

No. 13-3790
In the United States Court of Appeals for the Seventh Circuit

Michael W. Underwood, Joseph M. Vuich, Raymond)	
Scacchitti, Robert McNulty, John E. Dorn, William J.)	
Selke, Janiece R. Archer, Dennis Mushol, Richard)	
Aguinaga, James Sandow, Catherine A. Sandow, Marie)	Dist. Court
Johnston, and 338 other Named Plaintiffs listed in)	No. 13-CV-5687
Exhibit 1 to Complaint,)	
)	Hon. Judge James F. Holderman
Plaintiffs,)	
v.)	
)	
CITY OF CHICAGO, a Municipal Corporation,)	Previous Nos. in Cook County
)	Circuit Court:
Defendant,)	01 CH 4962
and)	87 CH 10134
)	
Trustees of the Policemen’s Annuity and Benefit Fund)	Removed from 2013 CH 17450
of Chicago;)	
)	
Trustees of the Firemen’s Annuity and Benefit Fund of)	
Chicago;)	
)	
Trustees of the Municipal Employees’ Annuity and)	
Benefit Fund of Chicago; and)	
)	
Trustees of the Laborers’ & Retirement Board)	
Employees’ Annuity & Benefit Fund of Chicago, et al.)	
)	
Defendants.)	

PLAINTIFFS’ MOTIONS¹

1) FOR STAY AND/OR AN INJUNCTION PENDING APPEAL, AND 2) REQUEST FOR REFERRAL TO THE ILLINOIS SUPREME COURT

Plaintiffs seek a Stay and/or an Injunction Pending Appeal to hold in abeyance the announced increases in rates charged against City of Chicago retiree participants employees’ pensions for health insurance coverage maintaining the retirees’ pension deductions at the *status*

¹ Plaintiffs counsel will contact the Clerk during office hours, pursuant to Rule Circuit Rule 27. Emergency Filings to request action be taken by December 31, 2013.

quo, as the City has already done voluntarily from the end of the Korshak settlement, on June 30, 2013 to January 1, 2014. Additionally, as the gravamen of this case addresses a question of first impression, on a matter of law, on a similar issue briefed and argued before the Illinois Supreme Court, Plaintiffs propose certain questions for certification under Illinois Supreme Court Rule 20(a).

This litigation continues the retiree healthcare litigation initiated by the City in 1987, and is the refilling of the case following the end of the most recent settlement, which expired June 30, 2013.

The gravamen is that the City is prohibited, by Article XIII §5 of the 1970 Illinois Constitution² and other grounds as well, from reducing the benefits or making adverse changes to the retiree healthcare benefits from the best terms in effect during a participant's participation in the City's four Annuitant and Benefit Plans. The pending appeal challenges the City's elimination of retiree medical benefits, and its position that Article XIII §5 protects no retiree medical benefits. In context, the "phase out" of the coverage eliminates the value of the monthly annuities received by the retirees and destroys the forward planning they have done for their retirement which is a constitutionally protected benefit of participation in the retirement fund, be it Police, Fire, Labor or Municipal retiree Fund.

This case began in 1987 by the City-initiated lawsuit for a declaration that the City did not have to continue annuitant healthcare benefits. There, the City's complaint was dismissed by the State court, then proceeded to trial on the claims that the City was obligated to continue the healthcare plans for participants without reduction, but settled between the City and the Funds

² 1970 Illinois Constitution, 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 shall not be diminished or impaired.

over annuitants' objections, with annuitants rights to revive the litigation, which was done thereafter at the conclusion of the 1988 Settlement, followed by revivals and other interim settlements, the latest of which expired on June 30, 2013, triggering the initiation of these proceedings.

On May 15, 2013, the City wrote to all participants in the City's retiree healthcare program, assuring all participants that the current coverage and benefit levels would continue through December 31, 2013, but that the City intended to make changes to the plan beginning January 1, 2014, intending to phase out of the plan by the beginning of 2017; and explained that it "expects to announce the details of this revised structure this summer, so that all retirees, current and future, will have all the information they need to appropriately prepare for this important component of retirement planning." Doc. No. 19-1, May 15, 2013 City of Chicago Letter to Annuitants.

Contrary to its assurance, the City waited until October 7, 2013, and simply sent out notifications of unilateral rate and program changes to participants, with substantial premium increases, some by as much as 60% or \$500 increase per month. Doc. No. 39-6, (October 7, 2013 mailings to annuitants). Following the immediate shock by fixed income retirees, when undersigned counsel released the new rates to the inquiring press, City declared that that the printer had sent out the wrong rates, then reissued new notices (*see* Doc. No.39-7, City's October 10, 2013 correction letter), slightly reducing the increases, some still amounting to 50% and \$400 monthly increases.³

This litigation was brought to obtain a declaration that healthcare benefits are included as part of the "Membership in any pension system" the "benefits of which shall not be diminished

³ All of this now also without the Settlement's oversight of both rates and auditing the actual charges. The reconciliation, in each year of the Korshak settlement, have shown that the City's set rates resulted in overcharges to virtually all participants, in each year's audited reconciliation.

or impaired” – in short hand – the “benefits of participation” in an Illinois government retirement system that the Illinois Constitution prohibits being diminished or impaired. The District Court dismissed the case on December 13, 2013. Doc. No. 59. As shown here, the history, plain language, and case law support Plaintiffs’ appeal, and for these purposes, we will show, the participants have a likelihood of prevailing on appeal, the damages are irreparable, a stay will present no unfair harm to the City (as this issue has been preserved in each interim settlement), the Illinois Supreme court has a related matter currently pending before it, a majority of the State supreme courts addressing the issue have favored the annuitants right to permanent protection for healthcare benefits and the public interest favors the stay.

Exacerbated by the City’s delay in informing them, retirees are on very short notice have to elect to continue participation in the City’s plans, at dramatically higher premium rates under the City plan, or drop their City coverage to sign up under the federal Affordable Healthcare Act (commonly called “Obamacare”/ACA) with dramatically increased out of pocket expenses annually under the federal healthcare exchange programs. While the need for a stay, is worsened by the chaotic rollout of the federal ACA’s signup problems, a critical irreparable harm is that retirees (who we believe this court will agree should ultimately be entitled to continue for life at the best level of benefits under the City’s plans during their participation) may in the interim drop their City coverage, and not be able to return to the City’s plan if we win. (The City Benefits Office has informed participants that those who drop their City coverage will be required to prove insurability if they wish to return in the future. Ex. 2 at page 2).

There is no easy choice for retirees, forced by the City’s unilateral actions, the ACA’s provisions of the out of pocket provisions (being as much as \$6,000-\$12,000, compared with the City retiree current program’s \$300 per person/\$900 max. per family) and are coupled with the

sharply reduced networks, constitute harm that goes beyond harm which can be remedied by mere money damages.

The City's hardball tactic against retirees threaten damages beyond those remedied by mere money damages. Retirees on fixed income may forego coverage altogether, for cost reasons. Those who opt for coverage under the federal plan will not be permitted back into the City's plans without proof of good health, in contrast with the federal prohibition on exclusion for pre-existing conditions. Second, the cost changes impose significant lifestyle changes, in some cases foregoing treatments, or having to go back to work, with some entirely unanticipated results⁴ that are simply not remedied by future monetary compensation. In this case, currently, we attached a sample of the verified statements that the increases will cause retirees, which the District Court did not refer to in his decision, unless it was incorporated by reference in his minute order that he was sympathetic to the plight and "concerns" of the retirees. Doc. No. 39-13, Doc. No. 59 (Docket Text).

While foregoing the increases while the issue pends involves only money issues to the City, and which have previously and repeatedly been deferred pending litigation and settlements in the State courts, but the impact on retirees' lives and security goes way beyond monetary. Indeed, having to sacrifice substantial lifestyle contractions in one's post-retirement years represent lost life enjoyment that mere money years later, no matter how much, is not an adequate remedy.

⁴ See *e.g.*, Doc. No. 39-9, at Ex. 8, In the Korshak litigation, we received more than 100 affidavit declarations from participants objecting to the first settlement (to which only the City and Trustees supported). One of them, from Harry Belluomini, described that despite medical problems and other increased costs, he would have to seek fulltime employment. (See Belluomini's March 1, 1990 affidavit). Belluomini (pronounced BelAhMinee, and went by "Harry Bell") retired August 1, 1988, worked as a contract federal court security officer, and on July 20, 1992, was killed in a shootout in the Dirksen building underground garage after shooting Jeffrey Erickson, an escaping bank robber, who had already killed another guard. (Also, Tribune reports of Detective Belluomini's widow's efforts to obtain his entitled federal benefits.)

The proposed increases irreparably harm retirees by forcing them to choose to pay unchallenged increases, and face the loss and phase out of their health coverage. The announced increases are steep, additionally, the brief period of time from their announcement in mid – October, 2013, until implementation January 1, 2014, combined with the uncertain effect of leaving coverage with the City weigh in favor of granting the injunction, as they create a great public harm, undermining the Rule of Law, breaking promises made to public retired employees, for political expediency, on an open question of Illinois law.

The City of Chicago expediently desires to work toward a balanced City budget on the backs of its retirees, by squeezing retired City employees and imposing massive increases in the healthcare deduction, and eventually renege on the social contract between former public servants, retirees by eventually discontinuing retired employee's health benefits.

Pending resolution while on appeal, a stay will not harm the City. However, Plaintiffs and the public interest will suffer irreparable harm absent a stay by lowering our society to one that casts off former public servants without healthcare after years of service, and impacting thousands of retirees of generally modest means, and on fixed incomes in a point in their life where they cannot go back into the work force. Where the Mayor and the City have budget tools and the ability to raise revenue or cut discretionary spending in hundreds of departments, Plaintiffs have a kitchen table and family budget, and only themselves to look at in order to provide for their own healthcare coverage in their quiet years of retirement.

The question on the merits, a matter of law, is certainly not settled based on the District Court's decision. The District Court's ruling on most of the substantive legal issue of the Complaint hinges on mostly on Count I, Plaintiffs' Illinois Constitutional Claim (that healthcare benefits are included in the protected benefits of participation, against being diminished or impaired), which is developing through the Illinois court system, with a split of decisions in the

Illinois lower courts, a majority split in favor of protection by the other States' Supreme courts, and, as recognized by the District Court below, with the issue pending in the Illinois Supreme Court, which is the appropriate forum to decide this question of Illinois law.

Of the three State Supreme Courts that have addressed the issue under identical language in their state constitution, two squarely hold that the provision protects participants' healthcare benefits, not just annuity payments, against reduction or impairment. *Everson v. State*, 122 Hawai'i 402, 419, 228 P.3d 282, 299 (2010) and *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 888 (Alaska 2003).

Indeed, it is only by ignoring the actual language of the provisions (whose protection of "benefits of participation" in a retirement system, does not limit itself to annuities), and the very title of the retirement systems here (each one created in the Illinois Pension Code as a [Policemans', Firemens', Municipal Employees' or Laborers'] "Annuity and Benefit Fund" and creation of benefits other than just annuitites), that even the court below could conclude that healthcare benefits are not protected. Doc. No. 59. A plain reading of the applicable provisions supports the participants here.

Indeed, the scholarly analysis of the "Pension" clause's plain language, its history, case law, and purpose all support Plaintiffs' position. See: Madiar, "*Is Welching On Public Pension Promises An Option: An Analysis of the Illinois Constitution's Pension Protection Clause*" Ex. 1, <http://www.senatedem.ilga.gov/phocadownload/PDF/PensionDocs/madiarrevisedpensionclausearticle.pdf> (last visited December 27, 2013) (review of the "Pension" clause language, origin, convention debate, adoption, and relevant decisions). Madiar's exhaustive chronology, documentation, and analysis makes many relevant conclusions:

1. The General Assembly cannot unilaterally cut pension benefits or current employees 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 decision construing the Clause. *Id.* at 2.

2. The Clause not only makes a public employee's participation in a pension system an enforceable contractual relationship, but also constitutionally protects the benefit rights in place when an employee becomes a member of that pension system. *Id.* at 2.

3. The plain language of the clause, states "the 'benefits' of" membership that a public employee enjoys cannot be diminished or impaired." *Id.* at 3. (The provision nowhere limits its protection to annuity payments).

4. After considering that "benefits" may not be diminished or impaired, Madiar analyzes what is a "benefit" and what is "impair", and looking at the dictionary explains that the "Clause's own language bars governmental action to reduce or eliminate a public employee's pension payment and *other entitlements available to the employee under the terms of membership when the person becomes a pension system member*" referring to the definition of "anything contributing to an improvement in condition; advantage; help." *Id.* at 4.

5. The "Clause on its face does not permit a *unilateral* "reduction or elimination of the pension benefits...due to exigent circumstance, such as a fiscal emergency." *Id.* at 4. (Emphasis in the original).

6. Madiar notes *Wolfson v. Avery*, 126 N.E.2d 701, 707 (1955), at page 4, footnote 25, for the proposition that the court should consider the language used, the object obtained, or the evil to be remedied – in other words the context – and then notes that retirement plans or the purpose of a pension, is to offer employees a sufficiency so "they can live in reasonable security" and retirement plans have value to attract employees, noting that government cannot compete with private industry on salary, and "rely heavily upon the equalization factor of an attractive and liberal retirement plan." *Id.* at 4-5.

7. In continuing with the history of the Clause, Madiar analysis of the “Voters Understanding of the Pension Clause” at the time of adoption, notes, “These sources indicate that voters were informed that the provision protected pension benefits rights from reduction and granted public employees a constitutional right to their “full pension benefits” noting the official text, explanations and Illinois newspaper reports. *Id.* at 24; and See, Concluding Observations a summary of conclusions, at *Id.* at 25-26.

8. Madiar’s analysis continues and rejects the argument that the state can require current employees to pay higher contribution rates for the same or lower level of pension benefits, and rejecting proposals for employees to be “wean[ed]” off existing plans as a violation of the Clause for the reasons articulated in passim in the article. *Id.* at 70-71.

In any event, there is a similar question pending before the Illinois Supreme Court, *Kanerva et al v. Weems et al*, No. 115811, reviewing an Illinois circuit court decision to the contrary on direct appeal, fully briefed, argued, and awaiting decision; whose connection to this case is sufficiently close that we and the City have both filed amicus briefs in that case. (Even the District Court below indicated that it would have ordinarily deferred its decision here, but chose to decide the merits due to our participants’ request for accelerated ruling on the stay, in light of the City’s January 1, 2014 changes).

On Plaintiffs’ side, the highest courts of Hawaii and Alaska squarely agree that their identically worded constitutions include healthcare benefits against reduction; rejecting New York’s holding its provision protects only annuitites. Doc. No. 59 at 20-23.

Based on the split in other state courts, and the pending case before the Illinois Supreme Court, and in recognition that all of the material issues herein are ultimately for the Illinois Supreme Court’s decision, the most appropriate action would be for this court to certify the

following questions to the Illinois Supreme Court under Ill.S.Ct. Rule 20. The questions being proposed to be certified are:

1. Whether the Illinois Constitution, Article III, § 5 protection of benefits of participation” in a “pension or retirement system” includes healthcare benefits, not just annuities.
2. Whether the District Court fundamentally erred in its view that the 1970 Illinois Constitution “Pension Clause” Article III, § 5, protects only the benefits of participation that were in place at the time of the Constitution’s adoption.
3. Whether the trigger date for protection is based on when the person began their participation in the system (i.e., their date of hire) or vested at their retirement.
4. Whether it is unconstitutional for the Illinois Legislature to attempt to create a benefit of participation in a pension system that is not a “protected” benefit.

As shown below, these questions are pure matters of law, needing resolution by the Illinois Supreme court, and on which Plaintiffs have a substantial likelihood of prevailing, based upon a plain language review, and the Supreme Court decisions in Alaska and Hawaii.

Argument

Pursuant to Rule 8(a)(2)(A)(ii) of the Federal Rules of Appellate Procedure, Plaintiffs, retired City of Chicago employees (“Retirees”) request that the Court stay the district court’s order denying a preliminary injunction of imposing increases in health insurance rates and discontinuance of health care benefits upon the City’s retirees pending resolution of this appeal.

Plaintiff sought a preliminary injunction before the district court, (Doc. No. 19) which was denied as moot by the District Court’s dismissal of the case on its unique view of the merits, for the reasons stated in its December 13, 2013 decision. Doc. No. 59/61.

Standard of Review

This court should stay the judgment pending appeal where the Plaintiffs can demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury from denial of the stay; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This test is flexible, *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985), “[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” “The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor . . .” *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984).

In the 30 years since the *Roland* decision the formulation has been refined as a *threshold* phase and a *balancing* phase. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

To survive the threshold phase, a party seeking a preliminary injunction must satisfy three requirements. First, that absent a preliminary injunction, it will suffer irreparable harm in the interim period prior to final resolution of its claims. Second, that traditional legal remedies would be inadequate. And third, that its claim has some likelihood of succeeding on the merits. If the court determines that the moving party has failed to demonstrate any one of these three threshold requirements, it must deny the injunction. If, however, the court finds that the moving party has passed this initial threshold, it then proceeds to the balancing phase of the analysis.

In this second phase, the court, in an attempt to minimize the cost of potential error, “must somehow balance the nature and degree of the plaintiff’s injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the ‘public interest,’ ”. Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief. In so doing, the court employs a sliding scale approach: “[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.” Where appropriate, this balancing process should also encompass any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the “public interest”). Taking into account all these considerations, the district court must exercise its discretion “to arrive at a decision based on a subjective evaluation

of the import of the various factors and a personal, intuitive sense about the nature of the case.”

Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc., 549 F.3d 1079, 1086 (7th Cir. 2008) (citations omitted).

The district court's decision to grant or deny a preliminary injunction is reviewed for “an abuse of discretion.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). In this motion, following the formulation in *Girl Scouts of Manitou Council, Inc.* we will show that all four factors weigh in favor of a stay.

I. First, absent a stay and preliminary injunction, Retirees will suffer irreparable harm in the interim period prior to final resolution of its claims.

Retiree healthcare is not just a question of money that can be adequately compensated later by a money judgment. As important as food and shelter, healthcare coverage ensures one's ability to function and maintain a person's health. Decision about whether to forego the City's plan despite the steep up to 50% increases or seek other coverage involves a decision greater than later monetary relief can remedy.

The loss of one's healthcare for this retiree population represents a huge loss. Here the steep unilaterally imposed increases, for this year alone, cannot be replaced later by subtracting the difference in premiums.

The forced interim decision to change health plans may have catastrophic results that cannot be undone. The City Benefits Office has advised participants that those who leave the City plan will not be able to return, absent “proof of good health.” Ex. 2. In order to decide to leave the City's plan, sufficient time must be afforded to the annuitants. Here the window to decide was remarkably short, and shortened by the City's own decision not to inform participants until October, rather than the promised summer notification. The mid-October to the end of December time frame was inadequate for scores of retirees who have many factors to consider,

inter alia, their health, their budget, their options for other coverage, costs and benefits of other plans, and items not within their control such the actual functioning of the national healthcare web page which even at this point remains suspect. Moreover, the consequences of leaving, are significant. The retirees were rushed out the door with by the City's announcement without proper time to consider their options, let alone, the legality of the City's action.

We also pointed out in our Reply in support of Class Certification, (denied as moot) that retirees whose City employment began prior to April 1, 1986 do not qualify for Medicare coverage from their City employment, no matter how many quarters they thereafter worked for the City before retiring, regardless of their retirement date. For COBRA exemption from credits or coverage for state and local employees whose work began before 4/1/1986, see PL99-272 sec.13205(a).

II. Mere monetary remedies are inadequate.

The haphazard opening of the healthcare exchanges, coupled with the City's failure to timely advise participants of the City's plans for 2014, has created a very confusing situation. Annuitants are not sure what they should do; should they be buying in the exchanges, or staying with the City's coverage with the steep increases. Indeed, without information and guidance, many retirees will likely make uninformed decisions, and apply and pay for coverage with the exchanges that is redundant of their City coverage, or at unnecessary cost to retirees.

It is not clear that City retirees will be better off on the ACA exchanges, in addition to the chaotic rollout, the dramatic increases in out of pocket annual expenditures and the sharply restricted provider networks combine to make the Exchange plans a drastic and inferior program for these retiree participants. The Chicago Tribune's recent article makes it clear that the health care exchanges (with deductibles ranging from \$6,000 to \$12,000 annually, and severely limited provider networks, compared with the current PPO plans with \$300-\$600 annual deductibles,

and full provider choice) might be desirable options only for those with absolutely no current coverage. Blithely informing retirees that they will save money by going on the Exchanges, focusing solely on the monthly premium charges seems little more than a sham device to induce uninformed retirees to drop their City coverage, opening them up for near-bankrupting costs to individuals.

The Plaintiffs supplied the District Court with verified impact statements by the affected participants, members of the proposed class, who alone and together present a sample of the stark and dire impact of the new rates upon them, presenting immediate and drastic impact on their lives that is not remedied by just eventually paying them back if we are successful. Indeed, the Plaintiff's Verified Statements received from participants were not referred to by the District Court's decision, denied as Moot. Doc. No. 61; (Doc. No. 39-12, Verified Statements).

On the other hand, the City presents *no evidence* at all, of immediate financial danger from having to continue coverage unchanged for the duration of this case. Even the RHBC report's conclusion of the additional cost faced by the City is a very small percentage of the city's annual budget for any year. Retiree Health Care Benefits Commission, January 11, 2013.

