possibility, but there is a fair amount of disappointment with what GASB has done so far with respect to accounting.

President Ramo: You might explain what that is.

Professor Monahan: Oh, sorry. Governmental Accounting Standards Board. GASB puts in place rules for accounting for your pension costs that have effectively become de facto funding standards. They are voluntary, and they are, for lack of a better term, squishy.

So I don't know if GASB is the right body either, but I think the bottom line is you ideally want the actuaries and the financial economists to talk to each other about it and work it out, and I think the PBGC, the Pension Benefit Guaranty Corporation, that is in charge of private-employer plan funding would also be a good resource there.

President Ramo: So we are going to go to microphones 3, 4, 5, and 1.

Professor Adam J. Levitin (DC): Hi, Amy. I am going to exercise the co-medalist prerogative here, and the question I have is your solution I really like for dealing with how do we fix the system going forward, but I don't see how it addresses the legacy problem, and that is that trillion dollars of underfunding right now. Is there any way to fix it via legal—legal changes?

Professor Monahan: So I really—it is a great question with respect to the legacy costs. If this system had been in place from the beginning of time, I don't think we would be having this conversation. The fact is we are really in the hole already.

Can the law solve that? I think it can only solve it really by the two means that I talked about, either you find the money or you have to reduce benefits. Neither of those things is very attractive.

In terms of finding the money, right, is that feasible, I think that depends a lot on the states that you are talking about and the situations that you are talking about and what happens with market returns.

I should say most of these plans, even though they are drastically underfunded, are not going to run out of money tomorrow, so most of these plans do have decades, in most cases, to ramp up, so it might be possible to start increasing contributions. Maybe in some of the, I sort of hate to say it, but I think in many of these cases, it might be a combination of both increasing the money and reducing benefits, which is not an attractive outcome, but I think, in some cases, that really is going to be the only choice.

President Ramo: Thank you.

Mr. John G. Cameron, Jr. (MI): We have a little problem in the city of Detroit right now. Our plans in fact did run out of money, and the federal bankruptcy judge there suggested that our constitutional provision, which purported to guarantee those benefits, could be overridden by federal bankruptcy law. How would you deal with that in the context of your solution, which I find very elegant?

Professor Monahan: So I will just say an interesting fact about Michigan. Everyone talks about the constitutional protection of benefits. Michigan is one of the eight states that also has a constitutional requirement to fund pensions on an annual basis, annually on an actuarially sound basis. So Michigan ends up being kind of good evidence that funding requirements are not very successful.

I am not a bankruptcy expert. In terms of how it fits in, I think it is part of the larger story about the uncertainty of benefit protections, which I think makes this area, as a practical matter, really difficult to deal with, because no one's really sure what those protections mean. So Michigan says they are contractually protected, the bankruptcy court

says they can be modified in bankruptcy, which, you know, it seems like that is the way bankruptcy law was headed anyway.

I think it ends up being a great example of it is really hard to figure out what to do in this area, because there is so much uncertainty, and then you add to this the fact that maybe you can just get rid of your pension debt.

Professor Richard L. Revesz (NY): Thank you, Amy, for a great paper. Your solutions focus on the legislature, and I am somewhat skeptical the legislature is going to want to take care of this problem as they go along and want to bind themselves for the future, but I was wondering if there's any role for the courts. A lot of states, as you know, have balanced-budget requirements, and could a court interpret the balanced-budget requirement to in some way include pension obligations and therefore force the appropriation of sufficient money to keep the programs funded at an appropriate level?

Professor Monahan: That is a great question. I have not delved into the specifics of balanced-budget cases to see what the precedent looks like, to see if there is room for that argument. I do know that there is widespread agreement that underfunding your pension does not count as debt for those purposes. So what I don't know is the precise contours of the precedent to be able to determine whether a good litigator could go in and try to challenge it on balanced-budget amendments. I mean, so maybe there is room for courts to do that. I am not entirely optimistic that there is, but it might be worth, in specific states, looking at the precedent to see whether there is wiggle room.

President Ramo: Microphone 2, and then our last question will be at 1.

Professor Christopher B. Mueller (CO): I really enjoyed your presentation, too. It was eye opening. I think my question actually builds on the question that Ricky Revesz just asked you, which is if it is hard to get courts involved in moving toward the solution you prefer, do you have any idea how you could build a political constituency that would move in that direction? I would think you would have almost

the same problems that you have now, which is that spending today's dollars on today's projects is more attractive than spending today's dollars to try to make a system sounder in the long term.

