

SURVEY OF ILLINOIS LAW: *IN RE PENSION LITIGATION*

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I. INTRODUCTION

Illinois' public pension systems have been underfunded for nearly a century, and the fears of pensioners about the efficacy of those pensions have existed for most of that time.¹ Worse, prior to 1970, the “mandatory” nature of most pensions—*i.e.*, paying into the pension was a condition of employment—made them gratuities and not contractual rights; under the theory that since the employee contribution was not voluntary it did not constitute contractual consideration.² These conditions led the 1970 Illinois Constitutional Convention to add a clause guaranteeing pension rights.³ That Clause reads as follows: “Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”⁴

Today pension underfunding exceeds a hundred billion dollars, more than one and a half times the entire annual budget.⁵ Worse, it continues to grow.⁶ This has become a serious concern for Illinois, which as of

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1. REPORT OF THE ILLINOIS PENSION LAWS COMMISSION OF 1916, at 272 (1917).
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*, 48 J MARSHALL L. REV. 167, 176 (2014).
3. *Id.*
4. ILL. CONST. 1970 art. XIII, § 5.
5. *Illinois Bid to Solve \$111 Billion Pension Shortfall Is Dead*, BLOOMBERG, <http://www.bloomberg.com/news/articles/2015-05-08/illinois-pension-reform-legislation-overturned-by-state-court-i9fs4sid> (last updated May 8, 2015). Furthermore, at the time of this writing, Illinois still has not passed a budget for the current year. Heather Long, *Illinois and Pa. are 170 days overdue on budgets*, CNN MONEY (Dec. 18, 2015), <http://money.cnn.com/2015/12/18/news/economy/illinois-pennsylvania-no-state-budgets/>.
6. See Madiar, *supra* note 2, at 169 (explaining that Illinois' underfunded pensions will continue to consume an exponential amount of the State's resources unless taxes are raised or services cut).

February 2013, had the worst credit rating of any state in the country.⁷ In the first major effort of many to address the pension crisis, Illinois enacted Public Act 97-695, a law designed to offset increasing health insurance costs by making deductions from pension disbursements.⁸ But, in *Kanerva v. Weems*, the Illinois Supreme Court struck P.A. 97-695 holding that health insurance subsidies were pension benefits protected by Article XIII, Section 5 of the Illinois Constitution of 1970 (“the Pension Clause”).⁹ In so doing the Court was clear that the Pension Clause was to be interpreted broadly.¹⁰

Even before the Illinois Supreme Court’s *Kanerva* opinion, however, the State embarked upon a much more aggressive effort to resolve the pension crisis. In 2014, it enacted Public Act 98-599 (“the Act”) which made a host of changes to the pension system including among them: (1) eliminating the compounding of the automatic annual increases; (2) skipping the automatic annual increases in certain years; (3) raising the retirement age; (4) capping pensionable salary; and many others.¹¹ This resulted in five cases being filed in three four different counties challenging the constitutionality of the Act, which were all consolidated as *In Re Pension Reform Litigation*.¹²

With Public Act 97-695, the State tread more carefully around the Pension Clause, arguing that that Act was consistent with the Pension Clause because that Act made no changes to the pension statute at all and that, therefore, the Pension Clause was not triggered.¹³ Although the Supreme Court disagreed, upon remand the State quickly returned the monies withheld for premiums.¹⁴ But with Public Act 98-599, the State made no such arguments.¹⁵ There was no question that this Act made changes to the pension code itself and triggered the Pension Clause.¹⁶ Thus, the State argued that its reserved sovereign power (also known as the

7. *Illinois budget fight sinks credit rating*, CNBC (Oct. 20, 2015), <http://www.cnbc.com/2015/10/20/illinois-budget-fight-sinks-credit-rating.html>.

8. *See generally* 2012 Ill. Legis. Serv. P.A. 97-695 (S.B. 1313) (WEST).

9. 2014 IL 115811, ¶ 90.

10. *Id.* at ¶ 41.

11. *See generally* 2014 Ill. Legis. Serv. P.A. 98-599 (S.B. 1) (WEST) [hereinafter Pension Reform Act] (providing additional changes to pension earnings limitation, tier 1 employee contribution decrease, money purchase formula changes, optional defined contribution plan, unused sick and vacation time, prohibition of non-public employees, and state funding); *see also* State Universities Retirement System of Illinois, *Summary of Public Act 98-599 (Pension Reform) December 20, 2013*, <http://www.surs.com/pdfs/legal/Pension-Reform-Summary-SB1.pdf>, for a summary of changes to state public pension systems following the passage of Public Act 98-599 (last visited May 6, 2016).

12. 2015 IL 118585, ¶¶ 1–2.

13. 2014 IL 115811, ¶ 26.

14. *See* John Miller, *Update on State Employee Retiree Health Insurance Premiums*, BLUESTEM FINANCIAL ADVISORS, LLC (Feb. 27, 2015), <http://bluestemfa.com/il-retiree-insurance-2015/>.

15. *See generally* *In Re Pension Reform Litigation*, 2015 IL 118585.

16. *Id.* at ¶¶ 43–45.

police power) permitted it to ignore the Pension Clause's Constitutional Prohibition against diminishing pension benefits.¹⁷

On May 8, 2015, the Supreme Court issued its opinion in *In Re Pension Reform Litigation*, and struck Public Act 98-599 as unconstitutional.¹⁸ The Supreme Court resoundingly found that the Pension Clause was not subject to the State's Reserved Sovereign Power—the Pension Clause is absolute.¹⁹ Importantly, where *Kanerva* was a 6-1 decision, the Supreme Court's opinion in *In Re Pension Reform Litigation* was unanimous.²⁰ This article addresses the foundation of the State's argument, explaining both the practical concerns with that argument, as well as the Supreme Court's final ruling.

