Can State Constitutional Development Make a Difference in Illinois?

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For over a decade, Illinois has faced perilous financial and political crises. Many commentators believe that state constitutional development in the context of pensions, term limits, and legislative redistricting are a necessary key to placing Illinois on a path toward prosperity. This article considers whether state constitutional reform (by way of judicial interpretation or amendment) in these areas is possible and whether it would likely bring about the change some observers seek.

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"The law must be stable, but it must not stand still."

-- Roscoe Pound

I. INTRODUCTION

Illinois is at financial and political crossroads. The state recently went two years without a budget.[1] It suffers from massive financial shortfalls amid a power struggle between its legislative and executive branches with no long-term resolution in sight. Since his election in 2014, Governor Bruce Rauner has fought with legislative leaders over fiscal reform measures identified in his "Turnaround Agenda."[2] Meanwhile, Illinois has fallen billions of dollars behind in its bills and teeters on the edge of junk-bond status.[3] Many Illinois-ans, including Governor Rauner and various interest groups, openly advocate solutions that amend or judicially reinterpret, the Illinois Constitution on three issues: public pensions, legislative districting, and term limits.[4]

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1. Julie Bosman & Monica Davey, *Illinois Lawmakers Override Budget Veto, Ending Two-Year Stalemate*, N.Y. TIMES, July 6, 2017.

2. OFFICE OF THE GOVERNOR, THE ILLINOIS TURNAROUND (hereinafter TURNAROUND AGENDA), https://www.illinois.gov/gov/Documents/CompiledPacket.pdf [https://perma.cc/4QZ5-BCSP].

3. Bosman & Davey, *supra* note 1.

4. ILL. CONST. of 1970. All references herein to the "Illinois Constitution" refer to the Illinois Constitution of 1970 unless otherwise stated.

While this battle rages, Illinois's government—and its people—have essentially been held hostage. In the absence of a budget authorizing expenditures, many of the state's most basic operations—such as paying state employees' salaries—had to be performed pursuant to court orders.[5] The judiciary's institutional functions do not, however, include micromanaging governmental operations and the delivery of governmental services; those obligations belong to the legislative and executive branches. Yet when those obligations remain unmet, many eyes turn toward the judiciary for action. As a result, Illinois courts have been besieged with cases testing the limits of constitutional protections on pension benefits and efforts to amend the Illinois Constitution through ballot initiatives.[6] Despite these attempts, successful efforts to develop state constitutional doctrine, whether by judicial interpretation or reinterpretation, or by textual amendment, remain elusive.

This paper considers whether state constitutional development offers a potential solution to Illinois's challenges. This paper defines constitutional development, primarily, to mean amendment of the constitutional text, but in very rare circumstances it could also include an evolution in judicial interpretation. First, this paper examines the strengths and liabilities of relying on state constitutional development. Then, this paper reviews the paths that exist for constitutional development in Illinois. Finally, this paper examines government pensions, term limits, legislative redistricting, and considers how, if at all, state constitutional development can impact those issues.

II. IS STATE CONSTITUTIONAL DEVELOPMENT PREFERABLE?

A. THE CASE FOR NO

Given a constitution's position at the pinnacle of the legal hierarchy—being substantially more authoritative and important than a mere statute—its baseline protections should be free from routine tampering. This notion is

5. . *See, e.g.*, Am. Fed'n of State, Cty. & Mun. Emp., Council 31 v. Ill., 2015 IL App. (5th) 150277-U (unpublished) (affirming issuance of a temporary restraining order requiring state employees to be paid despite the absence of a state appropriations budget).

6. Many commentators and leaders expected the Illinois Supreme Court to provide "guidance" as to what pension reforms would be constitutional. *See, e.g.*, Bob Secter, *Experts: Pension Fix Could Backfire*, CHI. TRIB. April 15, 2015, *available in* 2015 WL 10950603 (reporting that Governor Rauner expected "ground rules" from the court). Illinois courts, however, generally have no authority to offer advisory opinions as to future legislation. For example, pursuant to article VI, § 9 of the Illinois Constitution, the circuit court has jurisdiction over all "justiciable matters except when the Supreme Court has original and exclusive jurisdiction." ILL. CONST. of 1970, art. VI, § 9. A matter is typically not "justiciable" unless it presents "a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177, 184 (Ill. 2002).

rooted in one of the oldest and most important cases in the pantheon of American law, *Marbury v. Madison*.[7] In *Marbury*, the Court considered whether the federal "constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it" and decided on the former, forever setting the stage of constitutional supremacy.[8]

Yet, as Professor David Pozen observes, state constitutions have "never attained any mythical status."[9] One reason for that lack of recognition may be that state constitutions sometimes address issues that seem to be more appropriately treated in the context of a statute. Indeed, state constitutions too often have "created opportunities for precipitous action and filling up the document with clutter, with policies that hardly warrant the label 'constitutional.'"[10] For example, New York's state constitution identifies strict requirements for the width of ski trails.[11] Other state constitutions contain provisions that seem practically medieval, such as Kentucky's requirement that legislators, public officials, and lawyers take an oath affirming that they have never fought in a duel.[12] And, some state constitutions are subject to easy modification, making them seem more closely akin to "super legislation" than to "sacred texts."[13] Indeed, in Alabama alone, the state constitution has been amended over 800 times.[14]

The dangers of an easily amendable constitution are easily imagined. It may be readily subject to tampering by persons with scurrilous intentions, special interest groups with little meaningful connection to the state's citizenry, or impulsive amendments precipitated by unexpected events or conditions that might be unjustified if cooler minds prevailed.[15] For instance, the State of Florida's constitution includes a provision stating that it "shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is

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7. This notion of hierarchical authority has its roots in Marbury v. Madison, 5 U.S. 137, 176-80 (1803).

8. For further discussion regarding constitutional development and the value of stability, *see* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1668-81 (2014).

9. Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 30 (2011) (citing David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008)).

10. Daniel B. Rodriguez, *Change That Matters: An Essay on State Constitutional Development*, 115 PENN. ST. L. REV. 1073, 1082 (2011).

11. *See* N.Y. CONST. art. XIV, § 1.

12. *See* KY. CONST. § 228.

13. Mansker & Devins, *supra* note 9, at 30 (citing Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35 (1988)).

14. Mansker & Devins, *supra* note 9, at 30.

15. *See* Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 902-06 (2011).

prevented from turning around freely."[16] Florida's pregnant-pig-protection amendment came about following a national campaign by animal rights activists who focused their efforts on that state because of the relative ease of modifying its constitution.[17] California's state constitutional amendment process is so forgiving that a lawyer recently sought to have a proposed constitutional amendment placed on the ballot that called for the execution of homosexuals.[18] Another example of dangerous tampering involves the control of Congress. Because state constitutions largely control the decennial redistricting of the United States Congress,[19] special interest groups could seek changes to the redistricting process to further their own self-interest goals.

State constitutional amendments can also be used, or abused, by lawmakers seeking to avoid the application of federal constitutional protections or statutes.[20] Examples abound. Recently, Arizona, Oklahoma, and Missouri sought refuge from the Affordable Care Act by proposing changes to their state constitutions.[21] In anticipation of the Supreme Court's same-sex ruling in *Obergefell v. Hodges*,[22] other state lawmakers began proposing "religious liberty" amendments to their state constitutions.[23] Most recently, Kentucky lawmaker Joe Fischer proposed a state constitutional amendment establishing that "only a matrimony between one man and one woman shall be valid or recognized as a matrimony in Kentucky," a proposition that would obviously be unlawful in the wake of *Obergefell*.[24] An Idaho legislator sought to counter federal gun control legislation by proposing a state constitutional amendment that drafted all adults into a militia.[25] While sometimes based on good intentions, these types of proposed amendments are often contrary to

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16. FLA. CONST. art. X, § 21. Avoiding cruelty to animals is, of course, an important state objective. But, it seems more appropriate for statutory rather than constitutional protection.

17. Williams, *supra* note 15, at 902. *See also* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STANFORD L. REV. 1583, 1611 (2010) (stating that interest group influence is more prevalent in the context of state constitutional amendments, particularly where the barrier to amendment is low, because voters seem less inclined to support a full constitutional convention and because a full constitution would involve greater monitoring and political horse trading).

18. Russell Berman, *Will Californians Vote On Executing Gays and Lesbians?*, THE ATLANTIC, March 26, 2015.

19. *See* James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 886 (2006).

20. *See generally* Williams, *supra* note 15.

21. Williams, *supra* note 15, at 902.

22. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

23. Matt Dotray, *Texas Has Introduced its Own Bills Related to "Religious Freedom,"* LUBBOCK AVALANCHE-JOURNAL, April 5, 2015, *available in* 2015 WLNR 9943345.

