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Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of Illinois Constitution, 48 J. Marshall L. Rev. 167 (2014)

Eric Madiar

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IS WELCHING ON PUBLIC PENSION PROMISES AN OPTION FOR ILLINOIS? AN ANALYSIS OF ARTICLE XIII, SECTION 5 OF THE ILLINOIS CONSTITUTION

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1. Chief Legal Counsel to Illinois Senate President John J. Cullerton and Parliamentarian of the Illinois Senate. B.A., Truman State University; J.D. Chicago-Kent College of Law. All rights reserved; November 2014. I thank Senate President John J. Cullerton and Senator Andy Manar for the opportunity to work on this project, and my wife for her support in pursuing this endeavor. I also thank Senator Don Harmon, Kristin Richards, Toby Trimmer, John Patterson, Kim Janas, Maurice Scholten, Amy Bowne, Thomas Stanton, John Costello, Mark O’Toole, Mary Pat Burns, Thomas Gray of the Teachers Retirement System, Kathy O’Brien of the Illinois Municipal Retirement Fund, Aaron Chambers, and Professor Ann Lousin of John Marshall Law School for their advice and comments at various stages in the development of this Article. I further thank the Legal Review Staff, the staff of the Abraham Lincoln Presidential Library for access to the 1970 Illinois Constitutional Convention materials, John Hoffman of the University Library, Illinois History and Lincoln Collections, at the University of Illinois for access to Del. Henry Green’s Convention materials, and the staff of the Illinois State Library for access to the reports of the Illinois Public Employees Pension Laws Commission.

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There is no moral exemption for any man or body of men that breaks contracts. Nor is there any hope of public or private respect for a contract breaker. A contract breaker is an utter misfit as a citizen or a business man.

—Franklin MacVeagh, former president
of the Commercial Club of Chicago
and U.S. Secretary of Treasury²

OVERVIEW

Illinois's five public pension systems are in awful shape.

2. Franklin MacVeagh, Labor Unions, Address before the Cincinnati Commercial Club (May 26, 1905), in 8 PUB. POL'Y 29, 30 (July–Dec. 1905) [hereinafter Address of Franklin MacVeagh], available at http://books.google.com/books?id=V9IpAAAAYAAJ&pg=PA25&lpg=PA25&dq=franklin+macveagh+labor+unions&source=bl&ots=y4X4wNxZt&sig=ZUGhs7_05xd4otztKS143Y_CwBA&hl=en&ei=tYITTYSEC4W0lQearemDDg&sa=X&oi=book_result&ct=result&resnum=5&ved=0CCcQ6AEwBA#v=onepage&q=franklin%20macveagh%20labor%20unions&f=false (last visited Dec. 23, 2010).

Combined, the five retirement funds serving teachers, state employees, university employees, judges, and legislators have for fiscal year 2014 unfunded liabilities totaling \$104.6 billion, and an overall funding percentage of 42.9%.³ The Teachers Retirement System alone has \$58 billion in unfunded liabilities and is 44.2% funded.⁴ Indeed, Illinois has the largest unfunded pension obligations of any state in the nation.⁵ In addition, these obligations will consume a larger and larger share of the State's annual revenues and force the State to cut State services, raise taxes, or both.⁶

These unfunded liabilities, though, are not the fault of public employees. Public employees have historically paid their fair share of the normal cost of benefits through payroll deductions.⁷ Rather, the liabilities principally stem from the State's decades-long failure to make its required contributions to the five pension systems.⁸

In particular, between fiscal years 1985 and 2012 unfunded pension liabilities grew by over \$87 billion.⁹ Over 47% of that

3. COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, SPECIAL PENSION BRIEFING 2 (Nov. 2014), *available at* <http://cgfa.ilga.gov/Upload/1114%20SPECIAL%20PENSION%20BRIEFING.pdf>.

4. *Id.*

5. THE PEW CENTER ON THE STATES, THE TRILLION DOLLAR GAP: UNDERFUNDED STATE RETIREMENT SYSTEMS AND THE ROAD TO REFORM 17 (Feb. 2010), *available at* <http://www.pewtrusts.org/en/research-and-analysis/reports/2010/02/10/the-trillion-dollar-gap>.

6. ILLINOIS GENERAL ASSEMBLY, REPORT OF THE PENSION MODERNIZATION TASK FORCE 48, 62 (revised Mar. 30, 2010) [hereinafter PENSION TASK FORCE REPORT]. In early January 2011, the General Assembly raised the income tax rate as well as imposed spending caps. Taxpayer Accountability and Budget Stabilization Act, Public Act 96-1496.

7. *See e.g.*, Correspondence from Illinois State Board of Investment (Feb. 11, 2011) (on file with author) (detailing that over the last 40 years members of the State University Retirement System have paid on average 43.9% of the normal cost of benefits via employee contributions, whereas the State meets its share of normal cost through employer contributions, which have not historically been paid in full).

8. PENSION TASK FORCE REPORT, *supra* note 6, at 48, 68, 119, 121. In addition, employee benefit increases that were added since FY1987 only comprise \$7.8 billion of the State's unfunded liabilities. *Id.* at 120. *See* Eric M. Madiar, *Illinois Public Pension Reform: What's Past Is Prologue*, in 31 ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT, Summer 2014, at 5–17 nn.15–140 and accompanying text [hereinafter *Madiar Prologue Article*] (for a detailed discussion of the State's history in failing to properly fund the State's public pension systems), *available at* http://www.illinoisenatedemocrats.com/images/PDFS/2014/il_public_pension_reform.pdf.

9. COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, Briefing on Causes of State Pension Unfunded Liability, Presented to First Conference Committee on Senate Bill 1, at 5 (June 27, 2013), <http://cgfa.ilga.gov/Upload/Presentation%206-27-13.pdf>. The remaining 17.5%

growth (or \$41.2 billion) came from the State not paying what it should have to the pension systems. Stock market losses, the next single largest cause, accounts for 16.5% (or \$14.4 billion) of that growth. Changes in actuarial assumptions, such as people living longer than expected, caused 10.1% (or \$8.8 billion) of that growth. Benefit increases for public employees only accounts for 9.3% (or \$8.1 billion) of the growth. And employee salary increases were less than expected over that period and actually helped reduce those unfunded liabilities by .6% (or \$535 million).

State contributions were not forthcoming because the State's fiscal system failed to generate sufficient revenue to both maintain public services, such as education, healthcare, and public safety, as well as cover the State's actuarially required contributions to the systems.¹⁰ As a result, the legislature and various governors chose for decades to use the pension system as a credit card to fund public services and stave off the need for tax increases or service cuts.¹¹

Nonetheless, the staggering size of these liabilities produced an immediate response from the Illinois General Assembly in 2010. The legislature passed Senate Bill 1946, which cut the pension benefits provided to future public employees and officials hired after January 1, 2011.¹² While the legislation slowed the growth of the State's future liabilities, the legislation did not reduce the State's existing liabilities.

Some commentators have urged the legislature to go even

(or \$15.2 billion) in growth in unfunded liabilities is attributable to "miscellaneous factors," such as: (a) Retroactive benefit payments for individuals who delayed applying for retirement, (b) Fewer terminations of vested employees than expected, (c) Differences between actual cost of benefits earned and projected costs; (d) Retirements with reciprocal service credits; (e) Disablements and service retirements other than expected; (f) Delayed reporting of retirements (effects on pension benefit obligations); and (g) Mortality other than expected. *Id.* See also Doug Finke, *State of Illinois' Record of Shorting Pensions Goes Back Decades*, ST. J-REG., Feb. 9, 2013, <http://www.sj-r.com/top-stories/x846054923/State-of-Illinois-record-of-shorting-pensions-goes-back-decades> (providing a similar summary of the growth of unfunded liabilities between FY1985 and FY2012).

10. PENSION TASK FORCE REPORT, *supra* note 6, at 48. The Commission on Government Forecasting and Accountability stated in its testimony before the First Conference Committee on Senate Bill 1 on June 27, 2013 that the Pension Task Force Report's assessment remained correct that state pension contributions were not forthcoming because the state's fiscal system failed to generate sufficient revenue and that the pension system was used as a credit card to fund public services and stave off the need for tax increases or service cuts. 98th Ill. Gen. Assem., Proceedings of the First Conference Committee on Senate Bill 1, Presentation of the Commission on Government Forecasting and Accountability, at 56:44-1:14:01 (June 27, 2013) (on file with author).

11. *Id.*; *Madiar Prologue Article*, *supra* note 8.

12. Public Act 96-0889 (later codified in 40 ILL. COMP. STAT. 5/1-160).

further,¹³ sparking a legal debate at the State Capitol in Springfield over whether the General Assembly could cut the pension benefits promised to current employees (and retirees) without violating the 1970 Illinois Constitution's Pension Clause. The Clause, however, plainly provides that: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."¹⁴

This Article reviews not only the Pension Clause's language and origins, but also the constitutional convention debates discussing it, and relevant court decisions construing the provision. The Article also evaluates the arguments made by legal commentators on behalf of particular stakeholders about whether the Clause allows the legislature to cut the pension benefits of current public employees and retirees as well as other related issues. The Article concludes that the General Assembly cannot unilaterally cut the pension benefits of current employees or retirees as a means to reduce the State's existing pension liabilities based on the Clause's plain language, the drafters' original intent, voters' understanding of the provision, and court decisions construing the Clause. Simply put, there is no police or reserved powers exception to the Clause's protection.

As detailed below, the Clause not only makes a public employee's participation in a pension system an enforceable contractual relationship at the time an employee joins a pension system, but also insulates from diminishment or impairment by the General Assembly all "benefits" found in the Pension Code or in other state statutes that are conditioned on a person's membership in one of the State's various public pension systems, including subsidized health care. The Clause's protection also extends to employee contribution rates *and* any benefit increases added during an employee's term of service. In addition, the drafters of the Clause intended (as confirmed by the Illinois Supreme Court) to grant pension recipients the ability to obtain relief in State court to ensure that they receive their pension payments if a pension system defaults or is on the verge of default.

Moreover, any solution seeking to shrink the State's existing pension liabilities must derive from either paying the outstanding liabilities or reducing benefits to current employees via legitimate contract principles. The proposals offered by one legal commentator on behalf of Illinois's business community, as detailed below, cannot be squared with the boundaries imposed by the Pension Clause. In sum, welching is not a legal option

13. *See infra* notes 342–44, 353–56, 529 and accompanying text.

14. ILL. CONST. of 1970, art. XIII, § 5 (emphasis added).

available to the State. An analysis of the Pension Clause, as with any constitutional provision, begins with its language.

I. THE PENSION CLAUSE'S LANGUAGE AND ORIGINS

A. *The Clause's Plain Language*

1. *Guiding Rules of Interpretation and the Clause's Text*

The meaning of the Pension Clause, as with any constitutional provision, “depends on the common understanding of the citizens who, by ratifying the constitution, gave it life,” as well as the delegates who drafted and adopted it at the convention.¹⁵ This understanding is best determined by referring to the common meaning of the words used in the provision.¹⁶ If that language is unambiguous, it must be given effect without reliance on other aids of construction.¹⁷ As the Illinois Supreme Court put it long ago, “Constitutions are of a practical nature, founded on the common business of life, designed for common use, and fitted for common understandings. The people make them, the people adopt them, and the people must be supposed to read them with the help of common sense.”¹⁸ With this in mind, we begin our review with the Pension Clause's language.

The Pension Clause provides: “Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”¹⁹ Even without resorting to a dictionary or grammar book, the plain language of this sentence contains two interconnected parts establishing two propositions. *First*, a public employee's membership in a State or local pension system is an enforceable contractual relationship. *Second*, the “benefits of” membership that a public employee enjoys cannot be diminished or impaired.

15. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1184 (Ill. 1996). *Accord Baker v. Miller*, 636 N.E.2d 551, 554–55 (Ill. 1994) (“As with statutory construction, this court must construe a constitutional provision so as to effectuate the intent of the drafters. The best indication of the intent of the drafters of a constitutional provision is the language which they voted to adopt.”).

16. *Id.*

17. *Glisson v. City of Marion*, 720 N.E.2d 1034, 1041 (Ill. 1999).

18. *People ex rel. Decatur & State Line Ry. Co. v. McRoberts*, 62 Ill. 38, 40–41, 1871 WL 8316 *1 (1871) (quoting Justice Story for this proposition).

19. ILL. CONST. of 1970, art. XIII, § 5.

2. *Membership in a Pension System Is a Contractual and Enforceable Right*

As to the first proposition, while the Pension Clause does not specify when an employee obtains contractual rights, common sense and logic nonetheless dictate that an employee receives these rights upon becoming a member of a pension system. Under the Illinois Pension Code, public employees are eligible for membership in different systems after different periods of service. Judges, for example, are immediately enrolled into the Judges Retirement System (JRS) upon assuming office.²⁰

In addition, unless the terms of membership specify otherwise, common sense and logic further dictate that a public employee has a legal interest in his or her membership rights even if certain conditions must be met before reaping the full rewards of membership.²¹ In other words, there is nothing that immediately suggests that a member of a pension system only has a legal interest in rights that he or she accrues or earns on a per day basis.

3. *Pension Benefit Rights May Not Be Diminished or Impaired by the Legislature*

As to the second proposition, while the Pension Clause lacks detail as to what “benefits” of membership may not be “diminished or impaired,” the common meaning for these terms provides significant clarity as to the Clause’s protective scope. Webster’s New World Dictionary defines the word “benefit” as “anything contributing to an improvement in condition; advantage; help” and, in another, more specific definition as “payments made by an insurance company, public agency, welfare society etc. as during sickness, retirement, unemployment, etc. or death.”²² Accordingly, the word “benefit” refers not only to the specific annuity payments a public employee or retiree is eligible to receive, but also other entitlements of membership that advantage the public employee or retiree.

The word “impair” has a common meaning of “to make worse, less, weaker, etc. damage; reduce.”²³ And, the word “diminish”

20. 40 ILL. COMP. STAT. 5/18-120 (2008) (judges).

21. See e.g., *Forester Wheeler Energy Corp. v. LSP Equip., LLC*, 805 N.E.2d 668, 694 (Ill. App. Ct. 2004) (“It is well settled that a party’s rights under a contract become ‘vested’ for the purposes of the retroactive application of a statute when the contract is entered into rather than when the rights thereunder are asserted.”).

22. WEBSTER’S NEW WORLD DICTIONARY, 131 (2d Coll. Ed. 1978).

23. *Id.* at 703.

means “to make smaller; lessened; reduced.”²⁴ Taken together, the Pension Clause’s own language bars governmental action to reduce or eliminate a public employee’s or retiree’s pension payments and other entitlements available to the employee or retiree under the terms of membership when the person became a pension system member. At the same time, the plain language also indicates that an employee’s pension payments and other membership entitlements are “contractual” in nature and may be presumably altered through mutual assent via contract principles.

4. *The Pension Clause’s Prohibition against the
Diminishment or Impairment of Pension Benefits
Is Cast in Absolute Terms*

These propositions, in turn, indicate that the Clause on its face does not permit a *unilateral* reduction or elimination of the pension benefits of a current member of a pension system due to exigent circumstances, such as a fiscal emergency.²⁵ The Clause, after all, lacks any exceptions to its prohibitory language against the diminishment or impairment of pension benefits. As a consequence, the Clause’s text at least provides no support for the claim that the legislature could use the pension system’s present unfunded liabilities as a reason for cutting the benefits of current employees or retirees participating in the system.

While the Clause’s plain language undoubtedly supports the above conclusion, Illinois courts have long instructed that constitutional interpretation involves the object and purpose of the provision at issue.²⁶ As a result, this analysis also considers the

24. *Id.* at 396.

25. *People ex rel. Lyle v. City of Chi.*, 195 N.E. 451, 453 (Ill. 1935) (holding that the exigency of the Great Depression was an insufficient basis to reduce judicial salaries in violation of the Illinois Constitution, and explaining “[l]egitimate methods of relieving the situation are commendable, and where the law, either by express provision or by necessary implication, provides for an emergency departure from its terms, it is permissible to accommodate the law to such emergencies, but in order to justify such a departure the justification must be found within the law. It does not arise from the emergency, but, as existing under the law, is applied when the emergency happens.”); *People ex rel. Northrup v. City Council of Chi.*, 31 N.E.2d 337, 339 (Ill. App. Ct. 1941) (same conclusion with respect to aldermanic salaries and stating “an emergency cannot be created by the facts and used as a means of construction of a constitutional provision which has made no reference to any emergency by its terms.”). *Accord Jorgenson v. Blagojevich*, 811 N.E.2d 652, 662–63 (Ill. 2004) (explaining that in *Lyle*, the Supreme Court noted that “any departure from the law is impermissible unless justification for that departure is found within the law itself. Exigent circumstances are not enough. Neither the legislature nor any executive or judicial officer may disregard the provisions of the Constitution even in case of a great emergency.”).

26. *Wolfson v. Avery*, 126 N.E.2d 701, 707 (Ill. 1955).

Clause's origins and background to ascertain its object and purpose.

This inquiry seeks to determine the scope and nature of the "contractual relationship" established by the Clause as well as the "benefits" that are subject to its protection. Illinois court decisions instruct that after consulting a provision's language, it is appropriate to consider the historical background underlying its inclusion in the constitution, the debates of the members who drafted the provision at the convention, as well as the explanations of the provision published at the time.²⁷ Illinois courts also instruct that it is *improper* to construe a constitutional provision in a manner that seeks to avoid the intention of the framers, even to relieve a great hardship or inconvenience.²⁸ Finally, a constitutional guaranty, such as the Pension Clause, is must be liberally construed.²⁹ With these rules in mind, we review the Pension Clause's historical origins as well as the original intent and purpose of the provision according to its framers and the voters who gave it life.

B. Public Pension Law in Illinois Prior to the 1970 Constitution

1. The Purpose of a Pension

Two years before the 1970 Illinois Constitutional Convention ("Convention"), Rubin Cohn, an esteemed law professor at the University of Illinois, legal advisor to the Convention, and long time member of the Illinois Public Employees Pension Laws

In seeking such intention courts are to consider the language used, the object to be attained, or the evil to be remedied. This may involve more than the literal meaning of words. That which is within the intention of the statute, though no within the letter, and, though, within the letter, it is nevertheless *not* within the statute if not likewise within the spirit. The same general principles to be applied in construing statutes apply in the construction of the constitution.

Id. (emphasis added).

27. *Id.* Accord *People ex rel. Keenan v. McGuane*, 150 N.E.2d 168, 172 (Ill. 1958) (considering the historical background leading to the provision's inclusion in the constitution). *McNamee v. State*, 672 N.E.2d 1159, 1165 (Ill. 1996) (consulting the sponsors' floor debate statements to determine the scope of the Pension Clause); *Client Follow-Up Co. v. Hynes*, 390 N.E.2d 847, 853 (Ill. 1979) (explaining courts often look to official information disseminated to voters and newspaper accounts of wide circulation about the provision to discern the voter's understanding of the provision's meaning).

28. *Chance v. County of Marion*, 64 Ill. 66, 68, 1872 WL 8262 at *1 (Ill. 1872); *Wolfson*, 126 N.E.2d at 710 ("Courts should not apply so strict a construction as to exclude its real object and intent.").

29. *Wolfson*, 126 N.E.2d at 710.

Commission ("Pension Laws Commission"), explained the multiple purposes for pension and retirement plans.³⁰ Retirement plans, he explained, offer employees a sufficient level of income upon retirement so they can live in reasonable security.³¹

These plans also allow employers to attract better employees, reduce turnover, facilitate orderly retirement of older employees, and make it possible to retain valuable employees who might otherwise seek more gainful employment.³² In addition, retirement plans are especially important for public employers because the "government cannot compete with private industry salary levels, and must rely heavily upon the equalizing factor of an attractive and liberal retirement plan."³³

2. *The Legal Protection Provided to Mandatory and Optional Public Pension Plans Prior to the 1970 Illinois Constitution*

Before the adoption of the 1970 Illinois Constitution, Illinois courts afforded different legal protection to public pension benefits depending on whether a person participated in a mandatory or optional retirement plan.³⁴ If an employee participated in an optional plan, then the pension was considered enforceable under contract principles, and was deemed to provide the employee with "vested rights."³⁵ The plan was "optional" because the person could elect to participate in the retirement plan by making contributions to the plan via payroll deductions.³⁶ An employee in an optional plan received constitutional protection under the 1870 Constitution's Contracts Clause, which, like the U.S. Constitution, barred the State from impairing contracts.³⁷

Importantly, an employee in an optional plan was entitled to

30. Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of Employees' Rights*, 1968 U. ILL. L.F. 32, 40 (1968) [hereinafter Cohn].

31. *Id.*

32. *Id.*

33. *Id.*

34. *People ex rel. Sklodowski v. State (Sklodowski I)*, 695 N.E.2d 374, 377 (Ill. 1998). See generally, Comment, *Public Employee Pension Rights and the 1970 Illinois Constitution: Does Article XIII, Section 5 Guarantee Increased Protection?*, 9 J. MARSHALL J. PRAC. & PROC. 440, 441, 445–49, 458–59 (1976) [hereinafter Comment] and Cohn, *supra* note 30, at 51–58 (providing a detailed background discussion of the mandatory/optional pension distinction). See also REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION 102–09 (1963) [hereinafter 1963 PENSION LAWS REPORT] (summarizing the prevailing view regarding the type of legal protection for mandatory and optional pension plans).

35. *Sklodowski I*, 695 N.E.2d at 377 (citing *Bardens v. Bd. of Trs.*, 174 N.E.2d 168, 170 (Ill. 1961)).

36. *Id.*

37. *Bardens*, 174 N.E.2d at 172.

a pension based on the pension statute in effect when the employee entered the retirement system, not the statute that existed when the employee retired.³⁸ In *Bardens v. Board of Trustees of the Judges Retirement System*, for example, the Illinois Supreme Court invalidated a retroactive change to the salary formula used to determine a judge's pension.³⁹ Under the statute, the pension would have been based on the judge's average salary over the last four years of service, rather than the salary on the judge's last day of service.⁴⁰ The court found the statute unconstitutional because the plaintiff had originally contracted for the right to receive a pension "measured by the salary that he was receiving upon the date of his retirement."⁴¹

Indeed, prior to the 1970 Constitutional Convention, it was well understood that by the Illinois Attorney General and at least one scholar that the *Bardens* decision absolutely barred the General Assembly from unilaterally reducing the benefits of participants in an optional plan.⁴² The Illinois Supreme Court later made the same observation in a 1981 decision where it declared that the legislature had "no power" to diminish or repeal the pension rights existing in the optional plan at the time the participant began making contributions to the plan.⁴³

3. *Most Public Employees in Illinois in 1970 Were Members of "Mandatory" Pension Plans Lacking Constitutional Protection*

If an employee participated, however, in a mandatory plan, then the "rights" created in the relationship were simply a gratuity or bounty,⁴⁴ and the legislature could change or revoke

38. *Id.* at 171; *Arnold v. Bd. of Trs.*, 417 N.E.2d 1026, 1027 (Ill. 1981); *Kraus v. Bd. of Trs.*, 390 N.E.2d 1281, 1284–85 (Ill. App. Ct. 1979).

39. *Bardens*, 174 N.E.2d at 171.

40. *Id.*

41. *Id.*

42. *Pensions: State Emps.' Ret. Sys.*, No. 21, 1961 Op. Atty. Ill. Gen. 75, 78–80 (1961) (opining that optional pension plans afforded vested contractual rights under the Illinois Constitution's Contracts Clause "could not be impaired by subsequent legislation" even if the unilateral alteration or modification were "slight" or "minor" in nature); Cohn, *supra* note 30, at 62; Comment, *supra* note at 34, at 458–59 & n.87.

43. *Arnold*, 417 N.E.2d at 1027 (emphasis added) (citing *Raines v. Bd. of Trs.*, 7 N.E.2d at 491–92 (Ill. 1937); *Kraus*, 390 N.E.2d at 1284–85).

44. Characterizing pension benefits as a bounty under a mandatory plan beckons the famous law school hypothetical of one person offering \$100 to anyone who would walk across the Brooklyn Bridge. E. ALLEN FARNSWORTH, *CONTRACTS* § 3.24, at 191–96 (2d ed. 1990). Traditional contract doctrine would hold that a person would only obtain a contractual right to receive the \$100 if the person walked the entire length of the bridge (complete performance). *Id.* at 192. Short of that, the traditional view allowed the person

the plan's terms at any time.⁴⁵ A plan was deemed "mandatory" if the employee was required, as a condition of employment, to make contributions to a pension plan that were automatically deducted from his or her salary.⁴⁶ An employee belonging to such a plan only had the "right...to share in the [pension] fund in the manner and on such terms as the legislature may, from time to time, determine best serves the welfare of the participants and the people of the State."⁴⁷

At the time of the 1970 Illinois Constitutional Convention, 15 of the 17 retirement systems set forth in the Pension Code were "mandatory" plans.⁴⁸ Only the Judicial Retirement System and General Assembly Retirement System (GARS) were "optional" plans.⁴⁹ As a consequence, the pension "rights" of the vast majority of state and local employees could be modified or abolished by the legislature at any time.

C. Public Pension Law in Illinois Before the Convention Mirrored the Law of Other States

Illinois's optional versus mandatory distinction in legal protection provided to pension plans reflected the majority view taken by other states at the time of the Convention.⁵⁰ Most states viewed public pensions as "simply gratuities which a gracious and beneficent government employer may confer, withhold, modify or repeal as the whim of an omniscient sovereign dictates."⁵¹ The majority view also governed the private sector before Congress enacted the federal Employee Retirement Income Security Act of 1974 (ERISA), except where the employer's plan expressly created a contractual obligation.⁵²

making the offer to revoke it any time prior to complete performance. *Id.* As we all learned in law school, the traditional view has long been rejected and the offer cannot be revoked when performance begins because the person obtains an option contract to complete his or her performance in a reasonable period of time. *Id.* at 193–94. See also Jason A. Walters, *The Brooklyn Bridge is Falling Down: Unilateral Contract Modification and the Sole Requirement of the Offeree's Assent*, 32 CUMB L. REV. 375, 401–08 (2002) (discussing the history of unilateral contract theory and the option contract concept in further detail).

45. *Skłodowski I*, 695 N.E.2d at 377 (citing *Bergin v. Bd. of Trs.*, 202 N.E.2d 489, 494 (Ill. 1964)).

46. *Id.*

47. *Keegan v. Bd. of Trs.*, 107 N.E.2d 702, 706 (Ill. 1952).

48. *Arnold*, 417 N.E.2d at 1028.

49. *Id.*

50. Cohn, *supra* note 30, at 33.

51. *Id.*

52. Note, *Contingent Workers and ERISA: Should the Law Protect Workers With No Reasonable Pension Expectations?*, 25 OKLA. CITY U. L. REV. 667, 670–75 (2000) (explaining how pension benefits were governed by state law

While the “gratuity” approach was the dominant legal theory, four other perspectives existed at that time of the Convention and bear discussion. Each of these approaches is briefly reviewed below.

1. *The Significance of the New Jersey Supreme Court’s Spina Decision*

Henry Green, one of the Pension Clause’s principal sponsors, gave special mention at the Convention to a 1964 New Jersey Supreme Court decision that treated public pensions as property rights, but having no better protection than gratuities.⁵³ In *Spina v. Consolidated Police and Firemen’s Pension Fund Commission*,⁵⁴ the court dealt with a challenge to a legislative change requiring police and firemen to work 25 years, rather than 20 years to receive a pension.⁵⁵ The court rejected the trend to treat pension benefits as contractual in nature after noting that an attempt to characterize pensions as “contracts” failed at New Jersey’s 1947 Constitutional Convention.⁵⁶ The court, instead, framed the issue as whether the legislature was free to rewrite the formula to receive pension benefits for the good of all who contributed where the pension fund could not meet “present and future [fiscal] demands.”⁵⁷ The court upheld the change and reasoned that while public employees had “a property interest in an existing [pension] fund” that the State could not simply confiscate, the legislature could nonetheless, cut benefits to maintain the fund’s solvency.⁵⁸ Green, as discussed below, explained to Convention delegates that the result permitted by the *Spina* decision made the Pension Clause necessary so that result could not occur in Illinois.⁵⁹

and treated as gratuities or vested contractual rights depending on the terms of the private employer’s retirement plan). See *Hughes v. Encyclopedia Britannica, Inc.*, 117 N.E.2d 880, 882 (Ill. App. Ct. 1954); *Guincy v. Curtice Burns, Inc.*, 327 N.E.2d 284, 286 (Ill. App. Ct. 1975) (summarizing Illinois law).

53. *Transcripts: Jul. 10, 1970–Aug. 5, 1970*, 4 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2931 (1972) [hereinafter 4 PROCEEDINGS] (statement of Del. Green), available at <http://www.idaillinois.org/cdm/ref/collection/isl2/id/7417>. Del. Green further explained that the need to afford contractual protection to Illinois public pension participants was based, in part, “on a Supreme Court decision from New Jersey in 1964 that has a very, very similar pension problem to that of Illinois.” *Id.*

54. *Spina v. Consol. Police & Firemen’s Pension Fund Comm’n*, 197 A.2d 169 (N.J. 1964).

55. *Id.* at 171.

56. *Id.* at 174–76 & n.3.

57. *Id.* at 175.

58. *Id.* at 175–76.

59. 4 PROCEEDINGS, *supra* note 53, at 2931.

2. Few States Provided "Contractual" and Constitutional Protection to Public Employee Pensions

Only a minority of state courts provided "contractual" protection to pension benefits regardless of their mandatory or optional nature.⁶⁰ In Arizona and Georgia, pension benefits were completely immunized from legislative impairment.⁶¹ In *Yeazell v. Capins*, the Arizona Supreme Court, for example, invalidated a statute that adversely changed the formula used to determine the pensions of active police officers from a one-year average of final salary to a five-year average of final salary.⁶² The court held that, because employee pension benefit rights became "vested" when employment was accepted, the legislature could not later change those rights retroactively without the mutual assent of the employee.⁶³ The court also held the fact that the employee continued to work after the statutory change took effect could not be construed as employee acquiescence or a waiver of existing rights.⁶⁴ In the court's view, the employee could not be compelled while being employed to choose between his original pension rights and the statutorily modified pension rights via "legislative coercion."⁶⁵

California, Washington, and other states, however, provided a less restrictive or "limited vesting" approach to pension benefits.⁶⁶ In these states, the legislature had the reserved power to make reasonable reductions or modifications to pension benefit rights to maintain the fiscal integrity of the pension system so long employees were also afforded an off-setting increase in benefits.⁶⁷ Under both the Arizona and California "contract" approaches, though, employee pension benefits were "vested" or legally fixed according to the pension statute in effect when the person started employment and was enrolled in the retirement plan.⁶⁸

60. Cohn, *supra* note 30, at 33.

61. *Id.* at 33–34, 42–46 (discussing *Yeazell v. Capins*, 402 P.2d 541 (Ariz. 1965) (where the court held that an employee's "rights" to a pension became 'vested' upon acceptance of employment and could not be retroactively 'impaired' by the legislature), *Burks v. Bd. of Trs.*, 104 S.E.2d 255, 227 (Ga. 1958) (same); *Bender v. Anglin*, 60 S.E.2d 756, 760 (Ga. 1950) (same)).

62. *Yeazell*, 402 P.2d at 542.

63. *Id.* at 546 (citing and quoting *York v. Cent. Ill. Mut. Relief Ass'n*, 173 N.E. 80, 83 (Ill. 1930)).

64. *Id.* at 546–47.

65. *Id.*

66. Cohn, *supra* note 30, at 33, 46–48.

67. *Id.* at 46–48.

68. *Id.* at 42–48. See e.g., *Allen v. City of Long Beach*, 287 P.2d 765 (invalidating a unilateral increase in employee contributions rates from 2% to 10% of salary and an adverse change in the formula used to compute pension payments because those modifications were not reasonable changes necessary to the successful operation of the pension plan and because the employees

3. *The New York Constitution Expressly Protected Public Pension Benefits in Absolute Terms*

New York, as detailed later, provided express constitutional protection to pensions through a 1938 constitutional amendment that characterized a public employee's participation in a retirement plan as a "contractual relationship."⁶⁹ The provision also stated that pension benefits set forth in a retirement plan could not be "diminished or impaired."⁷⁰ At the time of the 1970 Convention, New York court decisions held—as they do today—that the constitutional amendment "fix[es] the [pension] rights of the employee at the time he or she becomes a member of the system."⁷¹ These decisions also held that the "benefits" receiving protection under New York constitutional provision were "pecuniary matters" and that the provision prohibited "any action which would impair or diminish the member's right to payment of pensions, annuities, and related monetary advantages."⁷² The New York constitutional provision, in short, afforded the same robust legal protection Arizona courts provided to public pension benefit rights. Accordingly, New York's constitutional provision prohibits "official action during a public employment membership in a retirement system which adversely affects the amount of the retirement benefits payable to the members on retirement under the laws and conditions existing at the time of his entrance into retirement system membership."⁷³

were not given new off-setting benefits); *Bakenhaus v. Seattle*, 296 P.2d 536, 539–41 (Wash. 1956) (rejecting a 1937 law that made the right to receive a pension vest only when all the conditions precedent were met, and holding that pension rights are a vested, contractual right based on a promise made by the State at the time an employee commences service. The court also held that pension rights may be modified prior to retirement when necessary to keep the system "flexible" and maintain "its integrity." Those modifications must be reasonable and any disadvantageous modification must be accompanied by a corresponding benefit to employees).

69. N.Y. CONST. art. V, § 7 ("After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the *benefits* of which shall not be diminished or impaired.") (emphasis added).

70. *Id.*

71. *Birnbaum v. N.Y. State Teachers Ret. Sys.*, 152 N.E.2d 241, 245 (N.Y. 1958). *Accord* *Ballatine v. Koch*, 674 N.E.2d 292, 294 (N.Y. 1996).

72. *Brown v. N.Y. State Teachers Ret. Sys.*, 269 N.Y.S.2d 649, 650 (N.Y. App. Div. 1966), *aff'd*, 279 N.Y.S.2d 532 (N.Y. 1967).

73. *Birnbaum*, 152 N.E.2d at 246. *See Ballatine*, 674 N.E.2d at 294 ("The provision 'fix[es] the rights of the employees at the time of commencement of membership in [a pension or retirement] system, rather than as previously at retirement,' and thus prohibits unilateral action by either the employer or the Legislature that impairs or diminishes the rights established by the employee's membership."); *Pub. Emps. Fed'n, AFL-CIO v. Cuomo*, 467 N.E.2d

4. *The Hawaii, Alaska, and Michigan Constitutions Also Protected Public Pension Benefits, but Only “Accrued” Benefits*

At the time of the 1970 Convention, the constitutions of Hawaii, Alaska, and Michigan also each contained provisions protecting public pensions that were virtually identical to the New York Constitution.⁷⁴ As with the New York Constitution, a person’s membership in a public pension system was deemed a “contractual relationship.”⁷⁵ The Hawaii and Alaska Constitutions, however, only protected “accrued benefits” from diminishment or impairment.⁷⁶ Similarly, the Michigan Constitution only protected “accrued financial benefits.”⁷⁷ The New York Constitution, in contrast, lacked the limiting word “accrued.”

While courts in Hawaii, Alaska, and Michigan had not definitively construed the scope of their respective constitutional provisions in 1970, they ultimately arrived at different conclusions as to what pension benefit rights received protection based on each state’s constitutional convention debates. In Hawaii, the courts concluded that the provision’s use of the word “accrued” differentiated between a current employee’s past and future pension benefits.⁷⁸ This word, in turn, permitted the legislature to

236, 239 (N.Y. 1984) (noting that the purpose of the New York Pension Clause “was to fix the rights of the employee at the time he became a member of [a pension] system” and “[i]f changes were applied retroactively to prior members of a public retirement system, they were held unconstitutional on the theory that a member’s rights were frozen as of the date of the employment and that any changes lessening benefits must be made prospectively.”); *Lippman v. Bd. of Educ.*, 487 N.E.2d 897 (N.Y. 1985) (“The membership in a pension or retirement system is, therefore, substantially a contractual relationship when the members joins the system. The benefits which are the essence of that contract should not be diminished or impaired.”).

74. See HAW. CONST. of 1950, art. XVI, § 2 (“Membership in any employees’ retirement system of the State or any political subdivision thereof shall be a contractual relationship, the *accrued benefits* of which shall not be diminished or impaired.”) (emphasis added); ALA. CONST. of 1956, art. XII, § 7 (“Retirement Systems. Membership 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.”) (emphasis added); MICH. CONST. of 1963, art. IV, § 24 (“The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.”) (emphasis added).

75. *Id.*

76. *Id.*

77. *Id.*

78. See e.g., *Everson v. State*, 228 P.3d 282, 290–91 (Haw. 2010) (explaining that based on the 1950 constitutional convention debates of the Hawaii’s pension provision, “the legislature could reduce benefits as to (1) new entrants into a retirement system, or (2) as to person already in the system in

reduce the pension benefits of current employees for benefits derived from future services, but not benefits a person already earned through past services.⁷⁹

The Michigan Supreme Court reached a similar conclusion that its constitutional provision conferred a contractual right upon a member of a public pension system to receive “accrued financial benefits” from services already performed, which could not be diminished or impaired.⁸⁰ However, the provision would not limit the legislature from imposing new conditions for earning financial benefits in the future so long as those conditions were reasonable.⁸¹

The Alaska Supreme Court, on the other hand, construed its constitutional provision in a manner consistent with California’s “limited vesting” approach.⁸² Under this approach, an employee’s rights to benefits under the pension system “vest” on initial employment and enrollment in the system, rather than at the time when an employee becomes eligible to receive benefits.⁸³ These benefits, including any enhancements occurring during the person’s employment, could not be “diminished or impaired.”⁸⁴ Consistent with the California approach, though, the legislature could make reasonable modifications in benefits if any resulting disadvantage to employees were offset by a comparable new advantage.⁸⁵

As detailed below, public employee groups lobbied Convention delegates to constitutionally protect pension benefit rights not only because Illinois courts characterized pension benefits in mandatory plans as mere gratuities, and the New Jersey Supreme Court authorized the reduction of benefits in its *Spina* decision due to chronic underfunding, but also because public employees believed the government would abandon the already underfunded pension system in an economic crisis. These lobbying efforts ultimately succeeded in the inclusion of a constitutional provision modeled after New York’s 1938 constitutional amendment.

so far as their future services were concerned. It could not, however, reduce the benefits attributable to past services.”).

79. *Id.*

80. Advisory Op. re Constitutionality of 1972 PA 258, 209 N.W.2d 200, 202–03 (Mich. 1973).

81. *Id.*

82. *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056–57 (Alaska 1981) (citing and quoting with approval *Allen*, 287 P.2d at 767 (Cal. 1955)).

83. *Duncan v. Retired Pub. Emps. Ass’n*, 71 P.3d 882, 886 (Alaska 2003).

84. *Id.*

85. *Hammond*, 627 P.2d at 1057.

D. The Public Employee Outcry for Constitutional Protection of Pension Benefits

While providing constitutional protection to public pension benefits was not the impetus for the 1970 Illinois Constitutional Convention,⁸⁶ it nonetheless became a significant issue. Elmer Gertz, chairperson of the Convention's Bill of Rights Committee, reported that he and other committee members were inundated with communications from public employees, particularly university employees.⁸⁷ Public employees believed their pension benefits were imperiled due to underfunding and required constitutional protection.⁸⁸ John Parkhurst, chairperson of the Local Government Committee, received similar correspondence from police and firemen who concerned that granting municipalities "home rule" authority would permit them to abandon their pension obligations to employees.⁸⁹

A review of the correspondence the framers received during the Convention sheds valuable light on to what they knew about the pension issue and why the Pension Clause ultimately became part of the 1970 Constitution.⁹⁰ The review below concludes that

86. See Arnold B. Kanter & Wayne W. Whalen, *Thoughts on Constitutional Drafting*, 9 HARV. J. ON LEGIS. 31 n.2 (1971) (stating the Convention was prompted by the need to revise: (1) the State's revenue system; (2) the method of judicial selection due to corruption; (3) the method for redrawing House and Senate districts due to U.S. Supreme Court redistricting decisions; (4) the need for "home rule" authority for municipalities; (5) and the general inflexibility of the 1870 Illinois Constitution).

87. Elmer Gertz, *The Making of the Illinois Constitution of 1970*, 5 J. MARSHALL J. PRAC. & PROC. 215, 233 (1972) [hereinafter Gertz].

88. *Id.*

89. See e.g., Letter from Donald E. Nolan, to John C. Parkhurst, Chairman, Local Gov't Comm., Ill. Const. Convention (April 27, 1970), in ILLINOIS CONSTITUTIONAL CONVENTION, Box 28, Folder 30 (on file with Ill. State Historical Library) [hereinafter ILL. CONST. CONV. PAPERS] (writing in opposition to a home rule proposal pending before the Convention's Local Government on behalf of police and firemen because it poses "a threat to losing protection of the Pension Fund Program"); Letter from David S. Clark, Sec'y, Des Plaines Prof'l Firemen's Ass'n, to John C. Parkhurst, Chairman, Local Gov't Comm., Ill. Const. Convention (April 20, 1970), in (same); Letter from Edward J. Malloy, Legislative Representative, Mun. Emps. Soc'y of Chi., to John C. Parkhurst, Chairman, Local Gov't Comm., Ill. Const. Convention (May 4, 1970), in (same). Mr. Parkhurst received hundreds of other letters and postcards from police and firemen—many handwritten—stating the same concerns. See generally ILL. CONST. CONV. PAPERS, at Box 28, Folder 30.

90. See *Elk Grove Eng'g Co. v. Korzen*, 304 N.E.2d 65, 68–69 (Ill. 1973) ("The framers of the constitution would naturally examine the state of things at the time; and their work sufficiently attests that they did so."); *Hoffman v. Clark*, 372 N.E.2d 74, 82 (Ill. 1977) (referring to a delegate's briefing memo to discern the intent and purpose of Article IX, Section 4(b) of the Illinois Constitution); *People v. Tesler*, 469 N.E.2d 147, 162–63 (Ill. 1984) (Ward, J., concurring) (relying on the research papers delegates received at the 1970

the framers and delegates had a deep understanding of both the fiscal condition and legal landscape governing public pensions. More importantly, the delegates were familiar with the reasons why public employees wanted to constitutionally protect their pension benefits at the time employees became members of a pension system.

