

Winter 1975

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Recommended Citation

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PUBLIC EMPLOYEE PENSION RIGHTS AND THE 1970 ILLINOIS CONSTITUTION: DOES ARTICLE XIII, SECTION 5 GUARANTEE INCREASED PROTECTION?

INTRODUCTION

The status of public employee pension rights¹ is of vital concern to more than 616,000 members of Illinois pension funds.² Members rely on pension benefits for economic security in their retirement and as personal security in the event of disability or other unforeseen hardships. Pension benefits are also a major factor affecting recruitment of government employees; thus, the security of these benefits affects the calibre of public service rendered to the individual citizen by such public employees.

The status of pension rights is not simply the isolated concern of public employees who rely on these benefits. Each Illinois citizen is directly affected in his capacity as taxpayer since pension benefits comprise an increasingly greater tax burden. As legislation adds liberalized pensions benefits, and as additional government employees enter service, this tax burden cannot help but increase further.

The revelation that public employee pension benefits have historically been characterized by courts as "gratuitous" and "non-contractual" carries broad implications for both pensioner and taxpayer. The public employee has often been unaware of this characterization and is understandably disturbed when he learns of it. The taxpayer, on the other hand, may feel relief that the tax burden created by pension benefits can be lessened if circumstances require.

1. The scope of this comment is limited to public pensions, as opposed to private pensions, because the constitutional provision forming the basis for this analysis is only concerned with public employee pensions. ILL. CONST. art. XIII, § 5 (1970). "Pension" or "pension right," refers to annuities or credits earned toward such annuities under a joint contributory plan, payable upon retirement from government service, and normally related to age and service conditions.

Recent federal pension legislation is inapplicable to public employee government pensions plans. It specifically provides that "[t]he provisions of this subchapter shall not apply to any employee benefit plan if (1) such plan is a governmental plan." 29 U.S.C. § 1003(b)(1) (1974).

2. The types of employees covered include: judges, state legislators, state university employees, Chicago and downstate teachers, policemen, firemen, and other local, county, and state employees. They belong to the 455 individual pension funds operating under 17 sections of the Pension Code, chapter 108½, Illinois Revised Statutes. 1975 REPORT OF EXAMINATION, PUBLIC EMPLOYEES' PENSION FUNDS, ILLINOIS DEPARTMENT OF INSURANCE, at 42 (1975) (hereinafter cited as 1975 REPORT OF EXAMINATION).

The adoption of the 1970 Illinois Constitution, however, insured that public employee pension rights would no longer be defeated so easily. The pension provision contained in article XIII, section 5 provides:

Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency thereof, shall be an *enforceable contractual relationship*, the benefits of which shall not be *diminished or impaired*.³

This section developed from concern over the security of pension funds in the light of financial and historical developments. Public employees feared that the grant of new powers to home rule units might result in modification or termination of benefits by financially hard pressed municipalities.⁴ Members of state supported pension programs feared that the Illinois General Assembly's longstanding reluctance to fund adequately its share of pension contributions might impair the financial viability of their funds and thus the prospect of receiving benefits when due.⁵ Those public employees, aware that their benefits were characterized as "bounties" or "gratuities," were concerned that their benefits might be modified or terminated by the legislature in the future.⁶ These combined concerns were sufficiently persuasive to cause the pension section to be included in the 1970 Illinois Constitution.

Until the new pension section, no constitutional safeguard existed in Illinois for the majority of pension funds. Article II, section 14 of the 1870 Constitution protected against impairment of contracts, but was inapplicable to most pension plans.⁷ Basically, the courts have distinguished pension rights on the basis of the type of participation in the plan. While optional participation plans were characterized as "contractual," the majority are still mandatory participation plans, and the courts have labelled these "gratuitous." These "non-contractual" mandatory

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

4. See delegate Green's comments during introduction of article XIII, section 5 on the floor of the 1970 Illinois Constitutional Convention. RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Verbatim Transcripts*, vol. IV at 2925 (1969-1970) (hereinafter cited as *Verbatim Transcripts*).

5. The five state supported pension funds in Illinois are: Judges Retirement System, State Universities Retirement System, Teachers Retirement System, State Employees Retirement System, and General Assembly Retirement System. 1975 REPORT OF EXAMINATION at 26.

6. See comments of delegates Green, Kinney, Kemp, and Lyons. *Verbatim Transcripts*, vol. IV at 2925-29. The "gratuity" concept basically holds that pension benefits under mandatory participation plans are "bounties" or "gratuities," and thus may be changed, diminished, or abrogated entirely at the will of the legislature. *Dodge v. Board of Educ.*, 302 U.S. 74 (1937); *Bergin v. Board of Trustees*, 31 Ill. 2d 566, 202 N.E.2d 489 (1964).

7. "No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed." ILL. CONST. art. II, § 14 (1870).

participation plans thus fell outside of the 1870 Constitution's scope of protection.⁸

The basic issue presented is the extent of protection which article XIII, section 5 of the 1970 Illinois Constitution provides for pension funds. The scope of the phrase "enforceable contractual relationship" determines whether or not this section provides a new status for mandatory participation funds. If a more protected status is mandated by the constitution, analysis must then center on the issue of the pension benefits which may not be "diminished or impaired." Aspects of this issue include the type of benefits protected, the question of vesting, and the extent of funding which may be constitutionally required to insure that pension benefits are protected. Some of these issues have been specifically decided by the Illinois Supreme Court in cases which will be discussed in subsequent sections of this comment. Due to the narrow nature of these holdings, however, any analysis of the pensions rights issue must depend largely on factors which are raised only by inference in these recent decisions. An historical view of pension rights is the initial step in attempting to define the parameters of article XIII, section 5.

HISTORICAL PERSPECTIVE—UNITED STATES PENSION LAW

Gratuity Theory

The landmark decision of *Pennie v. Reis*⁹ established the legal nature of compulsory public employee pension funds. *Pennie* involved deductions of \$2 per month from police officers' pay which was placed into the police life and health insurance fund. The benefit in question was a \$1,000 death benefit payment. Ten days before an officer's death the legislature repealed the death benefit by amendment. His widow claimed that the contributions taken from the officer's pay established a property interest in the death benefit which could not be impaired by the legislature because of the U.S. Constitutional prohibition against impairment of contracts.¹⁰ In rejecting this contention the Court held that the fund was "subject to change or revocation at any time, at the will of the legislature."¹¹ There was no absolute

8. *Pecoy v. City of Chicago*, 265 Ill. 78, 106 N.E. 435 (1914). In contrast, for a voluntary participation fund, rights are protected by the impairment of contracts clause. *Bardens v. Board of Trustees*, 22 Ill. 2d 56, 174 N.E.2d 168 (1961). It is important to note that a pension fund may be contributory (most Illinois funds involve joint contributions by employer and employee) or non-contributory (employer pays for the pension). However, the crucial distinction is not contributions, but the type of participation, whether mandatory or optional.

9. 132 U.S. 464 (1889).