II. THE CRISIS AND THE POLITICAL STALEMATE

Before the police power can be invoked, there must be a crisis that requires the State to act.²¹ And, what finally brought the State to address its fiscal crisis through pension reform was the difficulty of the negotiation in passing any law which would do so.²² From the first comments, it was noted that Senate Bill 1—which became Public Act 98-599—was an effort to break a political stalemate that plagued the General Assembly.

Ladies and Gentlemen of the Senate, with this 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 the Senate, but also between competing views within each one of the four caucuses.²³

The final plea for passage by Senator Radogno made this point clearly:

This certainly has not been an easy negotiation. We're very cognizant of the fact that this is not just a numbers issue, but it's a people issue as well.

17. *Id.* at ¶ 52.

18. *Id.* at ¶ 98.

19. *Id.* at ¶ 70.

20. Compare *Kanerva v. Weems*, 2014 IL 115811, with *In re Pension*, 2015 IL 118585.

21. See, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (holding that ban on handguns within village limits was within limits of police power as ban protected safety and health of village citizens); *City of Chicago v. Chicago & N. W. Ry. Co.*, 4 Ill.2d 307, 122 N.E.2d 553 (1954) (holding State may impair contracts through enactment of regulations under the State's police power for the purpose of securing public's health, safety, morals, or general welfare).

22. 98TH ILL. GEN. ASSEM., Senate Proceedings, Dec. 3, 2013, at 3 [hereinafter Senate Proceedings] (statement of Sen. Raoul), <http://www.ilga.gov/senate/transcripts/strans98/09801002.pdf>.

23. *Id.*

To address some of the previous speakers' concerns, however, I do not believe we can possibly begin to address the financial situation of this State if we don't address the pension system. The fact of the matter is, a lot—a lot has been made over the fact that this is not a perfect bill, but it is a good bill and it is one that has meaningful reforms in it and it's one that saves a meaningful amount of money, both in the short term and in the long term. This is the one opportunity that we have to finally, finally address the most important economic issues that are facing this State, and that includes our credit ratings, our financial position, our jobs climate, and frankly, our reputation in the global economy. This is one opportunity we have today to finally bring some stability and predictability to Illinois, to the budget, to the very retirees, who I understand that we are impacting. They will be able to count on the benefits once we pass this bill. This will help our vendors. It will help our job creators, who are looking to invest here, because we have so many other assets in this State. During this process, certainly some people wanted more, some people wanted less and, quite frankly, some people want this to be a political issue, which it should not be. Remember, this is a result of bipartisan and bicameral negotiations . . . The issue's been raised, why does only a small amount of the savings go towards reinvesting in the pension system? Because we want to be in a position to be able to sunset the tax increase and to fund the other critical services that we have to fund in this State.²⁴

III. THE STATE'S POLICE POWER ARGUMENT

The reserved sovereign powers—the police power—is that power available to the State to enact regulations, to secure the health, safety, morals, and general welfare of the public.²⁵ The financial condition of the State has become such, argued the State, that violation of the Pension Clause was necessary to secure the general welfare.²⁶

The State then argued that the Pension Clause itself is subject to the reserved sovereign power, because it creates a “contractual relationship.”²⁷ As a general principal, contracts are subservient to the State's reserved sovereign power.²⁸ Like the Constitution of the United States, even before the Constitution of 1970, the Illinois Constitution had a Contracts Clause providing: “No ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privilege or immunities, shall be passed.”²⁹ Though the police power is nowhere

24. *Id.* at 48–49 (statement of Sen. Radogno).

25. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 310, 891 N.E.2d 839, 849 (2008); *see generally*, *also*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

26. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 52.

27. *Id.* at ¶ 59.

28. *City of Chicago v. Chicago & N. W. Ry. Co.*, 4 Ill.2d 307, 317, 122 N.E.2d 553, 558 (1954).

29. ILL. CONST. 1870 art. II, § 14.

mentioned in the Contract Clause, the Illinois Supreme Court has recognized the police power in relation to contracts.³⁰

In *Mills v. St. Clair County*, the Supreme Court noted that contractual rights are “subject to an implied reservation of the sovereign power.”³¹ Thus, contracts themselves, in spite of the Contract Clause, may be subject to the police power. But does the Pension Clause put pensions in their own class as contracts not subject to the police power? The State argued that they cannot be.³² Were it otherwise, pensions would be some kind of “super contract,” and that principal could not be consistent with Constitutional History.³³

IV. THE GENERAL ASSEMBLY HAD REASON TO BELIEVE THAT THIS LAW COULD NOT STAND

The pension crisis was such that the General Assembly was under considerable pressure to take some action.³⁴ Unfortunately, it was so split that the various constituencies were unable to find common ground as to any resolution, which would not diminish public pension payments.³⁵ Indeed, the Act itself passed with a two-vote margin in the House, and none at all in the Senate—where it received the bare minimum number of votes required for passage.³⁶ Thus, the General Assembly was left with taking an action that it could not deny would have that effect, and it knew would likely trigger the Pension Clause:

30. See, e.g., *Hite v. Cincinnati, Indianapolis, and W.R.R. Co.*, 284 Ill. 297, 299, 119 N.E. 904, 905 (1918); see also George D. Braden & Rubin G. Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* 71–72 (1969), for discussion on the “the ever present, formidable police power concept.”

31. 7 Ill. 197, 227 (1845).

32. *In Re Pension Reform Litigation*, 2015 IL 118585, ¶¶ 59–60.

33. See *id.*

34. See *id.* at ¶¶ 22–23, for an explanation of the numerous threats and issues facing the State and the General Assembly, including issues with creditors and financial markets, unable to meet financial obligations; reduction in State’s credit rating; elimination of government programs; and possible tax increases.

35. See *id.* at ¶ 23, for a discussion that the General Assembly was engaged in “heated and protracted debate,” while also attempting numerous failed attempts to resolve the pension crisis.

