RETIRING PENSION REFORM: AN ANALYSIS OF *IN RE PENSION REFORM LITIGATION*, 2015 IL 118585, 32 N.E.3D 1

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I. INTRODUCTION

Consider a seventy-year-old former public school librarian who has retired, living on a carefully structured budget based on her promised pension benefits. One day she opens the mail and discovers that her promised benefits, around which she has carefully planned her golden years, have been reduced, even though the Illinois Constitution specifically protects those benefits. Indeed, those guaranteed benefits were one of the main incentives that attracted her to her job.

Now, imagine a state in deep fiscal woes, unable to cope with the overwhelming debt it has incurred and scrambling to provide a solution that averts disaster for its government and its citizens. Keeping its head just above water, the state's legislature determines that emergency measures are necessary to avoid drowning in a sea of budget crises—specifically, reducing its teachers' promised pension benefits.

These are the competing interests at issue in *In re Pension Reform Litigation*.[1] In that decision, as in other recent decisions resulting in similar holdings for many of the same reasons, the Illinois Supreme Court relied on the Illinois Constitution's pension protection clause to determine that the State's unfortunate dilemma does not excuse its unconstitutional alteration of the retirement benefits promised to government employees.[2]

In modern-day American society, many consider pensions essential to retirement.[3] Pension plans are "fundamentally different from savings because you cannot outlive the guaranteed monthly income provided by your pension . . . [since] [n]o matter how long you may live, you can be

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1. *See generally In re* Pension Reform Litigation, 2015 IL 118585, 32 N.E.3d 1.
2. *See generally* Kanerva v. Weems, 2014 IL 115811, 13 N.E.3d 1228.
3. NAT'L INSTITUTE ON RETIREMENT SECURITY, THE IMPORTANCE OF YOUR PENSION 1 (2011), http://assets.aarp.org/www.aarp.org_/articles/work/importance-of-your-pension.pdf.

sure that your pension check will continue to come every month."[4] In 1970, Illinois citizens codified this principle when they voted to approve a new Illinois constitutional amendment that included a pension protection clause, which mandates that Illinois' public employees are constitutionally guaranteed their promised benefits at the time the State hired those employees.[5]

Unfortunately for Illinois public retirees, Illinois' public pension programs have been plagued by chronic under-funding.[6] On June 1, 2014, the General Assembly's latest of multiple attempts to curb this shortage became effective in the form of Public Act 98-599 ("98-599").[7] Public Act 98-599 attempted to mitigate the State's obligations to the pension fund by reducing the amount the State was required to pay into existing pensioners' benefits.[8] In an unanimous decision, the Illinois Supreme Court promptly struck down 98-599 as an unconstitutional attempt to lessen the State's financial obligations to the pension fund, in violation of the pension protection clause.[9] This contradicted the State's argument that use of its reserved emergency police power allowed it to override this constitutional protection as a necessary means to respond to Illinois' fiscal crisis.[10]

Disagreeing with the State, the court reasoned that 98-599 over-stepped the bounds of the State's police powers by undermining the Illinois Constitution's pension protection clause.[11] This Note analyzes the Illinois Supreme Court's decision in *In re Pension Reform Litigation*, arguing the court properly concluded 98-599 was unconstitutional. Section II discusses the legal background of 98-599, including a brief history of Illinois' public pension program. Section III provides a thorough synopsis of the court's decision in *In re Pension Reform Litigation*, expounding the court's specific arguments and reasoning. Finally, Section IV analyzes the court's decision and argues that 98-599 was properly found to be unconstitutional. This will be supplemented with arguments for and against available constitutional options and alternatives, in keeping with the court's decision, that the State may be forced to implement.

In order to fully understand the court's reasoning and the issues it confronts in *In re Pension Reform Litigation*, it is necessary to place it in the proper historical and legal context.

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4. *Id*.
5. *Pension Reform Litig.*, at ¶ 46, 32 N.E.3d at 7–8.
6. David R. Godofsky & Emily Hootkins, *Illinois Supreme Court Affirms Constitutional Protection of Public Pensions*, 28 BENEFITS L. J. 79, 80 (2015).
7. *Id*.
8. *Id*. at 81.
9. *Pension Reform Litig.*, at ¶ 98, 32 N.E.3d at 30.
10. *Id*. at ¶ 52, 32 N.E.3d at 18.
11. *Id*. at ¶ 96, 32 N.E.3d at 30.

II. LEGAL BACKGROUND

Before 1970, Illinois considered public pensions to be a contractual relationship between the State and its employees; as such, with every new session of the General Assembly, the State had immense opportunity to either renegotiate its obligations or to ignore them by branding those obligations as less important than other pressing matters.[12] The reality of this situation precipitated the foreseeable result of the State falling short of its pension funding obligations, to the detriment of state pensioners.[13] In response, Illinois citizens determined that more protection was needed for public pensions, and voted to ratify the 1970 Illinois Constitution, which included the pension protection clause.[14]

Even this measure, however, did not guarantee protection: "[I]n Illinois, the state's pension contributions are discretionary, so governors and lawmakers can basically contribute whatever they feel like."[15] Lawmakers have ignored warnings of the underfunding's dangers,[16] due in part to the immense complexity inherent in determining what level of funding is "healthy."[17] Actuarial pension funding is an inexact science and, consequentially, experts in the field place optimal funding at disparate levels.[18] One expert may claim that a pension is adequately funded when eighty percent of its total amount is provided, while others place the correct figure at ninety percent.[19] Still, others insist that a pension can only be considered robust when it is one-hundred percent funded.[20] Illinois, however, falls distressingly short of all standards, with a pension system funded at forty-two percent as of 2013.[21]