10. U.S. CONST. art. I, § 10.

11. 132 U.S. at 471.

property right possessed by the officer, and "[n]o vested right in the officer to such payment."¹² Until the actual moment when a payment became due, the officer's interest remained "[a] mere expectancy, created by law, and liable to be revoked or destroyed by the same authority."¹³

The gratuity theory of pension rights thus sprang from the 1889 holding in *Pennie*. This theory is as strong today as it was then. In 1974 a federal district court asserted that *Pennie* is still the leading case on pension rights and followed its holding even though it recognized the harsh effect of the gratuity theory.¹⁴

Federal case law makes no distinction among the various categories of pension plans. Whether a plan is non-contributory or contributory (whether mandatory or optional participation), the federal courts have held that none provide vested rights in pension benefits.¹⁵ The only significant concession to pension rights is that the pensioner has a vested interest in a payment once it becomes due.¹⁶

Contractual Theory

The first case establishing the contractual theory for pension benefits was *Ball v. Board of Trustees*.¹⁷ The foundation for the contractual theory is the distinction between mandatory and optional participation in a pension plan. Unlike federal case law, many states provide a greater protection for optional participation plans. In the *Ball* case, a New Jersey retirement plan calling for optional participation was construed to be a contractual relationship. The court held that the statutory provision of pension benefits for teachers was analogous to traditional contract principles, and thus the agreement "could not be altered without the consent of both parties . . . and upon sufficient consideration."¹⁸

The mandatory-optional participation distinction is the key to labelling pension benefit rights as either contractual or

12. *Id.*

13. *Id.*

14. *Muzquiz v. City of San Antonio*, 378 F. Supp. 949 (W.D. Tex. 1974): "The rule is harsh, perhaps, but we feel constrained in this case . . . to apply the law as it is given to us, *stare decisis*, for it has heretofore admitted of no exceptions and no modifications. . . ." *Id.* at 958.

15. *Dodge v. Board of Educ.*, 302 U.S. 74 (1939); *Lynch v. United States*, 292 U.S. 571 (1934) (dictum); *Rafferty v. United States*, 210 F.2d 934 (3rd Cir. 1954); *Anderson v. United States*, 205 F.2d 326 (9th Cir. 1953); *Morgan v. United States*, 115 F.2d 426 (5th Cir. 1941); *MacLeod v. Fernandez*, 101 F.2d 20 (1st Cir. 1938); *In re Goodwin*, 57 F.2d 31 (6th Cir. 1932); *Robbins v. Police Pension Fund*, 321 F. Supp. 93 (S.D.N.Y. 1970); *Price v. Folsom*, 168 F. Supp. 392 (D.C.N.J. 1959); *Allen v. United States*, 148 F. Supp. 817 (S.D. Ill. 1957); *Gibney v. United States*, 146 F. Supp. 135 (S.D. Cal. 1956).

16. *Price v. Folsom*, 168 F. Supp. 392, 398 (D.C.N.J. 1959).

17. 71 N.J.L. 64, 58 A. 111 (Sup. Ct. 1904).

18. *Id.* at 66, 58 A. at 112.

gratuitous. Case law throughout the United States supports its result through this distinction.¹⁹ Yet this method of determining pension rights is not without its critics.²⁰ While the labels applied to pension plans may determine whether pension rights receive protection from diminishment, the goals and objectives of pension plans remain the same regardless of label. There is no compelling practical justification for the optional-mandatory distinction.

Cases supporting the gratuity theory often employ archaic concepts and language. Few public employees would consider their pensions to be in the "nature of a bounty springing from the appreciation and graciousness of the sovereign."²¹ Yet this language is found in a 1957 judicial opinion. While it may be desirable that a reasonable power of modification should be retained by a legislature, archaic language is poor support for such a result.

An inflexible application of the counterpart contractual theory may also harm total pension objectives. If application of the contract theory denies the legislature the ability to adjust pension benefits or contributions in order to maintain the fiscal viability of a pension fund, the very benefits which are being so zealously guarded may be lost.²² In view of the adverse consequences which may attach from inflexible application of either the gratuity or contract theory, several states have outlined a third alternative method of establishing pension rights.

Limited Vesting

California and Washington have extensively used a principle described as "limited vesting."²³ The thrust of "limited vesting" is to recognize a power of legislative modification within reasonable limits. While the weakness of the principle is an inability to rely on any specified objective criteria to determine if a change

19. *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Blough v. Ekstrom*, 14 Ill. App. 2d 153, 144 N.E.2d 436 (1957); *Bader v. Crone*, 116 N.J.L. 329, 184 A. 346 (Sup. Ct. 1936); *State ex rel. Fox v. Board of Trustees*, 148 W. Va. 369, 135 S.E.2d 262 (Sup. Ct. of App. 1964).

20. See Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 ILL. L.F. 32.

21. *Blough v. Ekstrom*, 14 Ill. App. 2d 153, 160, 144 N.E.2d 436, 440 (1957).

22. Just such a situation led to the result in *Spina v. Consol. Police and Firemen's Pension Fund Comm'n*, 41 N.J. 391, 197 A.2d 169 (1964), where the court deviated from strict application of the contract theory to avoid bankruptcy. See text accompanying notes 24 and 25 *infra*.

23. *E.g.*, *Houghton v. City of Long Beach*, 164 Cal. App. 2d 298, 330 P.2d 918 (1958); *Eisenbacher v. City of Tacoma*, 53 Wash. 2d 280, 333 P.2d 642 (1958); *Leterman v. City of Tacoma*, 53 Wash. 2d 294, 333 P.2d 650 (1958); *Pearson v. Los Angeles County*, 49 Cal. 2d 523, 319 P.2d 624 (1957).

in pension benefits is "reasonable," the courts have emphasized the need for "corresponding" or "compensatory" benefits in keeping with principles of equity. Thus an emphasis on pension labels is minimized in favor of a thorough consideration of the effect of changes on pension objectives.

Another example of a judicial attempt to protect pension rights without resorting to labels is a New Jersey case, *Spina v. Consolidated Police and Firemen's Pension Fund Commission*.²⁴ In construing the effect of a decrease in pension benefits legislated on a mandatory participation plan, the court rejected the simple alternative of labelling pension rights as "gratuitous." Instead, the court dealt squarely with the situation, detailing first the revisions of pension provisions necessitated by the fund's financial instability. It then held that the validity of the legislation imposing more stringent age and service requirements and increased employer and employee contributions should be measured in terms of alternatives rather than the specific impact upon the individual plaintiffs. The court felt "[t]here is no profit in dealing with labels such as 'gratuity,' 'compensation,' 'contract,' and 'vested rights.' None fits precisely, and it would be a mistake to choose one and be driven by that choice to some inevitable consequence."²⁵

The three approaches to pension rights by jurisdictions other than Illinois serve to illustrate necessary principles for understanding pension rights adequately. They also outline the possible approaches which Illinois might have utilized in determining the status of pension rights. Later analysis will compare the effect of the Illinois constitution pension provision on pension rights with the effect these three approaches had on pension rights. The initial supposition is that the term "enforceable contractual relationship" brings Illinois pension rights after 1970 under the ambit of the "contractual" theory. The following exposition of Illinois case law will establish the context of pension rights prior to the adoption of the pension provision in the new constitution.

ILLINOIS PENSION LAW BEFORE THE 1970 ILLINOIS CONSTITUTION

The majority of Illinois decisions have adhered to the traditional classification of pension rights as "gratuitous" in mandatory participation plans and "contractual" in optional participation plans.²⁶ At one time it appeared that Illinois might

24. 41 N.J. 391, 197 A.2d 169 (1964).

25. *Id.* at 401, 197 A.2d at 174.