1. *Public Employee Organizations Led Efforts to Include Pension Protection in the New Constitution Due to Underfunding*

Lobbying efforts to constitutionally protect pension benefits at the Convention began in early March 1970 when a group of University of Illinois retirees wrote the Convention President and each of its committee chairs on two occasions.⁹¹ The retirees requested the inclusion of the following language in the proposed

constitutional convention to determine the intent for Article I, Section 6 of the Illinois Constitution; the “research papers should not be overlooked in any search to determine the mind of the constitution.”). *See also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48.4 (7th ed. 2010) (noting “[t]he events occurring immediately prior to the time when an act becomes law comprises an instructive source, indicative of what meaning the legislature intended. * * * Legislative history can also consider part of a statute that never became into existence. * * * The contemporary history of events during this period consists chiefly in statements by various parties concerning the nature and effect of the proposed law and statements or other evidence on the evils to be remedied. Contemporary history also includes information concerning the activities of pressure groups, economic conditions in the country at the time, prevailing business practices, and the prior state law, including judicial decisions, applicable to the subject of the legislation in question.”).

91. Letter from Mary Lois Bull, Sec’y, Univ. of Ill. Urbana Retirees’ Interim Comm., to Samuel Witwer et al., President, Ill. Const. Convention (Mar. 5, 1970), *in* PAPERS OF HENRY I. GREEN COLLECTION, Box 1, Folder 13 (on file with Univ. of Ill., Urbana-Champaign, Ill. History and Lincoln Collection) [hereinafter GREEN PAPERS]. The lobbying efforts of the university retirees later led to the formation of the State Universities Annuitants Association (SUAA) with the Pension Clause as its signature achievement. *See* STATE UNIVERSITIES ANNUITANTS ASSOCIATION: 25 YEARS OF HISTORY, 1971–1996, at 3, (May 1996), *available at* <http://www.suaa-ui.org/archive/SUAA%20History%2025%20Years%201971-1996.pdf> (“On April 1, 1970, the University of Illinois, Urbana-Champaign Chapter of Annuitants of the State Universities Retirement System (UIUC) was formed, the first of the now twenty-five local associations. One of the most important accomplishments of the Urbana Chapter was working for the inclusion in the 1970 revision of the Illinois Constitution of an article protecting all state pension systems: Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired. (Constitution of the State of Illinois, Article XIII, Section 5. Pension and Retirement Rights). Such a vested pension rights provision had been a goal vigorously sought by Ed Gibala [Executive Director of SURS] and SURS, and the Urbana SUAA Chapter.”).

constitution:

Pension rights of public employees are an integral part of the contract of employment, and these rights are vested in the employee at the time he accepts each employment contract. The General Assembly shall have the responsibility of implementing and preserving the value of these vested rights both during the period of employment and after retirement.⁹²

The university retirees stated in their letter that their proposal had been recommended by "the Advisory Committee to the State Universities Retirement Board."⁹³ The Illinois Education Association sent a virtually identical letter to the same delegates in April 1970 explaining that "[m]ost teachers continue to work at salaries greatly less than other professions and continue to do so only because they can rely on their pensions for retirement."⁹⁴

These requests were renewed in a June 26, 1970, letter received by all Convention delegates from Harl H. Ray, chairman of the Employees Advisory Committee to the State Universities Retirement System.⁹⁵ Mr. Ray implored delegates to "not deny us the Constitutional right to always be able to receive that pension promised by the State Legislature during our period of employment." Constitutional protection, he reasoned, was warranted because "the State Legislature has failed to finance the pension obligations on a sound basis."⁹⁶

2. *The Pension System Was No Better Funded in 1970 Than It Is Today*

At the time of the Convention, the Pension Laws Commission reported that the General Assembly Retirement System (GARS)

92. *Id.*

93. *Id.* See also Letter from Sharon Thannert, to Dels., Ill. Const. Convention (Mar. 4, 1970), in PAPERS OF PETER A. TOMEI, Box 15, Folder 6 (on file with Chi. History Museum) [hereinafter TOMEI PAPERS]; Letter from Jeanne Wojsiat, to Del. Peter A. Tomei, in TOMEI PAPERS (same); Letter from Warren Johnson, to Del. Peter A. Tomei, in TOMEI PAPERS, Box 15, Folder 3; Letter from Karen Tarpey, to Del. Peter A. Tomei, in TOMEI PAPERS, Box 15, Folder 6.

94. Letter from David Frey, Sec'y, Lake Shore Div. of the Ill. Educ. Ass'n, to Fred Turner et al., Ill. Const. Convention (Apr. 7, 1970), in ILL. CONST. CONV. PAPERS, *supra* note 89, at Box 28, Folder 30.

95. Letter from Harl H. Ray, Vice Chairman, Emps. Advisory Comm., SURS, to Dels., Ill. Const. Convention (June 26, 1970), in GREEN PAPERS, *supra* note 91. See also, Letter from Stanley L. Johnson, Exec. Vice President, Ill. State Fed'n of Labor and Cong. of Indus. Orgs., to Dels., Ill. Const. Convention (June 17, 1970), in GREEN PAPERS, *supra* note 91 (advocating that "[s]peaking of Public Employees, those who have already retired and those to go on pension are also concerned over their vested right to receive pensions from the Public Body now and in the future.").

96. *Id.*

was 68.5% funded, while the State University Retirement System (SURS) was 47% funded.⁹⁷ The remaining state-funded retirement systems had the following funding percentages: State Employees Retirement System (SERS) 43%; Judicial Retirement System (JRS) 32.3%; and Teachers Retirement System (TRS) 40%.⁹⁸ The five State pension systems had an aggregate funding ratio of 41.8%. By comparison police and firemen pension funds were respectively only 33.8% and 19.1% funded.⁹⁹ As noted at the outset, the five systems currently have a combined funding ratio of 42.9%.

3. *The State University Retirement System Also Advocated for Constitutional Protection Because of Its Underfunding and the Lack of Legal Protection Provided to Mandatory Pension Plans*

In July 1970, Henry Green, one of the Pension Clause's principal sponsors, received a letter from the Executive Director of the State Universities Retirement System (SURS) containing a similar plea for the constitutional protection of pensions along with a legal memorandum.¹⁰⁰ The letter stated that the memorandum provided the "reasons why" the constitution should include a provision "regarding the vesting and funding of public employee pension rights."¹⁰¹ Delegate Green later read verbatim portions of this memorandum as his floor speech to explain the intent and purpose of the Pension Clause to Convention delegates.¹⁰² The legal memorandum was also distributed to all

97. REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION 32 (1969) [hereinafter 1969 PENSION LAWS REPORT].

98. *Id.*

99. *Id.* at 42.

100. Letter from Edward S. Gibala, Exec. Dir., SURS, to Henry Green, a Pension Clause principal sponsor (July 2, 1970) [hereinafter SURS Letter], in GREEN PAPERS, *supra* note 91. See Article Appendix A.

101. *Id.*

102. *Compare* 4 PROCEEDINGS, *supra* note 53, at 2925 (Del. Green) (stating,

Now at the end of 1968 in Illinois we had more than 370,000 public employees who were participating in 374 pension funds in this state. In addition, there were more than 79,000 people who were already on retirement or disability or survivor's insurance benefits from these funds. . . . Now, with regard to the first point, the Illinois courts have generally ruled that pension benefits under mandatory participation plans were in the nature of bounties which could be changed or even recalled as a matter of complete legislative discretion. And as a result in Illinois today we have public employees who are beginning to lose faith in the ability of the state and its political subdivisions to meet these benefit payments. This insecurity on the part of the public employees is defeating the very purpose for which the retirement system was established[.] . . . In the past twenty-two years the

Convention delegates.¹⁰³

The SURS letter noted that while the “General Assembly has done an excellent job in funding its own retirement system obligations,” it “has failed to meet its commitment to other public employees.”¹⁰⁴ The letter continued that the legislature’s failure to fund the other retirement systems “has created such a staggering liability for future taxpayers that the extra load during an adverse economic period may require the public to renege on its obligations to its public servants.”¹⁰⁵ By way of example, SURS noted how the General Assembly passed legislation in 1967 providing state universities with appropriations that would at least cover the amount necessary to fully fund current service costs and the interest owed on past liabilities.¹⁰⁶ Yet, in 1968 and 1969, the legislature reneged on this funding commitment by failing to appropriate the required funds.¹⁰⁷

The letter’s accompanying legal memorandum then detailed not only the total accrued liabilities and assets of Illinois’s State and Local retirement systems, but also the distinction in legal protection afforded to participants in “mandatory” and “optional” pension plans.¹⁰⁸ The memorandum explained that since “most pension plans in Illinois provide for mandatory participation, the

unfunded accrued liabilities of these pension plans in Illinois have increased from about \$359,000,000 to almost \$2,500,000,000, and the unfunded accrued liabilities are real and are not theoretical obligations based upon service already rendered. . . . Despite consistent warnings from the Pension Laws Commission, the current budgeting of pension costs necessary to ensure the financial stability of these funds, the General Assembly has failed to meet its commitments to finance the pension obligations on a sound basis. In 1967, the General Assembly approved Senate Bill 515 which provided for the appropriation to one state university retirement system, to at least equal to the amount which would be necessary to fund fully the current service costs and to cover the interest on the past service; and despite this legislative mandate, the General Assembly refused to appropriate the necessary funds. Now, during this two year period alone the appropriations under this system were \$67,000,000 less than the minimum required by the senate bill).

with Memorandum from Edward S. Gibala, Exec. Dir., SURS, on Const. Provision Concerning Vesting of Pension Rights for Public Emps., at 1, 2–3, and 4, in GREEN PAPERS, *supra* note 91 [hereinafter SURS Memorandum]. The italicized text in the parenthetical is verbatim to portions of the SURS Memorandum. See Article Appendix A.

103. Constitutional Provision Concerning Vesting of Pension Rights for Public Employees, in ILL. CONST. CONV. PAPERS, *supra* note 89, at Box 51, Folder 5.

104. SURS Letter, *supra* note 100, at 1.

105. *Id.*

106. SURS Memorandum, *supra* note 102, at 3.

107. *Id.*

108. *Id.* at 1.

pension ‘rights’ of public employees in this State are mere expectancies which are subject to a reserved legislative power of change or repeal.”¹⁰⁹ The memorandum then referenced the New Jersey Supreme Court’s *Spina* decision as an example of how the legislature could reduce the pension benefits of mandatory plan participants when the fund’s solvency was at stake.¹¹⁰

The memorandum also discussed how the New York Constitution guaranteed public employees “a ‘contractual relationship’ in the governmental ‘pension’ or ‘retirement system,’” the benefits of which could not be diminished or impaired.¹¹¹ The memorandum concluded that because “Illinois courts have generally ruled that public employee pensions are mere gratuities which can be revised or revoked at the will of the legislature,” and because the General Assembly “has cast a spell of doom on the future of pension expectancies” by underfunding the pension system, “public employees are beginning to lose faith in the ability of the State and its political subdivisions to meet benefit payments during an adverse economic period.”¹¹²

The memorandum then requested a constitutional provision vesting employee pension benefits at the time of employment and “direct[ing] the General Assembly to take the necessary steps to fund the pension obligations on a basis consistent with sound actuarial principles.”¹¹³ To that end, the memorandum proposed a constitutional provision with language nearly identical to what the delegates had received in March and April of 1970.¹¹⁴

In sum, Delegate Gertz’s remarks and the correspondence received by Convention delegates, including Henry Green, the Pension Clause’s sponsor, indicate that the protection of public pension benefits garnered significant attention at the Convention.¹¹⁵ These communications also gave delegates, at a

109. *Id.* at 1 (citing *Beutel v. Foreman*, 123 N.E. 270 (Ill. 1919)).

110. *Id.* at 1–2.

111. *Id.* at 4.

112. *Id.*

113. *Id.*

114. The memorandum requested that the constitution include the following provision:

Vesting of Pension Rights of Public Employees

Pension rights of public employees are an integral part of the contract of employment, and these rights are vested in the employee at the time he accepts each employment contract. The General Assembly shall be responsible for safeguarding these vested rights during the employment period and after retirement by providing for methods of financing which are consistent with sound actuarial principles.

Id. at 4–5.

115. Gertz, *supra* note 87, at 233 (stating that because of the volume of correspondence the securing of pension benefits “became a subject a

minimum, a sophisticated understanding of the fiscal condition of the State's pension systems, and the difference in legal protection afforded to mandatory and optional pension plans. They also provided the reasons why public employees sought to constitutionally protect the pension benefits in place when they became members of a pension system. We next consider how the Pension Clause became part of the Illinois Constitution.

E. The Pension Clause: A Provision Soon to Have a Home

Initially, it was unclear where a provision safeguarding pension benefits would belong in the new constitution. Indeed, concerns over pensions drew the attention of both the Bill of Rights and Local Government Committees. On June 23, 1970, Helen Kinney, the second principal sponsor of the Pension Clause, made a parliamentary inquiry about the process of offering a proposal to protect public pension benefits and was informed to file her proposal as a resolution with the Convention's Rules Committee for review.¹¹⁶ On July 1, 1970, Delegate Kinney filed a resolution seeking a parliamentary ruling from the Convention's Rules Committee on the matter.¹¹⁷ The resolution also set forth the text of what essentially became the Pension Clause.¹¹⁸

conversation among delegates and staff").

116. *Transcripts: May 22, 1970–Jul. 9, 1970*, 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1939–40 (1972) [hereinafter 3 PROCEEDINGS] (Del. Kinney), *available at* <http://www.idaillinois.org/cdm/ref/collection/isl2/id/3982>.

117. *See id.* at 2188 (Del. Kinney) (explaining that she wished to "offer a provision covering pension rights for state or local employees", but she really didn't "know where this would be germane—whether it would be local government, general government, bill of rights, or some other one completely."); *Daily Journals: Dec. 8, 1969–Sept. 3, 1970*, 1 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 393 (1972) [hereinafter 1 PROCEEDINGS] (Del. Kinney), *available at* <http://www.idaillinois.org/cdm/ref/collection/isl2/id/1703> (text of Resolution No. 63 filed by Del. Kinney setting for her pension proposal and requesting a ruling on when the matter could be presented to the Convention). *See also* 3 Proceedings, *supra* note 116, at 1940 (providing the colloquy of Dels. Kinney and Davis, where Del. Kinney inquires as to the proper mode of offering a proposal to public pensions).

118. *Compare* 1 PROCEEDINGS, *supra* note 117, at 393 (Resolution No. 63) ("Membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be a contractual relationship, the benefits of which shall not be diminished or impaired, *but* benefits may be increased for pensioners of any such system or for their dependents or beneficiaries.") (emphasis added), *with* ILL. CONST. of 1970, art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which

On July 9, 1970, the Rules Committee unanimously voted to allow Kinney's proposal to advance as a proposed amendment to the Legislative Committee's proposed Legislative Article to the constitution.¹¹⁹ Delegate David Davis, Vice-Chair of the Rules Committee, explained to the Convention that the pension proposal "relates to the power the legislature—a limitation, as a matter of fact—on the power of the legislature to alter the provisions of public pension and retirement plans."¹²⁰ The Convention approved the Rules Committee's decision and allowed the pension proposal to proceed.¹²¹

After the parliamentary ruling, Delegates Green and Kinney jointly sponsored and filed the pension proposal as an amendment to the proposed Legislative Article.¹²² Delegate Green, a community college official from Urbana,¹²³ sought the amendment because of concerns raised by university employees.¹²⁴ Delegate Kinney, a former DuPage County state's attorney,¹²⁵ was prompted by concerns of police and firemen who believed municipalities would use their new home rule powers to spend retirement system moneys to repair streets and abandon the pension system.¹²⁶

The amendment's text was nearly identical to what Delegate Kinney had set forth in her parliamentary inquiry.¹²⁷ The only

shall not be diminished or impaired."). The Convention's Style and Drafting Committee made stylistic changes to the text, which the Convention later adopted.

119. 4 PROCEEDINGS, *supra* note 53, at 2505–06. (statement of Del. Davis of the Convention Rules Comm.).

120. *Id.*

121. *Id.*

122. 1 PROCEEDINGS, *supra* note 117, at 470. The pension proposal was formally designated as an amendment and referred to as "Proposed Addition No. 1 to Legislative Proposal," which was the legislative article to the constitution proposed by the Legislative Committee. *Id.* Dels. Green and Kinney along with Dels. Anthony M. Peccarelli and Donald D. Zeglis were listed on the printed amendment filed with the Convention. Amendments Pertaining to Committee Proposals, in ILL. CONST. CONV. PAPERS, *supra* note 89, at Box 46, Folder 42; 1 PROCEEDINGS, *supra* note 117, at 470. Later, Dels. Philip J. Carey, Betty Howard, Henry C. Hendren, David Kenney, Dwight P. Friedrich, Stanley L. Klaus, Thomas R. Lyons, Richard M. Daley, Madison L. Brown, Louis F. Bottino, William F. Fennoy, Elmer Gertz, Harold M. Nudelman, and J.L. Buford added their names via signature as additional co-sponsors. Amendments Pertaining to Committee Proposals, in ILL. CONST. CONV. PAPERS, *supra* note 89, at Box 46, Folder 42; 1 PROCEEDINGS, *supra* note 117, at 470.

123. 1 PROCEEDINGS, *supra* note 117, at 899 (convention biography of Del. Green).

124. 4 PROCEEDINGS, *supra* note 53, at 2925 (statement of Del. Green).

125. 1 PROCEEDINGS, *supra* note 117, at 892 (convention biography of Del. Kinney).

126. 4 PROCEEDINGS, *supra* note 53, at 2926 (statement of Del. Kinney).

127. Compare 1 PROCEEDINGS, *supra* note 117, at 393 (Resolution No. 63)

difference was that the amendment no longer expressly stated that the government could increase pension benefits of pensioners or their dependents or beneficiaries after they began receiving benefits.¹²⁸ The amendment stated, “[m]embership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be an enforceable, contractual relationship, the benefits of which shall not be diminished or impaired.”¹²⁹ Delegates Green and Kinney jointly presented the amendment to the Convention for consideration on July 21, 1970.¹³⁰

F. A Capsule of the Convention’s Floor Debate of the Pension Clause

1. Delegate Green’s Opening Remarks on Why the Pension Provision Was Necessary

Delegate Henry Green made the initial presentation of the pension proposal to Convention delegates, and used verbatim portions of the SURS legal memorandum he had earlier received as his floor speech.¹³¹ Green explained that the pension proposal would “do two things.”¹³² First, it “mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly to not impair or diminish these rights.”¹³³

As to the first objective, Green stated that Illinois courts treated pension benefits in mandatory participation plans as “bounties which could be changed or even revoked as a matter of complete legislative discretion.”¹³⁴ Green detailed how this legal reality, coupled with the fact that the pension system was underfunded,¹³⁵ caused public employees “to lose faith in the

(“Membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be a contractual relationship, the benefits of which shall not be diminished or impaired, *but* benefits may be increased for pensioners of any such system or for their dependents or beneficiaries.”) (emphasis added), *with id.* at 470–71 (“Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”)

128. *Id.* at 393, 470–71.

129. 4 PROCEEDINGS, *supra* note 53, at 2925; 1 PROCEEDINGS, *supra* note 117, at 470.

130. 4 PROCEEDINGS, *supra* note 53, at 2925–33.

131. *See* 1969 PENSION LAWS REPORT, *supra* note 97, at 42.

132. 4 PROCEEDINGS, *supra* note 53, at 2925.

133. *Id.*

134. *Id.*

135. *Id.* For this proposition, Del. Green specifically relied upon and quoted

ability of State and local governments to make benefits payments.”¹³⁶

Green noted how the General Assembly had passed legislation in 1967 providing state universities with appropriations that would at least cover the amount necessary to fully fund current service costs and interest owed on past service liabilities, but the legislature failed to make the requisite appropriations in 1968 and 1969.¹³⁷ For these reasons, Green requested “that the Convention adopt the provision which will guarantee these [(i.e., employee pension)] rights and direct the General Assembly to take the necessary steps to fund the pension obligations.”¹³⁸

The pension proposal, Green noted, was based on the text of a 1938 amendment to the New York Constitution.¹³⁹ He explained that the 1938 amendment came about “under a similar circumstance” because the New York legislature was under “great pressure” to “cut out some of the money that they were giving to pension programs in New York.”¹⁴⁰ The amendment, he further explained, was adopted to prevent such legislative action, and it was for that reason that he and other delegates were “suggesting” that the Convention adopt New York’s constitutional language.¹⁴¹

While Delegate Green was under the misimpression that the New York constitutional language expressly “mandated that state to fully fund” its public pension funds “in two years”,¹⁴² he clarified that the pension proposal was not offered to compel such a result in Illinois.¹⁴³ Rather, the proposal was intended to “put the

from the SURS legal memorandum he had received in early July 1970. 1969 PENSION LAWS REPORT, *supra* note 102; Henry Green, Speech at the Illinois Constitutional Convention: Const. Provision Concerning Vesting of Pension Rights for Public Emps., in GREEN PAPERS, *supra* note 91.

136. 4 PROCEEDINGS, *supra* note 53, at 2925.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*; Comment, *supra* note 34, at 450. The two-year requirement in the New York Constitution’s Pension Clause Del. Green referenced did not require the full funding of public pensions but delayed the Clause’s effective date to July 1, 1940

to enable the State and its civil divisions to review their pension systems and to adjust, amend, or supplement the provisions of existing systems in light of the fact that after such effective date such systems were no longer gratuities, but by virtue of the new amendment became contracts and the members of pension systems thereby acquired vested interests which could not thereafter be diminished or impaired.

Day v. Mruk, 121 N.E.2d 362, 363 (N.Y. 1954).

143. *Transcripts: Aug. 6, 1970—Sept. 3, 1970*, 5 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2925 (1972) [hereinafter 5 PROCEEDINGS], *available at*

General Assembly on notice that these memberships are enforceable contracts and that they shall not be diminished or impaired.”¹⁴⁴ Put differently, a public employee (whether retired or currently employed) acquired vested pension benefits at the time he or she was hired and entered the retirement system, and the legislature could not later decide to reduce or eliminate those benefits via legislative action.

*2. Delegate Kinney’s Opening Remarks Define the Terms
“Enforceable,” and “Impair,” as Used in the Pension
Proposal, and Set Forth the Purpose of the Proposal*

Delegate Kinney concurred with Delegate Green’s explanation. As she put it, the proposal provided “a means of giving them [(i.e., police and firemen)] assurance that these benefits will not at some future date be eliminated on the part of municipalities who do contribute to these funds.”¹⁴⁵ As noted earlier, Delegate Kinney supported the proposal because police and firemen were concerned that municipalities would use their new “home rule” powers to “abandon the pension system.”¹⁴⁶

She also provided specific meanings for the terms “enforceable” and “impaired” as used in the proposal. Delegate Kinney stated that the word “enforceable” was “meant to provide that the rights established shall be subject to judicial proceedings and can be enforced through court action.”¹⁴⁷ The word “impaired,” she stated, was “meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved.”¹⁴⁸ She further observed that “it was definitely the intent that an increase in benefits would not be precluded” under the proposal, including an automatic cost of living increase.¹⁴⁹ She also listed the other delegates supporting the pension proposal.

*3. Other Convention Delegates Speak in Favor of and
Against the Proposal*

After these opening remarks, several delegates offered their views on the proposal’s scope. Delegate James Kemp spoke in support because “the government employee is not notoriously

<http://www.idaillinois.org/cdm/ref/collection/isl2/id/6263>.

144. *Id.*

145. 4 PROCEEDINGS, *supra* note 53, at 2926.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

overpaid,” and because of concerns expressed by firemen.¹⁵⁰ He understood the proposal as making “certain that irrespective of the financial condition of a municipality or even the state government that those persons who have worked for often substandard wages over a long period of time could at least expect to live in some kind of dignity during their golden years.”¹⁵¹

Several delegates, however, voiced opposition and claimed that the proposal mandated the immediate and full funding of the various pension systems.¹⁵² One opponent, John Parkhurst further claimed that the provision’s use of the word “diminished” meant that the dollar value of pension benefits had to be immunized from inflation.¹⁵³ In addition, he disputed the necessity of the proposal by noting “[t]here is no history in the state of Illinois of impairing or diminishing or welching on any pension when they came due.”¹⁵⁴ If we get to the point, he added, “where we can’t pay, we’re down the drain anyway.”¹⁵⁵

Delegate Paul Elward, also an opponent, assumed that the provision would prohibit the reorganization or consolidation of pension systems.¹⁵⁶ He also believed the proposal would bar the legislature from cutting benefits “for a surviving widow of a policeman in order to increase the benefits of minor children[.]”¹⁵⁷ Delegate Ted Borek took a different approach in his opposition, and characterized the proposal as “special legislation” protecting

150. *Id.*

151. *Id.*

152. *See id.* at 2927 (Del. Parkhurst) (stating he read the amendment to “mandate the General Assembly to put in 100 percent of the money to pay anybody’s pension on anybody’s actuarial projection right now, because it says, ‘the benefits of which shall not be diminished or impaired.’”); *id.* (Del. Elward) (stating that the proposal will bust the budget “because either it means a mandatory funding up to some percentage figure way beyond what the average is now, or it doesn’t. If it doesn’t mean it, it doesn’t do anything”).

153. *Id.* (Del. Parkhurst).

Suppose this goes into the constitution. Suppose we have more inflation. Suppose we devalue the dollar in five years or ten years. Haven’t we then diminished the pension funding and the pension rights of a pensioner, based on today’s dollars? Of course we have. So this is an admonition to the courts not to let them be diminished in terms of the general level of the economy or the value of the dollar, now or in the future. I submit that this is a kind of left-handed way to increase their pension benefits and not let them ride with the value of the dollar in years to come.

Id.

154. *Id.*

155. *Id.*

156. *Id.* (Del. Elward) (“This would, it seems to me, prohibit consolidation which hopefully, under economic pressures in times to come, the legislature can get some of these associations together.”).

157. *Id.* at 2927–28.

the one in seven employees who were public employees.¹⁵⁸

Reacting to the opposing delegates' comments, Delegate Thomas Lyons, a co-sponsor of the proposal, asked the principal sponsors to clarify whether the amendment's purpose "was to give protection to those people who felt that they needed protection for their pension rights in the event that sweeping home rule powers were given to local governments."¹⁵⁹

4. *Delegate Kinney Reassures Proponents and Refutes the Claims Made by the Proposal's Opponents*

In response to Delegate Lyons' inquiry, Delegate Kinney explained that this was what the proposal "was designed to do,"¹⁶⁰ and then offered the following illustration as to what pension proposal was intended to accomplish:

Benefits not being diminished really refers to this situation: If a police officer accepted employment under a provision where he was entitled to retire at two-thirds of his salary after twenty years of service, that could not be subsequently changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing. That is the thrust of the word "diminished."¹⁶¹

She continued that the proposal was not intended to require the pensions systems to be fully funded or funded up to a certain percentage.¹⁶² Rather, the funding issue only became relevant and intertwined with the pension provision "where a court might judicially determine that imminent bankruptcy would really be an impairment" because pension payments could not be made.¹⁶³

Delegate Kinney also refuted the claim that the proposal would prevent system-wide consolidation or reorganization.¹⁶⁴ She reiterated that the proposal would not preclude future increases in benefits to pensioners or the dependents.¹⁶⁵ As she put it, the provision would simply give public employees "a basic protection

158. *Id.* at 2928. Del. Borek also stated the words "diminished" or "impaired" indicated to him that "the treasury of the state of Illinois would guarantee 374 pension funds; should they go broke, they will reimburse them to the extent that they can operate." *Id.*

159. *Id.* at 2928–29.

160. *Id.* at 2929.

161. *Id.*

162. *Id.* ("It is not intended to require 100 percent funding or 50 percent or 30 percent funding or get into any of those problems.").

163. *Id.*

164. *Id.*

165. *Id.*

against abolishing their [pension] rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them.”¹⁶⁶

5. *Co-sponsors Endorse the Views Expressed by Delegates Green and Kinney*

Delegate Lyons, in turn, affirmed his support for the proposal based on Kinney’s clarification.¹⁶⁷ Delegate Anthony Peccarelli, another co-sponsor, stated he agreed with “all the things said” by Delegates Green, Kinney, and Kemp and urged delegates “to take what they have said and consider it and emphasize what *they* have said and ask that you vote for the amendment.”¹⁶⁸

6. *Delegate Wayne Whalen’s Comments in Opposition*

Delegate Wayne Whalen, rising in opposition, agreed with Kinney’s view that the “whole question of funding” the pension system at a certain percentage was “irrelevant to the issue of whether we should adopt the provision.”¹⁶⁹ He disagreed, though, that the provision would achieve the proponents’ objective. He opined that the pension proposal merely characterized “pension benefits as being contractual rights” and “lock[ed] in the contractual line of cases into the constitution.”¹⁷⁰ As such, he asserted that the amendment simply converted the pension benefits of public employees participating in mandatory plans from “gratuities” to “contractual rights,” and thereby made them subject to no greater protection than any contract under the Contracts Clause.¹⁷¹

166. *Id.*

167. *Id.* (statement of Del. Lyons). Delegate Lyons stated:

We now have heard from the proponents who have represented that that is the limit of the scope of this amendment. It does not refer to upfunding, nor does it seek to establish some sort of an administrative elite to administer these various funds. All that it seeks to do, as I read the thing, is simply to grant protection to people who feel that the protection they now feel they have might in some sense be impaired in the event that local governments move into these fields which heretofore were the preserve of the state.

Id.

168. *Id.* (emphasis added).

169. *Id.*

170. *Id.*

171. *Id.* at 2929–30. Del. Whalen suggested that rather than characterize “pension benefits as being contractual rights,” it made more sense to characterize these rights “as being proprietary rights of the person receiving the benefit.” *Id.* at 2929. He believed that pension recipients would “stand a better chance of receiving full payment” of their pension benefits, especially in

Delegate Whalen added that as a contractual right it “may be subject to any contingency built into the contract.”¹⁷² For these reasons, he stated it would be more appropriate to expressly protect pensions under the Contracts Clause of the Illinois Constitution.¹⁷³ Thereafter, several other delegates *opposing* the proposal adopted Whalen’s view that public pensions should be protected by amending the proposed bill of rights’ Contracts Clause.¹⁷⁴

7. Delegate Green’s Closing Remarks

The floor debate then concluded with closing comments from the pension proposal’s principal sponsors, Green and Kinney. In closing, Green stated the main reason for “mandated contractual status” for pension benefits was to foreclose the circumstance allowed by the New Jersey Supreme Court in its *Spina* decision.¹⁷⁵ In that case, the court upheld a statutory reduction in pension benefits because chronic underfunding left insufficient money in the pension funds to pay benefits to both current and future retirees.¹⁷⁶ Green then refuted Delegate Parkhurst’s claim that the pension provision required inflationary protection for benefits.¹⁷⁷

the bankruptcy context, if these benefits were deemed “proprietary,” rather than “contractual rights.” *Id.* Del. Whalen’s claim while interesting is unpersuasive. As one scholar has explained, while “property rights cannot be diminished or impaired without due process of law,” “all that substantive due process requires is that the state’s action not be arbitrary or irrational.” Amy Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC., FIN. & POL’Y, at 30–31 (March 17, 2010) (Minn. Legal Stud. Res., Paper No. 10-13), available at <http://ssrn.com/abstract=1573864>. This standard would, accordingly, allow a state to make “significant changes to public pension plans, provided there is a rational basis for the amendment.” *Id.* at 31 (citing *Flemming v. Nestor*, 363 U.S. 603, 610–11 (1960), where the U.S. Supreme Court held that Congress could make unilateral changes to Social Security benefits so long as the statutory changes did not manifest “a patently arbitrary classification, utterly lacking in rational justification”). In short, “while characterizing the right to pension benefits as a property right may prevent the state from taking a retiree’s benefits without just compensation, changes to the benefits of current participants can be relatively freely made.” *Id.*

172. 4 PROCEEDINGS, *supra* note 53, at 2930.

173. *Id.*

174. See *id.* at 2930–31 (noting statements of Dels. Weisburg, Davis, Borek and Bottino).

175. *Id.* at 2931.

176. *Spina*, 197 A.2d 169, 171, 175–76 (N.J. 1964).

177. 4 PROCEEDINGS, *supra* note 53, at 2931.

In answer to Delegate Parkhurst’s question with regard to the diminishing aspect of it—the cost of living—any of you who know when you buy an insurance policy you’re going to get back what the contract says. Now if the dollar isn’t worth but 27 cents when you get it back,

Green then provided, as Kinney had earlier, his own illustration of what the pension proposal was intended to cover:

What we are trying to merely say is that if you mandate the public employees in the state of Illinois to put in their 5 percent or 8 percent or whatever it may be monthly, and you say when you employ these people, 'Now if you do this, when you reach sixty-five, you will receive \$287 a month,' that is in fact, is what you will get.¹⁷⁸

Green concluded his comments with a plea to the legislature to properly fund the pension system as had been the case in New York since that state adopted its identical constitutional provision in 1938.¹⁷⁹

8. *Delegate Kinney's Closing Remarks*

Kinney similarly reiterated in her final remarks that "the thrust of" the pension proposal, as with the New York constitutional provision it was based on, was "that people who do accept employment will not find at a future time that they are not entitled to the benefits they thought they were when they accepted the employment."¹⁸⁰ She further explained that after conferring with staff counsel, both she and Green agreed "it would be quite fair if a person undertook employment under a statute that provided for a contingency for lowering the benefits at some future

there is absolutely no reason why you have any recourse against that insurance company.

Id.

178. *Id.*

179. *Id.* (Del. Green) Quoting an Illinois Pension Code provision requiring the legislature to make certain appropriations to the pension systems, he stated:

Now, I think [the legislature] either ought to live up to the laws that they pass or that very quickly we ought to stop when we are hiring public employees by telling them that they have any retirement rights in the state of Illinois. If we are going to tell a policeman or a school teacher that, "Yes, if you will work for us for your thirty years or until whenever you reach retirement age, that you will receive this," if the state of Illinois and its municipalities are going to play insurance company and live up to these contribution then they ought to live by their own rules. And this is all in the world this mandate is doing. In closing, I would further say it was done in 1938 by these exact words in the state of New York.

Id.

180. *Id.*

time, that this was, indeed, the contract he had accepted.”¹⁸¹ Kinney reminded delegates, however, the proposal was intended “to guarantee that people will have the rights that were in force at the time they entered the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should be no less than \$100 a month in 1990.”¹⁸²

The Convention then proceeded to take a roll call vote approving the pension proposal.¹⁸³ Thereafter, the proposal was referred to a procedural committee for editing and inclusion into the working draft of the proposed constitution.¹⁸⁴

G. Key Conclusions Derived From the Pension Clause’s Convention Debates

In sum, the following conclusions can be drawn from the Pension Clause’s Convention debates:

- The Pension Clause was prompted by concerns raised by state university employees over the underfunding of the university pension system and the lack of constitutional protection for mandatory retirement plans, and by firemen and police officers that municipalities would use their new “home rule” authority to abandon their local pension plans.
- A public employee’s participation in a public pension system creates an enforceable contractual relationship in the employment context. The drafters intended to provide constitutional protection to the pension benefit rights in place when an employee started employment and became a member of a pension system.
- The Pension Clause serves as a bar against any unilateral legislative or governmental action to reduce or eliminate the pension benefit rights in place when an employee became a member of a pension system.
- The principal sponsors each offered examples of how the provision prohibited the legislature from altering the terms of an employee’s pension benefit rights after he or she entered service.
 - Delegate Green illustrated this point by stating that

181. *Id.* (Del. Kinney).

182. *Id.*

183. *Id.* at 2932–33.

184. *Id.*

if a retirement plan requires a starting employee to pay 5% of his or her salary each month and work until age 65 to receive a pension of \$247 per month, then “that is in fact, is what [he] will get.”

- Delegate Green, also stated the provision was prompted by and intended to prohibit the result allowed by the New Jersey Supreme Court in its *Spina* decision where the court upheld a statutory reduction in pension benefits because chronic underfunding left insufficient funds to pay benefits to both current and future retirees.
 - Delegate Kinney similarly remarked that the proposal was intended “to guarantee that people will have the rights that were in force at the time they entered the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should be no less than \$100 a month in 1990.”
- Accordingly, the General Assembly could not under the Clause later require an employee to contribute a greater percentage of his salary to receive the same benefit, require him to work more years to receive the same benefit or unilaterally reduce the amount of an participant’s pension or benefit rights.
- The provision is intended to be enforceable in circuit court, including the ability to obtain judicial enforcement of pension benefit rights and benefit payments, even if a pension fund is broke or on the “verge of default or imminent bankruptcy.”
- The Pension Clause was modeled after and is virtually identical to the New York Constitution’s provision, which protects pension benefits, according to New York court decisions, by “prohibiting any action which would impair or diminish the member’s right to payment of pensions, annuities, and related monetary advantages.”¹⁸⁵
- Pension benefit increases are permissible under the Pension Clause, including automatic cost of living adjustments.

The drafters stated that it would be “fair” for the legislature to condition a person’s initial entry into a pension system upon a contingency that would allow the lowering of the person’s pension

185. *Brown*, 269 N.Y.S.2d at 650, *aff’d*, 279 N.Y.S.2d 532 (1967).

benefits under certain circumstances or at a future time.

The drafters also made clear during the Convention debates that the Pension Clause was not intended to: (1) require the full funding of any pension system or require funding up to any given percentage; or (2) limit the General Assembly's authority to consolidate or reorganize the pension system.

While the Convention debates undoubtedly provide fertile material for determining the intent and purpose of the Pension Clause, additional evidence exists regarding the scope of the Clause. The next two sections of this Article recount the failed efforts to modify the Pension Clause before the Convention adjourned and how the voters who approved the constitution understood the Clause. Each of these sections reinforces the view that the framers intended for the Pension Clause to prohibit the legislature from unilaterally and adversely changing the terms of a pension plan after an employee entered the pension system, and that the voters who ratified the 1970 Constitution had the same understanding.

H. The Pension Laws Commission's Failed Efforts to Change the Pension Clause Before the Convention Adjourned

After the Convention approved the pension proposal on July 21, 1970, efforts were made in August 1970 to delete or at least significantly amend the proposal before the Convention adjourned and the proposed constitution was submitted to voters for ratification. Indeed, the Convention delegates had several opportunities to amend the proposal before its final adoption in late August 1970 and submission to Illinois voters for approval at a special election held in December 1970.¹⁸⁶ As detailed below,

186. After the Convention initially approved Dels. Green and Kinney's amendment on July 21, 1970, the proposal went to the Convention's Committee on Style and Drafting for editing. On August 12, 1970, the Style and Drafting Committee submitted its report concerning the Legislative Article, which included the pension provision as Section 16, to the Convention for approval. 1 PROCEEDINGS, *supra* note 117, at 608; 5 PROCEEDINGS, *supra* note 143, at 4022–23. The Convention then entertained amendments to the Committee's report on August 13, 1970 and no amendments were offered to the pension provision. 5 PROCEEDINGS, *supra* note 143, at 4106–07. The Committee later filed a revised report and filed it with the Convention on August 27, 1970, which made some minor non-substantive, stylistic changes to the pension proposal and which were approved by the Convention. 1 PROCEEDINGS, *supra* note 117, at 643, 670; *Part II: Committee & Member Proposals: Dec. 8, 1969—Sept. 3, 1970*, 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2429, 2584 (1972) [hereinafter 7 PROCEEDINGS], available at <http://www.idaillinois.org/cdm/ref/collection/isl2/id/10512>; 5 PROCEEDINGS, *supra* note 143, at 4257 (statements of Del.

these attempts to amend the pension proposal were rejected.

1. *The Pension Laws Commission's First Failed Attempt to Modify the Clause Via Amendment.*

Two weeks after the Convention initially approved the Pension Clause, E.B. Groen, the Chairman of the Pension Laws Commission and an Illinois State Senator, sent Delegate Henry Green a letter in early August 1970.¹⁸⁷ The General Assembly created the Commission in 1945 to monitor the status of the pension system and offer recommendations to the legislature and public on ways to improve and fund the pension system as well as the potential impact of proposed pension legislation.¹⁸⁸

The letter detailed the Commission's opposition to the pension proposal and the Commission's hope that the proposal would be withdrawn.¹⁸⁹ Groen further stated to Delegate Green that the Commission believed the proposal was unnecessary and not in the best interests of pension participants.¹⁹⁰ He also opined that the proposal's "rigid" and "inflexible" language "would only serve to curtail" legislative authority to make "reasonable modifications" to benefits if doing so was necessary to preserve the integrity of the pension system.¹⁹¹

Based on these concerns, Groen asked Delegate Green to revise the pension proposal by adding the underlined language to "lend some flexibility":

Subject to the authority of the General Assembly to enact

Whalen). The Convention gave final approval to the pension proposal on August 31, 1970. 1 PROCEEDINGS, *supra* note 117, at 740; 5 PROCEEDINGS, *supra* note 143, at 4515–16. The Convention adjourned on September 3, 1970. 5 PROCEEDINGS, *supra* note 143, at 4678.

187. Letter from E.B. Groen, Illinois State Senator, Chairman, Ill. Pub. Emps. Pension Laws Comm'n, to Henry Green (August 7, 1970) [hereinafter Groen Letter], in GREEN PAPERS, *supra* note 91. See Article Appendix B (for the full text of the letter). *Accord* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION 65–66 (1971) [hereinafter 1971 PENSION LAWS REPORT] ("Although no formal decision was then made by the Commission, it was clear to all concerned that the members of the Commission were strongly opposed to the inclusion of [the pension] provision in the new Constitution. While time still remained for the Convention to undo or modify its initial approval of this provision, the delegate who had secured its adoption was contacted and given a statement of reasons why the Pension Laws Commission was concerned with the proposal. * * * The Commission would have preferred Convention reversal and total rejection of the proposed [pension provision.]"). See Article Appendix D. (for the full text of the report).

188. 108½ ILL. REV. STAT. § 22/801-802 (1969).

189. Groen Letter, *supra* note 187, at 1; 1971 PENSION LAWS REPORT, *supra* note 187.

190. Groen Letter, *supra* note 187 at 1–2.

191. *Id.*

reasonable modifications in employee rates of contribution, minimum service requirements and other provisions pertaining to the fiscal soundness of the retirement systems, membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.¹⁹²

Chairman Groen claimed the underlined text would “not completely foreclose the authority of the General Assembly to make desirable changes in some of the basic provisions and would still preserve the pension and benefit expectancies of the members of these systems.”¹⁹³ Delegate Green promptly denied Groen’s request saying that no delegates would support the Commission’s amendment and that he would not offer it for Convention consideration.¹⁹⁴

2. *The Pension Laws Commission’s Second Failed Attempt to Change the Clause Via a Convention Floor Statement of Intent*

A week before the Convention adjourned in September 1970 a second attempt was made to allow the legislature to unilaterally change pension benefit rights. Rubin Cohn, legal advisor to the Convention’s Judiciary Committee and member of the Pension Laws Commission, sent Delegate Green a follow-up letter asking him to read an enclosed statement into the Convention record that sought to achieve the same objective as the Commission’s amendment through floor debate.¹⁹⁵

The statement provided, in pertinent part, that while the proposed Pension Clause “is taken from the Constitution of New York,” “it should not be interpreted as embodying a Convention intent that it withdraws from the legislature the authority to make reasonable adjustments or modifications in respect to employee and employer rates of contribution, qualifying service and benefit conditions, and other changes designed to assure the financial stability of pension and retirement funds.”¹⁹⁶ This second

192. *Id.* at 2.

