

Perspectives

Democracy in DuPage: Perpetual Public Benefits and the Illinois Constitution

By Edward N. Tiesenga

The Illinois Constitution of 1970

This article sketches out a historical-legal biography of the so-called “pension clause” of the Illinois Constitution, the key lawyers who wrote it, and how that single sentence operates today. For a more exhaustive scholarly treatment of the Illinois Constitution that was completely revamped in 1970, the reader may consult much heavier works.¹

History – Big and Small

Let’s set the historical stage. Richard Nixon is President of the United States, and the first trip to the Moon is still fresh in the public mind. Kennedy half-dollars have only been available for six years. Grim Communism still rules Russia, Eastern Europe, and China. The Vietnam war is on. Led Zeppelin has been a band for just two years. Halfway around the world, in the former Dutch colony of Jakarta, Barack Obama has just celebrated his ninth birthday. Richard B. Ogilvie is Governor of Illinois

There is also a constitutional convention going on in Illinois. And DuPage County figures right in the middle of it.

1. I recommend the law review article by Professor Ann Lousin, “*The 1970 Illinois Constitution: Has it Made a Difference?*”, 8 N.Ill. U.L. Rev 571 (1988).

Key Role of Two Republican DuPage County Attorneys

Helen Kinney was a DuPage County Assistant States Attorney (1962-69) and later circuit judge (the first woman to hold either position in DuPage). Kinney was also a Republican party activist, whose name is now on the annual scholarship award given by the DuPage Association of Women Lawyers (DAWL) to an outstanding female law student in DuPage County each year.

Helen Kinney understood public employees and pensions, as she spent her career as a public employee, and lived in Hinsdale until her death about 30 years ago. In 1970, Kinney was appointed to a committee drafting the new Illinois Constitution. Also on the committee was Kinney’s fellow Republican and former boss, former DuPage County States Attorney Tony Peccarelli. Peccarelli also went on to become a judge.

Peccarelli had already become the first Italian-American attorney in DuPage County, and through his outstanding personal character, the Justinian Society of DuPage County still bestows the annual Anthony Peccarelli Award for Outstanding Character to a DuPage County lawyer exemplifying his fine example.

Kinney and Peccarelli were two of the 116 delegates chosen from the then-58 senatorial districts² in Illinois. Over several years, these delegates generated 117 volumes of deliberation minutes. Out of this larger group, Kinney and Peccarelli worked with two other attorneys on a subcommittee to draft the “pension clause.”

Downstate Republican Attorneys Complete the Team

The other two pension clause committee drafters were Republicans Henry Green from Urbana and Donald Zeglis from Kankakee. Green located the language for the Pension Clause, modeled on a similar provision in New York’s 1938 Constitution that states:

[Membership in Retirement Systems; benefits not to be diminished nor impaired] After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.³

Zeglis put down deep roots in Illinois. After attending Harvard, his son John followed him into the law, practicing at Sidley and Austin LLP in Chicago,⁴ and later became President of AT&T as it left its protected monopoly, entered the competitive marketplace, and broke into many units.

The people who drafted our pension clause were not scheming big spenders out to wreck Illinois. Far from it. They were leaders in 1970 and their legacy lives on today.

Text of the Pension Clause

Given its tincture of infallibility, presenting the pension clause in Psalm format helps to reveal the elegance and scope of its application:

Membership in any pension or retirement system of the State,
 any unit of local government or school district,
 or any agency or instrumentality thereof,
 shall be an
 enforceable contractual relationship,
 the benefits of which
 shall not be diminished
 or impaired.⁵

2. There are now 59 districts.
 3. Constitution of the State of New York (1938), Article V, Sec. 7.
 4. While at Sidley, Zeglis was a protégé of then-firm chairman Chuck Douglas, now retired and living in Oak Brook.
 5. Illinois Constitution, Art XIII, Section 5.

About the Author



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PERSPECTIVES

Some Things the Pension Clause Does Not Say

Now notice what this section does not say:

- It does not restrict what unit of government can incur benefits payable to employees.
- It does not authorize one unit of government to force another unit of government to incur more and more expensive pension benefits.
- It does not prevent the state from imposing benefit levels onto local governments.
- It does not preserve autonomy for local governments to determine their own levels of pension benefits that can never be “diminished or impaired.”