26. *Bergin v. Board of Trustees*, 31 Ill. 2d 566, 202 N.E.2d 489 (1964); *Jordan v. Metropolitan Sanitary District*, 15 Ill. 2d 369, 155 N.E.2d 297 (1958); *Keegan v. Board of Trustees*, 412 Ill. 430, 107 N.E.2d 702 (1952);

attach contractual status to all pension plans. In a 1914 case, *Hughes v. Traeger*,²⁷ a pension plan was challenged on the ground that it provided "extra compensation" in violation of article IV, section 9 of the 1870 Illinois Constitution. The court dismissed this contention, declaring that pensions are "[p]ay withheld to induce long-continued and faithful service. . . ."²⁸

Almost simultaneously, however, the gratuity concept of pension rights was developing. In the 1914 case of *Pecoy v. City of Chicago*²⁹ a legislative modification increasing the minimum service requirement from 10 to 20 years was held not to violate plaintiffs' constitutional right against impairment of contracts. The court held that since the pensions were not contractual relationships, but in the nature of bounties which could be modified or terminated at the legislature's discretion, these pension benefits did not fall under the constitutional guarantee. Subsequent decisions have strengthened and expanded the gratuity concept.³⁰

The contradictory principles of pensions as both "earned but deferred compensation," and as "gratuities" have existed simultaneously in Illinois case law with no attempt by the courts to reconcile the apparent conflict. On occasion these conflicting principles have even been applied to the same funds.³¹ The contradiction is difficult to justify, since "earned but deferred com-

Wagner v. Retirement Board, 370 Ill. 73, 17 N.E.2d 972 (1938); *Porter v. Loehr*, 332 Ill. 353, 163 N.E. 689 (1928); *People ex rel. Drea v. Hanson*, 330 Ill. 79, 161 N.E. 145 (1928); *McCann v. Retirement Board*, 331 Ill. 193, 162 N.E. 859 (1928); *People ex rel. Donovan v. Retirement Board*, 326 Ill. 579, 158 N.E. 220 (1927); *Stiles v. Board of Trustees*, 281 Ill. 636, 118 N.E. 202 (1917); *Londrigan v. Board of Trustees*, 7 Ill. App. 3d 572, 288 N.E.2d 125 (1972) (the deciding event occurred before the effective date of the 1970 Ill. Const.); *Jansen v. Illinois Municipal Retirement Fund*, 58 Ill. App. 2d 97, 206 N.E.2d 249 (1965); *Dannenbergh v. Frantz*, 41 Ill. App. 2d 150, 190 N.E.2d 132 (1963); *Blough v. Ekstrom*, 14 Ill. App. 2d 153, 144 N.E.2d 436 (1957).

27. 264 Ill. 612, 106 N.E. 431 (1914).

28. *Id.* at 618, 106 N.E. at 433. This earned but deferred compensation theory was strengthened by subsequent cases: *McFarlane v. Hotz*, 401 Ill. 506, 82 N.E.2d 650 (1948); *Sommers v. Patton*, 399 Ill. 540, 78 N.E. 2d 313 (1948).

29. 265 Ill. 78, 106 N.E. 435 (1914).

30. See note 26 *supra*. A case illustrating the length to which the courts have been willing to stretch the gratuity concept under the mandatory-optional distinction is *Keegan v. Board of Trustees*, 412 Ill. 430, 107 N.E.2d 702 (1952). The affected plan was mandatory, but the legislature had declared the annuities and benefits to be vested rights. The court managed to hold that a vested right is not a contractual interest where participation is mandatory, despite the vested language in the law, holding that "[a] vested right is created in the participant to share in the 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." *Id.* at 435-36, 107 N.E.2d at 706. Thus a vested right in a compulsory plan was really nothing more than a gratuity, and distinctly inferior to a contractual right.

31. *People ex rel. Schmidt v. Yerger*, 21 Ill. 2d 338, 172 N.E.2d 753 (1961); *Sommers v. Patton*, 399 Ill. 540, 78 N.E.2d 313 (1948).

pensation" seems to imply a contractual relationship and the label of contractual and gratuitous certainly cannot coexist when applied to the same fund. It is apparent, however, that this contradiction arose from the nature of the challenge against the legislative action. To justify the power of the legislature to establish pension plans, courts avoided attacks which claimed that the plans were "extra compensation" by answering that pensions were not gifts, but salary earned and deferred until completion of service.³² Conversely, when the legislature diminished pension benefits, the courts withstood the challenge that these rights were "contractual" or "vested" (and thus under the protection of the impairment of contracts clause in the 1870 Constitution) by labelling the pension benefits as "gratuities" or "expectancies."³³ No apparent attempt has been made to reconcile these conflicting principles, presumably because each serves a useful purpose and because reconciliation might indeed be more confusing than the existing situation. The existence of this contradiction does serve to illustrate the fragile rationale underlying pension labels.

While Illinois attached the gratuity theory to mandatory participation pension plans, it also adhered to the technique of labelling optional participation plans as "contractual." *Raines v. Board of Education*³⁴ upheld an increase of post-retirement benefits to teachers under an optional membership plan. Previous post-retirement increases under mandatory participation plans had been held to violate the "extra compensation" prohibition in the constitution.³⁵ The court saved the post-retirement increases in *Raines* by distinguishing the previous cases on the theory that *Raines* involved an optional rather than mandatory participation plan. Since the optional nature established a contractual status, the benefits were not constitutionally prohibited gifts. Subsequent decisions have affirmed this distinction by granting contractual status to plans which fit into the optional participation pattern set by *Raines*.³⁶

There are only a few recent cases which do not fit neatly into the Illinois mandatory-optional classification. *Voight v. Board of Education*³⁷ involved a post-retirement increase similar to *Raines*. But the *Voight* plan, unlike *Raines*, had been labelled

32. See notes 27 and 28 *supra*.

33. See notes 29 and 30 *supra*.

34. 365 Ill. 610, 7 N.E.2d 489 (1937).

35. *Porter v. Loehr*, 332 Ill. 353, 163 N.E. 689 (1928).

36. *Bardens v. Board of Trustees*, 22 Ill. 2d 56, 174 N.E.2d 168 (1961); *People ex rel. Judges Retirement System v. Wright*, 379 Ill. 328, 40 N.E.2d 719 (1942); *Ridgely v. Board of Trustees*, 371 Ill. 409, 21 N.E.2d 286 (1939).

37. 413 Ill. 233, 108 N.E.2d 426 (1952).

gratuitous. Previous case authority held that post-retirement increases under mandatory (thus "gratuitous") plans were constitutionally prohibited.³⁸ Since the *Voight* plan could not be labelled "contractual," the court surmounted the dilemma by applying the concept of "moral obligation" to pension rights. The "moral obligation" to provide the post-retirement increases overrode the constitutional prohibition against gifts.

Another case involving a similar situation but a different solution is *Gorham v. Board of Trustees of the Teachers' Retirement System*.³⁹ Here, a contractual status was superimposed over a plan of mandatory participation by virtue of voluntary (thus optional) payments made by retired school teachers which enabled them to receive much larger supplemental payments yearly. It appears that the voluntary payment of the nominal sum effectively changed the legal status of the pension plan, allowing the advantages of contractual status.

Raines, Voight, and Gorham raise the question of whether the distinction between gratuitous and contractual pension plans has been obliterated. By utilizing various rationale, these cases have afforded mandatory participation plans the contractual status normally extended only to optional participation plans. If the trend in Illinois pension law is to afford contractual status to mandatory funds under various rationale, the term "enforceable contractual relationship" in the new constitution merely confirms what has already taken place. Such a conclusion, however, is subject to question. Each of these three cases involved challenges to the validity of post-retirement pension increases. The courts have already proven adept at fashioning the "earned but deferred" rationale to justify the existence of pension plans. This similar method is now being used to sustain desired post-retirement pension increases against the same challenges that the payments are constitutionally prohibited gifts. But when the validity of *modification* or *termination* of pension benefits has been challenged, the Illinois Courts have never failed to adhere to the traditional mandatory-optional distinction. Decisions rendered up to the effective date of the new pension provision in the 1970 Illinois Constitution contain language and reasoning clearly indicating an adherence to the optional-mandatory distinction.⁴⁰ By contrast, neither *Voight* nor *Gorham* has been used subsequently to support a contractual status for any

38. *Wagner v. Retirement Board*, 370 Ill. 73, 17 N.E.2d 972 (1938); *Porter v. Loehr*, 332 Ill. 353, 163 N.E. 689 (1928).

39. 27 Ill. 2d 593, 190 N.E.2d 329 (1963).

