IIT CHICAGO-KENT COLLEGE OF LAW
AND
THE UNIVERSITY OF ILLINOIS SCHOOL
OF LABOR AND EMPLOYMENT

ILLINOIS PUBLIC EMPLOYEE RELATIONS
REPORT

Volume 31 Issue 3 – Summer 2014

Illinois Public Pension Reform: What's Past is Prologue

By: Eric M. Madiar

RECENT DEVELOPMENTS

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, The First Amendment and the Illinois Constitution.

Volume 31 Issue 3 – Summer 2014

Illinois Public Pension Reform: What's Past Is Prologue

Eric M. Madiar is Chief Legal Counsel to Illinois Senate President John J. Cullerton and Parliamentarian of the Illinois Senate. He has a B.A. from Truman State University and a J.D. from IIT Chicago-Kent College of Law. The author thanks Senate President John J. Cullerton for the continued opportunity to research public pension issues in Illinois and elsewhere, offer counsel on these issues, and publish in this field. He also thanks Professor Martin Malin for inviting him to write this article. This article is based on an earlier presentation at the Illinois Public Sector Labor Relations Law Conference held at IIT Chicago-Kent College of Law on December 6, 2013.

I. Introduction

In December 2013, after three years of contentious debate, the Illinois General Assembly enacted sweeping pension legislation via Public Act 98-0599 to reduce the pension benefits of current and retired teachers, State and university employees, legislators, and elected State officials.[1] The legislation—which was the culmination of events beginning in 2010, when the legislature lowered the benefits of employees hired after January 1, 2011[2]—broke a political stalemate over competing bills and views on how to address the State's underfunded pension systems.[3]

The 2013 legislation was also the product of aggressive lobbying efforts by Illinois' business community, principally the Commercial Club of Chicago (the "Club"), to cut the benefits of current and retired employees.[4] Although the Club recognized that the State's failure to properly fund the State-funded pension systems was the primary cause of those systems' underfunding,[5] the Club stated it would be "unfair to require taxpayers to bear the costs of the current pension programs for the State's employees."[6] As Eden Martin, then-Club President, stated to Club members, paying these obligations was politically unpalatable because "State Government couldn't cut—and nobody could stand the thought of a tax increase."[7] Ty Fahner, Martin's successor, put it even more bluntly: "[I]t is fundamentally unfair to ask 95 percent of us—all of those who are not in one of the State's five pension systems—to pay for the 5 percent who benefit from those plans."[8]

Public employees and retirees, however, have a much different perspective and view Public Act 98-0599 and other unilateral efforts to cut benefits as morally and legally irresponsible.[9] They point out that "almost 80% of [public sector] workers are ineligible for Social Security, making pensions their only reliable means of retirement security."[10] They note that the State's unfunded pension liabilities are not their fault because they have historically paid their fair share of the normal cost of benefits through payroll deductions.[11] If fault must be assigned, then they contend it is well-established that fault principally rests with past governors and General Assemblies that, for decades, used the moneys the State should have contributed to the pension system to fund public services, such as education, healthcare, and public safety, and stave off the need for tax increases, services cuts or both.[12]

In other words, the State's underfunding of the pension system has, for decades, served as a proverbial credit card that benefitted taxpayers and elected officials alike by relieving them of (i) the short term burden of tax increases, service cuts or both, and (ii) the long term burden of fixing a State fiscal system that generates insufficient revenue to pay for public services and cover the State's actuarially-required pension contributions.[13] As a result, public employees and retirees contend that the State cannot repudiate its pension obligations simply because meeting those obligations now presents the State with politically and economically difficult choices.[14]

This Article chronicles the history of public pension funding in Illinois to give proper context to the Illinois Constitution's Pension Clause, the General Assembly's recent legislation, and the pending legal challenges to that legislation. To that end, the Article first considers the causes of the State's underfunded pension systems. It then provides an overview of the Illinois Constitution's Pension Clause, which presents a significant legal obstacle to the legislation. Against this backdrop, the Article summarizes and discusses the main provisions of Public Act 98-0599. It then provides an update on the five lawsuits challenging the constitutionality of Public Act 98-0599 pending in the Circuit Court of Sangamon County, Illinois as of September 2014. Finally, the Article offers concluding comments on three main legal issues involving the constitutionality of Public Act 98-0599: (1) whether the 3% compounded cost of living adjustment (or "COLA") that is part of a person's base pension qualifies as a protected "benefit" under the Pension Clause; (2) whether persons receiving a pension before the 3% compounded COLA became law in August 1989 could claim that the COLA rate increase is a protected "benefit"; and (3) whether the Pension Clause is subject to a police or reserved powers exception. As detailed below, the Pension Clause, as with other constitutional prohibitions and positive mandates found in the Illinois Constitution, does not yield to claims of necessity, and the likelihood that Public Act 98-0599 will pass legal muster is remote at best.

II. Illinois' Long History of Underfunding Public Pensions

A. State and Municipal Pension Funds Were Chronically Underfunded Long Before the 1970 Illinois Constitutional Convention

For public officials and the general public, Illinois' underfunded State and municipal pension systems are a well-known problem and hardly a surprise. What is surprising, however, is how long the lack of proper funding has been the primary cause of that problem. The discussion that follows reviews the history of that problem.

In 1917, in a report commissioned by the General Assembly, the Illinois Pension Laws Commission described the condition of the State and municipal pension systems as "one of insolvency" and "moving toward crisis" because the "financial provisions [were] entirely inadequate for paying the stipulated pensions when due."[15] The Commission recommended that the General Assembly adopt a "reserve plan" whereby the amount needed to pay pensions when due "should be set aside at the time service is rendered" by the State and municipalities so "each generation of taxpayers pays its own obligations for services rendered."[16]

In 1919, in a subsequent report, the Commission reiterated this conclusion, detailed how the "reserve plan" would operate, and reviewed the legal protections provided to public pensions in Illinois and elsewhere.[17] That legal analysis found, in part, that pension benefits were gratuities, and that pension funds were not held in trust to pay pension amounts due, but could be devoted to other purposes.[18] Interestingly, concerns over the State and municipalities raiding the pension funds to spend the moneys on other purposes later led the delegates to the 1922 Illinois Constitutional Convention to include a provision that would prohibit such action, as a first attempt to protect pension benefits constitutionally.[19] The proposed 1922 Constitution, though, was rejected by voters and not adopted.[20]

Decades later, in 1945, the General Assembly created the Illinois Public Employees Pension Laws Commission to again study the financial condition of State and municipal pension systems and to advise the legislature and the public on trends, best practices, and proposed changes to those systems.[21] From 1947 through 1969, the Pension Commission issued a series of biennial reports with dire warnings of the pension systems' impending insolvency, the growth of unfunded pension liabilities, and the significant burden these liabilities posed for "present and future generations of taxpayers."[22] The Commission observed that "[p]ension obligations [were] not contingent or speculative" but "fixed debts which ultimately must be paid."[23] The Commission stated that the size of these obligations would place a great demand on future tax revenues and needed to be considered in concert with "budgetary needs for other governmental functions and services which [were] steadily increasing."[24] In both its 1965 and 1969 reports, the Commission further stated that these obligations rested "exclusively upon government as the employer" and "must be met by public funds derived from future taxation."[25]

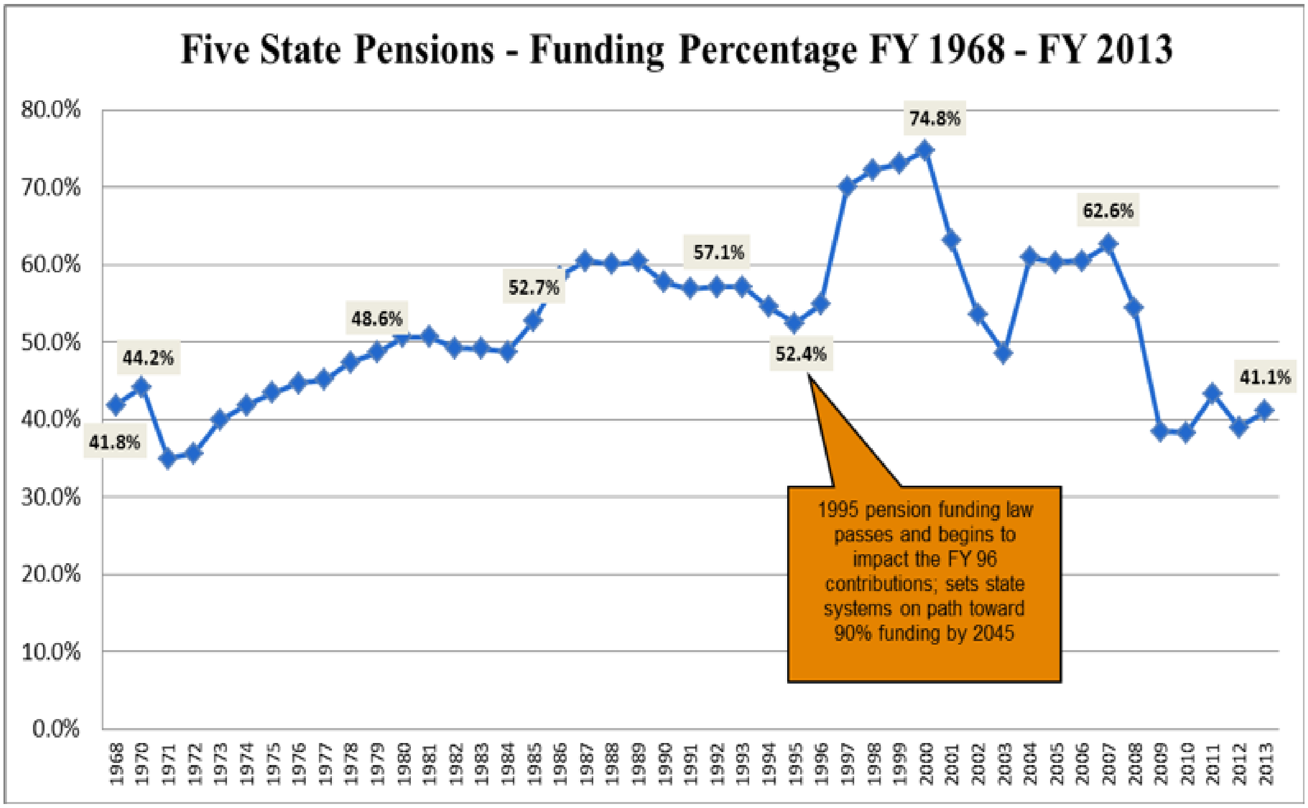
The Commission reported that the unfunded liabilities were primarily due to inadequate pension contributions made by the State and municipalities as public employers.[26] In a statement to Governor William Stratton in 1957, the Commission stated: "[w]hereas many states, particularly those adjoining the State of Illinois, have provided for full or substantially complete funding of pension plans, Illinois has been woefully derelict in this regard."[27] The Commission observed in its 1955 report that the State appropriations to the five State pension funds had "fallen far short of full funding requirements" because of "increased demands upon the State for essential services in many areas."[28] In reports from both 1961 and 1969, the Commission further observed that these appropriations were "arbitrary," "grossly insufficient," and "below mandatory statutory requirements as expressly provided in the governing laws."[29] Indeed, in 1969, the Commission declared that Illinois stood "foremost in the United States in the maintenance and perpetuation of an inherently unsound and unworkable policy of administration for its public employees."[30]

As a consistent and repeated recommendation beginning in 1947, the Commission stated it was "imperative" that the State and municipalities budget and fund their pension costs as employees rendered service, and that the General Assembly enact actuarially-sound funding requirements to retire existing and future liabilities.[31] In the Commission's view, there was "no short cut method to financing pensions."[32] This recommendation, however, went unheeded by the General Assembly partially because of "the unwarranted objections of certain civic organizations to the allocation of proper revenues" to the pension funds.[33]

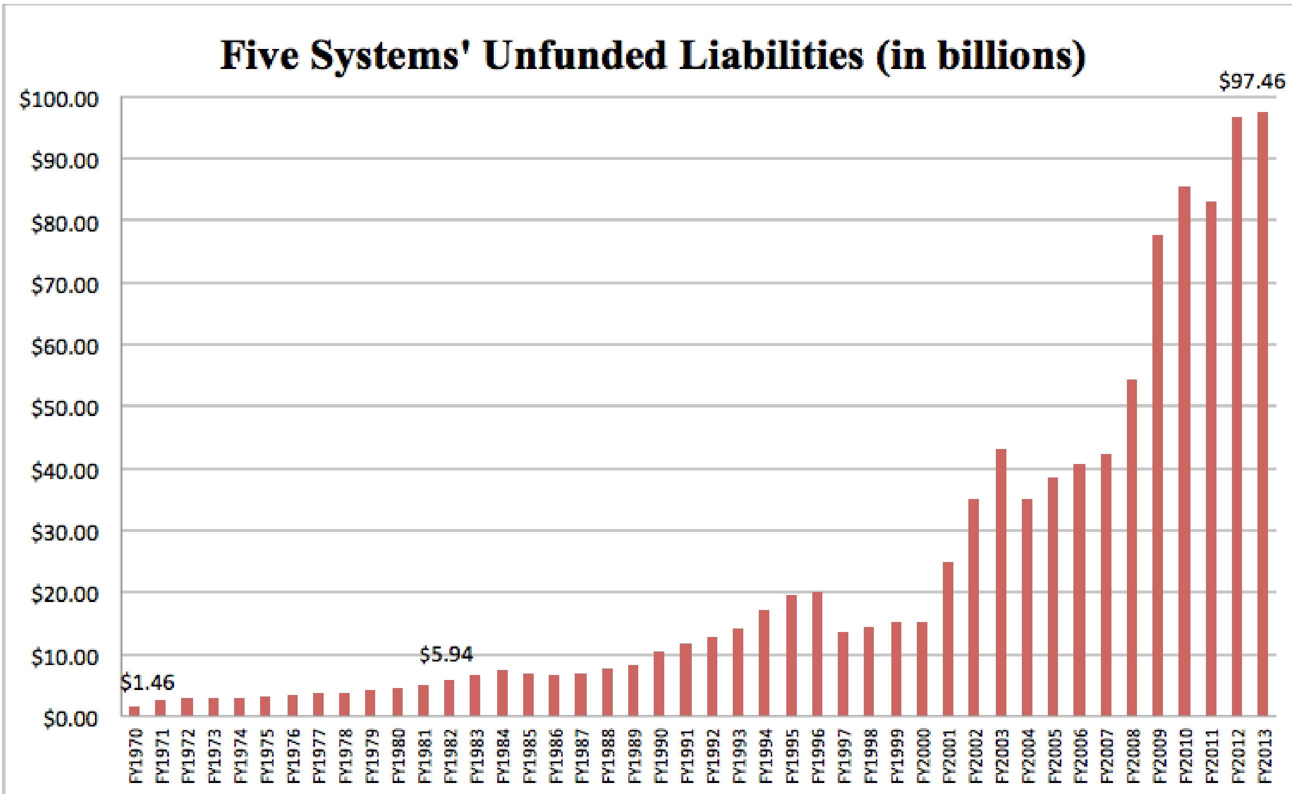
The Commission found it "regrettable" that despite the obvious relationship existing between governmental finance and the pension obligations, "public officials still fail[ed] or refuse[d] to recognize that pension obligations have a direct and immediate relationship to the entire fiscal structure of their respective government units."[34] As early as 1957, the Commission asked rhetorically: “[i]f the State of Illinois and the local governments are today resisting the full or substantial financing of pension obligations under present conditions of economic prosperity, [then] how much more unfavorable will be the financial status of the funds when the obligations mature in greater proportions and the economic conditions may not be as promising?”[35] The Commission later remarked that it “would be unfortunate indeed if the pension expectancies of thousands of employees and dependents are impaired in the future because of the present policy of government to defer costs.”[36] The Commission cautioned that “this is precisely what may occur if required changes [were] not made to provide for financing the pension funds in accordance with their accruing requirements.”[37]

In addition to studying the financial status of the State and municipal pension funds, the Commission contrasted (i) Illinois’ treatment of pension as “gratuities” with (ii) other states’ protection of public pension benefits under a contractual theory throughstate constitutional provisions or court decisions.[38] The Commission explained in its 1961 report that benefits deemed “gratuities” created “no contractual rights for the members” and “no vested rights in the continuance of the plan or in the maintenance of any particular benefit schedule” because the plan and its benefit terms rested “entirely within the discretion of the legislative body that created them.”[39]

By 1969, the Commission reported that the General Assembly Retirement System (GARS) was 68.5% funded, while the State University Retirement System (SURS) was 47% funded.[40] The remaining three funds were funded at the following percentages: State Employees Retirement System (SERS) 43%; Judicial Retirement System (JRS) 32.3%; and Teachers Retirement System (TRS) 40%.[41] Overall, the five State pension systems were 41.8% funded in 1969, while today the systems are similarly 41.1% funded as noted on Chart 1 below.[42]



As noted in Chart 2 below, in 1970, the five State pension systems had unfunded liabilities of $1.46 billion, whereas the systems presently have $97.4 billion in unfunded liabilities.