A. History of Illinois' Pension System Until 1970

Illinois has not always constitutionally protected the pensions of its public employees.[22] Prior to 1970, the State contributed to the pension program on its own initiative, despite statutorily mandated payment

12. Whet Moser, *Illinois: A Long History of Underfunded Pensions*, CHI. MAG. (Dec. 19, 2012), http://www.chicagomag.com/Chicago-Magazine/The-312/December-2012-1/Illinois-A-Long-History-of-Underfunded-Pensions/.
13. *Pension Reform Litig*., 2015 IL 118585 at ¶ 12, 32 N.E.3d at 6.
14. *Id*. at ¶ 13, 32 N.E.3d at 6.
15. Alex Keefe, *The Ghosts of Illinois Pensions Past*, WBEZ NEWS (Dec. 19, 2012), http://www.wbez.org/news/ghosts-illinois-pensions-past-104467.
16. *Id*.
17. Moser, *supra* note 12.
18. *Id*.
19. *Id*.
20. *Id*.
21. Godofsky & Hootkins, *supra* note 6, at 80.
22. Moser, *supra* note 12.

requirements.[23] While Illinois bore the responsibility to do so, no provision had any teeth to force the State to fulfill its obligations.[24] Provisions that attempted to do so were either ignored or legislatively overridden by the General Assembly through diversion of pension funds to other projects.[25] In 1917, various groups and commissions attempted to notify the General Assembly that it was shortchanging the pension systems.[26] The General Assembly, however, failed to act either to increase its subsequent contributions to make up for this gap or to amend its payment policies to ensure future payments.[27] Indeed, even in times of economic prosperity Illinois failed to live up to its obligations.[28]

B. The 1970 Illinois Constitution

Public concern for the State's inaction to curb the growing pension crisis led to the inclusion of the pension protection clause in Illinois' 1970 Constitution.[29] The clause dictates that "[m]embership 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." [30] With this constitutional provision, the General Assembly and the people at large both hoped that Illinois would finally leave behind its history of unreliability and fulfill its obligations—no longer solely contractual, but constitutional—to its public pensioners.[31] The Assembly based the new provision in part on the experience of New York's legislature when that state was in an analogous situation.[32]

During the 1970 Convention, Delegate Henry Green, a major proponent of the pension protection clause, analogized Illinois' pension crisis to that of New York, which had previously found itself in an economic crisis due to its legislature's failure to pay into the State's pension system.[33] New York eventually adopted a pension protection clause—an economic victory that remedied the issues with its pension plan.[34] Delegate

23. *In re* Pension Reform Litig., 2015 IL 118585, ¶ 12, 32 N.E.3d 1, 6.
24. *Id*. at ¶ 11, 32 N.E.3d at 6.
25. *Id*. at ¶¶ 11-13, 32 N.E.3d at 6.
26. *Id*. at ¶ 11, 32 N.E.3d at 6.
27. *Id*. at ¶ 12, 32 N.E.3d at 6.
28. *Id*.
29. *Id*. at ¶ 13, 32 N.E.3d at 6.
30. ILL. CONST. OF 1970, art. XIII, § 5.
31. *Pension Reform Litig.*, 118585 at ¶¶ 14-17, 32 N.E.3d at 7-8.
32. *Id.*
33. *Id*. at ¶ 13, 32 N.E.3d at 6.
34. *Id*.; *see also* N.Y. CONST. art. V, § 7 ("[M]embership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.").

Green was inspired by New York's solution, stating that Illinois' proposed language was the same "language that is in the New York Constitution which was adopted in 1938, really under a similar circumstance."[35] Because of that similarity, there was "good reason to believe that this type of language [would] be a mandate to the General Assembly to do something which they ha[d] not previously done in some twenty-two years."[36] That "something" was to fulfill its obligations to the State of Illinois' public pension systems.[37]

C. Purpose of the Pension Protection Clause

The pension protection clause purported to "'make[] participation in a public pension plan an enforceable contractual relationship,' but also [to] 'demand[] that the "benefits" of that relationship "not be diminished or impaired."'"[38] Ideally, this language would ensure that, no matter what, state pensioners could not be denied their pensions, even in the event of legislative mismanagement.[39] The court in *In re Pension Reform Litigation* treated this purpose as conclusive evidence that, even in situations that could be described as emergencies, the State's police power is not capable of overriding this constitutional provision.[40]

D. Public Act 98-599

Recently, Illinois has been plagued with greater economic woes than in the past, due to pension and Medicaid obligations, growing debt, and fiscal mismanagement.[41] The General Assembly enacted 98-599 in 2014 in an attempt to alleviate some of the State's financial obligations and help dig Illinois out of its monetary ditch.[42] Relying on this purpose, the court determined that 98-599 was "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."[43] 98-599 provided numerous changes, the most important of which was "a comprehensive set of

35. *Pension Reform Litig.*, 118585 at ¶ 13, 32 N.E.3d at 6.
36. *Id*.
37. *Id*.
38. *Id*. at ¶ 16, 32 N.E.3d at 8 (internal quotation marks omitted).
39. *Id*.
40. *Id*. at ¶ 75, 32 N.E.3d at 24.
41. *See generally* STATE BUDGET CRISIS TASK FORCE, REPORT OF THE STATE BUDGET CRISIS TASK FORCE, ILLINOIS REPORT 7 (2012), https://www.macfound.org/media/files/2012_Illinois_Report.pdf.
42. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 24, 32 N.E.3d at 10.
43. ILL. PUB. ACT 98-599.

provisions designed to reduce annuity benefits for members of [four of the five state pension systems] entitled to Tier 1 benefits."[44] The Illinois Supreme Court in *In re Pension Reform Litigation* summarized 98-599's provisions as follows:

> First, it delays, by up to five years, when members under the age of 46 are eligible to begin receiving their retirement annuities. Second, with certain exceptions and qualifications, it caps the maximum salary that may be considered when calculating the amount of a member's retirement annuity. Third, it [discards] the current provisions under which retirees receive flat [three percent] annual increases to their annuities and replaces them with a system under which annual annuity increases are determined according to a variable formula and are limited. Fourth, it completely eliminates at least one and up to five annual annuity increases depending on the age of the pension system member at the time of the Act's effective date. Finally . . . the Act also alters how the base annuity amount is determined . . . as an alternative to the standard formula for calculating pensions.[45]

After elucidating these aspects of 98-599, the court went on to determine whether they were acceptable provisions in light of the Illinois Constitution.[46]

III. EXPOSITION OF THE CASE

In *In re Pension Reform Litigation*, the Illinois Supreme Court held that 98-599 violated the pension protection clause of the Illinois Constitution.[47] The court found certain provisions of 98-599 which diminished the retirement benefits received by members from four of the State's pension systems, and 98-599 as a whole, to be unconstitutional.[48]

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44. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 27, 32 N.E.3d at 11-12. Membership within the five separate systems are based on the nature of the public employee's job. *See id.* at ¶ 4, 32 N.E.3d at 4. They include the General Assembly Retirement System, the State Employees' Retirement System, the State Universities Retirement System, the Teachers' Retirement System, and the Judges' Retirement System. *Id.* The General Assembly did not subject the Judges' Retirement System to any of 98-599's provisions. *Id.* at ¶ 24, 32 N.E. at 10.
45. *Id*. at ¶ 27, 32 N.E.3d at 11 (citations omitted).
46. *Id*. at ¶ 43, 32 N.E.3d at 16.
47. *Id*. at ¶ 47, 32 N.E.3d at 17–18.
48. *Id*. at ¶ 96, 32 N.E.3d at 30.

A. Facts

Public employees in Illinois are classified into one of five existing retirement systems, depending upon their employment.[49] The systems include: the General Assembly Retirement System, the State Employees' Retirement System of Illinois, the State Universities Retirement System, the Teachers' Retirement System of the State of Illinois, and the Judges Retirement System of Illinois.[50] In drafting 98-599, the General Assembly chose for its provisions to affect only the first four systems, intentionally excluding the Judges Retirement System from 98-599's provisions.[51] Some have interpreted this as an attempt to dodge what has become somewhat of a political firestorm coalescing around the State's Judges Retirement System.[52]

Funding for the pension systems stems from three different sources: the State, via funds approved by the General Assembly; the income of the pension members themselves; and income gained through each fund's investments.[53] Pension members receive differing benefits based on what "Tier" they fall within.[54] Tier 1 members are those who have contributed to their pension system before January 1, 2011.[55] Tier 2 consists of those pensioners who began contributing after that date.[56] Tier 2 members receive lower benefits than those in Tier 1.[57]

The dominant effect of 98-599 is that it reduces the benefits allotted to Tier 1 members by delaying the age of retirement, capping the salary amount to be considered in determining retirement benefits, replacing a flat three percent annual increase with a fluctuating formula, doing away with anywhere between one and five annual increases, and altering how the base annuity is calculated for some pension systems.[58]

B. Procedural History

The plaintiffs in *In re Pension Reform Litigation* were current employees and retirees of the State of Illinois, along with organizations

49. *Id*. at ¶ 4, 32 N.E.3d at 2.
50. *See* 40 ILL. COMP. STAT. 5/2-101, 5/14-101, 5/15-101, 5/16-101, 5/18-101, respectively.
51. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 5, 32 N.E.3d at 5.
52. Amanda Vinicky, *No Pension Cuts for Illinois Judges*, WILL (May 24, 2013), https://will.illinois.edu/news/story/no-pension-cuts-for-illinois-judges.
53. *See* 40 ILL. COMP. STAT. 5/2-124 to -126, 5/14-131 to -133.1, 5/15-155 to -157.1, 5/16-152, 5/16-154, 5/16-158, 5/18-131 to -133.1.
54. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 5, 32 N.E.3d at 4–5.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. at ¶ 27, 32 N.E.3d at 11.

representing other Illinois pensioners, who filed five separate lawsuits.[59] These were later consolidated into one lawsuit in the Circuit Court of Sangamon County, challenging the validity of 98-599's Tier 1 benefit alterations.[60] Specifically, the plaintiffs contended that the contested provisions violated the pension protection clause of the 1970 Illinois Constitution, along with an equal protection challenge based on the exclusion of the Judges' Retirement System from 98-599's overall scheme.[61]

The defendants ("the State") included Governor Patrick Quinn, the Treasurers and Boards of Trustees of the four pension systems, and, before her death in office, State Comptroller Judy Baar Topinka.[62] The State argued that its police power made 98-599's provisions constitutionally valid for three reasons: (1) the General Assembly had the authority to employ such measures when it determined them to be "reasonable and necessary to advance a public purpose;" (2) the deplorable condition of Illinois' overall fiscal situation required action "for the public good;" and (3) the loss of retirement annuity benefits resulting from the provisions were not only necessary, but "fair and reasonable under the circumstances."[63]

In this case, the plaintiffs and the defendants both filed motions for summary judgment.[64] The Sangamon County Circuit Court granted the plaintiffs' motion, ruling that the Illinois Constitution's pension protection clause precluded the State from reducing Tier 1 benefits, and it found "nothing [in the Illinois Constitution] to support the contention that the legislature possessed implied or reserved power to diminish or impair pensions."[65] Additionally, 98-599's unconstitutional provisions were so fundamental to 98-599's overall statutory scheme that they were inseverable from it, and therefore, the entirety of 98-599 was unconstitutional.[66] Because the circuit court invalidated a state statute, the State's appeal was brought directly to the Illinois Supreme Court, pursuant to Illinois Supreme Court Rule 302(a).[67]