193. *Id.*

194. 1971 PENSION LAWS REPORT, *supra* note 187, at 66. *Accord Kraus*, 390 N.E.2d at 1294 (citing Comment, *supra* note 34, at 451).

195. Letter from Rubin G. Cohn, Pension Laws Commission member, Staff Counsel, Judiciary Comm., Ill. Const. Convention (Aug. 27, 1970), in GREEN PAPERS, *supra* note 91. See Article Appendix C (for the full text of the letter).

196. Rubin G. Cohn, Enclosed Statement Re Provision Conferring Contractual Status on Pension Rights, at 1 (Aug. 27, 1970), in GREEN PAPERS, *supra* note 91. See Article Appendix C (for the full text of the statement).

request also failed, and the statement was never read into the Convention record.¹⁹⁷

The Commission later reported of its failed attempts to modify the Pension Clause in its May 1971 report to the General Assembly and explained how the Pension Clause presented an absolute bar the General Assembly's ability to unilaterally reduce pension benefits.¹⁹⁸ The Commission stated that because of the Clause "[i]t may be necessary for the General Assembly to resort to a policy of limiting liberalizing changes in the pension laws to periods of short duration, say 1 or 2 years, with a reexamination of renewal thereof at the end of this prescribed period."¹⁹⁹ The contemporaneous nature of the Commission's overtures and their rejection by Convention delegates demonstrate that the drafters (1) were cognizant of the Clause's broad limitation on legislative power and (2) intended to immunize pension benefit rights (e.g., employee benefits payments, conditions or contribution rates) from any adverse, unilateral action by General Assembly.

I. The Voters' Understanding of the Pension Clause

The final piece of Convention history that bears upon the intended scope of the Pension Clause is the voters' understanding of the provision. Since the object of construing a constitutional provision involves the understanding of the voters who adopted the provision, Illinois courts look to the official explanation and press accounts because these sources are "part of the total body of information by which voters were informed as to the meaning of the various sections of the constitution."²⁰⁰ These sources indicate that voters were informed that the provision protected pension benefit rights from reductions and granted public employees a constitutional right to their "*full* pension benefits."

Ultimately, the Convention approved Delegates Green and Kinney's pension proposal with some minor, non-substantive

197. 1971 PENSION LAWS REPORT, *supra* note 187, at 66. *Accord Kraus*, 390 N.E.2d at 1294 (citing Comment, *supra* note 34, at 451).

198. 1971 PENSION LAWS REPORT, *supra* note 187, at 68. The report states:

The constitutional provision introduces an unfortunate complicating obstacle in the formulation of pension principles by the Commission and the General Assembly. Until now it has been possible rationally and realistically to experiment with new and untested aspects of pension policy. That freedom will now be substantially limited since errors in judgment, as borne out by experience, may become impossible to rectify if the result would impair or diminish benefits within the meaning of the constitutional provisions.

Id.

199. *Id.* at 69

200. *Hynes*, 390 N.E.2d at 854.

changes to conform its text to other provisions of the proposed Constitution.²⁰¹ The proposal, as finally approved and submitted to voters, would appear in Article XIII, and read as follows:

Section 5. Pension and Retirement Rights

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.²⁰²

The Convention stated in its official text and explanation of the proposed Constitution that under the Pension Clause “provisions of state and local governmental pension and retirement systems shall not have their benefits reduced.”²⁰³ And, “membership in such systems shall be a valid contractual relationship.”²⁰⁴ The Convention’s official explanation also stated that the Clause was a new section “and self-explanatory.”²⁰⁵ The Convention’s official text and explanation was mailed to each registered voter in Illinois and published in newspapers throughout the State prior to the special referendum election held in December 1970 to approve the proposed Constitution.²⁰⁶

Similarly, the *Illinois State Register* reported that the Pension Clause was a “sweetener” that gave public employees on State, county, and municipal payrolls “a constitutional right to their *full* pension benefits.”²⁰⁷ Other Illinois newspapers simply repeated the

201. 5 PROCEEDINGS, *supra* note 143, at 4257 (statements of Del. Whalen). The pension provision was amended to read as follows with changes appearing in legislative style:

Membership in any pension or retirement systems of the State, ~~or~~ any unit of local government, or school district, or any agency or instrumentality ~~of either~~ thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

7 PROCEEDINGS, *supra* note 186, at 2584.

202. *Id.* at 2747.

203. *Id.* at 2677. This explanation mirrored the description provided by the Conventions’ Public Information Committee in its August 21, 1970 Weekly Summary, which stated the proposed constitution included: “A section on pension and retirement rights would prohibit retirement benefits from any State retirement system from being diminished or impaired.” Weekly Summary (Aug. 21, 1970), in ILL. CONST. CONV. PAPERS, *supra* note 89, at Box 62, Folder 19.

204. 7 PROCEEDINGS, *supra* note 186, at 2677.

205. *Id.* at 2747.

206. *Id.* at 2667.

207. Charles Scolare, *Con-Con Near Windup*, ILLINOIS STATE REGISTER (Springfield), Aug. 27, 1970 (Evening Ed.), in ILLINOIS CONSTITUTIONAL CONVENTION, Box 54, Folder 1 (on file with Abraham Lincoln Presidential

text of the Clause²⁰⁸ or described it much the same way as the *Illinois State Register*.²⁰⁹ As a result, both the official explanation and newspaper descriptions of the Pension Clause show that voters were informed that the provision protected pension benefit rights from reductions and granted public employees a constitutional right to their “full pension benefits.”

Finally, it is worth recounting the correspondence between

Library).

208. Will Davis, *Condensation of Proposed Constitution*, QUINCY HERALD-WHIG, Aug. 26, 1970, in, ILLINOIS CONSTITUTIONAL CONVENTION, Box 54, Folder 1 (on file with Abraham Lincoln Presidential Library) (“PENSION AND RETIREMENT: Membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”).

209. See e.g., Charles Hity, *Pensions Safe*, BLOOMINGTON PANTAGRAPH, Dec. 3, 1970, in, ILLINOIS CONSTITUTIONAL CONVENTION, Box 53, Folder 7 (on file with Abraham Lincoln Presidential Library) (noting that

[p]ensions are dear to any person who has ever contributed to a retirement fund. Con-Con’s Local Government Committee had one of its hottest weeks after statewide circulation of a rumor that all municipal pension agreements could be cancelled under a new constitution. Most legal scholars didn’t consider the question a constitutional problem, but the delegates recognized a political problem when it hit them. Pension protection didn’t become part of the Local Government article, but it was added to the General Provisions article. Section 5 of that article says, in part, . . . ‘membership in any (public) pension or retirement system . . . shall be an enforceable contract . . . benefits shall not be (reduced) . . .’ The Local Government committee turned its attention back to other things, which are outlined in today’s article.);

Bill O’Connell, *Financial Disclosures*, PEORIA JOURNAL-STAR, Dec. 7, 1970 (Morning Ed.), in ILLINOIS CONSTITUTIONAL CONVENTION, Box 54, Folder 3 (on file with Abraham Lincoln Presidential Library) (“Other general provisions of the new document: . . . Provide that no pension or retirement benefits of public employes [sic] can be diminished or impaired.”); Charles N. Wheeler III, *Con Con Votes Down Effort For 3-Group Setup In Remap*, CHI. SUN-TIMES, July 22, 1970, in ILLINOIS CONSTITUTIONAL CONVENTION, Box 52, Folder 81 (on file with Abraham Lincoln Presidential Library) (“In other action, delegates voted 57 to 36 to include a section in the legislative article protecting pension and retirement rights of state and local government employes [sic].”); Ed Nash, *Dec. 15 Vote May Change Status Quo*, WAUKEGAN NEWS-SUN, Sept. 18, 1970, in ILLINOIS CONSTITUTIONAL CONVENTION, Box 54, Folder 2 (on file with Abraham Lincoln Presidential Library) (“Other provisions included in the proposed constitution: * * * ‘Public employees’ pension and retirement rights and benefits would not be diminished or impaired.”); Bill O’Connell, *Constitutional Convention Adjourning: It’s Up to Voters Now; The Old, New? Four Options or What?*, PEORIA JOURNAL-STAR, Sept. 3, 1970 (Morning Edition), in ILLINOIS CONSTITUTIONAL CONVENTION, Box 54, Folder 1 (on file with Abraham Lincoln Presidential Library) (“Other sections provide for regulation of corporations by the legislature and guarantee that public employees’ [sic] pension and retirement rights and benefits may not be diminished or impaired.”).

Delegate Peter Tomei and a constituent regarding the scope of the Pension Clause prior to the voters' ratification of the new constitution in December 1970. Delegate Tomei voted in favor of the Pension Clause at the Convention and served as the chairperson of the Convention's Suffrage and Constitution Amending Committee.²¹⁰ He also chaired the Chicago Bar Association's committee calling for the Convention and wrote a monthly column in the Illinois Bar Journal updating members on the Convention's activities.²¹¹

In June 1970, Delegate Tomei received a letter from Bernard Babler, a university employee, about how Delegate Elmer Gertz, the chairperson of the Convention's Bill of Rights Committee, had "refused to take action on a resolution" proposed by the University of Illinois faculty senates to include constitutional protection for public pension rights of current employees and retirees.²¹² In the letter, Mr. Babler included two attachments, the first was a copy of the pension rights proposal sent by university retirees to the delegates in March 1970, and the second was a copy of a resolution adopted by the University of Illinois faculty senate objecting to cuts in state contributions to the State Universities Retirement System (SURS).²¹³ The letter notes the General Assembly's continued failure to properly fund SURS and concluded that "[i]f pension rights of state employees were part of the constitution, these rights would be permanently vested and not subject to the changing legislature."²¹⁴

Delegate Tomei responded to Mr. Babler's letter on December 4, 1970, just before the special December 15, 1970 election to approve the new constitution.²¹⁵ Tomei responded: "I regret that I was unable to reply to the letter you wrote me during the Convention. I believe that the Convention adopted the substance of your recommendation regarding pension rights for public employees, in Section 5 of the General Article XIII. I urge you to support the new Constitution and vote on December 15."²¹⁶ The Tomei correspondence provides further evidence that the Clause was intended to immunize pension benefits from unilateral cuts by

210. 4 PROCEEDINGS, *supra* note 53, at 2933; 1 PROCEEDINGS, *supra* note 117, at xxii.

211. See Peter A. Tomei, *A Report on Con-Con*, 58 ILL. B.J. 437-38, 531-32, 618-19, 732-34, 828-30, 900-02 (1970); Peter A. Tomei, *A Report on Con-Con*, 59 ILL. B.J. 56-58, 137-38 (1970).

212. Letter from Bernard J. Babler, to Del. Peter A. Tomei (June 26, 1970), in TOMEI PAPERS, *supra* note 93, at Box 15, Folder 1.

213. *Id.*

214. *Id.*

215. Letter from Peter A. Tomei, to Bernard J. Babler (Dec. 4, 1970), in TOMEI PAPERS, *supra* note 93, at Box 15, Folder 1 (responding to Letter from Bernard J. Babler, *supra* note 212).

216. *Id.*

the General Assembly.

J. Concluding Observations Based on the Clause's Text and Historical Background

Up to this point, we have traced the status of public pension law prior to the 1970 Convention, the lobbying efforts of public employee groups to obtain constitutional protection for pension benefits rights at the Convention, the Clause's drafting history and debates, the failed efforts by the Pension Laws Commission to modify the Clause during the Convention, and how the Clause was described to voters who ratified the new Constitution in December 1970. Several observations can be made from this historical review.

First, prior to the Clause's adoption, nearly all public employees were members of mandatory pension plans that lacked constitutional protection as "contractual" rights and could be adversely changed by the legislature at any time. These mandatory plans were also underfunded and no better funded than the State's five pension systems today.

Second, public employees believed constitutional protection was necessary because the State had historically failed to make its required contributions, and because employees believed that the State would renege on its obligations should a fiscal crisis arise. Police and firemen were particularly concerned that municipalities would use their new "home rule" powers to abandon their local pension systems. Accordingly, employee groups advocated for a constitutional provision that would not only protect pension benefit rights, but also require the full funding of the pension system.

Third, the drafters of the Clause were aware of the concerns raised and requests made by public employee groups, the State's failure to properly fund the pension system, and the difference in legal protection afforded to persons participating in a mandatory and optional pension plan. These concerns, in turn, prompted the drafters to include the Clause in the new Constitution.

Fourth, the drafters intended for the Clause to (1) protect pension benefit rights in all pension plans as "enforceable contractual rights" as of when a public employee became a member of a pension system, and (2) bar the legislature from later unilaterally reducing these rights. In particular, the legislature could not require an employee to contribute a greater percentage of his or her salary to receive the same benefit, require him or her to work more years to receive the same benefit, or pay the employee a lower pension amount or unilaterally reduce his or her benefit rights.

Fifth, while the drafters did not intend for the Clause to

require the funding of the pension system at any particular funding percentage, they nonetheless intended to require that pension benefit payments be paid when those payments became due, even if a pension system were to default or be on the verge of default. Indeed, the drafters contemplated that a participant could enforce his or her right to benefit payments in court through a group action to compel payment.

Sixth, the drafters based the Clause on an identical provision in the New York Constitution, and included the Clause, in part, to foreclose the circumstance that occurred in New Jersey Supreme Court's decision in *Spina* where the court upheld a unilateral reduction in pension benefits to retain the pension system.

Seventh, the drafters were aware of the concerns raised by the Pension Laws Commission that the Clause's plain language barred the legislature from making unilateral adverse changes pension benefits. And, they rejected the Commission's efforts to alter the Clause and permit the General Assembly to unilaterally impose adverse changes to employee contribution rates, service conditions or other benefit terms.

Eighth, voters ratified the Clause based on the premise that the provision protected public pension benefit rights from reductions and that public employees were granted a constitutional right to their "full pension benefits."

Finally, a plain language reading of the Pension Clause's text makes clear that governmental entities may not unilaterally reduce or eliminate a public employee's pension payments and other membership entitlements once the employee becomes a pension system member. At the same time, the plain language also indicates that an employee's pension payments and other membership entitlements are "contractual" in nature that may be presumably altered through mutual assent via contract principles. Further, the Clause's prohibitory language against the diminishment or impairment of pension benefits is cast in absolute terms and lacks any exceptions. As the Convention's official text and explanation put it, the Clause is "self-explanatory."

With these observations in mind, we next consider how Illinois courts have interpreted the Pension Clause since it took effect on July 1, 1971.

II. ILLINOIS COURT DECISIONS INTERPRETING THE PENSION CLAUSE

The discussion that follows considers how Illinois courts have thus far construed the Pension Clause. As detailed below, two general conclusions may be drawn from these decisions. These conclusions mirror the framers' intent and voters' understanding regarding the Clause and reflect the historical background of the

provision.

First, public employees and retirees are constitutionally entitled under the Clause to have their pension benefit rights determined in accordance with the terms of the Illinois Pension Code in effect when they entered the pension system as well as any enhancements they may have received during employment. The Clause also protects all other benefits found in state statutes that are “limited to, conditioned on, and flow directly from membership in one of the State’s various public pension systems,” including subsidized health care.²¹⁷ These benefit rights are, in turn, deemed “vested rights,” which the legislature cannot unilaterally and adversely modify or repeal. These rights, however, are subject to change according to contract principles if employees receive new consideration and assent to the change.

Second, absent express language contained in the Pension Code that contractually commits the State to a particular funding formula, the Clause does not constitutionally require the State to fund the pension system at a specific funding percentage or make the State’s required contributions according to a specific schedule. With that said, the Illinois Supreme Court has stated that the Clause guarantees that pension payments must be made when the payments are due, and that pension participants would have a cause of action to receive payment should a pension system default or be on the verge of default.

As to the first proposition, there are five court cases that best reveal the evolution of the court’s interpretation of the Clause.²¹⁸ As to the second proposition, there are three relevant decisions.²¹⁹ Since these cases factor heavily into the positions of the legal commentators discussed later below, a detailed review of each case is necessary. We begin our discussion with the first proposition and the Illinois Supreme Court’s 1974 decision in *Peters v. City of Springfield*.

217. *Kanerva v. Weems*, 2014 IL 115811, ¶ 39.

218. *Id.*; *Buddell v. Bd. of Trs.*, 514 N.E.2d 184 (Ill. 1987); *Felt v. Bd. of Trs.*, 481 N.E.2d 698 (Ill. 1985); *Peters v. City of Springfield*, 311 N.E.2d 107 (Ill. 1974); *Kraus*, 390 N.E.2d 1281.

219. *Skłodowski I*, 695 N.E.2d 374; *McNamee*, 672 N.E.2d 1159; *People ex rel. Ill. Fed’n of Teachers v. Lindberg*, 326 N.E.2d 749 (Ill. 1975).

A. The Pension Clause, According to Illinois Courts, Protects Those Pension Benefit Rights Contained in the Illinois Pension Code and Other Entitlements Tied to Membership As of When a Public Employee Becomes a Member of the Pension System

1. *Peters v. City of Springfield*

a. Facts and Procedural History

In *Peters*, three Springfield firemen filed suit to enjoin the city from enforcing a municipal ordinance that reduced the mandatory retirement age from 63 to 60. When the firemen were hired the mandatory retirement age was 63 per state law. The Illinois Pension Code, though silent on the issue of mandatory retirement, separately allowed firemen to receive a pension of 50% of salary after 20 years of service and incremental increases for every year thereafter up to a maximum of 65% of salary. Each plaintiff was already older than 60 and had worked 20 years, but only one qualified for a pension at 65% of salary.

The plaintiffs argued that the city not only exceeded its home rule authority in reducing the retirement age from 63 (as provided by state law) to 60, but also impaired the firemen's ability maximize their pensions by continuing to work to age 63 in violation of the Pension Clause. The trial court agreed with the firemen on both points. On the Pension Clause issue, the trial court held that the firemen had the right to work until age 63 because that was the retirement age found in the Municipal Code when the firemen were hired, even though the Pension Code did not specify a mandatory retirement age. The issues before the Supreme Court were whether the City of Springfield exceeded its home rule powers and whether the city's action violated the Pension Clause.

b. The Supreme Court's Analysis and Holding in *Peters*

After concluding that the city acted within its home rule powers, the Supreme Court took up the trial court's holding on the Pension Clause issue.²²⁰ The court observed that the trial court found the retirement age of 63 to be part of the firemen's pension rights because it was applicable when the firemen entered the pension system.²²¹ The trial court drew no significance from the fact that the Pension Code lacked any retirement age provision.

220. *Peters*, 311 N.E.2d at 111–12.

221. *Id.* at 111.

The court next briefly outlined how the Pension Clause was adopted on the Convention floor without the benefit of committee hearings.²²² Also, the court read the debates as only indicating “a general intent to protect the pension benefits of public employees, but, other than concern that vested rights not be defeated by reason of the failure to provide necessary funding, [the debates] reflect uncertainty as to the scope of the restriction which the section imposed on legislative bodies.”²²³

The court then recounted the arguments of the City of Springfield and City of Chicago as *amicus curiae*, seeking reversal of the trial court.²²⁴ The City of Springfield, per the court, argued that no Pension Clause violation occurred because the Pension Code served as the source of protected pension rights, and the Code “does not provide that a fireman may work until age 63.”²²⁵ The City of Chicago, however, made a broader claim that “the right to work to a specified age is not a pension benefit” and the change in retirement age would only indirectly affect the firemen’s pension benefits.²²⁶

The court then observed that a person’s pension formula is based on salary and length of service and changes to those variables impacts the pension amount.²²⁷ The court further observed that public employment is “not static” in that various demands may cause positions to be eliminated or have their duties or employment conditions changed.²²⁸

The court stated it had not previously construed the scope of the Pension Clause’s phrase “enforceable contractual relationship,” but noted it was similar to a New York constitutional provision that had been interpreted by New York courts.²²⁹ The court, in turn, cited several New York decisions along with Rubin Cohn’s 1968 law review article,²³⁰ which this Article discussed earlier.²³¹

With these prefatory statements, the court concluded that the “constitutional debates and authorities” show that “the purpose and intent of the constitutional provision was to insure that pension rights of public employees which had been earned should not be ‘diminished’ or ‘impaired’ but it was not intended, and did not serve, to prevent the defendant city from reducing the maximum retirement age, even though the reduction might affect

222. *Id.* at 112.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See *supra* notes 30–33, 42 and accompanying text.

the pensions which plaintiffs would ultimately have received.”²³² Based on this reasoning, the court reversed the trial court.

2. *Kraus v. Board of Trustees of the Police Pension Fund of the Village of Niles*

a. *Kraus’s Factual Background and Procedural History*

Prior to *Kraus*, no Illinois courts had confronted a Pension Clause challenge to a Pension Code change that reduced the benefits a *current* public employee was entitled to under the Code provisions in effect when the employee entered the pension system, but was not yet eligible to receive those benefits.²³³ Five years after the Supreme Court’s decision in *Peters*, the Illinois Appellate Court considered this question in *Kraus*.

In *Kraus*, a police officer was hired and entered the pension

232. *Peters*, 311 N.E.2d at 112.

233. *See Kraus*, 390 N.E.2d at 1286–88 (discussing the inapplicability of cases prior to *Kraus*). Illinois courts came close to deciding the issue discussed in *Kraus* in *Peifer v. Bd. of Trs.*, 342 N.E.2d 131 (Ill. App. Ct. 1976). In *Peifer*, a police officer petitioned for declaratory judgment on whether he was entitled to a regular pension after having been on disability for several years. *Id.* at 132. The police officer sought a regular pension under the Pension Code provision in place when he joined the pension system, but was repealed by the legislature shortly *before* he applied for the regular pension. *Id.* The trial court dismissed the petition because the officer had not elected to receive the pension until after the legislature repealed the Code provision. *Id.* at 136. The Illinois Appellate Court reversed and held that the police officer was entitled to receive the regular pension per the original terms of the Pension Code, not the amended Code terms. *Id.* The court explained that applying the amended Code would drastically reduce the officer’s pension and “diminish the retirement benefits which the plaintiff became eligible for under” the original Pension Code provision. *Id.* at 135. Accordingly, the court concluded that applying the amended Code to the officer would violate the Pension Clause. *Id.*

The Illinois Supreme Court also came close to the issue in *Kerner v. State Employees’ Retirement System*, 382 N.E.2d 243 (Ill. 1978). In *Kerner*, the Supreme Court held that a former Governor’s felony conviction during office caused him to forfeit his pension benefits per the terms of the Pension Code when he entered the system. The court stated that the forfeiture provision was part of the pension plan when he became a member of that plan and that the Pension Clause only protected the “contractual relationship” existing at the time of membership.

By implication, *Kerner* supports *Kraus’s* holding that the Pension Clause safeguards the Pension Code provisions in place when a person becomes a member of the system, even though the person is not yet eligible to receive benefits under those provisions. *See DiFalco v. Bd. of Trs.*, 521 N.E.2d 923, 925 (Ill. 1988) (noting that per *Kerner*, the “contractual relationship” under the Pension Clause “is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system. Therefore, in determining plaintiff’s rights under the Pension Code, we must look to the language of the relevant statutes in effect . . . when the plaintiff began paying into the pension fund.”).

system in 1956, but was later placed on disability in 1967 due to an on-duty injury. At the time he entered the pension system, the Pension Code permitted an officer to receive a regular pension if the officer reached age 50 and had 20 years of service. An officer could fulfill the 20-year service requirement either by having 20 years of active service or by having 20 combined years of active service and years on disability.

The Code also allowed an officer placed on disability to receive a regular pension of 50% of the salary attached to the officer's rank for the year he or she decided to retire. Put differently, the Code allowed an officer not only to stay on disability to meet the pension eligibility requirements as to years of service, but also to receive a regular pension based on the salary for his or her rank for the year he or she elected to retire, not the applicable salary when the officer went on disability.

In 1973, before the officer reached age 50 and met the 20-year requirement, the General Assembly changed the Pension Code. The Code was amended to only give an officer placed on disability a regular pension of 50% of the salary attached to their rank when the person was placed on disability, not the higher salary existing when the officer decided to retire. In 1976, the officer reached age 50 and met the 20-year service requirement. He also decided to retire and applied for a regular pension.

Based on the statutory change, the police pension board denied the officer's request for a pension based on 50% of the higher salary amount in effect in 1976. Instead, the board applied the Pension Code change to the plaintiff and awarded him the reduced pension based on 50% of the (lower) salary for his rank at the time he went on disability in 1967. The trial court reversed the board's decision and the board appealed.

b. The Issue Before the *Kraus* court and Its Analysis

The issue before the Appellate Court was whether the Pension Clause entitled the officer "to receive a pension based on a section of the Pension Code in effect at the time of his entry into the pension system and at the time the [Clause] became effective, although the section was subsequently repealed and replaced prior to the time plaintiff retired or became eligible to retire."²³⁴ The appellate court concluded that the officer was "entitled to receive benefits under the relevant sections of the Pension Code as in effect at the time the constitutional provision became effective in 1971."²³⁵

²³⁴ *Kraus*, 390 N.E.2d at 1283.

²³⁵ *Id.* at 1289, 1290–92.

c. *Kraus's* Discussion of Illinois Pension Cases Predating the 1970 Constitution

To support its conclusion, the appellate court extensively reviewed Illinois's public pension law prior to the adoption of the 1970 Constitution, the Clause's plain language, Convention debates, Illinois cases construing the Pension Clause, and New York cases construing that state's identical constitutional provision. As an initial matter, the court defined the term "vesting," in the context of "pension benefits."²³⁶ The court explained that "vesting" referred "to a contractual right to an interest in a pension that may be upheld at law," not a functional understanding whereby a person fulfilled the specific qualifying conditions under a retirement plan to receive a benefit.²³⁷

From this starting point, the court detailed how prior to the 1970 Constitution only the pension benefits of participants in optional retirement system plans were deemed "contractual rights." These rights, the court stated, were "vested from the time the employee began contributing to the pension fund" and protected under the 1870 Constitution's Contracts Clause.²³⁸ The rights also "entitled" a person in an optional plan "to a pension based on the statute in effect at the time he entered the system, rather than the statute as amended prior to his retirement."²³⁹ Pension benefits of participants in mandatory plans, in contrast, were merely "gratuities" that could be legislatively reduced or eliminated at any time.²⁴⁰

d. *Kraus's* Review of the Constitutional Debates

Relying on the Convention statements of Delegates Green and Kinney, the court determined that the drafters intended for the Pension Clause to eliminate the different legal protections provided to pensions under optional and mandatory plans.²⁴¹ The court also observed that the drafters modeled the Clause after a New York constitutional provision and "intended to achieve the same results [as that provision] by adopting" its language.²⁴² The court held that when the Pension Clause took effect in 1971, "its purpose and effect was to guarantee that [the plaintiff] would receive no less than the benefits he would receive under that

236. *Id.* at 1284.

237. *Id.* at 1284–85.

238. *Id.*

239. *Id.* at 1284–85.

240. *Id.*

241. *Id.* at 1291–92.

242. *Id.* at 1288.

pension.”²⁴³

The court continued that applying the legislature’s 1973 Pension Code “amendment to the plaintiff would amount to a change in the terms of his contract with [the] pension system 17 years after he embarked upon his employment and 2 years after the constitution fixed the terms of the contract, and would directly diminish his benefits under the contract.”²⁴⁴ Accordingly, the court held that the 1973 amendment could not constitutionally apply to the plaintiff under the Pension Clause because he was “entitled to receive the benefits under the relevant sections of the Pension Code as in effect at the time the constitutional provision became effective in 1971.”²⁴⁵

e. *Kraus’s Reliance on Relevant New York Court Decisions*

The court then stated its holding was supported by New York court interpretations of that state’s identical constitutional provision.²⁴⁶ Reliance on New York cases was appropriate, the court explained, because the drafters intended for the Pension Clause to follow the results of the New York provision.²⁴⁷ These cases, according to the court, made clear that employee pension rights became fixed as of the time the employee entered the pension system or the time the constitutional amendment became operative, whichever is later, but not at the time of retirement.²⁴⁸

The court also took particular notice of *Kleinfeldt v. New York*—as would the Illinois Supreme Court in 1985—where the New York court of appeals held that a statute adversely changing the salary base on which retirement benefits were computed could not constitutionally apply to those who became members of the system prior to the statute’s effective date.²⁴⁹ Because the drafters modeled the Pension Clause after New York’s, the court distinguished the Clause from the constitutional provisions of Alaska, Hawaii, and Michigan, which only safeguarded pension benefits that had been “accrued.”²⁵⁰

f. *Kraus’s Treatment of the Supreme Court’s Peters Decision*

The *Peters* decision, according to the appellate court, did not

243. *Id.* at 1289.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1289–90.

248. *Id.* at 1290.

249. *Id.*

250. *Id.* at 1291.

sanction a contrary result because its description of protecting “earned” benefits was uttered “in the context of a reduction in the mandatory retirement age, which had only indirect effect on the benefits the plaintiffs might ultimately receive.”²⁵¹ The court explained that characterizing the plaintiff’s “17 years of service” prior to the Pension Code change as “fully accrued” would “be an unwarranted judicial engraftment on the constitutional provision and would frustrate the express intent of its drafters.”²⁵²

g. The Appellate Court’s Conclusion and Reasoning

In closing, the *Kraus* court refuted the arguments of the Illinois Attorney General and local pension board that its interpretation of the Pension Clause “would result in absurdity or injustice.”²⁵³ The court reiterated its holding: the Clause “prohibits legislative action which directly diminished the benefits to be received by those who became members of the pension system prior to the enactment of the legislation, though they are not yet eligible to retire.”²⁵⁴

The Clause, according to the court, did not apply to “[l]egislative action directed toward another aim” and having “an incidental effect on the pensions which employees would ultimately receive”.²⁵⁵ The legislature could, based on analogous New York cases, reduce for independent reasons the mandatory retirement age, work hours, and salaries because these changes only involved an “indirect effect on the pension benefits ultimately received.”²⁵⁶ The legislature could also require employees to provide 30 days notice before retiring.²⁵⁷ The court also stated in *dicta* that the legislature could increase the contributions rates of some employees to equalize them with the contribution rates of others.²⁵⁸ Further, since pension benefits were “contractual” under the Clause and governed by the “actual terms of the contract or pension,” the court noted “there is nothing to prohibit an employee from agreeing, for consideration, to accept a reduction in benefits” as illustrated by New York cases.²⁵⁹

Based on these observations, the court found there was no merit to the Attorney General and pension board’s fears that the court’s holding would create a parade of horrors. The court

251. *Id.* at 1291–92.

252. *Id.* at 1292.

253. *Id.* at 1292.

254. *Id.* at 1292–93.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 1293.

further concluded that there was no support for the argument that the General Assembly retained “a reasonable power of modification, even to diminish benefits to be received by prior members of the pension system.”²⁶⁰ The court explained (as this Article has above) that during the constitutional convention, the sponsors of the Clause rejected two attempts by the Pension Laws Commission to add such authority through an amendment to the Clause and statement of intent.²⁶¹

h. A Summary of *Kraus*’s Main Points

In sum, *Kraus* was the first Illinois court decision to comprehensively review the Pension Clause’s history, Convention debates, and existing case law, and to apply that background to a circumstance where the legislature attempted to reduce the pension benefits of a current employee not yet eligible to retire. The court concluded that the Clause’s original intent barred such legislative action because employees were entitled to the pension benefit rights existing in the Pension Code at the time they began contributing to the pension system. This conclusion, the court noted, was in accord with New York cases and how Illinois courts treated the pension benefits of employees participating in optional retirement plans under the 1870 Illinois Constitution.

The court also clarified that pension benefit rights were “contractual” in nature under the Clause, and as such could be modified if an employee received consideration and accepted the reduction in benefits. Similarly, the court noted that the Clause would not be violated if a person lost his or her pension due to non-compliance with terms or contingencies outlined in the plan when the person entered the system. Finally, the court rejected the notion that the General Assembly somehow retained a “reserved power” to modify and reduce pension benefits because neither the Clause’s text nor drafting history supported that view. On this last point, the court found instructive the failed efforts of the Pension Laws Commission to alter the Clause during the Convention.

3. *Felt v. Board of Trustees of the Judges Retirement System*

a. Facts and Procedural Background

In 1985, six years after the *Kraus* decision, the Illinois Supreme Court in *Felt* addressed for the first time whether an adverse unilateral change to the Pension Code applied to current

²⁶⁰ *Id.*

²⁶¹ *Id.*

participants of a pension system. The three judges and a widower filed suit against the retirement system after the system applied an amendment to the Pension Code that lowered the salary formula used to determine their respective pensions, rather than the more favorable salary formula in place when they began contributing to the system as members. When they entered the system, the Code allowed judges to retire with a pension based on the salary of the last day of service. While the plaintiffs were serving on the bench, the legislature through separate legislation not only increased judicial salaries, but also changed the Code, effective July 1, 1982, to provide judges with pensions based on an average of a judge's salary during the last year of service.

The judges argued that the system's application of the Code change violated the Pension Clause and the Contracts Clause. The trial court agreed, and held that the Code change could apply only to new judges entering the system. The Illinois Attorney General appealed both legal issues to the Supreme Court.

b. The Court's Analysis and Holding That the Statute at Issue Violated the Pension Clause and Contracts Clause

Relying on Delegate Green's convention statements, the Supreme Court concluded that the Pension Clause was intended to protect pension benefits "by first creating a contractual relationship between the employer and the employee" and by "mandat[ing] [that] the General Assembly not impair or diminish these rights."²⁶² The court further concluded by quoting from Delegate Kinney's statements that the Clause was intended "to simply give [public employees] a basic protection against abolishing their rights completely or changing the terms of their rights after they embarked upon the employment—to lessen them."²⁶³

From these premises, the court observed *Peters's* determination that annuities are based on length of service and salary, and any changes in those factors will affect the amount of the annuity.²⁶⁴ The court held that since the Pension Code change at issue "clearly effects a reduction or impairment in the retirement benefits to the plaintiffs" the change constituted a "violation of the constitutional assurance of section 5, Article XIII."²⁶⁵

The court further explained that the Pension Clause was modeled after an "almost identical" "provision in the New York

262. *Felt*, 481 N.E.2d at 699–700.

263. *Id.*

264. *Id.* at 700.

265. *Id.*

Constitution.”²⁶⁶ The court also pointed to a New York court decision analogous to *Felt* that reached the same conclusion.²⁶⁷ The court noted that the Supreme Court in *Bardens v. Board of Trustees* invalidated a nearly identical statutory change to the pension formula under the 1870 Illinois Constitution’s Contracts Clause.²⁶⁸ The earlier statute “had the effect of changing the basis of calculation of a retirement annuity from the judge’s salary on the last day of service to the judge’s average salary over last four years of service” whereas the statute in *Felt* used the judge’s average salary over the last year of service.²⁶⁹ The *Bardens* court struck down the statute because the plaintiff had originally contracted for the right to receive a pension “measured by the salary that he was receiving upon the date of his retirement.”²⁷⁰ From this proposition, the court found *Bardens* controlling and held that the statute also violated the Contracts Clause.²⁷¹

c. The Court Rejects the Attorney General’s Arguments

After making these holdings, the court addressed the Attorney General’s argument that the “reduction in retirement benefits” should be upheld because it was an “insubstantial” impairment of benefits, and because the legislature had the power to modify benefits under its police power.²⁷² Initially, the court acknowledged that “the contracts clause does not immunize contractual obligations from every conceivable kind of impairment or from the effect of a reasonable exercise by the States of their police power.”²⁷³ Rather, “the severity of the impairment measures the height of the hurdle the legislation must clear.”²⁷⁴ The court then stated that “presumably the defendants would offer a similar contention regarding [the Pension Clause] on the question of diminution and impairment of benefits.”²⁷⁵

Curtly, the court stated that the Attorney General’s “argument is not convincing” because the statute effectuated a substantial impairment, and because *Bardens* similarly found that a contract clause violation “was not defensible as a reasonable exercise of police power.”²⁷⁶ The court continued that while the legislature has an “undeniable interest and responsibility in

266. *Id.* at 700.

267. *Id.*

268. *Id.* at 701.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 701–02.

273. *Id.*

274. *Id.* at 701–02.

275. *Id.* (emphasis added).

276. *Id.* at 702.

ensuring the adequate funding of the state pension systems, there was no evidence that the underfunding was due to judicial retirements or timing their retirements after salary increases.”²⁷⁷

The court also observed that the Pension Laws Commission, which had the statutory duty to study the financial problems of the pension systems, “did not act to restrict retirement benefits because of judicial pay increases.”²⁷⁸ The court stated that “the conclusion to be drawn” was “that the amendment severely impairs the retirement benefits of the plaintiffs and those similarly situated and on the record here is not defensible as a reasonable exercise of the State’s police powers.”²⁷⁹

d. The Court Endorses the Appellate Court’s Decision in *Kraus*

Finally, the court addressed the Attorney General’s argument that the court should permit a reduction in benefits despite analogous New York and Illinois decisions because “there are jurisdictions which permit reductions in retirement benefits,” and because Alaska, Hawaii, and Michigan are three states with “constitutional provision relating to pensions.”²⁸⁰ The court responded by relying on *Kraus* that “in those constitutional provisions, unlike ours and that of New York, there is restrictive language that has permitted modifications in benefits.”²⁸¹ The court continued that “[i]n order to accept the defendants’ argument we would have to ignore the plain language of the Constitution of Illinois, reject the New York decisions on the constitutional provision which was the model for section 5 of article XIII, and overrule this court’s decision in *Bardens*.”²⁸²

4. *Buddell v. Board of Trustees of the State University Retirement System*

In 1987, two years after its *Felt* decision, the Illinois Supreme Court issued its decision in the *Buddell* case, which involved another challenge to a unilateral and adverse Pension Code change affecting the pension rights of a current university employee. As detailed below, the Supreme Court not only clarified the scope of its 1974 *Peters* decision, but also endorsed the Appellate Court’s decision in *Kraus*.

277. *Id.*

278. *Id.* at 702.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 702.

a. Facts and Procedural History

In *Buddell*, a university employee started working in 1969 and entered SURS that same year. Before working for the university, the employee had previously been in the military. At the time he entered the system, the Pension Code allowed employees to purchase service credit for their time in the military. The Code was amended in 1974—three years after the Pension Clause took effect—to repeal the purchase option prospectively for new employees, and to require current employees to exercise that option by September 1, 1974. The original Code provision, in contrast, did not impose any deadline by which employees had to exercise the purchase option. The employee applied for the service credit in 1983, and the retirement system denied the request because the employee had not made the election by the deadline contained in the amended Code.

The trial court reversed the system’s decision and held the 1974 Pension Code change unconstitutional under the Clause. The trial court reasoned that the employee was constitutionally entitled to exercise the option at any time because the Code lacked a time limitation when he entered the system and when the Pension Clause took effect in 1971. The Attorney General appealed the decision to the Supreme Court. The issue on review was whether the military service credit provision in the Pension Code existing prior to the 1974 Code amendment as a protected benefit under the Pension Clause.²⁸³

b. The Supreme Court Analyzes and Distinguishes *Peters*

The Supreme Court began its analysis by reviewing the Clause’s Convention debates and drew three conclusions.²⁸⁴ The delegates intended for the provision to (1) characterize and guarantee pension benefits under a “contractual” theory, (2) eliminate the former distinction in legal protection provided to benefits under mandatory and optional retirement plans, and (3) ensure that “the vested rights of pension plan participants not be defeated or diminished.”²⁸⁵

The court then observed that *Peters* held that the Clause does not prohibit all changes in the terms of employment that might affect an employee’s retirement benefits, including a change to the mandatory retirement age.²⁸⁶ The court pointed out, however, that in *Peters*, “[t]here was no provision concerning retirement age in

283. *Buddell*, 514 N.E.2d at 186.

284. *Id.*

285. *Id.*

286. *Id.*

the Pension Code.”²⁸⁷ To this point, the court stated that the City of Springfield and its amicus had argued that the Pension Clause only protects those pension benefit rights set forth in the Pension Code.²⁸⁸ But, *Peters* “did not specifically reply to that argument” even though the court noted various provisions in Municipal Code governing mandatory retirement.²⁸⁹

The *Buddell* court then stated that the instant case involved rights “contained within the Pension Code itself and not provided for in some statutory provision relating to other matters which incidentally affect pension benefits.”²⁹⁰ In addition, those rights were in the Code when the employee entered the system and when the Pension Clause took effect.²⁹¹ As a result, the court concluded “[t]here can be no doubt . . . that upon the effective date of [the Pension Clause] the rights conferred upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles.”²⁹²

c. The Court Rejects the Attorney General’s Arguments

The court thereafter addressed the Attorney General’s argument that the plaintiff had no rights under the military service credit provision because “he had taken no step to avail himself of his benefit prior to the statutory cut-off date provided for in the [Pension Code] amendment.”²⁹³ The Attorney General cited the Appellate Court’s decision in *Ziebell v. Board of Trustees Police Pension Fund of the Village of Forest Park*²⁹⁴ for the proposition that the employee had “provided no consideration for these additional benefits.”²⁹⁵

The court rejected the argument and found *Ziebell* unsupportive of the Attorney General’s position.²⁹⁶ The court explained that *Ziebell* would apply “in our case only if the plaintiff were seeking to receive the additional military service pension benefit without paying the additional amount required by the Pension Code.”²⁹⁷ The court continued that because the Pension Code provided that the plaintiff could purchase military service credit in the retirement system when he joined the system, “[t]his

287. *Id.*

288. *Id.* at 187.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Ziebell v. Bd. of Trs.*, 392 N.E.2d 101, 105–06 (Ill. App. Ct. 1979).

295. *Buddell*, 514 N.E.2d at 187.