In addition, in 1969, the downstate police and firemen pension funds were respectively funded at 33.8% and 19.1%[43]The City of Chicago's five pension funds were funded at the following percentages: Police (34.6%); Firemen (50.6%); Laborers (81.9%); Municipal Employees (56.9%); and Teachers (32.7%).[44]

It was against this background that the Sixth Illinois Constitutional Convention ("Convention") convened in Springfield between December 8, 1969 and September 3, 1970, prompting the delegates to add the Pension Clause to the Illinois Constitution.[45] As the Illinois Supreme Court recently observed, the delegates were "mindful that in the past, appropriations to cover state pension obligations had 'been made a political football' and 'the party in power would just use the amount of the state contribution to help balance budgets,' jeopardizing the resources available to meet the State obligations to participants in its pension systems in the future."[46]

As a result, one of the purposes of the Clause was to bar the State from relying on the consequences of its failure to properly fund the pension system as a basis for cutting or repudiating it pension obligations.[47] Delegate Green, one of the Clause's two principal sponsors, explained how in 1964 the New Jersey Supreme Court rejected constitutional protection of pension benefits under a contractual theory and upheld a statute unilaterally cutting the benefits of police and firefighters because of chronic underfunding and insufficient assets to pay both present and future retirees.[48] Delegate Green pointed out that New Jersey's underfunding occurred because State contributions to its pension systems "were not related to the ultimate cost of pension benefits," just like in Illinois.[49]What happened in New Jersey, according to Delegate Green, "[was] basically what the people of Illinois—or the public employees of Illinois—are very fearful of."[50]

B. Chronic Underfunding Continued After The Pension Clause's Adoption in 1970

After the Pension Clause's adoption, the Commission continued to report on the precarious status of the pension systems until it was abolished in 1984 and its duties transferred to the Illinois Economic and Fiscal Commission.[51] As with its reports prior to 1970, the Pension Commission reported that "[c]ontributions by governmental employers [were] still below the level which might be considered adequate for the accruing requirements of the pension funds."[52] The Commission reiterated that its "primary concern" was the imperative need for "a realistic financial policy, consistent with recognized principles on the part of both the State of Illinois and the local governments which will produce adequate revenues for the financial needs of these funds."[53]

The Commission explained that for over 30 years it had advocated actuarial funding of the public retirement systems and insisted that "the State pay not only its share of the current service cost but additional amounts which would amortize the unfunded liability over a period of 30 or 40 years."[54] The Commission noted that because reaching "100% funding was probably impossible to attain . . . it recommended funding at a two-thirds level in the belief that a one-third unfunded liability would be manageable in terms of future State appropriations as annual payout obligations increased."[55] The Commission stated that "[w]hen legislative and executive indifference or hostility prevented implementation of this modified funding principle," it recommended the State pension contributions meet current service costs plus interest on the unfunded accrued liability to preclude further growth in that liability and to moderate the State's subsequent annual payment obligations.[56] The Commission further stated that while this recommendation was codified in 1967 as the statutory funding plan for the State Universities Retirement System, the State failed to follow that funding plan as well as the statutory funding requirements for the other State-supported pension funds.[57] That failure, according to the Commission, was "largely, though not exclusively, responsible for the increasing level of unfunded accrued liabilities."[58]

Undaunted, the Commission continued to advocate through the 1970s and 1980s that the State and municipalities budget and fund their obligations as employees rendered service and in line with actuarially sound principles by paying the "normal cost plus interest" on unfunded liabilities.[59] Under this funding approach, the State and municipalities, as public employers, would make contributions covering the current cost of benefits accrued by employees each year (i.e., "normal cost") as well as the cost associated with the interest due on unfunded liabilities (i.e., "plus interest on unfunded liability").[60] Under this funding approach, unfunded liabilities would *not* be reduced, but would remain a fixed amount that would "shrink as a percentage of payroll or total liabilities."[61] The Commission explained that "this is approach is considered to be acceptable for public retirement systems where permanence can be taken for granted and full funding is not regarded as essential."[62]

The Commission cautioned once more that at some point the "cost requirements for pension may become too burdensome to government," in which case it may be "necessary to limit services of government or reduce pension payouts."[63] The Commission noted, however, that a "reduction of pension payouts or established pension commitments may be difficult or impossible" under the Pension Clause.[64] The Commission explained that the Clause "created a contractual vested right in public employee pensions" that "may not be diminished or impaired."[65] The Commission further explained that under the Clause, "[o]nce a bill is enacted providing for increased pension credits and improved benefits, a definite legal obligation is established which cannot be removed or repealed."[66]

Accordingly, the Commission sharply criticized the funding policy the legislature began using in Fiscal Year 1973 to fund the State's five pension systems.[67] Under that policy, the General Assembly made employer contributions to the systems equal to 100% of what the systems were expected to "pay-out" in benefits each year. Under the "100% payout" policy, State pension contributions matched benefit payment amounts while "leaving employee contributions to at least stabilize, if not decrease, the systems' future unfunded liabilities."[68] The Commission called the "payout" policy "unacceptable since it result[ed] in a deferment of the burden of financing currently incurred benefit obligations to future generations of taxpayers" and "appreciably greater costs to government."[69]

Rubin Cohn, a long-time Commission member, explained in the Commission's 1975-1977 report that the "payout" policy was flawed because benefit payouts were expected to sharply increase in future years.[70] As Cohn put it, "it requires an article of faith to believe that these enormous annual pension requirements will be met from revenue increases occasioned by normal economic growth even as supplemented by new or increased State taxes and that they will reflect a reasonable percentage of the State's budget needs for all State purposes."[71] Cohn found this prospect unlikely, especially since "[n]either candidate for governor in 1976, nor candidates for legislative office proposed new taxes or an increase in existing taxes" to meet a $50 million shortfall in education funding based on a $10 billion State budget.[72] The only way to avoid such a "crushing" burden on taxpayers was for the legislature to adopt an actuarially sound funding policy.[73] To not adopt such a policy would ultimately lead to the "progressive depletion of the system and its ultimate insolvency and bankruptcy."[74]

In 1979, Governor Jim Thompson's administration echoed Cohn's concerns in a report prepared for his office by an outside consultant examining the State's pension system.[75] The report stated that financing Illinois' pension obligations had "reached crisis proportions" because funding benefit payouts had "increased dramatically in recent years."[76] The report noted that "Moody's and Standard and Poor's have expressed concern regarding the continuing increase of unfunded pension liabilities in Illinois," and that Illinois would jeopardize its "AAA bond rating" if "the unfunded liability is not stabilized."[77] As with the Commission, the report recommended that the State adopt the "normal cost plus interest" funding approach, but phase it in to accommodate other budgetary objectives.[78]

Despite these warnings, the General Assembly used the "payout" policy to fund the State's five pension systems in fiscal years 1973 through 1981.[79] Treasurer Judy Baar Topinka stated in May 2011 that although this funding method "had no relation to actuarial calculations of liability, it did guarantee a steady increase in State contributions."[80] This funding policy, because of higher than expected investment returns,[81] helped increase the funding ratio of these systems from 41.8% at the time of 1970 Constitutional Convention to 48.6% in 1979 as noted on Chart 1.[82]

C. Pension Underfunding Was Further Aggravated During Governor Thompson's Tenure

In March 1981, Governor Jim Thompson, however, announced that the State would abandon the "100% payout" policy in fiscal year 1982 as a "budget savings measure."[83] In its place, the State would contribute 60% of the estimated benefit payouts made by the five State pension systems.[84] Indeed, between fiscal years 1982 and 1995, pegging State pension contributions to at or below 60% of payout became the State's de facto funding policy.[85] During that period, "state pension contributions declined sharply in fiscal years 1982 and 1983 and increased modestly through fiscal year 1995."[86] These State contributions were well below the employer's actuarial cost of benefits accrued each year, with contributions fluctuating between 30% and 66% of actuarial cost.[87] Treasurer Topinka observed that this policy shift "aggravated" the pension funding problem.[88] The Chicago Tribune reported that the Thompson administration "rationed spending on pensions so that scarce state resources could be put toward more pressing and voter-pleasing needs."[89] As Governor Thompson's legislative lobbyist, Jim Edgar explained: "The state was trying to pay for all these services people wanted on the cheap."[90]

In addition to abandoning the "100% payout" policy, Governor Thompson successfully passed legislation in 1982 that made investment returns the largest funding source for the pension systems.[91] The legislation was an outgrowth of a study he commissioned in 1982 recommending that the pension systems be allowed to make investments under the prudent investor rule, rather than from a short list of statutorily-approved types of securities, such as government bonds.[92] The study explained that, "[t] he taxpayers and citizens of the state, upon whom the ultimate responsibility for financing the [pension] system rests, have a clear interest in an investment policy that generates maximum resources and relieves pressure on the tax base to increase contributions."[93] The study stated that if the three largest State pension funds "had achieved the same 8.6% market rate of return as the average U.S. pension fund did in the past five years, total investments would have been approximately $875 million greater. This could have been used to reduce the taxpayers' burden; to provide additional benefits; or, to increase the overall funding ratio another 8%."[94] The study also highlighted how Governor Thompson in 1981 signed into law legislation permitting the State pension systems to invest in mortgage-backed securities, and noted the program established by South Shore Bank of Chicago to assemble and sell packaged mortgages.[95]The Taxpayers' Federation of Illinois pointed out, however, that this shift in investment policy now made the pension systems dependent upon "the most volatile revenue" source because it directly depends "upon the vagaries of the economy to a greater degree than" State employer or employee contributions.[96]

In 1985, Governor Thompson convened a task force to investigate the funding status of the State pension systems and propose an alternative funding method to replace the 60% payout policy.[97] The task force proposed a new funding policy requiring the State to pay "vested" pension liabilities over a 40 year basis, but was viewed as little different from the 60% payout policy.[98] The task force also considered the impact of pension underfunding on the State's credit rating and found that Standard and Poors reduced its rating from AAA to AA+ due to the State's "deferral of pension obligations."[99] Indeed, the report noted that one rating agency expressed concern that the State's pension funding was a potential "time bomb" for the future.[100]

In 1988, the Illinois Economic and Fiscal Commission determined that staying on the 60% payout policy would ultimately cut into available revenues for schools, human services, and other programs.[101] The Fiscal Commission recommended that the legislature adopt a funding policy requiring the State to pay the normal cost of benefits when incurred plus an amount needed to pay off the unfunded liability over 40 years as a level percentage of payroll.[102]

In 1989, the General Assembly enacted a version of this plan to begin in fiscal year 1990.[103] Under that plan, the State's contribution would be "increased incrementally over a seven year period so that by FY 1996 the minimum contribution to be made by the State would be an amount sufficient to meet the normal cost [of benefits] and amortize the unfunded liability over 40 years, as a level percentage of payroll."[104] State Comptroller Dawn Clark Netsch stated that this plan failed because the governor and legislature never made the appropriations needed to meet the plan's funding requirements.[105]

Indeed, between fiscal years 1990 and 1995, over $1.4 billion in moneys needed to fund the plan were used on other State budget priorities.[106] In testimony before Congress in 1991, Comptroller Netsch stated that Illinois' pension problem was "underfunding" and that "[u]nderappropriated pension contributions [were] like unpaid credit card bills" that ultimately must be paid.[107] To highlight this point, Netsch noted how the legislature permitted Governor Jim Edgar to divert $21 million from moneys otherwise automatically transferred into the State's pension system to the State's General Revenue Fund for expenditure on other State programs.[108] She added that, "[o]ur problems might be more understandable if our retirement systems provided extravagant benefits, but they do not. We are having trouble facing our obligations for systems that have some of the lowest benefit levels in the county."[109] By 1994, the systems' unfunded liabilities had grown from $8.2 billion in 1989 to $17 billion (See Chart 2) and the systems' funding percentage dropped from 60% to 54% (See Chart 1).

D. The 1995 Funding Plan By Design Increased Unfunded Pension Liabilities

In 1994, the health and underfunding of the State's pension systems became a significant political issue for Governor Jim Edgar in his bid for re-election.[110] In February 1994, the Illinois Economic and Fiscal Commission reported that because of insufficient State contributions and not following the 1989 funding plan, the General Assembly Retirement System

(GARS) was selling assets to cover benefit payments to annuitants.[111] The Fiscal Commission stated that, if the State's inadequate funding practices continued, GARS would be insolvent by fiscal year 2008 and the financial status of the State's four other pension systems would begin to rapidly deteriorate in fiscal year 2013.[112] State Comptroller Netsch, the Democratic candidate for Governor, severely criticized Edgar for not adhering to the 1989 pension funding plan and labeled him a "charge-and-spend bureaucrat" who put "our massive pension deficit on the state's credit card."[113]

In response, Edgar unveiled in his budget address a fifty year pension funding plan that would phase in increased State pension contributions over the first twenty years and ultimately achieve 90% funding in fiscal year 2045.[114] Netsch countered with her own plan with a 10 year phase in of increased State contributions and stated that Edgar's plan would add $38 billion more to the State unfunded pension liabilities.[115] Edgar replied that his plan was "affordable" while Netsch's plan called for additional pension funding the State needed for education and child welfare programs.[116]

In June 1994, the General Assembly and Governor Edgar reached an agreement on a new pension funding plan modeled after Edgar's proposal beginning in 1995.[117] The 1995 funding plan was later signed into law as Public Act 88-593 in August 1994.[118] The legislation created a 50-year plan to achieve 90% funding of the State's five pension systems by fiscal year 2045.[119] The legislation included a 15-year ramp-up period of increasing pension contributions so the State could adapt to the increased financial commitment.[120] At the end of that period in fiscal year 2010, the State's contributions would remain at a level percentage of payrolls for thirty-five years until reaching 90% funding in fiscal year 2045.[121] When the plan began in 1995, the State's pension systems were significantly underfunded with almost $20 billion in unfunded liabilities and a funding ratio of 53%.[122]

In its March 2013 Order, the U.S. Securities and Exchange Commission ("SEC"), found that rather than "controlling the State's growing pension burden," the 1995 plan by design "increased the unfunded liability, underfunded the State's pension obligations, and deferred pension funding."[123] "This resulting underfunding of the pension systems enabled the State to shift the burden associated with its pension costs to the future and, as a result, created significant financial stress and risks for the State."[124] The SEC noted that unfunded liabilities grew because a majority of the State contributions required under the plan "were not sufficient to cover both (1) the cost of pension benefits earned by public employees by virtue of their service in the current year ("the normal cost") and (2) a payment to amortize" past unfunded liabilities.[125] Indeed, in

2006, John Filan, as Director of Governor Blagojevich's Office of Management and Budget, testified before a subcommittee of the U.S. House of Representatives that the 1995 plan was intended to underfund the pension systems and not pay normal costs and interest on the unfunded liability until 2034.[126]

In addition, the SEC found that the General Assembly compounded this problem by enacting "Pension Holidays" lowering already deficient contribution amounts in 2006 and 2007, and not increasing contributions in 2008 through 2010 to offset these reductions.[127] The SEC observed that from 1996 to 2010 "the State's unfunded liability increased by $57 billion" with insufficient State contributions as the "primary driver of this increase."[128] This underfunding, the SEC noted, "also compromised the creditworthiness of the State and increases the State's financing costs."[129] Taken together, the SEC found that because of the State's failure to adhere to the 1995 plan's 15-year ramp period, "the State should have known that it likely would have significant difficulty making required contributions in the future."[130]

E. The Lack of Proper Pension Funding Stems From A Flawed Fiscal System

In 2009, the General Assembly's Pension Modernization Task Force answered the important question of *why* proper pension funding was not forthcoming.[131] The Task Force found that: "[t]he State's failure to make its required contributions to the five pension systems can be traced to one, simple cause: a State fiscal system that is so poorly designed that it failed for decades to generate enough revenue growth both to maintain service levels from one year to the next, and cover the State's actuarially-required employer contribution to its five pension systems."[132] The Task Force further found:

This ongoing 'structural deficit' imposed a tough fiscal/political choice on State elected officials—fully fund pensions and cut services, or skip a portion of the pension payment and maintain as many services as possible. Not wanting to implement cuts in spending on these services (or enact revenue increases), the legislature and various governors elected to instead divert revenue from making the required employer pension contribution to maintain services like education, healthcare, public safety and caring for disadvantaged populations. Effectively, the State used the pension systems as a credit card to fund ongoing service operations.[133]

Indeed, in June 2013, the Commission on Government Forecasting and Accountability ("COGFA"), testified before the First Conference Committee to Public Act 98-0599 and detailed the factors that caused the $87 billion growth in unfunded pension liabilities between fiscal years

1985 and 2012.[134] COGFA's analysis revealed that 47% of that growth (or $41.2 billion) came from the State not paying what it should have to the pension systems.[135] Stock market losses, the next single largest cause, accounted for 16.5% (or $14.4 billion) of that growth.[136] COGFA found that changes in actuarial assumptions, such as people living longer than expected, caused 10.1% (or $8.8 billion) of that growth.[137] Benefit increases for public employees only accounted for 9.3% (or $8.1 billion) of the growth.[138] And employee salary increases were less than expected over that period and actually helped reduce those unfunded liabilities by .6% (or $535 million).[139]

In short, pension benefit increases and employee salary increases were not the main reasons why the State's five pension systems are so underfunded. Nor can the pension systems' underfunding be blamed primarily on stock market losses or faulty assumptions that underestimated increased lifespans. Rather, the problem stems primarily from the General Assembly's failure to fund the system—a problem that was long-standing and well-known in 1970 and was the reason why the Pension Clause was adopted.[140]

III. The Scope of the Illinois Constitution's Pension Clause

The Pension Clause of the Illinois Constitution presents a serious legal obstacle to any efforts by the General Assembly to unilaterally alter the pension benefits of current employees and retirees. The 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*."[141] The Clause is based on and nearly identical to a provision found in the New York Constitution.[142]

According to Illinois Supreme Court and Appellate Court decisions, the Pension Clause bars the General Assembly from unilaterally reducing the pension benefit rights of *current* employees as well as *retirees*.[143] The Pension Clause does this by safeguarding, as of when a person joins a public pension system, not only the benefit rights contained in the Illinois Pension Code,[144] but also all other benefits that are "limited to, conditioned on, and flow directly from membership in one of the State's various public pension systems," including subsidized health care.[145] The Clause's protection also extends to employee contribution rates *and* any benefit increases added during an employee's term of service.[146]

As to funding, while the Clause does not require the State to fund the pension system at a specific funding percentage, it does mandate that pensions will be paid when they become due.[147] Put differently, the Clause is "aimed at protecting the right to receive the promised retirement benefits, not the adequacy of the funding to pay them."[148] The Clause, according to the Illinois Supreme Court, "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." [149] The Clause also grants pension recipients a cause of action to compel the payment of benefits should a pension system default or be on the verge of default."[150]

Finally, while the Clause bars the General Assembly from *unilaterally* reducing pension benefit rights, these rights are "contractual" in nature.[151] Accordingly, pension benefit rights can be changed through contract *modification* principles if the legislature offers public employees legal consideration and public employees agree to accept that offer.[152]

IV. PROLOGUE: Public Act 98-0599 and Its Origins

A. Background

During its 2013 Spring Session, two pension reform proposals were advanced in the General Assembly—Senate Bill 1 and Senate Bill 2404. Senate Bill 1, as amended in the House of Representatives, was sponsored by House Speaker Michael Madigan,[153] while Senate Bill 2404 was sponsored by Senate President John Cullerton.[154] Both bills shared the objective of obtaining significant savings from the State pension systems by reducing the 3% compounded COLA rate that retirees and employees hired before January 1, 2011 receive under the Pension Code because that benefit represents the largest component of moneys paid out by the pension systems to retirees each year.[155]

Each bill, however, took a different approach to achieve its savings against the backdrop of the Pension Clause. The House proposal, which was set forth in several amendments to Senate Bill 1, sought to achieve savings through unilateral cuts to the pension benefits of retirees and current employees. In the opinion of the Civic Federation of Chicago, the bill would not violate the Pension Clause because the legislature purportedly retained the power to cut pension benefits to address the State's fiscal crisis, preserve the pension system, and protect the public welfare as detailed in the bill's preamble.[156] The bill was endorsed by Illinois' business community, including the Commercial Club of Chicago, and passed the House by a vote of 62-51-2, but failed to pass the Senate by a vote of 16-42-0.[157]

Senate Bill 2404, on the other hand, sought to achieve its savings by applying contract principles of offer, acceptance, and consideration through negotiations with public sector labor unions.[158] In exchange for agreeing to a lower COLA rate on their pensions, current employees and retirees were offered, among other things, a contractually-binding pension funding guarantee by the State, retiree healthcare access, and legal treatment of all future salary increases as pensionable income.[159] The bill sought to pass constitutional muster under the Pension Clause by using contract modification principles as indicated by Illinois court decisions.[160]Senate Bill 2404 was supported by public sector labor unions, passed the Senate by a vote of 40-16-0, but was never called for a vote in the House.[161]

Since neither of these proposals passed both chambers in May 2013, a conference committee was formed in June 2013 under Senate and House Rules to resolve the differences between Public Act 98-0599 and Senate Bill 2404. The 10-member bipartisan, bicameral committee, chaired by Senator Kwame Raoul, held three public hearings and other meetings throughout the summer and fall of 2013, and crafted a proposal.