III. Retirees Claims have a substantial likelihood of succeeding on the merits.

Under the Seventh Circuit's comparatively more restrictive view of retiree healthcare benefits under labor-management contracts (none of which had the State Constitutional protections that exist here), the district courts in this circuit have nonetheless granted preliminary injunctions, even where the eventual merits decision was ultimately adverse to the retirees.⁵

Indeed, the only cases in this Circuit denying a preliminary injunction are those in which the

⁵ See, *CNH America LLC v. Int'l Union UAW*, 2004 WL 5627648 (ED Wis. 2004) at *9-10; *Rossetto v. Pabst Brewing Co., Inc.*, 71 F.Supp.2d 913, 918 (ED Wis. 1999) reversed by Court of Appeals after finding union lacked standing to represent retirees on this claim. 128 F.3d 538 (7th Cir. 1997).

court has determined, after receiving evidence, that the retirees have no likelihood of succeeding on the merits.⁶

Indeed, presenting a much stronger likelihood of prevailing than the private employer cases (where employers' obligations to provide healthcare benefits are determined by nonspecific contract term language or ERISA hurdles), the healthcare benefits here, established under provisions of the Illinois Pension Code⁷ and, as benefits of participation in a governmental retirement system, are protected by Illinois' 1970 Constitution, against being diminished or impaired, from the terms and level at the time of a person's entry into the system, plus improvements during their participation thereafter.⁸

Additionally, movants have an ample likelihood of success on the merits of their claims, that the Illinois constitution prohibits the City from reducing any participant's level of healthcare coverage. Madiar, "Is Welching On Public Pension Promises An Option: An Analysis of the

⁶ *Pabst Brewing Co., Inc. v. Corrao*, 940 F.Supp. 217, 223(ED Wis. 1996); *Templeton Coal Co., Inc. v. Shalala*, 855 F.Supp. 990, 1004 (SD Ind.1993)(preliminary injunction granted, but dissolved after failing to show even negligible chance of prevailing).

⁷ Group Health benefits and subsidies for participants in the City of Chicago's four relevant annuity and benefit funds have existed continuously in the Illinois Pension Code since at least 1983. (Ill Stat. ch 108-1/2, (now 40 ILCS), ¶/§ 5-167.5 (Police), 6-164.2 (Firemen), [created by P.A. 82-1044, effective 1/1/1983], 8-164.1 (Municipal Employees) and 11-160.1 (Laborers) [added by P.A. 84-23, eff. 7/18/1985; subsequently amended by P.A. 86-273 eff. Aug. 23, 1989; P.A. 90-32, §5, eff. June 27, 1997; P.A. 92-599, §10, eff. June 28, 2002; P.A. 93-42, §5, effective July 1, 2003; most recently by P.A.98-43, enacted June 28, 2013, explicitly extending the subsidies by the four City of Chicago Annuity & Benefit Funds to December 31, 2016.

⁸ *Buddell v. Board of Trustees*, 118 Ill.2d 99, 105-6 (1987) (holding legislation unconstitutional which would eliminate existing rights to purchase additional credits); see also, *Felt v. Board of Trustees*, 107 Ill.2d 158 (1985) (invalidating reduction or impairment of retirement benefits for judges); see also *Dell v. City of Streator*, 193 Ill.App.3d 810, 550 N.E.2d 252 (Ill.App.3d Dist. 1990)(enjoining reduction of lifetime healthcare benefits promised to City employees); and *Marconi v. City of Joliet*, 2013 IL App (3d) 110865 (3d Dist May 2, 2013)(while reversing judgment below, that reduction of healthcare benefits was prohibited by 1970 Illinois Constitution, Art.XIII §5, as premature prior to determining on a non-constitutional basis whether the presumption of contract vesting was sufficient, nonetheless not disputing that the healthcare benefits might well be constitutionally protected.)

Illinois Constitution's Pension Protection Clause." Ex.1, and at,

<http://www.senatedem.ilga.gov/phocadownload/PDF/PensionDocs/madiarrevisedpensionclausearticle.pdf> (last visited December 27, 2013).

To begin with, the Illinois Constitution's Article XIII §5's protection is not limited to protecting merely pension annuity payments.

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.

Here, the District Court rejected the plain language of the provision and failed to hold that protecting "benefits" of participation in a pension or retirement system are protected against being diminished or impaired.

The provision at issue under the Illinois Constitution is not merely the "Pension Clause," its language is not so limited, by protecting any benefits of membership in a state or local governmental retirement system against being diminished or impaired. The meaning of what is included in benefits is central. While the District Court did not accept the provision's terms as a plain language reading, (i.e., that the term includes "benefits of participation" in a pension or retirement system, not just "pension" annuities), nonetheless, that is for the Illinois Supreme Court's determination, address that meaning of benefits universally includes health benefits. The Illinois Supreme Court is currently considering the application of the provision to health benefits of state retirees, to determine whether it protects their claim to permanent healthcare without reduction, even though their entitlement comes from an employment statute, rather than the Illinois Pension Code.

Review of Article XIII §5's application to healthcare benefits is underscored by the fact that the case currently pending before the Illinois Supreme Court is there by that court's grant of

direct appeal of the Sangamon County Circuit Court’s declaration that healthcare benefits are not protected benefits. *Kanerva v. Weems*, No. 115811, argued September 18, 2013. Recognizing that this issue is presently before the Illinois Supreme court, even the District Court recognized that it would ordinarily stay proceedings in deference to that court’s fully briefed and argued resolution. The District Court’s obvious pique at our requesting an accelerated decision on the stay, was not really cause for the court to accelerate its decision on the merits, on which it came out with a holding (that Illinois Constitution’s “Pension” provision protects only the benefits that were being received in 1970—something no court or party has previously asserted) that is clearly wrong.

Moreover, the appropriateness of this issue being decided by the Illinois Supreme Court is achievable in this proceeding by this court’s certifying the issue to the Illinois Supreme Court, by the process which, though unavailable to the District Courts, has been repeatedly and recently used by this court. Indeed, under Illinois Supreme Court Rule 20, this Court should certify the state law question to the Illinois Supreme Court for review.

Moreover, the majority of State Supreme Courts of States with identical constitutional protections of pension or retirement system benefits, have squarely held that the benefits protected include healthcare benefits. The Supreme Courts of Hawaii¹² and Alaska¹³ both held

¹² *Everson v. State*, 122 Hawai’I 402, 419, 228 P.3d 282, 299 (2010), distinguishing from Michigan’s constitution that protects “accrued financial benefits”, Hawaii’s non-impairment clause “uses the words ‘accrued benefits’ without qualifying the word ‘benefits’ with ‘financial’.”

¹³ *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 888 (Alaska 2003). “We conclude that the term “accrued benefits” ...includes all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee is hired, including health insurance benefits.”, noting as well a host of decisions from numerous states, most of which held that health insurance benefits are within the protected retirement benefits. See *Duncan*, at 888, n.23, citing *Thorning v. Hollister Sch. Dist.*, 11 Cal.App.4th 1598, 15 Cal.Rptr.2d 91,95 (1992), *Weiner v. County of Essex*, 262 NJSuper. 270, 620 A.2d 1071, 1079-80 (1992); *Emerling v. Village of Hamburg*, 255 A.S.2d 960, 680 NYS2d

that the retirement benefits protection clauses protect health insurance benefits, not just annuity payments, supported by a host of States' appellate decisions declaring health benefits to be within the protected retirement benefits.

IV. The Balancing Phase - The Public Interest Favors Retirees.

As described above, the Court in *Girl Scouts of Manitou Council, Inc.* 549 F.3d 1079, 1086 (7th Cir. 2008), describes the “second phase” as a balance of the “nature and degree of the plaintiff's injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted.” The “court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief” on a “sliding scale approach.”

The City has had decades and generations since this matter began in 1987, in which to construct a plan to keep its promises to the retired public servant retirees. Instead a lack of political leadership has caused this mess and now the City's solution is to toss its former public employees out, first, rather than search for other less expedient solutions.

The City's imposing massive increases in the healthcare deduction, and phasing out of the retiree health care coverage is a renegeing on the social contract with its former public servants, retirees. The balancing here of the public interest weights in favor of the Plaintiffs, the public interest suffers by lowering our society to one that casts off former public servants without healthcare after years of service, and impacting thousands of retirees of generally modest

37,37-38(NY App Div 1998); *McMinn v. City of Oklahoma City*, 952P.2d 517, 521-22 (Okla. 1997); *State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*, 185 W.Va 380, 407 SE2d 384, 387 (1991), and *Dadisman v. Moore*, 181 W.Va. 779, 384 SE2d 816, 829-31 (1988); as well as a minority of decisions going the other way: *Colorado Springs Fire Fighters Ass'n Local 5 v. City of Colorado Springs*, 784 P.2d 766, 770-73 (Colo. 1989); *Musselman v. Governor*, 448 Mich.503, 533 NW2d 237 (1995) modified 450 Mich. 574, 545 NW2d 346, 347-48 (1996); and *Davis v. Wilson County*, 70 SW 3d 724, 727-28 (Tenn. 2002).

means, and on fixed incomes in a point in their life where they cannot go back into the work force. The City's action lower the respect for the law and the Constitution by parsing and forcing horrible policy outcome threw a meat-grinder analysis for an outcome that is devoid of law.

Here the City of Chicago had decades to prepare and the ability to raise revenue, cut spending in hundreds of departments, and make priority decisions, but now instead pushes those hard decisions off itself by making the retirees face kitchen table and family budget decision about where, how, and if they should have health care coverage.

The City's decision to undermine its retirees at this late stage in their lives is against the public interest.

The public interest as well, whether it is represented by the over-20,000 participants in the City's retiree healthcare program, or the public's interest in having City employees knowing of the security of their benefits, and the importance of providing retirees with reasonable advance notice to be able to evaluate and plan their lives, the balance weighs in favor of enjoining the City from making changes, either during this litigation, or at least with the 6 months' notice that the City's letter recognizes as a reasonable period of warning against changes.

The City will not suffer unreasonable harm by having to continue providing coverage at current levels until the matter is resolved. The City has provided coverage by injunction or settlement continuously since before the litigation began in 1987. While there is certainly a cost, it is a cost the city cannot assert is unreasonable.

WHEREFORE, the Retirees have shown:

(1) there is an "irreparable injury" and "inadequate remedy" presented by the City's unilateral change in healthcare benefits for retirees;

(2) a likelihood of success, the Illinois Constitution's Article XIII, §5 protection of

“benefits of participation” in a government retirement system;

(3) that the Illinois Supreme Court is currently addressing this issue in the context of the State retirees’ healthcare coverage; and

(4) the public interest weight in favor of the Plaintiffs: the City has failed to live up to its commitments to retirees to give them six months to evaluate the City’s intended changes, the healthcare exchanges are not comparable to the current plan due to drastically increased out-of-pocket and substantially reduced provider networks from the current PPO coverage, and the severity of the immediate increases, and drastic end of retiree health care coverage to public servants at this stage of their lives, while the City to could make hosts of other budgetary decisions prior to sticking it to it former employees. The substantial changes in dropping the City plan for the Healthcare Exchanges is of a monetary magnitude with vastly greater impact on retirees than the City.

Wherefore, the Plaintiffs request 1) a stay and/or an injunction pending appeal, and 2) request for certification of questions for referral to the Illinois Supreme Court.

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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

By Eric M. Madiar¹

“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’ five public pension systems are in awful shape. Combined, the five retirement funds serving teachers, state employees, university employees, judges, and legislators have for fiscal year 2011 unfunded liabilities totaling \$96.8 billion, and an overall funding percentage of 39%.³ The Teachers Retirement System alone has \$53.5 billion in unfunded liabilities and is 40.6% 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

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; revised May 2013.* I thank Senate President John J. Cullerton and Chief of Staff 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, Kim Janas, Maurice Scholten, Thomas Stanton, John Costello, Mark O’Toole, Mary Pat Burns, Tom 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 Delegate 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.

² Address of Franklin MacVeagh to the Cincinnati Commercial Club, (May 26, 1905), [hereinafter Address of Franklin MacVeagh] Vol. XIII PUBLIC POLICY at 32 (July-Dec. 1905) at 32 *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=tYITTYSEC4W0IQearemDDg&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).

³ COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, Financial Condition of the Illinois State Retirement System as of June 30, 2012, at 25 (Feb. 2013).

⁴ *Id.*

⁵ The Pew Center on the States, The Trillion Dollar Gap: Unfunded State Retirement Systems and the Roads to Reform at 17 (Feb. 2010) *available at* http://www.pewcenteronthestates.org/trends_detail.aspx?id=58297 (last visited Feb. 21, 2011).

⁶ ILLINOIS GENERAL ASSEMBLY, REPORT OF THE PENSION MODERNIZATION TASK FORCE at 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—*after* subtracting investment returns).

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 1983 and 2012 unfunded pension liabilities grew by over \$90 billion.⁹ Nearly 47% of that growth (or \$42 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% (or \$14.8 billion) of that growth. Changes in actuarial assumptions, such as people living longer than expected, caused almost 10% (or \$8.9 billion) of that growth. Benefit increases for public employees only accounts for 9% (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 over \$292 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 urge the legislature to go even 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 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 other related issues. The Article concludes that the General Assembly cannot *unilaterally* cut the pension benefits of *current* employees 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.

⁸ Pension Task Force Report, *supra* note 6, at 48, 68, 119, and 121. In addition, employee benefit increases that were added since FY 1987 only comprise \$7.8 billion of the State's unfunded liabilities. *Id.* at 120.

⁹ Data compiled by Illinois Senate Democratic Legal Review Staff based on information contained in: the Pension Task Force Report, *supra* note 6, at 120 (for data between FY 1988 and FY 2007); ILLINOIS ECONOMIC AND FISCAL COMMISSION, Pension Overview: November 1990 at 11, 14 (Nov. 1990) (for data between FY 1985 and 1987). Compiled data set found in Appendix D. The remaining 18.8% (or \$17 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 FY 1985 and FY 2012).

¹⁰ Pension Task Force Report, *supra* note 6, at 48.

¹¹ *Id.*

¹² Public Act 96-0889.

¹³ See *infra* notes 342-344, 353-56, 529 and accompanying text.

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

As detailed below, the Clause not only makes a public employee's participation in a pension system an enforceable contractual relationship, but also constitutionally protects the pension benefit rights contained in the Illinois Pension Code when an employee becomes a member of that pension system, including employee contribution rates and subsequent benefit increases. Also, the drafters of the Clause intended (as confirmed by the Illinois Supreme Court) to grant pension recipients the ability to obtain relief in circuit 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 proposal offered by one legal commentator, as detailed below, is insufficient. In sum, welching is not a legal option available to the State. An analysis of the Pension Clause, as with any constitutional provision, begins with its language.

PART 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.

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

¹⁵ Committee for Educational Rights v. Edgar, 174 Ill. 2d 1, 13, 672 N.E.2d 1178, 1184 (1996); Baker v. Miller, 159 Ill. 2d 249, 257, 636 N.E.2d 551, 554-55 (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, 188 Ill. 2d 211, 224-25, 720 N.E.2d 1034, 1041 (Ill. 1999).

¹⁸ People ex rel. the Decatur and State Line Railway Co. v. McRoberts, 62 Ill. 38, 1871 WL 8316 *2 (1871) (quoting Justice Story for this proposition).

¹⁹ ILL. CONST. 1970, art. XIII, § 5.

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. 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” 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.”²¹ Accordingly, the word “benefit” refers not only to the specific annuity payments a public employee is eligible to receive, but also other entitlements of membership that advantage the public employee.

The word “impair” has a common meaning of “to make worse, less, weaker, etc. damage; reduce.”²² And, “diminished” means “to make smaller; lessened; reduced.”²³ Taken together, the Pension Clause’s own language bars governmental action to reduce or eliminate a public employee’s pension payments and other entitlements available to the employee under the terms of membership when the person 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” rights that 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.²⁴ 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

²⁰ 40 ILCS 5/18-120 (2008) (judges).

²¹ WEBSTER’S NEW WORLD DICTIONARY 131 (2d Coll. Ed. 1978).

²² *Id.* at 703.

²³ *Id.* at 396.

²⁴ People ex rel. Lyle v. City of Chicago, 360 Ill. 25, 29, 195 N.E. 451 (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 City of Chicago, 308 Ill. App. 3d 284, 31 N.E.2d 337, 339 (1st Dist. 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, 211 Ill. 2d 286, 304, 811 N.E.2d 652 (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.”).

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 participating in the system.

While the Clause's plain language undoubtedly supports the above conclusion, Illinois courts have long instructed that constitutional interpretation involves not only the text of the provision, but also its object and purpose.²⁵ As a result, this analysis also considers the 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.²⁶ 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.²⁷ Finally, a constitutional guaranty, such as the Pension Clause, is also to be liberally construed.²⁸ 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 Commission ("Pension Laws Commission"), explained the multiple purposes for pension and retirement plans.²⁹ Retirement plans offer employees a sufficient level of income upon retirement so they can live in reasonable security.³⁰

For employers, retirement plans 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.³¹ For public employers, retirement plans are especially important, Cohn noted, 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."³²

²⁵ *Wolfson v. Avery*, 6 Ill. 2d 78, 88, 126 N.E.2d 701, 707 (1955) ("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.") (emphasis added).

²⁶ *Id.* *Accord* *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 527, 150 N.E.2d 168, 172 (1958) (considering the historical background leading to the provision's inclusion in the constitution). *McNamee v. State*, 173 Ill. 2d 433, 445, 672 N.E.2d 1159, 1165 (1996) (consulting the sponsors' floor debate statements to determine the scope of the Pension Clause); *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 223, 390 N.E.2d 847, 853 (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).

²⁷ *Chance v. County of Marion*, 64 Ill. 66, 1872 WL 8262 at *1 (1872); *Wolfson*, 6 Ill. 2d at 94, 126 N.E.2d at 710 ("Courts should not apply to strict a construction to exclude its real object and intent.").

²⁸ *Wolfson*, 6 Ill. 2d at 94, 126 N.E.2d at 710.

²⁹ Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of Employee's Rights*, 1968 ILL. L. F. 32, 40 (1968) [hereinafter Cohn Article].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

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.³³ 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.”³⁴ The plan was “optional” because the person could elect to participate in the retirement plan by making contributions to the plan via payroll deductions.³⁵ 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.³⁶

Importantly, an employee in an optional plan was entitled to 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.³⁷ 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.³⁸ 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.³⁹ 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.”⁴⁰

Indeed, one scholar observed that before the 1970 Constitution no Illinois court had ever “previously allowed any type of impairment for a pension plan deemed ‘contractual’ under the mandatory-optional distinction[.]”⁴¹ Moreover, Illinois courts 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.⁴²

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*,⁴³ and the legislature could change or revoke the plan’s

³³ People ex rel. Sklodowski v. State, 182 Ill. 2d 220, 228, 695 N.E.2d 374, 377 (1998). See generally, Comment, *Public Employee Pension Rights and the 1970 Illinois Constitution: Does Article XIII, Section 5 Guarantee Increased Protections?*, 9 J. MARSHALL J. PRAC & PROC. 440, 441, 445-449, 458-59 (1976) [hereinafter Comment] and Cohn Article, *supra* note 29, at 51-58 (for a detailed background discussion of the mandatory/optional pension distinction). See also REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION at 102-109 (1963) (summarizing the prevailing view regarding the type of legal protection for mandatory and optional pension plans).

³⁴ *Skłodowski*, 182 Ill. 2d at 228, 695 N.E.2d at 377 (citing *Bardens v. Bd. of Trustees of the Judges Retirement Sys.*, 22 Ill. 2d 56, 60, 174 N.E.2d 168, 170 (1961)).

³⁵ *Id.*

³⁶ *Bardens*, 22 Ill. 2d at 62, 174 N.E.2d at 172.

³⁷ *Id.* at 60-61, 174 N.E.2d at 171; *Arnold v. Bd. of Trustees of County Employee’s Annuity and Benefit Fund of Cook County*, 84 Ill. 2d 57, 60, 417 N.E.2d 1026, 1027 (1981); *Kraus v. Bd. of Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 837, 390 N.E.2d 1281, 1284-85 (1st Dist. 1979).

³⁸ *Bardens*, 22 Ill. 2d at 60-61, 174 N.E.2d at 171.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Comment, *supra* note at 32, at 458-59 & fn. 87.

⁴² *Arnold*, 84 Ill.2d at 60, 417 N.E.2d at 1027 (emphasis added) (citing *Raines v. Bd. of Trustees*, 365 Ill. 610, 615-16, 7 N.E.2d 489 (1937) and *Kraus v. Bd. of Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 983 N.E.2d 1281 (1st Dist. 1979)).

⁴³ 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-

terms at any time.⁴⁴ 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.⁴⁵ 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.”⁴⁶

At the time of the 1970 Illinois Constitutional Convention, 15 of the 17 retirement systems set forth in the Pension Code were “mandatory” plans.⁴⁷ Only the Judicial Retirement System and General Assembly Retirement System (GARS) were “optional” plans.⁴⁸ 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’ 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.⁴⁹ 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.”⁵⁰ 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.⁵¹

While the “gratuity” approach was the dominant legal theory, four other perspectives existed at that time of the Convention which 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 espoused the majority view.⁵² In *Spina v. Consolidated Police and Firemen’s Pension Fund Commission*,⁵³ 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

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 making the offer to revoke it anytime prior to completed 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).

⁴⁴ *Sklodowski v. State*, 182 Ill. 2d 220, 228, 695 N.E.2d 374, 377 (1998) (citing *Bergin v. Bd. of Trustees of the Teachers’ Retirement Sys.*, 31 Ill. 2d 566, 574, 202 N.E.2d 489, 494 (1964)).