24. Ky. H.B. 571. (introduced March 1, 2016).

25. Mike Butts, *Rice: Make All Adults Militia Members*, IDAHO PRESS-TRIB., February 28, 2013, *available in* 2013 WLNR 4998226.

the federal constitution and can have the effect of creating political and legal instability and uncertainty.[26]

In short, the wisdom in having a hierarchy of laws, with a rigid constitution sitting at the top, boils down to two basic components.[27] First, the notion that temporary majorities should not be permitted to enact amendments weakening the basic right of citizens or the fundamental principles of governance.[28] Second, many believe society must be able to rely upon, and thus benefit from, the stability that comes from a non-malleable government.[29] In other words, constitutional stability lends itself to legal and political stability, reducing opportunities for influence by interest groups that may possess selfish aims.[30]

B. THE CASE FOR YES

A malleable state constitution offers several benefits—many of which are corollaries to the above-discussed weaknesses. For example, while one can argue that a state constitution should be immune from the daily political tensions that exist in most statehouses, one could also argue that a constitution represents the will of the people and, thus, should be easily modified to ensure that it remains an ongoing reflection of the citizenry's attitudes, values, and will. Under this view, a robust amendatory history likely reflects a citizenry that is active in the political process, which is generally considered a positive attribute in American society.[31] This benefit is particularly relevant in modern times given rapidly growing political influence of women and minority groups who had little voice in framing the Federal Constitution.[32]

Ample evidence exists in many states of public support for a flexible constitution.[33] Only nineteen states operate under their original constitutions, and most states have adopted at least three iterations.[34] Collectively, states have held over 230 constitutional conventions, adopted 146 constitutions, and enacted over 5000 constitutional amendments.[35] In contrast, the United States Constitution has been amended a mere twenty-seven times. While the

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26. *See* Versteeg & Zackin, *supra* note 8, at 1668-81.

27. Bruce E. Cain & Roger G. Noll, S*ymposium: What, If Anything, Do We Know About Constitutional Design*, 87 TEX. L. REV. 1517, 1517-18 (2009).

28. *Id.*

29. *Id.*

30. Daniel B. Rodriguez, *Change That Matters: An Essay on State Constitutional Development*, 115 PENN. ST. L. REV. 1073, 1082 (2011).

31. Many commentators believe malleable constitutions are advantageous because they can more easily accommodate changes in societal needs, economic challenges, and threats to sovereignty. Cain & Noll, *supra* note 27, at 1517, 1518-19.

32. Williams, *supra* note 15, at 905.

33. For further discussion on the state constitutions importance of state constitutions, *see generally* Williams, *supra* note 15.

34. Cain & Noll, *supra* note 27, at 1517, 1519-20.

35. *Id.*

Federal Constitution offers only one avenue for amendment, many state constitutions have multiple paths to modification, perhaps indicating an intent to retain greater flexibility to adapt to changing circumstances.

Sometimes state constitutions are amended to override an unpopular judicial decision. The judiciary, as an institution, is concerned only with interpreting and applying existing constitutional and statutory directives. For that reason, it is often considered the weakest branch of government, a notion also supported by sound principles of judicial restraint. Giving a state's citizenry a virtual veto pen to undo a judicial decision represents an important tool for maintaining democracy. Admittedly, though, the ability to override a judicial determination through the constitutional amendment process is not without risk. As noted, sometimes the proposed amendment is ineffective because it runs afoul of superior federal constitutional protections. One illustration is the hotly contested legal dispute over same-sex marriage.[36] Hawaii's courts found in 1996 that statutes prohibiting same-sex marriage violated that state's Equal-Protection Clause. In response, Hawaii's citizens amended their constitution.[37] In 2015, the United States Supreme Court held in *Obergefell*[38] that the Federal Constitution protected same-sex marriage. Thus, the Hawaii citizenry's "undo" was effectively undone by the federal court. Of course, at the time of the amendment it was unclear what the Supreme Court would hold on the issue.

The citizenry's virtual veto power over a judicial ruling has another role as well. Often, federal courts make rulings regarding limitations on individual rights that can be unpopular. As further discussed *infra*, state constitutions may be amended to provide individual protections not offered by the Federal Constitution. Justice Brennan stated the case for this movement:

> [T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand

36. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (remanding to trial court to determine whether statute served a compelling state interest); *see also* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Cir. Ct. Haw. Dec. 3, 1996) (on remand, finding that the statute was unconstitutional because it served no compelling state interest).

37. HAW. CONST. art. I, § 23 (ratified Nov. 3, 1998).

38. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

> constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.[39]

Perhaps Thomas Jefferson made the most eloquent argument for constitutional evolution, albeit with caution:

> I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change in circumstances, institutions must advance also, and keep pace with the times. . . . [Each generation has] a right to choose for itself the form of government it believes most promotive of its happiness . . . [A] solemn opportunity for doing this every nineteen or twenty years, should be provided by the constitution…[40]

Thus, amendment of a state constitution offers a critical second level of protection from governmental intrusion. Given the relative difficulty in amending the Federal Constitution to keep up with modern challenges to personal freedoms, a state constitution that is easily amendable can be advantageous.

III. VIABILITY OF STATE CONSTITUTIONAL DEVELOPMENT OPTIONS IN ILLINOIS

A. THE ILLINOIS APPROACH: DIFFICULT BY DESIGN

The drafters of the Illinois Constitution sought to balance these competing views of constitutional evolution by creating a framework that makes constitutional amendment somewhat difficult. The Illinois Constitution can generally be amended through one of three avenues: (1) a call for a constitutional convention (often referenced in political circles as a "con-con"); (2) a

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39. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

40. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 337 (1994) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816)), *in* 10 WRITINGS OF THOMAS JEFFERSON 42-43 (Paul L. Ford ed.) (New York, G. P. Putnam's Sons 1899).

referendum initiated by the legislature; and (3) a referendum initiated by the voters. Until the Illinois Constitution was amended in 1970, Illinois law did not permit constitutional amendment by voter initiative.[41] During the constitutional convention of 1970, the delegates decided to add a voter-initiated procedure for amending the constitution in art. XIV, § 3,[42] but that procedure is, by design, limited to matters involving the legislature itself.[43] The drafters' rationale appears to be that, while the legislature is best-suited to initiate necessary amendments in most contexts, the general assembly would be unwilling to initiate constitutional amendments that encroached on its own power. Thus, that ability was given directly to the voters.[44] As a delegate to the 1970 Constitutional Convention, Delegate Louis Perona explained:

> This provision has been structured to apply only to the legislative article and to be limited to the area of government which it is most likely will not be changed in the constitution by amendment. The legislature, being composed of human beings, will be reluctant to change the provisions of the constitution that govern its structure and makeup, the number of its members, and those sort of provisions. As I indicated

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41. *See* Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 145 (Ill. 1976). *See also* FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 58-61 (Ill. Bar Foundation 2001 ed.)

42. Article 14, § 3 provides as follows:

> Amendments to Article IV of this Constitution may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election. Amendments shall be limited to structural and procedural subjects contained in Article IV. A petition shall contain the text of the proposed amendment and the date of the general election at which the proposed amendment is to be submitted, shall have been signed by the petitioning electors not more than twenty-four months preceding that general election and shall be filed with the Secretary of State at least six months before that general election. The procedure for determining the validity and sufficiency of a petition shall be provided by law. If the petition is valid and sufficient, the proposed amendment shall be submitted to the electors at that general election and shall become effective if approved by either three-fifths of those voting on the amendment or a majority of those voting in the election.

ILL. CONST. of 1970, art. XIV, § 3.

43. *See* Coal. for Political Honesty, 359 N.E.2d at 140-47.

44. *See* OFFICIAL TEXT WITH EXPLANATION OF THE PROPOSED 1970 CONSTITUTION, 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2677-78 [hereinafter RECORD OF PROC) (acknowledging a possible "reluctance on the part of the General Assembly to propose change in its own domain"); DAVID R. MILLER, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 105 (4th ed. 2005) (stating "the convention did decide to allow change by initiative of the General Assembly's basic structure and operations, believing that the General Assembly would be unlikely to prose such changes itself.").

> preliminarily in my remarks, I think the limitation on this initiative eliminates the abuse which has been made of the initiative in some states. The attempt has been made here to prevent it being applied to ordinary legislation or to changes which do not attack or do not concern the actual structure or makeup of the legislature itself.[45]

Professor Ann Lousin was a research assistant at the con-con, and she offers a more "insider" take on art. XIV, § 3. She maintains:

> The voter initiative in article XIV, [§ 3] is really there for only one reason: to allow those who favored single-member districts for electing the Illinois House a method of abolishing the multi-member districts with cumulative voting system then in existence. This issue threatened to tear the convention apart, and some Downstaters were so adamant that they considered walking out. In order to avoid that scenario, the convention put in Article XIV, Section 3 and also gave voters a choice between the old system and the new one. The voters preferred the old system. In 1980 the initiative system was used to establish the single member districts system, as well as cut back on the size of the House by one-third. Any other use of the initiative is problematical.[46]

Professor James Garner, a political scientist in the early 1900s, wrote that "no constitution can expect to be permanent unless it guarantees progress as well as order."[47] Regardless of the reasons art. XIV, § 3 exists in its present form, commentators like Professor Lawrence Schlam viewed the Illinois Constitution as still being far too difficult to amend.[48] He noted that, as of the 1940s, Illinois had the most rigid constitution of any state in the country, and that its present constitution, enacted in 1970, is little better.[49] It is difficult to say whether the balance between progress and order is the best one available. But it is the one Illinois has chosen. The Illinois Constitution of 1970—along with its rigorous amendment procedures—was adopted by a vote of

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45. 4 RECORD OF PROC. 2911.