C. The Court's Opinion

Writing for a unanimous court, Justice Karmeier analyzed the constitutionality of 98-599, dividing the decision into three issues:

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59. *Id*. at ¶ 33, 32 N.E.3d at 13–14.
60. *Id*. at ¶¶ 33-34, 32 N.E.3d at 13–14.
61. *Id*. at ¶ 35, 32 N.E.3d at 14.
62. *Id*. at ¶ 33, 32 N.E.3d at 14.
63. *Id*. at ¶ 37, 32 N.E.3d at 15.
64. *Id*. at ¶ 38, 32 N.E.3d at 15.
65. *Id*. at ¶ 39, 32 N.E.3d at 15.
66. *Id*. at ¶ 40, 32 N.E.3d at 15.
67. *Id*. at ¶ 41, 32 N.E.3d at 16.

(1) whether its disputed provisions violated the pension protection clause; (2) if so, were those provisions nonetheless constitutional as a sound exercise of Illinois' police powers; and (3) if the police powers did not validate 98-599 provisions, whether those provisions were severable from the statute as a whole.[68] Deciding all issues against the State, the court held that 98-599, as a whole, was unconstitutional.[69]

1. The Disputed Provisions of 98-599 Violated the Pension Protection Clause

The court relied on its previous precedent that had interpreted the pension protection clause since the implementation of the 1970 Illinois Constitution, noting that the Illinois Supreme Court has consistently upheld the enforceability of its guarantee to state pensioners' promised benefits.[70] This was most recently evident in *Kanerva v. Weems*, which held that "benefits," as stated in the pension protection clause, refers broadly to all those benefits which are inherent in state employment, including health insurance coverage.[71] The clause's guarantee ensures that those benefits are legally enforceable rights which "attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires."[72] Under this interpretation, once an individual becomes an employee of the State and gains membership into one of the pension systems, he is entitled to those benefits available at the time he joined, no matter what changes to members' benefits are subsequently made in the system.[73] The court has consistently reached this result based on the plain language of the clause itself: "[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*."[74] Those benefits, which were the target of 98-599, are some of the most important that the pension systems provide to the systems' members because, in many cases, those benefits are the aspects that endeared them to work for the State.[75]

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68. *Id*. at ¶ 43, 32 N.E.3d at 16.
69. *Id*. at ¶ 93, 32 N.E.3d at 29.
70. *Id*. at ¶¶ 45-46, 32 N.E.3d at 16–17.
71. Kanerva v. Weems, 2014 IL 115811, ¶ 39, 13 N.E.3d 1228, 1239. *See* Adam M. Riley, *Can Public Servants Retire? Analyzing the Illinois Supreme Court's Decision in* Kanerva v. Weems, 2014 IL 115811, 13 N.E.3d 1228, 40 S. ILL. U. L.J. 349 (2016), for a thorough discussion of the issues in *Kanerva v. Weems*.
72. *Pension Reform Litig.*, 2015 IL 118585 at ¶¶ 45-46, 32 N.E.3d at 16–17.
73. *Id*.; *see also Kanerva*, 2014 IL 115811 at ¶ 32, 13 N.E.3d at 1238 (holding that benefits defined and designated at the time of employment cannot be altered by the State).
74. *Id*. at ¶ 45, 32 N.E.3d at 16 (quoting ILL. CONST. 1970, art. XIII, § 5).
75. *Id*. at ¶ 47, 32 N.E.3d at 17.

In accordance with the constitutional avoidance doctrine, the court attempted to read 98-599 in a way that would not violate the pension protection clause.[76] However, it was unable to do so in a way that would not patently contradict the clause's plain meaning, and therefore the court found those provisions of 98-599 to be invalid.[77] Put another way, the only way to read 98-599 was as an infringement on the explicit provisions of the pension protection clause.[78]

The court also supported its conclusion by analogizing *In re Pension Reform Litigation* to the Arizona Supreme Court's decision in *Fields v. Elected Officials' Retirement Plan*.[79] Of special note to the court was the fact that in reaching its decision in *Fields*, the Arizona Supreme Court premised its holding—that pension benefits cannot be infringed upon—largely on the Illinois Supreme Court's previous decision in *Miller v. Retirement Board of Policemen's Annuity & Benefit Fund*.[80] In *Miller*, the court came to the same conclusion as the courts in *Fields* and *In re Pension Reform Litigation*.[81] In short, the highest courts of other states relied upon Illinois case law to invalidate pension infringement, which lent credence to the notion that the reasoning and outcomes of the court's earlier cases were sound.[82]

After determining that 98-599 violated the pension protection clause, the court turned to the question of whether that violation was a permissible use of the State's police powers.[83]

2. Illinois' Police Power Did Not Justify 98-599's Undermining of the Pension Protection Clause

The court rejected the State's contention that 98-599 was a valid and necessary use of the State's reserved police powers.[84] The State argued that the pensions at issue were essentially contractual relationships between the State and pensioners, a relationship which has long been subject to the

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76. *Id*. at ¶¶ 95-98, 32 N.E.3d at 30.
77. *Id*.
78. *Id*.
79. *Id*. at ¶ 48, 32 N.E.3d at 18. (citing Fields v. Elected Officials' Ret. Plan, 234 Ariz. 214, 320 P.3d 1160, 1165-68 (Ariz. 2014)) (holding that a law altering state judges' pensions after they retired violated Arizona's Constitution's pension protection clause, A.R.S. CONST. art. XXIX § 1, which provides: "membership in a public retirement system is a contractual relationship . . . and public retirement system benefits shall not be diminished or impaired.").
80. *See generally* 771 N.E.2d 431 (2001).
81. *Id*. at ¶ 50, 32 N.E.3d at 18.
82. *Id*.
83. *Id*. at ¶ 52, 32 N.E.3d at 18.
84. *Id*. at ¶ 60, 32 N.E.3d at 20.