⁴⁵ *Id.*

⁴⁶ *Keegan v. Bd. of Trustees*, 412 Ill. 430, 435-36, 107 N.E.2d 702, 706 (1952).

⁴⁷ *Arnold*, 84 Ill. 2d at 62, 417 N.E.2d at 1028.

⁴⁸ *Id.*

⁴⁹ Cohn Article, *supra* note 29, at 33.

⁵⁰ *Id.*

⁵¹ 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 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.*, 1 Ill. App. 2d 514, 518-19, 117 N.E.2d 880, 882 (1st Dist. 1954) and *Guincy v. Curtice Burns, Inc.*, 28 Ill. App. 3d 398, 400, 327 N.E.2d 284, 286 (5th Dist. 1975) (summarizing Illinois law).

⁵² IV Record of Proceedings, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2931 [hereinafter Proceedings] (where Delegate Green 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.”)

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

pension.⁵⁴ The court 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 fund could not meet “present and future [fiscal] demands.”⁵⁵ 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.⁵⁶ Green, as discussed below, explained to Convention delegates that the *Spina* decision made the Pension Clause necessary.⁵⁷

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.⁵⁸ In Arizona and Georgia, pension benefits were completely immunized from legislative impairment.⁵⁹ In *Yeazell v. Capins*, the Arizona Supreme Court, for example, invalidated a statute that adversely changed the formula used to determine police pensions of current employees from a *one-year average* of final salary to a *five-year average* of final salary.⁶⁰ 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.⁶¹ 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.⁶² In the court’s view, the employee could not be compelled while being employed to choose between his original pension rights and statutorily-modified pension rights via “legislative coercion.”⁶³

California, Washington, and other states, however, provided a less restrictive or “limited vesting” approach to pension benefits.⁶⁴ 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.⁶⁵ 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.⁶⁶

⁵⁴ 41 N.J. at 392, 396, 197 A.2d at 171.

⁵⁵ *Id.* at 402, 197 A.2d at 175.

⁵⁶ *Id.* at 402-04, 197 A.2d at 175-76.

⁵⁷ Proceedings, *supra* note 52, at 2931.

⁵⁸ Cohn Article, *supra* note 29, at 33.

⁵⁹ *Id.* at 33-34, 42-46 *discussing* *Yeazell v. Capins*, 98 Ariz. 109, 402 P.2d 541 (Az. 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 Trustees*, 214 Ga. 251, 253, 104 S.E.2d 255, 227 (Ga. 1958) (same), and *Bender v. Anglin*, 207 Ga. 108, 112-13, 60 S.E.2d 756, 760 (Ga. 1950) (same).

⁶⁰ *Yeazell*, 98 Ariz. at 111, 402 P.2d at 542.

⁶¹ *Id.* at 116, 402 P.2d at 546 (citing and quoting from *York v. Central Illinois Mutual Relief Ass’n*, 340 Ill. 595, 602, 173 N.E. 80, 83 (1930)).

⁶² *Id.* at 117, 402 P.2d at 546-47.

⁶³ *Id.*

⁶⁴ Cohn Article, *supra* note 29, at 33, 46-48.

⁶⁵ *Id.* at 46-48.

⁶⁶ *Id.* at 42-48. *See e.g.*, *Allen v. City of Long Beach*, 45 Cal. 2d 128, 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 were not given new off-setting benefits); *Bakenhaus v. Seattle*, 48 Wash. 2d 695, 700-02, 296 P.2d 536 (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).

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."⁶⁷ The provision also stated that pension benefits set forth in a retirement plan could not be "diminished or impaired."⁶⁸ At the time of the 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."⁶⁹ The New York constitutional provision essentially mirrored the 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."⁷⁰

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.⁷¹ As with the New York Constitution, a person's membership in a public pension system was deemed a "contractual relationship."⁷² The Hawaii and Alaska Constitutions, however, only protected "*accrued* benefits" from diminishment or impairment.⁷³ Similarly, the Michigan Constitution only protected "*accrued financial* benefits."⁷⁴ The New York Constitution, in contrast, lacked the word "accrued."

⁶⁷ 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).

⁶⁸ *Id.*

⁶⁹ *Birnbaum v. New York State Teachers Retirement Sys.*, 5 N.Y.2d 1, 9, 152 N.E.2d 241, 245 (N.Y. 1958). *Accord* *Ballatine v. Koch*, 89 N.Y.2d 51, 56, 674 N.E.2d 292, 294 (N.Y. 1996).

⁷⁰ *Birnbaum*, 5 N.Y.2d at 11, 152 N.E.2d at 246. *Ballatine v. Koch*, 89 N.Y.2d 51, 56, 674 N.E.2d 292, 294 (1996) ("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. Employees Fed'n, AFL-CIO v. Cuomo*, 62 N.Y.2d 450, 459-60, 467 N.E.2d 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. Sewanhaka Central High Sch. Dist.*, 66 N.Y.2d 313, 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.")

⁷¹ HAW. CONST. 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. 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. 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).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

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.⁷⁵ This word, in turn, permitted the legislature to reduce the pension benefits of *current* employees for benefits derived from *future* services, but not benefits a person already earned through *past* services.⁷⁶

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.⁷⁷ However, the provision would not limit the legislature from imposing new conditions for earning financial benefits that have not yet accrued from services yet to be performed, so long as those conditions were reasonable.⁷⁸

The Alaska Supreme Court, on the other hand, construed its constitutional provision in a manner consistent with California's "limited vesting" approach.⁷⁹ 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.⁸⁰ These benefits, including any enhancements occurring during the person's employment, could not be "diminished or impaired."⁸¹ 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.⁸²

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, 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.

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 Illinois 1970 Constitutional Convention,⁸³ 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.⁸⁴ Public

⁷⁵ See e.g., *Everson v. State*, 122 Haw. 402, 228 P.2d 282, 290-291 (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 so far as their future services were concerned. It could not, however, reduce the benefits attributable to past services.").

⁷⁶ *Id.*

⁷⁷ *Advisory Opinion on Constitutionality of 1972 PA 258*, 389 Mich. 569, 209 N.W.2d 200, 202-03 (Mich. 1973). 403 Mich. 631, 64.

⁷⁸ *Id.*

⁷⁹ *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056-57 (Alaska 1981) (citing and quoting with approval *Allen v. City of Long Beach*, 45 Cal. 2d 128, 287, P.2d 765 (1955)).

⁸⁰ *Duncan v. Retired Pub. Employees Ass'n*, 71 P.3d 882, 886 (Alaska 2003).

⁸¹ *Id.*

⁸² *Hammond*, 627 P.2d at 1057.

⁸³ 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).

⁸⁴ Elmer Gertz, *The Making of the Illinois Constitution of 1970*, 5 JOHN MARSHALL J. PRAC. & PROC. 215, 233 (1972) [hereinafter Gertz].

employees believed their pension benefits were imperiled due to underfunding and required constitutional protection.⁸⁵ John Parkhurst, chairperson of the Local Government Committee, received similar correspondence from police and firemen concerned that granting municipalities “home rule” authority would permit them to abandon their pension obligations to employees.⁸⁶

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.⁸⁷ The review below concludes that 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 constitutionalize 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.⁸⁸ The retirees requested the inclusion of the following language in the proposed 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.⁸⁹

The university retirees stated in their letter that their proposal had been recommended by “the Advisory Committee to the State Universities Retirement Board.”⁹⁰ The Illinois Education Association sent a

⁸⁵ *Id.*

⁸⁶ See e.g., Donald E. Nolan, Letter to John C. Parkhurst, Chairman of the Convention’s Local Gov’t Committee, April 27, 1970, Illinois Constitutional Convention, Box 28, Folder 30, Illinois State Historical Library (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”); David S. Clark, Secretary of the Des Plaines Professional Firemen’s Association, Letter to John C. Parkhurst, Chairman of the Convention’s Local Government Committee, April 20, 1970 (same); Edward J. Malloy, Legislative Representative for the Municipal Employes [sic] Society of Chicago, Letter to John C. Parkhurst, Chairman of the Convention’s Local Government Committee, May 4, 1970 (same). Mr. Parkhurst received hundreds of other letters and post cards from police and firemen—many hand written—stating the same concerns. See Illinois Constitutional Convention, Box 28, Folder 30 Illinois State Historical Library.

⁸⁷ See *Hoffman v. Clark*, 69 Ill. 2d 402, 418, 372 N.E.2d 74, 82 (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*, 103 Ill. 2d 226, 255-59, 469 N.E.2d 147, 162-63 (1984) (J. Ward, concurring) (relying on the research papers delegates received at the 1970 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 Sutherland, STATUTORY CONSTRUCTION § 48.4 (“The 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.”).

⁸⁸ Mary Lois Bull, Secretary of the University of Illinois Urbana Retirees’ Interim Committee, Letter to Samuel Witwer et al., Convention President (Mar. 5, 1970), Papers of Henry I. Green Collection, Box 1, Folder 13 (University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection)[hereinafter Green Papers].

⁸⁹ *Id.*

⁹⁰ *Id.*

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.”⁹¹

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.⁹² 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.”⁹³

2. The pension system was no better funded in 1970 as it is today.

At the time of the Convention, the Pension Laws Commission reported that the General Assembly Retirement System (GARS) was 68.5% funded, while the State University Retirement System (SURS) was 47% funded.⁹⁴ 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%.⁹⁵ 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.⁹⁶ As noted at the outset, the five systems *currently* have a combined funding ratio of 39%.

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.⁹⁷ 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.”⁹⁸ 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.⁹⁹

⁹¹ David Frey, Secretary of the Lake Shore Division of the Illinois Education Association, Letter to Fred Turner et al. of the Illinois Constitutional Convention (Apr. 7, 1970), Illinois Constitutional Convention, Box 28, Folder 30 (Illinois State Historical Library).

⁹² Harl H. Ray, Vice Chairman of the Employees Advisory Committee to the State Universities Retirement System, Letter to Delegates of the Illinois Constitutional Convention, June 26, 1970, Green Papers, *supra* note 88. See also, Stanley L. Johnson, Executive Vice-President Illinois State Federation of Labor and Congress of Industrial Organizations, Letter to Delegates of the Illinois Constitutional Convention, June 17, 1970, Green Papers, *supra* note 88 (advocating: “Speaking 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.”).

⁹³ *Id.*

⁹⁴ REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION, at 32 (1969).

⁹⁵ *Id.*

⁹⁶ *Id.* at 42.

⁹⁷ Letter from Edward S. Gibala, Executive Director of State Universities Retirement System to Henry Green, a Pension Clause principal sponsor, (July 2, 1970) [hereinafter SURS Letter], Green Papers, *supra* note 88. See Article Appendix A.

⁹⁸ *Id.*

⁹⁹ Compare IV Proceedings 2925 (Delegate Green statement) (“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

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.”¹⁰⁰ 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.”¹⁰¹ 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.¹⁰² Yet, in 1968 and 1969, the legislature reneged on this funding commitment by failing to appropriate the required funds.¹⁰³

The letter’s accompanying legal memorandum then detailed not only the total accrued liabilities and assets of Illinois’ State and Local retirement systems, but also the distinction in legal protection afforded to participants in “mandatory” and “optional” pension plans.¹⁰⁴ The memorandum explained that since “most pension plans in Illinois provide for mandatory participation, the pension ‘rights’ of public employees in this State are mere expectancies which are subject to a reserved legislative power of change or repeal.”¹⁰⁵ The memorandum then referenced the New Jersey Supreme Court’s *Spina* decision as a stark example of how the legislature could reduce the pension benefits of mandatory plan participants when the fund’s solvency was at stake.¹⁰⁶

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.¹⁰⁷ 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.”¹⁰⁸

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.”¹⁰⁹ To that end, the

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 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, Executive Director of State Universities Retirement System, Constitutional Provision Concerning Vesting of Pension Rights for Public Employees at 1, 2-3, and 4, Green Papers, *supra* note 88 [hereinafter SURS Memorandum]. The italicized text in the parenthetical is verbatim to portions of the SURS legal memorandum. See Article Appendix A.

¹⁰⁰ SURS Letter, *supra* note 97, at 1.

¹⁰¹ *Id.*

¹⁰² SURS Memorandum, *supra* note 99, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 1 (citing *Beutel v. Foreman*, 288 Ill. 106, 123 N.E. 270 (1919)).

¹⁰⁶ *Id.* at 1-2.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

memorandum proposed a constitutional provision with language nearly identical to what the delegates had received in March and April of 1970.¹¹⁰

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.¹¹¹ These communications also gave delegates, at 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 constitutionalize 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. Helen Kinney, the second principal sponsor of the Pension Clause, filed a resolution seeking a parliamentary ruling from the Convention's Rules Committee on the matter.¹¹² The resolution also set forth the text of what essentially became the Pension Clause.¹¹³

Shortly after filing her motion, the Rules Committee unanimously voted to allow the proposal to advance as a proposed amendment to the Legislative Committee's proposed Legislative Article to the constitution.¹¹⁴ Delegate David Davis, Vice-Chair of the Rules Committee, explained to delegates 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."¹¹⁵ The Convention approved the Rules Committee's decision and allowed the pension proposal to proceed.¹¹⁶

¹¹⁰ The memorandum requested that the constitution include the following provision (at 4-5):

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.*

¹¹¹ Gertz, *supra* note 84, at 233 (stating that because of the volume of correspondence the securing of pension benefits "became a subject a conversation among delegates and staff").

¹¹² III Proceedings 2188 (Delegate 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."); I Proceedings 393 (text of Resolution No. 63 filed by Delegate Kinney setting for her pension proposal and requesting a ruling on when the matter could be presented to the Convention). *See also* III Proceedings 1940 (colloquy of Delegates Kinney and Davis) (where Delegate Kinney inquires as to the proper mode of offering a proposal to public pensions).

¹¹³ *Compare* I Proceedings 393 (emphasis added) (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.*") with ILL. CONST. 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 shall not be diminished or impaired."). The Convention's Style and Drafting Committee made stylistic changes to the text, which the Convention later adopted.

¹¹⁴ IV Proceedings 2505-2506 (statement of Delegate Davis of the Convention Rules Committee).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

After the parliamentary ruling, Delegates Green and Kinney jointly sponsored the pension proposal as an amendment to the proposed Legislative Article.¹¹⁷ Delegate Green, a community college official from Urbana,¹¹⁸ sought the amendment because of concerns raised by university employees.¹¹⁹ Delegate Kinney, a former DuPage County state's attorney,¹²⁰ was prompted by those 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.¹²¹

The amendment's text was nearly identical to what Delegate Kinney had set forth in her parliamentary inquiry.¹²² The only 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.¹²³ The amendment stated:

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.¹²⁴

Delegates Green and Kinney jointly presented the amendment to the Convention for consideration on July 21, 1970.¹²⁵

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 received earlier as his floor speech.¹²⁶ Green explained that the pension proposal would "do two things."¹²⁷ 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."¹²⁸

¹¹⁷ I Proceedings 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.* Delegates Green and Kinney along with Delegates Anthony M. Peccarelli and Donald D. Zeglis were listed on the printed amendment filed with the Convention. Illinois Constitutional Convention, Amendments Pertaining to Committee Proposals, Box 46, Folder 42 (Illinois Historical Library); I Proceedings 470; Green Papers, *supra* note 88. Later, Delegates 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. *See* Illinois Constitutional Convention, Amendments Pertaining to Committee Proposals, Box 46, Folder 42 (Illinois Historical Library); I Proceedings 470.

¹¹⁸ I Proceedings 899 (convention biography of Delegate Green).

¹¹⁹ IV Proceedings 2925 (statement of Delegate Green).

¹²⁰ I Proceedings 892 (convention biography of Delegate Kinney).

¹²¹ IV Proceedings 2926 (statement of Delegate Kinney).

¹²² *Compare* I Proceedings 393 (emphasis added) (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.*") with I Proceedings 470-471 ("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.")

¹²³ *Id.*

¹²⁴ IV Proceedings 2925; I Proceedings 470.

¹²⁵ IV Proceedings 2925-2933.

¹²⁶ *See supra* note 99.

¹²⁷ IV Proceedings 2925.

¹²⁸ *Id.*

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.”¹²⁹ Green detailed how this legal reality, coupled with the fact that the pension system was underfunded,¹³⁰ caused public employees “to lose faith in the ability of State and local governments to make benefits payments.”¹³¹

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 1969.¹³² 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.”¹³³

The pension proposal, Green noted, was based on the text of a 1938 amendment to the New York Constitution.¹³⁴ 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.”¹³⁵ 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.¹³⁶

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,”¹³⁷ he clarified that the pension proposal was not offered to compel such a result in Illinois.¹³⁸ Rather, the proposal was intended to “put the General Assembly on notice that these memberships are enforceable contracts and that they shall not be diminished or impaired.”¹³⁹ 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 assessment. 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.”¹⁴⁰ As noted earlier, Delegate Kinney supported the proposal because police and firemen were concerned that municipalities would use their newly-proposed “home rule” powers to “abandon the pension system.”¹⁴¹

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

¹²⁹ *Id.*

¹³⁰ *Id.* For this proposition, Delegate Green specifically relied upon and quoted from the SURS legal memorandum he had received in early July 1970. *See supra* note 99. *See also* Henry Green, Convention Speech entitled “Constitutional Provision Concerning Vesting of Pension Rights for Public Employees,” Green Papers, *supra* note 88.

¹³¹ IV Proceedings 2925.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*; Comment, *supra* note 33, at 450.

¹³⁸ V Proceedings 2925.

¹³⁹ *Id.*

¹⁴⁰ IV Proceedings 2926.

¹⁴¹ *Id.*

established shall be subject to judicial proceedings and can be enforced through court action.”¹⁴² 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.”¹⁴³ 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.¹⁴⁴ She also listed the other delegates supporting the pension proposal.

3. *Other convention delegates speak in favor 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 overpaid,” and because of concerns expressed by firemen.¹⁴⁵ 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.”¹⁴⁶

Several delegates, however, voiced opposition and claimed that the proposal mandated the immediate and full funding of the various pension systems.¹⁴⁷ 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.¹⁴⁸ 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.”¹⁴⁹ If we get to the point, he added, “where we can’t pay, we’re down the drain anyway.”¹⁵⁰

Delegate Paul Elward, also an opponent, assumed that the provision would prohibit the reorganization or consolidation of pension systems.¹⁵¹ 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[.]”¹⁵² Delegate Ted Borek took a different approach in his opposition, and characterized the proposal as “special legislation” protecting the one in seven employees who were public employees.¹⁵³

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

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ IV Proceedings 2926.

¹⁴⁶ *Id.*

¹⁴⁷ See IV Proceedings 2927 (Delegate 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.* (Delegate 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”).

¹⁴⁸ *Id.* (Delegate 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 tht 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.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (Delegate 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.”).

¹⁵² *Id.* at 2927-28.

¹⁵³ IV Proceedings 2928. Delegate 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.*

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.”¹⁵⁴

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,”¹⁵⁵ 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.”¹⁵⁶

She continued that the proposal was not intended to require the pensions systems to be fully funded or funded up to a certain percentage.¹⁵⁷ 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.¹⁵⁸

Delegate Kinney also refuted the claim that the proposal would prevent system-wide consolidation or reorganization.¹⁵⁹ She reiterated that the proposal would not preclude future increases in benefits to pensioners or the dependents.¹⁶⁰ As she put it, the provision would simply give public employees “a basic protection against abolishing their [pension] rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them.”¹⁶¹

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.¹⁶² 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.”¹⁶³

6. Delegate Wayne Whalen’s comments in opposition.

¹⁵⁴ IV Proceedings 2928-29.

¹⁵⁵ IV Proceedings 2929.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (“It is not intended to require 100 percent funding or 50 percent or 30 percent funding or get into any of those problems”).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (Delegate Lyons) (“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.”).

¹⁶³ IV Proceedings 2929 (emphasis added).

Delegate Wayne Whalen, though 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."¹⁶⁴ 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."¹⁶⁵ 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.¹⁶⁶

Delegate Whalen added that as a contractual right it "may be subject to any contingency built into the contract."¹⁶⁷ For these reasons, he stated it would be more appropriate to expressly protect pensions under the Contracts Clause.¹⁶⁸ Thereafter, several other delegates *opposing* the proposal adopted Whalen's view that public pensions should be protected simply under the proposed bill of rights' Contracts Clause.¹⁶⁹

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.¹⁷⁰ In that case, the court upheld a statutory reduction in pension benefits because there was insufficient money in the pension funds to pay benefits to both current and future retirees.¹⁷¹ Green then refuted Delegate Parkhurst's claim that the pension provision required inflationary protection for benefits.¹⁷²

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

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ IV Proceedings 2929-30. Delegate 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 the bankruptcy context, if these benefits were deemed "proprietary," rather than "contractual rights." *Id.* Delegate 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." Monahan, Amy, *Public Pension Plan Reform: The Legal Framework* at 30-31 (March 17, 2010). Education, Finance & Policy, Vol. 5, 2010; MINNESOTA LEGAL STUDIES RESEARCH No. 10-13. Available at SSRN: <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, 610-611 (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.*

¹⁶⁷ IV Proceedings 2930.

¹⁶⁸ *Id.*

¹⁶⁹ See IV Proceedings 2930-31 (statements of Delegates Weisburg, Davis, Borek and Bottino).

¹⁷⁰ IV Proceedings 2931.

¹⁷¹ *Spina v. Consolidated Police and Firemen's Fund Comm'n*, 41 N.J. 391, 396, 402-04, 197 A.2d 169, 171, 176-76 (N.J. 1964).

¹⁷² IV Proceedings 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, there is absolutely no reason why you have any recourse against that insurance company.").