40. *Londrigan v. Board of Trustees*, 7 Ill. App. 3d 572, 288 N.E.2d 125 (1972) (the deciding event had occurred before the effective date of the new pension provision); *Jansen v. Illinois Municipal Retirement Fund*, 58 Ill. App. 2d 97, 206 N.E.2d 249 (1965).

mandatory participation plan. It is clear that the new pension provision is not surplusage on existing case law. Its proponents correctly believed that their pension rights under mandatory participation plans were still "gratuitous," and in need of greater protection.

CONTEMPORARY HISTORY—THE ADOPTION OF THE PENSION
SECTION INTO THE 1970 ILLINOIS CONSTITUTION

Article XIII, section 5 of the 1970 Illinois Constitution lacks many of the attributes which ordinarily facilitate constitutional interpretation. The pension section is not a model of deliberation, and interpretation is made more difficult by that fact. The pension provision was neither the subject of any formal hearing, nor was it the consensual judgment of any committee of the Constitutional Convention. It was offered at a plenary session and adopted with relatively little debate.⁴¹ Neither the Illinois Public Employees Pension Laws Commission,⁴² nor any state or local officials or 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.⁴³ At the very least, notice to these vitally concerned groups would have given them the opportunity to prepare background information which would have allowed the convention to make a more informed judgment on the pension section's merits. The additional fact that no committee hearings were held on the section makes interpretation of constitutional intent extremely difficult.

Prior to actual sponsorship of the section, concerned firemen and policemen had contacted many delegates, expressing their fear that greater home rule powers would increase the likelihood of modification or termination of their pensions by municipalities. They contacted members of the Bill of Rights Committee and suggested that a pension provision be included in the Bill of Rights section.⁴⁴ Meanwhile, several delegates sponsored the

41. REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION at 65 (1971) (hereinafter cited as 1971 PENSION REPORT).

42. The Pension Laws Commission produces the PENSION REPORT previously cited. The Commission is authorized by ILL. REV. STAT. ch. 108½ § 22-802 to inquire into all aspects of the pension problems affecting public employees in Illinois and to promote and maintain benefits which are adequately financed and in accord with fundamental pension principles. Its functions include an appraisal of the pension laws in force and a critical analysis and evaluation of proposals for amendment of pension laws with respect to their policy and cost implications.

43. 1971 PENSION REPORT at 65.

44. In a recent law review article, Professor Elmer Gertz of The John Marshall Law School related his experiences on the Bill of Rights Committee of the 1970 Illinois Constitutional Convention. He noted that the committee received hundreds of letters asking it to consider inclusion of the pension provision in the Bill of Rights section. Committee members

section as an amendment to the legislative article of the constitution.⁴⁵

The debate on the section was exceedingly confused, with the several sponsors questioning each other as to the true intent of the section.⁴⁶ While delegate Green expressed the conviction that the section mandated the General Assembly to fully-fund the state-supported funds, drawing support from a similar pension provision in the New York Constitution which apparently achieved that result,⁴⁷ delegates Lyons, Kinney and Whalen each asserted that the section had nothing to do with mandating any level of funding at all.⁴⁸

A number of mistaken assertions were made by both advocates and opponents of the section.⁴⁹ Yet there was at least

were unsure whether the pension provision properly belonged in the Bill of Rights, but their concern was mooted when delegate Kinney sponsored a proposal to include the pension provision in the legislative article. Gertz, *The Making of the Illinois Constitution of 1970*, 5 J. Mar. J. 215, 232-33 (1972).

45. The pension amendment to the legislative article passed. The vote was: 57 yea, 36 nay, 3 present, and 6 pass. *Verbatim Transcripts*, vol. IV at 2933. Subsequently the pension provision was deleted from the legislative article and placed in article XIII.

46. Delegate Lyons:

But I would like to ask one of the sponsors of the amendment—I am a co-sponsor of it myself—I *thought* that the purpose of this amendment 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. . . .

. . . I would just appreciate an answer from somebody who feels that he knows.

Verbatim Transcripts, vol. IV at 2928.

47. It was delegate Green's assertion that the pension section would mandate full-funding which surprised co-sponsors and touched off a round of questioning. The New York amendment provides:

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.

MCKINNEY'S CONST. art. 5, § 7.

48. *Verbatim Transcripts*, vol. IV at 2928-30.

49. These assertions include: "The New York Constitution mandated that state to fully fund the program in two years." *Verbatim Transcripts*, vol. IV at 2925. There is no basis for this statement. The New York courts have never construed their constitutional provision as mandating full-funding.

"Now, what about diminished? . . . Suppose we have more inflation. . . . Haven't we then diminished the pension funding and the pension rights of a pensioner, based upon today's dollars?" *Verbatim Transcripts*, vol. IV at 2927. Based upon ordinary contract principles, such a suggestion is ridiculous. When a person contracts to perform work for "X" number of dollars, he receives that amount, no more, no less, unless some provision for inflation has been included in the contract.

"This would, it seems to me, prohibit consolidation [of various local pension plans into a statewide plan]." *Verbatim Transcripts*, vol. IV at 2927. This assertion was answered by delegate Kinney. "It is also not intended to get into freezing in a system of trustees or persons who would administer the various funds." *Verbatim Transcripts*, vol. IV at 2929.

"It seems to me that the [impairment of contracts clause in the 1870 Illinois Constitution] gives the pensioner the protection against the diminishing or impairing of his contractual rights, which the proponents of

some degree of certainty established as to the basic intent of the section. It was generally agreed that the intent 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 employment."⁵⁰ It was also agreed that an increase in benefits was not precluded.⁵¹ In accordance with basic contract principles, the delegates noted that the scope of protection afforded by the "enforceable contractual relationship" would depend on the content of the contract comprising the relationship.⁵²

The convention debates provide little guidance on perhaps the most important issue relating to the protection of pension benefits. The power of the legislature to modify pension provisions is limited by the "vesting" of rights concept. If the rights vest at the moment of employment, the legislature may be severely or absolutely limited in attempting to adjust pension benefits. On the issue of the time of vesting, delegate Kinney stated that "[a]ll we are seeking to do is to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee. . . ."⁵³ Taken literally, the section "vests" rights at the moment of employment and the legislature's power is thereby limited. For this reason the Pension Laws Commission opposed the pension section, fearing that freezing a specific set of pension benefits would have a stagnating effect on pension legislation.⁵⁴ The Pension Laws Commission attempted to have language allowing a reasonable power of legislative modification added to the section or read into the convention debates to establish intent, but no action was taken during the convention.⁵⁵ Since the extent of legislative modification power is a crucial element in pension rights, failure of the convention to provide more specific guidance by debate

this amendment seek to achieve." *Verbatim Transcripts*, vol. IV at 2930. This assertion overlooks the fact that almost all Illinois pension plans involve mandatory participation, have been construed as "gratuitous," and thus have been deemed outside the scope of protection afforded by the impairment of contracts clause. See text accompanying notes 29 and 30 *supra*.

50. *Verbatim Transcripts*, vol. IV at 2931.

51. It is definitely the intent that an increase in benefits would not be precluded. Many states tie their pension and retirement benefits into a cost of living and raise them from time to time. It is the intent of this amendment to permit so doing if the legislature at some future time should decide to do this.

Verbatim Transcripts, vol. IV at 2926.

52. Delegate Whalen noted that, "all [the pension provision] does is say that the pension is a contractual interest which the pensioner has; and the line of cases again has repeatedly held that this is a contractual right and may be subject to any contingency built into the contract." *Verbatim Transcripts*, vol. IV at 2930.

53. *Verbatim Transcripts*, vol. IV at 2931.

54. 1971 PENSION REPORT at 65-66.