The goal of this proposal was to make benefit changes consistent with how California courts treat pension benefits—by cutting benefits while offsetting those cuts with other advantages. The conference committee chose to follow this approach because it was different than the frameworks used by Senate Bill 1 and Senate Bill 2404. Under the California approach, the legislation may unilaterally reduce pension benefits so long as the reductions are reasonable, bear some material relation to the fiscal integrity of the pension system, and provide affected participants with offsetting advantages.[162] The Democratic members of the conference committee offered a proposal in early September 2013, but Republican committee members opposed it as not providing sufficient savings and benefit reductions.[163]

Due to that impasse, the four legislative leaders worked to bridge the gap in November 2013 and fashioned an agreed proposal.[164]The Leaders' agreement was set forth as the First Conference Committee Report to Senate Bill 1 and used the House's *unilateral*approach to achieve its goals rather than Senate Bill 2404's contractual approach.[165] The proposal passed the General Assembly on December 3, 2013, and was signed into law as Public Act 98-0599 two days later.[166] The legality of this approach under the Pension Clause is now pending in court.

B. SUMMARY OF PUBLIC ACT 98-0599'S PROVISIONS

1. Benefit Changes

The Leaders' Proposal, as set forth in Public Act 98-0599, makes six major changes to the pension benefits of current employees hired prior to January 1, 2011 and existing retirees as detailed below. The pension systems' actuaries estimate that because of the Act's pension benefit reductions and new funding plan, the State will save over $145 billion over the next 30 years.[167] The Public Act is also estimated to reduce the pension systems' existing $97.4 billion unfunded liability by $21 billion.[168] In addition, the Act is estimated to reduce the State's fiscal year 2016 pension contribution by $1.2 billion.[169]

Lower COLA Increases. Under Public Act 98-0599, the current 3% annual compounded COLA increase on pension income a participant receives is replaced by a formula that *caps* increases based on the participant's years of service.[170] The formula is as follows: $1000 x years of service x 3% for participants not coordinated with Social Security;[171] and $800 x years of service x 3% for participants coordinated with Social Security.[172] The $1000 and $800 figures contained in the formula are annually increased by *inflation* as determined by the U.S. Department of Labor's Bureau of Labor Statistics on a compounded basis.[173] If a participant's pension income is less than $1000 or $800, as applicable, multiplied by years of service, then the participant will continue to receive the 3% compounded COLA increase.

- *Examples*: A retired teacher participating in TRS who worked 30 years will receive a maximum $900 increase—$1000 x 30 x .03=$900. A retired State agency employee participating in SERS who worked 30 years will receive a maximum $720 increase—$800 x 30 x .03=$720.

The goal of the COLA rate change is to allow retirees with lower annual pensions and longer years of service to continue to receive the 3% compounded increases they would have received prior to Public Act 98-0599. At the same time, the new COLA rate caps the increases for retirees with higher pension income amounts and for those who have fewer years of service.

Skipped COLA Increases. In addition to lowering the COLA rate, Public Act 98-0599 also skips (or withholds) a certain number of COLA increases after retirement at the new rate for current employees *only* based on their age as of June 1, 2014.[174] The bill exempts retirees from this provision. The skipped or withheld COLA increases begin in the participant's second year in retirement.[175] COLA increases are also skipped or withheld on a staggered basis, not in back to back years as detailed below:

- Age 50 or older lose one increase (year two)[176]
- Age 49 to 47 lose three increases (years two, four and six of retirement)[177]
- Age 46 to 44 lose four increases (years two, four, six and eight of retirement)[178]
- Age 43 and younger will lose five increases (years two, four, six, eight and ten of retirement)[179]

Retirement Age Increase. Public Act 98-0599 increases the retirement age at which current employees who are age 45 or younger as of June 1, 2014 are eligible to receive a pension.[180] For each year an employee is younger than 46, the retirement age increases by 4 months, but no more than 5 years.[181] For example: A 40-year-old would need to work two additional years.[182] A 31-year-old would need to work an additional five years.[183] Public Act 98-0599 does not increase the retirement age for current employees who are age 46 or older as of June 1, 2014.[184]

Cap on Pensionable Salary. Public Act 98-0599 imposes a cap on the maximum salary used to determine a current employee's pensionable income and, in turn, annual pension.[185] The cap is $110,631, but that amount is increased each year by the lesser of 3% or one half the rate of inflation as determined by U.S. Department of Labor's Bureau of Labor Statistics.[186] The salary cap provision, however, does not apply to annualized income exceeding the cap as of June 1, 2014, or salary based on an existing employment or collective bargaining agreement.[187] As a result, the salary of a current employee exceeding $110,631 is grandfathered-in and remains pensionable income.[188] Any future salary increases that employee receives, however, would not be deemed pensionable income until the salary cap noted above increases and exceeds the employee's salary level, unless the increases are built into an existing employment or collective bargaining agreement.

Money Purchase Plan Changes. For TRS and SURS only, Public Act 98-0599 modifies the formula used to determine a current employee's base pension amount when he or she retires under what is known as the "money purchase" formula. The "money purchase" formula is an alternative to the traditional benefit formula used to calculate an employee's base pension amount for employees who began employment prior to July 1, 2005.[189] An employee is entitled to receive the highest base pension amount based on the two formulas.[190]

For SURS participants, the money purchase formula produces the highest base pension amount the majority of the time. TRS participants typically receive the highest base pension amount from the traditional benefit formula.

The traditional benefit formula uses an employee's final average salary amount, years of service, retirement age, and statutory accrual rate (e.g., 2.2% for each year of service).[191] For example, a current SURS employee with a final average salary of $52,500, who worked 25 years, and retired at age 67 would receive an annual base pension amount of $28,875 under a traditional formula.[192]

The "money purchase" formula is a more complex calculation. [193] The formula takes the total employee contributions made to the pension system, multiplied by an interest rate known as the "effective rate of interest" or "regular interest rate" depending on the employee's participation in SURS or TRS.[194] That total is multiplied by 2.4, which represents total employer contributions, and then divided by an actuarial factor established by the relevant pension system.[195] The higher the effective rate of interest, the greater the employee's base annuity amount will be under the "money purchase" formula when he or she retires.

In addition, an employee participating in SURS cannot receive a base pension amount greater than 80% of final average salary.[196] If the "money purchase" formula results in a base pension amount greater than 80% of final average salary, then the base pension amount is capped at 80% and the employee is entitled to receive a lump sum refund of any excess contributions made to the pension system.[197]

Public Act 98-0599 alters the "money purchase" formula by statutorily-pegging the "effective rate interest" figure at the 30-year U.S. Treasury Bond rates plus .75%, which would be approximately 4.27%.[198] The effective rate of interest most recently used for the "money purchase" formula was 7.75%. The consequences of Public Act 98-0599's change are two-fold. First, the "money purchase" formula will produce lower base pensions for SURS members who retire after June 30, 2014. Second, some SURS members upon retiring will not receive a lump sum refund of their excess contributions because their base pension amount will no longer exceed the 80% cap.

1% Employee Contribution Rate Reduction. Public Act 98-0599 reduces by 1% of salary the amount current employees must contribute to the pension system.[199] The contribution rate reduction specifically eliminates the 1% or 0.5% of salary current employees contribute for purposes of funding the previous 3% compounded COLA rate.[200] The contribution rate reduction was included by the General Assembly as a form of "consideration" (or value given back) to employees for the COLA rate reduction and provide a legal defense to that reduction.[201] Whether the contribution rate reduction qualifies as legal consideration is a matter Illinois courts will decide in light of the preexisting duty rule.[202]

2. Additional Provisions

In addition to making changes to pension benefits, Public Act 98-0599 contains several other provisions germane to the benefit changes. First, the bill replaces the 1995 funding plan with a new funding plan requiring each pension system to reach 100% funding by fiscal year 2043, as opposed to the 90% funding target in fiscal year 2045.[203]

Second, the bill includes a provision known as the "funding guarantee" whereby if the State Comptroller fails to make the State pension contribution required by law to a relevant State pension system, the relevant pension system board may file suit before the Illinois Supreme Court to order payment of the required contribution amount.[204] Unlike the "funding guarantee" provision contained in Senate Bill 2404, the provision in Public Act 98-0599 lacks express language making the State "contractually obligated" to adhere to the new 100% funding schedule.[205] The General Assembly, accordingly, appears to retain the discretion to adjust the required contribution amounts that must be paid to the pension systems each year.[206]

Third, Public Act 98-0599 redirects 10% of the savings obtained by the legislation as State contributions back into the pension systems rather than being money available in the state General Revenue Fund.[207] The bill further redirects $364 million to be contributed into the State pension systems in fiscal year 2019 and $1 billion in fiscal year 2020 and each year thereafter until the pension systems reach 100% funding.[208] The additional contributions made beginning in fiscal year 2019 represent money currently spent by the State to repay general obligation bonds that will be repaid in fiscal year 2019. As with the "funding guarantee" provision, the General Assembly appears to retain the discretion to adjust the additional contribution amounts described above.[209]

Fourth, Public Act 98-0599 creates an option for up to 5% of current employees to elect to participate in a voluntary, defined contribution plan offered by the affected State pension systems.[210] The terms of the plan would be established by each system.[211]

Fifth, the legislation bars persons hired on or after June 1, 2014 by non-governmental organizations, such as labor unions, lobbying groups and not-for-profit entities, from participating in the public pension system.[212] The legislation also prohibits accumulated sick or vacation time from qualifying as pension service credit or pensionable income for employees hired on or after June 1, 2014.[213]

Finally, Public Act 98-0599 prohibits all pension changes made by the legislation, subsequent legislation, and the impacts and effects of implementing that legislation from being a mandatory subject of collective bargaining or interest arbitration.[214] The only exception to this prohibition is that public employers and employees may continue to bargain over the pick-up of employee contributions pursuant to Sections 14-133.1, 15-157.1, or 16-152.1 of the Illinois Pension Code.[215]

V. The Pending Legal Challenges To Public Act 98-0599

A. Procedural History

Not long after Public Act 98-0599 became law on December 5, 2013, five lawsuits were filed challenging the constitutionality of the legislation.[216] Taken together, the lawsuits were brought by: current and retired teachers participating in TRS; two retired State employee groups representing retired SERS, GARS, TRS, and SURS participants; a coalition of public sector labor unions known as “We Are One” representing current employees and retirees in SERS, SURS, and TRS; and the State Universities Annuitants Association (SUAA) representing current employees and retirees in SURS.[217]

Because the lawsuits were filed in three different judicial circuits,[218] the Illinois Attorney General moved to consolidate the matters in the circuit court of Cook County where the first lawsuit was filed.[219] The Attorney General’s motion was opposed by three groups of plaintiffs who filed suit in the Seventh Judicial Circuit in Sangamon County and sought consolidation in that circuit. Since the SUAA filed suit in the Sixth Judicial Circuit in Champaign County, SUAA sought to be separate from the other suits and proceed in that district.[220] Ultimately, the Illinois Supreme Court issued an order consolidating all five lawsuits before the circuit court of Seventh Judicial Circuit in Sangamon County.[221] As of this writing, the five lawsuits are pending before the Honorable John W. Belz who entered a preliminary injunction against Public Act 98-0599 on May 15, 2014.[222]

B. Plaintiffs' Legal Challenges To Public Act 98-0599

Overall, the plaintiffs claim that Public Act 98-0599 violates three provisions of the Illinois Constitution: the Pension Clause, the Contract Clause, and the Takings Clause. Specifically, the plaintiffs argue that the reduction of the 3% compounded COLA rate, the COLA skips, the retirement age increase, the pensionable salary cap, and "money purchase" formula changes all violate these three provisions of the Illinois Constitution. The Pension Clause claim is the main legal argument against Public Act 98-0599 with the Contract and Takings Clause claims pled as alternative legal theories as to why the legislation's benefit changes improperly interfere with plaintiffs' contract or property rights. Through different individual plaintiffs, the lawsuits contend that the five pension benefits reductions made by Public Act 98-0599 "diminish or impair" their benefits in violations of the Pension Clause. Interestingly, the "We Are One" and SUAA plaintiffs also assert a Taking Clause claim that the State's failure to properly fund the State's pension systems has resulted in a taking of private property.[223] The plaintiffs did not assert any federal law claims against Public Act 98-0599.

In addition, the two State employee groups assert that the legislation violates the Illinois Constitution's Equal Protection Clause by not applying the benefit reductions to current and retired judges.[224] These plaintiffs further claim that Public Act 98-0599's COLA rate reduction violates the Contract Clause because the State purportedly made a contractual commitment through its 2002 early retirement incentive program whereby employees purchased service credit and the continued entitlement to the 3% compounded COLA rate in exchange for the State receiving lower personnel costs.[225] The Retired State Employees Association additionally claims that Senate Bill 1's COLA rate reduction violates the Contract Clause because the State contractually bound itself to continue to offer a 3% COLA rate to SERS participants through statements made in SERS' member handbooks between 1982 and 2011.[226]

With respect to the 3% compounded COLA rate, the plaintiffs contend that Public Act 98-0599's rate reduction will result in significantly smaller COLA increases in the future for the persons whose base pension amounts are subject to the new COLA rate.[227] The higher the base pension amount for these persons, plaintiffs assert, the greater their loss in future COLA increases when compared to the prior COLA rate. The “We Are One” plaintiffs, for example, state in their complaint that the COLA rate reduction will reduce the future COLA payments to one retiree by almost $71,000 by the time he reaches age 85.[228]

This loss in future COLA increases, according to the “We Are One” plaintiffs, has a compounded impact on current employees who are also subject to Public Act 98-0599’s COLA skips provision, retirement age increase, and pensionable salary cap.[229] As another example, Public Act 98-0599 would purportedly reduce the pension benefits of one current employee by approximately $718,000 over the course of a 25 year retirement.[230] Public Act 98-0599’s 1% reduction in that employee’s contribution rate, however, would only result in that employee recouping $15, 613.[231]

The SUAA complaint and its motion for a injunctive relief set forth the impact of Public Act 98-0599’s change to the “money purchase” formula.[232] SUAA states that by statutorily pegging the “effective rate interest” figure at 30-year U.S. Treasury Bond rates plus .75%, Public Act 98-0599 will have two adverse consequences for current employees in SURS.[233] First, the “money purchase” formula will produce a lower base pension amount than before the “effective rate of interest” change.[234] Second, for some employees in SURS, this change will result in a base pension amount less than 80% of final average salary, whereas before it would have exceeded that amount.[235] Accordingly, these employees will no longer receive at retirement a lump sum refund of any excess contributions they made to the pension system so their base pension amount would not exceed the 80% cap.[236]

C. The Illinois Attorney General’s Defense of Public Act 98-0599

As of September 2014, the Illinois Attorney General has asserted essentially two defenses to uphold the constitutionality of Public Act 98-0599. First, with respect to the COLA rate reduction and COLA skips provisions, the Illinois Attorney General contends that the 3% compounded COLA rate itself is “not part of the core pension benefit” protected by the Pension Clause.[237]

The Illinois Attorney General states that the 3% compounded COLA rate was enacted in 1989 and awarded to retirees and dependents already receiving pensions and they had not made any contributions to the pension systems in exchange for the increase.[238] Also, the 3% compounded COLA rate was awarded to existing employees who merely continued to work after the increase was enacted without a corresponding increase in employee contributions.[239] The

Illinois Attorney General further notes that the COLA rate has been increased by the legislature on several occasions, and the last time a COLA increase was coupled with an increase in employee contributions was in 1969 whereby employees contributed 0.5% of salary for a 1.5% simple annual increase on their base pension amount.[240] The Illinois Attorney General also points out that the 3% compounded COLA rate has "in recent years substantially exceeded inflation."[241] Public Act 98-0599's COLA rate change, the Illinois Attorney General asserts, "was designed to have the least impact on members with the lowest salaries on which their pensions are calculated, on members who put in the most years of public service, and on members who retired before July 1, 2014."[242]

Thus, the Illinois Attorney General appears to contend that the 3% compounded COLA (or any COLA increase) is not a protected "benefit" for Pension Clause purposes.[243] Similarly, the Illinois Attorney General appears to argue that even if it were a protected "benefit" under the Clause, persons already receiving pensions prior to when the 3% compound COLA increase become law in 1989 have no reasonable expectation to its continuation because they no longer worked for the State.[244] The same, under the Illinois Attorney General's logic, would apply to persons who were current employees prior to 1989 who continued working for the State because they did not make increased contributions to the pension systems in exchange for the increase.[245]

The Illinois Attorney General's second defense of Public Act 98-0599 rests on the State's so-called "police" or reserved powers. In its answer and defenses to the complaints, the Illinois Attorney General asserts that Public Act 98-0599 is a "permissible exercise of the State of Illinois' reserved sovereign powers (sometimes referred to as the State's police powers)."[246] In support, the Illinois Attorney General contends that the underfunding in the State-funded retirement system contributed significantly to a severe financial crisis adversely affecting the long-term financial soundness of those systems, the cost of financing the State's operation and outstanding debt, and the State's ability to provide critical services to Illinois residents.[247] The Illinois Attorney General further contends that the causes of this underfunding stemmed from "significant unforeseen and unanticipated events," such as poor stock market returns by the pension systems, historically low inflation, significant increases in life expectancy, and other changes in actuarial assumptions.[248]

These increased unfunded liabilities, the Illinois Attorney General argues, led to substantial reductions in the State's revenues to contribute to the pension systems and to spend on salaries and other benefits for State employees.[249] The Illinois Attorney General further asserts that these unfunded liabilities have become unsustainable, have grown worse, and have created substantial uncertainty to the State's business climate and ability to produce tax revenues to support public services and fund the pension systems.[250]