296. *Id.*

297. *Id.*

right to purchase additional credit became a contractual right under [the Pension Clause].”²⁹⁸ In addition, “[t]he consideration [the plaintiff paid] for that contractual right was the same as for any other right conferred by the Pension Code, his employment and continued employment by the public body, and, in addition, his prior military service.”²⁹⁹

d. The Court Endorses the Appellate Court’s *Kraus* Decision

In closing, the court stated that *Kraus* “held that the plaintiff was entitled to receive a pension based on the relevant section of the Pension Code in effect at the time that [the Pension Clause] became effective.”³⁰⁰ And, the court found “[t]his holding” to be “in accord with our holding in this case.”³⁰¹ The court stated that *Kraus* arrived at its holding by considering “the pre-1970 distinction between mandatory and optional pensions plans, the constitutional debates and many decision[s] of the courts of New York construing its constitutional provision, after which [the Clause] was patterned.”³⁰² The court continued that *Ziebell* does not conflict with *Kraus* or *Buddell*’s holding because “in *Ziebell* the plaintiff was seeking to receive additional pension payments for which no contribution had been made,” whereas the plaintiff, in the instant case, was “seeking to enforce his right to purchase the additional service credit toward his pension.”³⁰³

Accordingly, the court held that the “rights to exercise this option and make these additional payments are contractual rights by virtue of [the Pension Clause], and the legislature cannot divest the plaintiff of these rights.”³⁰⁴ The court further held that its interpretation of the Clause, “as discussed in *Kraus*,” was “in accord with the decisions of the New York courts interpreting” that state’s “comparable constitutional provision.”³⁰⁵

5. *Kanerva v. Weems*

In July 2014, the Illinois Supreme Court again considered the scope of the Pension Clause in *Kanerva v. Weems*.³⁰⁶ At issue in *Kanerva* was whether subsidized retiree healthcare premiums

298. *Id.* at 187–88.

299. *Id.* at 188.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 188.

306. *Kanerva*, 2014 IL 115811.

qualified as protected “benefits” under the Clause when those premium subsidies were set forth in a statute separate and apart from the Pension Code, and provided only to persons who were defined as annuitants of SERS, SURS, TRS, GARS, or JRS. For the court, this was an issue of first impression³⁰⁷ because its previous decisions had only dealt with statutory provisions found either *within* the Pension Code or outside of the Pension Code,³⁰⁸ but the purported benefit was not expressly contingent upon a person’s membership in a public pension system.³⁰⁹

As detailed below, in a 6–1 decision, the court in *Kanerva* not only held that subsidized healthcare premiums constituted “benefits” under the Clause based on its plain language and purpose, but also profoundly broadened the protective scope of the Clause. The court concluded that the Clause protects any “benefits”—whether found in the Pension Code or in other State statutes—that are “limited to, conditioned on, or flow[ing] from [a person’s] membership in one of the State’s various public pension systems,”³¹⁰ including “subsidized healthcare, disability and life insurance coverage, and eligibility to receive a retirement annuity and survivor benefits.”³¹¹ The majority opinion also drew a sharp dissenting opinion from Justice Anne Burke.

a. Facts and Procedural History

In *Kanerva*, the court considered the constitutionality of Public Act 97-695, which the General Assembly enacted in 2012 and which reduced the retiree healthcare premium subsidies the State paid based on a retiree’s years of service credit. Prior to that Act, persons who were defined as certain SERS, SURS, or TRS annuitants received a 5% premium subsidy for each year of service credit up to 100%. The statutory provision providing the graduated premium subsidies was set forth in Section 10 of the State Employee Group Insurance Act (“Insurance Act”) and enacted in 1997 and 1998. The graduated premium subsidies were also memorialized in collective bargaining agreements between public sector unions representing State employees participating from 1997 through 2012. The Insurance Act also provided premium-free retiree healthcare coverage for GRS and JRS members.

As mentioned above, the Insurance Act expressly conditioned the receipt of premium subsidies on person’s status as an SERS,

307. *Id.* ¶ 42.

308. *See e.g., Felt*, 481 N.E.2d at 699–702; *Buddell*, 514 N.E.2d at 186–87.

309. *See e.g., Peters*, 311 N.E.2d at 112; *Kouzoukas v. Ret. Bd. of Policemen’s Annuity & Benefit Fund of Chi.*, 917 N.E.2d 999, 1015–18 (Ill. 2009).

310. *Kanerva*, 2014 IL 115811, ¶ 38.

311. *Id.* ¶ 39.

SURS, TRS, GARS or JRS “annuitant.” By eliminating the premium subsidy provision for SERS, SURS, and TRS members, and the premium-free coverage for GARS and JRS members, Public Act 97-695 now required all retirees to pay healthcare premiums based on levels annually determined by the Department of Central Management Services via administrative rule. The Department’s rules required retirees to pay either 1% or 2% of their annual pension amount plus a portion of their group health benefits based on their years of service credit.

The plaintiffs in the case were four different groups of retirees collectively participating in SERS, SURS, TRS, GARS, and JRS who first began receiving pensions after January 1, 1998 as well as SERS and TRS retirees who elected to retire under an early retirement program enacted in 2002. For these retirees, Public Act 97-695 now required them to pay retiree healthcare premiums for the first time or much higher premiums than before. The plaintiffs filed four separate complaints in three different judicial circuits that were ultimately consolidated by the Illinois Supreme Court in Seventh Judicial Circuit in Sangamon County.

Collectively, the complaints alleged that the free or subsidized retiree healthcare premiums qualified as protected “benefits” under the Pension Clause and that Public Act 97-695 diminished or impaired these benefits. Some but not all of the plaintiffs also alleged, among other things, that Public Act 97-695 violated the Contracts Clause of the Illinois Constitution and constituted a breach of the State’s prior collective bargaining agreements with public sector unions and thereby triggering the payment of damages by the State.

After consolidation of the separate actions, the Illinois Attorney General moved to dismiss the complaints under Sections 2-615 and 2-619 of the Code of Civil Procedure for failing to state a cause of action. The Attorney General argued that the Pension Clause only protects traditional pension benefits and does not encompass the State’s obligation to contribute toward the cost of healthcare benefits for retired state employees and their survivors. The Attorney General further argued that Public Act 97-695 did not violate the Illinois Constitution’s Contract Clause because the healthcare subsidies were not tantamount to contractual rights. As to the breach of contract claim, the Attorney General asserted that the claim belonged before the Illinois Court of Claims because the trial lacked jurisdiction over money damage actions against the State.

After briefing and oral argument, the trial court entered an order in March 2013 dismissing all of plaintiffs’ claims based on the ground asserted by the Attorney General. The trial court agreed with the Attorney General’s position that Pension Clause only protects the benefits set forth in the Pension Code.

Accordingly, the trial court found that the subsidies fell outside of the Clause's protection because the statutory provision establishing the subsidies was not set forth in the Code, but in the Insurance Act.

As support for this conclusion, the trial court observed that the Pension Code and Insurance Act were "structurally separate and substantially different" in that pensions were paid with moneys from a particular pension fund and actuarially certain while healthcare subsidies were paid with moneys from the State's General Revenue Fund and medical costs change with advances in technology and treatment. The trial court further observed that the New York's highest court similarly concluded that healthcare benefits were not protected "benefits" under that state's nearly identical provision, which had served as the model for the Pension Clause of the Illinois Constitution.

As for plaintiffs' Contracts Clause claim, the trial court found that the claim failed because the healthcare subsidies were not vested or contractual rights. The trial court explained that a statute does not generally create vested or contractual rights unless it contains clear and unmistakable language to the contrary. Absent such language, a statute "merely declares a policy" that the legislature can alter or repeal at any time. Because the provision in the Insurance Act granting healthcare subsidies lacked unmistakably clear language, the trial court concluded that the subsidies were not vested or contractual rights and consequently the General Assembly was free to eliminate the provision. As for plaintiffs' claim that the State's breached its collective bargaining agreements, the trial court held that the claim belonged before the Illinois Court of Claims since it sought money damages.

b. The Supreme Court's Analysis and Holding in *Kanerva*

On appeal, the Illinois Supreme Court stated the central issue before it was whether the trial court erred in dismissing the plaintiffs' complaints that Public Act 97-695 violated the Pension Clause. After reciting the applicable rules of interpreting constitutional provisions, the court concluded that the Clause's plain language made it clear that "if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired."³¹² As a result, the key question presented was "whether a health insurance subsidy provided in retirement qualifies as a benefit of membership" under the

312. *Id.* ¶ 38.

Clause.³¹³

In analyzing this question, the court first observed that “Illinois law affords most state employees a package of benefits in addition to the wages they are paid”, including “subsidized health care, disability and life insurance coverage, [and] eligibility to receive a retirement annuity and survivor benefits.”³¹⁴ These benefits, the court noted, “were provided when [the Pension Clause] was proposed to Illinois voters for approval, as they are now.”³¹⁵ Most importantly, though, eligibility for these benefits were “limited to, conditioned on, and flow[ed] directly from membership in one of the State’s various public pension systems.”³¹⁶

According to the court, because of the “plain and ordinary meaning” of the Clause’s language, “all of these benefits, including subsidized healthcare, must be considered benefits of membership in a pension or retirement system of the State and, therefore, within that provision’s protections.”³¹⁷ The fact that the benefits were governed by provisions set forth in the Pension Code or in another State statute was unimportant so long the benefits were conditioned upon a person’s membership in a pension system.³¹⁸

Based on this conclusion and reasoning, the court then rejected the Attorney General’s argument that the Clause only protects those benefits found in the Pension Code. The court stated that if the drafters of the Clause “had intended to protect only core pension annuity benefits and exclude various other benefits state employers were and are entitled to receive as a result of membership in the State’s pensions [sic] systems, the drafters could have so specified. But they did not.”³¹⁹ Instead, “the drafters chose expansive language that goes beyond annuities and the terms of the Pension Code, defining the range of protected benefits broadly to encompass those attendant to membership in the State’s retirement systems.”³²⁰ As a result, the court stated that “to hold that [subsidized health care] benefits are not among the benefits of membership protected by the constitution would require us to construe [the Clause] in a way that the plain language of the provision does not support.” In addition, the court stated that it could “not rewrite the pension protection clause to include restrictions and limitations that the drafters did not

313. *Id.* ¶¶ 32–37.

314. *Id.* ¶ 39.

315. *Id.*

316. *Id.* ¶ 40.

317. *Id.*

318. *Id.*

319. *Id.* ¶ 41.

320. *Id.*

express and the citizens of Illinois did not approve.”³²¹

The court next addressed and rejected the Attorney General’s argument that the Clause’s constitutional convention debates supported her position. The court observed that while it had considered these debates in past cases, “none of those cases involved the question of whether certain benefits attendant to membership in a state retirement system covered by the protections guaranteed by [the Clause].”³²² And since the issue at hand could be decided based on the Clause’s plain language, the debates were of little utility in construing such language.³²³

Moreover, “[e]ven if reference to the convention debates were appropriate,” the court stated “it would not aid the State’s position.”³²⁴ After referring to the remarks of several convention delegates, particularly the Clause’s principal sponsors,³²⁵ the court concluded that the Clause “was intended to eliminate the uncertainty that existed under the traditional classification of retirement systems [as either mandatory or optional] and to guarantee that retirement rights enjoyed by public employees would be afforded contractual status and insulated from diminishment or impairment by the General Assembly.”³²⁶ Also, the Clause “was aimed at protecting the right to receive the promised retirement benefits, not the adequacy of the funding to pay them.”³²⁷ “To infer more, however, would require more than the reports of the floor debate would reasonably support” and there was “nothing in the debates” evincing an intention “to treat annuitant health care benefits differently from other benefits of pension and retirement system membership then in effect.”³²⁸

The court also found that its conclusion was supported by a 2010 decision from the Hawaii Supreme Court, which considered the same issue in the context of a similar pension protection provision contained in the Hawaii state constitution.³²⁹ The court observed that, as with Illinois law, Hawaii state law “confer[red] on public employees a package of benefits which includes both health insurance and eligibility for retirement annuities.”³³⁰ And as in Illinois, eligibility for health coverage was “addressed in a separate statute from the law governing retirement annuities” and “conditioned on membership” in a public retirement system.³³¹ The

321. *Id.*

322. *Id.* ¶ 42.

323. *Id.*

324. *Id.* ¶ 43.

325. *Id.* ¶¶ 45–47.

326. *Id.* ¶ 48.

327. *Id.*

328. *Id.*

329. *Id.* ¶ 49 (citing *Everson*, 228 P.3d 282).

330. *Id.*

331. *Id.*

court stated that from this analysis the Hawaii Supreme Court reached the same conclusion that the health care benefits were protected because they derived “from and are conditioned on membership in a public retirement system”.³³²

The court further found that its conclusion was not undermined by the fact that New York’s highest court had ruled that the New York Constitution’s pension provision only protected “benefits directly related to the terms of the retirement annuity,” and not retiree healthcare subsidies.³³³ The court offered three reasons.

First, the court agreed with the finding of the Hawaii Supreme Court it had earlier referenced, which found the New York court decision distinguishable and unpersuasive. *Second*, the court recounted how retiree healthcare benefits were part of the package of benefits provided to state employees at the time the Pension Clause was proposed, and how eligibility for all those benefits was tied to a person’s membership in one of the State’s pension systems, which made them constitutionally protected. The court reiterated that there was nothing in the Clause’s plain language, history, or convention debates indicating a contrary result that the Clause only protected the retirement annuity itself. *Finally*, the court noted that, unlike in the New York case, the Illinois law at issue did not involve a mere increase in the contribution levels of retirees consistent with the boundaries of existing law, but rather a complete elimination of those subsidies.

The court was also not persuaded by the Attorney General’s final argument that healthcare benefits lacked constitutional protection because “health care costs and benefits are governed by a different set of calculations than retirement annuities.” The court stated that while it is true the two benefits are calculated differently, it was “also legally irrelevant.”³³⁴ The court again repeated its earlier conclusion: “Whether a benefit qualifies for protection under [the Clause] turns simply on whether it is derived from membership in one of the State’s public pension systems. If it qualifies as a benefit of membership, it is protected. If it does not, it is not.”³³⁵

Finally, the court explained that “to the extent that there may be any remaining doubt regarding the meaning or effect of” the provisions set forth in the Clause, the court was “obliged to resolve that doubt in favor of the members of the State’s public retirement systems.”³³⁶ Accordingly, the court concluded that the trial court erred in dismissing the plaintiffs’ Pension Clause claim because

332. *Id.*

333. *Id.* ¶¶ 50–53.

334. *Id.* ¶ 54.

335. *Id.*

336. *Id.* ¶ 55.

retiree healthcare benefits qualified as protected benefits and “the General Assembly was precluded from diminishing or impairing that benefit for those employees, annuitants, and survivors whose rights were governed by the version of section 10 of the [Insurance Act] that was in effect prior to the enactment of Public Act 97-695.”³³⁷ The court then remanded the case to the trial court for further proceedings consistent with the majority’s opinion.

c. Justice Anne Burke’s Dissent

Justice Burke issued a dissent nearly as long as the majority opinion’s analysis that made two points.³³⁸ *First*, Justice Burke disagreed with the majority’s holding that retiree healthcare subsidies constituted protected “benefits” under the Clause. *Second*, she disagreed with the majority’s disposition of the case to not review the plaintiffs’ remaining claims. The first point raised by Justice Burke is discussed below.

On her first point, Justice Burke opined that the Clause only “protects pensions, not subsidized healthcare premiums.”³³⁹ To support her view, she first looked to the Clause’s title—“Pension and Retirement Rights”—as an indication that the Clause is limited to protecting “pension and retirement rights,” and that this phrase was defined as a “plan or fund that provides retirement income to employees.”³⁴⁰ She next referred to one of the court’s earlier decisions, which held that the benefits subject to the Clause’s protection are “the actual terms of the Pension Code at the time the employee becomes a member of the pension system.”³⁴¹

From this basis, she found that retiree healthcare subsidies were not protected benefits because they were not set forth in Pension Code, and not provided by the pension systems to retirees.³⁴² She also expressed her agreement with the trial court (and Attorney General’s position) that the health benefits lacked protection because pensions are different from subsidized health insurance premiums in how they are calculated and in the source of the funds used to pay these benefits.³⁴³

In addition, she stated that the only way the majority opinion was able to reach its conclusion was by reading into the Clause “language that is not there.”³⁴⁴ She observed that “[n]owhere in the

337. *Id.* ¶ 57.

338. *Id.* ¶¶ 63–94.

339. *Id.* ¶¶ 87.

340. *Id.* ¶¶ 65–67.

341. *Id.* ¶ 68.

342. *Id.* ¶¶ 69–70.

343. *Id.* ¶¶ 70, 86.

344. *Id.* ¶ 72.

clause does it state that every benefit which ‘results from,’ is ‘conditioned on,’ ‘flows directly from’ or ‘is attendant to’ being a member of a pension system is provided constitutional protection.”³⁴⁵ By adding this language, she asserted, the majority committed error and usurped the “sovereign power of the people.” Justice Burke then stated that the majority’s actions fundamentally changed the Clause’s meaning to no longer protect “statutory benefits provided by a pension or retirement system” but “any statutory benefit—however unrelated to pensions—if the recipient of the benefit is a member of a pension system.”³⁴⁶ This new meaning of the Clause, according to Justice Burke, had no limits, and under the majority’s reasoning the Clause would now protect an “honorary plaque” specifically awarded to members of the municipal retirement system under a city ordinance.³⁴⁷

The remainder of her dissent turned to how the majority’s conclusion, in Justice Burke’s view, was not supported by the court’s prior decisions, the Clause’s convention debates, and the cases from other states considering the same question.³⁴⁸ Justice Burke gave particular weight and attention to the decision of the New York Court of Appeals, which held that retiree healthcare benefits are not protected by the pension provision of that State’s constitution.³⁴⁹ In her words, the case was “squarely on point and persuasive”, while the majority opinion’s reliance on decisions from the Alaska and Hawaii Supreme Courts were not.³⁵⁰

In the end, Justice Burke appeared to agree with the majority opinion that both the Clause’s plain language and convention debates were “unambiguous” in that protected benefit rights “could not be altered” by legislative action to the detriment of pension participants.³⁵¹

6. *Distilling the Illinois Courts’ Decisions in Peters, Kraus, Felt, Buddell, and Kanerva*

The decisions in *Peters*, *Kraus*, *Felt*, *Buddell*, and *Kanerva* illustrate the evolutionary path of how Illinois courts have construed the scope of the Pension Clause’s protection. While the *Peters* decision was an ambiguous beginning to this endeavor, the courts in *Kraus*, *Felt*, and *Buddell* each clarified *Peters*’s import. These three cases, in turn, held that the Clause safeguards the pension benefit rights contained in the Pension Code when a

345. *Id.*

346. *Id.* ¶ 73.

347. *Id.*

348. *Id.* ¶¶ 74–85.

349. *Id.* ¶¶ 77–81.

350. *Id.* ¶¶ 81–85.

351. *Id.* ¶¶ 68, 74.

participant becomes a member of pension system whether or not the employee is eligible to retire. The courts in *Kraus* and *Felt* drew this conclusion principally from Convention debates, especially the statements of Delegates Green and Kinney. Under these decisions, a public employee obtains “vested rights” in the Pension Code provisions relevant to pension benefits when the employee becomes a member of a pension system by making his or her initial employee contribution to the system. Finally, under *Kraus* and *Buddell*, the Clause protects pension benefit rights as an enforceable contractual relationship that is subject to modification through contract principles.³⁵²

In *Kanerva*, the Illinois Supreme Court broadened the Clause’s reach to also protect any benefits—whether found in the Pension Code or in other state statutes—that are “limited to, conditioned on, or flow[ing] directly from [a person’s] membership in one of the State’s various public pension systems.”³⁵³ The court held that the protected benefits included “subsidized healthcare, disability and life insurance coverage, [and] eligibility to receive a retirement annuity and survivor benefits.”³⁵⁴ The court’s conclusion reflects a plain language analysis of the Pension Clause and tracks with the dictionary definition of the term “benefit,” as discussed earlier in this Article, to mean not only the specific annuity payments a public employee is eligible to receive, but also other entitlements of membership that advantage the employee.³⁵⁵ The court’s conclusion also squares with how New York courts interpreted the same term under its constitutional provision prior to 1970 as referring to “pecuniary matters” and prohibiting “any action which would impair or diminish the member’s right to payment of pensions, annuities, and related monetary advantages.”³⁵⁶

352. By characterizing pension benefits as “contractual” in nature, the Clause allows benefits to be altered through contract principles of offer, acceptance, and consideration, whereas constitutional guarantees prohibiting mid-term decreases in the salary or compensation of public officials cannot be altered through these principles. See *Northrup*, 31 N.E.2d at 340–42 (invalidating ordinances that imposed a mid-term reduction in the salary of Chicago aldermen as violative of Article XI, Section 11 of the 1870 Illinois Constitution, and rejecting the claim that the aldermen could bargain or gift away such reductions as being “against public policy and void”). Despite that distinction, the Pension Clause and the constitutional provisions protecting the salary or compensation of public officials are equivalent in absolutely barring *unilateral* actions that would reduce or eliminate protected benefits, salary or compensation, as the case may be, because each of these provisions expressly prohibits “diminishments.” See *infra* notes 530, 617–22 and accompanying text.

353. *Kanerva*, 2014 IL 115811, ¶¶ 39–40.

354. *Id.*

355. See Part I.A.3.

356. *Brown*, 269 N.Y.S.2d at 650, *aff’d*, 279 N.Y.S.2d 532.

It is unclear, however, whether Justice Burke's criticism of the majority's holding would protect an "honorary plaque" or other monetary advantage specifically awarded to members of the municipal retirement system under a city ordinance.³⁵⁷ The court, of course, was not confronted with this circumstance, but rather a benefit set forth in a state statutory provision outside the Pension Code. From that perspective, the majority's holding is limited to the facts before the court. In addition, the scenario raised by Justice Burke turns on the novel question of whether a unit of local government (home rule or not) has the legal power—absent a statutory delegation from the General Assembly—to *create* a benefit via ordinance or resolution that receives Pension Clause protection.³⁵⁸ This is a question Illinois courts will need to address and is not considered here.

Finally, the *Kraus* decision indicates that the Clause does not cover general terms or conditions of public employment, such as mandatory retirement age, work hours, and salaries of employees even though they have an indirect effect on the pension employees ultimately receive.³⁵⁹ These terms or conditions are subject to modification provided that the change "is directed toward another aim" or stems from an independent reason.³⁶⁰ We next consider three Illinois Supreme Court decisions regarding the funding of the pension system.

*B. While the Pension Clause Does Not Require the
Pension System to Be Funded at a Particular
Funding Percentage, the Illinois Supreme Court Has
Held That the Clause Requires Pension Benefit
Payments to Be Made When Those Payments Are Due*

As discussed in Part I of this Article, the pension system was significantly underfunded at the time of the Convention, just as today. Also, the inclusion of the Pension Clause in the 1970 Constitution was largely due to the lobbying efforts of public

357. *Kanerva*, 2014 IL 115811, ¶ 73.

358. See e.g., 40 ILL. COMP. STAT. 5/7-141.1 (allowing municipalities covered under Article VII of the Pension Code to establish an early retirement incentive program consistent with statutory parameters via ordinance or resolution).

359. *Kraus*, 390 N.E.2d at 1292–93. But see *Miller v. Ret. Bd. of Policemen's Annuity*, 771 N.E.2d 431, 441 (Ill. App. Ct. 2001) (distinguishing *Peters* and holding that the application of a statutory amendment to the mandatory retirement age provision contained in the Pension Code for retired police officers violated the Pension Clause as that provision was in place when the officers joined the pension system, fixed the officers' annuity amount, and the statutory change lowered the amount of the officers' pension).

360. *Kraus*, 390 N.E.2d at 1293.

employee groups at the Convention.

Not long after the Clause took effect, public employee groups began a long-standing litigation effort to require the legislature or local governments to pay the system's unfunded liabilities and fund the system on an actuarially sound basis. The Illinois Supreme Court addressed this issue on three different occasions and the employee groups' efforts proved unsuccessful as explained below.

Based on the Convention statements of Delegates Green and Kinney, the Supreme Court has held that the Clause does not mandate that the pension systems be funded at a specific funding percentage or according to a particular funding schedule. Rather, the Pension Clause requires that pension benefits be paid when the payments become due. In addition, the court has favorably relied upon the Convention statements of Delegate Kinney that pension recipients would have a cause of action to compel the payment of benefits should a pension system default or be on the verge of default. We briefly consider the Supreme Court's three decisions below beginning with its decision in *People ex rel. Illinois Federation of Teachers v. Lindberg*.

1. *People ex rel. Illinois Federation of Teachers v. Lindberg*

In *Lindberg*, members of the teachers' pension systems and members of other systems filed a *mandamus* action as a class to require the Comptroller to pay certain amounts originally appropriated by the General Assembly to their retirement systems after the Governor exercised his item reduction veto power to reduce the appropriated amounts.³⁶¹ The plaintiffs contended that the Pension Clause afforded them an enforceable, contractual right to have their respective pension systems funded in an actuarially sound manner.³⁶² They also argued that the provisions of the Pension Code manifested a binding funding obligation on the legislature that could not be impaired.³⁶³ Accordingly, the plaintiffs asked the court to restore the original appropriation amounts and void the Governor's item reduction veto. The trial court dismissed plaintiffs' class action.

After reviewing the Convention debates and relying on Delegate Kinney's statements, the Supreme Court concluded that the drafters did "not establish the intent to constitutionally require a specific level of pension appropriations during a fiscal year."³⁶⁴ The court noted, however, that the Convention debates established that "members of pension plans . . . would receive the

361. *Lindberg*, 326 N.E.2d at 750–51.

362. *Id.* at 752.

363. *Id.*

364. *Id.*

money due them at the time of their retirement.”³⁶⁵

As to the plaintiffs’ second claim, the court first noted that it had not yet decided whether to characterize pension benefits under mandatory pension plans as “contractual” in light of the Pension Clause.³⁶⁶ From this premise, the court reasoned that because the funding provisions at issue pertained to mandatory plans, and because those plans were construed as not providing vested rights, the plaintiffs had no basis to claim that these funding provisions created a contractual obligation on the State to make certain annual contributions to plaintiffs’ pension systems.³⁶⁷ For these reasons, the Supreme Court affirmed the trial court decision.

2. *McNamee v. State*

a. Background and Procedural History

Twenty years after its *Lindberg* decision, the Illinois Supreme Court in *McNamee* again addressed whether the Pension Clause mandates that the pension system be funded at a particular funding percentage or according to a funding schedule.³⁶⁸ This time the court considered a statutory change to the funding formula applicable to downstate police pension funds.³⁶⁹ Prior to the statutory change, the Pension Code imposed a 40-year amortization period by which the funds were to pay off their unfunded liabilities beginning on January 1, 1980.³⁷⁰ The legislature changed the start date of the 40-year period to July 1, 1993 as well as the method for calculating the existing unfunded liabilities.³⁷¹

Current and retired police officers filed suit claiming that the new funding schedule violated the Pension Clause because it allowed municipalities to contribute lower initial annual contributions to the police pension funds, thereby making the funds less secure.³⁷² The plaintiffs argued that a New York court found a similar statutory change unconstitutional under that state’s pension clause, which was the model for Illinois’s Pension Clause.³⁷³ The defendants responded that the Convention debates and Supreme Court’s *Lindberg* decision made clear that the

365. *Id.* at 751.

366. *Id.* at 752.

367. *Id.* at 752–53.

368. *McNamee*, 672 N.E.2d at 1159.

369. *Id.* at 1160–61.

370. *Id.*

371. *Id.*

372. *Id.* at 1161.

373. *Id.*

Clause protects employee pension benefits, not any particular method of funding the pension system.³⁷⁴ The defendants also noted that the legislation did not reduce benefits due to any beneficiaries.³⁷⁵

The trial court agreed with plaintiffs' position and held the statutory change unconstitutional based on the reasoning of the New York court decision. The Supreme Court allowed a direct appeal, and the issue was whether the legislation violated the Pension Clause.

b. The Supreme Court's Analysis

The court began its analysis by reiterating its holding from a previous case "that the contractual relationship [covered by the Clause] is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system."³⁷⁶ The court then explained that the primary purpose of the Clause was "to eliminate the uncertainty surrounding public pension benefits created by the distinction between mandatory and optional pension plans," especially the prospect that home rule municipalities would abandon their pension obligations.³⁷⁷

After extensively reviewing the Convention debates, the court concluded based on the statements of Delegates Green and Kinney that the drafters did not intend for the Clause to require pension funding at a particular level.³⁷⁸ Rather, the Clause was "intended to force the funding of pensions indirectly, by putting the state and municipal governments on notice that they are responsible for those benefits."³⁷⁹

The court, in turn, relied on its *Lindberg* decision that the Clause "does not create a contractual basis for participants to expect a particular level of funding, but only a contractual right 'that they would receive the money due [to] them at the time of their retirement.'"³⁸⁰ The court then noted that because the Clause protects benefits, both it and the Illinois Appellate Court had "consistently invalidated amendments to the Pension Code where the result [was] to diminish benefits."³⁸¹

374. *Id.*

375. *Id.*

376. *Id.* at 1162 (citing *DiFalco*, 521 N.E.2d at 925 (1998); *Kerner*, 382 N.E.2d at 247).

377. *Id.* at 1162.

378. *Id.* at 1162–64.

379. *Id.* at 1164.

380. *Id.* at 1165 (quoting *Lindberg*, 326 N.E.2d at 751).

381. *Id.* (citing favorably *Felt*, 481 N.E.2d 698; *Buddell*, 514 N.E.2d 184; *Schroeder v. Morton Grove Police Pension Bd.*, 570 N.E.2d 997 (Ill. App. Ct. 1991)).

c. *McNamee's Holding*

In conclusion, the court stated that while the Pension Clause was modeled after the New York Constitution's identical provision and Illinois courts had found New York court decisions construing that provision instructive, the Convention debates demonstrated that the framers did not intend to adopt the funding obligations required by the New York Constitution.³⁸² Accordingly, the court reiterated its holding that the Clause "creates an enforceable contractual relationship that protects only the right to receive benefits."³⁸³ Further, the court contrasted how plaintiffs' complaint did not allege that the legislation diminished a person's right to receive benefits or placed the pension system, in Delegate Kinney's words, "on the verge of default or imminent bankruptcy."³⁸⁴ The court's final observation, however, indicates that a cause of action would exist if legislation diminished a person's right to receive benefits or placed the pension system on the verge of default or imminent bankruptcy.

3. *People ex rel. Sklodowski v. State*

a. *Factual Background and Circuit Court History*

In 1998, two years after *McNamee*, the Supreme Court took up for a third time a funding claim under the Clause in *People ex rel. Sklodowski v. State*.³⁸⁵ The case was filed by participants of the State's five pension systems because of the State's failure to make the pension contributions prescribed by Public Act 86-273. That Act committed the State to make additional pension contributions over a seven-year period and pay the existing unfunded liabilities of each system over a 40-year period. The plaintiffs claimed that by enacting the Public Act as part of the Pension Code the legislature made the Act's funding schedule an enforceable contractual right under the Clause. Accordingly, the plaintiffs contended that the State's failure to adhere to that schedule impaired their rights under the Clause and sought the issuance of a writ of *mandamus* to compel the State Comptroller, among others officials, to comply with the Public Act's funding schedule.

The trial court dismissed the plaintiffs' complaint because the

382. *Id.* at 1165–66.

383. *Id.* at 1166.

384. *Id.* at 1166 (citing 4 PROCEEDINGS, *supra* note 53, at 2926 (statements of Del. Kinney ("The word 'impaired' is meant to imply and intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved.")).

385. *Sklodowski I*, 695 N.E.2d 374.

requested relief would violate the separation of powers clause under the Illinois Constitution. Plaintiffs appealed to the Appellate Court. While the appeal was pending, the General Assembly passed Public Act 88-593, which repealed Public Act 86-273. Public Act 88-593 established a new, less aggressive funding schedule for the State's five pension systems as compared to Public Act 86-273. The defendants moved to dismiss the appeal as moot, and the Appellate Court denied the motion.

b. Appellate Court History

The Appellate Court reversed the trial court and held that the complaint was not barred by the separation of powers clause or by sovereign immunity.³⁸⁶ The appellate court explained: “[o]nce rights are created by the constitution or statute, ‘[i]t is within the realm of judicial authority to assure that the action of members of the executive branch does not deprive [individuals] of an institution of rights conferred by statute or by the Constitution.’”³⁸⁷ The court further held that by enacting Public Act 86-273, the legislature “intended to bind itself to the obligation of paying funds to the retirement system” according to that Public Act’s funding schedule.³⁸⁸ From this premise, the court distinguished the present case from the circumstances in *Lindberg*, because the Public Act “provided for the ‘how much’ and ‘when’ as to funding the retirement systems” in contractual terms.³⁸⁹

The appellate court utilized the same basis to distinguish the Supreme Court’s *McNamee* decision.³⁹⁰ The court also noted that the present case was unlike *McNamee* because the plaintiffs alleged that the “financial status of their separate pension funds is in a precarious state and that there will be no funds from which to pay benefits by 2008, 2009.”³⁹¹ As a result, the appellate court concluded that the trial court erred in dismissing the complaint and remanded the case to the trial court.³⁹²

c. The Supreme Court’s Analysis

After reviewing the case’s procedural history,³⁹³ the Supreme

386. *People ex rel. Sklodowski v. State (Sklodowski II)*, 674 N.E.2d 81 (Ill. App. Ct. 1996).

387. *Id.* at 86.

388. *Id.* at 87.

389. *Id.* at 88.

390. *Id.* at 88–89.

391. *Id.* at 89.

392. *Id.* at 90.

393. *Sklodowski I*, 695 N.E.2d at 375–78.

Court reiterated its holdings from its previous decisions that: (1) the Clause was included to eliminate the distinction in legal protections afforded to mandatory and optional pension plans prior to the 1970 Constitution;³⁹⁴ (2) the Clause “makes participation in a public pension plan an enforceable contractual relationship and also demands that the ‘benefits’ of that relationship” not be “diminished or impaired”;³⁹⁵ and (3) the contractual relationship is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system.³⁹⁶

The court then discussed its *Lindberg* and *McNamee* decisions, and reaffirmed the holdings of both cases that the Clause does not create a contractual basis for participants to expect a particular level of funding, but only a contractual right that they would receive the money due them at the time of their retirement.³⁹⁷ The court further held that the plaintiffs offered “no cogent argument” as to why the pension funding provisions in Public Act 86-273 created a vested right to a specific funding schedule.³⁹⁸

The Supreme Court also rejected plaintiffs’ claim that they stated a Pension Clause challenge by stating their benefits were at risk.³⁹⁹ The court explained that while in *McNamee* it “recognized that . . . a beneficiary need not wait until benefits are actually diminished to bring suit under the clause,” plaintiffs offered no “factual allegations that would support the finding that the [pension] funds at issue are ‘on the verge of default or imminent bankruptcy’ such that benefits are in immediate danger of being diminished.”⁴⁰⁰ Accordingly, the court reversed the appellate court because neither the Clause, nor Pension Code itself provided the plaintiffs with a vested contractual right mandating that the pension system be funded pursuant to Public Act 86-273.⁴⁰¹ The court further found it unnecessary to address the appellate court’s ruling on sovereign immunity.⁴⁰²

4. *The Take Home Message of Lindberg, McNamee, and Sklodowski*

Through the above three decisions, the Illinois Supreme Court has made several points clear with respect to the Pension

394. *Id.* at 377 (citing *McNamee*, 672 N.E.2d 1159).

395. *Id.* at 377 (citing ILL. CONST. of 1970, art. XIII, § 5.).

396. *Id.* at 377 (citing *DiFalco*, 521 N.E.2d at 926; *Kerner*, 382 N.E.2d at 247).

397. *Id.* at 378–79.

398. *Id.* at 379.

399. *Id.*

400. *Id.* (citing *McNamee*, 672 N.E.2d at 1165).

401. *Id.*

402. *Id.*

Clause and pension funding. *First*, relying principally on the statements of Delegates Green and Kinney at the Convention, the drafters did not intend for the Clause to require the pension system to be funded at a particular funding percentage or according to a specific funding schedule, unless the Pension Code expressly contains clear and binding language. Rather, as stated in *McNamee*, the Clause was “intended to force the funding of pensions indirectly, by putting the state and municipal governments on notice that they are responsible for those benefits.”⁴⁰³ As a consequence, the Clause guarantees that pension participants will receive the money due them at the time of their retirement.

Second, the Clause makes participation in a public pension plan an enforceable contractual relationship and also demands that the “benefits’ of that relationship” not be diminished or impaired. Further, the contractual relationship is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system. It is for this reason that both the Supreme Court and Appellate Court have invalidated changes to the Pension Code that would diminish or impair a current participant’s pension benefit rights.

Finally, the Supreme Court has recognized that while a beneficiary of a pension system need not wait until his or her benefits are actually diminished to bring suit in circuit court under the Clause, a beneficiary could only do so if the complaint contained factual allegations that the relevant pension fund was in default or on the verge of default. The court again found support for this position in Delegate Kinney’s statements at the Convention.

III. A REVIEW OF STAKEHOLDER PERSPECTIVES

In Parts I and II of this Article, we have reviewed the Clause’s plain language, the status of public pension law prior to the 1970 Convention, the lobbying efforts of public employee groups to obtain constitutional protection for pension benefits rights at the Convention, the Clause’s drafting history and debates, the failed efforts by the Pension Laws Commission to modify the Clause during the Convention, how the Clause was described to the voters who ratified the new Constitution in December 1970, and relevant Illinois court decisions construing the Clause. With this background in mind, we now consider the claims legal commentators have made about the Clause, including whether it permits the legislature to unilaterally cut the pension benefits of current employees. Since the legal commentators

403. *McNamee*, 672 N.E.2d at 1164.

penned their claims prior to and without the benefit of the Illinois Supreme Court's decision in *Kanerva* that decision is not factored into the discussion below, except for a brief reference in Part III.H.

A. Background

1. *The Commercial Club of Chicago and Sidley Austin LLP*

In November 2009, the Civic Committee of the Commercial Club of Chicago (the "Club")⁴⁰⁴ issued a minority report to the Illinois General Assembly's Pension Modernization Task Force report.⁴⁰⁵ In its minority report, the Club claimed that the legislature could, without violating the Pension Clause, unilaterally "freeze" the pension benefits that current public employees "earned" through past service, and reduce the benefits those employees would "earn" going forward through future service.⁴⁰⁶

At a lunch meeting, then-Club President, R. Eden Martin stated that the proposal outlined in the Club's minority report would cut the State's existing unfunded pension liabilities by \$20 billion and net annual savings of \$2 billion for the State.⁴⁰⁷ While agreeing that the principal cause of the State's existing liabilities stemmed from the State's failure to fund pension costs,⁴⁰⁸ the Club's report stated it was "unfair to require taxpayers to bear the costs of the current pension programs for the State's employees."⁴⁰⁹ Martin explained to Club members that paying these obligations

404. See RICHARD SCHNEIROV, *LABOR AND URBAN POLITICS: CLASS CONFLICT AND THE ORIGINS OF MODERN LIBERALISM IN CHICAGO, 1864–97* 142 (1998) (recounting that the Commercial Club of Chicago was formed in 1877 by a group of the "sixty outstanding" Chicago businessmen belonging to the Citizens Association of Chicago). Schneirov explained that the Club was formed "as a forum for political discussion and as a caucus within the Citizens Association." *Id.* "Franklin MacVeagh, a wholesale merchant who was the first president of the Citizens Association," and later Club president in 1870, "candidly explained the purpose of the Citizens Association in his first address when he asserted that universal male suffrage had placed 'political power in the hands of the baser part of the community,' which resulted in binding 'hand and foot the best part of the community.'" *Id.* at 58. "The Citizens Association" while officially non-partisan, like the Club, "was a 'supplemental political organization' that would 'represent these disfranchised people.'" *Id.*

405. PENSION TASK FORCE REPORT, *supra* note 6, at 61–77.

406. *Id.* at 71–72.

407. W. James Farrell, Chairman, The Commercial Club of Chicago and R. Eden Martin, President, The Commercial Club of Chicago, Presentation to the Commercial Club of Chicago: Illinois State Finance—A Study in Failure, at 6 (Jan. 12, 2010) [hereinafter Club Meeting Presentation], available at <http://www.chicagocivic.org/initiatives/StateFinance/Remarks%20n%20Slides%20for%20Website.pdf>

408. PENSION TASK FORCE REPORT, *supra* note 6, at 68.

409. *Id.* at 70.

was politically unpalatable because “State Government couldn’t cut—and nobody could stand the thought of a tax increase.”⁴¹⁰

The Club claimed its proposal comported with the Pension Clause because of a two-page statement prepared by the law firm Sidley Austin LLP (“Sidley”).⁴¹¹ Sidley is not only a Club member, but also the firm where Mr. Martin practices law.⁴¹² In April 2010, Sidley later supplemented its analysis with an additional two-page position statement,⁴¹³ and then a more detailed narrative in early May 2010.⁴¹⁴ After the Chicago Tribune endorsed Sidley’s position in two editorials,⁴¹⁵ four other Chicago law firms signed onto Sidley’s position.⁴¹⁶ These firms are also Club members, and have other Club members as clients, including the Tribune.⁴¹⁷

410. Club Meeting Presentation, *supra* note 407, at 6. Martin further explained that “[a]s to taxes, most of us would agree that cost-cutting must be the first step. Most would agree that talking about tax increases at this stage would detract from the effort to get reforms and cuts.” *Id.* at 12.

411. PENSION TASK FORCE REPORT, *supra* note 6, at 76–77.

412. See *Members*, THE COMMERCIAL CLUB OF CHICAGO, <http://www.commercialclubchicago.org/members> (last visited Feb. 11, 2011) (listing the managing partner of Sidley Austin LLP as a member); see also *People*, SIDLEY AUSTIN LLP, <http://www.sidley.com/r-eden-martin/> (last visited Feb. 11, 2011) (listing R. Eden Martin as “Of Counsel”).

413. THE COMMERCIAL CLUB OF CHI., CHICAGO’S UNDERFUNDED PENSION PLANS: A REPORT TO THE COMMERCIAL CLUB OF CHICAGO 33–37 (2010), available at http://www.civiccommittee.org/Media/Default/pdf/Chicagos_Underfunded_Pension_Plans_FINAL.pdf.

414. Memorandum from Sidley Austin LLP on Ill. Auth. to Reduce the Pension Benefits That Current Emps. Will Earn from Future Serv. (Apr. 27, 2010), available at <http://www.illinoisenatedemocrats.com/images/pensions/C/Sidley%20Memo%2004-27-10.pdf> [hereinafter *Sidley Memo*].