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.¹⁷³

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.¹⁷⁴

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.”¹⁷⁵ She further explained that after conferring with staff counsel, both she and Green agreed the legislature could enact a pension statute applicable to new entrants containing a contingency clause for lowering the benefits at some future time.¹⁷⁶ 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.”¹⁷⁷

The Convention then proceeded to take a roll call vote approving the pension proposal.¹⁷⁸ Thereafter, the proposal was referred to a procedural committee for editing and inclusion into the working draft of the proposed constitution.¹⁷⁹

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

In sum, the following conclusions regarding original intent may 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.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (Delegate 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.”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (Delegate Kinney) (“Thank you. Mr. Green and I did discuss the term “vesting” with Mr. Kanter, the counsel to the Committee on Style and Drafting, and we thought that 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 time, that this was, indeed, the contract he had accepted.”).

¹⁷⁷ *Id.*

¹⁷⁸ IV Proceedings 2932-33.

¹⁷⁹ *Id.*

- 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 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 there was 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 pay the employee a lower pension if he or she met his or her contribution and service obligations.
- 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.
- 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 lower the person's pension 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; (2) limit the General Assembly's authority to consolidate or reorganize the pension system; or (3) require pension benefit payments to remain immune from inflation.

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 Clause was understood by voters who approved the constitution. 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 voters ratifying 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 and submission to Illinois voters for approval at a special election held in December 1970.¹⁸⁰ As detailed below, 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.¹⁸¹ The General Assembly created the Commission in 1945 to advise and offer recommendations to the legislature and public on the impact of proposed pension legislation.¹⁸²

The letter detailed the Commission's opposition to the pension proposal and the Commission's hope that the proposal would be withdrawn.¹⁸³ Groen further stated to Delegate Green that the

¹⁸⁰ After the Convention initially approved Delegates 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. I Proceedings 608; V Proceedings 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. V Proceedings 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. I Proceedings 643, 670; VII Proceedings 2429, 2584; V Proceedings 4257 (statements of Delegate Whalen). The Convention gave final approval to the pension proposal on August 31, 1970. I Proceedings 740; V Proceedings 4515-16.

¹⁸¹ Letter from E.B. Groen, Illinois State Senator and Chairman of the Illinois Public Employees Pension Laws Commission to Henry Green (August 7, 1970) [hereinafter Groen Letter] Green Papers, *supra* note 88 (See Article Appendix B). *Accord* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION at 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.

¹⁸² Ill. Rev. Stat. 1969, ch. 108½, pars. 22-801, 22-802.

¹⁸³ Groen Letter, *supra* note 181, at 1; 1971 Pension Laws Report, *supra* note 181, at 65-66.

Commission believed the proposal was unnecessary and not in the best interests of pension participants.¹⁸⁴ 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.¹⁸⁵

Based on these concerns, Groen asked Delegate Green to revise the proposal to add the following italicized language to "lend some flexibility":

*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.*¹⁸⁶

Chairman Groen claimed the added 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."¹⁸⁷ 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.¹⁸⁸

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 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 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.¹⁸⁹

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."¹⁹⁰ This request too failed, and the statement was never read into the Convention record.¹⁹¹

The Commission's failed attempts to modify the Pension Clause, as discussed above, demonstrate that even the statutorily-created body obligated to evaluate Illinois pension laws had deep concerns about

¹⁸⁴ Groen Letter, *supra* note 181 at 1-2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 2.

¹⁸⁷ *Id.*

¹⁸⁸ 1971 Pension Laws Report, *supra* note 181, at 66. *Accord* Kraus v. Bd. of Trustees of the Police Pension Fund of the Village of Niles, 72 Ill. App. 3d 833, 851, 390 N.E.2d 1281, 1294 (1st Dist. 1979) (citing Comment, *supra* note 33, at 451).

¹⁸⁹ Letter from Rubin G. Cohn, Pension Laws Commission member and Staff Counsel to the Convention's Judiciary Committee, (Aug. 27, 1970) [hereinafter Cohn Letter] Green Papers, *supra* note 88. See Article Appendix C.

¹⁹⁰ Rubin G. Cohn, Enclosed Statement Re Provision Conferring Contractual Status on Pension Rights at 1 (Aug. 27, 1970) [hereinafter "Cohn Floor Statement"], Green Papers, *supra* note 88. See Article Appendix C.

¹⁹¹ 1971 Pension Laws Report, *supra* note 181, at 66. *Accord* Kraus, 72 Ill. App. 3d at 851, 390 N.E.2d at 1294 (citing Comment, *supra* note 33, at 451).

the scope of the Pension Clause.¹⁹² The Commission, in turn, made Delegate Green, the Clause's sponsor, aware of its concerns and asked, before the Convention adjourned, that the provision be modified to permit the legislature to change pension benefit rights when necessary to preserve the solvency of the pension system.¹⁹³ The contemporaneous nature of the Commission's overtures and their rejection by Convention delegates show 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."¹⁹⁴ 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 Delegate Green and Kinney's pension proposal with some minor, non-substantive changes to conform its text to other provisions of the proposed Constitution.¹⁹⁵ 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.¹⁹⁶

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."¹⁹⁷ And, "membership in such systems shall be a valid contractual relationship."¹⁹⁸ The Convention's official explanation also stated that the Clause was a new section "and self-explanatory."¹⁹⁹ 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.²⁰⁰

¹⁹² See *Felt v. Bd. Trustees Judicial Retirement Sys.*, 107 Ill. 2d 158, 167, 481 N.E.2d 698, 702 (1985) (referring to the Pension Laws Commission's statutory obligation "to give study to the financial problems of the several pension funds and to recommend revisions in the financial provisions of such funds.").

¹⁹³ See *Finish Express, Inc. v. City of Chicago*, 72 Ill. 2d 131, 136, 379 N.E.2d 290, 291 (1978) (relying reports of legislatively-created a commission to discern legislative intent).

¹⁹⁴ *Client Follow-Up Company v. Hynes*, 75 Ill. 2d 208, 224-25, 390 N.E.2d 847, 854 (1979).

¹⁹⁵ V Proceedings 4257 (statements of Delegate 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." VII Proceedings 2584.

¹⁹⁶ VII Proceedings 2747.

¹⁹⁷ VII Proceedings 2677.

¹⁹⁸ *Id.*

¹⁹⁹ VII Proceedings 2747.

²⁰⁰ VII Proceedings 2667.

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.”²⁰¹ Other Illinois newspapers simply repeated the text of the Clause²⁰² or described it much the same way as the *Illinois State Register*.²⁰³ 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.”

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 felt 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.

²⁰¹ Charles Scolare, *Con-Con Near Windup*, Springfield, ILLINOIS STATE REGISTER, Evening Edition, Aug. 27, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 54, Folder 1).

²⁰² Will Davis, *Condensation of Proposed Constitution*, QUINCY HERALD-WHIG, Aug. 26, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 54, Folder 1) (“**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.’”) (bold in original).

²⁰³ See e.g., Charles Hity, *Pensions Safe*, BLOOMINGTON PANTAGRAPH, Dec. 3, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 53, Folder 7) (“Pensions 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, Morning Edition, Dec. 7, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 54, Folder 3) (“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*, CHICAGO SUN-TIMES, July 22, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 52, Folder 81) (“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 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 54, Folder 2) (“Other provisions included in the proposed constitution: * * * ‘Public employe’ 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, Morning Edition, Sept. 3, 1970 (Abraham Lincoln Presidential Library, Illinois Constitutional Convention, Box 54, Folder 1) (“Other sections provide for regulation of corporations by the legislature and guarantee that public employes’ [sic] pension and retirement rights and benefits may not be diminished or impaired”).

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 those 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 if he or she met his or her contribution and service obligations.

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 an employee 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.

Seventh, the drafters were aware of the concerns raised by the Pension Laws Commission as to the significant limitation the Clause would place on legislative power. And, they rejected the Commission's overtures to amend the Clause to allow the General Assembly to unilaterally change 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 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" rights 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.

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

PART 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 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. These benefit rights are, in turn, deemed "vested rights," which the legislature cannot unilaterally repeal or modify. 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 will 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 four court cases that best reveal the evolution of the court's interpretation of the Clause.²⁰⁴ As to the second proposition, there are three relevant decisions.²⁰⁵ 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*.

A. The Pension Clause, According to Illinois Courts, Protects Those Pension Benefit Rights Contained in the Illinois Pension Code When a Public Employee Begins Contributing to a 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 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.²⁰⁶ 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.²⁰⁷ The trial court drew no significance from the fact that the Pension Code lacked any retirement age provision.

The court next briefly outlined how the Pension Clause was adopted on the convention floor without the benefit of committee hearings.²⁰⁸ Also, the court read the debates as only indicating "a

²⁰⁴ *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974); *Kraus v. Bd. of Trustees*, 72 Ill. App. 3d 833, 390 N.E.2d 1281 (1st Dist. 1979); *Felt v. Bd. of Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 481 N.E.2d 698 (1985); and *Buddell v. Bd. of Trustees, State University Retirement Sys.*, 118 Ill. 2d 99, 514 N.E.2d 184 (1987)

²⁰⁵ *People ex rel. Sklodowski v. State of Illinois*, 182 Ill. 2d 220, 695 N.E.2d 374 (1998); *McNamee v. State of Illinois*, 173 Ill. 2d 433, 672 N.E.2d 1159 (1996); *People ex rel. Illinois Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 326 N.E.2d 749 (1975).

²⁰⁶ *Peters*, 57 Ill. 2d at 149-52, 311 N.E.2d at 111-12.

²⁰⁷ *Id.* at 150, 311 N.E.2d at 111.

²⁰⁸ *Id.* at 150-51, 311 N.E.2d at 112.

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.”²⁰⁹

The court then recounted the arguments of the City of Springfield and City of Chicago as *amicus curiae*, seeking reversal of the trial court.²¹⁰ 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.”²¹¹ 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.²¹²

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.²¹³ 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.²¹⁴

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.²¹⁵ The court, in turn, cited several New York decisions along with Rubin Cohn’s 1968 law review article,²¹⁶ which this Article discussed earlier.²¹⁷

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 the pensions which plaintiffs would ultimately have received.”²¹⁸ 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’ 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.²¹⁹

²⁰⁹ *Id.* at 151, 311 N.E.2d at 112.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See *supra* notes 67-70 and accompanying text.

²¹⁸ *Peters*, 57 Ill. 2d at 151-52, 311 N.E.2d at 112.

²¹⁹ See *Kraus v. Bd. of Trustees*, 72 Ill. App. 3d 833, 834-43, 390 N.E.2d 1281, 1286-88 (1st Dist. 1979) (discussing the inapplicability of cases prior to *Kraus*). Illinois courts came close to deciding the issue discussed in *Kraus* in *Peifer v. Board of Trustees of the Police Pension Fund of the Village of Winnetka*, 35 Ill. App. 3d 383, 342 N.E.2d 131 (1st Dist. 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. 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. The trial court dismissed the petition because the officer had not elected to receive the pension until after the legislature repealed the Code provision. 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. 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

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 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."²²⁰ 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."²²¹

c. Kraus' discussion of Illinois pension cases predating the 1970 Constitution.

under" the original Pension Code provision. Accordingly, the court concluded that applying the amended Code to the officer would violate the Pension Clause.

The Illinois Supreme Court also came close to the issue in *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507, 382 N.E.2d 243 (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*' 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 Trustees of Firemen's Pension Fund of the Wood Dale Fire Protection Dist.*, 122 Ill. 2d 22, 27, 521 N.E.2d 923, 925 (1988) (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 system.").

²²⁰ *Kraus*, 72 Ill. App. 3d at 834-35, 390 N.E.2d at 1283.

²²¹ *Id.* at 844, 845-49, 390 N.E.2d at 1289, 1290-92.

To support its conclusion, the appellate court extensively reviewed Illinois' 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."²²² 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.²²³

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.²²⁴ 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."²²⁵ Pension benefits of participants in *mandatory* plans, in contrast, were merely "gratuities" that could be legislatively reduced or eliminated at any time.²²⁶

d. Kraus' 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.²²⁷ 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.²²⁸ 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 pension."²²⁹

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."²³⁰ 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."²³¹

²²² *Id.* at 836, 390 N.E.2d at 1284.

²²³ *Id.* at 837-38, 390 N.E.2d at 1284-85.

²²⁴ *Id.*

²²⁵ *Id.* at 837, 390 N.E.2d at 1284-85.

²²⁶ *Id.*

²²⁷ *Id.* at 847-48, 390 N.E.2d at 1291-92.

²²⁸ *Id.* at 843, 390 N.E.2d at 1288.

²²⁹ *Id.* at 844, 390 N.E.2d at 1289.

²³⁰ *Id.*

²³¹ *Id.*

e. **Kraus' 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.²³² Further, reliance on New York cases was appropriate because the drafters intended for the Pension Clause to follow the results of the New York provision.²³³ 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.²³⁴

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 be constitutionally applied to those who became members of the system prior to the statute's effective date.²³⁵ 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.”²³⁶

f. **Kraus' treatment of the Supreme Court's *Peters* decision.**

Peters, according to the court, did not 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.”²³⁷ 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.”²³⁸

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.”²³⁹ 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.*”²⁴⁰

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.”²⁴¹ 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.”²⁴² The legislature could also require employees to provide 30 days notice before retiring.²⁴³ 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.²⁴⁴ Further, since pension

²³² *Id.*

²³³ *Id.* at 844-46, 390 N.E.2d at 1289-90.

²³⁴ *Id.* at 845, 390 N.E.2d at 1290.

²³⁵ *Id.*

²³⁶ *Id.* at 847, 390 N.E.2d at 1291.

²³⁷ *Id.* at 847-48, 390 N.E.2d at 1291-92.

²³⁸ *Id.* at 848, 390 N.E.2d at 1292.

²³⁹ *Id.* at 849, 390 N.E.2d at 1292.

²⁴⁰ *Id.* at 849, 390 N.E.2d at 1292-93.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

benefits were “contractual” under the Clause and governed by the “actual terms of the contract or pension,” the court noted that “there is nothing to prohibit an employee from agreeing, for consideration, to accept a reduction in benefits” as illustrated by New York cases.²⁴⁵

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 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.”²⁴⁶ The court explained (as this Article has above) that during the constitutional convention, the sponsors of the Clause rejected an attempt by the Pension Laws Commission to add such authority through an amendment and statement of intent.²⁴⁷

h. A summary of *Kraus*’ 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 benefits existing in the Pension Code at the time they began contributing to the pension system. This conclusion, the court noted, was in accord 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” under the Clause, and as such could be modified if an employee received consideration to accept a 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 amend 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 addressed for the first time in the *Felt* case whether an adverse change to the Pension Code applied to *current* 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*.

²⁴⁵ *Id.* at 849, 390 N.E.2d at 1293.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

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 the matter 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."²⁴⁸ 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."²⁴⁹

From these premises, the court observed *Peters'* determination that annuities are based on length of service and salary, and any changes in those factors will affect the amount of the annuity.²⁵⁰ The court held that since the Pension Code change "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."²⁵¹

The court further explained that the Pension Clause was modeled after an "almost identical" "provision in the New York Constitution."²⁵² The court also pointed to a New York court decision analogous to *Felt* that reached the same conclusion.²⁵³ 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.²⁵⁴ 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.²⁵⁵ 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."²⁵⁶ From this proposition, the court found *Bardens* controlling and held that the statute also violated the Contracts Clause.²⁵⁷

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.²⁵⁸ 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."²⁵⁹ Rather, "the severity of the impairment measures the height of the hurdle the legislation must

²⁴⁸ *Felt v. Bd. of Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 161-62, 481 N.E.2d 698, 699-700 (1985).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 162-63, 481 N.E.2d at 700.

²⁵¹ *Id.*

²⁵² *Id.* at 163, 481 N.E.2d at 700.

²⁵³ *Id.*

²⁵⁴ *Id.* at 164, 481 N.E.2d at 701.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 165-66, 481 N.E.2d at 701-02.

²⁵⁹ *Id.*

clear.”²⁶⁰ 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.”²⁶¹

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.”²⁶² The court continued that while the legislature has an “undeniable interest and responsibility in 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.”²⁶³

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.”²⁶⁴ 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.”²⁶⁵

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.”²⁶⁶ 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.”²⁶⁷ 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*.”²⁶⁸

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 an 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*.

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

²⁶⁰ *Id.* at 166, 481 N.E.2d at 701-02.

²⁶¹ *Id.* (emphasis added).

²⁶² *Id.* at 166, 481 N.E.2d at 702.

²⁶³ *Id.*

²⁶⁴ *Id.* at 167, 481 N.E.2d at 702.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 167-68, 481 N.E.2d at 702.

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. 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 existed prior to the 1974 Code amendment as a protected benefit under the Pension Clause.²⁶⁹

b. The Supreme Court analyzes and distinguishes *Peters*.

The Supreme Court began its analysis by reviewing the Clause's convention debates and drew two conclusions.²⁷⁰ The delegates intended for the provision to characterize and guarantee pension benefits as "contractual" rights, and to eliminate the former distinction in legal protection provided to benefits under mandatory and optional retirement plans.²⁷¹

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.²⁷² The court pointed out, however, that in *Peters*, "there was no provision concerning retirement age in the Pension Code."²⁷³ To this point, the court stated that the City of Springfield and its amicus had argued that the Pension Clause only protects those pension benefits set forth in the Pension Code.²⁷⁴ But, *Peters* "did not specifically reply to that argument" even though the court noted various provisions in Municipal Code governing mandatory retirement.²⁷⁵

The *Buddell* court then stated that the instant case involved rights "contained in the Pension Code itself and not provided for in some statutory provision relating to other matters which incidentally affect pension benefits."²⁷⁶ In addition, those rights were in the Code when the employee entered the system and when the Pension Clause took effect.²⁷⁷ 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."²⁷⁸

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."²⁷⁹ The Attorney General cited the Appellate Court's decision in *Ziebell v. Board of Trustees Police Pension Fund of the*

²⁶⁹ *Buddell v. Bd. of Trustees, State Universities Retirement Sys.*, 118 Ill. 2d 99, 103, 514 N.E.2d 184, 186 (1987).

²⁷⁰ *Id.* at 102, 514 N.E.2d at 186.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 103, 514 N.E.2d at 186.

²⁷⁴ *Id.* at 104, 514 N.E.2d at 187.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 104-05, 514 N.E.2d at 187.

²⁷⁹ *Id.* at 105, 514 N.E.2d at 187.

*Village of Forest Park*²⁸⁰ for the proposition that the employee had “provided no consideration for these additional benefits.”²⁸¹

The court rejected the argument and found *Ziebell* unsupportive of the Attorney General’s position.²⁸² 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.”²⁸³ 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 right to purchase additional credit became a contractual right under [the Pension Clause].”²⁸⁴ In addition, “the 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.”²⁸⁵

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.”²⁸⁶ And, the court found “[t]his holding” to be “in accord with our holding in this case.”²⁸⁷ 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 decisions of the courts of New York construing its constitutional provision, after which [the Clause] was patterned.”²⁸⁸ 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.”²⁸⁹

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.”²⁹⁰ 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.”²⁹¹

5. Distilling the Illinois courts’ decisions in *Peters*, *Kraus*, *Felt*, and *Buddell*.

The decisions in *Peters*, *Kraus*, *Felt*, and *Buddell* illustrate the evolutionary path Illinois courts pursued in determining 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*’ import. These three cases, in turn, held that the Clause safeguards the pension benefit rights contained in the Pension Code when a public employee begins contributing to the 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

²⁸⁰ 73 Ill. App. 3d 894, 900, 392 N.E.2d 101, 105-06 (1st Dist. 1979).

²⁸¹ *Buddell*, 118 Ill. 2d at 105, 514 N.E.2d at 187,

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 105-06, 514 N.E.2d at 187-88.

²⁸⁵ *Id.* at 106, 514 N.E.2d at 188.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 106-07, 514 N.E.2d at 188.

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. In addition, the Clause protects pension benefit rights as an enforceable contractual relationship that is subject to modification through contract principles.

The Clause does not cover, however, general terms or conditions of public employment unless expressly set forth in the Pension Code.²⁹² These terms or conditions generally include the mandatory retirement age, work hours, and salaries of employees even though they have an indirect effect the pension employees receive. These terms or conditions are subject to modification if the change stems from an independent reason. 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 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.²⁹³ 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.²⁹⁴ They also argued that the provisions of the Pension Code manifested a binding funding obligation on the legislature that could not be impaired.²⁹⁵ 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.

²⁹² See *Miller v. Retirement Bd. Policemen’s Annuity*, 329 Ill. App. 3d 589, 601, 771 N.E.2d 431, 441 (1st Dist. 2001) (distinguishing *Peters* and holding that the application of a statutory amendment to the 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 and fixed the officers’ annuity amount).

²⁹³ *People ex rel. Illinois Fed’n of Teachers v. Lindberg*, 60 Ill. 2d 266, 268-70, 326 N.E.2d 749, 750-51 (1975)

²⁹⁴ *Id.* at 271, 326 N.E.2d at 752.

²⁹⁵ *Id.* at 272-73, 326 N.E.2d at 752.

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."²⁹⁶ The court noted, however, that the Convention debates established that "members of pension plans . . . would receive the money due them at the time of their retirement."²⁹⁷

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.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰ This time the court considered a statutory change to the funding formula applicable to downstate police pension funds.³⁰¹ 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, 1980.³⁰² 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.³⁰³

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.³⁰⁴ 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' Pension Clause.³⁰⁵ The defendants responded that the Convention debates and Supreme Court's *Lindberg* decision made clear that the Clause protects employee pension benefits, not any particular method of funding the pension system.³⁰⁶ The defendants also noted that the legislation did not reduce benefits due to any beneficiaries.³⁰⁷

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.