55. *Id.*

or specific language is a major weakness of the section. Legislative modification is the primary method by which attempts to diminish or impair pension benefits occur. This issue was left unresolved by the convention and the Illinois courts have not yet had occasion to determine the extent of such legislative power to modify.

There are only two recent cases directly construing the pension section. Analysis of them will indicate the extent to which the courts have relied on the convention debates as a guide to intent. Both holdings are rather narrow, insofar as each establishes what the section does not provide, rather than what increased protection it gives.

HINTS ON THE SCOPE OF PROTECTION PROVIDED BY THE PENSION SECTION—PETERS v. CITY OF SPRINGFIELD

The first case decided by the Illinois Supreme Court which construed article XIII, section 5 was *Peters v. City of Springfield*.⁵⁶ The court held that reduction in the mandatory retirement age for firemen from 63 to 60 years old was not a diminishment or impairment under the protection of the constitution. Although this was the first case dealing with the constitutional section on pensions, the court provided little guidance on the scope of the pension section. It did not point out the difference between the former gratuitous status of mandatory participation plans and the new constitutional protection provided by the "enforceable contractual relationship."⁵⁷ In a rather narrow statement outlining what the pension section does not protect, the court concluded 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 that 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 pensions which plaintiffs would ultimately have received.⁵⁸

The right to a 63 year old retirement age stemmed from the Illinois Municipal Code which the court held the city, as a home-rule unit, was not bound to follow.⁵⁹ The Pension Code did

56. 57 Ill. 2d 142, 311 N.E.2d 107 (1974).

57. See notes 65 and 70 *infra*, and accompanying text for an illustration of the approach in New York and Michigan (both of which have similar constitutional provisions) where the courts take great pains to illuminate the differences raised by the new pension sections.

58. *Peters v. City of Springfield*, 57 Ill. 2d 142, 152, 311 N.E.2d 107, 112 (1974).

59. The court held that under the home rule powers conferred by article VII, section 6(a) of the 1970 Illinois Constitution, the City of Springfield could lower the retirement age to 60 since the General Assembly had neither limited specifically the concurrent exercise of this power, nor

not contain any section protecting the right to a maximum retirement at age 63.⁶⁰ Although the court did not explicitly mention the point, it evidently agreed with defendant's contention that the only contractual rights protected are those based upon the provisions of the Pension Code.

It appears that *Peters*, under the new pension provision, provides less protection for pension benefits than previous cases provided under the pre-1970 Constitution "contractual" theory based on the mandatory-optional participation distinction. The case of *Bardens v. Board of Trustees of the Judges Retirement System*⁶¹ is a pre-1970 case illustrating the strong protection Illinois courts have afforded contractual status pension plans. In *Bardens* the court invalidated an attempted change in the computation of judges' retirement annuities on the basis that the voluntary nature of the Judges Retirement System created vested contractual rights in pension benefits. The court held that the judge was entitled to computation of the retirement annuity on the basis of the statutory plan existing at the time of his initial entry into government service. If *Bardens* protects computation of retirement benefits from impairment of contract (under the 1870 Illinois Constitution) why does *Peters* fail to protect the right of a 63 year maximum retirement age under the contractual provisions of the new pension section? The distinction must be made on the basis of the origin of the right. In *Bardens* the right to computation of the annuity was controlled by a formula contained in the Pension Code,⁶² while

specifically declared the State's exercise of this power to be exclusive. The 63 year retirement age was provided for by ILL. REV. STAT. ch. 24, § 10-1-18 (1973).

60. The only provisions in the Pension Code setting up minimum age requirements establish that in order to qualify for a pension a fireman must be over 50 and have at least 20 years of service. ILL. REV. STAT. ch. 108½, § 4-109 (1973). By comparison, another section of the Pension Code dealing with a different pension plan notes that no compulsory retirement age is set up by the pension law and no specific right is granted to the employee to remain in service. *Id.*, § 7-218.

61. 22 Ill. 2d 56, 174 N.E.2d 168 (1961).

62. ILL. REV. STAT. ch. 37, § 5.1 (1949). The conclusion that the crucial distinction is whether the right is contained in the pension statute is reinforced by analysis of two New York cases cited in *Peters*: *Geary v. Phillips*, 53 Misc. 2d 337, 278 N.Y.S.2d 506 (Sup. Ct. 1967) (reduction in retirement age did not violate the constitutional provision); *contra*, *Pettit v. McCabe*, 60 Misc. 2d 177, 302 N.Y.S.2d 209 (Sup. Ct. 1969) (local law reducing retirement age violated constitution). Resolution of these conflicting decisions was made by the *Pettit* court which noted that in *Geary* the local pension plans involved were not in the New York State Retirement System. The *Pettit* fund was a member of the New York State Retirement System which specifically provided for a mandatory retirement age of 70. Thus in *Pettit* the court held that the local law, which attempted to establish a mandatory retirement at 62, conflicted with the provisions in the pension plan's statute and thus was invalid. The conflict was not allowed because the State had pre-empted this particular area and local law could not be allowed to conflict. Under this reasoning the result in *Peters* comports with the distinction set up.

in *Peters* the right to the maximum retirement age was not contained in the Pension Code but rather in the Municipal Code. Without this distinction, the new constitutional provision would indeed appear to provide less protection than previous case law did for pension benefits under optional participation pension plans.

It is small comfort to the pensioner that the new pension section provides no less protection than previously afforded. The more crucial issue is whether it provides more protection for pension benefits. Does *Peters* erase the distinction between mandatory and optional participation pension plans, thus affording constitutional protection against impairment for all public employee pension benefits? Dicta in a recent case supports this assumption.⁶³ While it is reasonable to assume that *Peters* places all pensions under the protection of the "contractual" theory, the court does not mention the point or discuss the issue.

The *Peters* court cites several New York cases, indicating its awareness of New York's similar constitutional provision. In view of the fact that convention delegates also noted their awareness of the New York provision, the Illinois Supreme Court's utilization of it as persuasive authority is an accepted and helpful method of constitutional analysis.⁶⁴ New York cases construing their constitutional amendment shortly after its enactment left no doubt that its effect was to place all pension plans within the contractual class of protection.⁶⁵ While the cases establishing this rule were not cited by the *Peters* court, it is unlikely that Illinois would disagree with the basic purpose of the constitutional provision as explained by the New York courts and echoed by delegates at the Illinois Constitutional Convention.

Since *Peters* has demonstrated that persuasive cases from other jurisdictions may be helpful in construing the pension section, it is helpful to note that several states have similar provisions in their constitutions. New York,⁶⁶ Alaska,⁶⁷ Hawaii,⁶⁸

63. The new Illinois Constitution of 1970, S.H.A., effective July 1, 1971, appears to have no effect on the interpretation or validity of the statutes here involved, except as it may have eliminated indirectly the old case law distinction between voluntary and compulsory pension systems.

Illinois State Employees' Ass'n v. McCarter, 9 Ill. App. 3d 764, 769, 292 N.E.2d 901, 904 (1973) (dicta).

64. "Where a constitutional provision has been borrowed from another state after it has been construed by the court of last resort of that state, the general rule is that the construction is adopted with the provision." 16 AM. JUR. 2d *Constitutional Law* § 82 (1973).

65. *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y. 2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958); *Day v. Mruk*, 307 N.Y. 349, 121 N.E.2d 362 (1954).

66. See note 47 *supra*, for the text of the New York amendment.

67. "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." ALASKA

and Michigan⁶⁹ have constitutional provisions similar to article XIII, section 5. Unfortunately, the Alaska and Hawaii sections are so new that no case law construing their intent is now available. However, both Michigan and New York interpretive case law provides a useful tool for analysis of the probable scope of protection of the Illinois pension section.