46. Correspondence with Ann Lousin dated March 3, 2016 (on file with author).

47. James Wiford Garner, *Amendment of State Constitutions*, 1 THE AM. POL. SCI. REV. 213 (1907) (citing J.S. MILL: REPRESENTATIVE GOVERNMENT 8).

48. *See generally* Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269 (1994).

49. *See id.* at 312 (Thirty-six attempts were made to amend the Illinois Constitution of 1870, and only fifteen succeeded.). *See also* KOPECKY & HARRIS, *supra* note 41, at 58.

1,122,425 in favor to 838,168 against, with only 37% of voters casting a ballot.[50]

B. DEVELOPMENT THROUGH JUDICIAL INTERPRETATION

Getting things done in the Illinois legislature is not easy. Newspapers have spilled barrels of ink analyzing the state legislature's political function and ability to work cooperatively. In contrast, the Illinois's judiciary, particularly its Supreme Court, has a reputation for collegiality.[51] This is true despite the court's broad diversity.[52] But, despite being the branch of government with the greatest capacity to conduct its business without impasse, is the Illinois Supreme Court likely to bring major constitutional development on the scale as some observers hoped? As discussed below, the answer depends largely on whether the constitutional provision in question has an analogous federal constitutional provision.

1. State Constitutional Provisions with Analogous Federal Constitutional Provisions

a. The Modalities of Dependent Versus Independent State Constitutional Interpretation

Most state high courts in the United States have considered both the interplay between analogous provisions existing in both state and federal constitutions and the related question of whether state constitutional provisions may be interpreted without regard to their federal counterparts. For example, in *Heien v. North Carolina*, the United States Supreme Court held that a police officer can stop a vehicle, based on a mistaken understanding of the law, without violating the Fourth Amendment.[53] A state supreme court remains free, however, to consider whether an unlawful stop might violate that state's own constitutional protections. In *People v. Guthrie*, the Court of Appeals of New York considered whether to extend greater protections to a criminal defendant under New York's state constitution than those afforded under *Heien*.[54] A divided New York court ultimately followed *Heien*,[55] but

50. KOPECKY & HARRIS, *supra* note 41, at 7.

51. *See, e.g.*, Kirk Jenkins, *The Kilbride Court After 2 Years: Pragmatic and Collegial*, LAW360 (Jan. 24, 2013), http://www.law360.com/articles/407237/the-kilbride-court-after-2-years-pragmatic-and-collegial.

52. The Illinois Supreme Court consists of four Democrats and three Republicans; four men and three women; four upstate judges and three from central, or downstate, Illinois.

53. Heien v. North Carolina, 135 S. Ct. 530, 540 (2014), (Kagan, J., concurring).

54. People v. Guthrie, 30 N.E.3d 880, 886-88 (N.Y. 2015).

55. *Id.*

the Court of Appeals of Oregon reached the opposite conclusion in *State v. Heilman*,[56] as did a reviewing court in New Jersey in *State v. Scriven*.[57]

State courts that have considered the scope of state constitutional protections relative to federal guarantees have generally followed one of three paths. First, under the "lockstep" approach, the court ties its analysis to the United States Supreme Court's interpretation of the analogous federal provision, and "deviation is for all intents and purposes impossible."[58] Second, some states follow the "interstitial" approach, basing their interpretation on the application of criteria designed to determine whether "factors unique to the state weigh in favor of departing from the Supreme Court's interpretation of the same constitutional language."[59] Third, other states adopt the "primacy" or "primary" approach, whereby the state court largely rejects the notion of lockstep analysis and instead "undertakes an independent [state] constitutional analysis, using all the tools appropriate to the task, and relying upon federal decisional law only for guidance."[60]

b. Illinois and its "Limited Lockstep" Approach

In Illinois, the Supreme Court has observed three common situations when analyzing the interplay between the state and federal constitutions: (1) provisions that are unique to the state constitution; (2) sections in the state constitution that may be similar to a federal provision, but are nonetheless different in some meaningful way, requiring the state provision to be given effect; and (3) state constitutional provisions that have similar language and are functionally identical to their federal counterparts.[61] In the first situation, Illinois law requires no deference to federal jurisprudence. The second scenario requires that the language unique to the state constitution "be given effect." In other words, the first two scenarios leave room for independent judicial construction by state courts. The third situation invokes a federal

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56. State v. Heilman, 342 P.3d 1102, 1106 n.5 (Ore. Ct. App. 2015) (relying on enhanced state protections).

57. State v. Scriven, No. A-5680-13T3, 2015 WL 773824 (N.J. Super. Ct. App. Div. Jan. 12, 2015) (noting that New Jersey does not recognize a good-faith exception to the exclusionary rule).

58. People v. Caballes, 851 N.E.2d 26, 41 (Ill. 2006).

59. *Id.* at 42. (The Illinois Supreme Court relied upon the explanation of the New Mexico Supreme Court, "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. [Citation.] A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.") (quoting State v. Gomez, 932 P.2d 1, 7 (1997)).

60. *Id.* (quoting L. Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 95 (2000)).

61. *Id.* at 31-32.

court-dependent analysis that the court referred to in *People v. Caballes* as its "limited lockstep" approach.[62]

In *Caballes*, the court sought to place its jurisprudence somewhere between the interstitial and pure lockstep approaches.[63] However, the court's discussion of "limited lockstep," along with its prior precedent, suggests that the substance of "limited lockstep" is most closely aligned with the interstitial approach.[64] The Illinois Supreme Court declared that Illinois courts must follow "at the very least" a narrow version of the interstitial view under which: "[W]e recognize several justifications for departing from strict lockstep analysis. This approach has been described as one under which a court will 'assume the dominance of federal law and focus directly on the gap-filling potential of the state constitution.'" Under this approach, this court will "look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent." [65] Further, the court observed that the criteria it has used in the past to evaluate the state constitution's gap-filling potential includes language found in the state constitution or its constitutional debates and committee reports,[66] or in the state's values, traditions and pre-existing law.[67]

This description leaves the question of whether *Caballes* prohibits Illinois courts from abandoning a lockstep interpretation in the face of a flawed

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62. *Id*. *See also* James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63 (2012); John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965 (2013); Timothy P. O'Neill, *Escape from Freedom: Why "Limited Lockstep" Betrays Our System of Federalism*, 48 J. Marshall L. Rev. 325 (2014); James K. Leven, *Attention Gun-Rights Advocates! Don't Forget the Illinois Constitutional Right to Keep and Bear Arms*, 48 J. MARSHALL L. REV. 53 (2014). *See also* Hon. Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS (2018) (For a superb discussion on the importance of state constitutionalism).

63. The *Caballes* court characterized its doctrine as "either the interstitial approach, or perhaps a 'limited lockstep' approach." *Caballes*, 851 N.E.2d at 42. Yet, the court also stated that it "ha[d] not unequivocally adopted the interstitial approach as it has been broadly defined by the New Mexico court" in *State v. Gomez*, the case upon which it relied to explain the interstitial approach. *Caballes*, 851 N.E.2d at 42 (citing State v. Gomez, 932 P.2d at 7).

64. *See also* Anderson, *supra* note 62, at 1006.

65. *Caballes*, 851 N.E.2d at 42-43 (internal citations omitted). The court stated that it actually adopted the limited lockstep view in *People v. Tisler*, 469 N.E.2d 147 (1984), and "modified it in [*People v. Krueger*, 675 N.E.2d 604 (Ill. 1996)] and [*People v. Washington*, 665 N.E.2d 1330 (Ill. 1996)] to allow consideration of state traditions and values as reflected by long-standing state case precedent." *Id.* at 45.

66. *Id.* at 43 (citing *Tisler*, 469 N.E.2d at 157).