²⁹⁶ *Id.* at 271-72, 326 N.E.2d at 752.

²⁹⁷ *Id.* at 271, 326 N.E.2d at 751.

²⁹⁸ *Id.* at 272-73, 326 N.E.2d at 752.

²⁹⁹ *Id.* at 273-74, 326 N.E.2d at 752-53.

³⁰⁰ *McNamee v. State*, 173 Ill. 2d 433, 672 N.E.2d 1159 (1996)

³⁰¹ *Id.* at 435-36, 672 N.E.2d at 1160-61.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 437, 672 N.E.2d at 1161.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

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.”³⁰⁸ 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.³⁰⁹

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.³¹⁰ 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.”³¹¹

The court, in turn, agreed with 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.’”³¹² 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.”³¹³

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.³¹⁴ Accordingly, the court reiterated its holding that the Clause “creates an enforceable contractual relationship that protects only the right to receive benefits.”³¹⁵ 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.”³¹⁶ 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.

³⁰⁸ *Id.* at 439, 672 N.E.2d at 1162 (citing *DiFalco v. Bd. of Trs. of the Firemen's Pension Fund of the Wood Dale Fire Protection Dist.*, 122 Ill.2d 22, 26, 521 N.E.2d 923 (1998) and *Kerner v. State Employees' Retirement Sys.*, 72 Ill.2d 507, 514, 382 N.E.2d 243 (1978)).

³⁰⁹ *Id.* at 440, 672 N.E.2d at 1162.

³¹⁰ *Id.* at 440-44, 672 N.E.2d at 1162-64.

³¹¹ *Id.* at 442, 672 N.E.2d at 1164.

³¹² *Id.* at 444, 672 N.E.2d at 1165 (quoting *People ex rel. Illinois Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 271, 326 N.E.2d 749, 751 (1975)).

³¹³ *Id.* at 445, 672 N.E.2d at 1165 (citing favorably *Felt v. Bd. of Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 481 N.E.2d 698 (1985), *Buddell v. Bd. of Trustees, State Universities Retirement Fund*, 118 Ill. 2d 99, 514 N.E.2d 184 (1987); *Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill. App. 3d 697, 570 N.E.2d 997 (1st Dist. 1991)).

³¹⁴ *Id.* at 445-46, 672 N.E.2d at 1165-66.

³¹⁵ *Id.* at 446, 672 N.E.2d at 1166.

³¹⁶ *Id.* at 446-47, 672 N.E.2d at 1166 (citing 4 Proceedings 2926 (statements of Delegate 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”))).

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 pension funding claim under the Clause in *People ex rel. Sklodowski v. State*.³¹⁷ 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 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 contractual 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 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 upon becoming law. 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.³¹⁸ The appellate court explained: "Once 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.'"³¹⁹ 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.³²⁰ 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.³²¹

The appellate court utilized the same basis to distinguish the Supreme Court's *McNamee* decision.³²² 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."³²³ As a result, the appellate court concluded that the trial court erred in dismissing the complaint and remanded the case to the trial court.³²⁴

³¹⁷ *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 695 N.E.2d 374 (1998).

³¹⁸ *People ex rel. Sklodowski v. State*, 284 Ill. App. 3d 809, 674 N.E.2d 81 (1st Dist. 1996).

³¹⁹ *Id.* at 817, 674 N.E.2d at 86

³²⁰ *Id.* at 819, 674 N.E.2d at 87.

³²¹ *Id.* at 819-20, 674 N.E.2d at 88

³²² *Id.* at 820-22, 674 N.E.2d at 88-89.

³²³ *Id.* at 821-22, 674 N.E.2d at 89.

³²⁴ *Id.* at 823, 674 N.E.2d at 90.

c. The Supreme Court's analysis.

After reviewing the case's procedural history,³²⁵ the Supreme 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;³²⁶ (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";³²⁷ 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.³²⁸

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.³²⁹ 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.³³⁰

The Supreme Court also rejected plaintiffs' claim that they stated a Pension Clause challenge by stating their benefits were at risk.³³¹ 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."³³² 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 86-273.³³³ The court further found it unnecessary to address the appellate court's ruling on sovereign immunity.³³⁴

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 Clause and the funding issue. *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."³³⁵ 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. And, the contractual relationship is governed by the actual terms of the Pension Code at the time the

³²⁵ People ex rel. Sklodowski v. State, 182 Ill. 2d at 223-26, 695 N.E.2d at 375-78.

³²⁶ *Id.* at 228, 695 N.E.2d at 377 (citing *McNamee v. State*, 173 Ill. 2d 433, 440, 672 N.E.2d 1159 (1996)).

³²⁷ *Id.* at 228-29, 695 N.E.2d at 377 (citing ILL. CONST. 1970, art. XIII, § 5.)

³²⁸ *Id.* at 229, 695 N.E.2d at 377 (citing *DiFalco v. Bd. of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection Dist.*, 122 Ill. 2d 22, 26, 521 N.E.2d 923 (1988) and *Kerner v. State Employees' Retirement Sys.*, 72 Ill. 2d 507, 514, 382 N.E.2d 243 (1978)).

³²⁹ *Id.* at 229-31, 695 N.E.2d at 378-79.

³³⁰ *Id.* at 232, 695 N.E.2d at 379.

³³¹ *Id.* at 232-33, 695 N.E.2d at 379.

³³² *Id.* (citing *McNamee v. State*, 173 Ill. 2d 433, 446-47, 672 N.E.2d 1159, 1165 (1996)).

³³³ *Id.* at 233, 695 N.E.2d at 379.

³³⁴ *Id.*

³³⁵ *Id.* at 442, 672 N.E.2d at 1164.

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.

PART 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 recent claims legal commentators have made about the Clause, including whether it permits the legislature to unilaterally cut the pension benefits of current employees.

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")³³⁶ issued a minority report to the Illinois General Assembly's Pension Modernization Task Force report.³³⁷ 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.³³⁸

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.³³⁹ While agreeing that the principal cause of the State's existing liabilities stemmed from the *State's failure to fund pension costs*,³⁴⁰ 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."³⁴¹

³³⁶ Historian Richard Schneirov recounts that the Commercial Club of Chicago was formed in 1877 by a group of the "sixty most outstanding" Chicago businessmen belonging to the Citizens Association of Chicago. RICHARD SCHNEIROV, *LABOR AND URBAN POLITICS: CLASS CONFLICT AND THE ORIGINS OF MODERN LIBERALISM IN CHICAGO, 1864-97* at 142 (University of Illinois Press, 1998). He explains that the Club was formed as a forum for political discussion and as a caucus within the Citizens Association. *Id.* According to Schneirov, 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 [i.e., the right to vote] 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.*

³³⁷ Pension Task Force Report, *supra* note 6, at 61-77.

³³⁸ *Id.* at 71-72.

³³⁹ W. James Farrell and R. Eden Martin, "Illinois State Finance—A Study in Failure," Presentation to the Commercial Club of Chicago (Jan. 12, 2010) [hereinafter Club Meeting Presentation] *available at* <http://civiccommittee.org/initiatives/StateFinance/Remarks%20n%20Slides%20for%20Website.pdf> (last visited Feb. 11, 2011).

³⁴⁰ Pension Task Force Report, *supra* note 6, at 68

³⁴¹ *Id.* at 70

Martin explained to Club members that paying these obligations was politically unpalatable because “State government couldn’t cut—and nobody could stand the thought of a tax increase.”³⁴²

The Club claimed its proposal comported with the Pension Clause because of a two-page analysis prepared by the law firm Sidley Austin LLP (“Sidley”).³⁴³ Sidley is not only a Club member, but also the firm where Mr. Martin practices law.³⁴⁴ In April 2010, Sidley later supplemented its analysis with an additional two-page position statement,³⁴⁵ and then a more detailed narrative in early May 2010.³⁴⁶ After the *Chicago Tribune* endorsed Sidley’s position in two editorials,³⁴⁷ four other Chicago law firms signed onto Sidley’s position.³⁴⁸ These firms are also Club members, and have other Club members as clients, including the *Tribune*.³⁴⁹

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.³⁵⁰ 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.³⁵¹

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.³⁵² Sidley further argued in

³⁴² Club Meeting Presentation, *supra* note 339, at 6. Martin further explained that as 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.

³⁴³ Pension Task Force Report, *supra* note 6, at 76-77

³⁴⁴ See The Commercial Club of Chicago, Membership available at <http://www.commercialclubchicago.org/members/d.html> (last visited Feb. 11, 2011) (listing the managing partner of Sidley Austin LLP, as a member); Sidley Austin LLP, Our People available at <http://www.sidley.com/r-eden-martin/> (last visited Feb. 11, 2011) (listing R. Eden Martin as “of counsel”).

³⁴⁵ See Commercial Club of Chicago, Chicago’s Underfunded Pension Plans, App. B, at 33-37 (Apr. 2010) available at http://illinoisbroke.com/files/Chicagos_Underfunded_Pension_Plans_FINAL.pdf

³⁴⁶ Memorandum from Sidley Austin LLP, on Illinois’ Authority to Reduce the Pension Benefits That Current Employees Will Earn From Future Service (Apr. 27, 2010) [hereinafter Sidley Memo] available at www.illinoisbroke.com/sidleyaustin.aspx (last visited Feb. 11, 2011).

³⁴⁷ See Editorial, *Yes you can*, CHICAGO TRIBUNE, Mar. 27, 2010 (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.”) available at http://articles.chicagotribune.com/2010-03-27/news/ct-edit-pensions0328-20100327_1_pension-plans-house-speaker-michael-madigan-illinois (last visited Feb. 11, 2011); Editorial, *Don’t run from a fight*, CHICAGO TRIBUNE, Apr. 18, 2010 (same) available at http://articles.chicagotribune.com/2010-04-18/news/ct-edit-pensions-20100418_1_pension-illinois-chicago-public-schools (last visited Feb. 11, 2011).

³⁴⁸ See Letter from Civic Committee of the Commercial Club of Chicago (May 3, 2010) available at www.illinoisbroke.com/sidleyaustin.aspx (Sidley Memo, Cover Letter, *supra* note 346, listing Jenner & Block LLP, Mayer Brown LLP, Sonnenschein Nath & Rosenthal LLP, and Winston & Strawn LLP as endorsing Sidley’s position).

³⁴⁹ See *supra* note 343 (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) (identifying Jenner & Block as the Chicago Tribune’s counsel) available at <http://www.chicagobusiness.com/article/20090410/NEWS06/200033651/tribune-subpoenaed-by-feds-over-esop>; Mayer Brown LLP available at <http://www.mayerbrown.com/taxcontroversy/index.asp?nid=10793> (identifying the Tribune Company as a client via key word search); Sonnenschein Nath Rosenthal LLP available at <http://sonnenschein.com> (same); Winston & Strawn LLP available at <http://www.winston.com> (same).

³⁵⁰ Sidley Memo, *supra* note 346, 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.”) (emphasis in original).

³⁵¹ See Sidley Memo, *supra* note 346, at 8-15 (discussing Convention debates); *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).

³⁵² *Id.* at 2, 23-27.

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.³⁵³

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

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 received the endorsement of the Illinois State Bar Association.³⁵⁴ Justice DiVito found Sidley's argument to be "deeply flawed" and without "legal merit."³⁵⁵ 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."³⁵⁶ Justice DiVito also characterized Sidley's proposal to alter the pension benefit rights through contract principles as a "charade."³⁵⁷

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."³⁵⁸ 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 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" rights that 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.

³⁵³ Sidley Austin LLP, *State Is Not A Guarantor of State Pension Fund Obligations To Pension Plan Members*, available at <http://www.illinoisbroke.com/files/SidleyGuarantor.pdf> (last visited Feb. 11, 2011). See also Memorandum from Sidley Austin LLP on The State of Illinois, and the City of Chicago and Smaller Municipalities, Are Not Guarantors of the Payment of Pension Benefits (Dec. 7, 2010) (on file with author).

³⁵⁴ Memorandum from Gino DiVito, *Diminution of Pension Benefits for Current Employees* [hereinafter DiVito April Memo] (Apr. 12, 2010) available at <http://www.senatedem.ilga.gov/index.php/phoca-download/category/58-pensiondocs?download=285%3A04-12-2010-divito-memo-highlighting-constitutional-realities> (last visited Feb. 22, 2011). Illinois State Bar Association, *Statement: Reducing Current Pensions Is Unconstitutional* available at: <http://www.senatedem.ilga.gov/index.php/phoca-download/category/58-pensiondocs?download=287%3A04-14-2010-illinois-state-bar-association-reducing-current-pensions-is-unconstitutional> (last visited Feb 22, 2011)..

³⁵⁵ Memorandum from Gino DiVito, *Diminution of Pension Benefits for Current Employees* at 1, 9 [hereinafter DiVito May Memo] (May 5, 2010) available at <http://www.senatedem.ilga.gov/index.php/phoca-download/category/58-pensiondocs?download=289%3A05-05-2010-divito-reaffirms-constitutional-protections-for-workers>.

³⁵⁶ DiVito April Memo, *supra* note 354, at 3.

³⁵⁷ DiVito May Memo, *supra* note 354, at 7.

³⁵⁸ ILL. CONST. 1970, art. XIII, § 5.

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.”³⁵⁹ Sidley claims that the Clause only means that “employees have a contractual right not to be excluded from membership in a system.”³⁶⁰ Sidley further claims that “it says nothing about the way in which benefits earned by future employment are to be determined.”³⁶¹ Sidley 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.³⁶²

In Sidley'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.”³⁶³ Finally, Sidley 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.”³⁶⁴

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 public employee'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. 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.”³⁶⁵ 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.³⁶⁶

³⁵⁹ Sidley Memo, *supra* note 346, at 6.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 7.

³⁶⁴ *Id.*

³⁶⁵ See *supra* notes 21-23 and accompanying text. In discerning the plain meaning of a statutory or constitutional provision, Illinois generally look to dictionary definitions of undefined terms. In *re* Detention of Bailey, 317 Ill. App. 3d 1072, 1085 (1st Dist. 2000).

³⁶⁶ See *supra* note 24.

In sum, the Pension Clause's plain language reveals that an employee's contractual 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 Constitutions.³⁶⁷

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.³⁶⁸ Illinois courts have long explained that the judicial branch may not add limitations or exceptions where none exist.³⁶⁹

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.³⁷⁰

Moreover, contrary to Sidley's suggestion, our analysis of the Clause does not involve whether Illinois intended to deviate from how ERISA protects pension benefits when it adopted the Pension Clause.³⁷¹ The reason for this is simple. Congress did not pass ERISA until 1974—more than three years *after* the Pension Clause took effect.³⁷² 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.³⁷³

C. Sidley Mischaracterizes the Clause's Convention Debates.

1. Summary of Sidley's position.

Sidley also argues that the Convention debates fail to address even whether the Pension Clause limits the governments' ability to reduce pension benefits.³⁷⁴ Sidley further asserts that the drafters offered no opinion on whether the Clause prohibited purely prospective modifications of benefits formulas.³⁷⁵ 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.³⁷⁶

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.³⁷⁷ 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

³⁶⁷ See *supra* notes 72, 76-79 and accompanying text.

³⁶⁸ *Accord* DiVito May Memo, *supra* note 354, at 6.

³⁶⁹ See *Toys "R" Us v. Adelman*, 215 Ill. App. 3d 561, 568, 574 N.E.2d 1328 (3rd Dist. 1991) (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).

³⁷⁰ *Coalition for Political Honesty v. State Bd. of Elec.*, 65 Ill. 2d 453, 464, 359 N.E.2d 138, 143 (1977) ("One contending that language should not be given its natural meaning understandably has the burden of showing why it should not. * * * 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.").

³⁷¹ Sidley Memo, *supra* note 346, at 5.

³⁷² P.L. 93-406, 88 Stat. 829 (enacted Sept. 2, 1974).

³⁷³ 2B A. SUTHERLAND, STATUTORY CONSTRUCTION §51.6 (7th ed. 2010).

³⁷⁴ Sidley Memo, *supra* note 346 at 9.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 9, 12, 13-14.

³⁷⁷ *Id.* at 13-14.

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.”³⁷⁸

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 generally afford significant weight to sponsor statements when discerning the original intent and purpose of statutes and constitutional provisions.³⁷⁹ Illinois courts have particularly done so with respect to the Pension Clause.³⁸⁰ 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.

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.³⁸¹ 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 that the provision barred the legislature from eliminating or reducing an employee’s pension benefit rights after the person entered service.³⁸²

³⁷⁸ *Id.* at 8. To make this claim, Sidley relies upon the statements of Delegate 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 (quoting IV Proceedings 2932). It is difficult to fathom how this statement offers Sidley any support because at no point did Delegate Witwer dispute or reject Delegate Green or Kinney’s explanation of the pension rights safeguarded by the pension proposal.

³⁷⁹ *See e.g.*, *Baker v. Miller*, 159 Ill. 2d 249, 636 N.E.2d 551 (1994) (“As with statutory construction, this court must construe a constitutional provision so as to effectuate the intent of the drafters.”); *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 493, 496, 470 N.E.2d 266, 270-71 (1984) (“The 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. County of McLean*, 89 Ill. 2d 417, 423, 433 N.E.2d 666, 669 (1982) (“Generally, 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.*, 144 Ill. App. 3d 325, 330, 494 N.E.2d 196, 200 (2nd Dist. 1986) (quoting in part 2A A. Sutherland, *Statutory Construction* §48.15 (“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.’”)).

³⁸⁰ *See e.g.*, *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 232-33, 695 N.E.2d 374, 379 (1998) (quoting Delegate Kinney’s floor statements); *McNamee v. State*, 173 Ill. 2d 433, 440-446, 672 N.E.2d 1159, 1162-66 (1996) (relying on and quoting from Delegates Green and Kinney’s floor statements); *Felt v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 162, 481 N.E.2d 698, 700 (1985) (quoting or referring to both Delegates Green and Kinney’s floor statements); *People ex rel. IFT v. Lindberg*, 60 Ill. 2d 266, 271-72, 326 N.E.2d 749, 752 (1975) (same); *Kraus v. Bd. Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 843-44, 390 N.E.2d 1281, 1288-89 (1st Dist. 1979) (referring to statements from Delegates Green and Kinney).

³⁸¹ *See* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 48:13 and fn. 14 & 15 (“Floor 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).

³⁸² IV Proceedings 2931 (Delegate Green) (“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.”);

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.³⁸³ That understanding also reflects the view of the Pension Laws Commission, which tried on two occasions to amend the Clause before the Convention adjourned.³⁸⁴ The Commission's overtures, 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.³⁸⁵

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."³⁸⁶ 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.³⁸⁷ As noted above, Delegate Green, a community college official from Urbana,³⁸⁸ sponsored the constitutional provision because of concerns raised by university employees, while Delegate Kinney, a former DuPage County state's attorney,³⁸⁹ was prompted to do so by the concerns of police and firemen.³⁹⁰

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

IV Proceedings 2929 (Delegate Kinney) ("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."); IV Proceedings 2929 (Delegate Kinney) (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."); IV Proceedings 2931-32 (Delegate Kinney) ("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."); IV Proceedings 2929 (Delegate Lyons, a cosponsor) (agreeing with Delegate Kinney's remarks about the scope of the pension clause); Id. (Delegate Peccarelli, a cosponsor) ("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."); IV Proceedings 2927-28 (Delegate Elward, an opponent of the Clause) ("What 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. * * * What 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.").

³⁸³ See *supra* notes 83-111 and accompanying text.

³⁸⁴ See *supra* notes 180-193 and accompanying text.

³⁸⁵ See *supra* notes 197-203 and accompanying text.

³⁸⁶ Sidley Memo, *supra* note 346, at 14.

³⁸⁷ See *supra* notes 120-21, 140-41, 155 and accompanying text.

³⁸⁸ I Proceedings 899 (convention biography of Delegate Green).

³⁸⁹ I Proceedings 892 (convention biography of Delegate Kinney).

³⁹⁰ See IV Proceedings 2925-2926 (opening statements of Delegates Green and Kinney regarding the pension proposal).

beyond a constitutional provision's scope,³⁹¹ especially where that interpretation narrowly construes a constitutional guarantee.³⁹² 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.³⁹³ In fact, Sidley claims that *Peters* already decided the very issue now being debated in its favor.³⁹⁴ 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.’”³⁹⁵

Indeed, Sidley repeats the phrase “*had been earned*” throughout its position statement as a means to prove up its interpretation.³⁹⁶ Sidley also relies upon a 1979 Illinois Attorney General opinion construing *Peters*.³⁹⁷ 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.³⁹⁸

As detailed below, Sidley's argument fails because the *Peters* decision does not stand for the proposition Sidley suggests, and 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.”³⁹⁹ *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.

³⁹¹ *Wolfson v. Avery*, 6 Ill. 2d 78, 126 N.E.2d 701 (1955) (“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 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.”).

³⁹² *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.”).

³⁹³ Sidley Memo, *supra* note 346, at 14-22.

³⁹⁴ *Id.* at 14 (“the same argument that Judge DiVito now makes was rejected by the Illinois Supreme Court in *Peters v. City of Springfield*, 57 Ill. 2d 142 (1974).”).

³⁹⁵ *Id.* at 16.

³⁹⁶ *Id.* at 14, 15, 16, 17, 20

³⁹⁷ *Id.* at 17.

³⁹⁸ *Id.* at 16

³⁹⁹ *Kraus v. Bd. Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 849, 390 N.E.2d 1281, 12881292-93 (1st Dist. 1979).