I come from Boulder, Colorado, and I served for many years on the Open Space Board. That is one of those long-term "spend it now and enjoy the benefits in the future" programs, but it is very hard to get a political constituency behind that. You can, in Boulder, because everybody likes the out of doors, so there is kind of a present payoff in it, but I would think it would be very hard to do that when you are talking about pension plans. I just wondered if you had any sort of inspirations that would move in that direction.

Professor Monahan: Right, so that is a great question. I think you are absolutely right to identify that concern. Why is it any different to ask people to commit to pension funding in the manner that I talk about, why is that different than any other political problem here?

I think there is actually an opportunity here, because there is so much talk about reform, and by reform I mean changing benefits. And what I am trying to encourage decisionmakers to do is, when you are having these tough discussions about how you are going to be reducing benefits, right, what might be reasonable, what is feasible, and so on, along with the discussion, and perhaps negotiated agreement on reducing benefits, you also agree to strict funding standards going forward. I think there is some opportunity here to make it part of the package deal, and this sort of gets to Adam's question as well. In the current environment, where things are pretty dire in some states, maybe what you can do is address the current crisis and also fix funding going forward, but I think you are right that absent some kind of opportunity like that, it is going to be difficult to get people to agree.

Part of what I want to do is just to have an honest conversation about the cost, because I think to the extent that people say no, we are unwilling to responsibly fund our pension, I think that shows you that you should not have a pension. If you are not willing to fund it, then you need to think about something else, because it is simply unfair to promise the benefits and not put the money aside.

Professor Edmund W. Kitch (VA): Thank you for your excellent work on this terribly important set of problems.

I was wondering, have you thought about a possible role for federal law in dealing with this problem? Congress has already, in ERISA [Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.], addressed the problem on the private side. Does it have a possible constructive role on the public side?

Professor Monahan: That is a tough question. I get asked it a lot. I think in some ways there is a really compelling case for the federal government to regulate this area. I spend a lot of time talking to state legislatures, so it always makes me nervous when I get that question, because state legislatures have a very strong view that there should not be government, or federal government involvement.

I think there is a good case for it. I think it could be done. There is no reason that the federal government could not tie it to the tax benefit that they offer to qualified retirement plans. I think there it gets into political issues in terms of is the federal government willing to incur the wrath of states? But it might come down to that, right, so getting to the political problem of passing this on the state level, if we cannot get anything done at the state level, maybe that suggests we do need the federal government to take a more active role in this. There has been some interest in that, but not a lot in Congress.

President Ramo: So I said before that we were going to cut off questions to move on to Indian law, but come back for one second. Why don't we do this. Why don't you just state your question, and Amy won't answer it, (*laughter*) but what is important about the questions is that as everybody, or maybe everybody doesn't remember, one of the parts of winning the Young Scholars Medal is that you have a seminar out of which we hope maybe some work will make sense. Or we ask the question, is this an area that the ALI should work in? And so having your questions to consider will help us enormously, so why don't we just go microphones 5, 3, and 1, and if you would just state your question and say who you are.

Professor Alan B. Morrison (DC): On the two-thirds requirement, typically a state legislature cannot bind its successors without a constitutional amendment. Does that mean that you would have to have a constitutional amendment, and are you going to have even more trouble getting a constitutional amendment that is going to lock it in at the state level?

President Ramo: Three.

Professor Stephen D. Sugarman (CA): I am from Berkeley, California, and as a future beneficiary of the incredibly generous public-pension plan of the University of California, I raise this question with some trepidation, but I am surprised that you did not talk about another solution, which is to shift the risk of volatility to workers, which is what the private sector has done now, and adopt a public equivalent of the 401(k) solution in which people would—it would be a defined-contribution plan instead of defined-benefit plan. There is a lot of downside for that, but it solves this problem in a very substantial way, and I wish—I wonder whether you'd talk about or think about that as another avenue for the future.

President Ramo: And finally 1.

Judge Michael J. Kramer (IN): I am just curious about the effect of municipal bankruptcy on this, and not being as deferential to Justice Liu as you are, the example of San Bernardino, which I believe skipped out on like $8 million in pension payments, but the California state pension plan still has an obligation to those employees.

President Ramo: Well, I want to thank all of you, but most especially I want to thank Justice Liu and Amy. This has been a riveting and important discussion, and we look forward, Amy, to hearing more, and hearing exactly what your seminar is going to focus on. So please help me to thank Amy and Justice Liu. (*Applause*)