67. *Id.* at 43 (citing *Krueger*, 675 N.E.2d 604, 611-12 (Ill. 1996); then citing *Washington*, 665 N.E.2d 1330, 1336-37 (Ill. 1996)).

federal analysis. At least one appellate court panel has interpreted *Caballes* as having foreclosed this possibility.[68] In *People v. Fitzpatrick*, the appellate court stated that the "lockstep doctrine would be largely meaningless if Illinois courts interpreting state constitutional provisions followed only those United States Supreme Court decisions with which they agreed" and the "*Caballes* court did not suggest that a 'flawed federal analysis' would ordinarily be a valid basis for departing from United States Supreme Court precedent."[69] Nonetheless, this conclusion is difficult to reconcile with *People v. Coleman*, where the Illinois Supreme Court reiterated that the court may depart from the limited lockstep approach to account for "state tradition and values as reflected by long-standing state case precedent."[70] In practice, however, instances of Illinois courts departing from lockstep interpretation are highly uncommon; thus, it seems unlikely that Illinois courts will depart from an analogous United States Supreme Court decision when interpreting the Illinois Constitution. Therefore, to the extent state constitutional development is possible through judicial interpretation, it is far more likely to originate with the United States Supreme Court, not the Illinois Supreme Court, at least where the federal and state constitutions overlap.

2. State Constitutional Development Regarding Language with No Analogous Federal Provision

Where Illinois courts construe constitutional language with no federal counterpart, they are not required to give deference to federal decisions.[71] That view is not uncommon. Kopecky and Harris contend that constitutional interpretation is "probably the most important avenue of change and is frequently used" and offer an interesting example.[72] For decades, the Illinois Supreme Court's jurisprudence appeared to steadfastly hold that the Illinois Constitution of 1870 prohibited an income tax.[73] Nonetheless, the Illinois

68. People v. Fitzpatrick, 960 N.E.2d 709, 714 (Ill. App. Ct. 2011). *aff'd* 986 N.E.2d 1163 (Ill. 2013).

69. *Fitzpatrick*, 960 N.E.2d at 714. *But see Caballes*, 221 Ill. 2d at 310-11, 851 N.E.2d at 43 (citing *Krueger*, 675 N.E.2d at 611-12; *Washington*, 665 N.E.2d at 1336-37) (a court can deviate from lockstep analysis based on unique aspects of Illinois's values, traditions, and pre-existing law).

70. People v. Coleman, 996 N.E.2d 617, 635 n.2 (Ill. 2013). *See also Caballes*, 851 N.E.2d at 43 (citing *Krueger*, 675 N.E.2d at 611-12; *Washington*, 665 N.E.2d at 1336-37) (a court can deviate from lockstep analysis based on unique aspects of Illinois's values, traditions, and pre-existing law).

71. *Caballes*, 851 N.E.2d 26, 31 (Ill. 2006).

72. KOPECKY & HARRIS, *supra* note 41, at 58. Likening constitutional text to music and the judiciary to a conductor, Kopecky and Harris suggest that over time the same song may sound different when played by a different band. *See id*.

73. *See*, *e.g.*, Bachrach v. Nelson, 182 N.E. 909 (Ill. 1932); Ohio Oil Co. v. Wright, 53 N.E.2d 966 (Ill. 1944); Friedrich v. Wright, 53 N.E.2d 974 (Ill. 1944).

Supreme Court abruptly overruled its prior decisions in 1969 and declared that the then-existing constitution presented no barrier to an income tax.[74] To be sure, judicial interpretation of static constitutional text can sometimes change with a shift in court personnel[75] and, on very rare occasions, courts depart from *stare decisis*,[76] but the judiciary does not take such opportunities lightly nor often.[77] Accordingly, while the Illinois Supreme Court rarely initiates major shifts in constitutional interpretation, incremental or modest developments remain a remote possibility.

C. MODIFICATION OF THE STATE CONSTITUTIONAL TEXT THROUGH AMENDMENT

To address Illinois's many financial and political concerns, many commentators are calling for changes to the Illinois Constitution of 1970. As noted previously, Article XIV of the Illinois Constitution permits textual amendment through three basic approaches: (1) constitutional convention; (2) amendments initiated by the legislature; and (3) amendments initiated by voters.[78]

1. Constitutional Convention

In Illinois, a state constitution is enacted through a process called a constitutional convention. Pursuant to Article XIV, Section 1 of the Illinois Constitution, a constitutional convention may be initiated in one of two alternative ways.[79] First, three-fifths of both legislative houses may direct the

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74. Thorpe v. Mahin, 250 N.E.2d 633 (Ill. 1969).

75. An example is the Illinois Supreme Court's decision in Sw. Ill. Dev. Authority ("SWIDA") v. Nat'l City Envtl., 768 N.E.2d 1 (Ill. 2002). *SWIDA* involved an eminent domain taking that the appellate court deemed unconstitutional. In April 2001, the Illinois Supreme Court reversed that decision on a 4-3 vote. In June 2001, the court permitted rehearing and, in April 2002, affirmed the appellate court by a 5-2 vote. This change of position may have been fueled by a change in court personnel, with two new justices joining the court in December 2000, and another in February 2001. Notably, all three of the new members voted in the new 5-2 majority. Of course, this example represents a very different scenario from the court's sudden reversal on the tax cases after having taken the opposite position for many decades.

76. *See* People v. Petrenko, 931 N.E.2d 1198, 1212 (Ill. 2010). *See also In re* Commitment of Simons, 821 N.E.2d 1184, 1197-98 (Ill. 2004) (Freeman, J., dissenting).

77. *See* People v. Sharpe, 839 N.E.2d 492, 513 (Ill. 2005) (discussing the importance of *stare decisis* and the justification to depart from it).

78. KOPECKY & HARRIS, *supra* note 41, at 58.

79. The full text of Article XIV, section 1, reads as follows:

> (a) Whenever three-fifths of the members elected to each house of the General Assembly so direct, the question of whether a Constitutional Convention should be called shall be submitted to the electors at the general election next occurring at least six months after such legislative direction.

decision of whether to have a constitutional convention to be submitted to the voters.[80] Second, if twenty years pass without the General Assembly placing the question of whether to hold a constitutional convention on the ballot, the Illinois Secretary of State is directed to place it on the ballot.[81] Under either alternative, a con-con is called only if approved by "three-fifths of those voting on the question or a majority of those voting in the election."[82]

A con-con question last appeared on the ballot in 2008, so, absent legislative action, it will not reappear until 2028. Proponents of a 2008 con-con, such as then-Governor Quinn, declared it to be the "one chance that voters have every twenty years to go around the special interest and lobbyists and amend the constitution themselves."[83] Other commentators, like Professor Lousin, countered that the "major problems Illinois faces—such as the budget crisis, education financing and the pension deficit—are not

> (b) If the question of whether a Convention should be called is not submitted during any twenty-year period, the Secretary of State shall submit such question at the general election in the twentieth year following the last submission.
> (c) The vote on whether to call a Convention shall be on a separate ballot. A Convention shall be called if approved by three-fifths of those voting on the question or a majority of those voting in the election.
> (d) The General Assembly, at the session following approval by the electors, by law shall provide for the Convention and for the election of two delegates from each Legislative District; designate the time and place of the Convention's first meeting which shall be within three months after the election of delegates; fix and provide for the pay of delegates and officers; and provide for expenses necessarily incurred by the Convention.
> (e) To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly. Vacancies shall be filled as provided by law.
> (f) The Convention shall prepare such revision of or amendments to the Constitution as it deems necessary. Any proposed revision or amendments approved by a majority of the delegates elected shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment. Any revision or amendments proposed by the Convention shall be published with explanations, as the Convention provides, at least one month preceding the election.
> (g) The vote on the proposed revision or amendments shall be on a separate ballot. Any proposed revision or amendments shall become effective, as the Convention provides, if approved by a majority of those voting on the question.

ILL. CONST. of 1970, art. XIV, § 1.

80. ILL. CONST. of 1970, art. XIV, § 1(a).

81. ILL. CONST. of 1970, art. XIV, § 1(b).

82. ILL. CONST. of 1970, art. XIV, § 1(c).

83. Patrick Ferrell, *Does Illinois Need a New Constitution?*, ST. CHARLES SUN, Oct. 8, 2008.

constitutional problems. They are problems caused by lack of political courage and by unwillingness to compromise."[84] Illinois political commentator Dan Proft seemed opposed to a con-con as well, suggesting that the task of drafting a new constitution would merely be placed in the hands of those already in power.[85] Regardless, voters soundly defeated the 2008 con-con question, suggesting that similar efforts in the near future could meet the same fate.[86]

2. Legislature-Initiated Constitutional Amendment

Article XIV, Section 2 of the Illinois Constitution permits the General Assembly to place constitutional amendments on the ballot.[87] To do this, both houses must approve the proposed measure with a three-fifths vote.[88] Once placed on the ballot, the amendment is passed with approval of "three-fifths of those voting on the question or a majority of those voting in the election."[89]

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84. *Id.*

85. Cigi Ross, *Debaters Argue Merits of Convention*, THE COURIER NEWS, Sept. 21, 2008.

86. Voters rejected the question, with 3,062,724 electors (67.23%) voting "no" and 1,493,203 electors (32.77%) voting "yes." This is from a total of 5,539,172 votes cast. 983,245 voters chose neither option. Illinois State Board of Elections. Statewide question totals Ballotpedia, Illinois Constitutional Convention (2008) (Nov. 4, 2008), https://ballotpedia.org/Illinois_Constitutional_Convention_(2008) [https://perma.cc/4KE8-7VPQ].