The New York and Michigan cases make it clear that the intent of the pension section should be to eliminate the distinction between mandatory and optional participation, thus providing contractual protection for both types of pension plans.⁷⁰ With this point accepted, the issue turns to the type of benefits protected. It should be noted at the outset that any benefits may be altered, modified, or released *by contract*, in accordance with usual contract principles.⁷¹ The Michigan and New York courts have held that the right to a specific salary, even though it was the basis for computation, was not protected.⁷² In New York the right to a specific mandatory retirement age is not a protected benefit.⁷³ The loss of pension rights because of non-compliance with provisions of the pension statute is not protected in New York,⁷⁴ and neither is the right to remain in employment.⁷⁵ Finally, the loss of pension benefits accompanying

CONST. art. XII, § 7 (1959). The only case citing this section, *Begich v. Jefferson*, 441 P.2d 27, at 33 n.14 (Alaska 1968), does not deal with the pension protection issue, thus there is no interpretive precedent available at this time for the Alaska provision.

68. "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." HAWAII CONST. art. XIV, § 2 (1959). No case precedent available.

69. 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. . . .

Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

MICH. CONST. art. IX, § 24 (1963). Note that unlike Illinois, Michigan includes a specific provision concerning funding. Also, unlike Alaska and Hawaii, there is some Michigan precedent interpreting its constitutional pension provision. These cases will be referred to in subsequent notes and text.

70. *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958); *Day v. Mruk*, 307 N.Y. 349, 121 N.E.2d 362 (1954); *Retired Policemen and Firemen of City of Lincoln Park v. City of Lincoln Park*, 6 Mich. App. 372, 149 N.W.2d 206 (1967); *Campbell v. Michigan Judges Retirement Board*, 378 Mich. 169, 143 N.W.2d 755 (1966).

71. *Rosen v. New York City Teachers' Retirement Board*, 202 Misc. 159, 115 N.Y.S.2d 263 (Sup. Ct. 1952) (reversed on waiver, 122 N.Y.S.2d 485 (1953)).

72. *Hoar v. City of Yonkers*, 295 N.Y. 274, 67 N.E.2d 157 (1946).

73. *Geary v. Phillips*, 53 Misc. 2d 337, 278 N.Y.S.2d 506 (Sup. Ct. 1967); *contra*, *Pettit v. McCabe*, 60 Misc. 2d 177, 302 N.Y.S.2d 209 (Sup. Ct. 1969).

74. *Holz v. Kowal*, 27 A.D.2d 128, 276 N.Y.S.2d 398 (Sup. Ct. App. Div. 1967). In Illinois there are numerous manners in which pension benefits might be lost by failure to comply with the pension statute. One

dismissal for cause from a police force was not protected.⁷⁶

It is interesting to note that most cases state what benefits are not protected. There are several cases that do delineate the benefits which are protected. The right to computation of benefits under the mortality tables existing upon initial employment was a protected benefit in New York.⁷⁷ The most important benefit which cases uphold as constitutionally protected is the right to the provisions of the applicable pension statute as it existed when the pension rights "vested."⁷⁸ The subclasses of benefits protected is as broad as the applicable pension statute. The cases noted reinforce the assumption that those provisions specifically detailed in the applicable pension statute will be constitutionally protected. Benefits which are related indirectly to the statute's provisions, such as salary or retirement age, will not be protected.

The next issue is to determine the time at which the pension benefits or rights "vest." If the rights vest at the time of initial employment, the employee is entitled to their continuance as they affect him at retirement. However, if the rights do not vest until retirement, his rights may change during his employment, right up to retirement. Obviously, the rights must vest earlier than the actual time of payment, or the constitutional protection would be meaningless. The time of vesting has an enormous impact on pension planning and policy. A determination that rights vest at initial employment should cause a much more conservative outlook for policy makers and legislators responsible for enactment of pension law.

such method which received recent publicity involved the loss of pension rights resulting from conviction of a pension member for a felony connected with his office or duties. (See e.g., ILL. REV. STAT. ch. 108½, §-2-156). The Illinois General Assembly passed a bill which would have allowed legislators, judges and state employees convicted of a felony to retain their benefits. This was attempted by deletion of the felony conviction section in each affected portion of the Pension Code. If the bill had passed, some public employees would still retain their rights if convicted of a felony arising out of their official duties, and others would not retain their benefits. Dubbing the measure the "Future Felons Protection Act," Governor Walker vetoed it. *The State Journal-Register* (Springfield), Sept. 10, 1974 at 2.

75. *Gorman v. City of New York*, 304 N.Y. 865, 109 N.E.2d 881 (1952).

76. *Robbins v. Police Pension Fund*, 321 F. Supp. 93 (S.D.N.Y. 1970) (Plaintiff suspended and dismissed on 13 charges including assault, bigamy and forgery. Court held it is implicit that to receive benefits the employee must complete service in good standing).

77. *Ayman v. Teachers' Retirement Board*, 9 N.Y.2d 119, 172 N.E.2d 571 (1961); *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958); cf. *Haupt v. Teachers' Retirement Board*, 28 Misc. 2d 686, 210 N.Y.S.2d 337 (Sup. Ct. 1960).

78. *Kleinfeldt v. New York City Employees' Retirement System*, 36 N.Y.2d 95, 324 N.E.2d 865 (1975); *Donner v. New York City Employees' Retirement System*, 33 N.Y.2d 413, 308 N.E.2d 896 (1974); *Detroit Police Officers Ass'n v. City of Detroit*, 41 Mich. App. 723, 200 N.W.2d 722 (1972); *Murphy v. Wayne County Employees Retirement Board of Trustees*, 35 Mich. App. 480, 192 N.W.2d 568 (1971).

The *Peters* case does not deal directly with the issue of vesting, but it does contain language indicating that Illinois may be tending toward vesting at retirement rather than at initial employment. The court holds that "pension rights of public employees which *had been earned* should not be 'diminished or impaired.'"⁷⁹ Thus it appears the court is establishing a requirement that pension rights be earned by a period of employment before they are protected. While this language supports such an assumption, the conclusion that rights do not vest until retirement would be at variance with a considerable amount of authority.

The debate at the constitutional convention indicated an intent that such rights vest at the time of initial employment.⁸⁰ New York has made it explicitly clear that the purpose of their constitutional provision was to change the old rule which provided that rights did not vest until retirement.⁸¹ Under the new rule rights vest at the time of initial employment. It must be noted that Michigan holds that rights do not vest until retirement, but this difference may be traced solely to the wording of their pension provision. The Michigan section protects "the accrued financial benefits."⁸² The key word "accrued" determines that service must be completed before pension rights vest. The Illinois pension provision does not contain the limitation of "accrued," and it is difficult to see how it could be implied to achieve the Michigan interpretation.

If a strict interpretation of the Illinois pension section eliminates the possibility of modification of pension benefits which have vested at the time of initial employment, the severity of the problem becomes readily apparent. The contractual status afforded by the constitution may have locked in benefits which the legislature or municipality felt were gratuitous when established. Now the benefits are contractual, and may not be diminished as previously expected. In New York this situation was anticipated in order to allow pension units to adjust their obligations before the effective date of the constitutional amendment giving the more protected status to pension benefits.⁸³

79. 57 Ill. 2d 142, 152, 311 N.E.2d 107, 112 (1974) (emphasis added).

80. See text accompanying notes 50 and 53 *supra*.

81. *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y. 2d 1, 152 N.E.2d 241, 176 N.Y.S.2d 984 (1958); *Day v. Mruk*, 307 N.Y. 349, 121 N.E.2d 362 (1954).