415. See Editorial, *Yes You Can*, CHI. TRIB. (Mar. 27, 2010), available at http://articles.chicagotribune.com/2010-03-27/news/ct-edit-pensions0328-20100327_1_pension-plans-house-speaker-michael-madigan-illinois (referring to Sidley’s position, the Tribune opined: “Many of the pols who run Illinois blithely deflect calls to curb current employees’ pensions. They say state lawyers tell them the state constitution forbids such revisions. Unfortunately for the pols, one of the nation’s top law firms now says that’s just false.”); Editorial, *Don’t Run from a Fight*, CHI. TRIB. (Apr. 18, 2010), available at http://articles.chicagotribune.com/2010-04-18/news/ct-edit-pensions20100418_1_pension-illinois-chicago-public-schools.

416. Letter from Civic Comm., Commercial Club of Chicago (May 3, 2010), (on file with author); *Sidley Memo*, *supra* note 414 (listing Jenner & Block LLP, Mayer Brown LLP, Sonnenschein Nath & Rosenthal LLP, and Winston & Strawn LLP as endorsing Sidley’s position).

417. See *Members*, THE COMMERCIAL CLUB OF CHICAGO, *supra* note 412 (identifying one or more attorneys of Jenner & Block LLP, Mayer Brown LLP, Sonnenschein Nath & Rosenthal LLP, and Winston & Strawn as members of the Commercial Club). See, e.g., Lorene Yue, *Tribune Subpoenaed by Feds over ESOP*, CRAIN’S CHICAGO BUSINESS (Apr. 10, 2010), available at <http://www.chicagobusiness.com/article/20090410/NEWS06/200033651/tribune-subpoena-ed-by-feds-over-esop> (identifying Jenner & Block as the Chicago

According to Sidley, “compelling arguments” allowed the General Assembly to unilaterally cut the pension benefits that current employees will earn in the future without violating the Pension Clause.⁴¹⁸ Those arguments, Sidley contended, derived not only from its reading of the Clause and Convention debates, but also from Illinois court decisions, particularly the Supreme Court’s *Peters* decision and a 1979 Illinois Attorney General opinion.⁴¹⁹

Sidley also argued that even if the Clause prohibited such unilateral action, the legislature could nonetheless modify pension formulas going forward for existing employees in exchange for letting them keep their jobs or current salaries and in order to preserve the pension system.⁴²⁰ Sidley further argued in a separate statement that if a State pension fund went bankrupt, then pension recipients would have no legal recourse against the State for continued benefit payments.⁴²¹

2. *Justice Gino DiVito and the Illinois State Bar Association*

In April and May 2010, Gino DiVito, a former and highly respected Illinois Appellate Court justice, however, offered an opposing view that addressed Sidley’s position point-by-point and

Tribune’s counsel); *see also* MAYER BROWN LLP: Tax Controversy (2013), available at <http://www.mayerbrown.com/experience/Tax-Controversy/?section=additional> (identifying the Tribune Company as a client); SONNENSCHNEIN NATH ROSENTHAL LLP, <http://dentons.com> (last visited Feb. 17, 2015); WINSTON & STRAWN LLP, <http://www.winston.com> (last visited Feb. 17, 2015).

418. Sidley Memo, *supra* note 414, at 1.

[T]he Pension Clause of the Illinois Constitution (Ill. Const., art. XII, § 5) prohibits State and local governments from reducing pension benefits that employees earned in prior years, but that there are compelling arguments that State and local governments may enact legislation that will *prospectively* reduce the pension benefits that current employees will earn as a result of *future* work performed after the prospective legislation takes effect.

Id.

419. *See id.* at 8–15 (discussing Convention debates); *see also id.* at 15–18 (discussing *Peters* and the Attorney General’s 1979 other court decisions); *id.* at 17 (discussing the 1979 Illinois Attorney General opinion).

420. *Id.* at 2, 23–27.

421. Memorandum from Sidley Austin LLP on State Is Not a Guarantor of State Pension Fund Obligations to Pension Plan Members, at 1, 4, available at <http://www.johnbiver.com/wp-content/uploads/2012/03/SidleyGuarantor.pdf> (last visited Feb. 11, 2011) [hereinafter Sidley Guarantor Memo]. *See also* Memorandum from Sidley Austin LLP on The State of Ill., and the City of Chicago and Smaller Municipalities, Are Not Guarantors of the Payment of Pension Benefits (Dec. 7, 2010) (on file with author) [hereinafter Sidley Supplemental Guarantor Memo].

received the endorsement of the Illinois State Bar Association.⁴²² Justice DiVito found Sidley's argument to be "deeply flawed" and without "legal merit."⁴²³ He concluded that the Pension Clause "was clearly intended to prohibit precisely the scenario suggested by [Sidley]: that a State employee's pension rights could be diminished at some point after he enters State employment."⁴²⁴ Justice DiVito also characterized Sidley's proposal to alter the pension benefit rights through contract principles as a "charade."⁴²⁵

Because Justice DiVito's position generally supports the conclusions contained in this Article, his views are discussed only when necessary. We consider below Sidley's position beginning with the Clause's text followed by the Convention debates and relevant case law.

B. Sidley's View Is Not Supported by the Clause's Plain Language

As discussed in Part I of this Article, the Pension Clause provides that: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."⁴²⁶ Part I explained that the Clause's plain language and common meaning reveal that a public employee's membership in a pension system is a contractual and enforceable right, and there is nothing in the text to suggest that a member only has a legal interest in rights that he or she purportedly "earns" on a per day basis.

Also, the Clause prohibits unilateral action by the legislature to diminish or impair the "benefits of" membership in a pension system. The term "benefits," per its common meaning, denotes not only the specific annuity payments a public employee is eligible to

422. Memorandum from Gino DiVito & John Fitzgerald, Diminution of Pension Benefits for Current Emps. (Apr. 12, 2010) *available at* <http://www.illinois.gov/publicincludes/statehome/gov/documents/DiVito%20Memorandum.pdf> [hereinafter DiVito April Memo]; Statement of the Ill. State Bar Ass'n (Apr. 14, 2010), *available at* <http://www.illinoissenate.democrats.com/index.php/phoca-download/category/58-pensiondocs?download=287%3A04-14-2010-illinois-state-bar-association-reducing-current-pensions-is-unconstitutional>.

423. Memorandum from Gino DiVito & John Fitzgerald on Diminution of Pension Benefits for Current Emps. 1, 9 (May 5, 2010), *available at* <http://www.illinoissenatedemocrats.com/images/pensions/C/Judge%20Gino%20Devito%20Memo%2005-05-10.pdf> [hereinafter DiVito May Memo].

424. DiVito April Memo, *supra* note 422, at 3.

425. DiVito May Memo, *supra* note 423, at 7.

426. ILL. CONST. of 1970, art. XIII, § 5.

receive, but also other entitlements of membership that advantage the employee. The plain language also indicates that an employee's pension payments and other membership entitlements are "contractual" in nature and may be altered through mutual assent via contract principles. Finally, the Clause's prohibition against diminishment and impairment is cast in absolute terms. As a consequence, the Clause on its face does not support the claim that the legislature could utilize the pension system's present unfunded liabilities as a reason to cut the benefits of current employees participating in the system.

1. *Sidley's Interpretation of the Clause's Plain Language*

Sidley, however, disputes that there is "remotely" any textual basis for the position that the Clause "gives each employee a right to have pension benefits" determined by "whatever [Pension Code] formula was in effect on his or her first day of service."⁴²⁷ Sidney claims that the Clause only means that "employees have a contractual right not to be excluded from membership in a system."⁴²⁸ Sidney further claims that "it says nothing about the way in which benefits earned by future employment are to be determined."⁴²⁹ Sidney states that the "only 'benefits' of membership in a pension" system an employee possesses is the "earn[ed]" right to receive an annuity at a certain level upon reaching retirement age as a result of their service.⁴³⁰

In Sidney's view, because the "Pension Clause does not prescribe any particular formula," "a prospective [legislative] change in the formula for calculating future benefits does not 'diminish' or 'impair' benefits or otherwise violate the plain meaning of the text of the provision . . . so long as the benefits that were previously earned are not cancelled or reduced."⁴³¹ Finally, Sidney asserts that since "Illinois is facing fiscal and financial crises of great magnitude," the Pension Clause should not be interpreted "to limit or impair the ability of the Government to deliver essential services in the manner believed most efficient and appropriate" absent "clear and unmistakable evidence of such a purpose."⁴³²

427. Sidney Memo, *supra* note 414, at 6.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 7.

432. *Id.*

2. *Sidley's Interpretation Cannot Be Squared with the Clause's Plain Language and Common Meaning*

Sidley's interpretation is without support for several reasons. *First*, the Pension Clause nowhere addresses, as Sidley claims, who may be excluded from pension system membership. Sidley's suggestion that the provision only gives a public employee "a contractual right not to be excluded" is classic misdirection and a *non sequitur*.

Second, while the Pension Clause itself does not detail specific pension rights, the plain language, as noted above, states that a participant's membership in a pension system is an "enforceable contractual relationship." Unless the terms of membership specify otherwise, common sense and logic dictate that a public employee has a legal interest in his or her membership rights—including any membership terms governing how benefits are calculated—upon joining a pension system.⁴³³ The Clause itself does not countenance a contrary result.

Finally, the inclusion of the phrase "benefits of which shall not be diminished or impaired" manifests, contrary to Sidley's protests, clear evidence of the framers' intent to limit the General Assembly's power to modify pension benefit rights even in the face of a fiscal crisis. This conclusion is supported by the common dictionary definitions of the terms "benefits," "diminish," and "impair."⁴³⁴ After all, the Clause's prohibitory language contains no exceptions and is fashioned in absolute terms. Illinois courts have long construed similar constitutional provisions as disallowing exigent circumstances to dictate the interpretation of the provision unless the provision itself permits a departure from its terms.⁴³⁵

In sum, the Pension Clause's plain language reveals that an participant's benefit rights exist and are legally secured at the time of membership, and those rights cannot be unilaterally reduced or voided thereafter. Nowhere does the Pension Clause limit protection, as Sidley claims, to only "benefits that were previously earned." To reach Sidley's conclusion, the provision would need to add the word "earned" or "accrued" before the word "benefits" as is the case with the Hawaii and Michigan

433. See e.g., *Forester Wheeler Energy Corp.*, 805, N.E.2d at 694 ("It is well settled that a party's rights under a contract become 'vested' for the purposes of the retroactive application of a statute when the contract is entered into rather than when the rights thereunder are asserted.").

434. See *supra* notes 21–23 (explaining that in discerning the plain meaning of a statutory or constitutional provision, Illinois generally looks to dictionary definitions of undefined terms). *In re Detention of Bailey*, 740 N.E.2d 1146, 1156 (Ill. App. Ct. 2000).

435. *Lyle*, 195 N.E. at 453.

Constitutions.⁴³⁶

Distilled to its essence, Sidley's construction ignores the Pension Clause's plain language, defies common sense and logic, and adds limitations where none exist.⁴³⁷ Illinois courts have long explained that the judicial branch may not add limitations or exceptions where none exist.⁴³⁸ As a result, there is no strength to Sidley's argument that "the Pension Clause protects only those benefits that an employee has already earned." Because Sidley cannot point to anything either in the text or the common meaning of the terms used in the Clause to support its position, Sidley has failed to meet *its* burden that the Clause should be read in a way contrary to its natural meaning.⁴³⁹

Moreover, contrary to Sidley's suggestion, an analysis of the Clause does not involve whether Illinois intended to deviate from how ERISA protects pension benefits when it adopted the Pension Clause.⁴⁴⁰ The reason for this is simple. Congress did not pass ERISA until 1974—more than three years after the Pension Clause took effect.⁴⁴¹ The drafters, obviously, had no knowledge of what Congress would do years later. Simply put, what ERISA permits has no bearing whatsoever on discerning the intent of the drafters and the voters who ratified the Pension Clause.⁴⁴²

C. Sidley Mischaracterizes the Clause's Convention Debates

1. Summary of Sidley's Position

Sidley also argues that the Convention debates fail to address

436. *Supra* notes 74–77 and accompanying text.

437. *Accord* DiVito May Memo, *supra* note 423, at 6.

438. *See* Toys "R" Us, Inc. v. Adelman, 574 N.E.2d 1328, 1332–33 (Ill. App. Ct. 1991) (stating that a court must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute's applications, regardless of its opinion regarding the desirability of the results of the statute's operation).

439. *Coal. for Political Honesty v. State Bd. of Elec.*, 359 N.E.2d 138, 143 (Ill. 1977) (stating, "[o]ne contending that language should not be given its natural meaning understandably has the burden of showing why it should not"). The court further stated:

This is a difficult burden for one who says that language should not be given its common meaning, but it is proper it should be difficult. Individuals and bodies, as a convention or a legislature, can hardly be said to intent that language they use is to be given an opposite meaning.

Id. at 144.

440. Sidley Memo, *supra* note 414, at 5.

441. Pub. L. No. 93-406, 88 Stat. 829 (1974).

442. 2B A. SINGER & SINGER, *supra* note 90 § 51.6.

even whether the Pension Clause limits the governments' ability to reduce pension benefits.⁴⁴³ Sidley further asserts that the drafters offered no opinion on whether the Clause prohibited purely prospective modifications of benefits formulas.⁴⁴⁴ Instead, Sidley claims that the debates only speak to whether the Pension Clause requires the full funding of the pension system and immunizes pension benefits from inflation.⁴⁴⁵

In addition, Sidley also dismisses any sponsor statements that undercut its position, especially those made by Delegate Kinney, as "vague," merely "personal views," "misstated or exaggerated" views or statements that were not endorsed by other sponsors or supporters of the Pension Clause.⁴⁴⁶ Indeed, Sidley attempts to marginalize the drafters' intent by inventing a new rule of constitutional interpretation that has no basis in Illinois law: the Pension Clause cannot be read to support the position presented in this Article "unless the discussion during the debates established, with unmistakable clarity, that this was the understanding of the meaning of the Clause that was widely shared by all the delegates who voted for the Clause."⁴⁴⁷

2. *Contrary to Sidley's Understanding, the Convention Debates Confirm That the Drafters Intended to Protect Those Pension Benefit Rights Contained in the Pension Code When an Employee Joined a Pension System, and Any Later Benefit Increases*

Sidley's reading of the Convention debates is myopic. Contrary to Sidley's view, Illinois courts afford significant weight to sponsor statements when discerning the original intent and purpose of statutes and constitutional provisions.⁴⁴⁸ Illinois courts

443. Sidley Memo, *supra* note 414 at 9.

444. *Id.*

445. *Id.* at 9, 12, 13–14.

446. *Id.* at 13–14.

447. *Id.* at 8. To make this claim, Sidley relies upon the statements of Del. Witwer who said the following before voting for the pension proposal:

I am voting yes in the hope that the points which Mr. Whalen [an opponent of the proposal] has raised will be properly protected in the work of the Style and Drafting Committee and that there will be an affirmation that this does not direct or control funding. I vote yes.

Id. at 12. It is difficult to fathom how this statement offers Sidley any support because at no point did Del. Witwer dispute or reject Del. Green or Kinney's explanation of the pension rights safeguarded by the pension proposal.

448. See e.g., *Baker*, 636 N.E.2d 554–55 (stating, "[a]s with statutory construction, this court must construe a constitutional provision so as to effectuate the intent of the drafters"); *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 270–71 (Ill. 1984) (stating,

have particularly done so with respect to the Pension Clause.⁴⁴⁹ No Illinois court has adopted Sidley's novel approach that drafter statements are only worthy when they are "widely shared by all the delegates who voted for" a particular constitutional provision.⁴⁵⁰

At best, Sidley's approach reflects how federal courts use Congressional floor statements about federal legislation, which is, of course, of no import to interpreting the Illinois Constitution.⁴⁵¹ Even if Sidley's approach had some plausible appeal, the Convention record indicates that the principal sponsors, co-sponsors, and at least one delegate opposing the Clause, agreed

[t]he meaning which the delegates to the convention attached to the provision in the Constitution before sending it to the voters for ratification is relevant in resolving ambiguities which may remain after consulting the language of the provision . . . [T]he court is not justified in relying upon arguments against a proposed constitutional amendment 'as seen by the minority,' to determine its meaning after adoption. A precedent so holding would be mischievous in the opportunity it would afford a minority to frustrate the purpose of the [constitutional convention] and the voters");

Drury v. Cnty. of McLean, 433 N.E.2d 666, 669 (Ill. 1982) (stating,

[g]enerally, the rules of statutory construction are applicable to the construction of a constitutional provision. We have previously acknowledged that in construing the Constitution the true inquiry concerns the underlying meaning of its provisions by the voters who adopted it. However, the practice of consulting the debates of the members of the convention which framed the constitution has long been indulged in by courts in determining the meaning of provisions which are thought to be doubtful. The debates, therefore, aid in determining the intent of the drafters of the Constitution.).

See also *Spinelli v. Immanuel Evangelical Lutheran Congregation, Inc.*, 494 N.E.2d 196, 200 (Ill. App. Ct. 1986) ("statements by the sponsor of the legislation are especially significant [in discerning legislative intent] 'since legislators look to the sponsor . . . to be particularly well informed about its purpose, meaning, and intended effect'" (quoting, in part, 2A A. SINGER & SINGER, *supra* note 90 § 48.15)).

449. See e.g., *Skłodowski I*, 695 N.E.2d at 379 (quoting Del. Kinney's floor statements); *McNamee*, 672 N.E.2d at 1162–66 (relying on and quoting from Dels. Green and Kinney's floor statements); *Felt*, 481 N.E.2d at 700 (quoting or referring to both Dels. Green and Kinney's floor statements); *People ex rel. IFT v. Lindberg*, 326 N.E.2d 749, 752 (Ill. 1975) (quoting or referring to both Dels. Green and Kinney's floor statements); *Kraus*, 390 N.E.2d at 1288–89 (referring to statements from Dels. Green and Kinney).

450. Sidley Memo, *supra* note 414 at 8.

451. See 2A SINGER & SINGER, *supra* note 90, § 48:13, at nn.14, 15 (stating, "[f]loor statements made by individual members of Congress have limited value in interpreting the intent of Congress as a whole. Now, the federal courts hold that statements by any members during legislative debates may be considered in the interpretation of a statute where they show a common agreement in the legislature about the meaning of an *ambiguous* provision") (emphasis added).

that the provision barred the legislature from eliminating or reducing an employee's pension benefit rights after the person entered service.⁴⁵²

As detailed in Part I of this Article, the above understanding reflects the objective of public employee groups that successfully lobbied for the Clause's inclusion in the 1970 Constitution.⁴⁵³ That understanding also reflects the view of the Pension Laws Commission, which tried on two occasions to alter the Clause

452. 4 PROCEEDINGS, *supra* note 53, at 2931. Del. Green stated:

[w]hat we are trying to merely say is that if you mandate the public employees in the state of Illinois to put in their 5 percent or 8 percent or whatever it may be monthly, and you say when you employ these people, "Now if you do this, when you reach sixty-five, you will receive \$287 a month," that is in fact, is what you will get.

Id. Del. Kinney stated,

[b]enefits not being diminished really refers to this situation: If a police officer accepted employment under a provision where he was entitled to retire at two-thirds of his salary after twenty years of service, that could not be subsequently changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing. That is the thrust of the word "diminished."

Id. at 2929. The Pension Clause, "is simply to give them [public employees] a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them." *Id.*

All we are seeking it to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should not be less than \$100 a month in 1990.

Id. at 2931–32. Del. Lyons, a cosponsor, agreed with Del. Kinney's remarks about the scope of the pension clause. *Id.* at 2929. Del. Peccarelli, a cosponsor, stated,

If I were as knowledgeable as Delegate Green, as scholarly as Delegate Kinney, or the orator as Delegate Kemp, I would say all the things that they have said. Being none of those three things, I would just ask you to take what they have said and consider it and emphasize what they have said and ask that you vote for the amendment.

Id. However, Del. Elward, an opponent of the Clause, stated,

[w]hat about the words "impairment" or "diminishing"? Supposing the General Assembly decides they want to cut the benefit for a surviving widow of a policeman in order to increase the benefits of the minor children? Under this constitutional amendment that might well be prohibited . . . [w]hat you are saying is that the present structure—which admittedly is not identical in each fund and which is surely far from ideal in terms of justice and charity—the present structure is to be frozen in for all time to come.

Id. at 2927–28.

⁴⁵³ *Supra* notes 86–115 and accompanying text.

before the Convention adjourned.⁴⁵⁴ The Commission's attempts, as discussed, were rejected by Convention delegates as the Commission itself reported to the General Assembly. These failed efforts demonstrate that the drafters were cognizant of the Clause's broad limitation on legislative power, and intended to immunize pension benefit rights from any adverse unilateral action by the General Assembly. Further, it was this same understanding of the Clause that was communicated to Illinois voters when they ratified the new Constitution.⁴⁵⁵

The fact that the principal sponsors may have not articulated their intent in the way Sidley prefers is mere equivocation on Sidley's part. It is hardly a compelling basis by which to discredit the framers' expressed views. In short, there is no force to Sidley's statement that only Delegate Helen Kinney expressed the view that the Pension Clause bars reductions in pension benefits after an employee began employment.

The same is true of Sidley's claim that Delegates Green and Kinney did not share each other's views on this point. Sidley claims that the principal sponsors were not of the same mind because Delegate Kinney at one point stated that "Mr. Green's interest in this matter is a little different than mine."⁴⁵⁶ Again, Sidley misses the mark. Both delegates shared the same goal of protecting pension benefits in the same manner, but were motivated by different public employee groups to do so.

Delegate Kinney, as discussed in Part I, made this statement in reference to why she was motivated to sponsor the pension proposal.⁴⁵⁷ As noted above, Delegate Green, a community college official from Urbana,⁴⁵⁸ sponsored the constitutional provision because of concerns raised by university employees, while Delegate Kinney, a former DuPage County state's attorney,⁴⁵⁹ was prompted to do so by the concerns of police and firemen.⁴⁶⁰

As the discussion in Part I of this Article shows, there is no evidence of original intent supporting Sidley's interpretation whatsoever. Illinois courts have long stated that an interpretation of this sort lies beyond a constitutional provision's scope,⁴⁶¹

454 *Supra* notes 187–99 and accompanying text.

455. *Supra* notes 200–16 and accompanying text.

456. Sidley Memo, *supra* note 414, at 14.

457. *Supra* notes 126, 145–46, 160 and accompanying text.

458. 1 PROCEEDINGS, *supra* note 117, at 899 (convention biography of Del. Green).

459. *Id.* at 892 (convention biography of Del. Kinney).

460. See 4 PROCEEDINGS, *supra* note 53, at 2925–26 (containing the opening statements of Dels. Green and Kinney regarding the pension proposal).

461. *Wolfson*, 126 N.E.2d at 710 (stating,

[i]n seeking such intention courts are to consider the language used, the object to be attained, or the evil to be remedied. This may involve

especially where that interpretation narrowly construes a constitutional guarantee.⁴⁶² Accordingly, Sidley's reading of the Clause's Convention debates lacks merit because it cannot be squared with the Clause's purpose and accepted understanding at the time of the Convention.

D. Illinois Court Decisions Categorically Reject Sidley's Interpretation of the Pension Clause

Sidley argues that even if the Pension Clause's plain language and Convention history do not support its view, the Illinois Supreme Court's 1974 decision in *Peters v. City of Springfield* provides sufficient grounds for its interpretation.⁴⁶³ In fact, Sidley claims that *Peters* already decided the very issue now being debated in its favor.⁴⁶⁴ To support this conclusion, Sidley paraphrases a passage from *Peters*:

[T]he delegates' debate on the Pension Clause establishes only 'a general intent to protect the pension benefits of public employees' and that the 'purpose and intent of the constitutional provisions' is limited to 'insur[ing] that pension rights of public employees *which had been earned* should not be diminished or impaired.'⁴⁶⁵

Indeed, Sidley repeats the phrase "had been earned" throughout its position statement as a means to prove up its interpretation.⁴⁶⁶ Sidley also relies upon a 1979 Illinois Attorney General opinion construing *Peters*.⁴⁶⁷ Sidley further states that *Peters* has not been overruled by the Illinois Supreme Court and later court decisions contrary to Sidley's view are distinguishable.⁴⁶⁸

As detailed below, Sidley's argument fails because the *Peters* decision does not stand for the proposition Sidley suggests, and

more than the literal meaning of words. That which is within the intention is within the statute, though not within the letter, and, though, within the letter, it is nevertheless not within the statute if not likewise within the intention. The same general principles to be applied in construing statutes apply in the construction of constitutions.

(quoting *Peabody v. Russel*, 134 N.E. 148, 149 (Ill. 1922)).

462. *Id.* "A constitutional guaranty should be interpreted in a broad and liberal spirit. Courts should not apply to strict a construction as to exclude its real object and intent." *Id.*

463. Sidley Memo, *supra* note 414, at 14–22.

464. *Id.* at 14. "[T]he same argument that Judge DiVito now makes was rejected by the Illinois Supreme Court in *Peters v. City of Springfield*." *Id.* (citing *Peters*, 311 N.E.2d at 107).

465. *Id.* at 16.

466. *Id.* at 14, 15, 16, 17, 20.

467. *Id.* at 17.

468. *Id.* at 16.

because both the Illinois Supreme Court and Appellate Court have clarified the scope of the *Peters* decision. The more cogent inquiry is how Illinois courts have construed that decision, not as Sidley claims whether the Illinois Supreme Court has rejected Sidley's reading of *Peters* in terms Sidley finds acceptable.

In particular, the Illinois Appellate Court rejected the same argument Sidley now makes in *Kraus*. *Kraus* both clarified the holding in *Peters* and concluded that the Pension Clause "prohibits legislative action which directly diminishes the benefits to be received by those who became members of the pension system prior to the enactment of the legislation, though they are not yet eligible to retire."⁴⁶⁹ *Kraus*, as an Illinois Appellate Court decision, is the law of this State until the Illinois Supreme Court says otherwise. In *Felt*, *Buddell*, and later decisions, the Illinois Supreme Court has endorsed *Kraus* and its reasoning. Accordingly, Sidley's position is unpersuasive. Our discussion below begins with the *Peters* decision.

1. *Peters Does Not Advance Sidley's Position*

As discussed in Part II of this Article, the Illinois Supreme Court in *Peters* considered whether the Pension Clause protected from unilateral modification a mandatory retirement age provision affecting firemen contained in the Illinois Municipal Code, not the Pension Code. The court held that the provision was beyond the Clause's scope and the upheld the modification.

Sidley contends, however, that *Peters* "rejected the claim that the Pension Clause gave a fireman the right to work up to the 'minimum retirement age provided by law at the time he enters the [retirement] system.'"⁴⁷⁰ Sidley further contends that *Peters* held that the "Clause protects only previously earned benefits."⁴⁷¹ From these contentions, Sidley posits that *Peters* allows "prospective changes in the law that reduce the benefits that could be earned in the future" without violating the Pension Clause.⁴⁷²

a. *Peters* Offers Little Guidance on Whether the Legislature May Cut the Pension Benefit Rights of Current Employees

Sidley's reading of *Peters* falters because the Supreme Court was simply not confronted with a Pension Code change that directly reduced the pension benefits ultimately received by current employees. Rather, *Peters* involved a change in an

469. *Kraus*, 390 N.E.2d at 1292–93.

470. Sidley Memo, *supra* note 414, at 16.

471. *Id.*

472. *Id.* at 16–17.

employment condition for firemen found in the Municipal Code, not a change to the Pension Code applicable to the firemen.

Indeed, the trial court itself explained, the “narrow question posed by this case is whether the law stating the retirement age in effect at the time an employee comes within a pension system is part of the pension contract so it may not be changed as to him during his service even if not found in the pension act itself.”⁴⁷³

The appellant similarly framed the issue to the Supreme Court as “whether the trial court correctly construed Section 5, Article XIII” of the Illinois Constitution.⁴⁷⁴ Also, no party in *Peters* advocated in its Supreme Court briefs that the Clause secures only pension rights earned on a per day basis.

Peters, as with any judicial decision, must be read within the context of the case before the court.⁴⁷⁵ Since the court was not confronted with a Pension Code change, *Peters* offers no guidance on whether the Clause would allow the legislature to cut the pension benefit rights of current employees contained in the Code. To conclude otherwise would be illogical, especially since the Illinois Supreme Court only a year before *Peters* declared that a public employee’s “right to a pension depends entirely upon the provisions of the [Pension] Code which provide for the pension.”⁴⁷⁶

Moreover, if Sidley’s reading of *Peters* were correct, then the decision would cause the Pension Clause to provide less protection to pension benefits than the level of protection afforded to optional pension plans under the 1870 constitution.⁴⁷⁷ Such a result would be perverse and contrary to the Clause’s original intent as previously discussed in Part I of this Article.⁴⁷⁸

473. Abstract of Record, Letter Announcing Circuit Court’s Decision at 24, *Peters*, 311 N.E.2d 107 (No. 45766) (emphasis added).

474. Brief for Defendants-Appellants City of Springfield and Amicus Curiae, Illinois Municipal League at 2, *Peters v. City of Springfield*, 311 N.E.2d 107 (Ill. 1974) (No. 45766).

475. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 855 (Ill. 2005) (explaining that “[a] judicial opinion is a response to the issues before the court, and these opinions, like others, must be read in the light of the issues that were before the court for determination”); *see United States v. Mitchell*, 271 U.S. 9, 14 (1926) (stating that “[i]t is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered”); *Somers v. Quinn*, 867 N.E.2d 539, 545–46 (Ill. App. Ct. 2007) (holding that “[a] judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy”).

476. *Peterson v. Bd. of Trs.*, 296 N.E.2d 721, 724 (Ill. 1973).

477. Comment, *supra* note 34, at 442.

478. *See supra* notes 86–216 and accompanying text (discussing the Illinois Constitutional Convention’s findings on the issue).

b. *Peters* Is Best Understood as Reaching a Narrow Result and Reserving the Question of When Pension Benefit Rights Vest for Another Day

Finally, the most plausible reading of *Peters* is that it merely declared a narrow result: a change in mandatory retirement age not specified in the Pension Code lies beyond the Pension Clause's protection.⁴⁷⁹ Also, *Peters* is best understood as leaving open the question of when pension benefits "vest" or are "earned."⁴⁸⁰ This conclusion stems from a careful comparison of the court's opinion with the position outlined by the City of Chicago in its amicus curiae brief.

The City of Chicago argued that the court should reverse the trial court decision because New York cases held that changes in salary and employment conditions lacked constitutional protection as "pension benefits,"⁴⁸¹ and because the Pension Clause does not cover "change[s] in employment conditions or salary" that are "independently justifiable" and have "secondary effects on pensions."⁴⁸² The court embraced both propositions in its opinion.⁴⁸³

The *Peters* opinion also mirrors the City of Chicago's

479. Comment, *supra* note 34, at 452–53, 457.

480. DiVito May Memo, *supra* note 423, at 2.

481. Brief of the City of Chicago, Amicus Curiae, at 11, *Peters v. City of Springfield*, 311 N.E.2d 107 (Ill. 1974) [hereinafter Brief of the City of Chicago, Amicus Curiae] (stating that "[t]he language [of the New York Constitution] is almost identical to Article XIII, Section of the Illinois Constitution"). The New York provision has been in effect and subject to judicial interpretation since 1940. *Id.* The New York Court of Appeals has held that a reduction in salary, even though it ultimately had an adverse effect on the plaintiff's pension benefits, did not violate the New York Constitution. *Hoar v. City of Yonkers*, 67 N.E.2d 157, 159 (N.Y. 1946). Other New York courts have followed *Hoar*, holding that a municipal employee's salary is not a pension "benefit," and that such a salary may be constitutionally diminished even if this has some effect on pensions. *Doyle v. Wright*, 108 N.Y.S.2d 473 (N.Y. Sup. Ct. 1951). Changing other conditions of employment is also not considered to be impairment of pension benefits in violation of the New York Constitution (citations to other New York cases omitted).

482. Brief of the City of Chicago, Amicus Curiae, *supra* note 481, at 12.

483. *Peters*, 311 N.E.2d at 112. The court explained that:

[m]unicipal employment is not static and a number of factors might require that a public position be abolished, its functions changed, or the terms of employment modified. Although this court has not previously considered the nature of the 'enforceable contractual relationship' contemplated by section 5 of article XIII, a similar provision is contained in the Constitution of New York and has been construed by the courts of that State . . . [The Pension Clause] was not intended, and did not serve, to prevent the defendant City from reducing the maximum retirement age, even though the reduction might affect the pensions which plaintiffs would ultimately have received).

description of the Convention debates as “unclear,” and as only providing “some general notion that [the provision] would help pensioners, but they formulated no standard for the legislature or home rule units to use when making pension policy.”⁴⁸⁴ The City of Chicago further claimed that there was uncertainty as to when and under what legal theory courts should use to determine the vesting of pension benefits under the Clause.⁴⁸⁵

The City of Chicago then suggested that the court examine the issue at length “and in light of other states with similar pension problems.”⁴⁸⁶ To that end, Chicago further suggested that “it is undesirable [for the court] to decide these questions [regarding vesting] perfunctorily,” and that the court “should await the appropriate case in which it is properly raised.”⁴⁸⁷

Given *Peters*’s murky language that the Clause protects pension rights “which had been earned,” the court undoubtedly heeded Chicago’s suggestion. The Illinois Supreme Court appeared to confirm this point a year later in its *Lindberg* decision when it stated that “the character of public-employee pension programs [as under the “contract view” or otherwise] has not been definitely

484. Compare Brief of the City of Chicago, Amicus Curiae, *supra* note 481, at 13, with *Peters*, 311 N.E.2d at 112 (stating that “[t]he debate on the provision indicates a general intent to protect the pension benefits of public employees, but, other than concern that vested rights not be defeated by reason of the failure to provide necessary funding, reflects uncertainty as to the scope of the restriction which the section imposed on legislative bodies”).

485. The Amicus Brief of the City of Chicago states:

[i]f retirement age were labeled [sic] a pension benefit or right, it would be difficult to determine when such a right vested. There are two conflicting lines of pension cases in Illinois, which are discussed at length in Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of the Employees’ Rights*, U. OF ILL. L.F. 32, [written by] professor of law at the University of Illinois and a member of the Illinois Public Employees Pension Laws Commission. These pension cases present very difficult problems concerning a public employee’s rights in his “pension benefits.” The operation of these rights, such as when the right to a pension benefit vests, have not been discussed at length here. The theory to be applied in Illinois under Article XIII Section 5 should be examined at length, and in light of the experience of other states with similar pension problems. (Many informative cases in this area are collected in Annotation Vested Right of Pensioner, 52 A.L.R.2d 437 (1957)). The public policy considerations, as discussed in Professor Cohn’s article, are of growing importance in a time of unsettled economic conditions. However, it is undesirable to decide these questions perfunctorily. This, the Court’s interpretation of the effect at Art. XIII, Sec. 5 should await the appropriate case in which it is properly raised.

Brief of the City of Chicago, Amicus Curiae, *supra* note 481, at 13–14.

486. *Id.* at 13.

487. *Id.* at 14.

established.”⁴⁸⁸

2. *Sidley’s Reliance on the Attorney General’s 1979 Opinion Is Misplaced*

Sidley attempts to bolster its view of *Peters* by relying upon a 1979 Illinois Attorney General opinion.⁴⁸⁹ Sidley goes so far to claim that “*Peters* led” the General Assembly to “enact” a Pension Code change in “1978” that “prospectively reduce[d] pension benefits by excluding some of the compensation received during an employee’s final year of service from the calculation of his or her pension benefits.”⁴⁹⁰ Sidley, in turn, states that the Attorney General opined that the legislation, per *Peters*’s instruction, was “constitutional notwithstanding the facts that it ‘may result in lower pension for some employees than they would have received otherwise’ and that the statute applies to employees who were members of the pension system before the statute was passed.”⁴⁹¹ Sidley further states “the Attorney General reasoned that, under *Peters*, the Pension Clause protects only those pension rights ‘which had been [previously] earned’ and this statutory provision did not affect pension benefits earned prior to the enactment of the statute.”⁴⁹²

Sidley’s reliance on the Attorney General opinion is unsound for several reasons. To begin with, there is no evidence that the legislature was prompted by *Peters*, as Sidley claims, to enact the purported Pension Code change addressed in the Attorney General’s opinion. As the Senate sponsor of the bill explained, the bill was a “housekeeping, clean-up type” measure that made multiple Pension Code changes.⁴⁹³ The sponsor at no point mentioned the *Peters* decision.

Also, an Attorney General opinion does not have the force and effect of law, and only a well-reasoned opinion serves as persuasive authority.⁴⁹⁴ The opinion is hardly well reasoned. Not only does it lack a detailed analysis of the Pension Clause, but the opinion also admits that the *Peters* court did not “settle” the issue of *when* pension benefits are constitutionally secured, which is the linchpin of Sidley’s entire analysis.⁴⁹⁵ Rather, as the Attorney

488. *Lindberg*, 326 N.E.2d at 752 (citing favorably Cohn, *supra* note 30).

489. Memorandum from Sidley Austin, LLP, *supra* note 414, at 17.

490. *Id.*

491. *Id.*

492. *Id.*

493. 80th Ill. Gen. Assem., Reg. Sess., at 208 (June 24, 1977) (statement of Robert J. Egan, Senator, on H.B. 1872, Public Act 80-841).

494. *Sparks & Wiewel Constr. Co. v. Martin*, 620 N.E.2d 533, 541 (Ill. App. Ct. 1993).

495. *Pensions: Effect of Pension Code Revisions on Vested Rights*, No. S-1407, Op. Atty. Gen. Ill., at 7 (Jan. 10, 1979).

General puts it, *Peters* “seems . . . to interpret the constitutional provision less stringently than [Delegate] Kinney in the Convention.”⁴⁹⁶

While Sidley is correct that the opinion ultimately favors Sidley’s view, the Attorney General’s reasoning is based solely on an assumption of what *Peters* “seems” to say, and not on what *Peters* was asked to decide,⁴⁹⁷ let alone the Clause’s plain language, Convention debates and history. In short, the opinion violates “Lesson Number One,” as the Illinois Supreme Court instructed, that “general language in a [judicial] opinion must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language.”⁴⁹⁸

In addition, the Attorney General’s opinion neither discusses, nor can be squared with the Illinois Supreme Court’s 1978 decision in *Kerner v. State Employees’ Retirement System*, where the court held that the “contractual relationship” protected by the Pension Clause is the terms of the Pension Code in effect when the person becomes a member of the retirement system.⁴⁹⁹

We need not dwell further on the import of the Attorney General’s opinion because four months after its issuance it became legally irrelevant. In May 1979, the Illinois Appellate Court issued its decision in *Kraus*.⁵⁰⁰ *Kraus* both clarified the holding in *Peters* and concluded that the Pension Clause “prohibits legislative action which directly diminishes the benefits to be received by those who became members of the pension system prior to the enactment of the legislation, though they are not yet eligible to retire.”⁵⁰¹ Contrary to Sidley’s protests, *Kraus*, as an Appellate Court decision, is the law of this State until the Illinois Supreme Court says otherwise.⁵⁰²

As detailed below, the Illinois Supreme Court has not said otherwise, but rather endorsed *Kraus* on multiple occasions, all of which render Sidley’s view incorrect. While Sidley may find solace in believing that the Illinois Supreme Court has not rejected its view of *Peters* in terms Sidley would accept, that viewpoint fails to resolve the issue at hand given *Kraus*’ broad acceptance.

496. *Id.* at 7–8.

497. *See* Blount v. Stroud, 904 N.E.2d 1, 15 (Ill. 2009) (explaining that even if a decision contains broad language, “the precedential scope of our decision is limited to the facts that were before us”).

498. *See* Rosewood Care Ctr. v. Caterpillar, 877 N.E.2d 1091, 1098 (Ill. 2007) (“Lesson Number One in the study of law is that general language in an opinion must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language.”).

499. *Kerner*, 382 N.E.2d at 247.

500. *Kraus*, 390 N.E.2d 1281.

501. *Id.* at 1292–93.

502. *People v. Carpenter*, 888 N.E.2d 105, 111–12 (Ill. 2008).

3. *The Appellate Court's Kraus Decision Displaces Sidley's Position*

Sidley admits in its analysis that *Kraus* rejects its position, but attempts to marginalize the decision because it is “not a Supreme Court case” and because Illinois courts have only purportedly “approved aspects of *Kraus*,” not “all of [its] reasoning.”⁵⁰³ Again, as noted above, Sidley’s reasoning is backwards and without merit because Appellate Court decisions are the law of this State until the Illinois Supreme Court says otherwise.⁵⁰⁴ Also, as Justice DiVito observed in his analysis, Sidley can point to no instance where the Supreme Court has disagreed with *Kraus*.⁵⁰⁵

If anything, Illinois court decisions since *Kraus* have either adopted or acted consistent with *Kraus*’s Pension Clause analysis.⁵⁰⁶ For example, one month after *Kraus* was decided, the Appellate Court in *Ziebell v. Board of Trustees Police Pension Fund of the Village of Forest Park*, concluded, per *Kraus* and Delegate Green’s Convention statements, that the Pension Clause eliminated the distinction between mandatory and optional retirement plans under Illinois law.⁵⁰⁷ *Ziebell* further found that the Clause established that pensions derived from contributions to either type of plan were a “contractual arrangement . . . binding the government to fulfill its agreement.”⁵⁰⁸ From these propositions, *Ziebell* held that the Clause protects statutory increases in pension benefits only where an employee makes contributions to a pension system after the statutory change takes effect.⁵⁰⁹ *Ziebell* explained that allowing an employee to receive a benefit increase without paying the required contribution to the pension system was tantamount to “an unconstitutional expenditure of public funds for a private purpose.”⁵¹⁰

503. Sidley Memo, *supra* note 414, at 21.

504. *Kraus*, 390 N.E.2d at 1292–93.

505. DiVito April Memo, *supra* note 422, at 5.

506. See DiVito April Memo, *supra* note 422, at 5 (noting that a “series of cases postdating the Attorney General’s Opinion . . . have consistently invalidated amendments to the Pension Code where the result is to diminish benefits”); DiVito May Memo, *supra* note 423, at 2–3 (stating that Sidley Austin “identifies no Illinois Supreme Court decision that disagrees with *Kraus* in any relevant respect”).

507. *Ziebell*, 392 N.E.2d at 105–06.

508. *Id.* at 106.

509. *Id.* at 105–06.