87. ILL. CONST. of 1970, art. XIV, section 2 stating:

> AMENDMENTS BY GENERAL ASSEMBLY
>
> (a) Amendments to this Constitution may be initiated in either house of the General Assembly. Amendments shall be read in full on three different days in each house and reproduced before the vote is taken on final passage. Amendments approved by the vote of three-fifths of the members elected to each house shall be submitted to the electors at the general election next occurring at least six months after such legislative approval, unless withdrawn by a vote of a majority of the members elected to each house.
>
> (b) Amendments proposed by the General Assembly shall be published with explanations, as provided by law, at least one month preceding the vote thereon by the electors. The vote on the proposed amendment or amendments shall be on a separate
>
> ballot. A proposed amendment shall become effective as the amendment provides if approved by either three-fifths of those voting on the question or a majority of those voting in the election.
>
> (c) The General Assembly shall not submit proposed amendments to more than three Articles of the Constitution at any one election. No amendment shall be proposed or submitted under this Section from the time a Convention is called until after the electors have voted on the revision or amendments, if any, proposed by such Convention.

Id.

88. ILL. CONST. of 1970, art. XIV, § 2.

89. *Id.*

Since 1970, voters have both approved[90] and rejected[91] several proposed legislature-initiated amendments.[92] The Illinois legislature has not, however, endeavored to address Illinois's financial challenges, nor the controversial issues of pension reform, redistricting, or term limits. Nor is it likely that they will. Practically speaking, the political party in control of the legislature—no matter which party that is—would be unlikely to implement such reforms, at least with regard to redistricting and term limits, because they could lead to dissipation of its own power.

3. Voter-Initiated Constitutional Amendment

Under certain narrow circumstances, Article XIV, section 3 of the Illinois Constitution permits voters to initiate constitutional amendments pertaining only to the legislature itself.[93] When it comes to the practical application of Article XIV, section 3, the key limiting language is the requirement

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90. *See* S.J. Res. 56, 81st Gen. Assemb. (Ill. 1979-80) (amending art. IX, section 8 to reduce the time permitted for redemption of certain types of real property sold for nonpayment of taxes); S.J. Res. 36, 82nd Gen. Assemb. (Ill. 1981-82) (amending art. I, section 9 to expand the classifications of criminal suspects who may be denied bail); S.J. Res. 22, 84th Gen. Assemb. (Ill. 1985-86) (amending art. I, section 9 by further expanding the classifications of suspects who may be denied bail); H.J. Res. 1, 85th Gen. Assemb. (Ill. 1987-88) (amending art. III, section 1 to reduce the minimum voting age to 18 and reduce the minimum residency requirement to 30 days); H.J. Res. 4, 86th Gen. Assemb. (Ill. 1989-90) (amending art. IX, section 8 again to subdivide the types of real property having a reduced tax redemption period into two groups); H.J. Res. 28 87th Gen. Assemb. (Ill. 1992) (adding to art. I a new section 8.1 regarding the rights of crime victims); S.J. Res. 123, 88th Gen. Assemb. (Ill. 1994) (amending art. 1, section 8 to eliminate the requirement of face-to-face confrontation in criminal trials); H.J. Res. 35, 88th Gen. Assemb. (Ill. 1994) (amending art. IV, section 10 to modify the intended legislative adjournment date from June 30 to May 31); S.J. Res. 52, 90th Gen. Assemb. (Ill. 1998) (amending art. VI, section 15 to modify the process of disciplining judges); H.J. Res. 31, 96th Gen. Assemb. (Ill. 2009) (adding art. III, section 7 to provide power to recall the governor); H.J. Res. 1, 98th Gen. Assemb. (Ill. 2014) (amending art. I, section 8.1 dealing with victims' rights); H.J. Res. 52, 98th Gen. Assemb. 2 (Ill. 2014) (adding art. III, section 8 (addressing voter discrimination)).

91. *See* H.J. Res. 7, 78th Gen. Assemb. (Ill. 1973) (limiting the Governor's amendatory veto); H.J. Res.. 21, 80th Gen. Assemb. (Ill. 1977-78) (removing the requirement in Article IX, section 5(c) that the legislature abolish all remaining taxation on personal property); H.J. Res. 29, 80th Gen. Assemb. (Ill. 1977-78) (exempting veterans' organizations from property tax); H.J. Res. 83rd Gen. Assemb. (Ill. 1983-84) (exempting veterans' organizations from property tax); S.J. Res. 11, 78th Gen. Assemb. (Ill. 1985-86) (exempting veterans' organizations from property tax and requiring the state to reimburse local governmental entities for lost tax revenue); H.J. Res. 13, 85th Gen. Assemb. (Ill. 1987-88) (changing redemption period for nonpayment of taxes); S.J. Res. 30, 87th Gen. Assemb. (Ill. 1992) (addressing education financing); H.J. Res.49, 97th Gen. Assemb. (Ill. 2012) (addressing pension benefits).

92. *See* Ann M. Lousin, *Constitutional Revision: Are Seriatim Amendments or Constitutional Conventions the Better Way to Amend a State Constitution?*, 115 PENN. ST. L. REV. 1099 (2011) (discussing past revisions to the Illinois Constitution).

93. ILL. CONST. of 1970, art. XIV, § 3.

that "[a]mendments shall be limited to structural and procedural subjects contained in Article IV," the legislative article.[94] Although Illinois courts have interpreted this requirement only a handful of times, it seems to be the most hotly contested path to constitutional amendment in Illinois—conceivably because it has the capability to strip power from the legislature.

In the first case to address the issue, *Coalition for Political Honesty v. State Board of Elections* ("*Coalition I"*),[95] the package of proposed amendments included restrictions on holding dual offices, prohibitions against legislators from voting despite conflicts of interest, and limitations on payment of legislative salaries. Plaintiffs—many of whom were delegates to the constitutional convention or otherwise heavily involved in crafting the Illinois Constitution of 1970—filed an action seeking to enjoin the Illinois State Board of Elections and other officials from expending public funds to determine the validity and sufficiency of the initiative petition. The Illinois Supreme Court concluded, in a 6-1 decision, that the word "and" in the sentence "structural and procedural subjects" requires that proposed amendments must be *both* structural and procedural, such as a proposal to convert from a bicameral to a unicameral legislature or to convert from multiple- to single-member legislative districts.[96] Ultimately, the *Coalition I* court determined that the proposed amendment did not satisfy the "structural and procedural" requirements.[97]

Confusion seems to have arisen because the *Coalition I* court did not provide an unequivocal explanation of how to identify the types of amendments that would impact both the structural and procedural aspects of the legislature. The court did, however, quote Delegate Perona, explaining the importance of a voter-initiated check against the legislature: "if we are dependent upon an amendment suggested by the legislature to reduce its size or to abolish cumulative voting or possibly to change to a unicameral legislature, I don't think we are going to get it done."[98] The court also referenced and quoted at length from a committee report explaining that voter-driven amendments could not involve matters of substantive policy, but rather, were limited to matters that "pertain[] only to the basic qualities of the legislative branch—namely structure, size, organization, procedures, etc."[99] Ultimately, the *Coalition* court determined that the proposed amendments did not satisfy the "structural and procedural" requirement. Further, the committee report

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94. There is no dispute that direct-participation amendments may be directed only toward the legislative article. *See* Coal. for Political Honesty v. State Bd. of Elections [hereinafter *Coalition I*], 359 N.E.2d 138, 140 (Ill. 1976).

95. *Coalition I*, 359 N.E.2d 138 (Ill. 1976).

96. *Id.*

97. *Id.* at 145-47.

98. *Id.* at 145 (citing 2 RECORD OF PROC. 583).

99. *Id.* (citing 6 RECORD OF PROC. 1400-01).

noted the framers sought to avoid the problems experienced in other states that adopted voter-initiated amendments, namely (1) legislation by constitutional amendment, and (2) the entanglement of the constitutional amendment process in "highly emotional and complex issues which often cannot be adequately and clearly explained to the voters."[100]

Four years later, the same parties involved in *Coalition I* met again in a case commonly known as *Coalition II*.[101] That case involved an action for a writ of mandamus directing the State Board of Elections to certify a proposed constitutional amendment. A central issue in the case was whether multiple questions could be combined into a single proposition without violating the Illinois Constitution's Free and Equal Clause.[102] The questions at issue were: (1) whether the number of members of the Illinois House of Representatives should be reduced, (2) whether to abolish cumulative voting, and (3) whether to elect representatives from single-member districts.[103] The court permitted this weaving of multiple questions into a single proposition so long as they maintained a reasonable, workable relationship to the same subject.[104] Applying these principles, the court concluded that the questions presented all related directly to the ultimate purpose of structural and procedural change in the Illinois House of Representatives.[105] Further, the court found that the questions were "compatibly interrelated to provide a consistent and workable whole in the sense that reasonable voters can support the entire proposition."[106] On these bases, the court issued the writ of mandamus directing the State Board of Elections to certify the proposed constitutional amendment.[107]

In *Lousin v. State Board of Elections*, the appellate court considered the validity of various proposed constitutional amendments, including one that would have permitted bills to be initiated by voters and created a procedure for such voter-initiated measures to become law.[108] The court provided a circular explanation of Article VIV, section 3's requirements, stating that an "amendment is structural and procedural if it relates to the structure, and, of necessity, incidentally affects the procedure of the General Assembly."[109] The court concluded that the proposed amendment was an alteration or

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100. *Coalition I*, 359 N.E.2d 138 (Ill. 1976) (citing 6 RECORD OF PROC. 1400-01).