82. MICH. CONST. art. IX, § 24 (1963).

83. In *Day v. Mruk*, 307 N.Y. 349, 121 N.E.2d 362 (1954), the court emphasized that the 1½ year delay between the enactment of the pension amendment and its effective date was in order to give pension systems a chance to revise their provisions in light of the fact that benefits could no longer be diminished or impaired as before. When the plaintiffs in *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 152 N.E.2d 241, 176 N.Y.S.2d 984 (1958) claimed that the inability to

Whether any Illinois pension units took protective measures in anticipation of the new pension provision is an open question. On the contrary, it appears that the Illinois General Assembly is passing more liberal pension legislation aimed at expanding pension benefits.⁸⁴

A strict construction of the pension section as providing vested rights at initial employment appears warranted by authority, but the practical implications of such a construction could prove detrimental to pensions and pensioners. The adverse effects of such a construction are tempered somewhat by holdings which state that attempted changes in pension benefits would only be invalid as to persons in service at the time of the attempted change. The change would be valid as to employees entering service subsequent to their effective date.⁸⁵ If the state were severely hard-pressed in meeting the financial obligations of a pension program, some support for a reasonable impairment of contract may be gained from cases concerning the impairment of contracts clause in the 1870 Illinois Constitution.⁸⁶ It must be noted, however, that although some impairments have been justified by the courts and upheld by the U.S. Supreme Court, the Illinois courts have never previously allowed any type of impairment for a pension plan deemed "contractual" under

change mortality tables might throw the system into bankruptcy, the court said they had delayed too long to attempt to change the tables now; that if they were in trouble they should go to the legislature for funds.

84. The 1973 PENSION REPORT details the volume of proposed liberalized pension laws which it is called upon to consider and advise the Illinois General Assembly. There is no noticeable trend toward conservatism in pension benefit legislation since the pension provision was included in the 1970 Illinois Constitution.

85. In New York, since the employee's rights vest upon employment, he takes subject to changes already in effect. The constitutional pension provision does not serve to make the pensioner's rights retroactive to those existing before his employment. *Ayman v. Teachers' Retirement Board of the City of New York*, 9 N.Y.2d 119, 172 N.E.2d 571, 211 N.Y.S.2d 198 (1961).

86. However, there has been a widespread tendency in state courts to consider the limitations on impairment of contracts as absolute rather than subject to reasonable impairment. See Comment, *Contractual Aspects of Pension Plan Modification*, 56 COL. L. REV. 251 (1956). In fact, the dominant motive behind Illinois use of the "gratuity" concept appears to be avoidance of the consequences which would attach by calling pension rights "contractual" and thus subject to the impairment of contracts clause.

A reasonable power of impairment of contract by the state is usually expressed in terms of the police power concept. The police power concept recognizes the ability of the legislature to consider the public health, safety or morals, thus protecting these factors by interfering with or even abolishing certain contract rights. See BRADEN AND COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 70-76 (1969). The concept has been applied in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (temporary relief from mortgage obligations); *Hoyne v. Chicago & O.P. Elev. R.R.*, 294 Ill. 413, 128 N.E. 587 (1920) (rate regulation); *Wabash Eastern Ry. v. Comm'rs of East Lake Fork Special Drainage Dist.*, 134 Ill. 384, 25 N.E. 781 (1890) (liens affecting existing contract rights).

the mandatory-optional distinction predating the 1970 constitution.⁸⁷ Thus it appears that the "enforceable contractual relationship" mandated by the pension provision would not be easily circumvented by this method. Furthermore, the word "enforceable" implies that the pension member whose rights were diminished would have a remedy. It would be ironic to establish a remedy and yet deny it expression by resort to an analogy to reasonable impairment of contract.

An interpretation of the scope of the pension section depends upon inferences drawn from the rather narrow holding in *Peters*. It is unclear whether Illinois will rely on out of state precedent for interpretation of its own pension section. But to the extent that Illinois relies on New York precedent, it will have a major effect on the extent of protection afforded to Illinois pension rights. Analysis of the *Peters* case primarily concerned the extent of protection which the public employee possessed for his pension rights. The next case directly construing the pension section deals with the more practical question of the extent of funding which the constitutional provision might require.

THE FULL-FUNDING ISSUE—PEOPLE *ex rel.*

I.F.T. v. LINDBERG

The five state supported public employee pension funds in Illinois depend on joint contributions by the state and state employees.⁸⁸ These funds have been continually under funded by actuarial standards, which has been a matter of constant concern both to members of these funds and to the Pension Laws Commission.⁸⁹ By 1975, the amount of accrued liabilities exceeded pension fund assets by over 5.7 billion dollars. This substantial figure, termed the "unfunded accrued liabilities," has risen sharply and steadily in the last decade.⁹⁰ Although unfunded accrued liabilities is an estimate, it nevertheless represents the actual amount of money needed in the future to pay off presently existing pension obligations according to actuarial

87. *Bardens v. Board of Trustees*, 22 Ill. 2d 56, 174 N.E.2d 168 (1961) (attempted impairment of judge's annuity rights). This case underscores the fact that although a reasonable impairment of contracts has been allowed in some instances in Illinois, the courts have never applied the concept to impair pension benefits. The possibility of using the concept does not imply that the guarantee of the pension section would be easily circumvented.

88. See notes 5 and 8 *supra*.

89. 1973 PENSION REPORT 65-73.

90. Illinois Pension Fund Trends:

	Net Assets	Accrued Liabilities	Unfunded Accrued Liabilities
1967	\$1,646,110,392	\$3,594,718,075	\$1,948,607,683
1971	2,568,195,465	5,742,849,950	3,174,654,485
1975	4,250,926,279	9,999,528,004	5,748,601,725

Source: 1975 REPORT OF EXAMINATION.

projections.⁹¹ The Illinois General Assembly has generally adopted a "pay as you go" philosophy, which pays little more than the current year's obligations.⁹²

Although this issue is, at its root, a fiscal issue which might be construed as political, there is some indication that provisions of the pension statutes require a specific level of appropriations by the General Assembly.⁹³ Also, portions of the convention debate gave the *Lindberg* plaintiffs hope that the court would construe the pension section as mandating full-funding by the General Assembly.⁹⁴ An additional complication in *Lindberg* is that although the General Assembly had, in this case, appropriated funds which the plaintiffs felt were adequate, the Governor utilized an amendatory veto to reduce these amounts.

The court dismissed the contention that any specific level of funding was mandated by the constitution. This result was foreseeable in light of the lack of consensus on funding expressed during the constitution debates.⁹⁵ It was bolstered also by the omission of any specific wording in the pension provision suggesting that any level of funding was required.⁹⁶ The court also found that the Governor's veto powers took precedence over the right of the pension funds to any level of appropriations.⁹⁷

A more thorough examination of *Lindberg* reveals that perhaps the real factor controlling the determination was that the case was premature. The court noted that, "[n]o allegation was advanced . . . that those presently entitled to receive pension benefits were not receiving the necessary monies."⁹⁸ In concluding, the Illinois Supreme Court noted that "[p]laintiffs have asserted that the respective pension funds are inadequately funded. The question of the specific fiscal appropriations necessary to meet these deficiencies is one which, *at this time*,

91. 1973 *Pension Report* 68-69.

92. *Id.*

93. The State Universities Retirement System statute provides:

The contributions of employers from State appropriations for any fiscal year shall not be less than an amount which is required to fund fully the current service costs in accordance with actuarial reserve requirements as prescribed in paragraph (1) of this Section, plus interest at the prescribed rate on the unfunded accrued liabilities.

ILL. REV. STAT. ch. 108½, § 15-155 (1973).

94. Specifically, the plaintiffs relied on comments made by one pension section sponsor, delegate Green. See *Verbatim Transcripts*, vol. IV at 2925, 2931.

95. See notes 46-48 *supra*, and accompanying text.

96. For comparison, see the Michigan constitutional provision which explicitly prescribes funding measures, note 69 *supra*.