The Illinois Attorney General claims the General Assembly enacted Public Act 98-0599 as a reasonable and necessary response to unanticipated exigencies to address the State's financial crisis after already taking earlier action to reduce public spending, raise income taxes, defer State vendor payments, and enact a second tier of pension benefits for new hires in 2010.[251] For these reasons, the Illinois Attorney General argues that Public Act 98-0599 "represents a valid exercise of the State's reserved sovereign powers to modify contractual rights and obligations, including contractual obligations of the State established under Article I, Section 16 and Article XII [sic], Section 5 of the Illinois Constitution."[252]

In late June 2014, the plaintiffs collectively responded to the Attorney General by moving for summary judgment to invalidate Public Act 98-0599 solely on their Pension Clause claims.[253] In that motion, the plaintiffs contend that the Pension Clause is not subject to a police power exception based on its plain language and drafting history as well as relevant Illinois court decisions.[254] At this point, however, the trial court judge has decided to postpone action on the plaintiffs' motion and will allow the Attorney General to develop its defense by permitting fact and expert witnesses to be called. To that end, the court established a discovery schedule extending into December 2014.[255] The trial court judge, at that point, appeared inclined to have the parties prepare a detailed factual record before ruling on each of the plaintiffs' claims and the Attorney General's defenses. As this Article went to press, however, the trial court judge entered an order staying discovery and expressed interest in deciding the case by the end of this calendar year.[256]

VI. Concluding Observations

As of September 2014, the Illinois Attorney General has not set forth the specific legal authority supporting her claim that the State's so-called police or reserved powers allowed the General Assembly to make the unilateral pension benefit cuts provided in Public Act 98-0599 without violating the Pension Clause. Illinois' business community, however, through the Commercial Club of Chicago and its law firm, Sidley Austin, previously articulated such an argument in April 2011 in response to an earlier article that this author wrote that comprehensively reviewed the origins, background, and scope of the Pension Clause.[257]

Sidley argued that because paying 100% of all pension benefits will "crowd out expenditures on health, education, and public safety" under current revenue assumptions, the State can trump is obligations under the Pension Clause and divert funds to fund government services the General Assembly deems essential.[258] Sidley rested this conclusion on the claim that "no constitutional rights are absolute," its reading of the Illinois Supreme Court's decision in *Felt v. Board of Trustees of the Judges Retirement Systems*, and its view that the Pension Clause provides no better protection than the Contract Clause of the U.S. Constitution.[259] While Sidley's police powers argument is fatally flawed for several reasons articulated by this author elsewhere, only one need be discussed here.[260]

The police powers argument cannot be squared with the Pension Clause's plain language which admits of no exceptions. Nor is that argument supported by the Pension Clause's drafting history, Convention debates, and voters' understanding of the Clause.[261]Indeed, the drafters did not accept the proposal made by Delegate Wayne Whalen, an opponent of the Pension Clause, to expressly amend the Illinois Constitution's Contract Clause to protect public pensions or his view that the Pension Clause provided no better protection than the Contract Clause.[262]

Instead, the delegates adopted an independent provision modeled after the one found in the New York Constitution to ensure "the vested rights of pension plan participants not be defeated or diminished."[263] The Illinois Supreme Court has explained that the framers added the Clause to give public employees "a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them."[264] The Clause, as the Court recently observed, was intended "to guarantee that retirement rights enjoyed by public employees would be afforded contractual status and insulated from diminishment and impairment by the General Assembly."[265] In addition, the notion that the Pension Clause is subject to a police powers exception has already been rejected by Illinois courts on two occasions.[266]

Moreover, if the drafters intended to subject the Pension Clause to a police powers exception, then they certainly knew how to accomplish that result as they did with the individual constitutional right to bear arms found in Article I, Section 22 of the Illinois Constitution.[267] As the Illinois Supreme Court recently concluded, "[w]e may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of the Illinois did not approve."[268] Accordingly, the State's police power is not superior to the Pension Clause; rather it yields to the Clause, just as it yields to other specific constitutional prohibitions and positive mandates.[269]

Also, the Pension Clause cannot be equated with the Bill of Rights to the U.S. Constitution as inherently containing or being subject to exceptions based on notions of necessity. As the U.S. Supreme Court explained long ago, it is "well-settled" that the Bill of Rights was "not intended to lay down any novel principles of government, but simply certain guaranties and immunities which were inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case."[270]

The Pension Clause, in contrast, does not have such a history or intent to accommodate exceptions based on claims of necessity. As noted above, Delegate Green stated during the Convention that one of the purposes of the Clause was to bar the State from relying on the consequences of its failure to properly fund the pension system as a basis for cutting or repudiating it pension obligations as was the case in New Jersey in 1964.[271]

Simply put, the Pension Clause constitutes what the U.S. Supreme Court described in its *Blaisdell* decision as a constitutional restriction that is specific and "so particularized as to not admit of construction" based on its language and history.[272] In *Blaisdell*, the Supreme Court implied a police power exception to the Contract Clause of the U.S. Constitution based on that clause's "general language," unhelpful legislative history, and the fact that the Tenth Amendment of the U.S. Constitution reserves police power to the States.[273] None of these features, which were dispositive in *Blaisdell* about the Contract Clause, apply to the Pension Clause.

After all, what constitutes a "contract" or "impairment" for Contract Clause purposes is strictly a question of federal, not state law.[274] As the Illinois Supreme Court has explained, "[t]his court's jurisprudence of state constitutional law cannot be predicated on trends in legal scholarship, the actions of our sister states, a desire to bring about change in the law, or a sense of deference to the nation's highest court."[275] "Rather, our choice of a rule of decision on matters governed by both the state and federal constitutions has always been and must continue to be predicated on our best assessment of the intent of the drafters, the delegates, and the voters—this is out solemn obligation."[276] As a result, the likelihood of a police power defense succeeding to vindicate Public Act 98-0599 should be at best an extremely remote outcome, especially because of the Clause's plain language, drafting history, and purpose, and because of Illinois' long-standing and conscious failure to properly fund the pension systems as discussed above.

With that said, the Illinois Attorney General's position that the 3% compounded COLA rate is not a protected "benefit" under the Pension Clause for persons who were already retired and receiving pensions prior to that rate increase becoming law in August 1989 has merit. The Illinois Appellate Court has long held that a member of pension system who did not continue working or make contributions to the pension system after the legislature enacted a benefit increase is not entitled to that benefit increase under the Clause.[277] These decisions explain that allowing a member to receive the benefit increase would be tantamount to "an unconstitutional expenditure of public funds for a private purpose" in violation of Article VIII, Section 1 of the Illinois Constitution.[278] Whether the Illinois Supreme Court will reach the same conclusion remains to be seen.

Finally, the claim that the 3% compounded COLA is not a protected "benefit" under the Pension Clause cannot withstand scrutiny for employees who joined the pension system or continued working for the State after the Pension Code provision took effect in 1989. During the Convention debates, the sponsors of the Pension Clause refuted the opponents' claim that the Clause required inflationary protection of benefits.[279] Those statements, however, do not support the conclusion that a Pension Code provision that automatically increases a member's base pension amount during retirement lacks Pension Clause protection. As Delegate Henry Green stated in response to the opponents, "any of you know when you buy an insurance policy you're going to get 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 the insurance company."[280] Delegate Kinney also explained that "an increase in benefits would not be precluded" by the Clause and that the legislature could tie pension benefits to automatic cost of living increases.[281]

Indeed, as the Illinois Supreme Court recently determined, the Pension Clause's plain language protects all benefits that are "limited to, conditioned on, and flow directly from membership in one of the State's various public pension systems" whether found in the Pension Code or in other state statutes.[282] The Clause further protects benefit increases later enacted so long as the person continues working or contributing to the pension system after the increase takes effect.[283] As a result, it is hard to fathom how the 3% compounded COLA rate increase provision found in the Pension Code would not qualify as a protected benefit for those plaintiffs who either joined the pension system or continued working for the State after that Pension Code provision took effect in 1989.

In closing, Public Act 98-0599 is not the first instance where the State has attempted to trump the plain language and purpose of a specific provision of the Illinois Constitution under the banner of fiscal necessity. In 1863, the Illinois Supreme Court, in the midst of the Civil War, considered the constitutionality of legislation passed in 1861 that swept and diverted moneys from a special property tax and fund established by Article XV of the 1848 Illinois Constitution.[284] Article XV was separately approved by Illinois voters[285] for the purpose of retiring the "almost insurmountable"[286] debts the State had incurred during the 1830s and 1840s to finance internal improvement projects, such as the construction of railroads and improved modes of river transportation.[287]

The preamble of the 1861 legislation declared that while the State's financial condition required more revenue, the State's "prosperity" "imperatively demand[ed]" that such revenue not come from taxation, "but on the contrary, if possible, by diminishing [the State's] present heavy rate of taxation."[288] To that end, the legislation ordered the State Auditor to sweep the moneys in Article XV's special fund and also divert the proceeds of the special property tax for deposit into the general revenue fund for expenditure on other purposes.[289] In defending the legislation, the State Auditor claimed without dispute that if the diverted moneys had to be restored to Article XV's special fund to repay bondholders, then the State Treasury would be "bankrupt" and the State would not be able to pay its ordinary expenses.[290]

The Illinois Supreme Court invalidated the 1861 legislation as violative of Article XV's plain language and purpose, and ordered the restoration of the diverted funds.[291] The Court bluntly explained that "however praiseworthy" was the legislature's desire "to relieve the people from a heavy, and apparently, an unnecessary tax" the "injunction of the constitution should be considered above them all."[292] The Court continued that "[p]rivate distress, great financial embarrassments, even public calamity, are held, by a just people, as airy nothings, when weighed against the high behests of the constitution."[293] Emphatically, the Court stated:

Let it not be said, however great disasters may befall us, however much we may be impoverished, how heavy the burden imposed upon us may be, we will, for relief, destroy the constitution, or disregard its requirements. Our safety, in the midst of perils, is in a strict observance of the constitution—this is the bulwark to shield us from aggressions. Trifling with it, treating it lightly, dispensing with this or that provision of it, is the sure precursor of the direst calamity which can befall the people, the end of which cannot fail to be, anarchy and ruin."[294]

Moreover, in response to the State Auditor's claim that the State Treasury lacked adequate funds to pay ordinary State government expenses without the diverted moneys, the Court stated that the

General Assembly was "composed of high minded, and patriotic, and just men, clothed with ample powers to provide for all financial difficulties" and that they would "promptly" come up with a way to rescue the State."[295]

In sum, if this State's law and history is at all dispositive, then Public Act 98-0599 will most likely suffer a fate similar to the 1861 law. For this outcome to have lasting significance, however, will require the public's acceptance of the obligations and boundaries imposed by the Pension Clause, and the public's rejection of the mindset that "history is more or less bunk…and the only history that is worth a tinker's damn is the history we make today."[296]

---

[1] Public Act 98-0599 (Ill. 2013) *available at:* "http://www.ilga.gov/legislation/billstatus.asp?DocNum=1&GAID=12&GA=98&DocTypeID=SB&LegID=68366&SessionID=85&SpecSess=0″.

[2] Eric M. Madiar, *Is Welching on Public Pension Promises An Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution* 47 JOHN MARSHALL L. REV. ___, (forthcoming 2014) (manuscript p. 2, on file with author) [hereinafter Madiar Pension Article]. An earlier version of this article was posted on the Social Science Research Network (SSRN) under the same title and is *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774163.

[3] S.B. 0001, 98th Ill. Gen. Assemb., 1st Spec. Sess., at 3 (Senate Proceedings, Dec. 3, 2013) (statements of Senator Kwame Raoul, sponsor of Senate Bill 1 and chairperson of the First Conference Committee on Senate Bill 1 (explaining that with "Conference Committee Report to Senate Bill 1, the General Assembly can finally break the political stalemate that has held up changes to the pension systems, not only between the House and Senate, but also between competing views within each one of the four caucuses."); *Id.* at 7, 43, 45-46, 50-51 (same).

[4] *See* Madiar Pension Article, *supra* note 2, at 79-81; *see also* Photograph off Ty Fahner, *Ty Fahner, President, Civic Committee of the Commercial Club,* CHI. TRIB., Jan. 13, 2014, *available at:* http://www.chicagotribune.com/business/chi-chicago-business-people-to-watch-in-2014-ty-fahner,0,46101.photo (stating, "It took the Civic Committee, a group of about 100 of the city's leading business executives, about six years of hounding to see reductions in the state workers' pension benefits passed through the state legislature."); 97th Ill. Gen. Assm.,

Senate Bill 512 *available at*: http://www.ilga.gov/legislation/97/SB/PDF/09700SB0512ham001.pdf; Chris Wetterich, *TRS Questions House Plan To Raise Employee Pension Contributions*, ST. J. REG., May 27, 2011, *available at:* http://www.sj-r.com/top-stories/x1355383674/Cross-pension-bill-spells-out-employee-contribution-levels *(detailing the increases in employee contribution rates to receive the same level of benefits from Illinois' pension systems);* Chris Wetterich, *General Assembly Takes No Action On Pensions*, Gambling, ST. J. REG., Nov. 11, 2011, *available at*: http://www.sj-r.com/top-stories/x1439486170/General-Assembly-takes-no-action-on-pensions-gambling.

[5] Madiar Pension Article, *supra* note 2, at 79.

[6] 98TH GEN. ASSEMB., REPORT OF THE PENSION MODERNIZATION TASK FORCE, H.R.J. RES. 65 at 68 (III. 2009) (revised Mar. 30, 2010) [hereinafter PENSION TASK FORCE REPORT].

[7] Madiar Pension Article, *supra* note 2, at 79.

[8] Ty Fahner, *Pensions Can—And Must—Be Reformed*, ST. J. REG., Mar. 18, 2011, *available at:* http://www.sj-r.com/article/20110318/News/303189931.

[9] *See e.g.*, Glen Brown, Illinois Senate Bill 1, The So-called "Pension Reform Bill (or Attempt to Break a Constitutional Contract with Public Employees and Retirees, (Dec. 2, 2013) *available at*: http://teacherpoetmusicianglenbrown.blogspot.com/2013/12/illinois-senate-bill-1-so-called.html (describing Public Act 98-0599 as "the bill created by liars and thieves of the current General Assembly, those who are attempting to renege on their legal and moral responsibilities" and that "[w]e knew this day would come and that political and corporate opportunists, who have no legal or moral concerns except their own, would be eager to break a constitutional contract with public employees.").

[10] We Are One Illinois, Analysis of Worker and Retiree Pension Benefit Cuts under the Quinn Plan and HB 6258, at 2 (Dec. 17, 2012) (hereinafter "We Are One Analysis") *available at*: http://www.ift-aft.org/docs/default-source/Legislative/we-are-one-illinois-white-papers.pdf?sfvrsn=0.

[11] *Id. See* Madiar Pension Article, *supra* note 2, at n. 7 (referring to correspondence from the Illinois State Board of Investment regarding how over the last 40 years members of the State

University Retirement System paid on average 43.9% of the normal cost of benefits via employee contributions).

[12] We Are One Analysis, *supra* note 10, at 2-3; PENSION TASK FORCE REPORT, *supra* note 6, at 48.

[13] *Id*.; Bob Sector, *Pension Mess Now All The Rage In Springfield,* CHI. TRIB. Dec. 30, 2012, *available at:* 2012 WLNR 28162974, ("But at its core, today's pension crisis is a testament to the pitfalls of yesterday's political expediency. It was long standing operating procedure for the mayors and governors to divert that would have underpinned the long-term financial viability of pension funds to other, more immediate and voter-friendly needs.").

[14] We Are One, Statement on Governor Quinn's State of the State Address (Feb. 6, 2013) *available at*: http://www.weareoneillinois.org/news/statement-on-governor-quinns-state-of-the-state (last visited July 24, 2014) ("It would be irresponsible for the state to walk away from the pension debt owed for past services performed by employees. Our Illinois keeps its promises to those workers and retirees who taught our children, protected our families, and paid their fair share for a secure future, even as the state failed to generate sufficient revenue to do so.").

[15] REPORT OF THE ILLINOIS PENSION LAWS COMMISSION OF 1916, at 272 (1917) [hereinafter 1917 COMMISSION REPORT] *available at:* https://archive.org/download/illinoispension00illirich/illinoispension00illirich_bw.pdf.

[16] *Id.* at 280.

[17] REPORT OF THE ILLINOIS PENSION LAWS COMMISSION, 1918-1919, at 5-15 (1919) [hereinafter 1919 COMMISSION REPORT] *available at:* https://archive.org/download/reportofillinois00illino/reportofillinois00illino_bw.pdf.

[18] *Id.* at 281-85, 324-325.

[19] Ill. 1922 Proposed Const. § 206; Proceedings of 1920-22 Ill. Constitutional Convention 3811-15, 3749-53 (1922).

[20] JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS: 1818-1970 at 114-15 (1972), *available at:* http://babel.hathitrust.org/cgi/imgsrv/download/pdf?id=mdp.39015014507431;orient=0;size=100.

[21] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1951, at 7 (1951) (explaining that the General Assembly created the Commission "for the further study of pension annuity and benefit laws relating to employees and officers of governmental service" and provide "valuable contributions toward the solution of a vexatious and difficult financial problems" and "continued exploration in this important area of governmental operation"). *See also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1953, at 105-113 (1953) (providing a brief history of Illinois pension policy and the role and origins of the Commission and previous commissions); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1959, at 19-22 1959) (same).

[22] *See e.g.,* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1949, at 10 (1949) (noting: (1) the Commission's deep concern with "the tremendous, ever-increasing and disproportionate liabilities being imposed upon present and future taxpayers by reason of the absence of consistent or guiding pension policy," and (2) "the obligations of the pension funds have been in a steady and persistent uptrend for a considerable period of time, and this trend had become quite pronounced in recent years. The revenues allocated to the pension funds have not kept pace with the increases in obligations. As a result, an accumulation of large accrued liabilities has developed. With a few exceptions every fund in Illinois suffers at this time an actuarial insolvency, which is growing in startling proportions and is becoming increasingly burdensome."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1947 at 7, 10-13, 28-29, 32, 35, 44, 46 (1947) (same and outlining the potential consequences of underfunding); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1951, at 21-22, 39-41, 59-60 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1953, at 20-21 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1955, at a, 24; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 7-8, 23-24, 26-27, 76 (same); *id.* at 24 (stating: "With few exceptions, all state and local funds in Illinois are actuarially insolvent. The point at which they will become actually insolvent, e.g., when their reserves will be insufficient to meet current expenditures, may vary from fund to fund, but that such condition will result if the present trend continues unchecked appears inevitable."); *id.* at 26 ("As the deficit pyramids, the likelihood of eventual insolvency increases. That likelihood today is not a remote speculation. It is based upon practical and realistic judgment."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION

LAWS COMMISSION OF 1961, at 46 (1961) (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1963, at 8 (1963) (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 10-11, 64-65 (1969) (same).

[23] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 8.