101. Coal. For Political Honesty v. State Bd. of Elections [hereinafter *Coalition II*], 415 N.E.2d 368 (Ill. 1980).

102. *See id.* at 378-82. The Free and Equal Clause states that "All elections shall be free and equal." ILL. CONST. of 1970, art. III, § 3.

103. *Coalition II*, 415 N.E.2d at 379.

104. *Id.* at 375-77.

105. *Id.*

106. *Id.*

107. *Id.*

108. Lousin v. State Bd. of Elections, 438 N.E.2d 1241 (Ill. App. Ct. 1982).

109. *Id.* at 1246.

change of legislative power and was therefore prohibited by Article XIV, section 3.[110]

In *Chicago Bar Ass'n v. State Board of Elections* ("*CBA I*"), the Illinois Supreme Court considered a proposed constitutional amendment requiring, among other things, that any legislation resulting in a state revenue increase be approved by three-fifths of the General Assembly.[111] The court again, with significant reliance on legislative history, held that the proposed amendment violated the "structural and procedural" requirements of Article XIV, section 3.[112] In its decision the court clarified that Article XIV section 3 includes at least three requirements for a voter-initiated amendment.[113] First, the proposed amendment must implement structural and procedural modifications to the legislature.[114] Second, the amendment may not include substantive matters.[115] Third, the subject matter of the initiative must be found in Article XIV.[116] In *CBA I*, the initiative ran afoul of these requirements when its proponents "[w]rapped up in this structural and procedural package…a substantive issue not found in Article XIV—the subject of increasing State revenue or increasing taxes."[117] The court clearly refused to permit proponents to repackage substantive amendments under the guise of compliance with Article XIV, section 3, by merely referencing the legislature in the language of the proposed amendment.

Reminiscent of the *Coalition* cases, the parties of *CBA I* squared off again in the high court just four years later. In *Chicago Bar Ass'n v. Illinois State Board of Elections* ("*CBA II*"), the Illinois Supreme Court considered whether a measure imposing term limits violated Article XIV, section 3. The court's 4-3 decision answered that question in the affirmative, stating that "it is clear" that a term-limit amendment "does not meet the 'structural and procedural' requirement."[118] The court stated:

> The eligibility or qualifications of an individual legislator does not involve the structure of the legislature as an institution. The General Assembly would remain a bicameral legislature consisting of a House and Senate with a total of 177 members and would maintain the same organization.

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110. *Id.*
111. Chicago Bar Ass'n v. State Bd. of Elections [hereinafter CBA I], 561 N.E.2d 50 (Ill. 1990).
112. *Id*. at 53-55.
113. *Id.* at 55.
114. *Id.*
115. *Id.*
116. Chicago Bar Ass'n v. State Bd. of Elections [hereinafter CBA II], 641 N.E.2d 525 (Ill. 1994).
117. *Id.*
118. *Id.* at 529.

> Likewise, the eligibility or qualifications of an individual legislator does not involve any of the General Assembly's procedures. The process by which the General Assembly adopts a law would remain unchanged.[119]

Writing for the dissent, Justice Harrison rejected the notions that the proposed amendment represented a substantive change to the constitution and that the framers explicitly regarded the legislature's composition as being subject to voter-initiated amendment.[120] He also opined that the Illinois Supreme Court's Article XIV, section 3 jurisprudence made it difficult to envision many structural changes to the General Assembly that would pass constitutional muster, thus rendering the Constitution's voter-initiated amendment provision a virtual nullity.[121] Finally, the dissent concluded that "there is no realistic possibility that a term-limit amendment can ever be realized."[122]

The most recent Illinois case on term limits, *Clark v. Illinois State Board of Elections*, represents another test of Article XIV, § 3.[123] In *Clark*, the voter initiative at issue was fairly expansive and multi-faceted. The proposed amendment sought to, among other things, (1) decrease the number of legislative districts by reducing the number of state senators from fifty-nine to forty-one; (2) increase the number of representative districts within a senate district from two to three; (3) eliminate staggered terms for state senators and make all senate terms four years long; (4) prohibit legislators from serving more than eight years in the General Assembly; and (5) increase the number of votes necessary to override a governor's veto from three-fifths to two-thirds in each house.[124]

The trial court declared the proposed amendment unconstitutional, finding that it was contrary to *CBA II* due to the inclusion of term-limit language.[125] The court held that such language was not limited to structural and procedural changes to the legislative article.[126] Additionally, the trial court determined that the measure violated the Illinois Constitution's Free and

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119. *Id.*

120. *Id.* at 533-34 (Harrison, J., dissenting). Interestingly, the dissent acknowledged that "legitimate legal defects" in the proposed amendment might exist but did not offer any further discussion on that point other than to state that the parties did not raise such defects and they would not, in any event, justify excluding the initiative from the ballot.

121. *CBA II*, 641 N.E.2d at 534 (Harrison, J., dissenting).

122. Id.

123. Clark v. Ill. State Bd. of Elections, 17 N.E.3d 771 (Ill. App. Ct. 2014).

124. *Id.* at 779.

125. *Id.* at 775.

126. *Id.*

Equal Clause[127] because its objectives were "so broad that they cannot be viewed as bases to bring these component parts into a consistent, workable whole."[128]

The appellate court affirmed the trial court's determination, but its ruling left some morsels of hope for the amendment's proponents to the extent they wished to return to the drawing board. Indeed, the court observed that "some components of the [measure] may very well comply with article XIV, § 3" but the proposed amendment was doomed by the inclusion of term limits.[129] The court viewed itself as being bound by *CBA II*'s ruling that term limits pertain to the eligibility or qualifications of a legislator and, thus, are neither structural nor procedural.[130] Accordingly, the appellate court rejected the proponents' assertions that the term limits provisions were somehow different than those in *CBA II*.[131]

Finally, the appellate court also agreed with the trial court's finding that the proposed amendment violated the Illinois Constitution's Free and Equal Clause.[132] The court explained that the Free and Equal Clause prohibits separate and unrelated questions from being combined in a single ballot question.[133] In the case of a ballot initiative, multiple questions may be combined only if they are "reasonably related to a common objective in a workable manner."[134] Another consideration is whether the "questions are compatibly interrelated to provide a consistent and workable whole in the sense that reasonable voters can support the entire proposition."[135] In the end, the court found that the various facets of the proposed amendment were impermissibly broad, separate, and unrelated.[136] The court was unable to view these components as being compatibly interrelated.[137] Even if, for example, the court adopted the measure's large-scale purpose of "increasing the responsiveness of the general assembly," the veto provision still appeared disconnected from that purpose.[138]

In summary, the path to a voter-initiated constitutional path is treacherous by design. It requires a proposed measure that is limited to the nebulous

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127. *Id.* The Illinois Constitution states that "[a]ll elections shall be free and equal." ILL. CONST. of 1970, art. III, § 3.

128. *Clark*, 17 N.E.3d at 775.

129. *Id.* at 777.

130. *Id.* at 778. The opinion appeared to poke at the Illinois Supreme Court, however, referring to *CBA II*'s reasoning as "sparse."

131. *Id.* at 779.

132. *Id.* at 779-80.

133. *Clark*, 17 N.E.3d at 779-80.

134. *Id.* (citing *Coalition II*, 415 N.E.2d at 375).

135. *Clark*, 17 N.E.3d at 779.

136. *Id.* at 779-80.

137. *Id.*

138. *Id.* at 779.

concepts of structural and procedural subjects pertaining to the legislature. To be viable, the proposed measure cannot bootstrap improper materials to the narrow range of permitted subjects. Likewise, any voter-initiated measure must be supported by a massive number of voter signatures—so many that collecting the necessary signatures alone presents a herculean task.[139]

IV. CAN CONSTITUTIONAL DEVELOPMENT MAKE A DIFFERENCE?

Illinoisans are currently engaged in numerous debates, in the Statehouse and in local lunchrooms, regarding how to solve the state's many problems. This paper does not attempt to opine on whether constitutional development relative to pension reform, term limits, and legislative redistricting are needed, but rather, whether they could make a difference. Those issues are, however, among the most hotly debated. Consequently, this paper examines those topics.