97. 60 Ill. 2d 266, 326 N.E.2d 749 (1975). The court felt that since the constitution gives the governor broad budgetary powers, a construction of the constitution as a whole would result in his ability to use the amendatory veto on pension appropriations.

98. *Id.* at 270, 326 N.E.2d at 751.

should be directed to the legislature."⁹⁹ It thus appears that the pension rights in question had not been "impaired" to the extent that the court felt constrained to intervene. In the event of disruption of actual benefit payments caused by fiscal instability, the court would have to reevaluate the issue.¹⁰⁰

One disturbing point in *Lindberg* is the utilization of the mandatory-optional participation distinction to refute plaintiff's claim that the statutes described a contractual relationship which the legislature was bound to honor by appropriating proper monies. The court held that the statute had been previously construed as not defining a "contractual" relationship since, "it has long been settled that compulsory participation in a statutory pension plan confers no vested rights, thus permitting amendment, change, or repeal as the legislature sees fit."¹⁰¹ The court had already decided that the constitution did not impose a duty to fund pension plans at any level. Now it felt compelled to block this additional challenge by use of pre-1970 case law. This language seems to place doubt on the assumption that the pension provision erased the mandatory-optional distinction. The only justification for resort to this language is that it is limited to the issue of full-funding. It is not conceivable that the court could justify termination or modification of pension benefits by resort to this language in the face of the new pension provision's explicit wording. The court would have provided a great service if it had modified the use of the language by an explanation of its limited scope of application in light of the new constitution.

In both *Peters* and *Lindberg* the Illinois Supreme Court has decided only the narrow issue at hand. No attempt has been made to illuminate the crucial differences between the old status of pensions and the new constitutionally protected status. If only to serve as notice to all the affected parties, the court would provide a great service by redefining the pension relationships as they now exist in order to provide guidance for future conduct. The Illinois General Assembly could legislate more wisely if it knew with certainty what status the enacted pension benefits carried. And certainly the individual pension plan members

99. *Id.* at 277, 326 N.E.2d at 755 (emphasis added).

100. This conclusion is suggested by a comment of delegate Kinney at the constitutional convention which the *Lindberg* court cites:

It was not intended to require 100 per cent funding or 50 per cent funding or 30 per cent funding or get into any of those problems, aside from the very slim area where a court might judicially determine that imminent bankruptcy might really be impairment.

Id. at 271, 326 N.E.2d at 752.

101. *Id.* at 273, 326 N.E.2d at 752 (citing *Bergin v. Board of Trustees of Teacher's Retirement System*, 31 Ill. 2d 566, 202 N.E.2d 489 (1964)).

deserve some confirmation of the intended effect of the pension provision.

CONCLUSION—EFFECTIVE SECURITY FOR PENSION RIGHTS

One must exercise caution in speculating on future interpretations of article XIII, section 5 of the 1970 Illinois Constitution. The guarantee of an "enforceable contractual relationship" must not be thought of as an all-encompassing status possessed by the public employee. The Illinois Supreme Court has been extremely careful to limit both *Peters* and *Lindberg* to their narrow issues, presumably in order to retain a flexibility to cope with unforeseen difficulties in the future. In so doing, the court has twice limited the meaning of the pension section. Also, analysis of persuasive precedent from other jurisdictions suggests limitations on the apparent meaning of the section's wording.¹⁰²

Further caution in speculating on the meaning of the pension section is merited because of the strength of the mandatory-optional distinction. Illinois has adhered religiously to this distinction since its inception in the 19th century. Arguments and reasoning based on the mandatory-optional distinction have even crept up several times since the effective date of the 1970 Constitution without any mention of the pension section's supposed effect.¹⁰³ The resurrection of mandatory-optional reasoning in *Lindberg* is a prime example of the tenacity of this old concept. Although it is scarcely conceivable, it would be ironic if pension rights were held to be contractual under the 1970 Constitution, yet subject to derogation based on pre-1970 case law distinctions.

The authorities examined suggest the opposite conclusion, that the effect of the 1970 Illinois Constitution's pension section is to place all public employee pensions under the scope of protection given by the contractual theory. Pre-1970 cases which protected pension rights under the contractual theory stressed very clearly that its effect was to reverse the traditional rule that pensions were "bounties" or "gratuities," for which no contractual relationship existed. Under the contractual theory, pension benefits were protected from the date of initial employment. The package of pension laws applicable to a specific pensioner upon entry into government service was one which could not be changed in a way that would impair his rights. The pension section in the 1970 Illinois Constitution states not only that a

102. See notes 65-76 *supra*, and accompanying text.

103. *People ex rel. I.F.T. v. Lindberg*, 60 Ill. 2d 266, 326 N.E.2d 749 (1975); *Lee v. Retirement Board of Policemen's Annuity and Benefit Fund*, 22 Ill. App. 3d 600, 317 N.E.2d 758 (1974); *Londrigan v. Board of Trustees*, 7 Ill. App. 3d 572, 288 N.E.2d 125 (1972).

“contractual relationship” exists; it emphasizes the point by addition of the word “enforceable” before the phrase “contractual relationship.” Surely the pension section brings pension rights under the protection of the contractual theory. Anything less than that degree of protection already afforded by the courts before the 1970 Constitution would be inconceivable.

The State of Illinois must establish and maintain a vital awareness that the new constitution’s pension section has drastically changed the longstanding “gratuity” label applied to most pensions. It is no longer enough that the State has always fulfilled its good faith promise to provide pension benefits when due. The obligation is now constitutionally mandated in explicit terms. Legislators and the tax-paying public must be aware that present and future pension plan legislation imposes obligations which are binding now and must be redeemed in the future.

It may well be argued that the new pension provision is unwise if it prohibits any legislative modification of pension benefits to meet future contingencies. It seems clear from the authorities that this is precisely the effect of the pension section. While a reasonable degree of modification would have been a practical and more desirable method of pension protection, there is no suggestion in either the wording of the pension section or the debates on it which supports this method. In retrospect it appears that neither the framers of the pension section nor the public which ratified the 1970 Illinois Constitution were aware of the severe strictures which were thereby imposed on the Illinois General Assembly’s power to modify pension plans.

Effective security for pension benefits rests on the protection provided by the constitution, but in even more practical terms it depends on pension funding. Although pension funding may be construed as more a political than a legal issue, it is nevertheless a vital element of pension rights. While *Lindberg* may have held that no specific level of funding is mandated by the constitution, at some point a lack of funding would truly impair an individual’s right to a pension payment. In such a case the courts would be forced to fashion a remedy which would live up to the constitutional promise of an “enforceable contractual relationship.” While no Illinois pension fund has presently defaulted on its obligations, several factors point to a difficult future. Actuarial estimates of increased pension costs, increases in the numbers of public employees and the amount of their compensation, and possible worsening of economic conditions are factors indicating that pension fund stability will be severely tested in the remainder of this century.

While the law should not concern itself too deeply with political and financial considerations, it cannot remain in a vacuum. It must relate itself to real and not theoretical problems. There is a certain futility to fixing rules and concepts of law only to find that actual circumstances have rendered them useless. Thus, in strictly practical terms, pension security does depend on the good faith and fiscal responsibility of those responsible for the funding and protection of pension funds.

Until the 1970 Illinois Constitution, members of mandatory participation plans could only rely on the good faith of the legislature and the fiscal stability of their plans. The new pension section does not leave pension protection to these factors, it mandates a constitutionally protected status for pension benefits of *all* public employee pension plans. The term "enforceable contractual relationship" is not a mere label which may be minimized by the courts, and its effect must not be overlooked by legislators enacting new pension benefits. Public employee pension benefits in Illinois now carry the full weight of the 1970 Illinois Constitution. They are "enforceable contractual relationships," and the benefits may not be diminished or impaired.

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