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 firemen the right to work up to the 'minimum retirement age provided by law at the time he enters the [retirement] system.'"⁴⁰⁰ Sidley further contends that *Peters* held that the "Clause protects only previously earned benefits."⁴⁰¹ From these contentions, Sidley posits that *Peters* allows "prospective changes in law that reduce the benefits that will be earned in the future" without violating the Pension Clause.⁴⁰²

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 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*."⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵ 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."⁴⁰⁶

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

⁴⁰⁰ Sidley Memo, *supra* note 346, at 16.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 16-17.

⁴⁰³ Abstract of Record, Letter Announcing Circuit Court's Decision at 24, *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974) (45766) (emphasis added).

⁴⁰⁴ Brief and Argument for Defendants-Appellants City of Springfield and Amicus Curiae, Illinois Municipal League at 2, *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974).

⁴⁰⁵ *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 189, 835 N.E.2d 801, 855 (2005) ("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 *U.S. v. Mitchell*, 271 U.S. 9, 14 (1926) ("It 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*, 373 Ill. App. 3d 87, 95, 867 N.E.2d 539, 545-46 (2nd Dist. 2007) ("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.").

⁴⁰⁶ *Peterson v. Bd. of Trustees of Firemen's Pension Fund for the City of Des Plaines*, 54 Ill. 2d 260, 264, 296 N.E.2d 721, 724 (1973).

pension plans under the 1870 constitution.⁴⁰⁷ Such a result would be perverse and contrary to the Clause's original intent as previously discussed in Part I of this Article.⁴⁰⁸

b. Peters is best understood as reaching a narrow result and reserving the question of *when* pension benefit rights vest for a later 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.⁴⁰⁹ Also, *Peters* is best understood as leaving open the question of *when* pension benefits "vest" or are "earned."⁴¹⁰ 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,"⁴¹¹ 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."⁴¹² The court embraced both propositions in its opinion.⁴¹³

The *Peters* opinion also mirrors the City of Chicago's 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."⁴¹⁴ 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.⁴¹⁵

⁴⁰⁷ Comment, *supra* note 33, at 424.

⁴⁰⁸ See *supra* notes 83-179 and accompanying text.

⁴⁰⁹ Comment, *supra* note 33, at 452-53, 457.

⁴¹⁰ DiVito May Memo, *supra* note 354, at 2.

⁴¹¹ Brief of the City of Chicago, *Amicus Curiae* at 11, *Peters v. City of Springfield*, 57 Ill.2d 142, 311 N.E.2d 107 (1974) [hereinafter Brief of the City of Chicago, *Amicus Curiae*] ("The 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. 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*, 295 N.Y. 274, 67 N.E.2d 157 (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. 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]").

⁴¹² *Id.* at 12.

⁴¹³ *Peters*, 57 Ill. 2d at 151, 311 N.E.2d at 112 ("Municipal 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 relations' contemplated by section 5, article XIII, a similar provision 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.").

⁴¹⁴ Compare Brief of the City of Chicago, *Amicus Curiae*, *supra* note 410, at 13 with *Peters*, 57 Ill. 2d at 151, 311 N.E.2d at 112 ("The debates on the provision indicate 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.").

⁴¹⁵ Brief of the City of Chicago, *Amicus Curiae*, *supra* note 410, at 13-14 ("If retirement age were labelled [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 "Public Employees Retirement Plans—The Nature of the Employees' Rights." 1968 U. of Ill. Law Forum 32 by Rubin Cohn, 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

The City of Chicago then suggested that the court examine the issue at length “and in light of other states with similar pension problems.”⁴¹⁶ 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.”⁴¹⁷

Given *Peters*’ murky language that the Clause protects pension rights “which had been earned,” the court undoubtedly heeded Chicago’s suggestion. The Supreme Court appeared to confirm this point a year later in its *Lindberg* decision where it remarked that “the character of public-employee pension programs [as under the “contract view” or otherwise] has not been definitely established.”⁴¹⁸

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.⁴¹⁹ 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.”⁴²⁰ Sidley, in turn, states that the Attorney General opined that the legislation, per *Peters*’ 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.”⁴²¹ 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.”⁴²²

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.⁴²³ 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.⁴²⁴ 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.⁴²⁵ Rather, as the Attorney General puts it, *Peters* “seems . . . to interpret the constitutional provision less stringently than [Delegate] Kinney in the Convention”.⁴²⁶

Annotation Vested Right of Pensioner, 52 A.L.R.2d 437.) 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 Article XIII, Section 5 should await the appropriate case in which it is properly raised.”).

⁴¹⁶ *Id.* at 13.

⁴¹⁷ *Id.* at 14.

⁴¹⁸ *People ex rel. Illinois Fed’n of Teachers v. Lindberg*, 60 Ill. 2d 266, 273, 326 N.E.2d 749, 752 (1975) (citing favorably Cohn Article, *supra* note 29).

⁴¹⁹ Sidley Memo, *supra* note 346, at 17.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ 80th Ill. Gen. Assem., Senate Proceedings, June 24, 1977, at 208 (statement of Senate sponsor Egan regarding H.B. 1872, which became Public 80-841).

⁴²⁴ *Sparks & Wiewel Constr. Co. v. Martin*, 250 Ill. App. 3d 955, 965, 620 N.E.2d 533, 541 (4th Dist. 1993).

⁴²⁵ Ill. Atty. Gen. Op. S-1407, 1979 Ill. Atty. Gen. 9, 12 (Jan. 10, 1979) at 12.

⁴²⁶ *Id.*

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,⁴²⁷ 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."⁴²⁸

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.⁴²⁹

We need not dwell further on the import of the Attorney General's opinion because four months after its issuance its legality became a mere intellectual curiosity. In May 1979, the Illinois Appellate Court issued its decision in *Kraus*.⁴³⁰ *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."⁴³¹ Contrary to Sidley's protests, *Kraus*, as an Appellate Court decision, is the law of this State until the Illinois Supreme Court says otherwise.⁴³²

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 approach fails to resolve the issue at hand given *Kraus*' broad acceptance.

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."⁴³³ 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.⁴³⁴ Also, as Justice DiVito observed in his analysis, Sidley can point to no instance where the Supreme Court has disagreed with *Kraus*.⁴³⁵

If anything, Illinois court decisions since *Kraus* have either adopted or acted consistent with *Kraus*' Pension Clause analysis.⁴³⁶ 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.⁴³⁷ *Ziebell* further found that the Clause

⁴²⁷ See *Blount v. Stroud*, 232 Ill. 2d 302, 324, 904 N.E.2d 1, 15 (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.").

⁴²⁸ *Rosewood Care Center v. Caterpillar*, 226 Ill. 2d 559, 572, 877 N.E.2d 1091, 1098 (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.").

⁴²⁹ *Kerner v. State Employees' Retirement Sys.*, 72 Ill. 2d 507, 514-15, 382 N.E.2d 243, 247 (1978).

⁴³⁰ *Kraus v. Bd. of Trustees*, 72 Ill. App. 3d 833, 390 N.E.2d 1281 (1st Dist. 1979).

⁴³¹ *Id.* at 849, 390 N.E.2d at 1292-93.

⁴³² *People v. Carpenter*, 228 Ill. 2d 250, 259-60, 888 N.E.2d 105, 111-12 (2008).

⁴³³ Sidley Memo, *supra* note 346, at 21.

⁴³⁴ See *supra* note 431.

⁴³⁵ DiVito May Memo, *supra* note 354, at 3.

⁴³⁶ See DiVito April Memo, *supra* note 354, at 3-6; DiVito May Memo, *supra* note 354, at 2-3.

⁴³⁷ *Ziebel v. Bd. of Trustees Police Pension Fund of Forest Park*, 73 Ill. App. 3d 894, 900, 392 N.E.2d 101, 105-06 (1st Dist. 1979).

established that pensions derived from contributions to either type of plan were a “contractual arrangement...binding the government to its full agreement.”⁴³⁸

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.⁴³⁹ *Ziebell* explained that allowing an employee to receive a benefit increase *without* a contribution to the pension system was tantamount to “an unconstitutional expenditure of public funds for a private purpose.”⁴⁴⁰

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.”⁴⁴¹

In 1982, the Appellate Court in *Kuhlmann v. Board of Trustees of the Police Fund of Maywood*,⁴⁴² 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.⁴⁴³

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.⁴⁴⁴ *Second*, the police officer was *not* constitutionally-entitled to a later statutory-increase in his salary formula because the officer never made a pension contribution to the system after the increase became law.⁴⁴⁵ The officer was on disability when the enhancement became law and made no system contributions while on disability.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 900-01, 392 N.E.2d at 105-06.

⁴⁴⁰ *Id.* at 901, 392 N.E.2d 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 Trustees of the Teachers’ Retirement Sys.*, 27 Ill. 2d 593, 190 N.E.2d 329 (1963) (upholding statute permitting retired teachers to purchase a pension benefit increase by electing to contributing an additional sum to the pension system, and reviewing cases); *People ex rel. Schmidt v. Yerger*, 21 Ill. 2d 338, 172 N.E.2d 752 (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); Ill. Att’y Gen. Op. No. 81, 1960 Ill. Att’y Gen. 146, 151 (1960) (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. of Chicago*, 413 Ill. 233, 237-38, 108 N.E.2d 426 (1952).

⁴⁴¹ *Arnold v. Bd. of Trustees of County Employees’ Annuity and Benefit Fund of Cook County*, 84 Ill. 2d 57, 60, 417 N.E.2d 1026, 1027 (1981) (emphasis added).

⁴⁴² *Kuhlmann v. Bd. of Trustees of the Police Fund of Maywood*, 106 Ill. App. 3d 603, 607-608, 435 N.E.2d 1307, 1310-11 (1st Dist. 1982). *Accord* *Greves v. Firemen’s Pension Fund of City of Blue Island*, 147 Ill. App. 3d 956, 958, 498 N.E.2d 618, 620 (1st Dist. 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).

⁴⁴³ *Id.* at 608, 435 N.E.2d at 1311.

⁴⁴⁴ *Id.* at 608-09, 435 N.E.2d at 1311-12.

⁴⁴⁵ *Id.*

The rule *Kuhlmann* established was, 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.⁴⁴⁶ The Illinois Supreme Court, moreover, has favorably cited at least one of the post-*Kuhlmann* decisions as well as *Kraus* as settled law.⁴⁴⁷

Also, the Supreme Court has adopted the same legal framework,⁴⁴⁸ as have the Illinois Appellate Court and a federal district court during the last ten years.⁴⁴⁹ 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.⁴⁵⁰

⁴⁴⁶ See Redding Bd. of Trustees of the Police Pension Fund of the Village of Oak Park, 115 Ill. App. 3d 242, 450 N.E.2d 763 (1st Dist. 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 Trustees of the Pension Fund of the Village of Hoffman Estates, 125 Ill. App. 3d 1096, 466 N.E.2d 1075 (1st Dist. 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 Trustees of the Police Pension Fund of the Village of Winthrop Harbor, 133 Ill. App. 3d 566, 479 N.E.2d 31 (2nd Dist. 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*, 139 Ill. App. 3d 45, 487 N.E.2d 1050 (1st Dist. 1985) (citing *Kuhlmann*, *Kraus*, and *Ziebell*) (same holdings as *Taft*); Carr v. Bd. of Trustees of the Police Pension Fund of Peoria, 158 Ill. App. 3d 7, 511 N.E.2d 142 (3rd Dist. 1987) (citing *Kraus*, *Kuhlmann*, *Taft*, and *Gualano*) (same holdings *Taft* and *Gualano*); *Fenton v. Bd. of Trs. of the City of Murphysboro*, 203 Ill. App. 3d 714, 561 N.E.2d 105 (5th Dist. 1990) (citing *Kraus*, *Gualano*, *Taft*, and *Carr*) (holding that trial court did not error when it awarded an employee disability pension benefits without a reduction in payments received under Workers Compensation Act); *Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill. App. 3d 697, 579 N.E.2d 997 (1st Dist. 1991) (citing *Kraus*, *Kuhlmann*, *Taft*, *Gualano*, and *Carr*) (same holding as *Taft*); *Hannigan v. Hoffmeister*, 240 Ill. App. 3d 1065, 608 N.E.2d 396 (1st Dist. 1992) (citing *Taft*, *Gualano*, and *Carr*) (holding that university employee's pension benefits could be off set by amounts he received under the Workers Compensation Act because the setoff provisions were always apart 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 Trustees of the State Employees' Retirement Sys.*, 285 Ill. App. 3d 827, 674 N.E.2d 852 (1st Dist. 1996) (citing *Felt* and *Kraus*).

⁴⁴⁷ *McNamee v. State*, 173 Ill. 2d 433, 672 N.E.2d 1159 (1996) (citing *Kraus* and *Schroeder* for the proposition that "the appellate court has also invalidated amendments to the Pension Code only where the result is to diminish benefits").

⁴⁴⁸ *DiFalco v. Bd. of Trustees of Firemen's Pension Fund of Wood Dale Fire Prot. Dist.*, 122 Ill. 2d 22, 26, 521 N.E.2d 923, 925 (1988) ("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."); *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 229, 695 N.E.2d 374, 377 (1998) ("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.").

⁴⁴⁹ *Miller v. Retirement Bd. of the Policemen's Annuity Fund of the City of Chicago*, 329 Ill. App. 3d 589, 771 N.E.2d 431 (1st Dist. 2002) (citing *Sklodowski*, *Felt*, *Hannigan*, *Taft*, and *Kraus*, and outlining the legal framework); *In re Marriage of Menken*, 334 Ill. App. 3d 531, 534, 778 N.E.2d 281, 284 (2nd Dist. 2002) (citing *Sklodowski*, 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. Chicago Transit Auth.*, 164 F. Supp. 2d 1040, 1055 (N.D. Ill. 2001) (citing *Kraus* and *Sklodowski*) ("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.").

⁴⁵⁰ *Greves v. Firemen's Pension Fund of City of Blue Island*, 147 Ill. App. 3d 956, 958, 498 N.E.2d 618, 620 (1st Dist. 1986).

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.⁴⁵¹ 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.”⁴⁵²

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,⁴⁵³ but also the Illinois Constitution's Contracts Clause per the court's 1961 decision in *Bardens*.⁴⁵⁴ 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.⁴⁵⁵

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.’”⁴⁵⁶ 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.⁴⁵⁷ 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.”⁴⁵⁸ 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.”⁴⁵⁹

Sidley's position is not remotely correct. No party raised in its briefs the judicial salary provision 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.⁴⁶⁰ Indeed,

⁴⁵¹ Sidley Memo, *supra* note 346, at 18-20.

⁴⁵² *Id.* at 18-19, 22.

⁴⁵³ *Felt v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 162-64, 481 N.E.2d 698, 700-01 (1985).

⁴⁵⁴ *Id.* at 167-68, 481 N.E.2d at 702.

⁴⁵⁵ *Id.*

⁴⁵⁶ Sidley Memo, *supra* note 346, at 18.

⁴⁵⁷ *Id.* at 18-19.

⁴⁵⁸ *Id.* at 18 (quoting *Felt*, 107 Ill. 2d at 166).

⁴⁵⁹ *Id.* at 19, 28. We believe that 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. 211 Ill. 2d 286, 302, 811 N.E.2d 652, 662 (2004). 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.* with *infra* notes 541-49, 569-80, and accompanying text.

⁴⁶⁰ See *Felt*, 107 Ill. 2d at 166, 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.”).

this was the overarching argument that the Attorney General made to the court in its briefs to uphold the statute.⁴⁶¹

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.⁴⁶² As a substitute, the Attorney General asked the court to adopt California's "limited vesting" approach to pension benefits, which allows the legislature to make unilateral reductions in benefits⁴⁶³

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.⁴⁶⁴ The court, in turn, found that the salary formula change at issue nonetheless failed the Attorney General's self-prescribed test.⁴⁶⁵ 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.⁴⁶⁶

⁴⁶¹ See Brief and Argument for Defendants-Appellants at 31-32, *Felt v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 481 N.E.2d 698 (60373) (where 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 intend 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 (where 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 (where 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 v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 481 N.E.2d 698 (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).

⁴⁶² Brief and Argument for Defendants-Appellants, *supra* note 459, at 31-32 (recounting that "the Court [in *Kraus*] examined the history of this constitutional provision and concluded that it adopted 'absolute vesting'. Citing the remark by Delegate Kinney, the court decided that the convention intended to adopt the same constitutional provision as had been enacted in New York. 72 Ill. App. 3d at 845-46. Turning to New York law, the Appellate Court examined the decision in *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 152 N.E.2d 241 (1958) and determined that under this law no changes could be made in the retirement benefits of government employees under art. XIII, § 5. 72 Ill. App. 3d 845-56. The 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.' 72 Ill. App. 3d at 847. 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.' 72 Ill. App. 3d at 849. Defendant urges this Court not to follow this interpretation for several reasons.").

⁴⁶³ *Id.* at 24-27 (where 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).

⁴⁶⁴ *Felt*, 107 Ill. 2d at 166, 481 N.E.2d 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).

⁴⁶⁵ *Id.* at 166-67.

⁴⁶⁶ *McNamee v. State*, 173 Ill. 2d 433, 442, 444, 672 N.E.2d 1159, 1164-65 (1996).

Finally, the Illinois Supreme Court explained, per *Kraus*, that 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."⁴⁶⁷ Since the Pension Clause eliminated the legal distinction between optional and mandatory pension plans,⁴⁶⁸ it cannot be seriously argued that pension rights under the Clause somehow lack at least the same 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*.⁴⁶⁹

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.

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*' holding that a person is constitutionally-entitled to the pension benefits set forth in the Pension Code when he or she entered the system.⁴⁷⁰ 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. Later Illinois Supreme Court decisions confirm this

⁴⁶⁷ *Arnold v. Bd. of Trustees of County Employee's Annuity and Benefit Fund of Cook County*, 84 Ill. 2d 57, 60, 417 N.E.2d 1026, 1027 (1981). See 1961 Ill. Att'y. Gen. Op. 75, 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).

⁴⁶⁸ *Kraus v. Bd. of Trustees of the Police Pension Fund of Niles*, 72 Ill. App. 3d 833, 847-48, 390 N.E.2d 1281, 1291-92 (1st Dist. 1979); *Ziebell v. Bd. of Trs. Police Pension Fund of Forest Park*, 73 Ill. App. 3d 894, 900, 392 N.E.2d 101, 105-06 (1st Dist. 1979); *Buddell v. Bd. of Trustees of the State University Retirement Sys.*, 118 Ill. 2d 99, 102, 514 N.E.2d 184, 186 (1987) ("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.").

⁴⁶⁹ *Kleinfeldt v. New York City Employee's Ret. Sys.*, 36 N.Y.2d 95, 101-02, 324 N.E.2d 865, 869 (1975) ("The 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. New York State Teachers Retirement System*, 5 N.Y.2d 1, 11, 152 N.E.2d 241, 246, *Supra*: 'The 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.'").

⁴⁷⁰ *Buddell*, 118 Ill. 2d at 104-05, 514 N.E.2d at 187 ("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.")

point.⁴⁷¹ Sidley unsurprisingly offers only a brief analysis of *Buddell* because it later tacitly acknowledges that its reading of *Buddell* (and *Felt*) is wrong.⁴⁷²

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.⁴⁷³ 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.⁴⁷⁴ 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."⁴⁷⁵ The Attorney General took the same position in a 1976 opinion involving the same Pension Code provision.⁴⁷⁶ Since *Buddell* rejected the Attorney General's view of *Peters*,⁴⁷⁷ 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 *current* public employees as proposed by the Commercial Club.⁴⁷⁸ Sidley contends that "contract rights can be modified

⁴⁷¹ *Accord* DiFalco v. Bd. of Trustees of Firemen's Pension Fund of Wood Dale Fire Prot. Dist., 122 Ill. 2d 22, 265, 521 N.E.2d 923, 925 (1988) ("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."); *People ex rel. Sklodowski*, 182 Ill. 2d 220, 229, 695 N.E.2d 374, 377 (1998) ("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."). See also DiVito May Memo, *supra* note 354, at 6.

⁴⁷² Sidley Memo, *supra* note 346, at 22 ("That said, 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.").

⁴⁷³ *Buddell*, 118 Ill. 2d at 187, 514 N.E.2d at 721.

⁴⁷⁴ Brief of Defendants-Appellants at 4-5, *Buddell v. Bd. of Trustees of the State University Retirement Sys.*, 118 Ill. 2d 99, 514 N.E.2d 184 (1987) (64296). See Reply Brief of Defendants-Appellants at 4, *Buddell v. Bd. of Trustees of the State University Retirement Sys.*, 118 Ill. 2d 99, 514 N.E.2d 184 (1987) (64296) ("The 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.").

⁴⁷⁵ Reply Brief of Defendants-Appellants, *supra* note 472, at 3.

⁴⁷⁶ 1976 Ill. Att'y Gen. Op. No. S-1153, 1976 Ill. Att'y Gen. 289, 291 (citing *Peters*) ("Neither 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.").

⁴⁷⁷ *Buddell*, 118 Ill. 2d at 105-06, 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]."