36. See 98TH ILL. GEN. ASSEM., Senate Vote First Special Session Senate Bill No. 1 Conference Committee Report Third Reading (2013), http://www.ilga.gov/legislation/votehistory/98/senate/09800SB0001_12032013_005000R.pdf (providing the senate vote of 30 yeas and 24 nays, which was the exact majority needed to pass); 98TH ILL. GEN. ASSEM., House Roll Call First Special Session Senate Bill 1 Adopt 1st Conference Committee Report Adopted (2013), http://www.ilga.gov/legislation/votehistory/98/house/09800SB0001_12032013_006000R.pdf (providing the house of 62 yeas and 53 days, with a passage rate of 2 votes over the required majority).

SENATOR HUTCHINSON:

. . . is it fair to say that we are sacrificing a substantial amount of people's pension benefits to protect the State's finances? . . .

SENATOR RAOUL:

Yeah, I—you know, that's a harsh characterization, but—but I—I suppose yes.³⁷

The General Assembly, therefore, made several efforts to preserve the Act, in the face of the Pension Clause. One was to add a severability clause, so that if part of the statute failed other parts might not.³⁸ Second, it took pains to include a preamble that described the State's fiscal problems and to note that the State had made other efforts to resolve the problem.³⁹

The purpose of this preamble was to permit the State to argue for application of the police powers. And the State's Answer to the Complaints in the Circuit Court did precisely that—it included the police power as an

37. Senate Proceedings, *supra* note 22, at 41–42.

38. Pension Reform Act, *supra* note 11, at § 97.

39. *Id.* at § 1.

At the time of passage of this amendatory Act of the 98th General Assembly, Illinois has both atypically large debts and structural budgetary imbalances that will, unless addressed by the General Assembly, lead to even greater and rapidly growing debts and deficits. Already, Illinois has the lowest credit rating of any state, and it faces the prospect of future credit downgrades that will further increase the high cost of borrowing.

The State has taken significant action to address these fiscal troubles, including, but not limited to, increasing the income tax and reducing pension benefits for future employees.

Further, the State has enacted a series of budgets over the last several fiscal years that resulted in deep cuts to important discretionary programs that are essential to the people of Illinois.

At the time of passage of this amendatory Act of the 98th General Assembly, the State's retirement systems have unfunded actuarially accrued liabilities of approximately \$100 billion.

Meanwhile, the State's annual pension contribution has substantially increased in recent years, and will continue to Public Act 098-0599 increase in coming years. The General Assembly recognizes that without significant pension reform, the unfunded liability and the State's pension contribution will continue to grow, and further burden the fiscal stability of both the State and its retirement systems.

This amendatory Act of the 98th General Assembly is intended to address the fiscal issues facing the State and its retirement systems in a manner that is feasible, consistent with the Illinois Constitution, and advantageous to both the taxpayers and employees impacted by these changes. Having considered other alternatives that would not involve changes to the retirement systems, the General Assembly has determined that the fiscal problems facing the State and its retirement systems cannot be solved without making some changes to the structure of the retirement systems.

Id.

affirmative defense.⁴⁰ During the course of the Circuit Court proceedings, the State filed a Motion for Summary Judgment on its police powers defense.⁴¹ Attached to that motion were no less than six expert reports demonstrating the dire budgetary and economic situation the State faced.⁴² The Plaintiffs groups filed several of their own motions including a motion to strike the affirmative defense altogether, and a motion for summary judgment on that affirmative defense.⁴³ Eventually, the Circuit Court granted the Plaintiffs' various motions, and denied the State's Motion for Summary Judgment—without ever having considered whether the State could meet the standards to necessary to use the police power.⁴⁴

Thus, at the Supreme Court, the State was not arguing for a finding that its exercise of the police power was constitutional. Procedurally, the State's police power defense had been struck before the State ever got to proving its propriety.⁴⁵ Rather, the State sought to have the case remanded so that it could address that defense.⁴⁶ However, "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."⁴⁷

The floor debates on final passage would tend to indicate that the State would have been unable to meet its burden on the police powers defense in the first instance:

SENATOR HUTCHINSON:

The bill's legislative statement states in the fourth paragraph that this 'is intended to address fiscal issues facing the State and its retirement systems in a manner that's feasible.' So, by using the word 'feasible,' does that mean that there are other feasible alternatives to this bill? . . .

SENATOR RAOUL:

Certainly there are. I mean, certainly, you know, as has been mentioned, a lot of these levers are—are levers that can be tweaked one way or the other, and there are other proposals that were entertained by the conference committee. But—but, you know, we're trying to move from a

40. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 37.

41. *Id.* at ¶ 38.

42. *See generally* Affidavit of Jessica Basham, *In re Pension Reform Litigation*, 2015 IL 118585, (No. 2014-MR-1); Affidavit of Paula R. Worthington, *In re Pension Reform Litigation*, 2015 IL 118585, (No. 2014-MR-1); Affidavit of Jonathan I. Arnold, *In re Pension Reform Litigation*, 2015 IL 118585, (No. 2014-MR-1); Declaration of Thomas S. Terry, *In re Pension Reform Litigation*, 2015 IL 118585, (No. 2014-MR-1).

43. *In re Pension*, 2015 IL 118585, ¶ 38.

44. *See id.* at ¶ 39.

45. *See id.*

46. *Id.* at ¶ 65.

47. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977)

stalemate. So, yes, there are other alternatives, but, you know, this is an effort to move from a—from a stalemate.⁴⁸

The discussion from there began to address various other alternatives that were not considered. The problem those alternatives faced was that the General Assembly was unable to obtain enough votes from its different constituents to pass them. For example:

SENATOR HUTCHINSON:

So one of those alternatives was—would have been to pass Senate Bill 2404 or a modified version of it? . . .

SENATOR RAOUL:

Yes. We—you know as we passed 2404 before, it went nowhere in the House. We could have done an alternative of it. We could have done a great many things, but this is what we've—we've—come to a compromise on to move—move the State forward. . . .