General Assembly's police power when "necessary and reasonable to secure the State's fiscal health and the well-being of its citizens."[85]

Reiterating that the State's enumerated reasons for enacting 98-599 were to combat Illinois' fiscal and economic woes, the court found that the current situation was not so ruinous as to provide a legitimate catalyst enabling legislation in derogation of Illinois' constitutional guarantees.[86] The court reasoned that economies are generally in flux and undulate unceasingly, and the State's contention that a current downward trend, however deep, is unforeseeable was without merit because economies by their very nature have ups and downs.[87] Put metaphorically, the State cannot immerse itself in a wave pool and say that it never expected an incoming wave. This is especially true in Illinois, where the State's pension systems have been steadily declining for decades.[88] As such, the State could not claim that the current state of affairs was an urgent emergency, because the General Assembly has both recognized the problem and attempted—unsuccessfully—to resolve it through legislation similar to 98-599 since the Great Depression.[89] Moreover, the court suggested that even if such an emergency existed, 98-599 would still be unconstitutional because "there simply is no police power to disregard the express provisions of the constitution."[90] The court has consistently struck down laws infringing on constitutional guarantees, and the State could not renew its argument that the same circumstances as before and the General Assembly's analogous legislation now warranted the use of Illinois' police powers.[91]

Courts faced with cases involving contractual impairment legislation, deemed necessary by the State in the furtherance of a declared public interest, must "consider whether the provisions which the state seeks to change had effects which were unforeseen and unintended by the legislature when [it] initially adopted [them] and whether the state could achieve its purposes through less drastic measures."[92] Additionally, the court cited a relevant view that the State's hands were not entirely clean in this matter, implying that the General Assembly could not create a crisis through its

85. *Id*. at ¶ 59, 32 N.E.3d at 20.
86. *Id*. at ¶ 53, 32 N.E.3d at 19.
87. *Id*.
88. *Id*.
89. *Id*. at ¶ 54, 32 N.E.3d at 19.
90. *Id*. at ¶ 85, 32 N.E.3d at 27.
91. *Id*. at ¶ 53, 32 N.E.3d at 19 (holding that police powers could not override the pension protection clause in this case. However, the court did not state that emergencies could never be so great as to warrant use of the State's reserved police powers.).
92. *Id*. at ¶ 65, 32 N.E.3d at 21 (citing U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 24 (1977)).

own policies and actions, and then use that crisis as reasoning to cut benefits promised by the Illinois Constitution.[93]

Applying the above standard and reasoning, the court determined that an inherently fluctuating economy, especially one plagued with consistent turmoil, cannot be a sound basis for enacting legislation that would foreseeably reduce the benefits of state pension system members.[94] Moreover, the court discussed less detrimental and drastic alternatives that the General Assembly could have embraced, such as a new schedule for funding the system or a permanent tax increase.[95]

Lastly, the court reasoned that to uphold 98-599 as a legitimate exercise of the State's police power, in response to an economic crisis, by subverting the pension protection clause would pervert the reasons for adopting the clause in the first place.[96] Adopted to guarantee the retirements of state pensioners, the pension protection clause would be rendered null if the State could, at any time it deemed necessary, change promised benefits to respond to foreseeable economic turbulence that it had a significant role in creating.[97] Because of this, 98-599 was not a valid exertion of the State's police power to curb the guarantees of the pension protection clause, and was therefore unconstitutional.[98]

3. The Contested Provisions Were Inseverable from 98-599 in its Entirety

The court noted that 98-599 included a severability provision declaring that, save for thirty-nine sections, the individual provisions of 98-599 were severable from one another.[99] Among the thirty-nine inseverable sections were various provisions at issue that the court found to be unconstitutional.[100] Because these sections were declared to be inseverable by the expressed terms of 98-599, the act as a whole was unconstitutional.[101]

IV. ANALYSIS

The Illinois Supreme Court in *In re Pension Reform Litigation* was correct in ruling that 98-599 was unconstitutional for violating the pension protection clause. Both the plain meaning of the clause and the intentions

93. *Id*. at ¶ 85, 32 N.E.3d at 28.
94. *Id*. at ¶¶ 65-66, 32 N.E.3d at 21–22.
95. *Id*. at ¶ 67, 32 N.E.3d at 22.
96. *Id*. at ¶ 75, 32 N.E.3d at 25.
97. *Id*.
98. *Id*. at ¶ 89, 32 N.E.3d at 68–69.
99. *Id*. at ¶ 92, 32 N.E.3d at 29.
100. *Id*. at ¶ 93, 32 N.E.3d at 29.
101. *Id*. at ¶ 96, 32 N.E.3d at 30.

of the General Assembly in drafting it unequivocally place 98-599 squarely within the realm of state action that the clause was meant to curb. As such, it would be contrary to the letter and spirit of the clause for the General Assembly, after failing to foot its part of the bill, to shift the burden to those employees who paid their share and are now constitutionally entitled to their due benefits. While this seems to be the court's line of reasoning, the court in *In re Pension Reform Litigation* declined to provide an exhaustive list of constitutionally sound alternatives to 98-599. They did, however, provide two.