A. GOVERNMENT PENSIONS

1. Judicial Interpretation of the Existing Constitutional Text

a. The In re Pension Reform Litigation Case

Of all the problems facing Illinois, one of the most critical is the immense magnitude of its unfunded pension liability.[140] As of December 2015, the State's five major pension systems had approximately $111 billion in unfunded liabilities.[141] These unfunded liabilities create suffocating debt for the

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139. A person or group wishing to place a proposed amendment on the ballot must present a "petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election." ILL. CONST. of 1970. art. XIV, § 3. In the 2014 gubernatorial race, 3,627,690 votes were cast. Ballotpedia, *Illinois gubernatorial and lieutenant gubernatorial election, 2014*, (Nov. 14, 2014) https://www.elections.il.gov/ElectionResults.aspx?ID=43 [http://perma.cc/XG5S-XDW5]. Thus, a voter-initiated amendment would require over 290,000 signatures from registered voters.

140. *See*, *e.g.*, ILL. GEN. ASSEMB., REP. OF PENSION MODERNIZATION TASK FORCE 10 (2009).

141. Doug Finke, *State Pension Contribution Next Year Up By $291 Million*, THE STATE JOURNAL-REGISTER (Dec. 10, 2015). This crushing debt is largely the product of planet-sized problems aligning, including inadequate contributions from the state, enhanced benefits such as three percent compounded cost-of-living-adjustment (COLA) for retirees, an early retirement plan, unforeseen market conditions, and an unrealistic plan for future funding. *See* Dave McKinney, *The Illinois Pension Disaster – What Went Wrong?*, CRAIN'S CHICAGO BUSINESS (Aug. 10, 2015) (presenting a thoughtful and balanced discussion of the causes of Illinois's pension crisis).

state and have led to numerous calls for reform.[142] Any modification to pension rights or obligations must, however, comply with the constitutional requirements of, the Illinois Constitution's Pension Clause, among other provisions.[143] The Pension Clause mandates 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."[144]

Despite this constitutional hurdle, in 2013 the Illinois legislature implemented a package of reforms that sought to reduce liabilities that included increasing the retirement age, modifying pension repayment schedules, and ending compounded COLAs.[145] And while many politicians and newspaper editors praised the reforms as necessary changes,[146] others were convinced from the beginning that the legislation was clearly unconstitutional, making its passage (accompanied by the inevitable court battles and other delays) a step backward.[147]

Following a trial judge's finding of unconstitutionality, the Illinois Supreme Court agreed in *In re Pension Reform Litigation*.[148] In its analysis, the Supreme Court first considered whether the pension reform legislation amounted to an unconstitutional "diminishment" under the Pension Clause and declared that issue was "easily resolved" in the affirmative.[149] Noting a long history of applying the plain meaning of statutory language, the court declared that the Pension Clause "means precisely what it says: 'if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired.'"[150] In other words, pensioners have a legally enforceable right to promised benefits.[151] The court was also not persuaded

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142. *See*, *e.g.*, The Civic Committee of the Commercial Club of Chicago, REFORM PROPOSAL (August 19, 2009), http://www.civiccommittee.org/Media/Default/pdf/August_2009_Pension_and_Health_Care_Reform_Proposal_for_Governors_Pension_Commission.pdf [http://perma.cc/PD8U-B4Y7].

143. ILL. CONST. of 1970, art. XIII, § 5.

144. *Id.*

145. *See* Ill. Pub. Act 98-599 (eff. June 1, 2014).

146. Editorial, *Vote 'Yes' on Pension Reform*, CHICAGO TRIBUNE Dec. 3, 2013, *available in* 2013 WLNR 30299390.

147. *See* Phil Ciciora, *Is Illinois' Pension Reform Constitutional?*, THE NEWS-GAZETTE (December 8, 2013, 8:00 AM), www.news-gazette.com/opinion/guest-commentary/2013-12-08/illinois-pension-reform-constitutional.html [https://perma.cc/XT6V-BYKY] (printing contrary views of law professor John Columbo and Laurie Reynolds).

148. *In re* Pension Reform Litig., 32 N.E.3d 1, 16 (Ill. 2015). The Court also considered whether any components of the legislation were severable. *Id.*

149. *See id.*

150. *See id.* (citing Kanerva v. Weems, 13 N.E.3d 1228 (Ill. 2014)).

151. *See id.*

by the State's argument that the legislation was a justifiable exercise of its inherent sovereignty and the "police powers" that sometimes justify an exception to the state and federal "Contracts Clauses" that prohibit the government from enacting any "law impairing the obligation of contracts."[152] While important, those protections are not absolute; the "'severity of the impairment measures the height of the hurdle the state legislation must clear.'"[153] When a state seeks to avoid its own contractual obligations, the hurdle is particularly high.[154]

In *In re Pension Reform Litigation*, the court rejected the State's police powers argument, citing a number of reasons. First, the State's pension shortfalls were largely due to the legislature skipping its required payments, making it foreseeable—even certain—that pension debt would balloon.[155] Second, ample other options for addressing the pension crisis existed, such as raising revenue or adopting a new amortization schedule.[156] Third, it would be improper for the State's financial burdens to be shouldered by a relatively small number of pensioners rather than by the State as a whole.[157] Fourth, informed by their knowledge of prior police power jurisprudence and the floor debates involving proposed amendments to the Pension Clause, the drafters of the Illinois Constitution demonstrated a legislative intent that the Clause not be subject to a police powers exception.[158] Ultimately, the Court concluded that financial pressures were insufficient to justify a departure from a clear constitutional directive.[159]

As the Court stated in *Jorgensen v. Blagojevich*:

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152. The Illinois Contracts Clause states that "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." ILL. CONST. of 1970, art. I, § 16. The federal provision provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. art. I, § 10, CL. 1.

153. *See In re Pension Reform Litig.*, 32 N.E.3d at 21 (citing Felt v. Bd. of Tr. of the Judges Ret. Sys., 481 N.E.2d 698, 701 (Ill. 1985) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)).

154. *In re Pension Reform Litig.*, 32 N.E.3d at 21 (citing U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 24 (1977)).

155. *See In re Pension Reform Litig.*, 32 N.E.3d at 22.

156. *Id.* at 22-23.

157. *See id.* (citing United States v. Winstar Corp., 518 U.S. 839, 883(1996)).

158. *See In re Pension Reform Litig.*, 32 N.E.3d at 24.

159. *Id.* at 19-20 (citing People *ex rel.* Lyle v. Cty. of Chi., 195 N.E. 451 (Ill. 1935); Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004)).

> [S]ubstantial budgetary challenges currently confront the Governor and the General Assembly. The adverse economic conditions facing so many of our fellow citizens have taken an inevitable toll on the state's treasury. Revenues are not keeping pace. Despite ongoing efforts by the Governor and legislature, shortfalls persist. We do not mean to diminish the seriousness of the situation or appear insensitive to the difficulties faced by our coordinate branches of government. Those difficulties are undeniable, and we are highly cognizant of the need for austerity and restraint in our spending. As administrators of the judiciary, we make every effort to economize whenever and however we can. One thing we cannot do, however, is ignore the Constitution of Illinois.[160]

Given that the Illinois Supreme Court has addressed this issue so recently, in a unanimous opinion markedly peppered with strong language, it is highly doubtful that the court will roll back its analysis of the Pension Clause's protections.

b. In re Pension Reform Litigation's Impact on Various State-Level Reform Proposals.

Subsequent to the Illinois Supreme Court's ruling in *In re Pension Reform Litigation*, some commentators and officials (including Governor Rauner) have continued to propose reforms that, even if not necessarily part of the 2013 reforms, appear nonetheless to be constitutional non-starters.[161] Primary among these reforms is the notion that pension benefits accrued up to the date of legislative reform may be retained by the employee, but that benefits going forward may be reduced, leaving individual employees with multiple tiers of benefits.[162] The Illinois Supreme Court appeared to flatly

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160. *See In re Pension Reform Litig.,* 32 N.E.3d 1, 20 (Ill. 2015) (citing Jorgensen v. Blagojevich, 811 N.E.2d 652, 669 (Ill. 2004)).

161. For example, the Governor's TURNAROUND AGENDA calls for all "Tier 1" pensioners to be moved to the "Tier 2" plan for future work. The Tier 2 plan entails lesser benefits, increased employee contributions, and longer required years of service. It is fairly clear, however, that the Illinois Supreme Court has already declared that a diminution of future-earned benefits is just as unconstitutional as a diminution of already-earned benefits. *See* ILL. GEN. ASSEMB., REP. OF PENSION MODERNIZATION TASK FORCE, *supra* note 140; Finke, *supra* note 141; REFORM PROPOSAL, *supra* note 142; ILL. CONST. of 1970, art. XIII, § 5; Illinois Public Act 98-599; *Vote 'Yes' on Pension Reform, supra* note 146; Ciciora, *supra* note 147; *In re Pension Reform Litig.*, 32 N.E.3d 1.