SENATOR HUTCHINSON:

Would another alternative be the proposal that the Center for Tax and Budget Accountability outlined before the conference committee, which would have re-amortized the current unfunded liabilities to a new gradual [level] dollar payment schedule to achieve well over eighty percent by 2059? . . .

SENATOR RAOUL:

Yes. The Center of Tax—the center that you talked about, they came before the conference committee, as well as did—did others with—with different proposals. So that—that and many other things could have been possible alternatives.⁴⁹

Having found itself unable to find an “acceptable” alternative, the General Assembly turned its attention on the pension systems themselves:

SENATOR HUTCHINSON:

There's another statement in the legislative statement that says “Having considered other alternatives that would not involve changes to the retirement systems, the General Assembly has determined that the fiscal

48. Senate Proceedings, *supra* note 22, at 42–43.

49. *Id.* at 43–44.

problems facing the State and its retirement systems cannot be solved without making some changes to the structure of the retirement systems.” What does that mean, about considering other alternatives not involving changes to the retirement systems? . . .

SENATOR RAUL:

I believe that phrase just reflects the climate of the General Assembly. And it makes it—it reflects the fact that it’s unlikely that the General Assembly would consider, at this time, increased revenues or the necessary cuts that—that achieve this. . . .

SENATOR HUTCHINSON:

So we should be clear that statement should not mean—or does not mean that we’ve exhausted every other thing that we could have done to solve this issue. . . .

SENATOR RAOUL:

As I’ve indicated before, there—there—there was all sorts of proposals and there are all sorts of different things; however, we’ve reached a point of stalemate and I think this pathway is a—the most feasible pathway to move us forward.⁵⁰

Having stalemated itself on any alternative that would meet current pension obligations, the General Assembly tried to justify its repudiation of pension obligations—by adding language that required the State to act with “more fiscal responsibility” than it had done in the past.

SENATOR HUTCHINSON:

The last sentence of the fourth paragraph [of the legislative statement] says, “As a result, this amendatory Act requires more fiscal responsibility of the State, while minimizing the impact on current and retired State employees.” Is the last phrase of that sentence referring to the fact that the legislation is actually reducing the pension benefits of current employees and retirees? . . .

SENATOR RAOUL:

Yes. . . .

50. *Id.* at 44–45.

SENATOR HUTCHINSON:

So that phrase also states that the legislation is “minimizing the impact on current and retired State employees.” So by using “minimizing,” does that mean that the legislation is somehow the least restrictive means available to us? . . .

SENATOR RAOUL:

Yeah, I—you know,—I don't know what the least restrictive means are. I—I think what we're doing just reflects what the political climate is. Again, I've—I've—I've said, time and again, that we've been cemented in a stalemate, and I, for my part, don't want to see the State sink as a result of that stalemate. So, it may not be the least restrictive means, but the political climate, I believe, allows for us to—to—to take the step that we're—we're hopefully now taking.”⁵¹

The police power can be used in certain circumstances to overrule a constitutional provision under the right circumstances, as has been demonstrated with regard to several provisions.⁵² But, Senator Hutchinson never addressed the police power itself.⁵³ Rather, he made a simple plea to vote no on the bill, because of its effect on members of the State's pension systems:

because this is a heart-wrenching decision and because I have so much respect for how—how much work has gone into this by so many people, I'm not going to stand here and use a whole lot of hyperbole to talk about people who are going to vote Yes on this bill. I'm standing here because I'm going to vote No on this bill. And it's really simple. During the 1970 Constitutional Convention, the delegate that carried this, her name was Helen Kinney, and she specifically said that the intention was simply to give public employees a basic protection against abolishing their rights completely or changing the terms of their rights after they've embarked upon employment, or lessening them. That was why the phrase was included. That was why it was debated as much as it was. That is why it is in the same Constitution that I raised my right hand and swore to uphold, along with the United States Constitution. I cannot abrogate my responsibility for that here today. This is—if this were only about picking the bill that saves the most money, we'd all pick the bill that saves the most money. We'd all do that. But it's not. It's about taking people's retirement benefits right when they need 'em the most, after they have worked hard and earned those benefits. They earn those benefits. And if

51. *Id.* at 45–46.

52. *See infra* note 85 and accompanying text.

53. *See generally* Senate Proceedings, *supra* note 22.

we don't respect the basic modicum of contract law, then we have a whole lot of other problems that we have to solve. Like maybe we could just rewrite all those underwater mortgages. Those are contracts. Last time I checked banks and chambers didn't want us to do that, because those are contracts. Those contracts are sacrosanct. This contract is not. I have a problem with that. This—for those people who say we're not constitutional lawyers, we don't know what's going to happen, I'm not a constitutional lawyer—I'm—I'm really not—but I can read, and it's in the Constitution. Please vote No.⁵⁴

In passing the bill, the Senate was well aware that the Supreme Court would be the final arbiters. Senator Radogno candidly admitted this point clearly in his closing remarks: “There’s a lot of reasons to vote No on this bill. A lot of excuses that can be made: the constitutionality, to which I say, let’s get it to the Supreme Court and that will be answered once and for all.”⁵⁵

V. PRACTICAL CONSIDERATIONS

The State’s argument for application of the reserved sovereign powers—to diminish pension rights in spite of the clear prohibition of the Pension Clause—hinges, first, on its need to secure the public welfare;⁵⁶ a welfare the State argues, that is put in jeopardy by the pension crisis itself.⁵⁷ The State’s credit rating has crashed.⁵⁸ The State is unable to meet its pension obligations at all, let alone meet its other financial obligations.⁵⁹ And true enough, as of the writing of this article, the State has been operating without a budget for months.⁶⁰

The State argued that the police power is warranted in this situation, where the crisis was the result of an unforeseeable “Great Recession” from 2008–2010.”⁶¹ Economic cycles, however, are not unforeseeable; history

54. *Id.* at 47–48 (statement of Sen. Hutchinson).

55. *Id.* at 49 (statement of Sen. Radogno).

56. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 310, 891 N.E.2d 839, 849 (2008).

57. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 37.

58. Ray Long and Monique Garcia, *Illinois credit rating sinks to worst in nation*, CHICAGO TRIBUNE (Jan. 25, 2013), http://articles.chicagotribune.com/2013-01-25/news/chi-illinois-credit-rating-sinks-to-worst-in-nation-20130125_1_action-on-pension-reform-robin-prunty-illinois-credit.

59. *See, e.g.*, Madiar, *supra* note 2, at 169 (providing that the state has long underfunded public pensions); Chris Matthews, *A lottery that doesn't pay its winners and other tales of financially incompetent U.S. states*, FORTUNE (Oct. 16, 2015), <http://fortune.com/2015/10/16/illinois-lottery-us-state-budgets/> (explaining that due to such dire financial crisis the state is unable to pay lottery winners); Rick Pearson, *Rauner, Madigan both blink on higher education money*, CHICAGO TRIBUNE (April 23, 2016), <http://www.chicagotribune.com/news/local/politics/ct-illinois-higher-education-funding-rauner-madigan-met-0424-20160424-story.html> (explaining that in a stop-gap measure the state provided last minute relief to keep public universities afloat).

60. Long, *supra* note 5.

61. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 52.

repeats itself. An economic boom in the early 1830's was followed by the recession of 1837,⁶² another boom was followed by the recession of 1873,⁶³ and of course the roaring '20's were followed by the Great Depression.⁶⁴ But mankind has known about economic cycles at least as early as Joseph's interpretation of Pharaoh's dreams.⁶⁵

The current pension dilemma is not a result of unforeseen circumstances, but rather of lack of planning. In short, it is a crisis of the State's own making. The State failed to fund pensions for nearly a century.⁶⁶ As the Supreme Court noted in *Kanerva*, delegates to the 1970 Constitutional Convention:

were also 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's obligations to participants in its pension systems in the future.⁶⁷

Complete funding is not always necessary to pay pensions, because money is being paid into the system by current employees—who will not be paid out of the system until they retire. That fact, combined with other monies that the State should have been putting into the systems to meet their obligations, should enable the systems to navigate economic ebbs and flows. When the State fails to put money into the systems, however, there is less margin for error when the economy ebbs.

Putting aside the State's argument, when enacting the pension clause, the General Assembly recognized that "the primary cause of [the underfunding] was the failure of past General Assemblies and Governors to properly fund the pension system[s] over several decades."⁶⁸ Senator Hutchinson then inquired whether "it's fair for us to say that we know how we got here and we know exactly how we got here. That's been debated over and over and over again. Would you agree with that?"⁶⁹ The response was "Yeah, as I indicated in my opening remarks, those—that history has

62. Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457, 457 (2002).

63. Richard Florida, *How the Crash Will Reshape America*, THE ATLANTIC (Mar. 2009), <http://www.theatlantic.com/magazine/archive/2009/03/how-the-crash-will-reshape-america/307293/#correction>.

64. Richard H. Pells, *Great Depression*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/event/Great-Depression/Causes-of-the-decline>.

65. *Genesis* 41:1–57.

66. ILL. GEN. ASSEM., REPORT OF THE PENSION MODERNIZATION TASK FORCE 48, 68, 119, 121 (revised Mar. 30, 2010) [hereinafter Pension Task Force Report].

67. *Kanerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228, 1241 (2014).

68. Senate Proceedings, *supra* note 22, at 42 (statement of Sen. Hutchinson).

69. *Id.*

compounded the problem.”⁷⁰ This demonstrates the General Assembly’s knowledge of the problem and the need to address such issues.

VI. THE POLICE POWER DOES NOT APPLY TO THE PENSION CLAUSE

Any analysis of a constitutional or statutory provision starts with its text.⁷¹ The Plaintiffs and the State differed dramatically on this point. From the Plaintiffs’ perspective, the Pension Clause is clear and simple.⁷² It provides for no exceptions.⁷³ But the State argued that by making pensions a contractual relationship, the Pension Clause sought to apply the police power exception by reference to the Contract Clause—which has been held to be subject to the police power.⁷⁴ The State sought refuge in Justice Freeman’s concurrence/dissent in *People ex rel Sklodowski v. State of Illinois*.⁷⁵ In its memorandum opposing Plaintiff’s summary judgment motion in the Circuit Court of Sangamon County, the State noted that:

His dissent was unambiguous: “the primary reason the drafters of our constitution elevated pension membership to contract status was simply to eliminate distinction between mandatory and optional participation plans[.]” “The protection against impairment of State pension benefits is *co-extensive* with the protection afforded all contracts under article I, section 16, of the constitution,” and that he was “unaware of any material difference between the contract clause and the protection afforded under our own constitution[.]” Indeed, the dissent recognized the police powers limitation on contractual rights under the Contracts Clause and treated it as being applicable to rights under the Pension Clause.⁷⁶

But a closer look at even the language the State had cited demonstrates the Justice Freeman had come to the opposite conclusion. He notes that the “protection against impairment” is co-extensive, not the entire Pension Clause.⁷⁷ The challenge to Public Act 98-599 related to the protection against “diminishment”.⁷⁸ Indeed, the preceding sentence in the opinion specifically notes that “[i]mplicated here [in *Sklodowski* as opposed

70. *Id.* (statement of Sen. Raoul).

71. *Hamer v. Board of Ed. Of School Dist. No. 109*, 47 Ill.2d 480, 487, 265 N.E.2d 616, 621 (1970)

72. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 35.

73. *See* ILL. CONST. 1970 art. 1, § 16.

74. *In re Pension*, 2015 IL 118585, ¶ 36.

75. Memorandum in Opposition to Plaintiffs’ Motions for Summary Judgment, For Judgment on the Pleadings, and to Strike Defendants’ Affirmative Matter at 25–26, *In Re Pension Reform Litigation*, 2015 IL 118585, (No. 2014-MR-1).