Part A of this section briefly states why the court was correct in holding that 98-599 was unconstitutional. Part B reviews the viability of the court's first suggestion, which was an altered payment schedule for the General Assembly to contribute to the pension fund. Part C does the same with the court's second suggestion: a permanent tax increase. Finally, Part D proposes other alternatives to mitigate the Illinois pension funding crisis that adheres to constitutional standards. These include future pensioners paying more to receive benefits, altering the structure of paying taxes on pension benefits, and allowing current pensioners to phase out in an effort to switch Illinois' pension system to one based on 401(k)s or Individual Retirement Accounts (IRAs).

A. The Court was Correct in Holding 98-599 Unconstitutional

In holding 98-599 unconstitutional, the Illinois Supreme Court correctly relied on and interpreted precedent regarding the pension protection clause.[102] Those cases uniformly held State reduction or alteration of state employees' pension benefits unconstitutional.[103]

The court also determined that the State's argument, that use of police powers was both necessary and constitutional, was lacking.[104] If that argument was upheld, the State would effectively be allowed to invoke its police powers in response to any crisis and invalidate any constitutional provision it wanted. This is an especially troubling scenario in situations where the General Assembly is responsible for the very conditions that warrant use of its police powers.

Sound policy refuses to allow those with unclean hands to attempt to wash them in the sweat of those they failed to provide for. Moreover, to allow such a result in blatant contradiction to the Illinois Constitution's provisions would essentially empower the State to dry those hands with the

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102. *See generally* Bardens v. Bd. of Trs. of the J. Ret. Sys., 174 N.E.2d 168 (Ill. 1961); Felt v. Bd. of Trs. of the J. Ret.t Sys., 481 N.E.2d 698 (Ill. 1985); Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004); Kanerva v. Weems, 2014 IL 115811, 13 N.E.3d 1228.

103. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 61, 32 N.E.3d at 47.

104. *Id*. at ¶ 60, 32 N.E.3d at 20.

pages of the Constitution itself, leaving the State in the position of creating crises and then limiting peoples' rights in order to respond to them.

Eschewing this result, the court upheld the validity of the pension protection clause, invalidated 98-599 in its entirety, and preserved the constitutional principle that the General Assembly cannot pick and choose which provisions of the Illinois Constitution it will employ and which it will ignore.

While this was the correct determination, it cannot be denied that Illinois still finds itself in the midst of an economic crisis requiring state action. Finding 98-599 unconstitutional, the court was still cognizant of the fact that viable constitutional options are necessary.[105] The court elucidated two such possibilities.

B. Altered Payment Schedule

The Illinois Pension Code requires Illinois to pay its contribution to the pension system, even when the State is in default.[106] The first option the court suggested was that the General Assembly could simply amend the time by which the State would be required to fund the pension system.[107]

This has several benefits. First, it would buy more time to find another, more permanent solution to the pension crisis. Second, it could ease the General Assembly's burden in finding time to raise the funds necessary for its contribution. Third, such an extension would provide political cover to the General Assembly, enabling them to focus more on the pension problem at hand instead of putting out political fires in their home districts based on inaction or public disillusionment stemming from the pension system itself. However, although these aspects of altering the payment schedule may seem positive, in the aggregate they are outweighed by the negative features of such an action.

Mitigating payment until a later time may seem tempting, but it also poses several drawbacks. First, it would only comprise a stopgap to the main problem, instead of curing the underlying malady. Private entities have largely abandoned pensions as a retirement plan because it poses a bit of a conundrum—people who receive benefits from an active system are no longer active within it.[108] Instead, pensioners are paid through the contributions of those working across a wide swath of time, ranging from

105. *Pension Reform Litig*., 2015 IL 118585 at ¶ 67, 32 N.E.3d at 22.

106. Eric M. Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution*, OFFICE OF THE SENATE PRESIDENT, 1, 68 (last modified July 5, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774163

107. *Pension Reform Litig*., 2015 IL 118585 at ¶ 67, 32 N.E.3d at 22.

108. Jeffrey R. Brown, *Reforming Public Pensions Subject to Political and Legal Constraints: The Illinois Experience*, 67 (4) NAT. TAX J. 941, 941 (2014).

when those same pensioners began contributing up until the present.[109] As a result, people currently paying into the pension system must pay at least somewhat for current retirees who do not, while simultaneously providing enough surplus to fund their own retirement benefits when they mature.[110] Modern companies and employers have largely abandoned this system because it creates a foreseeable problem—eventually the amount being paid out by the pension fund exceeds that which is being paid into it.[111] Accordingly, many employers have switched to alternative retirement methods that do not rely on the contributions of past or future employees.[112] Because pension systems are becoming increasingly antiquated, it is unlikely that postponing the General Assembly's payment into the retirement fund will do anything but delay the inevitable—the calcification and rejection of the pension system.

Second, delaying payments into the pension fund would do little more than allow the system to survive nominally. By simply lengthening the time in which the General Assembly is mandated to contribute to the fund, the fund does not grow. It is not swelling on the efforts of the General Assembly just because the Assembly decided that such a measure would be necessary so as not to default on its obligations. Put simply, prolonging the pension system as it currently exists only serves to perpetuate its stagnation, instead of dealing with the underlying economic problems endangering it.

Additionally, similar efforts have been made to defray costs at a later date.[113] As noted above, the General Assembly has been chronically behind on its payments into the pension fund, stretching all the way back to 1917.[114] When the time comes to pay an agreed upon amount into the pension system, the General Assembly has lagged behind both in the amount it actually contributes and the time in which that contribution is made.[115] Solutions that involve delaying payments are the same types of conduct that caused the problem in the first place. In short, to alter the payment schedule would merely perpetuate the same policies that necessitated 98-599's drastic measures. It would do nothing to save the pension system, and only serve to prolong its ineffectualness.