Pension Clause Makes it Into the Document

The vote of the whole convention to adopt this language recommended by this committee of four delegates was far from unanimous, according to the *Chicago Tribune*:

“... the transcript of the debate on that July day makes it clear that even the delegates who argued against the pension clause did so because they saw it as *something that could handcuff state and local officials as they sought to prioritize spending in tough times.*”⁶

Delegate John Parkhurst from Peoria complained that “This innocuous little amendment sounds a lot like motherhood and strawberry shortcake,” which Parkhurst went on to deride as “terribly, terribly mischievous.”⁷ Big problems might flow from this language. Or as Augustine said in one of his sermons describing how God used words to speak creation into existence (modified with a critical pensioned reading):

“Just as a spring, itself occupying only a small space... furnishes its flowing waters for more streams and over a greater area...spreading over an immense landscape... from just a small measure of language, floods crystal-line truth for the good of a quite considerable crowd of [public employees]. From this plenty, each [public employee] draws for himself whatever...he can.”⁸

This is constitutional *ex cathedra*. The Constitution now says that pension spending legislation is all infallible and cannot ever be reduced. Beyond prohibiting reductions, the pension clause has also been enforced to protect increases. In 1970, the only form of pension plans available were defined *benefit* plans, which the pension clause then proceeded to freeze into constitutional amber. This risk was foreseen by one convention delegate, who “...wondered if the state might be locking its employees into a retirement anachronism if better and more lucrative funding mechanisms were developed. ‘To freeze this in the constitution might hurt the very, very people that we are trying to help at this time’, said southwest-side delegate Ted Borek. Eight years later, the federal tax code was changed to allow the first 401(k)-type retirement plans.”⁹

The pension clause has therefore outlawed the use of defined *contribution* plans to Illinois public safety employees, whose pensions cannot be made “portable” and who cannot direct the investment of their retirement funds.

Constitutional petrification of increases has also subsequently locked in annual three percent (3%) compounding of benefits later written into the fire and police sections of the Illinois Pension Code.¹⁰

6. Transcript quoted by Bob Secter and Rick Pearson, “Pension debate at 1970 Constitutional Convention echoes in today’s crisis,” *Chicago Tribune*, Sept. 22, 2013

7. *Id.*

8. Augustine, *Confessions* (Sarah Ruden Trans., 2017 Modern Library Edition), Book 12, Sec. 37 at 418.

9. See Secter and Pearson, *supra* at fn.9.

10. This was done in 1993 and cannot be rolled back without violating the pension clause. See Public Act 87-1265 codified at 40 ILCS 5/7-139.7 and 40 ILCS 5/3-121; and then in 2009 Public Act 96-0775 reached back to apply the 3% compound increase to cost of living adjustments for any firefighter retiring after July 1, 1977, codified at 40 ILCS 5/4-109.1, Sec. 4-109.1(f).

“**The Constitution now says that pension spending legislation is all infallible and cannot ever be reduced. ...[T]he pension clause has also been enforced to protect increases.**”

Judges Strictly Construe the Pension Clause

Judges with their own pension and health benefit packages have also become cast-in-amber constitutional textualists.¹¹ Originalists. Literalists. Not a single liberal construction, hazy penumbra,¹² or deconstructionist critical interpretation¹³

11. See generally, Michael W. McConnell, “Textualism and the Dead Hand of the Past,” Chicago Unbound (1997). https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=12606&context=journal_articles

12. 15 See, In re Pension Reform Litigation (*Doris Heaton et al., Appellees, v. Pat Quinn, Governor, State of Illinois, et al., Appellants*), 2015 IL 118585. In the court’s opinion, Justice Karmeier quotes Helen Kinney, 30 pages before quoting James Madison to strike down any diminishment of pension spending.