510. *Id.* at 106. *Ziebell*’s conclusion that a pension participant must pay for benefit increases via contributions to the pension system mirrors how both Illinois courts and the Illinois Attorney General approached this issue under the 1870 Illinois Constitution. See, e.g., *Gorham v. Bd. of Trs.*, 190 N.E.2d 329 (Ill. 1963) (upholding statute permitting retired teachers to purchase a pension benefit increase by electing to contributing an additional sum to the

In 1981, the Illinois Supreme Court favorably cited *Kraus* for the proposition that even before the Pension Clause, “The legislature had no power to diminish or repeal [the pension benefits under an optional plan], and a participant was entitled to a pension based on the status of the plan at the time he began his contributions.”⁵¹¹

In 1982, the Appellate Court in *Kuhlmann v. Board of Trustees of the Police Fund of Maywood*,⁵¹² again relied on *Kraus* as well as *Ziebell* to fashion the following rule regarding the Clause’s scope:

[A]ny alteration of the pension system amounts to a modification of the existing contract between the State (or one of its agencies) and all members of the pension system, whether employees or retirees. A member is contractually protected against a reduction in benefits. By the same token, a member cannot take advantage of a beneficial pension change without providing consideration for the contractual modification. This consideration most often takes the form of new or continued contributions to the pension system.⁵¹³

Based on this framework, *Kuhlmann* made two holdings. *First*, a police officer placed on disability was constitutionally entitled to a pension at the salary level in place when he retired, not the lower salary level later enacted by the legislature because the higher salary level was part of the Pension Code when he joined the pension system.⁵¹⁴ *Second*, the police officer was not

pension system, and reviewing cases); *People ex rel. Schmidt v. Yerger*, 172 N.E.2d 753 (Ill. 1961) (holding that the legislature could not increase pension benefits to firemen who retired prior to the effective date of a benefit increase under the public funds clause of the 1870 Illinois Constitution); No. 81, 1960 Op. Ill. Atty. Gen. Ill. 146, 151 (reviewing case law and opining that a retired employee may receive an increase in pension benefits if he or she returns to service and makes the required contributions or remains retired but makes an additional contribution to the pension fund). It should be noted that the Illinois Supreme Court also upheld statutes providing pension payment increases to retirees and widows of public officials and employees without additional contributions so long as a moral obligation existed and the increased payments were made from general tax revenues, *not* pension system funds. *Voight v. Bd. of Educ.*, 108 N.E.2d 426, 429 (Ill. 1952).

511. *Arnold*, 417 N.E.2d at 1027 (emphasis added).

512. *Kuhlmann v. Bd. of Trs.*, 435 N.E.2d 1307, 1310–12 (Ill. App. Ct. 1982). *Accord* *Greves v. Firemen’s Pension Fund*, 498 N.E.2d 618, 620 (Ill. App. Ct. 1986) (finding that under the Pension Clause, “a participant is entitled to a pension based on the status of the system when his rights in the system *vested*, either at the time he [i.e., the employee] entered the system or in 1971, when the Illinois Constitution became effective, whichever is later.”) (emphasis added).

513. *Kuhlmann*, 435 N.E.2d at 1311.

514. *Id.* at 1311–12.

constitutionally entitled to a later statutory increase in his salary formula because the officer never made the required pension contribution to the system after the increase became law.⁵¹⁵ The officer was on disability when the enhancement became law and made no system contributions while on disability.

The rule *Kuhlmann* has been, in turn, adopted by the Appellate Court on at least nine occasions as the governing legal framework for determining whether or not an employee was constitutionally entitled to statutory pension benefit increases or protected from benefit decreases under the Clause.⁵¹⁶ The Illinois Supreme Court, moreover, has favorably cited at least one of the post-*Kuhlmann* decisions as well as *Kraus* as settled law.⁵¹⁷

Also, the Supreme Court has adopted the same legal

515. *Id.*

516. See *Redding v. Bd. of Trs.*, 450 N.E.2d 763, 764–65 (Ill. App. Ct. 1983) (holding based on *Kraus* and *Kuhlmann* that police officer was constitutionally entitled to retire under the Pension Code provisions in effect as of 1971, the year the Constitution took effect, and not a Code provision passed by the legislature after the officer entered the system, but before he became eligible to retire); *Taylor v. Bd. of Trs.*, 466 N.E.2d 1075, 1077–78 (Ill. App. Ct. 1984) (citing *Kraus*, holding that a local pension fund acted improperly and in violation of the Pension Clause when it attempted to add more conditions to a police chief's pension benefits after he had entered the system); *Taft v. Bd. of Trs.*, 479 N.E.2d 31, 35–36 (Ill. App. Ct. 1985) (citing *Kuhlmann* and *Kraus*, holding that the repeal of a Worker's Compensation Act provision that required employee pension benefits to be reduced by workers compensation payments constituted a constitutionally protected increase in benefits for individuals who made contributions to the system after the repeal took effect; also holding that when the legislature later re-enacted the same Worker's Compensation Act provision employees who had made system contributions prior to the re-enactment could not have the pension benefits reduced if they later received workers compensation benefits); *Gualano v. City of Des Plaines*, 487 N.E.2d 1050, 1051–53 (Ill. App. Ct. 1985) (citing *Kuhlmann*, *Kraus*, and *Ziebell* and coming to the same holdings as in *Taft*); *Carr v. Bd. of Trs.*, 511 N.E.2d 142, 144 (Ill. App. Ct. 1987) (citing *Kraus*, *Kuhlmann*, *Taft*, and *Gualano* and reaching the same holdings *Taft* and *Gualano*); *Fenton v. Bd. of Trs.*, 561 N.E.2d 105, 109–11 (Ill. App. Ct. 1990) (citing *Kraus*, *Gualano*, *Taft*, and *Carr* and holding that the trial court did not error when it awarded an employee disability pension benefits without a reduction in payments received under Workers Compensation Act); *Schroeder*, 579 N.E.2d at 999–1001 (Ill. App. Ct. 1991) (citing *Kraus*, *Kuhlmann*, *Taft*, *Gualano*, and *Carr* and holding the same as *Taft*); *Hannigan v. Hoffmeister*, 608 N.E.2d 396, 402–03 (Ill. App. Ct. 1992) (citing *Taft*, *Gualano*, and *Carr* and holding that university employee's pension benefits could be offset by amounts he received under the Workers Compensation Act because the setoff provisions were always a part of the Pension Code while the employee was a member of the system, the setoff provisions were never repealed unlike in *Taft*, *Kuhlmann*, *Gualano*, *Carr* and *Fenton*); *Disabato v. Bd. of Trs.*, 674 N.E.2d 852, 859 (Ill. App. Ct. 1996) (citing *Felt* and *Kraus*).

517. See *McNamee*, 672 N.E.2d at 1165 (citing *Kraus* and *Schroeder* for the proposition that “the appellate court has also invalidated amendments to the Pension Code only where the result was to diminish benefits”).

framework,⁵¹⁸ as have the Illinois Appellate Court and a federal district court during the last ten years.⁵¹⁹ In sum, Sidley's "disagreement" with *Kraus*' interpretation of the Clause is not an isolated affair, but rather fundamentally at odds with the well-accepted framework Illinois courts use to analyze Pension Clause violations. Sidley's view simply cannot be squared with the fact that under the Pension Clause a participant in a pension system is entitled to a pension based on the status of the system at the time he or she entered the system as well as enhancements added during his or her term of service.⁵²⁰

4. *The Illinois Supreme Court's Felt and Buddell Decisions Offer Sidley No Refuge*

As a final attempt to salvage its reading of the Pension Clause, Sidley turns to the Illinois Supreme Court's *Felt* and *Buddell* decisions.⁵²¹ Neither case, however, advances Sidley's cause. Both cases confirm what has already been said throughout this Article about the scope of the Pension Clause—the legislature lacks the power to unilaterally cut the pension benefit rights of current employees—even through self-described "comprehensive prospective pension reform legislation."⁵²²

518. *DiFalco*, 521 N.E.2d at 925. The framework provides:

After the effective date of the [1970] Constitution, 'the contractual relationship' [under the Pension Clause] is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system. Therefore, in determining plaintiff's rights under the Pension Code, we must look to the language of the relevant statutes in effect . . . when plaintiff began paying into the system.

Id. *Skłodowski I*, 695 N.E.2d at 377. "This court has held that the contractual relationship [under the Pension Clause] is governed by the actual terms of the Pension Code at the time the employee became a member of the pension system." *Id.*

519 See generally *Miller*, 771 N.E.2d 431 (Ill. App. Ct. 2002) (citing *Skłodowski*, *Felt*, *Hannigan*, *Taft*, and *Kraus*, and outlining the legal framework); see also *In re Marriage of Menken*, 778 N.E.2d 281, 284 (Ill. App. Ct. 2002) (citing *Skłodowski*, the court stated that the Pension Clause's "contractual relationship is governed by the terms of the [Pension] Code at the time the employee becomes a member of the pension system"); *Bosco v. Chi. Transit Auth.*, 164 F. Supp. 2d 1040, 1055–56 (N.D. Ill. 2001) (citing *Kraus* and *Skłodowski* and stating that "a participant [in a pension system] is entitled [under the Pension Clause] to a pension based on the status of the system when his rights in the system vested, either at the time he entered the system or in 1971 when the 1970 Constitution became effective, whichever is later").

520. *Greves*, 498 N.E.2d at 620.

521. Sidley Memo, *supra* note 414, at 18–20.

522. *Id.* at 18–19, 22.

a. *Felt* Supplies No Basis for Sidley's View

As discussed, *Felt* involved a unilateral Pension Code change to the salary basis used to calculate the pension benefits of sitting judges from a judge's salary on the last day of service to a one year average of the judge's final salary. The Supreme Court invalidated the statutory change because it violated not only the Pension Clause based on its plain language, Convention debates, and analogous New York cases,⁵²³ but also the Illinois Constitution's Contracts Clause per the court's 1961 decision in *Bardens*.⁵²⁴ Finally, the *Felt* court explained that only by ignoring the Clause's plain language, rejecting guiding New York cases, and overruling *Bardens* could the court accept the Attorney General's argument that the legislature had the power to reduce pension benefits.⁵²⁵

Sidley claims, however, that

Felt did not hold that prospective changes in pension benefit formulas are *per se* invalid. Rather, it applied a balancing test in which it compared the 'severity of the impairment' with the purpose served by legislation to determine whether the legislation was an unconstitutional impairment of a contract rather than a 'reasonable exercise of the police power.'⁵²⁶

Sidley further claims that the statute in *Felt* was invalidated because there "was no substantial evidence that early retirement of judges" caused the underfunding problem or that the legislation would reduce the State's present and future liabilities.⁵²⁷ Sidley also points to the court's recognition that the "legislature has an undeniable interest and responsibility in ensuring the adequate funding of State pension systems."⁵²⁸ Sidley finally argues that *Felt* could have declared the statute unconstitutional under Article VI, Section 14 of the Illinois Constitution, which (ironically) provides that judicial salaries "shall not be diminished" during a judge's "term of office."⁵²⁹

523. *Felt*, 481 N.E.2d at 700–01.

524. *Id.* at 702.

525. *Id.*

526. Sidley Memo, *supra* note 414, at 18.

527. *Id.* at 18–19.

528. *Id.* at 18 (quoting *Felt*, 481 N.E.2d at 702).

529. *Id.* at 19, 28. The same analysis used by the Supreme Court in its *Jorgenson v. Blagojevich* to discern "diminishments" in judicial salaries would equally apply to "diminishments" under the Pension Clause. *Jorgenson*, 811 N.E.2d at 662. Both constitutional provisions use the word "diminish" and the Pension Clause's original intent and drafting history supports an identical understanding of the court gave the term in *Jorgenson* that fiscal expediency is not an acceptable reason to violate the Article VI, Section 14. Compare *id.*

Sidley's position is not remotely correct. No party raised in its briefs the judicial salary clause in *Felt*. Also, the "balancing test" Sidley refers to was addressed by the court simply as the Attorney General's "presumption" that the Pension Clause, like the Contracts Clause, was subject to the legislature's reserved power to make insubstantial or reasonable and necessary modifications.⁵³⁰ Indeed, this was the overarching argument that the Attorney General made to the court in its briefs to uphold the statute.⁵³¹

In addition, the Attorney General expressly urged the court to reject *Kraus* because the Attorney General viewed *Kraus* as absolutely protecting pension benefits from unilateral reductions.⁵³² As a substitute, the Attorney General asked the

with *infra* notes 541–49, 569–80, and accompanying text.

530. See *Felt*, 481 N.E.2d at 701–02 (explaining that "presumably the defendants would offer a similar contention [i.e., that the insubstantial or reasonable and necessary impairments are allowed] regarding section 5 article XIII on the question of diminution and impairment of benefits").

531. See Brief and Argument for Defendants-Appellants at 31–32, *Felt*, 481 N.E.2d 698 (No. 60373) (explaining that the Attorney General admitted that while "the delegates sought to ensure that the government could not reduce the level of benefits below what it was when a member joined the system," the Attorney General argued that the delegates nonetheless did not intent to follow the interpretation given to New York's identical provision, which absolutely vested pension benefits and barred any unilateral benefit reductions); *Id.* at 36 (stating that the Attorney General claims all the drafters accomplished with the Pension Code was to bring pension benefits under the Contracts Clause, and thereby allowing those benefits to be subject to unsubstantial impairments or impairments justified as reasonable and necessary under the legislature's police power); *Id.* at 24–27 (stating that the Attorney General urges the court to adopt California's "limited vesting" approach to pension benefits whereby an employee entering the pension system acquires limited contractual rights which are fully vested at retirement, but are subject to "reasonable modification" before retirement). See also Reply Brief and Argument for Defendants-Appellants at 3–13, *Felt*, 481 N.E.2d 698 (No. 60373) (arguing the following: urging the court to deviate from New York cases interpreting that state's verbatim provision and "absolute vesting" approach; stating that the Illinois is not obligated to follow New York cases; reiterating the argument that the drafters did not intend to follow New York cases; asserting policy reasons why New York's interpretation of its provision should not be followed by Illinois courts).

532. Brief and Argument for Defendants-Appellants, *supra* note 531, at 31–32. The Attorney General recounted,

the Court [in *Kraus*] examined the history of this constitutional provision and concluded that it adopted 'absolute vesting'. Citing the remark by Del. Kinney, the court decided that the convention intended to adopt the same constitutional provision as had been enacted in New York. [*Kraus*, 390 N.E.2d at 1290–91]. Turning to New York law, the Appellate Court examined the decision in *Birnbaum v. N.Y. State Teachers Ret. Sys.*, 152 N.E.2d 241 and determined that under this law no changes could be made in the retirement benefits of government employees under art. XIII, § 5. [*Kraus*, 390 N.E.2d at 1290–91]. The

court to adopt California's "limited vesting" approach to pension benefits, which allows the legislature to make unilateral reductions in benefits⁵³³

The Supreme Court, as discussed, neither adopted the Attorney General's view, nor his request to overturn *Kraus*. Rather, the court merely accepted the Attorney General's Contracts Clause analysis for argument purposes.⁵³⁴ The court, in turn, found that the salary formula change at issue nonetheless failed the Attorney General's self-prescribed test.⁵³⁵ As a consequence, *Felt's* "balancing test" discussion is little more than a holding on a hypothetical before the court. Sidley may not, of course, ignore the court's principal holding that the Pension Clause (and the Contracts Clause in the public pension context) is an absolute bar to legislative impairments or reductions in pension benefits.

Moreover, while *Felt* did state that the "legislature has an undeniable interest and responsibility in ensuring the adequate funding of State pension systems," that proposition does not supply the legislature with a compelling basis to unilaterally cut the pension benefits of current employees. Rather, as the *McNamee* decision later explained, the legislature has an undeniable interest because the Clause was "intended to force the funding of pensions indirectly, by putting the state and municipal governments on notice that they are responsible for those benefits" and by paying them when they are due.⁵³⁶

Finally, the Illinois Supreme Court explained, per *Kraus*, that

Court also examined the constitutional provisions of three other states (Alaska, Hawaii, and Michigan) and found that each of those provisions utilized the word 'accrued' when discussing the pension benefits which could not be changed; the Court found the absence of this word in the 1970 Illinois Constitution 'conspicuous.' [*Id.* at 1291]. On the above bases, the Appellate Court concluded that 'section 5 of article XIII prohibits legislative action which directly diminishes the benefits to be received by those who became members of the pension system prior to the enactment of the legislation, though they are not yet eligible to retire.' [*Id.* at 1292–93]. Defendant urges this Court not to follow this interpretation for several reasons.

Id.

533. See *id.* at 24–27 (urging the court to adopt California's "limited vesting" approach to pension benefits whereby an employee entering the pension system acquires limited contractual rights which are fully vested at retirement, but are subject to "reasonable modification" before retirement).

534. See *Felt*, 481 N.E.2d at 701–02 (noting that the Attorney General would "[p]resumably" apply the contract clause's analysis of impairments "on the question of diminishment or impairments of benefits" under the Pension Clause).

535. *Id.* at 703 (comparing the Attorney General test against the salary formula at issue).

536. *McNamee*, 672 N.E.2d at 1164–65.

even under the 1870 Constitution's Contracts Clause, the "legislature had no power to diminish or repeal the vested contractual rights [contain in an optional plan], and a participant was entitled to a pension based on the status of the plan at the time he began his contributions."⁵³⁷ Since the Pension Clause eliminated the legal distinction between optional and mandatory pension plans,⁵³⁸ it cannot be seriously argued that pension rights under the Clause somehow lack at least the same absolute legal protection afforded to optional plans under the prior constitution. The same result was reached under New York law in *Kleinfeldt v. New York City Employees' Retirement System*, which was favorably cited and quoted by *Felt*.⁵³⁹

b. *Buddell* Confirms That *Sidley's* View of *Peters* Is Erroneous

As discussed in Part II, *Buddell* involved an adverse Pension Code change affecting the pension rights of a current university employee. At the time the employee entered the pension system, the Pension Code allowed employees to purchase service credit for their time in the military. The Code was later amended to repeal the purchase credit right for new employees, and required current employees to exercise the right by a specific date. The original Code provision, however, contained no deadline on when an employee had to exercise the right. When the plaintiff attempted to exercise the purchase option after the specified date, the retirement board denied the request based on the amended Code provision.

537. *Arnold*, 417 N.E.2d at 1027; see *Pensions: State Emps.' Ret. Sys.*, No. 21, 1961 Op. Ill. Atty. Gen. Ill. at 78–80 (opining that optional pension plans afforded vested contractual rights under the Illinois Constitution's Contract Clause "could not be impaired by subsequent legislation" even if the unilateral alteration or modification were "slight" or "minor" in nature).

538. *Kraus*, 390 N.E.2d at 1291–92; *Ziebell*, 392 N.E.2d at 105–06; *Buddell*, 514 N.E.2d at 186 (stating that, "in effect, this constitutional provision guarantees that all pension benefits will be determined under a contractual theory rather than being treated as 'bounties' or 'gratuities,' as some pensions were previously.").

539. *Kleinfeldt v. N.Y.C. Emps.' Ret. Sys. (Kleinfeldt I)*, 324 N.E.2d 865, 869 (N.Y. 1975) (mentioning how "[t]he court is not insensitive to the grave problem of spiraling costs of retirement benefits. Although fiscal relief is a current imperative, an unconstitutional method may not be blinked. As stated in *Birnbaum v. N.Y. State Teachers Ret. Sys.*, 152 N.E.2d at 246, '[t]he constitutional amendment . . . prohibits official action during a public employment membership in a retirement system which adversely affects the amount of the retirement benefits payable to the members on retirement under laws and conditions existing at the time of his entrance into retirement system membership. (The Retirement system) argues that if this court (so) holds . . . the system will be plunged into bankruptcy. The answer to that argument must be that we are not at liberty to hold otherwise.'").

Under these facts, *Buddell* made two holdings that completely undercut Sidley's interpretation of the Clause and reliance on *Peters*. First, *Buddell* answered the question of when a public employee's pension benefit rights "vest" under the Clause, which Justice DiVito correctly observed was not resolved in *Peters*. *Buddell* confirms *Kraus*'s holding that a person is constitutionally entitled to the pension benefits set forth in the Pension Code when he or she entered the system.⁵⁴⁰ There is no mention, as Sidley incessantly argues, that a person is only entitled to those rights he or she earns on a day-to-day basis while employed by a public entity.

Sidley's attempt to characterize *Buddell* as supporting its view because the plaintiff had already "earned" his right is unavailing. To use Sidley's lingo, *Buddell* makes clear that a person constitutionally "earns" the pension benefit rights that exist in the Pension Code when he or she joins a pension system by paying his or her initial contribution to that system.⁵⁴¹ Later Illinois Supreme Court decisions confirm this point.⁵⁴² Sidley unsurprisingly offers only a brief analysis of *Buddell* because it later tacitly acknowledges that its reading of *Buddell* (and *Felt*) is wrong.⁵⁴³

Second, *Buddell* clarified that *Peters* was inapposite to the matter before the court because *Peters* did not involve a challenge to a Pension Code amendment that reduced pension benefits.⁵⁴⁴

540. See *Buddell*, 514 N.E.2d at 187 (stating, "there can be no doubt . . . that upon the effective date of the [Pension Clause] the rights conferred upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified, or released except in accordance with usual contract principles").

541. See *United States v. Larionoff*, 431 U.S. 864, 878 (1977) (holding that a serviceman had "already earned" the contractual right—and was entitled—to receive a military bonus upon agreeing to a contractual commitment to re-enlist in the Navy even though the bonus program was repealed by Congress before the serviceman even began to serve his re-enlistment).

542. Accord *DiFalco*, 521 N.E.2d at 925 (discussing that, "[a]fter the effective date of the [1970] Constitution, 'the contractual relationship' [under the Pension Clause] is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system. Therefore, in determining plaintiff's rights under the Pension Code, we must look to the language of the relevant statutes in effect . . . when plaintiff began paying into the pension fund"); see *Skłodowski I*, 695 N.E.2d at 377 (concluding that, "the contractual relationship [under the Pension Clause] is governed by the actual terms of the Pension Code at the time the employee became a member of the pension system."); DiVito May Memo, *supra* note 423, at 6.

543. See Sidley Memo, *supra* note 414, at 22 (stating, "we acknowledge that there is language in *Buddell* and *Felt* that might be interpreted to read *Peters* narrowly or to give credence to the view that employees have some sort contractually protected interest in continuation of the benefits formula in effect when they commenced employment").

544. *Buddell*, 514 N.E.2d at 721.

This holding entirely upends Sidley's reading of *Peters* because the Attorney General defended the statute at issue under Sidley's theory of "earned" benefits. The Attorney General argued, per *Peters*, that the plaintiff would have only "earned" the military service credit "after he made timely payment" to purchase the credit.⁵⁴⁵ The Attorney General pressed further that if under the Clause "no legislative changes resulting in a reduction of benefits were constitutionally permissible after the date an employee became a member of the [pension] system, [then] *Peters* would have to have been decided the other way."⁵⁴⁶ The Attorney General took the same position in a 1976 opinion involving the same Pension Code provision.⁵⁴⁷ Since *Buddell* rejected the Attorney General's view of *Peters*,⁵⁴⁸ the same would be true of Sidley's reading of the case.

E. Sidley's "Contract" Proposal to Reduce the Pension Benefits of Current Employees Fails Under Contract Principles

1. Sidley's Contract Approach

Sidley also claims that even if its reading of the Pension Clause is wrong (and it is), then "contract principles" nonetheless allow the General Assembly to reduce the pension benefits of

545. Brief for Defendants-Appellants at 4–5, *Buddell*, 514 N.E.2d 184 (1987). See Reply Brief for Defendants-Appellants at 4, *Buddell*, 514 N.E.2d 184 (1987) (explaining that "[t]he Constitution proscribes reduction or diminution of established contractual benefits. Plaintiff had an opportunity to participate in voluntary program for which, by virtue of the nature of his prior employment, he was qualified. He chose not to participate. The legislature terminated the program. The termination of the program did not diminish plaintiff's earned retirement benefits by a single penny, and plaintiff does not so contend. If he had paid the money, then he could have obtained a higher amount of benefits. He failed to do so. Plaintiff's voluntary inaction should not be constitutionalized.").

546. Reply Brief for Defendants-Appellants, *supra* note 545, at 3.

547. See PENSIONS: State Univs. Ret. Sys. Serv. Credit, No. S-1153, 1976 Op. Ill. Atty Gen. 289, 291 (stating that "[n]either of the System participants in your two questions had elected to purchase credit for prior governmental service when the amendments altering the availability of prior service were enacted. Therefore, these employees did not have an earned right to this service credit when the amendments were enacted; the amendments thus did not diminish their earned pension rights. Because section 5 of article XIII of the Illinois Constitution protects only earned pension rights, Public Act 78-1184 and Public Act 79-775 did not violate the constitutional rights of these two employees").

548. *Buddell*, 514 N.E.2d at 187–88 (explaining that because the Pension Code provided that the plaintiff could purchase military service credit in the retirement system when he joined the system, [t]his right to purchase additional credit became a contractual right under the [Pension Clause].").

current public employees as proposed by the Commercial Club.⁵⁴⁹ Sidley contends that “contract rights can be modified or surrendered as long as ‘consideration’ is provided that supports the change in the contract.”⁵⁵⁰ Sidley defines “consideration” as a “new benefit to the employee, a new detriment to the employer, or . . . mutual agreement.”⁵⁵¹

Sidley submits that legislatively imposed reductions in future pension benefits would be supported by “consideration” if the State merely promised not to cut employee salaries or terminate employees.⁵⁵² Sidley reasons that an “employer’s failure to take those actions prospectively is a ‘new detriment to the employer’ and is thus consideration,” while an “employer’s decision to not take the other prospective actions is ‘a new benefit to the employee.’”⁵⁵³ In Sidley’s view, “governments have the constitutional authority to undertake either of these actions, except “for judges and other officers who compensation is constitutionally protected.”⁵⁵⁴ Accordingly, Sidley states that so long as “appropriate notice” is provided to public employees “there can be no objection to prospective modification of pension benefits earned in the future.”⁵⁵⁵

Sidley further states its position is supported by two Illinois employment law cases cited by Justice DiVito as well as *Kraus*.⁵⁵⁶ Sidley claims that, even under *Kraus*, “the Pension Clause itself does not in any way limit the State’s ability to change, or even terminate, the employment relationship and . . . the State is free to prospectively modify the terms of employment regardless of the incidental impact of such a modification upon pension benefits.”⁵⁵⁷ Sidley contends that *Kraus* “endorses reductions in salaries and hours as examples of permissible actions” as well as “outright termination of employment.” In its view, “*Kraus* goes on to explain that ‘there is nothing to prohibit an employee from agreeing, for consideration, to accept a reduction in benefits.’”⁵⁵⁸

549. Sidley Memo, *supra* note 414, at 22–27.

550. *See id.* at 23 (quoting *Robinson v. Ada S. McKinley Comm. Servs., Inc.*, 19 F.3d 359 (7th Cir. 1994)).

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*; *Doyle v. Holy Cross Hosp.*, 708 N.E.2d 1140, 1144 (Ill. 1999); *Ross v. May Co.*, 880 N.E.2d 210, 216–17 (Ill. App. Ct. 2007).

557. Sidley Memo, *supra* note 414, at 25–26.

558. *Id.* at 26.

2. *Sidley's Contract Approach Fails Due to a Lack of Consideration or Acceptance*

As explained below, Sidley's proposal fails for lack of consideration and proper acceptance based on contract principles and sound public policy. Sidley's argument relies on an "at-will" employment approach to modifying the pension benefit rights public employees have under the Pension Clause. Specifically, Sidley assumes that an employee's pension rights are just like any other term or condition of employment that an employer may unilaterally modify.

Under this approach, an employer may modify the terms of employment at any time, and if an employee continues to work after the modification occurs, then the employee is deemed to have accepted the change. Sidley tries to enhance the plausibility of its approach by tying pension benefit cuts to the State's promise to forbear from either firing or reducing the salaries of State employees. And, by placing employees on notice of this "offer," Sidley contends that employees who continue to work after the change takes place have "accepted" the "offer." Justice DiVito's description of Sidley's approach as a "charade" is correct.⁵⁵⁹

Pension benefits are constitutionally protected, "vested rights" and may not be traded away as easily as Sidley claims. As an initial matter, Sidley assumes that all current State employees have "at-will" employment status and could be subject to its proposal. This is simply not true. At most, approximately 32% of State employees participating in the State Employees Retirement System ("SERS") have "at-will" status, while the remaining 68% are covered by the Personnel Code and may only be terminated "for cause." Moreover, over 91% of state employees are further covered by a collective bargaining agreement with wage and job protections.⁵⁶⁰

In short, the proposal Sidley outlines is inapplicable to most SERS participants because they already have job and salary protection under the Personnel Code and collective bargaining agreements. This is also true of employees participating in the Teachers Retirement System and State University Retirement System as well because many of those employees are covered by collective bargaining agreements and civil service statutes. After all, the offer Sidley describes is premised on a promise by the State not to fire or reduce the salaries of employees who already legally enjoy that protection. An offer of this sort provides these

559. DiVito May Memo, *supra* note 423, at 7.

560. Doug Finke, *State of Unions: Domination of Illinois' Workforce a Campaign Issue*, JOURNAL STANDARD (Aug. 30, 2014) available at <http://www.journalstandard.com/article/20140830/NEWS/140839970/10287/NEWS?template=printart>.

employees nothing of value in exchange for a reduction in employee pension benefits.

Sidley's proposal fares no better for purely "at-will" State employees. Illinois courts have long held that the General Assembly lacks the power to enact legislation that adversely affects vested rights.⁵⁶¹ Further, as already discussed above, the Pension Clause affords constitutional protection to pension benefits as enforceable contractual rights that "vest" when public employees begin participating in the pension system.⁵⁶² The Clause, in turn, prohibits unilateral action by the legislature "which directly diminishes the benefits to be received by those who became members of the pension system prior to the enactment of the legislation, though they are not yet eligible to retire."⁵⁶³ Accordingly, the Supreme Court has held that pension benefits "cannot be altered, modified or released except in accordance with usual contract principles."⁵⁶⁴ Any modifications, of course, would need to be supported by new consideration and the mutual assent of the affected public employee.⁵⁶⁵

It is hornbook law that an "at-will" employer lacks the unilateral right to retroactively reduce or revoke contractually agreed upon benefits that have already vested.⁵⁶⁶ In the context of

561. *Boonstra v. City of Chi.*, 574 N.E.2d 689, 695 (Ill. App. Ct. 1991).

562. *See, e.g., Schroeder*, 579 N.E.2d at 999 (stating, "[a]n employee's rights in the [pension] system vest, either at the time he enters the system, e.g., making contributions, or in 1971 when the 1970 Constitution became effective, whichever is later").

563. *Kraus*, 390 N.E.2d at 1292–93.

[T]he convention chose to follow New York and provide that the employees' [pension] rights vest at the time they became members of the system . . . in instant case, we are dealing with an attempt to directly diminish benefits toward which plaintiff has contributed 17 years of service. To imply a requirement that those benefits have fully accrued in this context would, in our opinion, be an unwarranted judicial engraftment on the constitutional provision and would frustrate the express intent of the drafters.

Id. at 1291–92.

564. *Buddell*, 514 N.E.2d at 187.

565. *Kraus*, 390 N.E.2d at 1293; *see also* *Lomax v. Matthews*, 114 N.Y.S.2d 682 (N.Y. Cnty Ct. 1951) (holding that plaintiff was entitled to have increased cost of living allowance included with the salary basis used to calculate his pension amount under the New York Pension Clause because the plaintiff was not required to sign an endorsement that the increase was to be excluded); *White v. Hussey*, 87 N.Y.S.2d 252 (N.Y. 1949) (holding that public employee waived right to include cost of living adjustment in salary basis for purpose of New York Pension Clause where the employee was required sign and did sign salary checks bearing an endorsement that the increase was conditioned on it being excluded from the salary formula).

566. *Nattah v. Bush*, 605 F.3d 1052, 1058 (D.C. Cir. 2010) (citing 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:36 (4th ed. 2010)); *Jensen v. IBM*, 454 F.3d 382, 387 (4th Cir. 2006) (stating, "[b]ut consistent with the

Sidley's proposal, this means that the State cannot, as an "at-will" employer, adversely change employee pension benefit rights as a condition for continued employment because those rights are *already* vested whether or not the employee is eligible to retire.⁵⁶⁷

nature of at-will employment, an employer can modify its offer until the offer's conditions are satisfied. At that point, the employee's right under the unilateral contract is deemed to have accrued or become vested, and the employer no longer can modify the offer"); see *Kulins v. Malco Inc.*, 459 N.E.2d 1038, 1044 (Ill. App. Ct. 1984) (explaining that severance benefits policy allowing at-will employees to earn one week's pay for every year of service constituted "vested rights" for only each year the employees worked, and employees did not forfeit these rights by continuing to work after the employer terminated the benefits policy; stating "[t]o hold otherwise would relegate the promise of severance pay to the illusory status of an offer revocable at the pleasure of the corporation and result in a harsh forfeiture to loyal, long-term employees.").

567. *Kraus*, 390 N.E.2d at 1293. *Accord* *Greves*, 498 N.E.2d at 620 (finding that under the Pension Clause, "a participant is entitled to a pension based on the status of the system when his rights in the system *vested*, either at the time he [i.e., the employee] entered the system or in 1971, when the Illinois Constitution became effective, whichever is later") (emphasis added); *Thompson v. Ret. Bd. of Policemen's Annuity & Benefit Fund of Chi.*, 884 N.E.2d 195, 201 (Ill. App. Ct. 2008) (parroting the same holding); see *Kulins*, 459 N.E.2d at 1044 (explaining, "[o]nce the service condition is satisfied, the benefit derived from the term of service is vested and can be divested only by failure to satisfy the eligibility provisions"); see also *Yeazell*, 402 P.2d at 545–46 (holding that since public pension rights are vested rights upon acceptance of employment, "the legislature could not thereafter constitutionally alter the provisions of his already existing contract of [pension] membership" because his "rights in the fund could only be changed by mutual consent"; further holding that an employee's continued working after a legislative change occurred would not manifest consent or acceptance, because the employee should not be compelled to choose based on "legislative coercion"); *Bennet ex rel. Arizona State Personnel Comm'n v. Beard*, 556 P.2d 1137, 1139–40 (Ariz. Ct. App., 1976) (applying *Yeazell* and holding that where a term of public employment is not vested and employee serves "at-will," the employer may condition continued employment or employee compensation upon a change in that term of employment that is less favorable to the employee; however, where the term of public employment is a vested right based on state law, an employer could not condition continued employment or compensation on reduced benefits); *Lauderdale v. Eugene Water & Elec. Bd.*, 177 P.3d 13, 19–21 (Or. Ct. App. 2008) (explaining how under the contractual approach pension benefit rights vest *in toto* at the time the employee begins working for the employer and are therefore deemed "already earned" or vested," and stating that an "employer's ability to change an at-will employee's current compensation cannot meaningfully be compared to an employer's ability to change vested post-employment benefits."). Cf. *Taylor*, 466 N.E.2d at 1077–78 (holding that when a police chief was accepted into the pension system he obtained contractual rights in that system and the police pension board acted improperly when it attempted to impose new conditions on the police chief's ability to exercise those rights); *Haake v. Bd. of Educ.*, 925 N.E.2d 297, 314 (Ill. App. Ct. 2010) (stating that "[t]he general rule regarding the modification of vested benefits is that upon vesting, benefits become forever unalterable. The defendant employer has not identified any precedent in which simply

Similarly, the State could not force an employee to accept a forfeiture of his or her vested rights merely by continuing to work.⁵⁶⁸ As with any modification to an existing contract, there must be an offer, new consideration, and voluntary acceptance.⁵⁶⁹ As detailed below, Sidley's proposal fails under contract principles because it is bereft of new consideration and acceptance.

a. Sidley's Proposal Lacks Valid Consideration

While Sidley is correct that forbearance from firing or reducing the salary of an "at-will" employee may qualify as "consideration" for contract purposes, the forbearance it offers is not legal consideration for several reasons. *First*, the forbearance being offered is unsolicited and lacks any fixed period of time. Illinois courts have explained that forbearance will suffice as consideration where it "was expressly or impliedly requested by [the other party] as the agreed equivalent for his promise."⁵⁷⁰

Second, Sidley fails to specify the duration of the forbearance. Since the Club appears to believe that public employees are overpaid,⁵⁷¹ it is unreasonable to assume that the forbearance being offered is permanent. Rather, it is reasonable to assume that the offered forbearance is entirely within the State's discretion. Under these circumstances, the consideration would be illusory.⁵⁷²

Indeed, the Club's proposal is akin to what took place in *Mimica v. Area Interstate Trucking, Inc.*⁵⁷³ In that case, an "at-

continuing to work under similar circumstances was held to constitute assent to a reduction of vested benefits." (quoting *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir. 2005))).

568. *McCaskey v. Cal. State Auto. Ass'n*, 189 Cal. App. 4th 947, 970–73 (Cal. Ct. App. 2010); *Yeazell*, 402 P.2d at 545–46; *Beard*, 556 P.2d at 1139–40.

569. *Holy Cross Hosp.*, 708 N.E.2d at 1145 (stating, "[a] modification of an existing contract, like a newly formed contract, requires consideration to be valid and enforceable"); *Robinson*, 19 F.3d at 364 (7th Cir. 1994) (applying Illinois law, "[a] valid modification requires an offer, acceptance, and consideration"); *York v. Cent. Ill. Mut. Relief Ass'n*, 173 N.E. 80, 83 (Ill. 1930) (stating, "[t]here is no doubt that the parties to a contract may by mutual agreement accept substitution of a new contract for the old one with the intent to extinguish the obligation of the old contract, but one party cannot by his own acts release or alter its obligations. The intention must be mutual").

570. *First Nat. Bank v. Chapman*, 366 N.E.2d 937, 941 (Ill. App. Ct. 1977); see 3 LORD, *supra* note 566 § 7:44 (explaining, "[m]ere forbearance to exercise a legal right, without any request to forbear or circumstances from which an agreement to forbear may be implied, is not consideration such as which will support a promise.").

571. PENSION TASK FORCE REPORT, *supra* note 6, at 64–68.

572. 3 LORD, *supra* note 566, § 7:48 ("If upon proper interpretation, the agreement is to forbear only for such time as the promisor chooses, it is insufficient, for it is an illusory promise.").

573. *Mimica v. Area Interstate Trucking, Inc.*, 620 N.E.2d 1328 (Ill. App. Ct. 1993).

will” employee who invented a new kind of truck trailer while working for a trucking company was threatened with termination if he did not assign his patent rights over to his employer. The employee assigned his rights and was fired two weeks later. The court invalidated the assignment because the employee “was never paid anything for [the] assignment other than an illusory promise.”⁵⁷⁴ The court found that the consideration was grossly inadequate and accompanied by unfairness because the employer used its superior bargaining position to take undue advantage of the employee and substantially impaired the employee’s exercise of free will.⁵⁷⁵ A court would most likely reject Sidley’s proposal for the reasons outlined in *Mimica*.

Third, Judge DiVito’s assessment is correct that the forbearance contemplated by Sidley is inadequate because under *Kraus*, the State cannot use the potential threat of a loss of employment or cut in pay as a means to “bargain for” a reduction in pension benefits.⁵⁷⁶ *Kraus* explains that while the legislature may reduce work hours, salaries, and jobs, it may only do so when “directed toward another aim” even if those actions would have an indirect effect on the pension benefits ultimately received.⁵⁷⁷ Sidley’s proposal is conspicuously directed toward cutting benefits and for no other purpose.

Fourth, the State cannot terminate employees who refuse to accept an offer that directly cuts their pension benefits. Such a termination would most likely constitute a retaliatory discharge. Illinois courts have long held that public employees do not waive their constitutional rights as a function of employment, nor may they be arbitrarily barred or removed from employment.⁵⁷⁸ The Illinois Supreme Court observed that a private sector employee could not bring a retaliatory discharge action against a private employer for a constitutional violation because constitutional provisions are limitations on government actions and “mandate nothing concerning the relationship of . . . private individuals in the employer-employee relationship.”⁵⁷⁹ As discussed, this is not true of public employees because pension benefits are a fundamental component of the public employer-employee relationship. In addition, the Illinois Supreme Court has

574. *Id.* at 1334–35.

575. *Id.*

576. DiVito May Memo, *supra* note 423, at 7–8; *Kraus*, 390 N.E.2d at 1293. *Cf.* Bd. of Cnty Comm’rs v. Umbehr, 518 U.S. 668, 696 (1996) (Scalia, J., dissenting) (stating that “[a] public employee is always an individual, and a public employee below the highest political level (which is exempt from *Elrod*) is virtually always an individual who is not rich; the termination or denial of a public job is the termination or denial of a livelihood.”).

577. *Kraus*, 390 N.E.2d at 1293.

578. *Scutt v. LaSalle Cnty. Bd.*, 423 N.E.2d 213, 218 (Ill. App. Ct. 1981).

579. *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1357 (Ill. 1985).

recognized that retaliatory discharge is an exception to the “at-will” employment doctrine and covers public employees.⁵⁸⁰

Put differently, if the State cannot legally terminate public employees who refuse to agree to a cut in pension benefits, then the State is not in a position to offer a promise that it would not discharge them.⁵⁸¹ Similarly, a strong argument can be made that threatening to reduce the salaries of public employees who refuse to accept a cut in pension benefits would be tantamount to economic duress and void.⁵⁸² As a result, the State cannot offer a promise of no salary cuts as new consideration. The offer of forbearance Sidley describes is nothing more than a thinly veiled threat to public employees that if you do not accept benefit reductions you will be fired or your salary will be cut. Such an “offer” is simply inconsistent with public policy.

Finally, a public employer most likely lacks the power to discharge or discipline an “at-will” public employee seeking to exercise or preserve his or her pension rights. As the Illinois Supreme Court stated in one Pension Clause case, “[a]ttempting to save pension funds would not constitute cause for discharge nor would a discharge for that purpose be, in certain circumstances, a good-faith exercise of the asserted authority to summarily discharge probationary [at-will] [public employees].”⁵⁸³

A recent California court decision is also instructive.⁵⁸⁴ The case involved “at-will” employees selling insurance policies who obtained vested rights to sell fewer policies than other employees.⁵⁸⁵ The employer wanted the employees to sell more policies and attempted to unilaterally modify the employees’

580. *See id.* at 1356 (stating that “[t]he common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois, except for when the discharge violates a clearly mandated public policy.”); *Smith v. Waukegan Park Dist.*, 896 N.E.2d 232 (2008) (allowing a retaliatory discharge claim against a public sector employer).

581. *See also* *Fragakis v. Ill. State Toll Highway Auth.*, No 05 C 2741, 2006 WL 533359, at *5–6 (N.D. Ill. 2006) (holding that a public employee could bring a retaliatory discharge action against a public employee for a constitutional violation); *Hegeler v. Ill. State Toll Highway Auth.*, No 05 C 2739, 2005 WL 2861051, at *4 (N.D. Ill. 2005) (holding the same).