[24] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1963, at 8; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1967, at 7-8 (1967) (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-1980, at 10 (1980).

[25] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 45 (1965); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 15 (noting that the State's pension obligation "is now imposed in full on the General Revenue Fund.").

[26] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1947, at 32 (stating,: "The financial reports on the pension funds reveal that many of them have not been receiving revenues as contemplated under the plan of operation, sufficient to meet the prescribed benefit obligations. The amounts of revenue in many cases are too small to cover the obligations being incurred on account of current service, and to provide for the statutory requirements on account of the accrued liabilities for past service. Notwithstanding the fact that some of the funds have been in operation for a great many years, and provision for the funding of current and accrued obligations has been made according to an actuarial reserve basis, their liabilities are still increasing due to deficiency in revenues.");REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1949, at 5-6, 10-16 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1951, at 21-22, 39-41, 59-60, 71-81 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1953, at 30-32, 108, 112-113 (same); *id.* at 30 ("One of the major deficiencies in the operational structures of pension plans is that the employer's cost has never properly been related to their personal service requirements."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1955 at 7-8, 15-17, 23-20, 75-80 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 26-27, 76-77 (same); *id.* at 26-27 ("The basic cause of this condition has been insufficient allocations by governmental employers. Whereas many states, particularly those adjoining the State of Illinois, have provided for full or substantially complete funding of pension plans, Illinois has been woefully derelict in this

regard. Governmental contributions to the pension plans, throughout the years, have been materially insufficient and inadequate to finance their accruing share of the pension obligation."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1959, at 8 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 31-32, 45 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 9, 14, 38, 39-40 (same); *id.* at 9 ("Contribution by governmental employers, however are still far below the level which might be considered adequate for the requirements of the pension funds."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1967, at 47-48 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF1969, at 11, 14-15, 58, 106 (same); *id.* at 106 ("The inadequacy of the provisions for financing the employer's share of the cost contained in the pension laws enacted many years ago has resulted in large unfunded accrued liabilities. . . . In the case of state-financed pension funds, appropriations of grossly insufficient amounts unrelated to accruing requirements, mean only a deferment of the obligation. Allocations of fund by the state have been below mandatory statutory requirements as expressly provided in the governing laws.").

[27] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 26-27.

[28] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1955, at 25. The report further explained that with municipal pension funds, "the special tax rate authorization for pension purposes has been ineffective as a means of financing pension cost. The fixed tax rate is too rigid in respect to increased costs necessitated by higher salary authorizations, expansion of coverage to new employees, and liberalized benefit provisions secured by amendatory legislation. There is a perpetual gap between the authorized tax levy and the financial needs of the fund." *Id. See also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1959, at 30 ("In the case of State-financed pension funds, arbitrary appropriations unrelated to actual requirements mean only a deferment of the obligation. Considerably larger allocations will be required in the future."); *id.* at 43-44 ("The pension funds financed by State appropriations are likewise restricted to certain limited revenues which do not take into account the currently accruing pension cost for current service or the unfunded accrued liability for previous service."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 31-32 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1963, at 25-26 (same).

[29] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 32; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1963,

at 25-26; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 106.

[30] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 72; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 39).

[31] *See* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1947, at 28-29, 46-48 (1945) (discussing the Commission's recommendation to budget and fund pension costs when incurred and funding on an actuarially required basis); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1949, at 8, 17, 31-38, 73-75 (same and stating that pension underfunding "is a problem which will no longer respond to half-way measures of treatment. Corrective measures embodying approved and realistic pension principles are imperative."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF1951, at 11, 21-22, 39-41 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1953, at 7, 30-32; 112-13 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1955, at a-b, 15, 26-27, 54-55 (same) *id.* at 15 (recommending that pension be funded under a "current plus interest" method whereby contributions equals "current service requirements and an amount which shall at least be equal to the interest on the unfunded accrued liability; stating at 26 as to state pension funds that: "Instead of biennial appropriations in lump sum amounts to the pension system, each departmental or agency appropriation for personal services should be sufficient to include the pension costs incident to that appropriation. Upon payment of salary to the employee, the corresponding pension cost could be paid to the pension fund."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 7-8, 11, 15-21, 23-29,75-80 (same); *id.* at 8 ("States of a comparable economic position [as Illinois], especially those adjoining Illinois, all subscribe to the accrual principle of financing of pension obligations. Illinois remains the exception."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1959, at 8, 14, 30-31, 43-49 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 11, 18, 23-24, 31, 44-49 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1963, at 13-14, 25-32, (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 14, 37-46 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1967, at 9, 12, 45-52;*id* at 9 (noting that the recommendation "received acceptance at the State level."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 11, 14-15, 57-65 (same).

[32] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 76; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 39 (same).

[33] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 10; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1971, at 10 (1971) (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 15 (1977) (same); *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-80, at 13 (stating that the "method of current budgeting of the accruing pension cost as has been advocated by the Commission by integrating such costs with the personnel budget has not as yet received full acceptance among the various public agencies.").

[34] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 41.

[35] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1957, at 8; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 10 ("What is of primary concern to the Commission and imperatively required is a financial policy on the part of both the State of Illinois and the local governments which will produce adequate revenues for the financial needs of these funds on a basis that will permit financial progress and the development of the pension funds consistent with recognized principles for financing pensions.").

[36] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 46; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-80, at 52 (same).

[37] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 46.

[38] *See* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1947, at 48, 57-59 (briefly discussing how pensions are treated under Illinois law and case law developments); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1951, at 82-91 (analyzing the legal status of pension rights under Illinois law); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1953, at 94-104 (detailing the legal protections afforded to pension benefits deemed protected under a contractual theory); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 71 (explaining the

nature of gratuity plans); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1965, at 103-07 (discussing whether pension benefits were protected as vested or contractual rights, noting that "number of courts adopting the view that such pensions are in the nature of contractual or vested rights," and referring to this trend as "disturbing" because of the limits this theory could place on the ability legislature to alter or amend benefit rights).

[39] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1961, at 71.

[40] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 32.

[41] *Id.*

[42] COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, FINANCIAL CONDITION OF THE ILLINOIS STATE RETIREMENT SYSTEM as of June 30, 2013, at 27 (Mar. 2014) *available at:* http://cgfa.ilga.gov/Upload/FinCondILStateRetirementSysFY13Mar2014.pdf.

[43] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1969, at 42.

[44] *Id.* at 32.

[45] See Madiar Pension Article, *supra* note 2, at 7-40 (for a detailed discussion of the background, purposes, and scope of the Pension Clause); ROBERT TILOVE, PUBLIC EMPLOYEE PENSION FUNDS 337 (1976) (reviewing public pensions generally, focusing on New York, Massachusetts, and Illinois specifically and finding with respect to the Illinois Constitution's Pension Clause: "This provision, written by a constitutional convention, was copied almost verbatim from New York's constitution of 1938. Supported by organized labor and other employee groups and by some system trustees and administrators, the clause was opposed by the Pension Laws Commission, which argued that it was too rigid, would inhibit change, and would preclude correction of errors or equitable adjustments in rates of contribution, eligibility conditions, and the like. There was a major argument in favor of the clause: the failure of the state and its municipalities to fund the systems adequately. The danger of benefit cuts because of fiscal pressure seemed like a real possibility at the time."); Bob Sector & Rick Pearson, *Pension Crisis Rooted in 1970 Debate,* CHI. TRIB., Sept. 23, 2013, *available at:* http:// articles.Chicagotribune.com/2013-09-22/news/ct-met-public-pensions-1970-20130923_1_pension-clause-pension-debate-constitutional-convention (reviewing the 1970 Constitutional Convention debates of the Pension Clause and concluding that both its backers and critics agreed the provision "was

aimed at providing an ironclad guarantee to public workers that their pension benefits, once promised could not be trimmed" and the Clause was prompted by "a chronic failure by lawmakers to pay enough money into the funds to cover projected pension costs and keep them financially sound."). *Cf. Elk Grove Engineering Co. v. Korzen*, 55 Ill.2d 393, 399-400, 304 N.E.2d 65, 69 (1973) ("The framers of the constitution would naturally examine the state of things at the time; and their work sufficiently attests that they did so.").

[46] Kanerva v. Weems, 2014 IL 115811 at ¶45 quoting IV Proceedings, Sixth Ill. Constitutional Convention 2930-31 (1970) (statements of Delegate Bottino) [hereinafter IV Proceedings].

[47] IV Proceedings, *supra* note 46, at 2931(1970) (remarks of Delegate Green).

[48] *Id.* (referring to *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)).

[49] *Id.* at 2931; *see also id.* at 2930 (remarks of Delegate Bottino) ("[P]articipants in these pension systems have been leery for years of the fact that—this matter of the amount the state has appropriated has been made a political football, in a sense. In other words, in order to balance budgets, you see, the party in power would just use the amount of the state contribution to help balance budgets, and this had gotten to the point where many of the so-called pensioners under this system were very concerned; and I think this is the reason that pressure is constantly being placed on the legislature to at least put in a fair amount of state resources into guaranteeing payment of pensions.").

[50] *Id.* at 2931. *See Kanerva v. Weems*, 2014 IL 115811, at ¶46 (quoting Delegate Green's Convention statements as establishing that the Clause was intended "to protect 'public employees who are beginning to lost faith in the ability of the state and its political subdivisions to meet these benefit payments' and to address the 'insecurity on the part of the public employees [which] is really defeating the very purpose for which the retirement system was established.") (quoting IV Proceedings 2925). *Id.* at ¶46 (quoting remarks of Delegate Kemp, a supporter of the Clause, who "viewed its purpose as 'mak[ing] 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.") (quoting IV Proceedings 2926).

[51] Legislative Commission Reorganization Act of 1984, Public Act 83-1257 (Ill. 1984).

[52] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1971, at 9; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1973, at 69 (1973) (noting that increased unfunded liabilities "cannot be attributed to low rates of employee contributions."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 67 (stating that the failure to meet statutory funding policies for the state pension systems "is largely, though not exclusively, responsible for the increasing level of unfunded liabilities. A contributory retirement plan depends upon three critical sources of revenue. These are (1) employee contributions, (2) employer contributions, and (3) income derived from the investment of the employer and employee contributions. The employees have met their obligations since the inception of the system. The State has failed substantially to meet its share of the cost."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-1980, at 48 (same); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1981-1983, at 10, 39 (1983) (same).

[53] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1971, at 9.

[54] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-1980, at 66.

[55] *Id.*

[56] *Id.* at 66-67.

[57] *Id.*

[58] *Id.* at 67.

[59] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1971, at 29-36; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1973, at 17-18, 20-24, 27-30, 65-73; ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION, MAJOR POLICY JUDGMENTS, at 1 (Mar. 9, 1976) ("Pension costs should be budgeted currently as a part of the personnel service expense of each department or agency of government, thus expressing this cost equitably on a functional basis. The normal cost rate should be expressed as as a percentage of payroll to be applied annually by each department or agency against the amount requested for personal services. An addition to the rate should be provided to cover the interest accrual on the

unfunded pension liability, thus stabilizing such liability at its current level. This procedure would meet satisfactorily technical requirements for funding pension liabilities for public pension funds."); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 10, 14, 17-18, 23-25, 49-51, 56-60, 61-68; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-80, at 9, 37-38, 46-52, 85-87; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1981-83, at 29-44 (1983) (same).

[60] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1981-83, at 31-33 (1983).

[61] *Id*. at 33.

[62] *Id*.

[63] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1973, at 8.

[64] *Id.*

[65] *Id.* at 23-24.

[66] *Id.*; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1971, at 65-69 (discussing the Commission's failed attempts to modify the Pension Clause during the Constitutional Convention, the implications of the Clause, and limits the Clause would have on the ability of the General Assembly to unilaterally change pension benefits); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 77-82) (1977) (discussing the scope of the Pension Clause in light of court decisions from New York).

[67] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1973, at 13 ("As a means of alleviating the fiscal problems of government, a proposal has recently been advanced by economists and educators to fund the public employee retirement systems on a strict payout basis and thus dispense with the need for accumulated reserves. This method has been advanced as a means of 'reducing' public expenditures. An 'owe-as-you-go-' or strict 'payout' funding basis is unacceptable since it results in a deferment of the burden of financing currently incurred benefit obligations to future generations of taxpayers. The Commission's unequivocal conclusion is that instead of reducing cost requirements for pensions, it will result in appreciably

greater costs to government."); *id.* at 65-73 (further discussion of the current funding policy and proper alternatives); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 49-51, 61-68; ILLINOIS ECONOMIC AND FISCAL COMMISSION, PENSION OVERVIEW: February 1988, at 2 (1988) (identifying FY 1973 as the first year of the "payout" funding policy).

[68] TAXPAYERS' FEDERATION OF ILLINOIS, ILLINOIS STATE SPENDING: THE THOMSON YEARS, 1978-88, at 90 (1988) [hereinafter TAXPAYERS' REPORT].

[69] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1973, at X; REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-80, at 38 ("In the case of State-financed pension plans, arbitrary appropriations unrelated to actual requirements result only in a deferment of the pension obligations. Considerably larger allocations to the pension plans will be required in the future.").

[70] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 62-64; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-80, at 46-52 (examining the payout method and expected sharp increase in benefit payments in future years as well as the need to adopt an actuarially-sound funding policy).

[71] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 64.

[72] *Id.*; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1981-1983, at 30 ("Proponents of 'pay-as-you-go' funding argue that in the case of public retirement systems, the unlimited taxing power of government provides sufficient guarantee that benefits will be paid. But there is a distinct possibility that if future pension requirements become too burdensome, and adequate pension assets do not exist, pension benefits will be reduced by legislative action or a new, less liberal retirement plan will be instituted for new employees.").

[73] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 64-65; *see also* REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1979-1980, at 13, 43 (same).

[74] REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION OF 1975-1977, at 65.

[75] NOEL EBRAHIM ET AL., OFFICE OF THE GOVERNOR, A REPORT ON THE PUBLIC PENSION SYSTEMS OF THE STATE OF ILLINOIS (1979).

[76] *Id.*at 1 (Mercer Recommendations) ("Unfunded liabilities are projected to grow at an alarming rate. It is urgent for the state of Illinois to establish a funding program which will, at a minimum, stabilize the unfunded liabilities of the various state and local systems. The three major state benefit retirement systems, though solvent and making payments today, will not be able to meet future commitments because of the growth of the unfunded portion of the plans. It is doubtful that taxes will be able to keep pace with benefits and payout schedules. Because these funds face enormous future unfunded liabilities, it is quite possible that the bond rating of the state will be negatively affected. The Pension Laws Commission has held consistently to the recommendation of paying current costs plus interest on unfunded liability. Its effect has been to stabilize the present unfunded amounts to preclude growth of this liability. We agree and support this recommendation. Because a major commitment to establishing the unfunded liabilities of the systems would create a serious budgetary crisis if implemented immediately, we recommend that the rational approach toward funding this liability is the 'grade in' program. This approach envisions slowly grading in year by year, to the stabilized level of funding consistent with the guidelines of the Pension Laws Commission.").

[77] *Id.* at 3.

[78] *Id.* at 8-11; *id.* at 1 (Mercer Recommendations).

[79] ILLINOIS ECONOMIC AND FISCAL COMMISSION, PENSION OVERVIEW: February 1988, at 2 (Feb. 1988).

[80] JUDY BAAR TOPINKA, FISCAL FOCUS, ILLINOIS STATE PENSION SYSTEMS: A CHALLENGING POSITION 3 (May 2011) [hereinafter TOPINKA REPORT] *available at:* http://www.ioc.state.il.us/index.cfm/resources/fiscal-focus/may-2011-illinois-state-pension-systems-a-challenging-position/; TAXPAYERS REPORT, *supra* note 68, at 90.

[81] See ILLINOIS STUDY COMMISSION ON PUBLIC PENSION INVESTMENT POLICIES, FINAL REPORT 8 (Mar. 1982) (stating "net investment income recorded the sharpest advance in the

FY76-FY81 period, increasing more than 2½ times from $141.4 million to approximately $397.6 million. As a consequence, investment income accounts for a larger proportion of the [three funding sources] than it did five years ago: 35% rather than 24%.").

[82] GOVERNOR'S RETIREMENT SYSTEM TASK FORCE REPORT, December 1985, at 28 (1985).

[83] *See* TAXPAYERS REPORT, *supra* note 68, at 91; ILLINOIS STUDY COMMISSION ON PUBLIC PENSION INVESTMENT POLICIES, FINAL REPORT 8 (Mar. 1982) (noting the state's adherence to the 100% payout policy, but the departure from that policy in FY 1982 as a "budget savings measure"); *State of* Illinois, File No. 3-15237, Release No. 9389 at 3 (S.E.C. Mar. 13, 2013), *available at:*http://www.sec.gov/litigation/admin/2013/33-9389.pdf [hereinafter "SEC Order"]; Jennifer Halperin, *Pension Deficit Haunts Future: State Government Is Biggest Employer In Illinois, But The State Is Years Behind in Funding Its Pension System,*, ILLINOIS ISSUES, July 1993, at 18, *available at:* http://www.lib.niu.edu/1993/ii930717.html ("One habit consistently pointed out as devastating to the pension funds began in 1982, when the state stopped contributing enough money to the funds to cover checks going out in the same year. The stock market was doing well, so pension funds' investment income was up. In response, former Governor James R. Thompson reduced state contributions to less than two-thirds of the 1982 payout to retirees. That practice was supposed to be limited to one year but was not.").

[84] TAXPAYERS REPORT, *supra* note 68, at 91; TOPINKA REPORT, *supra* note 80, at 4.

[85] TAXPAYERS REPORT, *supra* note 68, at 91-94; TOPINKA REPORT, *supra* note 80 at 4; Dawn Clark Netsch, Testimony Before the Joint Hearing of the Select Committee on Aging and the Joint Economic Committee's Subcommittee on Investment: Using Public Employee Pensions to Balance State and Local Budgets: The Impact on Public Employees, Retirees, and Taxpayers 22 (Nov. 20, 1991) ("The basic problem is that the systems are not and have not been funded on an actuarial basis. From FY 1973 through FY 1981, the State contribution was set equal to 100% of benefit payout, on the assumption that both employee contributions and investment would be invested to provide for future benefits. When Illinois went into the recession in the early 1980s, one of the casualties was the State's pension contributions. In FY 1982, the aggregate contribution to the five systems was reduced to the equivalent of 62.5% of payout, one month's school, aid payments were delayed, over $60 million was 'borrowed' from other State funds, and $150 million was borrowed in the credit markets. For FY 1983, the Governor proposed a five-year phased-in return to 100% of payout and proposed a contribution equal to 70% of payout, but only 51% of payout was enacted. For FY 1984, the Governor proposed 77.5% of payout, but

only 60% of payout was enacted and that became Illinois 'funding policy' through FY 1987. For FY 1988, the Governor proposed a $1 billion tax increase, but no increase in pension contributions over the prior year. When the legislature refused to pass the tax increase, he cut agency budgets across the board and took additional cuts out of the pension contribution, for a total reduction of over $60 million. The cuts were justified by claiming that the State "should share in the retirement systems' above average investment returns." Two months later the stock market fell by over 500 points and the systems ended the year with investment returns of 2.5% or less. The resulting appropriation was the equivalent of 44% of payout, and a 'new' funding policy was implemented—at least for one more year.")