13. This is great news for judicial conservatives, to see our Illinois Supreme Court completely rejecting the pervasive leftist “standpoint theory of knowledge” that attacks the objectivity of language, e.g., Altweger, Edelsky and Flores, *Whole Language, What’s the Difference?* (Portsmouth, NH: Heinemann, 1991, at 32: “...reading is not a matter of ‘getting the meaning’ from the text, as if that meaning were in the text waiting to be decoded by the reader. Rather, reading is a matter of readers using the cues print provides and the knowledge they bring with them (of language subsystems, of the world), to construct a unique interpretation... This view of reading implies that there is no single ‘correct’ meaning for a given text, only plausible meanings.”

of this part of the Illinois constitution has crept into a single judicial opinion in any Illinois pension case written by any judge, liberal or conservative.¹⁴

These opinions reveal zero academic jargon about Wittgenstein¹⁵, semiotics, or the indeterminacy of language. They contain no anguish about being ruled by the dead hand of the past DuPage framers – no willingness to take up the challenge of “human imagination and ingenuity” urged upon us by Harvard Law Professor Laurence Tribe, who wrote:

“US Supreme Court Justice Robert Jackson famously described the “fixed star[s] in our constitutional constellation.” His metaphor feels singularly suggestive in this time of constitutional change. Stars may be “fixed,” but the constellations they form are products of human imagination and ingenuity, not cosmologically determined features of the observable universe. So, too, charting our current waters requires human judgment. The Constitution lights the way, but the task of navigation falls to us... over how to navigate the ship – by what stars, to what shore, and on whose say-so. We now must seize this moment to look toward a more inclusive horizon, and together decide which points of light are worth following – and which we should release into the darkened night.”¹⁶

No – The exact text of the pension clause is revered and enforced. Every time. No wobbling stars, no shifting shore.

14. This dedication to the text also supports the Illinois Supreme Court’s decision to uphold the gigantic pension benefit engineered by a teachers union lobbyist who arranged to spend one day as a substitute teacher to trigger applicability of a statutory text engineered by that same teacher’s lobbying victory to change the rules to provide him with credit for his non-classroom union organizing work toward credit for classroom teaching, leading to public outrage. The special language inserted by the lobbyist was then repealed by the legislature, leading the lobbyist to sue for the pension he earned from one day of teaching. The law unwinding the special pension benefit that only applied to this single lobbyist was declared unconstitutional by the Illinois Supreme Court, because it diminished the pension of this very connected lobbyist. *David Piccioli v. The Board of Trustees of the Teachers’ Retirement System*, 2019 IL 122905.

15. Cf., Sandy Grant, “How playing Wittgensteinian language-games can set us free,” Aeon.com, January 24, 2017 <https://aeon.co/ideas/how-playing-wittgensteinian-language-games-can-set-us-free> *Accord, The Williamson County Board of Commissioners v. The Board of Trustees of the Illinois Municipal Retirement Fund*, 2020 IL 125330.

16. Laurence Tribe, “Demagogic Stress and Constitutional Growth,” Project Syndicate, Dec. 26, 2019. <https://www.project-syndicate.org/magazine/trump-authoritarian-threat-is-an-opportunity-by-laurence-tribe-2019-12>

PERSPECTIVES

What About the Balanced Budget Clause?

Contrast this with the language of Art. 8, Sec. 2(a) that says the governor must submit a balanced budget to the legislature each year in which “proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.” These words seem to have gone hazy in practice, or fallen into indeterminacy, subject to what Tribe might call the “imagination and ingenuity” of our legislators with no restraint from the courts.

Another spillover effect of Springfield’s unbalanced pension mandate legislation was then imposed on each Illinois unit of government employing police or firefighters, to pay higher and higher pensions unsupported by local revenue levels.¹⁷ Springfield thus pushed these towns to violate the balanced budget policy enshrined in the Illinois Constitution.