582. *Cf. Gerber v. First Nat’l Bank*, 332 N.E.2d 615, 618 (Ill. App. Ct. 1975) (holding that a bank’s threat to terminate its legal business with an attorney unless the attorney signed a promissory note to cover a portion of a business loss experienced by a bank official in a venture recommended by the attorney sufficiently alleged economic duress where the bank provided the attorney with one-third to one-half of his income); *see generally* *Hasentab v. Bd. of Fire & Police Comm’rs*, 389 N.E.2d 588 (Ill. App. Ct. 1979) (holding that public employer could not suspend and reprimand firemen who exercised their constitutional rights).

583. *DiFalco*, 521 N.E.2d at 927.

584. *McCaskey*, 189 Cal. App. 4th 947.

585. *Id.* at 963–70.

vested rights by forbearing from firing the employees.⁵⁸⁶ The employees refused to consent to the unilateral change.⁵⁸⁷ The court found that the employees' vested rights created an exception to the "at-will" doctrine by only allowing the employer to discharge the plaintiffs "for no reason, or even for a bad reason," but not "for the reason that [the plaintiffs] had invoked, or insisted on the right to invoke, [their vested rights]."⁵⁸⁸ The court further concluded that the employees did not consent to the modification merely by continuing to work after the modification took place.⁵⁸⁹

b. Sidley's Proposal Also Fails for Lack of Assent

Even assuming Sidley's proposal provides adequate consideration, it nonetheless fails for lack of employee assent. Public employees who are members of a pension system are already obligated to contribute and work in order to receive pension payments.⁵⁹⁰ At least one Illinois court has held, in the pension context, that employee acceptance will not be inferred where the person who continues to work already has a preexisting duty to do so.⁵⁹¹

The Arizona Supreme Court reached a similar conclusion in *Yeazell v. Capins*.⁵⁹² In that case, the court held that because the pension benefit rights of public employees became "vested" upon accepting employment, the legislature could not later change those rights retroactively without the mutual assent of the employee.⁵⁹³ The court also held that an employee's choice to continue to work after the statutory change took effect could not be construed as an employee's acquiescence or a waiver of rights.⁵⁹⁴ In the court's view, the employee could not be compelled to choose while being employed between his original pension rights and the statutorily modified pension rights via "legislative coercion."⁵⁹⁵

Acceptance can only be demonstrated if the employee took some affirmative action apart from merely working as usual to

586. *Id.* at 958.

587. *Id.* at 972.

588. *Id.* at 970.

589. *Id.* at 971–73.

590. See e.g., 40 ILL. COMP. STAT. 5/14-107 (2008) (requiring persons enrolled in SERS to have 35 years of creditable service in order to retire at any age to receive a pension).

591. *Haake*, 925 N.E.2d at 313–14; see also *Excelsior Stove & Mfg. Co. v. Venturelli*, 8 N.E.2d 702, 704 (Ill. App. Ct. 1937) (noting that "[t]he mere fact that a person to whom an offer to buy or sell goods is made fails to reply thereto and reject the offer, ordinarily, cannot be taken as an acceptance to the offer, even though the offer states that silence will be taken as consent").

592. *Yeazell*, 402 P.2d 541.

593. *Id.* at 546 (citing and quoting *York*, 173 N.E. at 83).

594. *Id.* at 546–47.

595. *Id.*

manifest a desire to be bound by the offer.⁵⁹⁶ For example, a public employee would need to voluntarily and knowingly sign a waiver acknowledging that the employee was unequivocally agreeing to accept the benefit reductions in exchange for new legal consideration.⁵⁹⁷ New York courts use the same approach when evaluating whether a public employee has waived his or her pension rights under that State's identical constitutional provision, which the Pension Clause is modeled after.⁵⁹⁸ That approach requires any waiver to be assessed on an individualized basis.⁵⁹⁹

The fact that Sidley's proposal contains language informing employees that continuing to work manifests employee acceptance does not alter this result. To paraphrase the Illinois Supreme Court's holding in *Doyle v. Holy Cross Hospital*, continued employment does not constitute acceptance because the "illusion and irony is apparent:" to preserve their right under the existing contract the employees "would be forced to quit."⁶⁰⁰ Court decisions from other jurisdictions take the same view.⁶⁰¹ As the Illinois

596. *Haake*, 925 N.E.2d at 313–14; *Yeazell*, 402 P.2d at 546–47.

597. *See, e.g., Suburban Downs, Inc. v. Ill. Racing Bd.*, 735 N.E.2d 697, 704 (Ill. App. Ct. 2000) (explaining that while property rights, once acquired, cannot be dissolved by the legislature, the plaintiff knowingly and voluntarily waived his due process rights by submitting a written waiver of any and all rights to a hearing in accordance with the contested case provisions of the Illinois Horse Racing Act and elected instead to present evidence to the Racing Board at an informal hearing).

598. *Lomax*, 114 N.Y.S.2d at 684–85; *Wright*, 108 N.Y.S.2d at 474–75; *Carroll v. Grumet*, 117 N.Y.S.2d 553, 555–57 (N.Y. App. Div. 1952); *Rosen v N.Y.C. Teachers' Ret. Bd.*, 122 N.Y.S.2d 485, 487–88 (N.Y. App. Div. 1953). *Accord Kleinfeldt v. N.Y.C. Emps.' Ret. Sys. (Kleinfeldt II)*, 341 N.Y.S.2d 784, 789–90 (N.Y. 1973) (rejecting the claim that the mere acceptance of a pay check after the operative date of legislation changing how pension benefits are calculated for current employees constitutes a waiver of vested pension rights).

599. *Schwartz v. Schwartz*, 114 N.Y.S.2d 730, 737 (N.Y. Mun. Ct. 1952).

600. *Holy Cross Hosp.*, 708 N.E.2d at 1146.

601. *See Robinson*, 19 F.3d at 364 (applying Illinois law, "by continuing to work, [the employee] was merely performing her duties under the original contract. According to [the employer's] logic, the only way [the employee] could preserve her rights under their original employment contract would be to quit working after [the employer] unilaterally issued the disclaimer. That is ridiculous"); *DeMasse v. ITT*, 984 P.2d 1138, 1145–46 (Ariz. 1999) (collecting cases, "it is too much to require an employee to preserve his or her rights under the original employment contract by quitting working. Thus, an employee does not manifest consent to an offer modifying an existing contract without taking affirmative steps, beyond continued performance, to accept."); *Thompson v. Kings Entm't*, 674 F. Supp. 1194, 1199 (E.D. Va. 1987) (explaining "under [the employer's] view, acceptance is inferred from an employee's continuing to work with knowledge of the handbook's terms"). The *Thompson* case goes on to explain

[a]ccordingly, an employee seeking to reject the offer could not remain

Appellate Court explained in a similar context, “the [government] cannot whipsaw citizens into ‘voluntarily’ choosing one of two means by which they will be divested of an existing property interest.”⁶⁰²

Moreover, even if a proposed Pension Code revision reducing the pension rights of current employees were supported by legal consideration, each employee must still retain the right to withhold his or her consent and continue performing under the unrevised Code provisions.⁶⁰³ For these reasons, Sidley’s contract approach fails and is without merit.

F. Contrary to Sidley’s Claim, the State Must Make Pension Benefit Payments from Its General Fund if a State Pension System Defaults or Is on the Verge of Default

In a separate memorandum, Sidley contends that if the pension system goes broke, then public employees entitled to pension payments will have no recourse against the State to receive continued payments.⁶⁰⁴ As explained below, welching by

silent and continue to work. Instead, such an employee would have to give specific notice of rejection to the employer to avoid having his actions construed as acceptance. Requiring an offeree to take affirmative steps to reject an offer, however, is inconsistent with general contract law. In the absence of special relations between the parties or other circumstances, the offeree need make no reply to the offer and his silence and inaction cannot be construed as assent.

Id. See also 2 LORD, *supra* note 566 § 6:53 (explaining, “it is clear that, whatever the offeree may be thinking, no contract can be made unless the offer stated that the offeror would assume assent in the case the offeree did not reply, or the offeror in some other manner has led the offeree to believe that it may accept by remaining silent. Even under those circumstances, the offeree’s silence is ambiguous and may be shown not to have been intended as an assent to accept the offeror’s proposal. The offeror cannot, merely by indicating that it will take silence to mean assent, cast the burden to speak on the offeree, and the offeree may keep silent if it chooses without becoming liable on the express contract.”).

602. See *Boonstra*, 574 N.E.2d 689, 695 (invalidating a City of Chicago amendment to its taxi cab ordinance that conditioned license renewals on owners of previously issued licenses forfeiting their original right to assign the license to another person; holding that the owner who renewed the license maintained, rather than lost his assignment rights and had standing to challenge the constitutionality of the amendment).

603. See *York*, 173 N.E. at 83 (explaining that a party to mutual agreement that had “[k]nowledge of the terms of the new [agreement] when he made the payments was not sufficient to show an acceptance of those terms, for he had the right to disregard those terms and make the payments in accordance with the provisions of the old [agreement]”). It was therefore necessary to prove an intention to accept the terms of the new agreement. *Id.*

604. Sidley Guarantor Memo, *supra* note 421, at 1; Sidley Supplemental

the State is not an option, contrary to Sidley's suggestion.

The Clause stands as a constitutional guarantee that pension recipients will receive their pension payments when due even if a pension fund defaults or is on the verge of default. Any state pension participant placed in such a position would have a cause of action in circuit court to enforce this guarantee and obtain payment directly from the State's General Fund. A participant need not pursue payment before the Illinois Court of Claims and depend upon the largesse of the General Assembly.

1. A Summary of Sidley's Position That the State Is Not a Guarantor of Pension Payments if a Fund Defaults

Sidley claims that the obligation to pay annuities rests solely with the "State's employee pension funds" and that the "State itself is not a guarantor of that obligation."⁶⁰⁵ Sidley asserts that this result stems from Section 22-403 of the Illinois Pension Code, which provides that "[a]ny pension payable under any law hereinafter referred to shall not be construed to be a legal obligation of the State . . . but shall be held to be solely an obligation of such pension fund, unless otherwise specifically provided in the law creating the fund."⁶⁰⁶

Sidley advances this claim even though the Pension Code Article of each of the State's five retirement systems contains a nearly verbatim provision stating: "The payment of the required department contributions, all allowances, annuities, benefits granted under this Article, and all expenses of administration of the system *are* obligations of the State of Illinois to the extent specified in this Article."⁶⁰⁷

Sidley focuses on the phrase, "to the extent specified in this Article." From this phrase, Sidley argues that the State cannot be a guarantor because no other provision within each Article expressly states, "if the fund does not have sufficient assets, the State is the guarantor that pension benefits will be paid."⁶⁰⁸ Accordingly, Sidley loops back to Section 22-403 and concludes that there is no "specific provision" in the Pension Code requiring the State to act as a guarantor.⁶⁰⁹

Sidley further argues in a follow-up memorandum that because the "Obligations of the State" language in the Pension Code predated the adoption of the Pension Clause in 1970, and because the State pension systems were "mandatory" plans, the

Guarantor Memo *supra* note 421.

605. Sidley Guarantor Memo, *supra* note 421, at 1.

606. *See id.* at 1 (quoting 40 ILL. COMP. STAT. 5/22-403).

607. 40 ILL. COMP. STAT. 5/14-132 (emphasis added).

608. Sidley Guarantor Memo, *supra* note 421, at 2.

609. *Id.*

“Obligation of the State” language “could not have been intended to establish a State guarantor obligation for pension benefits.”⁶¹⁰ To support this proposition, Sidley points to the reasoning in the Illinois Supreme Court’s *Lindberg* decision.⁶¹¹ In *Lindberg*, the court held that the pension funding provisions of the Pension Code predating the 1970 Constitution did not create a binding funding obligation on the State because most pensions were deemed gratuities, not contractual rights.

Sidley also claims that the Convention debates “do not support that the delegates intended for the State to be a guarantor for the payment of State pensions as opposed to the State pension funds themselves.”⁶¹² Rather, Sidley rehashes its argument that delegates only agreed that the Clause did not impose specific funding obligations or provide for automatic cost of living adjustments.⁶¹³ Further, Sidley attempts to marginalize the statements of Delegate Kinney who stated that the term “impairment” as used in the Clause provided pension participants with a cause of action if a pension fund defaults or is on the verge of default.⁶¹⁴ Finally, Sidley contends that even if the State were a guarantor, the Sovereign Immunity Clause of the Illinois Constitution would require pension participants to obtain relief in the Illinois Court of Claims, not circuit court, and await a General Assembly appropriation to be paid.⁶¹⁵

2. *The Clause Makes the State a Guarantor Based on Its Plain Meaning, Convention History, Illinois Court Decisions, and Common Law Understanding of Pension Payments as Creating a Debtor Relationship*

a. Sidley’s “Guarantor” Argument Ignores the Clause’s Plain Language and Common Meaning

Sidley’s position is untenable for several reasons. *First*, as previously discussed in this Article, the Clause contains prohibitory language that pension benefit rights cannot be “diminished” or “impaired.”⁶¹⁶ Illinois courts have interpreted the word “diminish” under both the 1870 and 1970 Illinois Constitutions as a mandate to pay an obligation when due.⁶¹⁷ As a

610. Sidley Supplemental Guarantor Memo, *supra* note 604, at 4, 15–21.

611. *Id.* at 19–21.

612. *Id.* at 8–13.

613. *Id.* at 9.

614. *Id.* at 9–10.

615. *Id.* at 28–37.

616. *Supra* notes 23–29, 434–43 and accompanying text in Parts I and III, respectively.

617. *See Lyle*, 195 N.E. at 452–53 (construing Article IX, § 11 of the 1870 Illinois Constitution during the depths of the Great Depression as a command

consequence, Illinois courts will presume that the word “diminishment” as used in the Pension Clause imposes an identical mandate that pension payments be paid when due, especially since the term has a settled legal meaning.⁶¹⁸

This conclusion is bolstered by Delegate Kinney’s statements at the Convention. Delegate Kinney explained that the term “impair” “meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved.”⁶¹⁹ She further explained that while the Clause “was not intended to require 100 percent funding or 50 percent or 30 percent funding,” it would trigger funding if a court “determine[d] that imminent bankruptcy would really be [an] impairment” in that pension payments could not be made.⁶²⁰ She also stated that “if the word ‘impairment’ bothers people, I suggest, if it is the wish of the Convention, that word could be deleted, and the rest of the [Clause] could stand” via the word “diminish.”⁶²¹

In addition, the Illinois Supreme Court concluded in *Lindberg*, *McNamee*, and *Skłodowski* that the Clause guarantees that pension recipients will receive pension payments when they become due.⁶²² Relying on the statements of Delegates Green and Kinney, the court explained in *McNamee* that the Clause was “intended to force the funding of pensions indirectly, by putting the state and municipal governments on notice that they are responsible for those benefits.”⁶²³ As a result, Sidley’s search for the “magic”⁶²⁴ word “guarantor” in the Clause is unnecessary given

require that judicial salaries be paid where the provision provided that the “fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term”); see *Northrup*, 31 N.E.2d at 337 (same conclusion with respect to the salaries of aldermen); *Jorgensen*, 811 N.E.2d at 659–66 (relying on its *Lyle* decision and holding pursuant to Article VI, § 14 of the 1970 Illinois Constitution as a mandate that judges receive previously awarded cost of living increases where the provision provided that “Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office”).

618. See *People v. Smith*, 923 N.E.2d 259, 262 (Ill. 2010) (finding that “if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning”); *Robbins v. Bd. of Trs.*, 687 N.E.2d 39, 43 (Ill. 1997) (“It is fundamental that where a word or phrase is used in different sections of the same legislative act, a court presumes that the word or phrase is used with the same meaning throughout the act, unless a contrary legislative intent is clearly expressed.”).

619. 4 PROCEEDINGS, *supra* note 53, at 2926.

620. *Id.* at 2929.

621. *Id.*

622. See discussion *supra* Part II. B (discussing how Illinois jurisprudence has interpreted the Pension Clause).

623. *McNamee*, 672 N.E.2d at 1164.

624. Sidley Supplemental Guarantor Memo, *supra* note 604, at 4.

the meaning of the terms “diminish” and “impair.”

b. The Pension Code Sufficiently Manifests an Intent to Make Pension Payments the Obligations of the State When Due

Second, the Illinois Pension Code Article of each of the five state-funded pension systems contains a provision with sufficient language binding the State to pay pensions even if a system defaults. Each provision states in pertinent part that “[t]he payment of the required department contributions, all allowances, annuities, benefits granted under this Article, and all expenses of administration of the system are obligations of the State of Illinois to the extent specified in this Article.”⁶²⁵ The statute’s use of the word “specify” denotes a common meaning “to mention, describe, or define in detail.”⁶²⁶

The obvious import of the provision when read as a whole is that each of the required payments specified by the provisions within each Article (i.e., contributions, allowances, annuities, benefits, and expenses) is an obligation of the State. Even if this construction were not so plain, the Illinois Supreme Court has long held that ambiguous Pension Code provisions are to be construed in favor of pension recipients.⁶²⁷ Similarly, the Illinois Appellate Court has interpreted this language to mean that general state funds “could be reached” if a judgment were entered against a retirement system.⁶²⁸

Alternatively, Illinois courts have characterized public pension benefits as a “chose-in-action.”⁶²⁹ A “chose-in-action” is an intangible, personal property right to bring an action to receive or recover a debt, moneys or damages.⁶³⁰ As a form of compensation, the pension benefits owed by an employer to an employee create a

625. 40 ILL. COMP. STAT. 5/14-132.

626. WEBSTER’S NEW WORLD DICTIONARY, *supra* note 22, at 1367.

627. Taddeo v. Bd. Trs., 837 N.E.2d 876, 879 (Ill. 2005).

628. Shields v. State Emps.’ Ret. Sys., 844 N.E.2d 438, 442 (Ill. App. Ct. 2006); Jones v. Jones-Blythe Constr. Co., 501 N.E.2d 374, 375 (Ill. App. Ct. 1986).

629. *In re Marriage of Hunt*, 397 N.E.2d 511, 517–18 (Ill. App. Ct. 1979). *Accord*, *In re Marriage of Smith*, 405 N.E.2d 884, 886 (Ill. App. Ct. 1980) (stating a contractual pension right is a chose in action); *In re Marriage of Papeck*, 420 N.E.2d 528, 532 (Ill. App. Ct. 1981) (stating pension rights are deferred compensation); see *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (defining “chose in action—an interest in property not immediately reducible to possession (which overtime came to include a financial interest such as a debt, a legal claim for money, or a contractual right)”).

630. *Gonzalez v. Profile Sanding Equip., Inc.*, 776 N.E.2d 667, 679–80 (Ill. App. Ct. 2002); *Levine v. Pascal*, 236 N.E.2d 425, 429 (Ill. App. Ct. 1968).

debtor and creditor relationship.⁶³¹ As such, there is an absolute obligation on the part of the employer to pay and an absolute right on the part of the employee to receive payment.⁶³² Accordingly, Sidley is incorrect that the Pension Code could only be interpreted as making the State a guarantor if the Code “specifically provides” that the State will pay pensions if the pension system cannot.⁶³³

c. Section 9 of the Transition Schedule of the Illinois Constitution Renders Sidley’s Interpretation of the Pension Code Invalid Even if Correct

Third, even if Sidley’s interpretation of the Pension Code were correct that the State is not a guarantor or that pension recipients only have a right to moneys in their respective funds, this conclusion cannot overcome what the Pension Clause requires. Section 9 of the Transition Schedule of the 1970 Illinois Constitution provides in pertinent part:

The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution.⁶³⁴

The Illinois Supreme Court has construed this provision as invalidating those statutory provisions predating the 1970 Constitution that are inconsistent with the provisions of the new Constitution.⁶³⁵

As explained in this Article, the Clause guarantees that pension participants will receive their pension payments when those payments become due. Delegate Green made clear at the

631. *See* *State Street Furn. Co. v. Armour & Co.*, 177 N.E. 702, 703 (Ill. 1931) (stating in part that “[t]he relationship between an employer with respect to unpaid wages is that of a debtor and creditor, and the right of the employee to those wages is a chose in action”).

632. *Id.* at 704.

633. Sidley Supplemental Guarantor Memo, *supra* note 604, at 3–4, 15.

634. ILL. CONST. of 1970, Trans. Sched., § 9.

635. *See, e.g., Kanellos v. Cnty. of Cook*, 290 N.E.2d 240, 243–44 (Ill. 1972) (holding that a referendum provision contained in a statute predating was invalid pursuant to Section 9 of the Transition Schedule of the 1970 Constitution where the statute conflicted Cook County’s home rule powers under the new Constitution); *see also* *Washington Home of Chi. v. City of Chi.*, 41 N.E. 893, 896–97 (Ill. 1895) (reaching a similar conclusion under the 1870 Illinois Constitution).

Convention that the main reason the Clause “mandate[d] contractual status” for pension benefits was to ensure what happened in New Jersey would not occur in Illinois.⁶³⁶ As discussed, the New Jersey Supreme Court held in its *Spina* decision that its public pension participants only had a property interest in the pension fund itself, not any specified benefits.⁶³⁷ The court relied on this premise for its holding that the legislature had the power to reduce the pension benefits of current employees where the pension fund at issue lacked sufficient amounts to pay current and future recipients due to chronic underfunding.⁶³⁸ As a result, even if Sidley’s narrow interpretation of the Pension Code were correct, that interpretation would conflict with the demands of the Pension Clause and be invalid pursuant to Section 9 of the Transition Schedule of the 1970 Constitution. After all, the General Assembly cannot thwart a constitutional guarantee by legislation.⁶³⁹

In addition, the Supreme Court would most certainly reject Sidley’s public policy argument that the State somehow retains a reserved police power to abscond on its obligations to pension recipients should a pension system default.⁶⁴⁰ As discussed above, Illinois courts have concluded that the Clause affords the legislature no such reserved power.⁶⁴¹ Relying on *Kraus*, the Illinois Supreme Court explained in *Felt* that to accept the Attorney General’s argument “we would have to ignore the plain language of the Constitution of Illinois, reject the New York decisions on the constitutional provision which was the model for section 5 of article XIII, and overrule this court’s decision in *Bardens*.”⁶⁴² As a New York court noted, “[a]lthough fiscal relief is

636. 4 PROCEEDINGS, *supra* note 53, at 2931.

637. See *supra* notes 53–59 and accompanying text (explaining the New Jersey Supreme Court’s holding and how this decision influenced the discussion of the proposed amendment to the Pension Clause at the 1970 Illinois Constitutional Convention).

638. *Id.*

639. See *Washington Home*, 41 N.E. at 896–97 (holding, “[i]n cases where [a constitution’s] provisions are negative or prohibitory in their character, they execute themselves. Where that instrument limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, none would contend that the power might be exercised or the act performed until prohibited by the general assembly. . . . When the constitution says, ‘You must not pay,’ it must be obeyed in preference to a statute which says, ‘You must pay.’ And this is true, not only where the statute on its face is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such provision”).

640. Sidley Supplemental Guarantor Memo, *supra* note 604, at 33–35.

641. See *supra* notes 260–61, 280–82, and 504–49 and accompanying text (discussing Illinois precedent).

642. *Felt*, 481 N.E.2d at 702.

a current imperative, an unconstitutional method may not be blinked.”⁶⁴³

d. A Pension Recipient Would Most Likely Obtain Relief in Circuit Court Through a Mandamus Action Against the State Comptroller

Finally, Sidley is incorrect that a pension participant would need to seek relief before the Illinois Court of Claims should a State pension system default or be on the verge of default. Again, while the Illinois Supreme Court has held that the Pension Clause does not provide pension participants with a constitutional right to a specific funding percentage,⁶⁴⁴ it undoubtedly guarantees them the right to receive the money due them at the time of retirement.⁶⁴⁵

In addition, the Supreme Court has recognized, per the statements of Delegate Kinney, that if a pension fund were “on the verge of default or imminent bankruptcy” such that “benefits [were] in immediate danger of being diminished,” then pension participants would have a cause of action in circuit court to enforce their right to receive payments.⁶⁴⁶ Since the Clause acts as a restriction on legislative power, it is enforceable by the courts.⁶⁴⁷

This conclusion comports with the drafters’ original intent,⁶⁴⁸

643. *Kleinfeldt I*, 36 N.Y.2d at 100, 324 N.E.2d at 869 (cited and quoted favorably by *Felt*, 481 N.E.2d at 700).

644. *Lindberg*, 326 N.E.2d at 752.

645. See *Skłodowski I*, 695 N.E.2d at 379 (stating, “[t]he framers of the Illinois Constitution were careful to craft in the pension protection clause an amendment that would create a contractual right to benefits”); *McNamee*, 672 N.E.2d at 1166 (explaining, “[the Clause] creates an enforceable contractual relationship that protects only the right to receive benefits.”); *Lindberg*, 326 N.E.2d at 751–52 (stating that the Clause provides the right to “receive money due them at the time of their retirement”).

646. *Skłodowski I*, 695 N.E.2d at 379 (quoting *McNamee*, 672 N.E.2d at 1166).

647. *Hynes*, 390 N.E.2d at 850 (1979) (stating, “limitations written into the Constitution are restrictions on legislative power and are enforceable by courts.”); see also *People ex rel. Hilger v. Myers*, 252 N.E.2d 924 (Ill. App. Ct. 1969) (holding that sovereign immunity did not bar a *mandamus* action against a state official to pay a State employee back pay where a state statute required that the employee be paid).

648. See 4 PROCEEDINGS, *supra* note 53, at 2926 (Del. Kinney) (defining the word “enforceable” as “meant to provide that the rights . . . established shall be subject to judicial proceedings and can be enforced through court action”; and defining the word “impaired” as “meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved”); *id.* (Del. Kemp) (stating he understood the Clause as making “certain that irrespective of the financial condition of a municipality or even the state government, that those persons who have worked for often substandard wages over a long period of time could at least expect to live in

and the voters' understanding that pension recipients would receive their full benefits.⁶⁴⁹ In addition, the Attorney General conceded and counsel for TRS in Sklodowski argued in its briefs that the Clause guarantees that pension participants could enforce their pension benefits in court and continue to receive pension payments from the State.⁶⁵⁰ Sidley's contention that no such arguments were made is simply untrue.⁶⁵¹

some kind of dignity during their golden years") (emphasis added).

649. See *supra* notes 200–16 and accompanying text (discussing the Convention's official explanation and newspaper articles).

650. See Brief and Argument of Teachers' Ret. Sys. of The State of Illinois at *25–26, *People ex rel. Sklodowski v. State*, 695 N.E.2d 374 (Ill. 1998) (No. 82459), 1997 WL 33616214 (arguing, "[i]ndeed, by the logic of the State Defendants' interpretation of the separation of powers doctrine, the court could do nothing to enforce the TRS's members' right to receive retirement payments even if the TRS's assets were totally depleted, and the Pension Protection Clause's express guarantee that the right to receive such benefits is 'enforceable' would therefore be meaningless. Since a position rendering an explicit constitutional guarantee meaningless is untenable, the State Defendants attempt to avoid the logical consequence of their argument by contending that the courts can enforce the Pension Protection Clause only when the State Retirement Systems go totally bankrupt. That position concedes the issue. If the courts have the power to act when the Systems go bankrupt, then they *do* have the power to act. There is no logical explanation for the distinction that the State Defendants advance in this regard. Either the courts have the ability to enforce constitutionally binding contractual commitments by this State, or they do not. Undoubtedly, the courts have such power"); Brief of Defendants-Appellants and Counterdefendants-Appellants at *41–44, *People ex rel. Sklodowski v. State*, 695 N.E.2d 374 (Ill. 1998) (No. 82459), 1997 WL 33559053 (conceding that plaintiffs would have stated a cause of action under *McNamee* and *Lindberg* if they had alleged that their benefits had been unpaid, reduced or were even in danger of being unpaid or reduced in the near future; further, "even if . . . the pension funds were on the verge of bankruptcy such that the participants' benefits were diminished, there clearly was no danger that benefits might not be paid at the time the Appellate Court decided this case in late 1996. . . . [Public Act 88-593] not only repealed the language of Public Act 86-273 upon which plaintiffs, counterplaintiffs, and intervenors rely . . . but it provides for continuing automatic appropriations of the state contributions to each pension system if adequate contributions are not otherwise appropriated."); Reply Brief of Defendants-Appellants and Counterdefendants-Appellants at *23–24, *Skłodowski I*, 695 N.E.2d 374 (No. 82459), 1997 WL 33559057 (arguing that "[t]he plaintiffs did not allege that anyone had their benefits reduced or were in imminent danger of having their benefits reduced. Thus, the only contractual right which article XIII, section 5 gives to the plaintiffs—the right to receive a given amount of benefits under a given set of circumstances—is not at issue in this case . . . [i]f, as this Court has held, [the Pension Clause] guarantees only the right to receive pension benefits and no participant has failed to receive benefits, the impairment of contract provisions of the United States and Illinois Constitutions are not implicated").

651. See Sidley Guarantor Memo, *supra* note 421, at 4 (stating that plaintiffs have never argued that Illinois must pay pension benefits when due as a guarantor if the funds were on the verge of default or imminent bankruptcy); Sidley Supplemental Guarantor Memo, *supra* note 604, at 25

In sum, if the Illinois Supreme Court were confronted with a circumstance where a pension fund were on the verge of default and pension payments were diminished, then the court would most likely permit a *mandamus* action to proceed and resolve that action in the same manner as *Jorgenson v. Blagojevich*.⁶⁵² In that case, the court held that where a constitutional or statutory provision “categorically commands the performance of an act, so much money as is necessary to obey the command may be disbursed without any explicit appropriation.”⁶⁵³ The court applied this principal to compel the State Comptroller to pay judges from the State Treasury, without an appropriation, the cost of living increase that was part of their constitutionally protected salaries under Article VI, Section 14 of the Illinois Constitution.⁶⁵⁴

As noted, that provision bars the diminishment of judicial salaries just as the Clause prohibits the diminishment of pension benefit rights. Accordingly, the Supreme Court would most likely grant pension participants the same relief provided in *Jorgenson* by compelling the Comptroller to pay the needed funds from the State General Revenue Fund, especially since the State Pension Funds Continuing Appropriation Act requires automatic appropriations be made from the Fund to the five State pension systems.⁶⁵⁵

G. The State Cannot Require Current Employees to Pay Higher Contribution Rates for the Same Level of Pension Benefits

In December 2010, the Commercial Club unveiled a second proposal to unilaterally wean current employees off of their existing pension benefit plans.⁶⁵⁶ Under this proposal, current

(stating that plaintiffs have never argued that Illinois must “pay pension benefits when due if the pension funds are unable to do so”).

652. *Jorgensen*, 811 N.E.2d 652. See *Skłodowski II*, 674 N.E.2d at 87 (holding that the separation of powers doctrine did not prohibit the trial court from considering whether to issue a writ of *mandamus* to compel State officials to comply with a law) *abrogated on other grounds*, 695 N.E.2d at 379. *Accord* *Noyola v. Bd. of Educ.*, 688 N.E.2d 81, 86 (Ill. 1997) (“[courts] most certainly have the authority to assure that the action of public officials does not deprive citizens of rights conferred by statute or the Constitution. Where, as alleged here, public officials have failed or refused to comply with requirements imposed by statute, the courts may compel them to do so by means of a writ of *mandamus*, provided that the requirements of that writ have been satisfied”) (citation omitted).

653. *Jorgensen*, 811 N.E.2d at 668 (quoting *Antle v. Tuchbreiter*, 111 N.E.2d 836, 841 (Ill. 1953)).

654. *Id.* at 668–69.

655. 40 ILL. COMP. STAT. 15/1-1.2 (2008).

656. Tom Cross, Op-Ed, *More Pension Reforms*, CHI. TRIB. (Dec. 17, 2010), *available at* <http://press.gop->

employees would be required to pay substantially higher contributions to retain the same pension plans.⁶⁵⁷ For example, the normal cost of benefits for a sitting judge as a JRS member is 38.79% of his or her salary.⁶⁵⁸ The employee contribution rate for a judge is 11% of that 38.79% of normal cost, while the State is responsible for the remaining 27.79%.⁶⁵⁹ The Club's proposal would increase the employee contribution from 11% to at least 36.45%—a threefold-plus increase in what sitting judges would need to pay to obtain the same pension benefit.⁶⁶⁰

The phrase “at least” is used because the proposal would also require current JRS members to pay for any system liabilities due to any future wage increases.⁶⁶¹ This amount remains uncalculated for JRS and the other State systems, and would further *increase* the employee contribution rate paid by current members.⁶⁶² In other words, the proposal seeks to make it cost prohibitive for current employees and officials to stay with their existing plans.

The proposal would also allow employees to opt into the pension reform plan the legislature enacted in 2010 for new employees beginning on January 1, 2011.⁶⁶³ Under this option, employees and the State would split the plan's cost.⁶⁶⁴ In addition, the proposal would permit employees to select a 401(k) style defined contribution plan in which the State would match employees' contributions.⁶⁶⁵ In January 2011, identical legislation

network.org/news/full_article/116122?request=Ⓔhttp%3A%2F%2Fpress.gop-network.org%2F (stating, “[t]he Civic Committee of the Commercial Club of Chicago, a nonpartisan group of business and civic leaders, has studied this issue in depth and proposed a fair and balanced approach to help get our state on better financial footing”).

657. *See id.* (stating, “[e]mployees could stay in their current defined benefit pension plan, but the state would cover only 5 percent of the cost of the plan. The employees would cover the rest of the cost”).

658. Letter from Sandor Goldstein, Goldstein & Associates, to Dan Haniewicz, Commission on Gov't Forecasting and Accountability, at 3 (Feb. 16, 2011) (on file with author) (regarding House Bill 149).

659. *Id.*

660. *Id.* at 3, 5. For a current SERS employee, the contribution rate would increase at least from 5.63% to 13.5%. *Id.* For a current TRS employee, the contribution rate would increase at least from 9% to 13.77%. *Id.* For a current SURS employee, the contribution rate would increase at least from 8% to 15.31%. *Id.* For a current GARS member, the contribution rate would increase at least from 11.5% to 24.98%. *Id.*

661. *Id.* at 2, 5.

662. *Id.* at 5.

663. Chris Wetterich, *State Worker Pension Reductions Unconstitutional, Cullerton Says*, STATE JOURNAL REGISTER (Feb. 9, 2011), available at <http://www.sj-r.com/top-stories/x1179516893/Pension-reductions-for-current-employees-unconstitutional-Cullerton-says>.

664. *Id.*

665. *Id.*

encompassing the proposal was filed in the House and Senate, but failed to pass the legislature.⁶⁶⁶

Simply put, the Club's 2010 proposal sought to shift current employees off of existing plans through a combination of cost-prohibitive employee contribution increases and a reallocation of State pension contributions to other plans. As detailed below, the proposal would violate the Pension Clause because it unilaterally and adversely changes the actual terms of the pension benefit rights of current employees by requiring them to pay more to retain the same level of benefits. This conclusion is based on five reasons that cogently summarize the findings of this Article.

First, the proposal is contrary to the Clause's plain language and common meaning. The Clause makes an employee's membership in a public pension system an "enforceable contractual relationship," and prohibits the "benefits of" such membership from being diminished or impaired.⁶⁶⁷ The term "benefit" refers not only to the specific annuity payments a public employee is eligible to receive, but also other terms of membership that advantage the public employee.⁶⁶⁸

When a public employee joins a pension system, the employee agrees, per the Pension Code, to contribute to the system a specific percentage of salary and work a certain number of years to ultimately receive a pension upon retirement. The employee's contribution rate, in other words, is a term of that enforceable contractual relationship and a benefit because the employee need only pay that rate to receive a pension. In contract terms, the employee's contribution rate is the "consideration" that supports the unilateral contract between the employee and State. In short, requiring current employees to pay more for the same ultimate pension payment is tantamount to a bank changing the fixed mortgage payment required under a loan without a contractual right to do so. Considering a bank could not take such unilateral action, neither may the State.

Second, the proposal is inconsistent with the drafters' original intent based on the Clause's Convention history. Both sponsors of the Clause articulated that the provision safeguarded those pension rights existing at the time a public employee joined a pension system. Delegate Green aptly explained: "[w]hat we are trying to merely say is that if you mandate the public employees in the state of Illinois to put in their 5 percent or 8 percent or

666. S.B. 105, 97th Gen. Assem. (Ill. 2011), *available at* <http://www.ilga.gov/legislation/97/SB/PDF/09700SB0105lv.pdf>; H.B. 149, 97th Gen. Assem. (Ill. 2011), *available at* <http://www.ilga.gov/legislation/97/HB/PDF/09700HB0149lv.pdf>.

667. ILL. CONST. of 1970, art. XIII, § 5.

668. WEBSTER'S NEW WORLD DICTIONARY, *supra* note 22 and accompanying text.

whatever it may be monthly, and you say when you employ these people, 'Now if you do this, when you reach sixty-five, you will receive \$287 a month,' that is in fact, is what you will get."⁶⁶⁹ Delegate Kinney similarly stated that the Clause was intended "to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee."⁶⁷⁰

In addition, the drafters specifically rejected during the Convention two requests from the Pension Laws Commission to insert language or read a floor statement allowing the General Assembly to unilaterally change employee contribution rates.⁶⁷¹ Also, the provision was described to voters as protecting pension benefit rights and granting public employees a constitutional right to their "full pension benefits."⁶⁷² As a consequence, the Club's proposal deviates from the framers' intent and must be rejected.

Third, Illinois court decisions offer the proposal no legitimate assistance. As discussed, Illinois courts hold that the Clause entitles public employees to have their pension benefit rights determined in accordance with the terms of the Pension Code in effect when they entered the pension system.⁶⁷³ In other words, the Pension Code existing at the time "is deemed to be part of the contract as though it was expressly referred to or incorporated into it."⁶⁷⁴ These pension rights, in turn, "vest" when the employee begins making contributions to the system.⁶⁷⁵ Thus, the Clause entitles an employee to receive a pension based on those relevant sections of the Pension Code.⁶⁷⁶

As a result, the legislature could not unilaterally increase the contributions rates of current employees because it adversely changes the terms of the original contract by requiring employees to essentially pay additional consideration for the same pension amount.⁶⁷⁷ Put differently, the State is merely offering current

669. 4 PROCEEDINGS, *supra* note 53, at 2930.

670. *Id.* at 2930–31. *See id.* at 2929 (stating that the Clause gives public employees "a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them").

671. *Supra* notes 187–99 and accompanying text.

672. *Supra* notes 200–16 and accompanying text.

673. *Supra* Part II.A.

674. *Schroeder*, 579 N.E.2d at 999–1000.

675. *Id.* at 999; *Kraus*, 390 N.E.2d at 1289.

676. *Kraus*, 390 N.E.2d at 1289; *Redding*, 450 N.E.2d at 765; *DiFalco*, 521 N.E.2d at 925 (the "contractual relationship" under the Pension Clause "is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system. Therefore, in determining plaintiff's rights under the Pension Code, we must look to the language of the relevant statute in effect . . . when plaintiff began paying into the pension fund").

677. *See Boyd v. Madison Mut. Ins. Co.*, 507 N.E.2d 855, 857 (Ill. 1987) (declaring that it would be unconstitutional to retroactively apply a statute to an existing insurance contract where the statute imposed additional

employees what it is already required to do—paying them a pension based on the terms in place when they joined the system. Illinois courts have long held that one party cannot modify a contract merely by offering to do something that the party is already legally obligated to perform.⁶⁷⁸

As the Oregon Supreme Court stated in a similar context, “[o]nce offered and accepted, a pension promise made by the state is not a mirage (something seen in the distance that disappears before the employee reaches retirement).”⁶⁷⁹ The court continued that to allow the legislature to unilaterally increase a current employee’s cost of participation in a pension plan, “would serve notice to any person who might consider embarking on a career in public service that the state’s promises could well prove worthless, even after the employees had given consideration for those promises.”⁶⁸⁰

To be sure, the Club would most likely argue that providing current employees with the option to join a plan to receive lower pension benefits or a 401(k)-style plan constitutes a legal consideration. Even if that were true,⁶⁸¹ current employees, as discussed, must still have the power to freely accept or reject the offer and remain in their current plan under its original terms.⁶⁸²

obligations on one party which had not been originally agreed to by the parties; statute required insurance company to advance a sum of money equal to any settlement offer in order for the insurance company to preserve its existing contractual subrogation rights).

678. See *Smith v. Gray*, 147 N.E. 459 (Ill. 1925) (holding, “[i]t is the law that a promise to do that which the promisor is already bound to do is not sufficient consideration for such an agreement”). Accord *Watkins v. GMAC Fin. Servs.*, 785 N.E.2d 40, 44 (Ill. App. Ct. 2003) (stating, “[a] contract modification must satisfy the same criteria required for a valid contract: offer, acceptance, and consideration. Preexisting obligations are not sufficient consideration.”); *Carlile v. Snap-On Tools*, 648 N.E.2d 317, (Ill. App. Ct. 1995) (noting that at least two law professors have described an individual who refuses to perform his contract duties unless he receives a concession “as an extortionist”).

679. *Oregon State Police Officers’ Ass’n v. State*, 918 P.2d 765, 775–76 (Or. 1996)

680. *Id.*

681. In *Miller v. Retirement Board*, the Appellate Court considered a factually analogous circumstance where amendments to the Pension Code had the effect of increasing employee pension contributions and reducing pension payment amounts. *Miller*, 771 N.E.2d at 435. The court concluded that applying the amendments to the plaintiffs “amounted to a change in the terms of their contract with the pension system and directly diminished their benefits under the contract” in violation of the Clause. *Id.* at 440. The Club’s proposal is little different than what took place in *Miller* because current employees are required to either pay more for what they are already entitled, opt into a plan providing lower pension payments for potentially the same or higher employee contributions or opt into a 401(k) style plan that does not provide a guaranteed defined benefit.

682. *Supra* Part III.E.