[86] TOPINKA REPORT, *supra* note 80, at 4.

[87] ILLINOIS ECONOMIC AND FISCAL COMMISSION, PENSION OVERVIEW 20-22 & Tbl. 8 (1990) ("For the State systems, there is no relationship between contributions required under normal cost plus interest and actual employer contributions. [T]he employer contribution has fallen far short of the employer's normal cost plus interest between FY 1984 and FY 1989. Over that period State contributions have been related to benefit payout rather than the actuarial cost of benefits earned. The percentage of the required contribution that has been covered by the State has varied considerably. The contribution for TRS began at 50% in FY 1984, rose to over 60%, and then dropped below 50% for FY 1989. The percentage for SERS also improved and then dropped, while the SURS percentage increased slightly over the period and then decline. The covered percentages for JRS and GARS also fluctuated. The system considered to be the healthiest of the State systems (SERS0 had about two-thirds of the contribution covered for FY 1989. The largest system, TRS, had less than half of the contribution covered in FY 1989, and about one- third was covered for SURS. Even thought the TRS and SURS are currently in similar financial condition and have been receiving State contributions based on similar percentages of payout, the implications of continuing recent employer funding practices are more serious for SURS due to the size of the system and the particularly significant shortfalls between actual employer contributions and those required under normal cost plus interest.").

[88] TOPINKA REPORT, *supra* note 80, at 4.

[89] Bob Sector, *Pension Mess Now All The Rage In Springfield,* CHI. TRIB., Dec. 30, 2012, *available at:* 2012 WLNR 28162974.

[90] *Id*.

[91] Public Act 82-960 (Ill. 1982); TAXPAYERS REPORT, *supra* note 68, at 93; ILLINOIS TAX FOUNDATION, TWO DECADES OF ILLINOIS STATE SPENDING: 1972-1992, at 81 (1992) ("In FY72, employee contributions were the systems' main income source, providing more than one-half of the state retirement systems' total income. State appropriations provided roughly one-third of the total at that time and investment income represented only 14 percent of the total income for these systems. By FY75, state appropriations had become the primary income source and remained so for six consecutive years (through FY81). . . . Investment income became the retirement systems' principal income source beginning in the recession year of FY82 and it remained so through FY91. Through most of the '80s, state appropriations declined as a percentage of system's income, and from FY88-FY91 state retirement appropriations for the first time provided *less* cash for the retirement systems than was provided by employee payroll contributions.") (emphasis added).

[92] See ILLINOIS STUDY COMMISSION ON PUBLIC PENSION INVESTMENT POLICIES, FINAL REPORT, at 8, 44-47 (1982) (explaining that the investment authority of each state pension fund is subject to specific statutory restrictions); *id*. at 10 (stating that the investment returns of the five state pension funds "have not kept pace with inflation. The funds have also lagged behind other indicators of institutional investments. Over the last five years, the Standard & Poor 500 Index has had an annualized rate of return of 10.1%. The entire universe of public and private retirement funds had an average return of 8.6% for the same time period. Public funds, however, averaged significantly lower returns: 5.6% annually for the past five years and 3.1% in FY 1981."); *id.* at 5 (stating that "improvements in the performance of the funds can relieve some of the pressures on the state and its employees to increase contributions."); *id*. at 23 ("The Commission believes that inferior performance by the funds in recent years was due in part to compliance with statutory provisions.").

[93] *Id.* at 15; *id.* at 24 (same). The study also explained that: "[t]he prudent person rule is reinforced by several legal administrative and structural checks and balances, including Article XIII, Section 5 of the Illinois Constitution, which guarantees the payment of pension benefits."). *Id.* at 2 of Executive Summary. The study further explained that the Pension Clause "guarantees that retirement benefits, as enforceable contractual obligations, are paid as promised." *Id.* at 26.

[94] *Id.* at 19.

[95] *Id.* at 8, 28-30. The study stated that with respect to investment in mortgage backed securities, the pension funds "should require the original lender remain at risk for some portion of the package to ensure that appropriate underwriting standards are used in approving the underlying loans." *Id.* at 30.

[96] TAXPAYERS REPORT, *supra* note 68, at 90, 93-94. Because "[e]conomic downturns and other market shifts do not constitute unanticipated circumstances in a market-based economy," *Ferguson v. Ferguson,* 54 So.3d 553, 556 (Fla. App. 2011), the State, as a contracting party, appears to have assumed the foreseeable risk of future stock market downturns by shifting its investment policy to one seeking higher stock market returns. See YPI 180 N. *LaSalle Owners, LLC v. 180 N. LaSalle II, Inc.,* 403 Ill.App.3d 1, 7, 933 N.E. 2d 860, 865 (1st Dist. 2010) (stating that "if the risk was foreseeable there should have been a provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.") (quoting U.S. v. Winstar, 518 U.S. 839, 905 (1996)).

[97] GOVERNOR'S RETIREMENT SYSTEM TASK FORCE REPORT, December 1985, at 5, 7, 13(1985).

[98] *Id.* at 8, 71-83, 178.

[99] *Id.* at 32, 42-49.

[100] *Id.* at 48.

[101] *See* Charles N. Wheeler, *Policy Procrastination: State Pension Systems,* ILLINOIS ISSUES, February 1988, at 3, *available at:* http://www.lib.niu.edu/1988/ii880204.html (citing ILLINOIS ECONOMIC AND FISCAL COMMISSION, PENSION OVERVIEW: February 1988, at iv (1988)).

[102] *Id.* at 4; ILLINOIS ECONOMIC AND FISCAL COMMISSION, PENSION OVERVIEW: February 1988, at 25-27 (1988).

[103] Public Act 86-273 (Ill. 1989).

[104] ILLINOIS ECONOMIC AND FISCAL COMMISSION, FISCAL YEAR 1995, PENSION FUNDING REQUIREMENTS 4 (1994) (also explaining that under Public Act 86-273, "[t]he State contribution, as a percentage of the applicable employee payroll, was schedule to be increased in equal, annual

increments over the seven year period, until the specified funding requirements are met."); Michael D. Klemens, *State Pensions: The Truth and The Consequences*, ILLINOIS ISSUES, Nov. 1991, at 18, *available at:* http://www.lib.niu.edu/1991/ii911118.html.

[105] Dawn Clark Netsch, *State Pension Raids Rampant In the 1990s,* ILLINOIS MUNICIPAL REV., Feb. 1993, at 15 (Feb. 1993); *see also*LLINOIS ECONOMIC AND FISCAL COMMISSION, FISCAL YEAR 1995, PENSION FUNDING REQUIREMENTS 4 (1994) ("The State has not funded the State retirement systems as required by Senate Bill 95."); Jennifer Halperin, *Netsch Stays Off Cut-The-Waste Bandwagon*, ILLINOIS ISSUES, Nov. 1993, at 16, *available at:* http://www.lib.niu.edu/993/ii931116.html.

[106] ILLINOIS ECONOMIC AND FISCAL COMMISSION, FISCAL YEAR 1995, PENSION FUNDING REQUIREMENTS 4-5 & App. B (1994) (detailing shortfall in state contributions versus the statutory funding requirements); ILLINOIS ECONOMIC AND FISCAL COMMISSION, THE FINANCIAL CONDITION OF THE ILLINOIS PUBLIC RETIREMENT SYSTEMS 7 1992) (stating that employer contributions are for all of the systems by Public Act 86-273 with increased contributions phased-in over a seven year period in FY 1990 to FY 1996, but the statutory language has "historically had little bearing on the State's contributions to its pension systems, and the State has yet to comply with this requirement in any of the three subsequent budget years. On the contrary, the State's contributions have been usually determined through the appropriations process, based on availability of resources, and not according to statutory requirements. Generally, the State's pension payments have remained about the same for the last five years, amounting to a level-funding policy."); ILLINOIS ECONOMIC AND FISCAL COMMISSION, THE FINANCIAL CONDITION OF THE ILLINOIS PUBLIC RETIREMENT SYSTEMS 8 1994) (same); Associated Press, *Edgar Signs Measure To Cover Future Pension Debts,* ST. LOUIS POST-DISPATCH, Aug. 23, 1994, *available at:* 1994 WLNR 703595 (stating that the 1989 funding plan was ignored by governors and lawmakers because of "other budget priorities").

[107] *Using Public Employee Pensions to Balance State and Local Budgets: The Impact on Public Employees, Retirees, and Taxpayers, Hearing Before Select Comm. on Aging and Jt. Econ. Comm., Subcomm. on Investment,* 102d Cong., 18 (Nov. 20, 1991) (testimony of Dawn Clark Netsch).

[108] *Id.* at 18, 23-24.

[109] *Id.* at 17, 24.

[110] *See* Tim Novak, *Illinois Pension Fund At Issue In Campaign*, ST. LOUIS POST-DISPATCH, Apr. 19, 1994, *available at:* 1994 WLNR 697404.

[111] ILLINOIS ECONOMIC AND FISCAL COMMISSION, THE FINANCIAL CONDITION OF THE ILLINOIS PUBLIC RETIREMENT SYSTEMS II-III (1994).

[112] *Id.*

[113] Rick Pearson, *Edgar, Netsch Jostle on Pension Plans*, CHI. TRIB., Apr. 19, 1994, *available at:* 1994 WLNR 4348551.

[114] *Id.*; Novak, *supra* note 110.

[115] Novak, *supra* note 110; Pearson, *supra* note 113.

[116] Novak, *supra* note 110; Pearson, *supra* note 113.

[117] Rick Pearson, *Agreement Is Near On Compromise Plan to Bail Out State Pension*, CHI. TRIB., June 21, 1994, *available at:* 1994 WLNR 4294438; Associated Press, *supra* note 106.

[118] Public Act 88-593 (Ill. 1984).

[119] *See* SEC Order, *supra* note 85, at 3; ILLINOIS ECONOMIC AND FISCAL COMMISSION, FISCAL YEAR 1996 PENSION FUNDING REQUIREMENTSat 4 (1995) [hereinafter 1995 FISCAL REPORT] (same); *id.* at 16 ("The underfunding of employer contributions continues to place undue pressure on one other major sources of revenue to the retirement systems, namely income from investments. In recent years the higher-than-assumed rate of return on investments has distorted the fact that employer contributions have not kept pace with prior, current, and future estimated benefit costs. In three of the State retirement systems, employee contributions have exceeded employer contributions for the last several years.").

[120] SEC Order, *supra* note 83, at 3; 1995 FISCAL REPORT, *supra* note 119, at 4; TOPINKA REPORT, *supra* note 80, at 4.

[121] SEC Order, *supra* note 83, at 3; 1995 FISCAL REPORT, *supra* note 119, at 4; TOPINKA REPORT, *supra* note 80, at 4.

[122] *See* SEC Order, *supra* note 83, at 3; William G. Holland, Auditor General, Background Paper: The Five State Retirement Systems at 1 (Mar. 1996).

[123] SEC Order, *supra* note 83, at 3; *see also* Holland, *supra* note 122, at 4.

[124] SEC Order, *supra* note 83, at 3.

[125] *Id*.

[126] *Examining The Retirement Security of State and Local Government Employees, Field Hearing, Before H. Comm. on Education and the Workforce, Subcomm. on Employer-Employee Relations* 21-22 (Aug. 30, 2006) (Testimony of John Filan, Director, Ilinois Governor's Office of Management and Budget) ("During the 1970's, 1980's, and first half of the 1990's, state contributions were grossly inadequate. It increased the unfunded liability every single year, every adopted budget under-funded the pensions, without exception, during good times and during bad times. In 1994, the state adopted a payment schedule. That first became effective in fiscal year 1996. However, the payment schedule continued to under-fund each of the pension funds each and every year. And would do so until 2034, 40 years later. At that point in time, June 30, 1995, the plans had a total funded ratio of 52.4 percent, that is assets to liabilities, and an unfunded liability of $19.5 billion in 1995. . . . The 1995 payment schedule was structurally and fundamentally flawed when it was enacted. . . . Unfortunately, the 1995 payment schedule would not decrease the pension debt for 40 years. The $19.5 billion will not go down, over the next 40 years. Payments were not sufficient to pay normal costs and interest on unfunded liability until around 2034. Thus, the state was guaranteed to experience a growing unfunded liability. This had the impact of deferring and increasing major debt into the future. As a result, the unfunded liability was originally projected in 1995 to grow from the June 30, 1995 level of $19.5 billion to more than $70 billion in 2034. The plan was structured that way, before it finally reduces to $45 billion in 2045, the last 10 years of the plan, based on projections done by the actuaries in 1995.") *available* at: http://purl.access.gpo.gov/GPO/LPS76243.

[127] SEC Order, *supra* note 83, at 6-7.

[128] *Id.* at 4.

[129] *Id.* at 5.

[130] *Id.* at 7.

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

[132] Pension Task Force Report, *supra* note 6, at 48.

[133] *Id.*

[134] Commission on Government Forecasting and Accountability, Briefing on Causes of State Pension Unfunded Liability, Presented to First Conference Committee on Senate Bill 1, at 5 (June 27, 2013) [hereinafter COGFA Briefing] *available at:* http://cgfa.ilga.gov/Upload/Presentation%206-27-13.pdf. The remaining 17.5% (or $15.2 billion) in growth in unfunded liabilities is attributable to "miscellaneous factors," such as: (a) Retroactive benefit payments for individuals who delayed applying for retirement, (b) Fewer terminations of vested employees than expected, (c) Differences between actual cost of benefits earned and projected costs; (d) Retirements with reciprocal service credits; (e) Disablements and service retirements other than expected; (f) Delayed reporting of retirements (effects on pension benefit obligations); and (g) Mortality other than expected. *Id; see also* Doug Finke, *State of Illinois' Record of Shorting Pensions Goes Back Decades*, St. J-Reg., Feb. 9, 2013, *available at:* 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).

[135] COGFA Briefing, *supra* note 133, at 5.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See* Madiar Pension Article, *supra* note 2, at 15-19.

[141] Ill. Const. art. XIII, § 5 (emphasis added).

[142] *See* Madiar Pension Article, *supra* note 2, at 22, 27, 28, 47-50, 52, 54, 56-57 (relying on floor debates, *Buddell v. Bd. of Trustees, State Univ. Retirement Sys.*, 118 Ill.2d 99, 514 N.E.2d 184 (1987); *Felt v. Bd. of Trustees Judges Retirement Sys.*, 107 Ill.2d 158, 481 N.E.2d 698 (1985); *Kraus v. Bd. of Trustees Police Pension Fund of Village of* Niles, 72 Ill. App. 3d 833, 390 N.E.2d 1281 (1st Dist. 1979)).

[143] *Id.* at 94-95(relying on *Kuhlmann v. Bd. of Trustees of the Police Fund of Maywood*, 106 Ill.App.3d 603, 608, 435 N.E.2d 1307, 1311 (1st Dist. 1982)).

[144] *Id.* at 95 (relying on *DiFalco v. Bd. of Trustees of Firemen's Pension Fund of Wood Dale Fire Protection Dist.*, 122 Ill.2d 22, 26, 521 N.E. 2d 923, 925(1988).

[145] *Kanerva v. Weems*, 2014 IL 115811, at ¶40.

[146] *See* Madiar Pension Article, *supra* note 2, at 27 (quoting IV Proceedings Sixth Ill. Constitutional Convention 2931(1970 (remarks of Delegate Henry Green, one the principal sponsors of the Pension Clause)); *id.* at 83 (relying *on Kuhlmann v. Bd. of Trustees of the Police Fund of Maywood*, 106 Ill.App.3d 603, 608, 435 N.E.2d 1307, 1311 (1st Dist. 1982) (regarding benefit increases)).

[147] *Id.* at 23, 30-31, 39, 41, 70-78 (citing *People ex. rel. Sklodowski v. State*, 182 Ill. 2d 220, 695 N.E.2d 374 (1988); *People ex. Rel. Ill. Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 326 N.E.2d 749 (1975); *McNamee v. State*, 173 Ill. 2d 433, 672 N.E.2d 1159 (1966)).

[148] *Kanerva v. Weems,* 2014 IL 115811 at ¶48.

[149] *McNamee v. State,* 173 Ill. 2d 433, 442, 672 N.E.2d 1159, 1164 (1996).

[150] Madiar Pension Article, *supra* note 2, at 74-78 (citing *Sklodowski*; *McNamee*).

[151] *Id.* at 49-50, 56-57, 69 (citing *Buddell v. Bd. of Trustees, State Univ. Retirement Sys.*, 118 Ill.2d 99, 514 N.E.2d 184 (1987);*Kraus v. Bd. of Trustees Police Pension Fund of Village of* Niles, 72 Ill. App. 3d 833, 390 N.E.2d 1281 (1st Dist. 1979)).

[152] *Id.*

[153] 98th Ill. Gen. Assemb., Senate Bill 1 as amended by House Amendment Nos. 1, 3 and 4, *available at:* http://www.ilga.gov/legislation/billstatus.asp?DocNum=1&GAID=12&GA=98&DocTypeID=SB&LegID=68366&SessionID=85&SpecSess=0.

[154] 98th Ill. Gen. Assemb., Senate Bill 2404 (engrossed version), *available at:* http://www.ilga.gov/legislation/billstatus.asp?DocNum=2404&GAID=12&GA=98&DocTypeID=SB&LegID=74021&SessionID=85.

[155] *See e.g.*, Lynne Marek, *Head of Teacher Pension Fund Says State Will Need To Cut COLAs*, CRAIN'S CHI. BUS., Oct. 3, 2012, *available at:* http://www.chicagobusiness.com/article/20121003/NEWS02/121009921/head-of-teacher-pension-fund-says-state-will-need-to-cut-colas?template=printart (quoting TRS Executive Director Dick Ingram, that "25 percent of TRS payments are for cost-of-living increases on pension benefits.").

[156] Civic Federation of Chicago, *House to Consider Speaker's Pension Reform Bill*, INSTITUTE FOR ILLINOIS' FISCAL SUSTAINABILITY(May 2, 2013), http://www.civicfed.org/civic-federation/blog/house-consider-speaker%E2%80%99s-pension-reform-bill ("Supporters of Speaker Madigan's approach have argued that the State retirement systems are currently in such bad shape that pension benefits are already impaired. Under this idea, a sustainable funding plan could withstand legal challenges even if it cut benefits because it would aid employees and retirees. The preamble to the new plan appears to make this legal case for cutting pension benefits. It describes the State's financial crisis and steps already taken to fix it; finds that the health, safety and welfare of Illinois residents is in jeopardy; and concludes that the fiscal problems cannot be resolved without comprehensive pension reform."); *see* 98th Ill. Gen.