76. *Id.* at 26 (citations omitted).

77. *People ex rel. Sklodowski et al. v. State of Ill.*, 162 Ill.2d 117, 147, 642 N.E.2d 1180, 1192–93 (1994).

78. *Id.* at 147, 642 N.E.2d at 1192.

to in *In Re Pension Litigation*] is the protection against impairment, rather than the protection against diminution, as plaintiffs have yet to actually receive any benefits.⁷⁹ The sentence following that upon which the State relied, specifically noted the difference between the Contract Clause—which he calls “the general impairment of contracts provision” and the Pension Clause.⁸⁰ It states “[b]ut to avoid rendering the general impairment-of-contracts provision surplusage where State pensions are concerned, that general provision’s scope cannot include protection afforded membership in the systems here.”⁸¹ The limitation on the Contract Clause’s scope is that it does not include a prohibition against diminishment, as the Pension Clause does.⁸² In short, the provisions themselves are not co-extensive or duplicative.

This leads to the next step in the analysis of a constitutional provision: its structure.⁸³ Clearly the difference in language between the Contract Clause and the Pension Clause, and the fact that both exist, would tend to indicate that they both have meaning; otherwise, there would be no reason to have the Pension Clause in the first instance. It is this concern about surplusage that Justice Freeman just noted.⁸⁴ While it is true that the police power has been applied in the context of the Contract Clause—a clause which does not specifically recognize it—the general rule is that constitutional provisions which are subject to a police power exception provide for it.⁸⁵ Prohibitory clauses, like the Pension Clause, that are devoid of a reference to reserved police power, are clearly not intended to be subject to it.⁸⁶ Thus, here, there is clearly no intention that the Pension Clause would be subject to state police power—as the clause does not provide for such impairment.⁸⁷ However, the analysis of the Pension Clause does not end at the review of its structure.

79. *Id.*

80. *Id.*

81. *Id.*

82. Compare ILL. CONST. 1970 art. I, § 16, with ILL. CONST. 1970 art. XIII, § 5.

83. *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014).

84. *Sklodowski*, 162 Ill.2d at 147, 642 N.E.2d at 1180.

85. See, e.g., ILL. CONST. 1970 art. I, § 3 (“but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State”); *id.* at § 22 (“Subject only to the police power, the right . . . to keep and bear arms shall not be infringed”); *id.* at art. XI, § 2 (“Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law”).

86. See, e.g., *id.* at art. I, § 10 (“No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy”); *id.* at § 11 (“No person shall be transported out of State for an offense committed within the State”).

87. See *id.* at art. XIII, § 5.

The third step of constitutional analysis is to consider the purpose of the clause at issue.⁸⁸ The sponsors of the Clause at the 1970 convention were clear in stating its purpose. In the words of Delegate Hellen Kinney:

All we are seeking to do is to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are \$100 a month in 1971, they should not be less than \$100 a month in 1990.⁸⁹

The pensions were seriously underfunded in 1970, when the Pension Clause was added to the Constitution.⁹⁰ That concern was a significant factor in the Clause being included. In the words of Delegate Henry Green: “[I]n Illinois today we have public employees [who] are beginning to lose faith in the ability of the state and its political subdivisions to meet these benefit payments.” This insecurity on the part of the public employees is really defeating the purpose for which the retirement system was established.⁹¹ The Illinois Supreme Court made this very same point the year prior to *In Re Pension Litigation in Kanerva v. Weems*, wherein it quoted the constitutional convention debates extensively, specifically the following:

Delegate Kemp, who spoke in support of the measure, 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.”⁹²

In that case, the Supreme Court concluded, without qualification—the purpose of the Pension Clause was that pensions be “insulated from diminishment or impairment by the General Assembly.”⁹³

VII. THE CONTRACT CLAUSE ALSO PROHIBITS DIMINISHMENT OF PENSIONS

The primary challenge in *In Re Pension Litigation* was that the Act violated the Pension Clause.⁹⁴ But the underlying cases included other

88. *People v. Easley*, 119 Ill.2d 535, 540, 519 N.E.2d 914, 916 (1988).

89. 4 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2931–32 [hereinafter 4 PROCEEDINGS], available at <http://www.idaillinois.org/cdm/ref/collection/isl2/id/7417>.

90. Madiar, *supra* note 2, at 184.

91. 4 PROCEEDINGS, *supra* note 89, at 2925.

92. *Kanerva v. Weems*, 2014 IL 115811, ¶ 46 (quoting 4 PROCEEDINGS, *supra* note 89, at 2926).

93. *Id.* at ¶ 48.

94. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 1.

claims, as well. One was that the law violated the Contract Clause of the Illinois Constitution.⁹⁵ This issue was particularly important because, as already discussed, the State argued that the Pension Clause implicated a Contract Clause analysis.⁹⁶ There is no question that pensions are a kind of contract—the Pension Clause clarifies that point.⁹⁷ But Public Act 98-599 violated the Contract Clause as well. The Contract Clause provides: “No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.”⁹⁸

The State was correct in arguing that in certain circumstances the Contract Clause could be abridged by the police power.⁹⁹ But those circumstances are where the State is acting in its capacity as a sovereign, not when it is acting in its capacity of a contractor.¹⁰⁰ That dichotomy is easier to see in the context of a statute which violates a private contract, but it is no less true when the State is itself a party to the contract. For example, where the State sells a liquor license and then generally outlaws the sale of alcohol, that effectively violates the contract—but that is a legitimate exercise of police power, because the State is acting as the sovereign outlawing the sale of alcohol for the public morality.

However, where the government “comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same rules that govern individuals there.”¹⁰¹ There is, therefore, a dichotomy between the government as contractor and the government as sovereign. The later can exercise a sovereign power, the former cannot.¹⁰²

95. *Id.* at ¶ 60.

96. *Id.* at ¶ 36.

97. *See* ILL. CONST. 1970 art. XIII, § 5.