⁴⁷⁸ Sidley Memo, *supra* note 346, at 22-27.

or surrendered as long as ‘consideration’ is provided that supports the change in the contract.”⁴⁷⁹ Sidley defines “consideration” as a “new benefit to the employee, a new detriment to the employer, or . . . mutual agreement.”⁴⁸⁰

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.⁴⁸¹ 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.’”⁴⁸² In Sidley’s view, “governments have the constitutional authority to undertake either of these actions, except “for judges and other officers whose compensation is constitutionally protected.”⁴⁸³ 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.”⁴⁸⁴

Sidley further states its position is supported by two Illinois employment law cases cited by Justice DiVito as well as *Kraus*.⁴⁸⁵ 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.”⁴⁸⁶ 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.’”⁴⁸⁷

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.⁴⁸⁸

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”)

⁴⁷⁹ *Id.* at 23 (quoting *Robinson v. Ada S. McKinley Comm. Servs., Inc.*, 19 F.3d 359 (7th Cir. 1994)).

⁴⁸⁰ *Id.* at 23.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* (relying on *Doyle v. Holy Cross Hosp.*, 186 Ill. 2d 104 (1999) and *Ross v. May Co.*, 377 Ill. App. 3d 387 (1st Dist. 2007)).

⁴⁸⁶ *Id.* at 25-26.

⁴⁸⁷ *Id.* at 26.

⁴⁸⁸ DiVito May Memo, *supra* note 354, at 7.

have “at-will” status, while the remaining 68% are covered by the Personnel Code and may only be terminated “for cause.” Moreover, 95% of those employees (45,645) are further covered by a collective bargaining agreement with wage and job protections.

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 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.⁴⁸⁹ 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.⁴⁹⁰ The Clause, in turn, prohibits *unilateral* action by the legislature “which directly diminish[es] the benefits to be received by those who became members of the pension system prior to the enactment of legislation, *though they are not yet eligible to retire.*”⁴⁹¹ Accordingly, the Supreme Court has held that pension benefits “cannot be altered, modified or released except in accordance with usual contract principles.”⁴⁹² Any modifications, of course, would need to be supported by new consideration and the mutual assent of the affected public employee.⁴⁹³

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.⁴⁹⁴ In the context of 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

⁴⁸⁹ *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379, 387, 574 N.E.2d 689, 695 (1st Dist. 1991)

⁴⁹⁰ *See e.g., Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill. App. 3d 697, 700, 579 N.E.2d 997, 999 (1st Dist. 1991) (“An 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.”).

⁴⁹¹ *Kraus v. Bd. of Trustees of the Police Pension Fund of Niles*, 72 Ill. App. 3d 833, 849, 390 N.E.2d 1281 1292-93 (1st Dist. 1979); *Id.* at 847-48, 390 N.E.2d at 1291-92 (“the convention chose to follow New York and provide that the employees’ [pension] rights vest at the time they became members of the system. * * * [I]n 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.”).

⁴⁹² *Buddell v. Bd. of Trustees of the State Universities Retirement Sys.*, 118 Ill. 2d 99, 104-05, 514 N.E.2d 184, 187 (1987).

⁴⁹³ *Kraus*, 72 Ill. App. 3d at 849, 390 N.E.2d at 1293. *See also Lomax v. Matthews*, 114 N.Y.S.2d 682 (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 (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).

⁴⁹⁴ *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) (“But consistent with the 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.*, 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1st Dist. 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.”).

employee is eligible to retire.⁴⁹⁵ Similarly, the State could not force an employee to accept a forfeiture of his or her vested rights merely by continuing to work.⁴⁹⁶ As with any modification to an existing contract, there must be an offer, new consideration, and voluntary acceptance.⁴⁹⁷ 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."⁴⁹⁸

Second, Sidley fails to specify the duration of the forbearance. Since the Club appears to believe that public employees are overpaid,⁴⁹⁹ it is unreasonable to assume that the forbearance being offered is

⁴⁹⁵ *Kraus*, 72 Ill. App. 3d at 849, 390 N.E.2d at 1293. *Accord Greves v. Firemen's Pension Fund of City of Blue Island*, 147 Ill. App. 3d 956, 958, 498 N.E.2d 618, 620 (1st Dist. 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); *Thompson v. Retirement Bd. of Policemen's Annuity and Ben. Fund of City of Chicago*, 379 Ill.App.3d 498, 505, 884 N.E.2d 195, 201 (1st Dist. 2008) (same). See *Kulins*, 121 Ill. App. 3d at 526-27, 459 N.E.2d at 1044 ("Once 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 v. Copins*, 402 P.2d 541, 545-46 (1965) (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, 1139-140 (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 and Electric Bd.*, 177 P.3d 12, 19-21 (Or. 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 v. Bd. of Trustees of the Pension Fund of the Village of Hoffman Estates*, 125 Ill. App. 3d 1096, 1099-1100, 466 N.E.2d 1075, 1077-78 (1st Dist. 1984) (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. For Township High Sch. Dist. Glenbard Dist. 87*, 399 Ill. App. 3d 121, 139, 925 N.E.2d 297, 314 (2nd Dist. 2010) ("The 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 continuing to work under similar circumstances was held to constitute assent to a reduction of vested benefits.") (quoting *Bland v. Fiatallis North America, Inc.*, 401 F.3d 779, 784 (7th Cir. 2005)).

⁴⁹⁶ *McCaskey v. Cal. State Auto. Ass'n*, 189 Cal. App. 4th 947, 970-973 (Cal. Ct. App. 2010); *Yeazell*, 402 P.2d at 545-46; *Beard*, 556 P.2d at 1139-40.

⁴⁹⁷ *York v. Cent. Ill. Mut. Relief Ass'n*, 340 Ill. 595, 602 (1930) ("There 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."); *Doyle v. Holy Cross Hosp.*, 186 Ill. 2d 104, 112, 708 N.E.2d 1140, 1145 (1999) ("A modification of an existing contract, like a newly formed contract, requires consideration to be valid and enforceable."); *Robinson v. Ada S. McKinley Comm. Servs., Inc.*, 19 F.3d 359, 364 (7th Cir. 1994) (applying Illinois law) ("A valid modification requires an offer, acceptance, and consideration.").

⁴⁹⁸ *First Nat. Bank of Red Bud v. Chapman*, 51 Ill. App. 3d 738, 366 N.E.2d 937 (5th Dist. 1977); 3 Richard A. Lord, *WILLISTON ON CONTRACTS* § 7:44 (4th ed. 2010) ("Mere 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.").

⁴⁹⁹ Pension Task Force Report, *supra* note 6, at 64-68

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.⁵⁰⁰

Indeed, the Club's proposal is akin to what took place in *Mimica v. Area Interstate Trucking, Inc.*⁵⁰¹ In that case, an "at-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."⁵⁰² 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.⁵⁰³ 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 directly tie the potential threat of a loss of employment or cut in pay as a means to "bargain for" a reduction in pension benefits.⁵⁰⁴ *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.⁵⁰⁵ 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 to directly cut their pension benefits. Such a termination would most likely constitute a retaliatory discharge. Illinois courts have long held that public employees do not abandon their constitutional rights as a function of employment, nor may they be arbitrarily barred or removed from employment.⁵⁰⁶ 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."⁵⁰⁷ 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 Supreme Court has recognized that retaliatory discharge is an exception to the "at-will" employment doctrine and covers public employees.⁵⁰⁸

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.⁵⁰⁹ 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

⁵⁰⁰ 3 Richard A. Lord, WILLISTON ON CONTRACTS § 7:48 (4th ed. 2010) ("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.").

⁵⁰¹ 250 Ill. App. 3d 423, 620 N.E.2d 1328 (1st Dist. 1993).

⁵⁰² *Id.* at 431-32, 620 N.E.2d at 1334-35.

⁵⁰³ *Id.*

⁵⁰⁴ See Justice DiVito May Memo, *supra* note 354, at 7-8; *Kraus v. Bd. of Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 849, 390 N.E.2d 1281, 1293 (1st Dist. 1979). Cf. *Bd. of County of Comm'rs of Wabunsee Cty. V. O'Hare Truck Ser., Inc.*, 518 U.S. 668, 696 (Scalia, dissenting) ("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.").

⁵⁰⁵ *Id.*

⁵⁰⁶ *Scutt v. LaSalle County Bd.*, 97 Ill. App. 3d 181, 186, 423 N.E.2d 213, 218 (3rd Dist. 1981).

⁵⁰⁷ *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 528-29, 478 N.E.2d 1354, 1357 (1985).

⁵⁰⁸ See *id.* at 525, 478 N.E.2d at 1356 ("The 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.*, 231 Ill. 2d 111, 896 N.E.2d 232 (2008) (allowing retaliatory discharge claim against a public sector employer).

⁵⁰⁹ See also *Hegeler v. Ill. State Toll Highway Auth.*, No 05 C 2739, 2005 WL 2861051 *4 (N.D. Ill. 2005) (holding that a public employee could bring a retaliatory discharge action against a public employee for a constitutional violation); *Fragakis v. Ill. State Toll Highway Auth.*, No 05 C 2741, 2006 WL 533359 *5-*6 (N.D. Ill. 2006) (same).

void.⁵¹⁰ 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 have your salary 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, “attempting 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 authority to summarily discharge probationary [at-will] [public employees].”⁵¹¹

A recent California court decision is also instructive.⁵¹² The case involved “at-will” employees selling insurance policies who obtained vested rights to sell fewer policies than other employees.⁵¹³ The employer wanted the employees to sell more policies and attempted to unilaterally modify the employees’ vested rights by forbearing from firing the employees.⁵¹⁴ The employees refused to consent to the unilateral change.⁵¹⁵ 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].”⁵¹⁶ The court further concluded that the employees did not consent to the modification merely by continuing to work after the modification took place.⁵¹⁷

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.⁵¹⁸ 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.⁵¹⁹

The Arizona Supreme Court reached a similar conclusion in *Yeazell v. Capins*.⁵²⁰ 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

⁵¹⁰ *Cf.* *Gerber v. First National Bank of Lincolnwood*, 30 Ill. App. 3d 776, 779-80, 332 N.E.2d 615, 618 (1st Dist. 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); *Hasentab v. Bd. of Fire and Police Commissioners of the City of Belleville*, 71 Ill. App. 3d 244, 389 N.E.2d 588 (5th Dist. 1979) (holding that public employer could not suspend and reprimand firemen who exercised their constitutional rights).

⁵¹¹ *DiFalco v. Bd. Trustees of Firemen’s Pension Fund of Wood Dale Fire Prot. Dist.*, 122 Ill. 2d 22, 31-32, 531 N.E.2d 923, 927 (1988).

⁵¹² *McCaskey v. Cal. State Auto. Ass’n*, 189 Cal. App. 4th 947 (Cal. Ct. App. 2010).

⁵¹³ *Id.* at 963-970.

⁵¹⁴ *Id.* at 958.

⁵¹⁵ *Id.* at 972.

⁵¹⁶ *Id.* at 970.

⁵¹⁷ *Id.* at 971-73.

⁵¹⁸ *See e.g.*, 40 ILCS 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).

⁵¹⁹ *Haake v. Bd. of Educ. for Township High School Dist. Glenbard Dist.* 87, 399 Ill. App. 3d 121, 138, 925 N.E.2d 297, 313-14 (2nd Dist. 2010). *See also* *Excelsior Stove & Mfg. Co. v. Venturelli*, 290 Ill. App. 3d 502, 8 N.E.2d 702, 704 (2nd Dist. 1937) (“The 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.”).

⁵²⁰ 98 Ariz. 109, 402 P.2d 541 (Ariz. 1965).

the employee.⁵²¹ 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 rights.⁵²² In the court's view, the employee could not be compelled to choose while being employed between his original pension rights and statutorily-modified pension rights via "legislative coercion."⁵²³

Acceptance can only be demonstrated if the employee took some affirmative action apart from just working as usual to manifest a desire to be bound by the offer.⁵²⁴ 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.⁵²⁵ 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 Illinois Clause is modeled after.⁵²⁶ That approach requires any waiver to be assessed on an individualized basis.⁵²⁷

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."⁵²⁸ Court decisions from other jurisdictions take the same view.⁵²⁹ As the Illinois Appellate Court explained in a similar context, "the [government] cannot whipsaw citizens into

⁵²¹ *Id.* at 116, 402 P.2d at 546 (citing and quoting from *York v. Cent. Ill. Mut. Relief Ass'n*, 340 Ill. 595, 602, 173 N.E. 80, 83 (1930)).

⁵²² *Id.* at 117, 402 P.2d at 546-47.

⁵²³ *Id.*

⁵²⁴ *Haake*, 399 Ill. App. 3d at 138, 925 N.E.2d at 313-14; *Yeazell*, 98 Ariz. at 117, 402 P.2d at 546-47.

⁵²⁵ See e.g., *Suburban Downs, Inc. v. Ill. Racing Bd.*, 316 Ill. App. 3d 404, 735 N.E.2d 697 (1st Dist. 2000) (explaining that while property rights, once acquired, cannot be dissolved by the legislature, the plaintiff knowingly and voluntarily waived its 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).

⁵²⁶ *Lomax v. Matthews*, 114 N.Y.S. 2d 682, 684-85 (1951); *Doyle v. Wright*, 108 N.Y.S.2d 473, 474-75 (1951); *Carroll v. Grumet*, 117 N.Y.S.2d 553, 555-57 (1952); *Rosen v New York City Teachers' Retirement Bd.*, 122 N.Y.S.2d 485, 487-88 (1953). *Accord Kleinfeldt v. New York City Employees Retirement System*, 341 N.Y.S.2d 784, 789-90 (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).

⁵²⁷ *Schwartz v. Schwartz*, 114 N.Y.S.2d 730, 737 (1952).

⁵²⁸ 186 Ill. 2d 104, 106, 708 N.E.2d 1140, 1146 (1999).

⁵²⁹ 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 Entertainment*, 674 F. Supp. 1194, 1199 (E.D. Va. 1987) ("Under [the employer's] view, acceptance is inferred from an employee's continuing to work with knowledge of the handbook's terms. Accordingly, an employee seeking to reject the offer could not remain 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."). See also 2 Richard A. Lord, *WILLISTON ON CONTRACTS* § 6:53 (4th ed. 2010) ("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.").

‘voluntarily’ choosing one of two means by which they will be divested of an existing property interest.”⁵³⁰

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.⁵³¹ 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.⁵³² As explained below, welching by 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.”⁵³³ 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.*”⁵³⁴

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.”⁵³⁵

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

⁵³⁰ *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379, 387, 574 N.E.2d 689, 695 (1st Dist. 1991) (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).

⁵³¹ *York*, 340 Ill. at 602 (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].”).

⁵³² Sidley Austin LLP, *The State is not a Guarantor of State Pension Fund Obligations to Pension Plan Members* at 1 [hereinafter Sidley Guarantor Memo] available at <http://www.illinoisbroke.com/files/SidleyGuarantor.pdf> (lasted visited Feb. 19, 2011). See also Sidley Austin LLP, *Memorandum: The State of Illinois, and the City of Chicago and Smaller Municipalities, Are Not Guarantors of the Payment of Pension Benefits* (Dec. 7, 2010) [hereinafter Sidley Supplemental Guarantor Memo] (on file with author).

⁵³³ Sidley Guarantor Memo, *supra* note 532, at 1.

⁵³⁴ *Id.* at 1 (quoting 40 ILCS 5/22-403).

⁵³⁵ 40 ILCS 5/14-132 (emphasis added).

states: “if the fund does not have sufficient assets, the State is the guarantor that pension benefits will be paid.”⁵³⁶ 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.⁵³⁷

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 “Obligation of the State” language “could not have been intended to establish a State guarantor obligation for pension benefits.”⁵³⁸ To support this proposition, Sidley points to the reasoning in the Illinois Supreme Court’s *Lindberg* decision.⁵³⁹ 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.”⁵⁴⁰ 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.⁵⁴¹ 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.⁵⁴² 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.⁵⁴³

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.”⁵⁴⁴ Illinois courts have interpreted the word “diminish” under both the 1870 and 1970 Illinois Constitutions as a *mandate* to pay an obligation when due.⁵⁴⁵ As a consequence, Illinois courts will

⁵³⁶ Sidley Guarantor Memo, *supra* note 532, at 2.

⁵³⁷ *Id.*

⁵³⁸ Sidley Supplemental Guarantor Memo, *supra* note 532, at 4, 15-21.

⁵³⁹ *Id.* at 19-21.

⁵⁴⁰ *Id.* at 8-13.

⁵⁴¹ *Id.* at 9.

⁵⁴² *Id.* at 9-10.

⁵⁴³ *Id.* at 28-37.

⁵⁴⁴ See *supra* notes 21-25, 365-73 and accompanying text in Parts I and III, respectively.

⁵⁴⁵ See *People ex rel. Lyle v. City of Chicago*, 360 Ill. 25, 28-29, 195 N.E. 451 (1935) (construing Article IX, § 11 of the 1870 Illinois Constitution during the depths of the Great Depression as a command 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.”); *People ex rel. Northrup v. City Council of the City of Chicago*, 308 Ill. App. 3d 284, 31 N.E.2d 337 (1st Dist. 1941) (same conclusion with respect to the salaries of aldermen); *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 298-309, 811 N.E.2d 652, 659-66 (2004) (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.”).

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.⁵⁴⁶

This conclusion is bolstered by Delegate Kinney’s statements at the Convention. Delegate Kinney explained that the term “impair” “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.”⁵⁴⁷ 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.⁵⁴⁸ 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.”⁵⁴⁹

In addition, the Illinois Supreme Court concluded in *Lindberg, McNamee*, and *Sklodowski* that the Clause guarantees that pension recipients will receive pension payments when they become due.⁵⁵⁰ 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.”⁵⁵¹ As a result, Sidley’s search for the “magic”⁵⁵² word “guarantor” in the Clause is unnecessary given 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.”⁵⁵³ The statute’s use of the word “specify” denotes a common meaning “to mention, describe, or define in detail.”⁵⁵⁴

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.⁵⁵⁵ 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.⁵⁵⁶

⁵⁴⁶ See *Robbins v. Bd. of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 541, 687 N.E.2d 39, 43-44 (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.”); *People v. Smith*, 236 Ill. 2d 162, 167, 923 N.E.2d 259 (2010) (“if a term has a settled legal meaning, the courts will normally infer the legislature intended to incorporate the established meaning.”).

⁵⁴⁷ IV Proceedings 2926.

⁵⁴⁸ *Id.* at 2929.

⁵⁴⁹ *Id.* at 2929.

⁵⁵⁰ See discussion Part II B of this Article.

⁵⁵¹ *McNamee v. State*, 173 Ill. 2d 433, 444 672 N.E.2d 1159, 1164 (1996)

⁵⁵² Sidley Supplemental Guarantor Memo, *supra* note 532, at 4.

⁵⁵³ 40 ILCS 5/2-125; 40 ILCS 5/14-170; 40 ILCS 5/15-156; 40 ILCS 5/16-158; 40 ILCS 18-132.

⁵⁵⁴ WEBSTER’S NEW WORLD DICTIONARY 1367 (2d Coll. Ed. 1978).

⁵⁵⁵ *Taddeo v. Bd. Trustees of the Ill. Municipal Retirement Fund*, 216 Ill. 2d 590, 596, 837 N.E.2d 876, 879 (2005).

⁵⁵⁶ *Shields v. State Employees’ Retirement Sys.*, 363 Ill. App. 3d 999, 1004, 844 N.E.2d 438, 442 (1st Dist. 2006); *Jones v. Jones-Blythe Construction Co.*, 150 Ill. App. 3d 53, 55, 501 N.E.2d 374, 375 (4th Dist. 1986).

Alternatively, Illinois courts characterize public pension benefits as “deferred compensation,” and as a “chase-in-action.”⁵⁵⁷ A “chase-in-action” is an intangible, personal property right to bring an action to receive or recover a debt, moneys or damages.⁵⁵⁸ As a form of compensation, the pension benefits owed by an employer to an employee create a debtor and creditor relationship.⁵⁵⁹ 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.⁵⁶⁰ 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.⁵⁶¹

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.⁵⁶²

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.⁵⁶³

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 Convention that the main reason the Clause “mandated contractual status” for pension benefits was to ensure what happened in New Jersey would not occur in Illinois.⁵⁶⁴ 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.⁵⁶⁵ The court relied on this premise for its holding that the legislature had

⁵⁵⁷ In re Marriage of Hunt, 78 Ill. App. 3d 653, 661-62, 397 N.E.2d 511, 517-18 (1st Dist. 1979). *Accord*, In re Marriage of Smith, 84 Ill. App. 3d 446, 449, 405 N.E.2d 884, 886 (3rd Dist. 1980); In re Marriage of Papeck, 95 Ill. App. 3d 624, 629-30, 420 N.E.2d 528, 532 (1st Dist. 1981). *See* Sprint Communications Co. v. APCC Services, Inc., 554 U.S. 269, 276 (2008) (“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 interest”).

⁵⁵⁸ Levine v. Pascal, 94 Ill. App. 2d 43, 53, 236 N.E.2d 425, 429 (1st Dist. 1968); Gonzalez v. Profile Sanding Equipment, Inc., 333 Ill. App. 3d 680, 693-94, 776 N.E.2d 667, 679-80 (1st Dist. 2002)

⁵⁵⁹ *See* State Street Furniture Co. v. Armour & Co., 345 Ill. 160, 162-63, 177 N.E. 702, 703 (1931) (“The 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”).

⁵⁶⁰ *Id.* at 167, 177 N.E. at 704.

⁵⁶¹ Sidley Supplemental Memo, *supra* note 532, at 3-4, 15.

⁵⁶² ILL. CONST. 1970 Trans. Sch. § 9.

⁵⁶³ *See e.g.*, Kanellos v. County of Cook, 53 Ill. 2d 161, 290 N.E.2d 240 (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* Washington Home of Chicago v. City of Chicago, 157 Ill. 414, 426-28, 41 N.E. 893, 896-97 (1895) (reaching a similar conclusion under the 1870 Illinois Constitution).