Assemb., House Amendment #4 to Senate Bill 1, at 6 (stating that the "General Assembly finds that the reforms in this amendatory Act of the 98th General Assembly are necessary to address the fiscal crisis without incurring severe and irreparable harm to the public welfare") *available at:* http://www.ilga.gov/legislation/fulltext.asp?DocName=09800SB0001ham003&GA=98&SessionId=87&DocTypeId=SB&LegID=68366&DocNum=1&GAID=12&Session=0; 98th Ill. Gen. Assemb., House Proceedings, May 2, 2013, at 59 (statements of Representative Elaine Nekritz, co-sponsor of Senate Bill 1) ("I believe we have a very strong case in this Bill before us as to why this Bill is constitutional. Just as though . . . just like under the First Amendment, which is a very absolute statement that you're . . .that freedom of speech cannot be abridged, you can't, under that, still be allowed to shout fire in a crowded theater. And I believe that the courts will not force us, in this instance, to put pension payments above every other constitutionally required and constitutionally encouraged priorities that. . . that this state has.").

[157] 98th Ill. Gen. Assemb., Senate Bill 1 as amended by House Amendment Nos. 1, 3 and 4, *available at:* http://www.ilga.gov/legislation/billstatus.asp?DocNum=1&GAID=12&GA=98&DocTypeID=SB&LegID=68366&SessionID=85&SpecSess=0.

[158] *See, e.g.*, 98th Ill. Gen. Assemb., Senate Bill 2404, at 41-48 (setting forth the contractual choice framework for GARS members); *id.* at 71-80 (setting forth the contractual choice framework for SERS members); *id.* at 106-14 (setting forth the contractual choice framework for SURS members); *id.* at 146-55 (setting forth the contractual choice framework for TRS members), *available at:* http://www.ilga.gov/legislation/98/SB/PDF/09800SB2404eng.pdf.

[159] *See* 98th Ill. Gen. Assemb., Senate Proceedings, May 9, 2013, at 15-19 (statements of Senate President John Cullerton, principal sponsor of Senate Bill 2404) (explaining the bill's contractual framework).

[160] *Buddell v. Bd. of Trustees, State University Retirement Sys.*, 118 Ill. 2d 99, 104-05, 514 N.E.2d 184, 187 (1987) (noting pension benefits subject to change under contract principles*); Kraus v. Bd. of Trustees of the Police Pension Fund of the Village of Niles*, 72 Ill. App. 3d 833, 849-50, 390 N.E.2d 1281, 1293 (1st Dist. 1979) (same).

[161] 98th Ill. Gen. Assemb., Senate Bill 2404 (engrossed version) *available at:* http://www.ilga.gov/legislation/billstatus.asp?DocNum=2404&GAID=12&GA=98&DocTypeID=SB&LegID=74021&SessionID=85.

[162] *See* Eric M. Madiar, *Public Pension Benefits Under Seige: Does State Law Facilitate or Black Efforts to Cut the Pension Benefits of Public Servants?*, 27 A.B.A. J. LAB. & EMP. L. 179, 182-83 (2012) (describing the California approach to public pensions).

[163] *See* Amanda Vinicky, Pension Conference Committee Progress Report, Illinois Public Radio Sept. 26, 2013, *available at:* https://will.illinois.edu/news/story/pension-conference-committee-progress-report; *Editorial, Time to Move to Heart of Stunt: Pension Reform,* CHI. SUN-TIMES Sept. 29, 2013, *available at:* http://www.suntimes.com/opinions/22828613-474/time-to-move-to-heart-of-stunt-pension-reform.html; Ray Long, *Pension Deal Remains Elusive*, CHI. TRIB., Oct. 19, 2013, *available at:* http://articles.chicagotribune.com/2013-10-19/news/ct-met-illinois-pension-reform-veto-session-20131019_1_pension-reform-pension-deal-pension-changes.

[164] *See* Ray Long & Rick Pearson, *Illinois Lawmakers Reach Tentative Deal on Pension Fix*, CHI. TRIB., Nov. 27, 2013, *available at:* http://www.chicagotribune.com/news/local/breaking/chi-lawmakers-reach-an-agreement-on-pension-problem-20131127,0,5758411.story; Dave McKinney, *Legislative Leaders Strike Deal on Illinois Pension Reform,* CHI. SUN-TIMES, Nov. 27, 2013, *available at:* http://www.suntimes.com/24032109-761/legislative-leaders-strike-deal-on-illinois-pension-reform.html; Rick Lyman, *Illinois Legislature Approves Retiree Benefit Cuts in Troubled Pension System*, N.Y. TIMES, Dec. 3, 2013, *available at:* http://www.nytimes.com/2013/12/04/us/politics/illinois-legislature-approves-benefit-cuts-in-troubled-pension-system.html?pagewanted=all&_r=0.

[165] 98th Ill. Gen. Assemb., Senate Bill 1, at 1-3, *available at:* http://www.ilga.gov/legislation/98/SB/PDF/09800SB0001enr.pdf.

[166] 98th Ill. Gen. Assemb., Bill Status, Senate Bill 1, *available at:* http:// www.ilga.gov/legislation/BillStatus.asp?DocNum=0001&GAID=12&DocTypeID=SB&LegID=68366&SessionID=87&SpecSess=&Session=0&GA=98.

[167] COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, ILLINOIS STATE RETIREMENT SYSTEMS: FINANCIAL CONDITION as of June 30, 2013, at 34 (Mar. 2014 *available* at: http://cgfa.ilga.gov/Upload/FinCondILStateRetirementSysFY13Mar2014.pdf.

[168] *Id.*

[169] *Id.*

[170] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[171] 40 ILCS 5/2-119.1; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[172] 40 ILCS 5/14-114; 40 ILCS 5/14-115.

[173] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[174] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[175] *See* 40 ILCS 5/2-119.1 (only applying COLA skips to Tier I active members); 40 ILCS 5/14-114 (same); 40 ILCS 5/14-115 (same); 40 ILCS 5/15-136 (same); 40 ILCS 5/16-133.1 (same); 40 ILCS 16-136.1 (same).

[176] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[177] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[178] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[179] 40 ILCS 5/2-119.1; 40 ILCS 5/14-114; 40 ILCS 5/14-115; 40 ILCS 5/15-136; 40 ILCS 5/16-133.1; 40 ILCS 16-136.1.

[180] 40 ILCS 5/2-119; 40 ILCS 5/14-107; 40 ILCS 5/14-110; 40 ILCS 5/15-135; 40 ILCS 5/16-132.

[181] 40 ILCS 5/2-119; 40 ILCS 5/14-107; 40 ILCS 5/14-110; 40 ILCS 5/15-135; 40 ILCS 5/16-132.

[182] 40 ILCS 5/2-119; 40 ILCS 5/14-107; 40 ILCS 5/14-110; 40 ILCS 5/15-135; 40 ILCS 5/16-132.

[183] 40 ILCS 5/2-119; 40 ILCS 5/14-107; 40 ILCS 5/14-110; 40 ILCS 5/15-135; 40 ILCS 5/16-132.

[184] 40 ILCS 5/2-119; 40 ILCS 5/14-107; 40 ILCS 5/14-110; 40 ILCS 5/15-135; 40 ILCS 5/16-132.

[185] 40 ILCS 5/2-108; 40 ILCS 5/2-108.1; 40 ILCS 5/14-103.10; 40 ILCS 5/15-111; 40 ILCS 5/16-121.

[186] 40 ILCS 5/1-160(b-5).

[187] 40 ILCS 5/2-108; 40 ILCS 5/2-108.1; 40 ILCS 5/14-103.10; 40 ILCS 5/15-111; 40 ILCS 5/16-121.

[188] 40 ILCS 5/2-108; 40 ILCS 5/2-108.1; 40 ILCS 5/14-103.10; 40 ILCS 5/15-111; 40 ILCS 5/16-121.

[189] 40 ILCS 5/15-136(a) (Rule 2); 40 ILCS 5/16-133(a)(A).

[190] 40 ILCS 5/15-136; 40 ILCS 5/16-133.

[191] 40 ILCS 5/15-136(a) (Rule 1); 40 ILCS 5/16-133(a)(B).

[192] STATE UNIVERSITIES RETIREMENT SYSTEM, TRADITIONAL BENEFIT MEMBER GUIDE 16 (2013).

[193] 40 ILCS 5/15-136(a) (Rule 2); 40 ILCS 5/16-133(a)(A).

[194] STATE UNIVERSITIES RETIREMENT SYSTEM, TRADITIONAL BENEFIT MEMBER GUIDE 17 (2013).

[195] *Id.*

[196] 40 ILCS 5/15-136(c).

[197] 40 ILCS 5/15-157(e).

[198] 40 ILCS 5/15-125(2); UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES, RETIREMENT PROGRAMS FOR UNIVERSITY EMPLOYEES 4 (2014) (stating that the new effective rate of interest rate under Public Act 98-0599 would be approximately 4.27%) (on file with author).

[199] 40 ILCS 5/2-125 (2); 40 ILCS 5/2-126; 40 ILCS 5/14-133; 40 ILCS 5/15-157; 40 ILCS 5/16-19.

[200] 40 ILCS 5/15-125 (2); 40 ILCS 5/2-126; 40 ILCS 5/14-133; 40 ILCS 5/15-157; 40 ILCS 5/16-152.

[201] 98th Ill. Gen. Assemb., House Proceedings, Dec. 3, 2013, at 17 (statements of Speaker Madigan, principal House sponsor of Senate Bill 1) (stating that the "reduction in the employee contribution was put into the Bill as part of the items of consideration that were put into the Bill for purposes of the arguments before the Illinois Supreme Court."); *id.* at 53.

[202] *See Diederich Ins. Agency, LLC v. Smith*, 2011 IL App (5th) 100048, at ¶5, 962 N.E.2d 165, 167 (finding that the employer's reduction in the duration of an existing non-solicitation agreement from 2 years to 1 year was not legal consideration to support a new non-solicitation agreement the employee entered into because the employee "was already obligated to not compete against" the employer); *Ross v. May Co.*, 377 Ill.App.3d 387, 392, 880 N.E.2d 210, 215 (1st Dist. 2007) (finding that although an employer had offered an employee additional benefits such as paid personal days, disability insurance and a retirement savings plan, these additional benefits were offered to all employees and were not part of a bargained-for exchange with the employee to support a modification of the employer's binding employee handbook).

[203] 40 ILCS 5/2-124; 40 ILCS 5/14-131; 40 ILCS 5/15-155; 40 ILCS 5/16-158.

[204] 40 ILCS 5/2-125; 40 ILCS 5/14-132; 40 ILCS 5/15-156; 40 ILCS 5/16-158.2.

[205] *Compare* 98th Ill. Gen. Assemb., Senate Bill 2404, at 53, 85, 127, and 173 *available at:* http://www.ilga.gov/legislation/98/SB/PDF/09800SB2404eng.pdf (making the state "contractually obligated" to make pension contributions under the 1995 funding plan) *with* 40 ILCS 5/2-125; 40 ILCS 5/14-132; 40 ILCS 5/15-156; 40 ILCS 5/16-158.2 (lacking such language).

[206] *See* 98th Ill. Gen. Assemb., House Proceedings, Dec. 3, 2013, at 31-32 (colloquy between House Speaker Madigan, principal House sponsor of Senate Bill 1, and Representative Fortner where Representative Fortner asked with respect to the "funding guarantee" whether "the Legislature would still have the power through the statutory process " to "change the number that would be required for us to pay[?]" and the House Speaker answered, "The answer is yes.").

[207] 30 ILCS 122/20; 30 ILCS 122/25; 40 ILCS 5/2-125; 40 ILCS 5/14-132; 40 ILCS 5/15-156; 40 ILCS 5/16-158.2.

[208] 30 ILCS 122/20; 30 ILCS 122/25; 40 ILCS 5/2-125; 40 ILCS 5/14-132; 40 ILCS 5/15-156; 40 ILCS 5/16-158.2.

[209] *See* 98th Ill. Gen. Assemb., House Proceedings, Dec. 3, 2013, at 31-33 (colloquy between House Speaker Madigan, principal House sponsor of Senate Bill 1, and Representative Fortner regarding payment amounts).

[210] 40 ILCS 5/2-165; 40 ILCS 5/14-155; 40 ILCS 5/15-200; 40 ILCS 5/16-205; 40 ILCS 5/20-121; 40 ILCS 5/123; 40 ILCS 5/20-124; 40 ILCS 5/20-125.

[211] 40 ILCS 5/2-165; 40 ILCS 5/14-155; 40 ILCS 5/15-200; 40 ILCS 5/16-205.

[212] 40 ILCS 5/7-109; 40 ILCS 5/15-106; 40 ILCS 5/16-106.

[213] 40 ILCS 5/7-116; 40 ILCS 5/7-139; 40 ILCS 5/9-219; 40 ILCS 5/9-220; 40 ILCS 5/14-104.3; 40 ILCS 5/14-106; 40 ILCS 5/15-112; 40 ILCS 5/15-113.4; 40 ILCS 5/16-121; 40 ILCS 5/16-127; 40 ILCS 5/17-134.

[214] 5 ILCS 315/7.5.

[215] *Id.*

[216] Complaint, *Heaton v. Quinn*, No. 2013 CH 28406 (Cir. Ct. Cook County); Complaint, *Ill. State Employees Ass'n v. Bd. of Trustees of the State Employees Retirement System*, No. 2014 CH 3 (Cir. Ct. Sangamon County); Complaint, *Retired State Employees Ass'n v. Quinn*, No. 2014 CH 1 (Cir. Ct. Sangamon County); *Harrison v. Quinn*, No. 2014 CH 48 (Cir. Ct. Sangamon County) [hereinafter "We Are One Complaint"]; *State Universities Annuitants' Ass'n v. State Universities Retirement System*, 2014 MR 207 (Cir. Ct. Champaign County) [hereinafter "SUAA Complaint"].

[217] Complaint, *Heaton v. Quinn*, No. 2013 CH 28406 (Cir. Ct. Cook County); Complaint, *Ill. State Employees Ass'n v. Bd. of Trustees of the State Employees Retirement System*, No. 2014 CH 3 (Cir. Ct. Sangamon County); Complaint, *Retired State Employees Ass'n v. Quinn*, No. 2014 CH 1 (Cir. Ct. Sangamon County); We Are One Complaint; SUAA Complaint.

[218] The complaints were filed in circuit courts in Cook, Sangamon (7th Judicial District), and Champaign (6th Judicial District) Counties.

[219] Complaint, *Heaton v. Quinn*, No. 2013 CH 28406 (Cir. Ct. Cook County); Complaint, *Ill. State Employees Ass'n v. Bd. of Trustees of the State Employees Retirement System*, No. 2014 CH 3 (Cir. Ct. Sangamon County); Complaint, *Retired State Employees Ass'n v. Quinn*, No. 2014 CH 1 (Cir. Ct. Sangamon County); We Are One Complaint.

[220] Order Granting Motion for Consolidation and Transfer from the Circuit Court of Sangamon County, *In Re: Pension Reform Litigation*, No. 2014 CH 48 (Mar 3, 2014).

[221] *Id.*

[222] Order Granting Motion for Temporary Restraining Order and Preliminary Injunction, *In Re: Pension Reform Litigation*, No. 2014 MR 1 (May 15, 2014).

[223] We Are One Complaint, at 52-54; SUAA Complaint, at 14.

[224] Complaint, *Ill. State Employees Ass'n v. Bd. of Trustees of the State Employees Retirement System*, No. 2014 CH 3, at 12-13 (Cir. Ct. Sangamon County) [hereinafter "State Employees

Association Compliant"]; Complaint, *Retired State Employees Ass'n v. Quinn*, No. 2014 CH 1, at 24-26 (Cir. Ct. Sangamon County) [hereinafter "Retired State Employees Association Complaint"].

[225] State Employees Association Complaint at 27-29; Retired State Employees Association Complaint at 17-19.

[226] Retired State Employees Association Complaint at 14-17.

[227] *See e.g.,* We Are One Complaint at 43-45.

[228] We Are One Complaint, at 41.

[229] *Id*. at 34-44.

[230] *Id.* at 40.

[231] *Id.*

[232] SUAA Complaint, at 19-20; SUAA Motion for Injunctive Relief, at 6-8.

[233] SUAA Complaint, at 19-20; SUAA Motion for Injunctive Relief, at 6-8,10-13.

[234] SUAA Complaint, at 20-21.

[235] SUAA Motion for Injunctive Relief, at 7-8.

[236] *Id.*

[237] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 61 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 59 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,*No. 2014 MR 1, at 33 (May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR

1, at 17 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 21 (May 15, 2014).

[238] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 3-4 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 28-29 (May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 4 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General,*In re: Pension Reform Litigation*, No. 2014 MR 1, at 10-11 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 8 (May 15, 2014).

[239] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,*No. 2014 MR 1, at 3-4 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 28-29 (May 15, 2014).

[240] Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 28-30 (May 15, 2014).

[241] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 61 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 59-60 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 33-34 (May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General,*In re: Pension Reform Litigation*, No. 2014 MR 1, at 17-18 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 21-22 (May 15, 2014).

[242] Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 60 (May 15, 2014).

[243] *See e.g.*, Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation*, No. 2014 MR 1, at 28 (May 15, 2014) (denying "members of SERS

and SURS are entitled to 3% automatic annuity increases, but admiting that the Pension Code in effect immediately prior to June 1, 2014 provided that retired members of SERS, SURS, and TRS would receive each year a 3% automatic annuity increase to their pension amount, compounded.").

[244] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 3-4 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 28-29 (May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 4 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General,*In re: Pension Reform Litigation,* No. 2014 MR 1, at 10-11 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 4 (May 15, 2014).

[245] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 3-4 (May 15, 2014).

[246] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 59 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 57(May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 15 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 19 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 31 (May 15, 2014).

[247] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 59-64 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 57-62 (May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 15-20 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 19-24 (May 15, 2014); Answer and Defenses to State Employees

Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 30-36 (May 15, 2014).

[248] Answer and Defenses to “We Are One” Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 57-58 (May 15, 2014).

[249] *Id.*

[250] *Id.* at 58-59.