98. *Id.*

99. *Stelzer v. Matthews Roofing Co., Inc.*, 117 Ill.2d 186, 189, 511 N.E.2d 421, 423 (1987); *see also* *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 114, 421 N.E.2d 196, 202 (1981); *Meegan v. Village of Tinley Park et al.*, 52 Ill.2d 354, 357–58, 288 N.E.2d 423, 425 (1972).

100. *Compare* *Maricopa-Stanfield Lrr. And Drainage Dist. v. United States*, 158 F.3d 428, 438 (9th Cir. 1998) (explaining that the government has the ability to legislate its own contract when acting as a governmental body), *with* *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17-21 (1977) (explaining legislative action repealing a private contract between the state and another is prohibited, as it impedes a private contract for no other purpose).

101. *Cook v. United States*, 91 U.S. 389, 398 (1875).

102. *See* *Yankee Atomic Electric Co. v. United States*, 12 F.3d 1569, 1575 (Fed. Cir. 1997) (“The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had enters with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.”).

The Illinois Supreme Court has repeatedly held that legislation impairing pensions implicates the “Government-as-contractor.”¹⁰³ It noted in *In re Pension Reform Litigation* that:

While these principles sound expansive, legislation impairing contracts has actually been upheld against contract clause challenges only rarely. When the legislation has been directed at reducing pension benefits of State employees, this court has expressly held that it is “not defensible as a reasonable exercise of the State’s police powers” and declared it invalid under the contracts clause, as well as for other reasons.¹⁰⁴

In Illinois, the question really ends with the Pension Clause. However, other states that lack similar provisions in their constitutions do have similar Contract Clause provisions, which are modeled on the United States Constitution.¹⁰⁵ Indeed, Illinois had one in the prior iteration of its Constitution as well.¹⁰⁶ But many other states are facing pension crises of their own. For example, New Jersey is currently facing a \$40 billion shortfall in its public-worker retirement system.¹⁰⁷ Pension reform efforts in other states, while they may not run afoul of a pension clause, may still run afoul of the State’s (and the United States’) Contracts Clause.

VIII. IMPLICATIONS FOR THE FUTURE

There is no question that the State pensions are underfunded. That means that the State would be unable to meet the current pension obligations if all State employees could and did retire immediately. But the State of Illinois faces a financial dilemma unrelated to the pensions at all. The most obvious symptom is that the State has been unable to pass a

103. See generally *Felt v. Board of Trustees of the Judges Retirement System*, 107 Ill.2d 158, 481 N.E.2d 698 (1985); *Bardens v. Board of Trustees of the Judges Retirement System*, 22 Ill.2d 56, 174 N.E.2d 168 (1961); *Hardin v. Village of Mount Prospect*, 99 Ill.2d 96, 457 N.E.2d 429 (1983).

104. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 61.

105. See, e.g., AL. CONST. art. I, § 22; ALASKA CONST. art. 1, § 15; ARIZ. CONST. art. 2 § 25; ARK. CONST. art. 2, § 17; CAL. CONST. art. 1, § 9; COLO. CONST. art. 2, § 11; FLA. CONST. art. 1 § 10; IDAHO CONST. art. I, § 16; IND. CONST. art. 1, § 24; IOWA CONST. art. 1, § 21; KY. CONST. § 19; ME. CONST. art. 1, § 11; MICH. CONST. art. 1, § 10; MINN. CONST. art. 1, § 11; MISS. CONST. art. 3, § 16; MO. CONST. art. 3, § 16; MONT. CONST. art. 2, § 31; NEB. CONST. art. I, § 16; NEV. CONST. Art. 1, § 15; N.J. CONST. art. 4, § 7, ¶ 3; N.M. CONST. art. 2, § 19; OHIO CONST. art. II, § 28; OKLA. CONST. art. 2, § 15; OR. CONST. art. I, § 21; PA. CONST. art. 1, § 17; R.I. CONST. art. 1, § 12; S.C. CONST. art. I, § 4; S.D. CONST. art. 6, § 12; UTAH CONST. art. 1, § 18; WASH. CONST. art. 1, § 23; Wis. CONST. art. 1, § 12; WYO. CONST. art. 1, § 35.

106. ILL. CONST. 1870 art. II, § 14.

107. Michael Symons, *NJ’s pension debt up 13 percent, now tops \$40 billion*, APP.COM (April 23, 2015), <http://www.app.com/story/news/politics/new-jersey/2015/04/23/nj-pension-deficit-grows/26242039/>

budget at all.¹⁰⁸ This will come into play in many ways. The State will cut some programs by simply failing to fund them; it will have no choice to consciously cut other hoped expenditures, but expenditures related to pensions are protected.

One potential issue is health care. The Supreme Court's 2014 opinion in *Kanerva v. Weems*, was clear that "the drafters [of the Pension Clause] chose expansive language that goes beyond annuities and the terms of the Pension Code, defining the range of protected benefits broadly to encompass those attendant to membership in the State's retirement systems. Then, as now, subsidized health care was one of those benefits."¹⁰⁹

Although the Affordable Care Act has made an effort to provide health insurance through means other than employers, most of Illinois' citizens still get their health insurance in that manner.¹¹⁰ This is no less true for State employees.¹¹¹ State employees are typically members of one of the pension systems, and that includes both current employees and those who are retired.¹¹² Their health insurance subsidies are protected by the Pension Clause.¹¹³ Thus, whether the State makes a conscious decision to cut health insurance subsidies, or a *de facto* decision by simply not writing the checks, it will draw further lawsuits in the nature of *Kanerva* to maintain those benefits.

The question remains what can be done? And there are four "physical" possibilities. The Supreme Court of Illinois could choose to reverse itself; the Illinois Constitution could be amended to excise the Pension Clause; the State could renegotiate pensions to provide some other benefit; or the State could address its financial problems in a way that does not attack pension benefits. The Supreme Court's opinion in *In re Pension*

108. John W. Schoen, *Illinois' epic budget fail sets a dubious record*, CNBC (Mar. 30, 2016), <http://www.cnbc.com/2016/03/30/illinois-epic-budget-fail-sets-a-dubious-record.html>.