As the Illinois Supreme Court previously mentioned in a similarly decided case, *Kanerva v. Weems*, the General Assembly's obligation to fund the pension system has long been a "political football" where state politicians (generally, those of the political party in control at the time) use

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109. Dean Michael Mead et. al., *Staying Afloat in a Sea of Pension Numbers*, 35 MUN. FINANCE J. 1, 23 (2015).
110. *Id*.
111. Brown, *supra* note 108, at 941.
112. *Id*.
113. *In re* Pension Reform Litig., 2015 IL 118585, ¶ 11, 32 N.E.3d at 6.
114. *Id*.
115. *Id*.

those funds allocated for the pension system as a means of balancing the state budget.[116] The reasoning behind this is not surprising—a balanced budget is always a headline that garners votes, yet an underfunded pension system is not an attention grabber, and it does not affect as many people as does a state budget.[117] Accordingly, the pension system has been politically expendable up until recently, and now that it has garnered wide public interest, the General Assembly is attempting to punt the political football into the other team's end zone—in this case, the Illinois Supreme Court.

By enacting 98-599, the State seems to be doing something to avoid an unforeseeable crisis.[118] At the same time, the Illinois Supreme Court looks like it is attempting to embroil the State in further chaos by declaring 98-599 unconstitutional. In truth, the General Assembly's longstanding unwillingness to act to fix the pension system, coupled with its financially irresponsible decisions not to fund its part in that system, has coalesced into a crisis that requires sacrifice by those employees whom the pension protection clause was established to protect at all costs. Public Act 98-599 is the General Assembly's response to its own creation—an unconstitutional Hail Mary pass designed to draw attention away from it and towards anyone else. As a result, the people who have consistently paid into the pension system must now suffer.

C. Permanent Tax Increase

The second remedy to the underfunded pension system that the court suggested is the enactment of a permanent tax increase, with the revenue going directly to the pension system.[119] In evincing this option, the court took special note of the General Assembly previously enacting such a tax increase.[120] However, the General Assembly refused to make the tax increase permanent.[121] Instead, it opted to allow "the increased rate to lapse to a lower rate even as pension funding was being debated and litigated."[122] This implies that the court strongly suggested a permanent tax increase specifically devoted to funding the pension systems as a possible solution to the problem. But the question remains: who and what should be taxed?

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116. Kanerva v. Weems, 2014 IL 115811, ¶ 45, 13 N.E.3d 1228, 1241.
117. Sheila Weinberg, *Do the Math: Pension Crisis was Created—and Fueled—by Politicians*, CRAIN'S CHI. BUS. (Aug. 12, 2015), http://www.chicagobusiness.com/article/20150812/OPINION/150819935/do-the-math-pension-crisis-was-created-and-fueled-by-politicians.
118. *Id*.
119. *Pension Reform Litig*., 2015 IL 118585 at ¶ 67, 32 N.E.3d at 51.
120. *Id*.
121. *Id*.
122. *Id*.

A viable permanent tax is one that targets the pension benefits themselves.[123] Instead of placing a general tax on the public, such as an increased sales or income tax, a benefits tax would specifically target retirement incomes garnered by Illinois residents.[124] Currently, the Illinois tax system excludes from state income tax "payments received from Social Security, 401(k) plans, Individual Retirement Accounts, defined benefit pension plans, and virtually any other payment from a qualified retirement plan."[125] While it is understandable that funds representing long years and hard work be earmarked for retirees' golden years and protected from deduction, taxing only those funds at five percent could potentially garner $2 billion annually for state pensions.[126] Additionally, while the State is precluded from substantively affecting pension benefits from current retirees and pensioners, it still possesses the power to tax those benefits. [127]

Illinois currently has tax laws that, in general, are aimed at gaining political capital by employing minimal taxation on the public.[128] Particularly minimal, however, is Illinois' policies regarding the taxation of retirement funds.[129] In fact, the State does not tax retirement income at all.[130] This policy has the benefit of attracting retirees to Illinois, while keeping Illinois resident retirees from relocating to other states that employ lax tax structures and thereby aiding Illinois' economy by incentivizing more retired consumers to reside in Illinois.

Despite that economic benefit, it may be necessary for the State to alter its policy and begin taxing the retirement benefits of Illinois' present and future public retirees. Of course, this would only be economically viable if the added tax revenue would offset the lost consumer revenue attributable to retirees' leaving Illinois. If feasible, however, such a tax would be yet another way to mitigate the loss in the pension fund, directly funding the state pension systems and alleviating the State's burden in a constitutionally sound manner.

This proposal has the advantage of imposing a relatively marginal tax rate while at the same time providing substantial and crucial revenue to fund the pension system as a whole. Additionally, it has the added benefit of constitutionality. In keeping with the holding of *In re Pension Reform Litigation*, the State would not need to exercise its police power in order to subvert the pension protection clause. Instead, the State would not be

123. Brown, *supra* note 108, at 949.
124. *Id*. at 941.
125. *Id*.
126. *Id*.
127. *Pension Reform Litig*., 2015 IL 118585 at ¶ 67, 32 N.E.3d at 22.
128. ILLINOIS REPORT, *supra* note 41, at 16–17.
129. Brown, *supra* note 108, at 949.
130. *Id*.

lowering the benefits offered, but revising its tax code in order to gain added revenue.[131] There are, however, substantial drawbacks.

First, an increase in taxes rarely amasses substantial public support. People loath paying more to a government entity for a benefit that is not immediately tangible. Second, since retirement funds have historically been tax exempt in Illinois, it is unlikely that such a burden will be lightly shouldered by the public, especially given that the pension crisis is a result of government inaction. It would create a perception that the government is placing an unfair and unfamiliar burden on an entire class of people because that government's own incompetence necessitated it. Such a feeling is both understandable and hard to overcome.