[251] *Id.*

[252] Answer and Defenses to SUAA Complaint, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 64-65 (May 15, 2014); Answer and Defenses to We Are One Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 57(May 15, 2014); Answer and Defenses to Retired Teachers Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 20 (May 15, 2014); Answer and Defenses to Retired State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 23-24 (May 15, 2014); Answer and Defenses to State Employees Association Complaint, Illinois Attorney General, *In re: Pension Reform Litigation,* No. 2014 MR 1, at 35-36 (May 15, 2014).

[253] Memorandum of Law in Support of Plaintiffs’ Joint Motion for Partial Summary Judgment, No. 2014 MR 1 (June 25, 2014). A separate motion for summary judgment was filed by counsel for the Illinois State Employees Association and Retired State Employees’ Association arguing that Public Act 98-0599 violates the Equal Protection Clause of the Illinois Constitution by not applying the Act’s benefit cuts to judges. Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment, No. 2014 MR 1 (June. 25, 2014).

[254] Memorandum of Law in Support of Plaintiffs’ Joint Motion for Partial Summary Judgment, No. 2014 MR 1, 1-23 (June 29, 2014).

[255] Case Management Order, No. 2014 MR 1 (June 30, 2014).

[256] Doug Finke, *Judge:Insurance Ruling Will Factor Into Pension Reform Decision*, ST. J. REG., Sept. 4, 2014, *available at:* http://www.sj-r.com/article/20140904/NEWS/140909736; Order, No. 2014 MR 1 (Sept. 4, 2014).

[257] Sidley Austin LLP, Memorandum, The General Assembly's Authority to Enact Comprehensive Pension Reform Legislation: A Response to Eric Madiar (April 11, 2011) *available at:* docstoc.com/docs/96732951/April-THE-GENERAL-ASSEMBLY-AUTHORITY-TO-ENACT [hereinafter "Sidley Police Power Memo"]; Eric M. Madiar, Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution (Mar. 1, 2011)*, available at:* http://ssrn.com/abstract =1774163.

[258] Sidley Police Power Memo, *supra* note 257, at 2-3, 31-32, 37-41.

[259] *Id*. at 2-3, 12-14, 30-59.

[260] Madiar Pension Article, *supra* note 2, at 82-84, 96-98, 120-124.44.

[261] *Id.* at 47-49 (citing IV Proceedings 2931.

[262] IV Proceedings 2929-2930 (statements of Delegate Whalen; *see also* IV Proceedings 2930-31 (statements of Delegates Weisberg, Davis, and Bottino, opponents of the Clause, agreeing with Delegate Whalen's view that pension benefits should only be protected under the Illinois Constitution's Contract Clause).

[263] *See Buddell v. Bd. of Trustees, State Universities Retirement Sys.*, 118 Ill. 2d 99, 102, 514 N.E.2d 184, 186 (1987).

[264] *Felt v. Bd. of Trustees Judges Retirement Sys.*, 107 Ill.2d 158, 481 N.E.2d 698 (1985) (quoting IV Proceedings 2929) (statement of Delegate Kinney).

[265] *Kanerva v, Weems,* 2104 IL 115811, at ¶48.

[266] *Felt*, 107 Ill.2d at 167, 481 N.E.2d at 703: *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).

[267] *See* Ill. Const. 1970, art. I, § 22 (expressly subjecting "the right of the individual citizen to keep and bear arms" to the "police power"); *Kalodimos v. Village of Morton Grove*, 103 Ill.2d 483, (1984) (noting that the 1970 Constitutional Convention created an individual right to bear arms that is expressly "subject only to the police power"); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

[268] *Kanerva v, Weems*, 2104 IL 115811, at ¶41.

[269] *See Maddox v. Blagojevich*, 233 Ill.2d 508, 522, 911 N.E.2d 979, 988 (2009) ("The constitution operates as a limitation upon the General Assembly's sweeping authority, not as any grant of power [citation]; thus the General Assembly is free to enact any legislation that the constitution does not expressly prohibit[.]"); *O'Brien v. White*, 219 Ill.2d 86, 100, 846 N.E.2d 116, 124 (2006) (explaining, "the General Assembly cannot enact legislation that conflicts with specific provisions of the constitution, unless the constitution specifically grants the legislature that authority"); *People v. Adams*, 149 Ill.2d 331, 339-40, 597 N.E.2d 574, 579 (1992) ("the police power may not be used to violate a positive constitutional mandate"); *Greenfield v. Russel*, 292 Ill.392, 399, 127 N.E. 102, 105 (1920) ("Our Legislature possesses every power not delegated to some other department of the state or to the federal government or not denied to it by the Constitution of the state or of the United States."); *Town of Lake View v. The Rose Hill Cemetery Co.*, 70 Ill. 191, 197 (1873) ("It has been said, the source of [the police power] may be readily recognized as flowing from the people in their organized capacity, inalienable in its character, but it is difficult to define its boundaries or limit its operations. We are unwilling, however, to concede the existence of an indefinable power, superior to the constitution, that may be invoked whenever the legislature may deem the public exigency may require it[.]"); *see also Munn v. Illinois*, 94 U.S. 113, 124 (1876) ("When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and security of life and property. All the powers which they retained committed to their respective States, *unless in express terms or by implication reserved to themselves*. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the States, so that now the governments of the States possess all the powers of Parliament of England, except such as have been delegated to the United States or reserved to the people. *The reservations by the people are*

shown in the prohibitions of the constitutions.") (emphasis added); *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill.App.3d 400, 406, 357 N.E.2d 211, 217 (2d Dist. 1976) ("the State is free as a matter of its own law to impose greater restrictions on the police power than those held to be necessary upon federal constitutional standards").

[270] *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

[271] IV Proceedings 2931 (Delegate Green); *see also Peters v. City of Springfield*, 57 Ill.2d 142, 151, 311 N.E.2d 107, 112 (1974) (concluding that the Clause was intended to ensure that the pension benefits of public employees could "not be defeated by reason of the failure to provide necessary funding").

[272] *Home Bldg. & Loan v. Blaisdell*, 290 U.S. 398, 426-444 (1934); *id.* at 439 (stating that the State's "reserved power cannot be construed as to destroy the limitation [of the Contract Clause], nor is the limitation to construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other."); *id.* at 443 (same).

[273] *Id.* at 426-444.

[274] *General Motors Corp. v. Romein*, 503 U.S. 181, 187-89 (1992).

[275] *People v. Caballas*, 221 Ill.2d 282, 313, 851 N.E.2d 26, 45 (Ill. 2006).

[276] *Id.*

[277] Madiar Pension Article, *supra* note 2, at 94-95.

[278] *Id.*

[279] *See* IV Proceedings 2926-2931.

[280] IV Proceedings 2931.

[281] IV Proceeding 2926 (statements of Delegate Kinney) ("It is definitely the intent that an increase in benefits would not be precluded. Many states tie their pension and retirement

benefits into a cost of living and raise them from time to time. It is the intent that this amendment would permit so doing if the legislature at some future time should decide to do so.”).

[282] *Kanerva v. Weems*, 2014 IL 115811 at ¶¶39-40.

[283] *Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill. App. 3d 697, 701-02, 579 N.E.2d 997, 1000-01 (1st Dist. 1991);*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).

[284] *People ex rel. Merchants' Savings, Loan & Trust Co. v. Auditor of Public Accounts*, 30 Ill. 434, 435-38 (1863).

[285] Cornelius, *supra* note 20, at 35, 44.

[286] JOHN H. KRENKEL, ILLINOIS INTERNAL IMPROVEMENTS: 1818-1848 at 149 (1958), *available at:* https://archive.org/download/illinoisinternal00kren/illinoisinternal00kren.pdf (last visited July 24, 2014). In 1841, the State defaulted on annual interest payments it owed on the internal improvement debts, which totaled over $10.5 million. That indebtedness was described as “almost insurmountable” because the State’s annual interest payment was nearly $800,000, but the State only collected about $98,500 a year in revenue for general government expenses. *Id.* Efforts to repudiate these debts were blocked by Governor Thomas Ford in 1842 who succeeded in forcing the State “to assume its responsibilities and save its credit.” Cornelius, *supra* note 21, at 27. KRENKEL supra at 178-90; Theodore Pease. *The Frontier State:* 1818-1848, *in* THE CENTENNIAL HISTORY OF ILLINOIS 316-27 (1918) *available at:* https://archive.org/download/frontierstate18100peas/frontierstate18100peas.pdf.
The State did not pay off its internal improvement debts until the 1880s. KRENKEL *supra* note 286, at 215-16.

[287] Cornelius, *supra* note 20, at 27, 35, 44; KRENKEL, *supra* note 286, at 209-210 (describing the drafting history of Article XV at the 1847 Illinois Constitutional Convention); *People ex rel. Merchants' Saving, Loan & Trust Co.*, 30 Ill. at 439-440 (detailing Article XV’s purpose and background).

[288] 1861 Illinois Laws at 208.

[289] *Id.* at 208-09; *People ex rel. Merchants' Saving, Loan & Trust Co.*, 30 Ill. at 436-38.

[290] *People ex rel. Merchants' Saving, Loan & Trust Co.*, 30 Ill. at 437.

[291] *Id.* at 439-445.

[292] *Id*. at 440.

[293] *Id*.

[294] *Id*. at 444.

[295] *Id.* at 445.

[296] Henry Ford, Interview by Charles N. Wheeler in the CHI. TRIB., May 25, 1916 appearing in CLIFTON FADIMAN, THE LITTLE BROWN BOOK OF ANECDOTES 213 (1995)

PUBLISHED: September 18, 2014

Volume 31 Issue 3 – Summer 2014

I. IELRB Developments

A. Bargaining Units

In *Uni Faculty Organizations, IEA-NEA and Board of Trustees of the University of Illinois*, Case No. 2013-RC-0008-S, 30 PERI ¶299 (IELRB 2014), the IELRB affirmed an Administrative Law Judge decision that a bargaining unit of faculty at Uni High School, a laboratory high school affiliated with the University of Illinois, was appropriate. The faculty at Uni High who were seeking representation were considered, under the university statutes, to be "nontenure-track faculty members" of the University.

The IELRB observed that the petitioned-for unit was not one listed in its regulations setting forth presumptively appropriate units for the University of Illinois. Under those regulations, the unit could still be appropriate if the union seeking the unit could establish by clear and convincing evidence that:

1. the unit is otherwise appropriate under section 7 of the Illinois Educational Labor Relations Act;

2. special circumstances and compelling justifications make it appropriate for the Illinois Educational Labor Relations Board to establish a unit different from those set forth [in the regulations];

3. establishment of a different unit will not cause undue fragmentation of bargaining units or proliferation of bargaining units. Undue fragmentation of bargaining units or proliferation of bargaining units is such as to threaten to interrupt services, cause labor instability, and cause continual collective bargaining and a multitude of representation proceedings.

The IELRB found the unit appropriate under section 7 because the Uni faculty shared a community of interest. The IELRB relied on, among many things, the fact that Uni High faculty members reported to individuals at Uni High, not the University, Uni High faculty were subject to a different evaluation process than are University faculty, and Uni High faculty members taught secondary education rather than higher education. The IELRB relied on these factors plus a distinct school year and distinct school day for Uni faculty as well as different funding sources for Uni High School and the rest of the University to establish significant differences between Uni High faculty and University faculty. Further, the IELRB determined that, because of the differences between Uni High and the rest of the University, any labor dispute would be "physically and otherwise limited to Uni High School" if the IELRB were to approve the bargaining unit as appropriate. Accordingly, the IELRB found no evidence that allowing Uni High faculty members to collectively bargain would cause undue fragmentation of the bargaining unit or put any strain on the labor relations process.

B. Protected Activity

In *Amy Whiting-Singer and Mid-Valley Special Education Cooperative*, Case No. 2013-CA-0077-C, 30 PERI ¶ 297 (IELRB 2014), the IELRB held that allegations that Mid-Valley Special Education Cooperative violated Section 14(a) of the IELRA by terminating Whiting-Singer in retaliation for advocating, on behalf of her students, that her employer follow "federal and state laws related to educating individuals with disabilities" fell outside the IELRB's jurisdiction. The IELRB held that advocating on the behalf of students was not protected activity under the Act. Section 3 of the IELRA guarantees employees the right to engage in concerted activity for mutual aid and protection. The IELRB emphasized that Whiting-Singer never advocated on behalf of other employees. Her alleged advocacy for students fell outside of Section 3. Accordingly the IELRB found the charge to be outside its jurisdiction and dismissed the charge.

II. IPLRA Developments

A. Subjects of Bargaining

In *SEIU Local 73 and City of Chicago*, No. L-CA 10-061. 31 PERI ¶ 3 (ILRB Local Panel, 2014), the ILRB held that the use of hidden cameras to discipline employees was a mandatory subject of bargaining and, therefore, the City of Chicago violated Sections 10(a)(4) and (1) of the IPLRA when the City failed to notify and negotiate with SEIU.

After a series of break-ins at the West Pullman Library, the City installed two hidden surveillance cameras on the premises to help the police department capture intruders. The City did not notify the bargaining unit employees about the installation of the cameras, did not bargain with the Union about the installation and used the footage from the cameras to discipline bargaining unit employees. The Local Panel concluded that the use of cameras for this purpose amounted to a unilateral change in a mandatory subject of bargaining without granting notice to the employees' exclusive bargaining representative. The ILRB distinguished between the use of cameras for the exclusive reason to capture intruders, which would be a permissive subject of bargaining, and the use of the cameras to discipline employees as being a mandatory subject of bargaining.

The ILRB noted that although the city installed the cameras to catch an intruder, the city did not limit the scope of the surveillance when it placed the cameras in places that monitored bargaining unit employees. The ILRB also found it convincing that the conduct of bargaining unit employees was recorded 24 hours a day and 7 days a week. The ILRB reasoned further that the use of cameras to catch intruders wasn't the only reason the city installed the cameras. The ILRB found it persuasive that subsequently the City disciplined an employee for damaging a copy machine after seeing the employee's behavior on footage from the cameras. The Local Panel reasoned that if the City only intended to catch intruders, it could have informed the Union, installed visible cameras, and only recorded when no one was in the building (which was when the previous break-ins occurred).

III. First Amendment Developments

A. Fair Share Fees

In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Supreme Court held that the State of Illinois and SEIU Healthcare Illinois & Indiana violated the First Amendment rights of personal assistants who provide in home services for Medicaid recipients and who were not members of the union when it compelled them to pay fair share fees to the union, representing their share of the costs of representation. The Court held that its prior decision in *Abood v. Detroit v. Detroit Board of Education*, 431 U.S. 209 (1977) which had upheld the constitutionality of fair share fees confined to the non-member of the union's pro rata share of expenditures germane to the union's collective representation functions. The Court questioned the continuing validity of *Abood*, observing that the line drawn in that case between union political and ideological expenditures, which could not constitutionally be charged to non-members, and expenditures germane to collective bargaining which may be charged has turned out not to be a very bright line as issues of public employee compensation have captured the limelight in public discourse. While not revisiting *Abood* in this case, the Court confined its holding to "full fledged" public employees. It held *Abood* inapplicable to the personal assistants who it characterized as employees of the State only for purposes of collective bargaining but are otherwise employees of the Medicaid recipients who receive their services.

B. Free Speech

In *Lane v. Franks*, 134 S. Ct. 2369 (2004), the Supreme Court held that a public employee's sworn testimony given under subpoena is citizen speech, eligible for First Amendment protection. The Court clarified its prior decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which had held that speech made as an employee is not entitled to First Amendment protection against adverse employment action.

In 2006, Lane was hired by Central Alabama Community College (CACC) as the Director of Community Intensive Training for Youth ("CITY"). Lane conducted an audit of the program's expenses. The audit found that Suzanne Schmitz, an Alabama State Representative, was on the CITY payroll but not reporting to the CITY office or performing any work. Despite warnings from the CACC president and its attorney, Lane terminated Schmitz for failure to perform her work duties.

Following Schmitz's termination, the FBI conducted an investigation of her employment with CITY. Lane testified before a federal grand jury regarding his reasons for terminating Schmitz. In August 2008, Lane also testified under subpoena at Schmitz's criminal trial. Lane was terminated in January 2009. He filed suit against Franks, his supervisor, alleging that Franks retaliated against him for his testimony against Schmitz in violation of the First Amendment.

The district court granted Frank's motion for summary judgment, despite genuine issues of material fact concerning Frank's motivation. Relying on *Garcetti,* the district court found that there was no clear violation because Lane's speech was part of his official job duties. The Eleventh Circuit affirmed, holding that Frank was entitled to qualified immunity in his personal capacity because Lane's free speech right was not clearly established in the law. The Eleventh

Circuit also found “that Lane spoke as an employee and not as a citizen because he was acting pursuant to his official duties when he investigated Schmitz’s employment.”

The Supreme Court affirmed in part and reversed in part. The Court defined the issue as whether a public employee’s “truthful subpoenaed testimony, outside the course of their ordinary job responsibilities” was protected by the First Amendment.

The Court distinguished *Garcetti*, as holding that an “internal memorandum prepared by a prosecutor in the course of his ordinary job responsibility constituted unprotected employee speech.” In contrast, the Court found that Lane’s speech was not within the scope of his employment duties, even though Lane acquired the information for his testimony in the course of his employment.

The Court emphasized the importance that truthful testimony under oath by a public employee, regardless of any official obligations, also carries an obligation as a citizen to render sworn testimony which sets it apart from speech made purely in the capacity of an employee.

The Court turned to the two-part inquiry regarding citizen speech: (1) did the speech involve matters of public concern, and (2) did the government have an adequate justification, as an employer, for treating the employee differently than the public at large. The court found that Lane’s testimony regarding “corruption in a public program and misuse of state funds” to be “a matter of significant public concern.” Further, the Court noted that such a substantial matter of public concern created an exceedingly high bar for the government to attempt to justify their actions. In light of the truthful nature of Lane’s testimony, and the significance of the issue at hand, the Court found Lane’s speech entitled to protection under the First Amendment.

The Court, however, affirmed the Eleventh Circuit’s finding that Franks in his individual capacity was entitled to qualified immunity from damages because of the lack of clear precedent in the Eleventh Circuit at the time Franks terminated Lane.

IV. llinois Constitution Developments

A. Pension Clause

In *Kanerva v. Weems*, 2014 IL 115811, the Illinois Supreme Court held that "the State's provision of health insurance premium subsidies for retirees is a benefit of membership in a pension or retirement system within the meaning of Article XIII, Section 5, of the Illinois Constitution, and a statute that allowed for reduced subsidies for health insurance of retirees and their beneficiaries violates the State Constitution. Article XIII, Section 5 provides that that "[m]embership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." The court, reasoned that the health insurance subsidies are benefits of membership in the retirement system. The court further reasoned that, based on the clear language in Article XIII, Section 5, the language was intended to include subsidized health care benefits. Further, the court stated that if the constitution's drafters had wanted to only protect annuity benefits they could have so specified, however they did not.

Published: September 18, 2014