109. *Kanerva v. Weems*, 2014 IL 115811, ¶ 41.

110. Roughly, sixty percent of all private employers, nationwide, provide healthcare benefits to their employees, but only approximately seventy percent of employees actually having access to said coverage; nonetheless, of those who have access, about seventy-nine percent actively use employer provided healthcare benefits. See U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Establishments offering retirement and healthcare benefits: private industry workers, National Compensation Survey, March 2015*, available at <http://www.bls.gov/ncs/ebs/benefits/2015/ownership/private/table01a.pdf>; U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Healthcare benefits: Access, participation, and take-up rates, private industry workers, National Compensation survey, March 2015*, available at <http://www.bls.gov/ncs/ebs/benefits/2015/ownership/civilian/table09a.pdf>.

111. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Health care benefits: Access, participation, and take up rates, State and local government workers, National Compensation Survey, March 2015*, available at <http://www.bls.gov/ncs/ebs/benefits/2015/ownership/govt/table09a.pdf> (explaining that of nationwide state and local government workers roughly ninety percent take part in their employers provided health care benefits).

112. *Kanerva*, 2014 IL 115811, ¶ 39.

113. *Id.* at ¶ 57.

Litigation, is extraordinary in its depth and analysis, and goes well beyond the briefs filed by any party, exploring the trial court record, and public document.¹¹⁴ It was a 7-0 opinion, and it was decisive.¹¹⁵ It is highly unlikely that the Supreme Court will reverse itself at any time in the near future if ever.

Amending the State Constitution is also not likely in the near future. Article XIV of the Illinois Constitution discusses revisions.¹¹⁶ It can be done in one of two ways: (1) by Constitutional Convention;¹¹⁷ or (2) by amendment.¹¹⁸ A Constitutional Convention is only called by a vote at a general election.¹¹⁹ That vote can only be had if either (a) the General Assembly initiates the question with a three-fifths vote,¹²⁰ or by vote of the public where the question is had once every twenty years.¹²¹ The reality is that the cost of a convention itself would be prohibitive. The General Assembly would seem unlikely to find three-fifths of its membership prepared to put the question of a Constitutional Convention to the public. Meanwhile, the automatic submission of the question to the public would not come in the near future.

This leads to the question of a “simple” Constitutional Amendment, which seems unlikely as well. A Constitutional Amendment can be initiated by the General Assembly in the same way that it can initiate a Constitutional Convention, or it can be initiated by eight percent of the electorate—as defined by the number voting in the most recent gubernatorial election.¹²² That amendment will pass only if approved by three-fifths of the people voting on the question, or a majority of those voting in the election.¹²³ This is again a Herculean undertaking which would take considerable time, and is therefore, not expected in the near future.

This leaves the two more realistic possibilities. Returning to the Pension Clause itself, the first phrase is as follows: “Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship.”¹²⁴ Any contractual relationship can be renegotiated if both parties agree to do so. The State of Illinois has shown that it is willing to and can do so with Public Act 91-395, which offered

114. *See generally* *In re Pension Reform Litigation*, 2015 IL 118585.

115. *Id.* at ¶ 99.

116. ILL. CONST. 1970 art. XIV, §§ 1–4.

117. *Id.* at § 1.

118. *Id.* at § 2.

119. *Id.* at § 1(a).

120. *Id.*

121. *Id.* at § 1(b).

122. *Id.* at § 2(a).

123. *Id.* at § 2(b).

124. *Id.* at art. I, § 16.

SURS members the opportunity to renegotiate their pension benefits for other consideration, namely avoiding health insurance premium increases it had established by way of Public Act 90-65.¹²⁵ Those SURS members who accepted the offer may have lowered their annuity payments, but they got something in return—they freed themselves of the health insurance premiums they were to be charged pursuant to Public Act 90-65.¹²⁶ Thus, those members who accepted effectively renegotiated their pension contracts by accepting a new offer made by the State—new consideration in exchange for altering the existing agreement.

Finally, the State could turn its attention to resolving its financial problems through other means. The possibilities and combinations of possibilities are endless. The Supreme Court's opinion in *In Re Pension Reform Litigation* itself noted that less drastic measures were available to the legislature—less drastic than diminishing pension rights in violation of the Pension Clause:

[N]o possible claim can be made that no less drastic measures were available when balancing pension obligations with other State expenditures became problematic. One alternative, identified at the hearing on Public Act 98-599, would have been to adopt a new schedule for amortizing the unfunded liabilities. The General Assembly could also have sought additional tax revenue. While it did pass a temporary income tax increase, it allowed the increased rate to lapse to a lower rate even as pension funding was being debated and litigated.¹²⁷

Unfortunately, as time passes without a fix, the options are narrowing. It would most certainly have been far easier to start funding pensions immediately after the 1970 Constitution went into effect than to face the task anew more than forty years later. But over the course of time, the problem has ballooned. Not only has the State failed to address it for forty years, but it has continued to grow the problem by taking money out of the systems.¹²⁸ It may well be that the available options today are not attractive, but they promise to become even less attractive as the problem persists into the future.

125. 1999 Ill. Legis. Serv. P.A. 91-395 (S.B. 211) (WEST).

126. *Id.*; see also 1997 Ill. Legis. Serv. P.A. 90-65 (H.B. 110) (WEST). *Kanerva v. Weems* would not hold that health insurance subsidies were themselves pension benefits for another 20 plus years. See generally *Kanerva v. Weems*, 2014 IL 115811.

127. *In re Pension Reform Litigation*, 2015 IL 118585, ¶67.

128. See, e.g., *People ex rel. Sklodowski et al. v. State of Ill.*, 162 Ill.2d 117, 642 N.E.2d 1180 (1994).