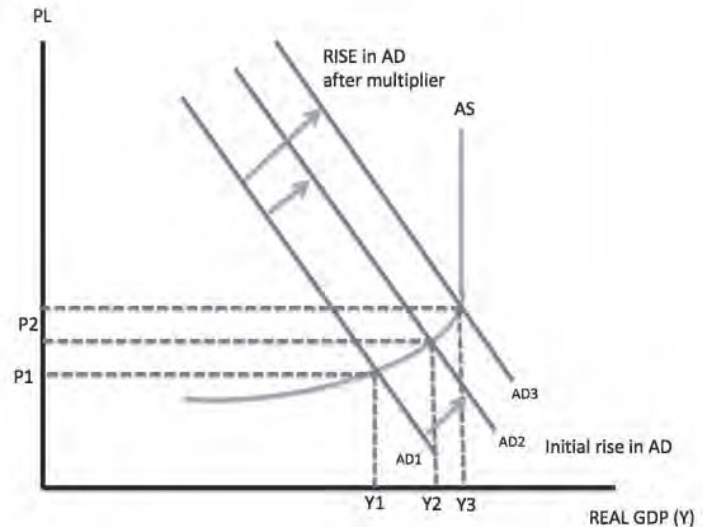
These unfunded local public safety employee pension mandates ballooned into unpayable levels, resulting in high proportions of “unfunded liabilities.” This is why many towns have only been able to fund their fire and police pensions at just 20%, 30%, or 40%.

Springfield has exercised state power to force local governments to violate the policy directive of Article 8, Sec. 2(a), but then Springfield violates it, too.¹⁸

Shouldn’t Article 8, Sec. 2(a) compel the state to provide the funds for all of the “expenditures” the state “proposes” your town to fund with property taxes? Right now, they don’t. All of this is justified by a circular reference back to Article 13, Section 5, the inviolate “no impairment” clause. Never mind the mandatory language of Article 8, Sec. 2(a) that is trampled by the way unimpaired increasing pension spending is imposed “downstream” by state legislation.

Will Hope and Change Ever Apply to the Pension Clause?

Changing the pension clause requires an initial 60% supermajority vote of both houses of the Illinois General Assembly, plus the governor’s signature, after which it must be approved by a referendum of all voters in the following general election. Until that happens, pensions will defy gravity, and will continue to go up without ever coming down, operating as a Keynesian stimulus spending national income equation stuck open¹⁹ locking in a “marginal propensity to consume” public spending.²⁰ This is how an economist graphs that out:



Made in DuPage

A less technical explanation is that now we have spending sugar that cannot be stirred back out of the constitutional coffee. All thanks to the timely and decisive leadership of two Republican lawyers from DuPage County. Whether or not they intended this outcome, their work endures to this day, to the undiminished delight of those receiving public pension benefits extracted from the populace at large for that dedicated contractual purpose.²¹ □

17. In particular, the fire and police pensions dictated by Articles 3 and 4 of the Illinois Pension Code, 40 ILCS 5/Art 3 and 40 ILCS 5/Art.4, which local governments must fund, reserve for, and pay, regardless of the resources of each town. Bipartisan majorities in Springfield amend the Pension Code almost every year to “sweeten” benefits. These sweeteners have cumulatively produced a crisis of unfunded local fire and police pension obligations now required to be carried on the balance sheets of each town as a liability, thus “unbalancing” their budgets. See, Government Accounting Standards Board (GASB) 68, which requires towns to disclose exactly how unbalanced their “balance sheets” really are due to Springfield’s unfunded pension mandates. <https://gasb.org/page/PageContent?pagelid=/standards-guidance/pronouncements/summary--statement-no-68.html&isStaticPage=true>

18. According to the Illinois Policy Institute, according to data from the Illinois State Comptroller, “Illinois budgets have been in the red for 21 years in a row.” <https://www.illinoispolicy.org/fact-check-pritzker-claims-balanced-budgets-state-reports-show-hes-wrong> As this study notes, “Illinois is one of 15 states lacking a requirement to balance the budget at the end of the year and prohibiting deficits from being carried year to year. Its balanced budget requirement applies only to the *planning stage* and allows for significant gimmicks and accounting games to hide deficits.” (emphasis added)

19. <https://corporatefinanceinstitute.com/resources/knowledge/economics/keynesian-multiplier>

20. Represented by Keynes symbolically thus: $1 / (1 - MPC) = 1 / (1 - 0.5)$

21. A continuing enactment of what Tocqueville described as a “sort of compromise between administrative despotism and the sovereignty of the people...” A. de Tocqueville, *Democracy in America* 337-38 (P. Bradley ed. 1945).