Third, the retirement tax would necessarily affect current retirees, a "group that has disproportionately high voter turnout."[132] As such, any representative of the General Assembly who voted for such a measure would be politically vulnerable to the anger of retirees.

Because of these drawbacks a permanent tax increase, though a possible solution to the underfunded pension system, would only be adopted by the General Assembly with great difficulty. A more likely scenario is that, as previously discussed, the General Assembly will simply levy another temporary tax increase to placate pensioners by appearing as if its efforts are attempts to solve the problem. This will also potentially assuage non-state pensioner constituents by claiming that Illinois citizens will not be paying more in perpetuity than they have for other people's pensions. In order for the General Assembly to provide more than a stopgap to the problem, it needs to either make its periodic tax increases permanent and more substantial or find another solution entirely different from a tax increase. This necessitates exploration of other options.

D. Other Possible Solutions

The current pension system cannot survive in its present form. As noted above, any stopgap to funding the pension system would be largely nominal in effect and merely abeyant in nature. Additionally, a tax increase, while viable, is somewhat politically untenable and historically temporary in duration. As such, it seems inevitable that the pension system must either drastically evolve or be allowed to retire. There are limited options to achieve this goal.

In order to accommodate current retirees while simultaneously providing a means of retirement for those paying pensions now and who will work in the future, the most prudent course of action is a phasing out of

131. *Id*.
132. *Id*.

the current system. Instead of delaying payments and attempting to work around existing difficulties, it is necessary to allow those who currently have been promised benefits to receive them in full, because any action tampering with the benefits or required contribution rate of current employees is unconstitutional.[133] However, there is nothing unconstitutional about the state promising future employees fewer benefits, or changing the nature of the benefits promised.

Few, if any, popular options are available to mend the Illinois pension crisis. Unfortunately, the situation has deteriorated to a point where more drastic actions may become necessary. Amending the Illinois Constitution is one such action. This move would require the General Assembly to determine that the only way to solve the fiscal crisis would be to completely do away with the pension protection clause. Currently, this seems an unlikely scenario. The General Assembly has been unwilling to make such a drastic move, especially because any such constitutional change would be incredibly unpopular with retirees in general, not to mention a compassionate public that can relate to those who cannot rely on their own promised benefits. Accordingly, such a drastic measure would likely only become a reality if the State's fiscal crisis evolves into an economic catastrophe.

To avoid such a scenario, one option is to phase out current pensioners, and require new ones to adopt an independent investment structure as the base of their retirement instead of a pension. However, some analysts believe that this option is unsubstantiated, arguing that switching from a pension system to one based on 401(k) would actually cost the state more money.[134] Pensions based on 401(k) plans are forty-eight percent more expensive than pensions at providing the same amount of benefits.[135] A pension system is also able to pool the collective funds of its members, meaning that individual fees are reduced while the group investments as a whole can afford more risk, and therefore potentially garner higher rewards.[136] This is opposed to a 401(k) plan, which is inherently individual in character, and therefore generally more conservative in investment strategy.[137] Retirees who base their retirements on 401(k)s can also lack expertise in the financial market, with inexperienced individuals investing less prudently than would a financial expert trained in interpreting an inherently fluctuating monetary organism.[138]

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133. Madiar, *supra* note 106, at 72.
134. *Id*.
135. *Id*.
136. *Id*.
137. *Id*.
138. *Id*.

Because of these drawbacks, 401(k)s may not be the knight-in-shining-armor that some argue they are. However, a move toward another retirement system would be more economically viable than the one currently in place, because history shows that the current system has been exploited and ignored by the General Assembly. Moreover, common practice in the private sector has abandoned pensions and vindicated 401(k)s. Because of this, a separate, more individualized retirement system based on personal investments may be the only viable alternative, given the necessary state contributions to current pension funds under the pension protection clause.

Illinois' pension system cannot survive as it currently is. It has been chronically mismanaged and underfunded for as long as it has existed, even after the Illinois Constitution was amended to protect it. So, here is where we find ourselves: the State cannot use its police action to change promised benefits; it is unlikely that the pension protection clause will be amended out of the Illinois Constitution; the current pension system is underfunded to the point of near-hilarity (were it not for its tragic consequences); and the only viable options left are difficult and sacrificial alternatives, such as imposing new, high taxes or switching from a pension system to another retirement plan based on 401(k) or possibly IRAs.

V. CONCLUSION

The Illinois Supreme Court correctly ruled that Public Act 98-599 was an unconstitutional use of the State's police power in violation of the pension protection clause. However, such a broad limit on the options available to fix the pension crisis in Illinois means that more, perhaps less popular, courses of action will need to be explored in order to avert a growing financial catastrophe. The court named, but declined to elaborate on, the possible implementation of an altered payment schedule or a permanent tax increase.[139] While feasible, the former would simply defer the problem, while the latter is unlikely to be popular or politically expedient. Additionally, both rely on the continuation of the current pension retirement system. To secure a long-term solution that is in keeping with modern retirement practice, the Illinois General Assembly should consider phasing out the pension system by allowing current employees and retirees to receive their promised benefits, while shifting new employees from a defined pension-based system to one based on 401(k) or IRAs. These are more in line with current employer policies and have evolved from pension systems based on their own experience with a pension retirement system's impracticability.

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139. *Pension Reform Litig.*, 2015 IL 118585 at ¶ 67, 32 N.E.3d at 22.

While these possibilities should be considered, the important takeaway from *In re Pension Reform Litigation* is this: if nothing is done to alleviate Illinois' fiscal crisis, it will evolve into a tsunami, where collateral damage to the people of Illinois is inevitable. While a solution may not be easy to either contemplate or administer, it is nonetheless necessary, lest we all be swept away in the aftermath of long-time fiscal mismanagement.