⁵⁶⁴ IV Proceedings 2931.

⁵⁶⁵ *See supra* notes 53-57 and accompanying text.

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.⁵⁶⁶

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 impair a constitutional guarantee by legislation.⁵⁶⁷

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.⁵⁶⁸ As discussed above, Illinois courts have concluded that the Clause affords the legislature no such reserved power.⁵⁶⁹ Relying on *Kraus*, the 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*."⁵⁷⁰ As a New York court noted, "[a]lthough fiscal relief is a current imperative, an unconstitutional method may not be blinked."⁵⁷¹

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,⁵⁷² it undoubtedly guarantees them the right to receive the money due them at the time of retirement.⁵⁷³

In addition, the Supreme Court has recognized, per the statements of Delegate Kinney, that if a pension fund were "on the verge of bankruptcy or imminent bankruptcy" and "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.⁵⁷⁴ Since the Clause acts as a restriction on legislative power, it is enforceable by the courts.⁵⁷⁵

⁵⁶⁶ *Id.*

⁵⁶⁷ *Washington Home*, 157 Ill. at 426-28, 41 N.E. at 896-97 (1895) ("In 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.").

⁵⁶⁸ Sidley Supplemental Guarantor Memo, *supra* note 532, at 33-35.

⁵⁶⁹ See *supra* notes 245-46, 265-67, 455-67 and accompanying text.

⁵⁷⁰ *Felt v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 167-68, , 481 N.E.2d 698, 702 (1985).

⁵⁷¹ *Kleinfeldt v. New York Employees' Retirement Sys.*, 365 N.Y.S.2d 500, 324 N.E.2d 865 (1975) (*cited and quoted favorably by Felt*, 118 Ill. 2d at 163, 481 N.E.2d at 700).

⁵⁷² See *supra* notes 295, 311, 328 and accompanying text. *People ex rel. Illinois Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 272, 326 N.E.2d 749, 752 (1975)

⁵⁷³ *Lindberg*, 60 Ill. 2d. at 271, 326 N.E.2d at 751-52 (stating that the Clause provides the contractual right to "receive money due them at the time of their retirement"); *McNamee v. State*, 173 Ill. 2d 433, 446, 672 N.E.2d 1159, 1166 (1996) ("[the Clause] creates an enforceable contractual relationship that protects only the right to receive benefits."); *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 230-31, 695 N.E.2d 374, 378-79 (1998) (same).

⁵⁷⁴ *McNamee*, 173 Ill. 2d at 446-47, 62 N.E.2d at 1166; *Skłodowski*, 182 Ill. 2d at 233, 695 N.E.2d at 379.

⁵⁷⁵ *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 390 N.E.2d 847 (1979) ("limitations written into the Constitution are restrictions on legislative power and are enforceable by courts."). See also *People ex rel. Hilger v. Myers*, 114 Ill. App. 2d 478, 252 N.E.2d 924 (1st Dist. 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).

This conclusion comports with the drafters' original intent,⁵⁷⁶ and the voters' understanding that pension recipients would receive their *full* benefits.⁵⁷⁷ 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.⁵⁷⁸ Sidley's contention that no such arguments were made is simply untrue.⁵⁷⁹

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*.⁵⁸⁰ 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."⁵⁸¹ The court applied this principal to compel the State Comptroller to pay judges from the State Treasury, without an appropriation, the cost of living

⁵⁷⁶ See IV Proceedings 2926 (statements of principal sponsor, Delegate 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.* (statements of co-sponsor, Delegate 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 some kind of dignity during their golden years") (emphasis added).

⁵⁷⁷ See *supra* notes 197-203 and accompanying text (discussing the Convention's official explanation and newspaper articles).

⁵⁷⁸ See *Br. Teachers' Retirement Sys. of the State of Illinois, People ex rel. Skodowski v. State*, 1997 WL 33559055 at *25-26 ("Indeed, 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 Defendant attempts 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."); *Br. Ill. Att'y Gen., People ex rel. Skodowski v. State*, 1997 WL 33669053 at *41-*44 (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 Systems if adequate contributions are not otherwise appropriated."); *Reply Br. Ill. Att'y Gen., People ex rel. Skodowski v. State*, 1997 WL 33669057, at *23-*24 ("The 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." * * * "If, as this Court has held, that provision [i.e., 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.").

⁵⁷⁹ See Sidley Guarantor Memo, *supra* note 532, at 4; Sidley Supplemental Guarantor Memo, *supra* note 532, at 25.

⁵⁸⁰ 211 Ill. 2d 286, 811 N.E.2d 652 (2004). See *People ex rel. Sklodowski v. Illinois Retired Teachers Ass'n*, 284 Ill. App. 3d 809, 817-18, 674 N.E.2d 81, 86-87 (1st Dist. 1996) ("Once rights are created by the constitution or statute, '[i]t is within the realm of judicial authority to assure that the action of the members of the executive branch does not deprive [individuals] of an institution of rights conferred by statute or by the Constitution.'" (citation omitted) *abrogated on other grounds, Sklodowski*, 182 Ill. 2d at 233, 695 N.E.2d at 379. *Accord Noyola v. Bd. of Educ. of the City of Chicago*, 179 Ill. 2d 121, 132, 688 N.E.2d 81, 86 (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.") (citing *Illinois Retired Teachers Ass'n*, 284 Ill. App. 3d at 817-18, 674 N.E.2d at 87).

⁵⁸¹ 211 Ill. 2d at 314, 811 N.E.2d at 668-69 (quoting *Antle v. Tuchbreiter*, 414 Ill. 571, 581, 111 N.E.2d 836 (1953)).

increase that was part of their constitutionally-protected salaries under Article VI, Section 14 of the Illinois Constitution.⁵⁸²

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.⁵⁸³

G. The State Cannot Require Current Employees to Pay Higher Contribution Rates For The Same Level Of Pension Benefits

While preparing this Article, the Commercial Club unveiled in December 2010 a second proposal to unilaterally wean current employees off of their existing pension benefit plans.⁵⁸⁴ Under this proposal, current employees would be required to pay substantially higher contributions to retain the same pension plans.⁵⁸⁵

For example, the normal cost of benefits for a sitting judge as a JRS member is 38.79% of his or her salary.⁵⁸⁶ 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%.⁵⁸⁷ The Club's new proposal would increase the employee contribution from 11% to *at least* 36.45%—a *three fold plus* increase in what sitting judges would need to pay to obtain the same pension benefit.⁵⁸⁸

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.⁵⁸⁹ This amount remains to be calculated for JRS and the other State systems, and would further *increase* the employee contribution rate paid by current members.⁵⁹⁰ 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 last year for new employees beginning on January 1, 2011.⁵⁹¹ Under this option, employees and the State would split the plan's cost.⁵⁹² In addition, the proposal would permit employees to select a

⁵⁸² *Id.*

⁵⁸³ 40 ILCS 15/1 (2008); 40 ILCS 15/1.1 (2008); 40 ILCS 15/1.2 (2008).

⁵⁸⁴ Tom Cross, *More Pension Reforms*, CHICAGO TRIBUNE (Dec. 17, 2010) (“The 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.”) available at http://press.gop-network.org/news/full_article/116122?request=http%3A%2F%2Fpress.gop-network.org%2F (last visited on Feb. 21, 2011).

⁵⁸⁵ *Id.* (“Employees 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.”).

⁵⁸⁶ Letter from Sandor Goldstein, Goldstein & Associates, to Dan Haniewicz of the Commission on Government Forecasting and Accountability regarding House Bill 149, at 3 (Feb. 16, 2011) (on file with author).

⁵⁸⁷ *Id.*

⁵⁸⁸ *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.*

⁵⁸⁹ *Id.* at 2, 5.

⁵⁹⁰ *Id.* at 5.

⁵⁹¹ 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> (last visited Feb. 22, 2011).

⁵⁹² See *supra* note 581.

401(k) style defined contribution plan in which the State would match employees' contributions.⁵⁹³ In January, identical legislation encompassing the proposal was filed in the House and Senate.⁵⁹⁴

Simply put, the Club's latest proposal seeks 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 violates 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.⁵⁹⁵ 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.⁵⁹⁶

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 minimum payment required under a loan without a contractual right to do so. Since 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: "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."⁵⁹⁷ 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."⁵⁹⁸

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.⁵⁹⁹ Also, the provision was described to voters as protecting pension benefit rights and granting public employees a constitutional right to their "full pension benefits."⁶⁰⁰ As a consequence, the Club's proposal deviates from the framers' intent and must be rejected.

⁵⁹³ *Id.*

⁵⁹⁴ See 97th Ill. Gen. Assem., Senate Bill 105 available at <http://www.ilga.gov/legislation/97/SB/PDF/09700SB0105lv.pdf> (last visited Feb. 21, 2011); 97th Ill. Gen. Assem., House Bill 149 available at <http://www.ilga.gov/legislation/97/HB/PDF/09700HB0149lv.pdf> (last visited Feb. 21, 2011).

⁵⁹⁵ ILL. CONST. 1970, art. XIII, § 5.

⁵⁹⁶ See *supra* note 21 and accompanying text.

⁵⁹⁷ See *supra* note 173 quoting IV Proceedings 2930, and accompanying text.

⁵⁹⁸ See *supra* note 176 quoting IV Proceedings 2930-31, and accompanying text. See IV Proceedings 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.").

⁵⁹⁹ See *supra* notes 181-192 and accompanying text.

⁶⁰⁰ See *supra* notes 197-203 and accompanying text.

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.⁶⁰¹ 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.”⁶⁰² These pension rights, in turn, “vest” when the employee begins making contributions to the system.⁶⁰³ Thus, the Clause entitles an employee to receive a pension based on those relevant sections of the Pension Code.⁶⁰⁴

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.⁶⁰⁵ Put differently, the State is merely offering current employees what it is already required to do—pay 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.⁶⁰⁶

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).”⁶⁰⁷ 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.”⁶⁰⁸

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,⁶⁰⁹ 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.⁶¹⁰

⁶⁰¹ See *supra* notes 220, 277-85, 307, 327, 428, 437, 443-45, 447-48, 465, 468-69 and accompanying text.

⁶⁰² *Schroeder*, 219 Ill. App. 3d at 700, 579 N.E.2d at 999-1000.

⁶⁰³ *Id.* at 700, 579 N.E.2d at 999; *Kraus*, 72 Ill. App. 3d at 844-45, 390 N.E.2d at 1289.

⁶⁰⁴ See *e.g.*, *Kraus*, 72 Ill. App. 3d at 844-45, 390 N.E.2d at 1289; *Redding*, 115 Ill. App. 3d at 245, 450 N.E.2d at 765; *DiFalco*, 122 Ill. 2d at 26, 521 N.E.2d at 448 (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 in 1982 when plaintiff began paying into the fund.”).

⁶⁰⁵ See *Boyd v. Madison Mutual Ins. Co.*, 116 Ill. 2d 305, 309, 507 N.E.2d 855, 857 (1987) (declaring that it would be unconstitutional to retroactively apply a statute to an existing insurance contract where the statute imposed additional 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).

⁶⁰⁶ *Smith v. Gray*, 316 Ill. 488, 496, 147 N.E. 459 (1925) (“It 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 Financial Services*, 337 Ill. App. 3d 58, 64, 785 N.E.2d at 44-45 (1st Dist. 2003) (“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*, 271 Ill. App. 3d 833, 648 N.E.2d 317, (4th Dist. 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.”).

⁶⁰⁷ *Oregon State Police Officers’ Ass’n v. State*, 918 P.2d 765, 775-76 (Or. 1996)

⁶⁰⁸ *Id.*

⁶⁰⁹ In *Miller v. Retirement Board of Policemen’s Annuity*, 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. 329 Ill. App. 3d 589, 594, 771 N.E.2d 431, 435 (1st Dist. 2002). 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 600, 771 N.E.2d 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.

⁶¹⁰ See *supra* notes 491, 493-95, 501, 513-14, 515-528 and accompanying text.

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.⁶¹¹ That approach permits the legislature to unilaterally reduce the benefits of current employees so long as they receive some kind of off-setting advantage.⁶¹² 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 XII, and overrule this court's decision in *Bardens*."⁶¹³

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."⁶¹⁴ *Kraus* cited a Michigan Supreme Court advisory opinion for this proposition.⁶¹⁵

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.⁶¹⁶ 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."⁶¹⁷

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.⁶¹⁸ The Illinois Supreme Court agreed in *Felt*, and used this analysis to reject the Attorney General's claim that the legislature retained a reserved power under the Clause to adversely alter the pension rights of current employees.⁶¹⁹

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 \$1200 annual increase—without any commensurate advantage to employees would run afoul of the Michigan Constitution.⁶²⁰ 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, respectively, to the Illinois Education Association and the Teachers Retirement System that a unilateral increase in employee contributions without a simultaneous enhancement in benefits would

⁶¹¹ See *supra* notes at 265-67, and 458-467 and accompanying text.

⁶¹² See *supra* notes 458-67 and accompanying text.

⁶¹³ *Felt v. Bd. Trustees of the Judges Retirement Sys.*, 107 Ill. 2d 158, 167-68, 481 N.E.2d 698, 702 (1985).

⁶¹⁴ *Kraus v. Bd. of Trustees*, 72 Ill. App. 3d 883, 849, 390 N.E.2d 1281, 1293 (1st Dist. 1979).

⁶¹⁵ *Id.*

⁶¹⁶ *In re Enrolled Senate Bill 1269*, 389 Mich. 659 (1973).

⁶¹⁷ *Id.* at 663

⁶¹⁸ *Kraus*, 72 Ill. App. 3d at 847, 390 N.E.2d at 1291.

⁶¹⁹ See *supra* note 267 (citing *Felt*, 107 Ill. 2d at 167-68, 481 N.E.2d at 702).

⁶²⁰ 1985-86 Mich. Att'y Gen. Op. 67, 1985 WL 200597 at *3-5.

violate the Pension Clause.⁶²¹ DLA Piper reached this conclusion in April 2010, while Jenner & Block did so in February 2005 well before it signed onto Sidley's opinion.⁶²²

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.”⁶²³ The phrase is quite curious as it suggests that when push comes to shove Illinois' present economic circumstances should drive how Illinois courts interpret the Clause, rather than its text, Convention history or relevant court decisions.⁶²⁴ Courts, though, “sit to determine questions on stormy as well as calm days,”⁶²⁵ and the Constitution was upheld during the Great Depression.⁶²⁶

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.”⁶²⁷ 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.”⁶²⁸ 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.”⁶²⁹ 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.”⁶³⁰

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

⁶²¹ See Memorandum from William Campbell et al., DLA Piper to the Illinois Education Association, 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 the Teachers Retirement System, Constitutionality of Potential Increases to TRS Members' Contributions at 2, 8 (Feb. 3, 2005) (“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”; further opining that “[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.”).

⁶²² See *supra* note 347.

⁶²³ Editorial, *The suicide pacts*, CHICAGO TRIBUNE, (Nov. 27, 2010) available at http://articles.chicagotribune.com/2010-11-27/news/ct-edit-pension-20101127_1_suicide-pacts-retirement-deals-unions (last visited Feb. 22, 2011).

⁶²⁴ See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J. dissenting) (“[t]here is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

⁶²⁵ WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939 TO 1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 55-56 (1981)

⁶²⁶ See *supra* note 24-24, 541 and accompanying text.

⁶²⁷ Editorial, *Pension bomb still ticking*, QUAD-CITIES ONLINE, (Jan. 18, 2011) available at http://www.qconline.com/archives/qco/print_display.php?id=52701 (last visited Jan. 19, 2011).

⁶²⁸ See Address of Franklin MacVeagh, *supra* note 2.

⁶²⁹ *Id.* at 30.

⁶³⁰ *Id.* at 31.

“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.”⁶³¹ Unfortunately, 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. 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.”⁶³²

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, but also constitutionally protects the pension benefit rights contained in the Pension Code when an employee joins a pension system, including employee contribution rates. The Clause also safeguards pension benefit enhancements that are later added during employment. Further, the Clause bars the General Assembly from adversely changing the benefit rights of current employees 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.⁶³³ By adopting the Clause, the drafters and voters weighed, measured, and found wanting the current claim that it is unfair to pay these pension obligations.⁶³⁴ Public employees have paid their *required* fair share of pension costs; it is incumbent on the State to meet its end of the bargain.

⁶³¹ See *supra* note 100-01 and accompanying text.

⁶³² JOHN PETER ALTGELD, THE COST OF SOMETHING FOR NOTHING 131-32 (1904) (“Every 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.”) available at http://books.google.com/books?id=gIImAAAAMAAJ&printsec=frontcover&dq=the+cost+of+something+for+nothing+altgeld&source=bl&ots=A_jG7CDlwE&sig=vcE2D2Lho1XrVYBcZda_g76pZG4&hl=en&ei=xQ1kTffeEsys8Aas_tzICw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBMQ6AEwAA#v=onepage&q&f=false (last visited Feb. 22, 2011).

⁶³³ William Atwood, Commentary, *Law says state can’t renege on pensions*, CHICAGO SUN-TIMES (Feb. 18, 2011) available at <http://www.suntimes.com/news/otherviews/3876426-417/law-says-state-cant-renege-on-pensions.html?print=true> (“This 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. * * * Today, 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 generations of public services—a pledge memorialized in the state constitution—would be an injustice.”).

⁶³⁴ See V Proceedings 4516 (statements of Delegate Borek, an opponent of the Clause) (“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.”). See IV Proceedings 2928 (Delegate Borek) (“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 Delegate 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. See IV Proceedings 2933 & V Proceedings 4516.

CITY OF CHICAGO RETIREMENT PLANNING HEALTH BENEFITS INFORMATION

Q. Can I continue to receive health care coverage after I retire?

A. When an employee retires, his/her active medical, dental and vision health benefits end on the date of retirement. The Annuitant Medical Care Plan is the only coverage available through the Pension Funds.

In some cases, you and your eligible dependents may continue the medical, dental or vision coverage offered to active employees under the Public Health Service Act (PHSA).

This coverage is only available for a limited time and requires you to pay the full cost of coverage plus an additional 2% administrative fee. If you choose to continue medical coverage under the PHSA and later wish to enroll in the Annuitant Medical Plan, you will have to provide proof of good health.

Dental and vision benefits are not available through Pension Funds.

Q. Can I enroll my dependents in the Annuitant Medical Plan?

A. You may enroll only those dependents who were covered under the City's Medical Plan on the day before you retire. This means that if you remarry while retired or have a newborn, these dependents are not eligible for coverage.

Q. What is the limiting age for dependents under the Annuitant Medical Care Plan?

Unmarried dependents enrolled in the Annuitant Plan are covered until their 19th birthday. Coverage can be extended to their 22nd birthday provided satisfactory proof of student status is received in the Benefits Management Office each school semester. PHSA coverage may be available if your dependent is over the limiting age when you retire.

Q. If I don't enroll in the Annuitant Medical Plan right away, can I enroll at a later date?

A. If you don't enroll within 30 days of becoming eligible, and you wish to enroll later, you will have to provide proof of good health for yourself and your dependents. You will also have to provide proof of good health if you cancel coverage and later wish to re-enroll or if you continue coverage under the PHSA and then want to enroll in the Annuitant Plan.

If you don't enroll when first eligible, you may enroll within 30 days of your 65th birthday without submitting proof of insurability.

Q. If I'm married to a City of Chicago employee who continues to work for the City after I retire, can I continue benefits as a dependent?

A. Yes. You have the option of continuing medical, dental and/or vision coverage as a dependent of your spouse. You will have 30 days to enroll in the Annuitant Plan without proof of good health when your coverage through your spouse ends for any reason.

Q. Do I have to enroll for Medicare coverage when I become eligible?

A. If you are eligible for Medicare Part A benefits and do not accept and enroll for Parts A and B coverage, you may face a substantial financial burden. The Annuitant Medical Plan coordinates with Medicare if you are eligible, even if you choose not to enroll. This means that the Annuitant Plan will only pay benefits above what Medicare would have paid.

If you will be receiving Social Security benefits, Medicare Part A will begin automatically when you reach age 65; Part B also begins automatically, unless you decline this coverage.

If you will not be receiving Social Security, you must apply for Medicare benefits three months before your 65th birthday. If you do not enroll within this time period, the start of coverage may be delayed. You may also be subject to a 10% Medicare Part B penalty for each year you do not enroll.

To avoid this penalty, you should contact the Social Security Administration at least one month before you retire and request an employment verification form. The City of Chicago Benefits Management Office will complete the form for you upon request.

Q. What is the difference between Medicare Part A and Part B?

A. Medicare Part A covers hospital expenses and Part B provides medical benefits. If you do not qualify for Part A benefits under your own work record, you may be eligible for coverage through your spouse. If you will never qualify for Medicare Part A benefits, the Annuitant Medical Plan will usually be your primary insurance.

Q. How does Medicare coordinate with the Annuitant Medical Plan?

A. When you become eligible for Medicare, your primary coverage will be through Medicare and your secondary coverage will be through the Annuitant Medical Plan. As a result, your cost for the Annuitant Medical Plan will be lower. You must notify your Pension Office and Benefits Management Office immediately when you become eligible for Medicare.

Certificate of Service

I, Kenneth T. Goldstein, an attorney, state that I caused a copy of the foregoing **PLAINTIFFS' MOTIONS FOR: 1) MOTION FOR STAY AND/OR AN INJUNCTION PENDING APPEAL AND 2) REQUEST FOR REFERAL TO THE ILLINOIS SUPREME COURT** to be filed and delivered via the Court's Electronic Case Filing System (or by U.S. mail or e-mail) on December 27, 2013 upon the following:

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