Otherwise, the proposal is tantamount to legislative coercion. In addition, the proposal cannot be squared with the Illinois Supreme Court's *Felt* decision where the court rejected the Attorney General's request that the Pension Clause be construed according to California's "limited vesting" approach.⁶⁸³ That approach permits the legislature to unilaterally reduce the benefits of current employees so long as they receive some kind of off-setting advantage.⁶⁸⁴ The *Felt* court explained, per *Kraus*, that in "order to accept the defendants' argument we would have to ignore the plain language of the Constitution of Illinois, reject the New York decisions on the constitutional provision which was the model for section 5 of article XIII, and overrule this court's decision in *Bardens*."⁶⁸⁵

Fourth, the Club's proposal finds no support in the Appellate Court's *Kraus* decision. In *Kraus*, the court stated in dicta that "[i]t is also possible, although we do not decide the question, that an increase in the contribution rates of some employees to equalize their contributions with those of others would not be prohibited."⁶⁸⁶ *Kraus* cited a Michigan Supreme Court advisory opinion for this proposition.⁶⁸⁷

That opinion involved a legislative proposal to unilaterally increase the contribution rates of certain teachers from 3% to 5% (an \$84 annual increase) to bring those rates in line with other teachers.⁶⁸⁸ The Michigan court concluded that the change was permissible because that State's constitution only protected "accrued financial benefits," and because the convention debates contemplated that the legislature could "attach new conditions for earning financial benefits which have not yet been accrued."⁶⁸⁹

As discussed above, both the Clause's plain language and Convention history manifest an intent that is at odds with what the Michigan Constitution would allow. Indeed, the Clause protects the "benefits of" pension system members, not just "accrued financial benefits" as under the Michigan Constitution. The *Kraus* court itself found this distinction important in arriving at its conclusion that the legislature may not unilaterally change the pension benefit rights of current employees.⁶⁹⁰ The Illinois Supreme Court agreed in *Felt*, and used this analysis to reject the Attorney General's claim that the legislature retained a reserved

683. *Supra* notes at 280–82, and 642–43 and accompanying text.

684. *Supra* notes 642–43 and accompanying text.

685. *Felt*, 481 N.E.2d at 702.

686. *Kraus*, 390 N.E.2d at 1293.

687. *Id.*

688. Advisory Op. re Constitutionality of 1972 PA 258, 209 N.W.2d at 201–02.

689. *Id.* at 202–03.

690. *Kraus*, 390 N.E.2d at 1291.

power under the Clause to adversely alter the pension rights of current employees.⁶⁹¹

Also, the Club's proposal neither seeks a nominal increase in employee contribution rates, nor attempts to equalize contribution rates with those of other employees. Rather, the proposal makes it cost-prohibitive for current employees to retain their existing plan. Even under these circumstances, the Michigan Attorney General would find its Supreme Court's decision inapposite. In 1985, the Michigan Attorney General opined that legislation substantially increasing current employee contributions rates—a \$1,200 annual increase—without any commensurate advantage to employees would run afoul of the Michigan Constitution.⁶⁹² For these reasons, *Kraus* is unpersuasive and does not advance the Club's proposal.

Finally, two law firms (DLA Piper and Jenner & Block) have similarly concluded in opinions provided to the Illinois Education Association and the Teachers Retirement System that a unilateral increase in employee contributions without a simultaneous enhancement in benefits would violate the Pension Clause.⁶⁹³ DLA Piper reached this conclusion in April 2010, while Jenner & Block did so in February 2005 well before it signed onto Sidley's opinion and changed its view.⁶⁹⁴

691. *Felt*, 481 N.E.2d at 702.

692. 1985–86 Mich. Att'y Gen. Op. 67, 1985 WL 200597 at *3–5.

693. See Memorandum from William Campbell et al., DLA Piper, to the Ill. Educ. Ass'n, on Constitutionality of Pension "Reform" Proposals (Apr. 19, 2010) (opining that the Club's initial proposal to unilaterally reduce existing employee pension benefits or increase employee contribution rates without a corresponding increase in pension benefits would violate the Pension Clause; also rejected Sidley's "earned right" concept); Memorandum from William Heinz, Jenner & Block, to Teachers Ret. Sys., on Constitutionality of Potential Increases to TRS Members' Contributions at 2, 8 (Feb. 3, 2005) (stating, "we believe that it is more likely than not that legislation increasing the teachers' contributions to the TRS without providing any corresponding benefit to the teachers would be found to be unconstitutional because it directly impairs the teachers' existing contract rights in their pensions"). The memorandum further opines,

[u]nlike situations that have been held to be an indirect impairment such as reduction in work hours or salary or reduction in the mandatory retirement age that have only incidentally related to the pension benefits, increasing the required contribution by plan members directly impairs the benefits that the plan members ultimately receive. In effect, the plan members are contributing more money to receive the same amount of benefit under the pension plan.

Id.

694. See *supra* note 415; Editorial, *Crisis and Judges*, CHI. TRIB., (Apr. 14, 2013), http://articles.chicagotribune.com/2013-04-14/opinion/ct-edit-courts-20130414_1_pension-system-pension-reform-pension-funds.

H. Sidley's Police Powers Argument Is Without Merit

In April 2011, Sidley issued a new position statement on behalf of the Commercial Club of Chicago in response to a forerunner of this Article made public in March 2011.⁶⁹⁵ In that statement, Sidley unveiled a new argument that purportedly allowing the General Assembly to unilaterally reduce the pension benefits of current employees, but not retirees.⁶⁹⁶ Under its new argument, Sidley claimed the legislature may exercise its so-called police or reserved powers “to modify the level of pension benefits that will be earned in the future when, as here, the legislation enables the funding of benefits that have been earned to date and is necessary to allow the State to continue to provide essential governmental services.”⁶⁹⁷ Sidley reasoned that because paying 100% of all pension benefits will “crowd out expenditures on health, education, and public safety” under current revenue assumptions, the State can trump its obligations under the Pension Clause and divert funds from those obligations in order to fund government services the General Assembly deems essential.⁶⁹⁸ Sidley rested this conclusion on the general notion that “no constitutional rights are absolute,” its reading of the Illinois Supreme Court’s decision in *Felt*, and its view that the Pension Clause provides no better protection than the Contract Clause of the U.S. Constitution.⁶⁹⁹ While a thorough reply to Sidley’s new argument is beyond the scope of this Article, Sidley’s police powers argument is without merit for reasons already articulated in this Article.⁷⁰⁰

First, Sidley’s argument cannot be squared with the Clause’s plain language, which admits of no exceptions. That claim is also contrary to the Clause’s drafting history, Convention debates, and voters’ understanding of the Clause. Indeed, the drafters did not accept the proposal made by Delegate Wayne Whalen, an opponent of the Pension Clause, to expressly amend the Illinois

695. Memorandum from Sidley Austin LLP on The Gen. Assembly’s Auth. to Enact Comprehensive Pension Reform Legislation: A Response to Eric Madiar (April 11, 2011), *available at* <http://www.docstoc.com/docs/96732951/2011-April-THE-GENERAL-ASSEMBLY-AUTHORITY-TO-ENACT> [hereinafter Sidley Police Power Memo]; Eric M. Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution* (Mar. 1, 2011), *available at* <http://ssrn.com/abstract=1774163>.

696. Sidley Police Power Memo, *supra* note 695, at 2–3, 12–14, 30–59.

697. *Id.* at 2–3, 14, 30–59.

698. *Id.* at 2–3, 31–32, 37–41.

699. *Id.* at 2–3, 12–14, 30–59.

700. *Madiar Prologue Article*, *supra* note 8, nn.257–296 and accompanying text (for additional reasons why Sidley’s police power’s argument is without merit).

Constitution's Contracts Clause to protect public pensions.⁷⁰¹ Instead, the delegates adopted an independent provision modeled after the one found in the New York Constitution to ensure "the vested rights of pension plan participants not be defeated or diminished."⁷⁰² The Illinois Supreme Court has explained that the framers added the Clause to give public employees "a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them."⁷⁰³

In addition, the voters ratified the Clause based on the premise that the provision protected public pension benefit rights from reductions and that public employees were granted a constitutional right to their "full pension benefits."⁷⁰⁴ As the Convention's official explanation to voters stated, the Clause was a new section "and self-explanatory."⁷⁰⁵ Accordingly, the state's police power yields to the Clause as it must to other specific constitutional prohibitions and positive mandates.⁷⁰⁶

701. 4 PROCEEDINGS, *supra* note 53, at 2931.

702. *Buddell*, 514 N.E.2d at 186.

703. *Felt*, 481 N.E.2d at 698 (quoting 4 PROCEEDINGS, *supra* note 53, at 2929) (statement of Del. Kinney).

704. *Supra* notes 203–16 and accompanying text.

705. *Supra* note 205 and accompanying text.

706. *People v. Adams*, 597 N.E.2d 574, 579 (Ill. 1992) ("the police power may not be used to violate a positive constitutional mandate"); *O'Brien v. White*, 846 N.E.2d 116, 124 (Ill. 2006) (explaining, "the General Assembly cannot enact legislation that conflicts with specific provisions of the constitution, unless the constitution specifically grants the legislature that authority"); *Maddux v. Blagojevich*, 911 N.E.2d 979, 988 (Ill. 2009) ("The constitution operates as a limitation upon the General Assembly's sweeping authority, not as any grant of power [citation]; thus the General Assembly is free to enact any legislation that the constitution does not expressly prohibit[.]"); *Parkway Bank & Trust Co. v. City of Darien*, 357 N.E.2d 211, 217 (Ill. App. Ct. 1976) ("the State is free as a matter of its own law to impose greater restrictions on the police power than those held to be necessary upon federal constitutional standards"); *Greenfield v. Russel*, 127 N.E. 102, 105 (Ill. 1920) ("Our Legislature possesses every power not delegated to some other department of the state or to the federal government or not denied to it by the Constitution of the state or of the United States."); *Munn v. Illinois*, 94 U.S. 113, 124 (1876) ("When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and security of life and property. All the powers which they retained committed to their respective States, *unless in express terms or by implication reserved to themselves*. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the States, so that now the governments of the States possess all the powers of Parliament of England, except such as have

Second, the Illinois Appellate Court rejected the argument that the Clause is subject to a police or reserved powers exception back in 1979 in its *Kraus* decision.⁷⁰⁷ The court in *Kraus* explained how during the constitutional convention the Illinois Public Employees Pension Laws Commission, per its May 1971 report to the General Assembly, “attempted to have language allowing a reasonable power of legislative modification added to the section [i.e., the Clause] or read into the [convention] debates to establish intent, but no such action was taken during the Convention.”⁷⁰⁸ The court continued that “[w]hile it might have been wise to provide for such power, there is no suggestion in the wording of the provision or in the debates to support the existence of one.”⁷⁰⁹ The Commission’s failed attempts to modify the Clause are detailed in this Article and its appendices.⁷¹⁰

Third, contrary to Sidley’s claim, the Illinois Supreme Court found *Kraus* persuasive and reached the same conclusion in its *Felt* decision.⁷¹¹ The court explained:

The defendants have argued that while there are decisions similar to those of New York and similar to *Bardens* and our holding here, there are jurisdictions that would permit reduction in retirement benefits. They note at least three States, Alaska, Hawaii, and Michigan, there are constitutional provisions relating to pensions. As was observed in *Kraus v. Board of Trustees* (1979) [citation omitted], however, in those constitutional provisions, unlike ours and that of New York, there is restrictive language that has permitted modifications in benefits. In order to accept the defendants’ arguments we would have to ignore the plain language of the Constitution of Illinois, reject the New York decisions on the constitutional provision which was the model for section 5 of article XIII, and overrule this court’s decision

been delegated to the United States or reserved to the people. *The reservations by the people are shown in the prohibitions of the constitutions.*”) (emphasis added); *Town of Lake View v. The Rose Hill Cemetery Co.*, 70 Ill. 191, 197 (1873) (“It has been said, the source of [the police power] may be readily recognized as flowing from the people in their organized capacity, inalienable in its character, but it is difficult to define its boundaries or limit its operations. We are unwilling, however, to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem the public exigency may require it[.]”).

707. *Kraus*, 390 N.E.2d at 1294–95.

708. *Id.*

709. *Id.*

710. See *supra* notes 200–16 and accompanying text (discussing the Commission’s failed attempts to modify the Pension Clause).

711. *Felt*, 481 N.E.2d at 702.

in *Bardens*.”⁷¹²

As revealed by this Article, the Supreme Court reached this conclusion after extension briefing and despite then-Illinois Attorney General Hartigan’s insistence that the court reject *Kraus* and that the Pension Clause was subject to a police power exception just like the U.S. Constitution’s Contracts Clause.⁷¹³ The *Felt* decision makes clear that the Attorney General did not prevail in either having the court reject *Kraus* or reading a police power exception in the Pension Clause.

Finally, even assuming pension benefits were only entitled to the same level of protection as optional pension plans under the 1870 Illinois Constitution’s Contracts Clause, the legislature would still be devoid of any power to unilaterally reduce those benefits per the Illinois Supreme Court’s *Arnold* decision.⁷¹⁴ In that case, the court favorably cited *Kraus* for the proposition that even before the Pension Clause, the “legislature had *no power* to diminish or repeal these vested contractual rights [i.e., the pension benefits under an optional plan], and a participant was entitled to a pension based on the status of the plan at the time he began his contributions.”⁷¹⁵ As stated earlier in this Article, prior to the 1970 Constitutional Convention, it was well understood that by the Illinois Attorney General and at least one scholar that the *Bardens* decision absolutely barred the General Assembly from unilaterally reducing the benefits of participants in an optional plan.⁷¹⁶

In sum, to read a police power exception into the Pension Clause would be perverse, and contrary to the Clause’s plain language, the drafters’ original intent, the voters’ understanding of the provision, and court decisions construing the Clause. To read such an exception into the Clause would also ignore the State’s sordid history of failing to properly fund the pension system.⁷¹⁷ The Clause, as the Illinois Supreme Court recently observed, was intended “to guarantee that retirement rights enjoyed by public employees would be afforded contractual status and insulated

712. *Id.*

713. See *supra* notes 531–40 and accompanying text (discussing the Attorney General’s police powers argument and request that the Illinois Supreme Court reject the *Kraus* decision).

714. *Arnold*, 417 N.E.2d at 1027.

715. *Id.*

716. *Pensions: State Emps.’ Ret. Sys.*, No. 21, 1961 Op. Atty. Gen. Ill. at 78–80 (1961) (opining that optional pension plans afforded vested contractual rights under the Illinois Constitution’s Contract Clause “could not be impaired by subsequent legislation” even if the unilateral alteration or modification were “slight” or “minor” in nature); Cohn, *supra* note 30, at 62; Comment, *supra* note at 34, at 458–59 & n.87.

717. See *Madiar Prologue Article*, *supra* note 8, nn.15–140 and accompanying text (detailing the State’s long history of failing to properly fund the State’s public pension systems).

from diminishment and impairment by the General Assembly.”⁷¹⁸ The court further observed that the Clause “was aimed at protecting the right to receive the promised retirement benefits, not the adequacy of the funding to pay for them.”⁷¹⁹ The court concluded that it “may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of the Illinois did not approve.”⁷²⁰

With the General Assembly’s passage of Senate Bill 1 in December 2013, however, the issue will again be before the Illinois Supreme Court since the Illinois Attorney General is primarily relying on a police powers argument to defend the legislation.⁷²¹ Indeed, as this Article went to press, a circuit court judge in Sangamon County found Senate Bill 1 unconstitutional under the Pension Clause and rejected the claim that the Clause is subject to a police powers exception.⁷²² The likelihood of this defense succeeding on appeal should be extremely unlikely and at best a remote outcome.⁷²³

It is worth noting that the Arizona Supreme Court recently rejected the same defense that the Arizona Constitution’s pension clause, which is nearly identical to Illinois Constitution’s Pension

718. *Kanerva*, 2104 IL 115811, ¶ 48.

719. *Id.*

720. *Id.* ¶ 41.

721. Answers and Defenses, Ill. Att’y Gen., *In re: Pension Reform Litigation*, No. 2014 MR 1, at 57–62 (May 15, 2014) (claiming that Public Act 98-599 is constitutional as “a permissible exercise of the State of Illinois’ reserved sovereign powers (sometimes referred to as the State’s police powers)”). See *Madiar Prologue Article*, *supra* note 8, nn.141–256 and accompanying text (for a discussion of Senate Bill 1). See generally Eric M. Madiar, *Public Pension Benefits Under Siege: Does State Law Facilitate or Block Efforts to Cut the Pension Benefits of Public Servants?*, 27 A.B.A. J. LAB. & EMP. L. 179, 185–87 (2012); Jack A. Beerman, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 47–63 (2013) (for a discussion of the police power exception to the U.S. Constitution’s Contract Clause).

722. *In re Pension Litigation*, No. 2014 MR 1, slip-op. (Sangamon Cty. Cir. Ct., Nov. 21, 2014). *Pensions: Effect of Pension Code Revisions on Vested Rights*, No. S-1407, Op. Atty Gen. Ill., at 7 (Jan. 10, 1979).

723. See *Scown v. Czarnecki*, 106 N.E. 276, 285 (Ill. 1914) (“It is the duty of this branch of the government to pass finally upon the construction of a law and determine whether the Legislature in its action has transcended its constitutional limits, and the community has the right to expect with confidence we will adhere to decisions made *after full argument and upon due consideration*. The members of the court may change totally every six years, and, if each change in the organization produces a change in the decisions and a different construction of laws under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious.’ * * * If ever there should be an adherence to former decisions, it should be in cases of construction of the Constitution involving rights of citizens as declared by that instrument.” (quoting *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351, 355 (1860))) (emphasis added).

Clause, provided no better protection than the Contracts Clause.⁷²⁴ The court reached this conclusion based on the clause's text and held that interpreting the clause just like the Contracts Clause "would render superfluous the latter portion of § 1(C), the Pension Clause, which prohibits diminishing or impairing public retirement benefits."⁷²⁵ The court explained that since the Arizona Constitution's pension clause only applies to public retirement benefits, it "confers additional, independent protection for public retirement benefits separate and distinct from the protection afforded by the Contracts Clause."⁷²⁶

IV. CONCLUSION

While writing this Article, the Chicago Tribune published an editorial stating that the Pension Clause as a constitutional provision "is not a suicide pact."⁷²⁷ The Tribune invoked this phrase to support its view that when push comes to shove Illinois's present political and economic circumstances should control how Illinois courts interpret the Pension Clause, rather than its text, Convention history or relevant court decisions.

That view is incorrect. As one court explained:

[I]t must be remembered that the people act through the courts, as well through the executive and legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. The recognition of this principle, unknown except in Great Britain and America, is necessary, to 'the end that government may be one of laws and not of men'—words which Webster said were the greatest contained in any written constitutional document.⁷²⁸

After all, courts "sit to determine questions on stormy as well

724. *Fields v. Elected Officials' Ret. Plan*, 320 P.3d 1160, 1164–65 (Ariz. 2014). Article 29, Section 1(C) of the Arizona Constitution provides: "Membership in a public retirement system is a contractual relationship that is subject to Article II, § 25, and public retirement system benefits shall not be diminished or impaired." ARIZ. CONST. art. 29, § 1(c).

725. *Fields*, 320 P.3d at 1164–65.

726. *Id.*

727. Editorial, *The Suicide Pacts*, CHI. TRIB., Nov. 27, 2010, http://articles.chicagotribune.com/2010-11-27/news/ct-edit-pension-20101127_1_suicide-pacts-retirement-deals-unions.

728. *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421, 433–34 (W. Va. 1973).

as calm days,”⁷²⁹ and the Constitution was upheld during the Great Depression.⁷³⁰

Indeed, perhaps this debate over the Pension Clause is, as Eden Martin of the Commercial Club candidly stated, “not about the law at all, it’s about the politics and arm-wrestling over money.”⁷³¹ That very well may be true for some stakeholders. This is Illinois after all.

There is, however, more at stake here—the rule of law in Illinois and keeping promises. This Article opened with a quote from Franklin MacVeagh, a former president of the Commercial Club, and his statement that a “contract breaker is an utter misfit as a citizen or a business man.”⁷³² He made this statement in a speech to the Cincinnati Commercial Club in 1905 about labor unions. As he put it, “until contracts become sacred with all unions—until the public mind believes union contracts to be good as gold—unionism will not be finally accepted by either the employers or the people.”⁷³³ MacVeagh then went on to extol the virtue of one union official who not only refused to break his union’s contract, “but used every influence of his personal authority and that of every friend he could rally about him to avert what he considered the dishonoring of his people.”⁷³⁴

It was this same sentiment that drove public employee groups to advocate for the inclusion of the Pension Clause in the 1970 Constitution. As the Executive Director of SURS stated in a letter to Delegate Henry Green in July 1970, while the “General Assembly has done an excellent job in funding its own retirement system obligations,” it “has failed to meet its commitments to other public employees” and “created such a staggering liability for future taxpayers that the extra load during an adverse economic period may require the public to renege on its obligations to its public servants.”⁷³⁵ Unfortunately, over 40 years later, not much has changed, and Illinois now finds itself on a precipice of what was foreshadowed—choosing to either honor the promise embodied in the Pension Clause or bow to the expediency of the moment.⁷³⁶

729. WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939 TO 1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 55–56 (1st ed. 1981).

730. *Supra* text accompanying note 24, 541.

731. Editorial, *Pension Bomb Still Ticking*, QUAD-CITIES ONLINE, Jan. 18, 2011, <http://www.qconline.com/archives/qco/print display.php?id=52701>.

732. *See* Address of Franklin MacVeagh, *supra* note 2 (citing a speech made whereby the author of the speech chastises individuals who breach contracts generally).

733. *Id.* at 30.

734. *Id.* at 31.

735. *Supra* text accompanying notes 100–01.

736. *See Madiar Prologue Article*, *supra* note 8, nn.15–140 (detailing the State’s long history of failing to properly fund the State’s public pension systems).

These are the ill effects of decades of skipping pension contributions to avoid tax increases and service cuts—a circumstance Illinois Governor John Peter Altgeld described long ago as the “cost of [getting] something for nothing.”⁷³⁷

As this Article shows, the rule of law is clear. The Pension Clause not only makes a public employee’s participation in a pension system an enforceable contractual relationship at the time an employee joins a pension system, but also insulates from diminishment or impairment by the General Assembly all “benefits” found in the Pension Code or in other state statutes that are conditioned on a person’s membership in one of the State’s various public pension systems, including subsidized health care. The Clause’s protection also extends to employee contribution rates *and* any benefit increases added during an employee’s term of service. Further, the Clause bars the General Assembly from adversely changing the benefit rights of current employees and retirees via unilateral action. And, the Clause ensures that pensions will be paid even if a pension system defaults or is on the verge of default. The Clause’s plain language, the framers’ original intent, and voters’ understanding of the provision, as well as court decisions interpreting the Clause, show these conclusions to be correct and Sidley’s analysis erroneous.

While welching on its pension obligations is not an option for Illinois, legitimate contract principles provide a solution to mitigate this crisis. The Pension Clause will become a “suicide pact” only if individual citizens are purely self-interested and admit no obligation to the common good and pay public employees what they are constitutionally entitled to receive.⁷³⁸ By adopting

737. JOHN PETER ALTGELD, *THE COST OF SOMETHING FOR NOTHING* 131–32 (1904), *available at* http://books.google.com/books?id=gIImAAAAAAAJ&printsec=frontcover&dq=the+cost+of+something+for+nothing+altgeld&source=bl&ots=A_jG7CDlwE&sig=vcE2D2Lho1XrVYBcZda_g76pZG4&hl=en&ei=xQ1kTffeEsys8Aas_tzlCw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBMQ6AEwAA#v=onepage&q&f=false (stating “[e]very thoughtful person who reads this book must realize that nothing can be had without cost, and that the accounts of the universe are adjusted and balanced so that in some way everyone must, sooner or later, pay for what he gets”).

738. William Atwood, Commentary, *Law Says State Can’t Renege on Pensions*, CHI. SUN-TIMES (Feb. 18, 2011), <http://www.suntimes.com/news/other/interviews/3876426-417/law-says-state-cant-renege-on-pensions.html?print=true> (stating, “[t]his arrangement—lower salaries for state employees in exchange for a constitutionally guaranteed pension—allowed the state to balance its budget, allocate resources to other state needs and provide critical public services”). Atwood further explains,

[t]oday, with the state facing severe budgetary constraints, some are arguing that these pension obligations be discounted or ignored. That approach, however, is simply not legally or morally tenable. For the state to consider balancing its books by denying promises made to

the Clause, the drafters and voters weighed, measured, and found wanting the current claim that it is unfair or impossible for the State to pay its pension obligations.⁷³⁹ Public employees have paid their required fair share of pension costs; it is incumbent on the State to meet its end of the bargain.

generations of public services—a pledge memorialized in the state constitution—would be an injustice.

Id.

739. See 5 PROCEEDINGS, *supra* note 143, at 4516 (Del. Borek) (opposing the Clause, Del. Borek stated, “I regret that I must vote no [on the Pension Clause]. I objected very much to section 5 [i.e., the Clause], since I represent six out of seven people who are not mentioned as a guarantee in the constitution with their pension system.”); 4 PROCEEDINGS, *supra* note 53, at 2928 (Del. Borek) (stating “let’s look at it [i.e., the Clause] this way: We’re told on this floor that one out of every seven people are [sic] public employees. By this amendment we are doing special legislation protecting one out of seven. What happens to the six out of seven that do not get this constitutional guarantee? They’ve got to be resentful and vote against this.”). Despite Del. Borek’s statements in opposition, Convention delegates adopted the Clause by a vote of 57–36–6 on July 21, 1970, and again by a vote of 99–3–2 on August 31, 1970. 4 PROCEEDINGS, *supra* note 53, at 2933; 5 PROCEEDINGS, *supra* note 143, at 4516.

ARTICLE APPENDICES

Appendix A — Letter and Legal Memorandum from Edward Gibala, Executive Director of the State Universities Retirements System, to Delegate Henry Green (dated July 2, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection.)

Appendix B — Letter from Chairman E.B. Groen, Illinois Public Employees Pension Law Commission, to Delegate Henry Green (dated August 7, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection).

Appendix C — Letter and Enclosed Statement of Rubin G. Cohn, Member of the Illinois Public Employees Pension Laws Commission, to Delegate Henry Green (dated August 27, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois History and Lincoln Collection).

Appendix D — Chapter 9 of the Report of the Illinois Public Employees Pension Laws Commission to the Illinois General Assembly (dated May 31, 1971).

Appendix A

Letter and Legal Memorandum from Edward Gibala, Executive Director of the State Universities Retirements System, to Delegate Henry Green (dated July 2, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection.)

State Universities Retirement System

807 SOUTH LINCOLN AVENUE

URBANA, ILLINOIS 61801

Telephone: 333-3860, Area Code 217

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342 Administration Building, Urbana 61801

P. O. GENTRY, Treasurer

Harris Trust and Savings Bank, Chicago 60690

July 2, 1970

Mr. Henry Green
608 West Pennsylvania
Urbana, Illinois 61801

Dear Henry:


I am enclosing three copies of a memorandum setting forth reasons why I believe that the Constitutional Convention should adopt a provision regarding vesting and funding of public employee pension rights.

The General Assembly has done an excellent job in funding its own retirement system obligations but has failed to meet its commitment to other public employees. This failure has created such a staggering liability for future taxpayers that the extra load during an adverse economic period may require the public to renege on its obligations to its public servants.

Other states are funding their current pension obligations and amortizing the past service liabilities over a period of years. The least that Illinois should do is fund the current obligations and pay interest on the past service obligation in order to stabilize the deficit at the current level.

We appreciate your efforts in trying to get this matter re-considered by the Constitutional Convention.

Sincerely yours,


Edward S. Gibala
Executive Director

ESG:rw
Encls.

Appendix B

Letter from Chairman E.B. Groen, Illinois Public Employees Pension Law Commission, to Delegate Henry Green (dated August 7, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection).

Box 1, Folder 13

ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION

Suite 1507, 14 E. Jackson Boulevard

Chicago, Illinois 60604

922-4573

ADDRESS ALL COMMUNICATION
TO THE SECRETARY

Officers

Senator E. B. Groen
Chairman

Gordon Franklin
1st Vice Chairman

Representative W. Robert Blair
2nd Vice Chairman

Senator Sam Romano
Secretary

August 7, 1970

Mr. Henry Green
608 W. Pennsylvania Avenue
Urbana, Illinois

Senators

E. B. Groen
Walter P. Hoffelder
John J. Lanigan
Edward A. Nihill
Sam Romano

Dear Mr. Green:

PROPOSAL FOR CONTRACTUAL VESTING OF PENSIONS

I understand that there is presently before the Constitutional Convention a proposal for establishing a contractual right in a pension under a pension or retirement system maintained for public employees, reading as follows:

"Membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

Representatives

W. Robert Blair
John G. Fary
Donald A. Henss
Norbert G. Springer
Frank C. Wolf

Public Members

Peter Barrett
Rubin G. Cohn
Richard J. Frankenstein, Jr.
Gordon Franklin
Noble W. Lee

A. A. Weinberg
Actuary

This Commission has been dealing with the subject of pensions for public employees for 25-years. During this period, the Commission has been concerned with the accrued rights of employees under these retirement systems, particularly with respect to the pension and benefit expectancies. It has consistently maintained a policy that would insure the promised benefits to the employees. This policy has been reaffirmed over the years by both the Commission and the State Legislature, without any reservations.

It would seem, therefore, that an inflexible provision of the kind proposed is unnecessary. In our opinion, it would only serve to curtail the powers of the Legislature and limit its authority. Its rigid aspects may

Mr. Henry Green

-2-

August 7, 1970

actually prove harmful to the employees and may operate adversely, if reasonable modifications for the preservation of these systems in such areas as rates of contribution, conditions for retirement or financing may be found to be necessary.

The subject was thoroughly explored at a meeting of the Commission held in Springfield last April, at which all such proposals were reviewed in the presence of representatives of the several sponsors thereof. The Commission was asked to submit a proposal to the Constitutional Convention bearing its endorsement.

Its judgment at the time was that no such action was necessary, since it may not be in the best interests of the participants of these systems in the long run. No such proposal, therefore, was submitted to the Convention.

In view of the fact that a proposal of this kind has been filed with your body, I should like to propose, on behalf of the Commission, a revised version thereof, which should lend some flexibility to the provision and, at the same time, accomplish the objectives which the employees are seeking. The revised proposal which we are offering reads as follows:

"Subject to the authority of the General Assembly to enact reasonable modifications in employee rates of contribution, minimum service requirements and other provisions pertaining to the fiscal soundness of the retirement systems, membership in any pension or retirement system of the state or any local government, or any agency or instrumentality of either, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

The foregoing version will not completely foreclose the authority of the General Assembly to make desirable changes in some of the basic provisions and would still preserve the pension and benefit expectancies of the members of these systems.

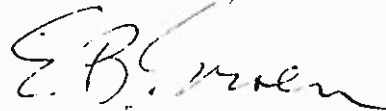
Mr. Henry Green

-3-

August 7, 1970

On behalf of the Commission, which is vitally interested in the maintenance of a viable and meaningful pension policy for public employees in this State, and which over the years has proposed many constructive changes in these plans, to the decided advantage of the employees and resulting in a more effective operation of these systems, I urge the adoption of this revised version of the proposal for contractual vesting of pensions.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "E. B. Groen", with a stylized flourish at the end.

E. B. Groen,
Chairman

EBG:o

Appendix C

Letter and Enclosed Statement of Rubin G. Cohn, Member of the Illinois Public Employees Pension Laws Commission, to Delegate Henry Green (dated August 27, 1970). Papers of Henry Green, Box 1, Folder 13 (University of Illinois History and Lincoln Collection).

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN
COLLEGE OF LAW
CHAMPAIGN, ILLINOIS 61820

August 27, 1970

Honorable Henry Green
Delegate Sixth Constitutional Convention of Illinois
Old State Capitol
Springfield, Illinois 62706

Dear Mr. Green:

Enclosed is a statement which reflects the views of the Illinois Public Employees Pension Laws Commission of which I have been a member since 1949.

It would be my hope and that of the Commission that if the provision concerning the contractual status of pension rights is not amended on third reading as per proposal submitted by Senator Groen, Chairman of the Pension Laws Commission (the most desirable approach) the enclosed statement would be read by you into the record of the Convention, preferably as a "sense of the Convention" statement.

I can assure you and the delegates that the interests of public employees will not be impaired by either the proposed Commission amendment or by the attached statement. Quite to the contrary their interests may be furthered, as the statement suggests.

With sincere appreciation of your interest and cooperation, I am

Sincerely yours,


Rubin G. Cohn

RGC/clw

Enclosure

cc: Mr. Albert A. Weinberg
Senator Egbert B. Groen

August 27, 1970

STATEMENT RE PROVISION CONFERRING CONTRACTUAL STATUS ON PENSION RIGHTS

The Convention has adopted the following proposal:

"Membership in any pension or retirement system of the State or local government, or any agency or instrumentality of either, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

This provision in essence is taken from the Constitution of New York and is also reflected in substance in the Constitutions of several other states.

The full implications of this principle have not been determined under any of the state constitutional provisions.

While expressing a desirable constitutional concept it should not be interpreted as embodying a Convention intent that it withdraws from the legislature the authority to make reasonable adjustments or modifications in respect to employee and employer rates of contribution, qualifying service and benefit conditions, and other changes designed to assure the financial stability of pension and retirement funds.

If the provision is interpreted to preclude any legislative changes which may in some incidental way "diminish or impair" pension benefits it would unnecessarily interfere with a desirable measure of legislative discretion to adopt necessary amendments occasioned by changing economic conditions or other sound reasons. Conceivably such construction could work to the substantial detriment of present and future public employees as the legislature, in its consideration of desirable liberalizing amendments proposed by employees, may well hesitate to adopt them in the light of an absence of power to make reasonable adjustments in the future. It is with this understanding that I have supported this amendment and I would hope that the Convention fully concurs in these views.

Appendix D

Chapter 9 of the Report of the Illinois Public Employees Pension Laws Commission to the Illinois General Assembly (dated May 31, 1971).

REPORT

of the

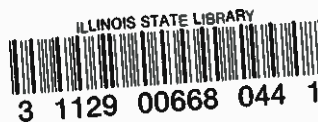
ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION

*Submitted pursuant to Article 22, Division 8
of the "Illinois Pension Code", approved
March 18, 1963. Chapter 108 ½ of the
Illinois Revised Statutes*

1971



State of Illinois
RICHARD B. OGILVIE
Governor



**ILLINOIS PUBLIC EMPLOYEES PENSION
LAWS COMMISSION**

OFFICERS

SENATOR E.B. GROEN, *Chairman*
GORDON FRANKLIN, *Vice-Chairman*
SENATOR SAM ROMANO, *Secretary*

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PETER BARRETT Chicago	NOBLE W. LEE Chicago
GORDON FRANKLIN Marion	

A. A. WEINBERG, *Actuary*

¹ Succeeded by Senator Bertil T. Rosander, Rockford, January 1971.

² Succeeded by Senator James C. Soper, Cicero, January 1971.

³ Succeeded by Representative Louis F. Capuzi, Chicago, February 1971.

LETTER OF TRANSMITTAL

May 31, 1971

TO GOVERNOR RICHARD B. OGILVIE

and

Members of the 77th General Assembly

Pursuant to Article 22, Division 8 of the "Illinois Pension Code," which provides for a study of pension and annuity and benefit laws for employees and officers in governmental service, the Illinois Public Employees Pension Laws Commission hereby respectfully transmits its report and recommendations concerning its research and survey.

Respectfully submitted,

E. B. GROEN, *Chairman*

GORDON FRANKLIN, *Vice-Chairman*

SAM ROMANO, *Secretary*

WALTER P. HOFFELDER ¹

JOHN J. LANIGAN ²

EDWARD A. NIHILL

W. ROBERT BLAIR ³

JOHN G. FARY

DONALD A. HENSS

DR. NORBERT G. SPRINGER

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¹ Succeeded by Senator Bertil T. Rosander, Rockford, January 1971.

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³ Succeeded by Representative Louis F. Capuzi, Chicago, February 1971.

CHAPTER 9.

Contractual Vesting of Accrued Rights and Pension Expectancies

*New constitutional provision in Illinois - proposed revision
by Commission - nature of vesting provision - true vesting of
pension rights - implications of constitutional provision -
conclusion*

THE 1970 Constitution of Illinois, effective July 1, 1971, contains the following new provision:

"Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

The provision (Section 5, Article XIII) was not the subject of a formal hearing or judgment by any Committee of the Constitutional Convention. It was offered as a proposal in a plenary session of the Convention and adopted with very little debate. Neither the Illinois Public Employees Pension Laws Commission, nor any state or local officials, nor any private organizations concerned with the operation of public retirement plans, such as the Civic Federation of Chicago or the Illinois Taxpayers Federation, had any advance notice of the intended Convention action.

Suggested amendment by Commission. The Pension Laws Commission was advised of this action by one of its members who had been informed of it by a Convention delegate. Several months prior thereto representatives of several public funds appeared before the Commission seeking approval of such a proposal. Although no formal decision was then made by the Commission, it was clear to all concerned that the members of the Commission were strongly opposed to the inclusion of such a provision in the new Constitution. While time still remained for the Convention to undo or modify its initial approval of this provision, the delegate

who had secured its adoption was contacted and given a statement of reasons why the Pension Laws Commission was concerned with the proposal. A communication was addressed to the delegate with a proposed amendment which would have inserted the following qualifying language as the introductory portion of the proposed section:

"Subject to the authority of the General Assembly to enact reasonable modifications in employee rates of contribution, minimum service requirements and other provisions relating to an equitable and financially sound retirement plan,"

Purpose of Commission proposal. The purpose of this proposed amendment is clear. The Commission would have preferred Convention reversal and total rejection of the proposed section but was advised by the delegate in question that this was not possible. Shortly after submission of this communication, the Commission member submitting the foregoing statement was advised by the delegate that he could get no additional delegate support for the proposed amendment and that he would not offer it.

The delegate was then asked if he would read a statement into the record of proceedings of the Convention which could be used as evidence of Convention "intent" to the effect that it was the sense of the Convention that the section would not preclude a reserved legislative power to make adjustments to retirement plans of the kind and for the purposes stated in the proposed amendment. The delegate indicated that he would try to do so. It was never done.

Nature of constitutional provision. The result is that the Constitution now contains the provision in question, effective July 1, 1971, with only an inconclusive, generalized and frequently confused debate of several hours duration dealing with its purpose and meaning. Occasionally the debate produced a glimpse of meaning such as references to preventing the promised statutory benefits from being reduced, concern that the provision is necessary to prevent home rule municipalities from repealing pension laws and the necessity for proper state and local funding. As an aid to the legislature of other concerned governmental and private groups, the debate was, however, virtually useless in formulating pension policy and in determining the extent or limits of legislative power in adjusting or modifying such policy.

The provision is modeled almost verbatim after the New York constitutional provision which became effective in 1940. Several

other states have also adopted similar constitutional provisions. Presumably the pressures for adoption of such a constitutional provision stem from a long history of statutory and judicial treatment of pension rights and expectancies as non-contractual and within the legislative power to modify or abrogate. Employee concern with such principle is surely legitimate, especially in states like Illinois where most public employee retirement systems have suffered in adequate funding over the years.

True vesting of pension rights. Whether the constitutional provision can by itself solve the problems and concerns of the employees remains problematical. As long ago as 1953 the Pension Laws Commission in its Report of that year devoted a chapter to an analysis of the legal nature of pension rights. The analysis prepared by Professor Rubin G. Cohn, then and now a member of the Commission, discussed constitutional and statutory provisions seeking to establish pension rights as contractual or vested. That analysis, in which the Commission concurred, concluded with the following paragraph:

"It is the writer's conviction that the best security of any pension plan lies in the strength of its financial structure and in the soundness of the principles which define its rights, benefits and duties. Constitutional and statutory provisions which seek to assure the protection of pension rights cannot be self-executing in the face of an insolvent fund and in the further inability to coerce taxation or appropriation of revenues by legislative action. On the other hand, a pension plan soundly conceived and financed runs little risk of legislative impairment nor does it require outside legal compulsion to assure that its benefits will be available upon retirement or disability. True vesting of pension rights can be accomplished only if the fund is strong in its underlying structure."

In a law review article written in 1968, Professor Cohn made essentially the same points, stating the following:

"In the last analysis, a vested or contractual right in public pensions depends upon the financial stability of the funds. There is little comfort and less sustenance in a contractual right in a fund which is or may become insolvent because of inadequate financing. Given . . . the legal impracticability if not impossibility of compelling the legislature to make appropriations . . . the contract right may turn out to be the stuff of which dreams are made. . . ."

The Commission has long believed that the legislature must have a continuing power to make necessary adjustments and modifications in statutory plans. If this power is circumscribed or limited by a constitutional provision which prohibits the diminution or impairment of benefits, the likelihood of the establishment of sound pension principles may be substantially lessened. It is primarily for this reason that the Commission did not view the constitutional proposal favorably.

Implications of constitutional provision. The meaning, scope and implications of the new constitutional provision are obscure and ambiguous. Notwithstanding that the New York provision has been in effect since 1940 there has been a rather fragmentary and inconclusive development of authoritative legal analysis concerning its meaning. The comparable constitutional provisions in the several other states are of much more recent vintage and offer no significant judicial precedent. The New York provision has resulted in decisions which indicate a severe restraint upon legislative efforts to amend retirement laws. In at least two cases efforts to adjust to new actuarial tables for computation of benefits have been held invalid in that state. In another decision an amendment establishing a compulsory retirement age was held to violate the constitutional provision.

Conclusion. The Commission has long favored and fought for the establishment legislatively of principles which would most effectively protect the rights and expectancies of public employees and their beneficiaries. Frequently the principles have resulted in revisions of employee contributions, changes in service requirements and greater governmental revenue commitments. These have been designed to establish an equitable allocation of financial responsibilities between employees and employer, and a more secure fiscal structure for the retirement systems. The Commission is concerned that the new constitutional provision may prove to be an inhibiting factor in its continuing efforts to achieve these objectives.

The constitutional provision introduces an unfortunate complicating obstacle in the formulation of pension principles by the Commission and the General Assembly. Until now it has been possible rationally and realistically to experiment with new and untested aspects of pension policy. That freedom will now be substantially limited since errors in judgment, as borne out by experience, may become impossible to rectify if the result would impair or diminish benefits within the meaning of the constitutional provision. This

may well result in the development of too rigid a conservatism in the Commission and the General Assembly as they seek to adjust pension principles to ever changing conditions. This probability is, of course, enhanced by the unfavorable financial status of most public pension funds in Illinois.

It may be necessary for the General Assembly to resort to a policy of limiting liberalizing changes in the pension laws to periods of short duration, say 1 or 2 years, with a reexamination of the renewal thereof at the end of the prescribed period. This may prove to be a hardship to the employees or the prospective beneficiaries but it might be the only logical course of action for the General Assembly in the circumstances.

Perhaps the Commission is too pessimistic in its analysis of the potential negative consequences of the new constitutional provision. If so, only time will tell. In the meantime, the provision will loom large and forbidding in future years in its effect upon the formulation of pension policy.