162. *Id.* Some state constitutions, such as those in Hawaii, Alaska, and Michigan convey protection only for such "accrued" benefits. *See* 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, 182-83 (2014). One person even declared that all

reject the suggestion that the State could preserve already-earned benefits and prospectively reduce only future benefits, holding that Pension Clause protections "attach … upon employment … [and] not when the employee ultimately retires. Accordingly, once an individual begins work … any subsequent changes to the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual."[163] Thus, while the State can always further enhance benefits and demand additional employee contributions or consideration in exchange, "once the additional benefits are in place and the employee continues to work, remains a member of a covered retirement system, and complies with any qualifications imposed when the additional benefits were first offered, the additional benefits cannot be unilaterally diminished or eliminated."[164]

Some commentators have suggested, alternatively, that Illinois could take a step toward resolving its fiscal problems by starting to tax pension benefits.[165] Of the 41 states that impose an income tax, Illinois is one of only three that does not tax retirement income (whether derived from social security or private and public pensions).[166] Professor Julie Roin makes a strong case for taxing retirement income and suggests that an exemption is not well justified.[167] Proponents estimate that Illinois could recover as much as an

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state workers should be fired and then rehired under a new pension plan. Diana Skroka Rickert, *First, Lay Off All the State Workers*, CHICAGO TRIBUNE, May 11, 2015.

163. *See In re Pension Reform Litig*., 32 N.E.3d 1, 16-17 n.12 (Ill. 2015) (citing Di Falco v. Bd. Trs. of the Firemen's Pension Fund of the Wood Dale Fire Prot. Dist. No. One, 521 N.E.2d 923 (Ill. 1988)) (addressing whether a probationary firefighter was entitled to a benefit); Buddell v. Bd. of Trs., State Univ. Ret. Sys., 514 N.E.2d 184 (Ill. 1987) (blocking statutory preventing member from purchasing service credit for time in the armed forces); Felt v. Bd. of Trs. of the Judges Ret. Sys., 481 N.E.2d 698 (Ill. 1985) (striking down modification to base salary used to compute pension benefits); Kraus v. Bd. of Trs. of the Police Pension Fund, 390 N.E.2d 1281 (Ill. App. Ct. 1st Dist. 1979) (rejecting a modification in method of calculating change in pensionable salary); Miller v. Ret. Bd. of Policemen's Annuity & Benefit Fund, 771 N.E.2d 431 (Ill. App. Ct. 1st Dist. 2001) (declaring unconstitutional amendments reducing benefits of existing pensioners regarding automatic annual increases); Schroeder v. Morton Grove Police Pension Bd., 579 N.E.2d 997 (Ill. App. Ct. 1st Dist. 1991) (blocking a reduction in pension benefits due to a pensioner's entitlement to workers' compensation benefits).

164. *In re* Pension Reform Litig., 32 N.E.3d 1, 17 n.12.

165. *See*, *e.g*., Julie Roin, *Planning Past Pensions*, 46 LOY. U. CHI. L.J. 747, 770-789 (2015). *See also* Dennis Byrne, *Time to Tax Retirement Income*, CHICAGO TRIBUNE, August 5, 2015; Melissa Harris, *Want to Fix Illinois' Pension Problem? Tax Retirement Income*, CHICAGO TRIBUNE, May 14, 2015 [hereinafter *Harris*]; Ted Ballantine, *Illinois Has Left $1.3 Billion on Table By Not Taxing Benefits of Currently Retired Teachers and Administrators*, PENSION 360 (http://pension360.org/illinois-leaves-1-3-billion-on-table-by-not-taxing-currently-retired-teachers-and-administrators/) [https://perma.cc/5GHD-3QE] [hereinafter *Ballentine*].

166. *See* Ballentine, *supra* note 165; Harris, *supra* note 165. Retirement income was taxed until 1984 when the legislature voted to exempt it.

167. *See* Roin, *supra* note 165 at 777-81.

additional $2.3 billion annually by taxing retirement income, which would go a long way toward bringing stability to the State's pension funds.[168] Others have suggested taxing only retirement income that exceeds $50,000,[169] although that could run afoul of the State's constitutional prohibition on taxation at a graduated rate.[170]

But, taxing retirement income raises additional questions. Presumably, the State would have to tax all retirement income rather than just public pensions. Public pensioners could potentially argue, though, that the benefit they were promised (or, more accurately, contracted for) was a tax-free pension. Indeed, when a pensioner begins employment that leads to a $55,000 pension that is not subject to State income tax, and the State subsequently imposes a 5% income tax on that pension, is that not a diminishment or impairment under *In re Pension Reform Litigation*? And, if the State can permissibly give with the left hand and then take with the right hand, could the General Assembly effectively do away with public pensions by taxing them at 100%? Assuming a 5% income tax on retirement income is permissible but a 100% income tax is not, should a court be required to identify the percentage at which a permissible "tax" becomes an unconstitutional "diminishment" or "impairment?" The answer is far from clear.

2. Amendment of the Existing Constitutional Text

Along with various pundits, some legislators, including Rep. Joseph Sosnowski (R-Rockford) and Rep. Tom Morrison (R-Palatine),[171] have argued that a key component in stabilizing Illinois's pension crisis is to modify, or even eliminate, the Illinois Constitution's Pension Clause.[172] Because any alteration of the Pension Clause would be unlikely to impact the "structure and procedure" of the legislature, the legislature would necessarily have to initiate those changes. Representative Sosnowski has already introduced and sponsored a constitutional amendment that simply repeals the Pension Clause

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168. *See* Byrne, *supra* note 165.

169. *See* Ballentine, *supra* note 165.

170. *See* ILL. CONST. of 1970, art. IX, §9.

171. Rep. Tom Morrison, Opinion, *Change in Constitution is Only Permanent Solution to Pension Crisis*, DAILY HERALD, March 27, 2015.

172. *See* Paul Merrion, *Amending the Illinois Constitution is a Tough Path for Pension Reform*, CRAIN'S CHI. BUS., July 16, 2014, http://www.chicagobusiness.com/article/20140716/NEWS02/140719888/amending-the-illinois-constitution-is-a-tough-path-for-pension-reform [https://perma.cc/6KEE-JU27]; Editorial, *Time for Pension Reform 2.0*, CHI. SUN-TIMES, August 7, 2014 (advocating for a "weakening" of the Pension Clause); Editorial, *How the Pols Who Caused This Crisis Can Save Illinois From Ruin*, CHI. TRIBUNE, July 4, 2014 ("A better option is for the … Illinois governance to declare right now that they will put before us an amendment to refine the state constitution's retiree benefits protection wording.").

from the Illinois Constitution.[173] As previously discussed, a legislature initiated amendment must be approved by three-fifths of the Illinois House and Senate and then approved by "either three-fifths of those voting on the question or a majority of those voting in the election."[174]

Politically, the challenges to passing the proposed measure are daunting. The November 2012 Presidential election ballot contained a proposed constitutional amendment related to pension reform.[175] The proposed

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173. *See* H.R.J. Res. Const. amend. 48.

174. *See* ILL. CONST. of 1970, art. XIV, § 2.

175. H.R.J. Res. CA49 (2012). The proposed amendment stated as follows:
SECTION 5.1. PENSION AND RETIREMENT BENEFIT INCREASES
(a) No bill, except a bill for appropriations, that provides a benefit increase under any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall become law without the concurrence of three-fifths of the members elected to each house of the General Assembly. If the Governor vetoes such a bill by returning it with objections to the house in which it originated, the provisions of Article IV, Section 9 shall govern the passage of that bill except that such bill shall not become law unless, upon its return, it is passed by a record vote of two-thirds of the members elected to each house of the General Assembly. If the Governor returns such a bill with specific recommendations for change to the house in which it originated, the provisions of Article IV, Section 9 shall govern the acceptance of those specific recommendations except that such recommendations may be accepted only by a record vote of two-thirds of the members elected to each house of the General Assembly, regardless of bill's date of passage or effective date.
For purposes of this subsection, the term "benefit increase" means a change to any pension or other law that results in a member of a pension or retirement system receiving a new benefit or an enhancement to a benefit, including, but not limited to, any changes that (i) increase the amount of the pension or annuity that a member could receive upon retirement, or (ii) reduce or eliminate the eligibility requirements or other terms or conditions a member must meet to receive a pension or annuity upon retirement. The term "benefit increase" also means a change to any pension or other law that expands the class of persons who may become a member of any pension or retirement system or who may receive a pension or annuity from a pension or retirement system. An increase in salary or wage level, by itself, shall not constitute a "benefit increase" unless that increase exceeds limitations provided by law.
(b) No ordinance, resolution, rule, or other action of the governing body, or an appointee or employee of the governing body, of any unit of local government or school district that provides an emolument increase to an official or employee that has the effect of increasing the amount of the pension or annuity that an official or employee could receive as a member of a pension or retirement system shall be valid without the concurrence of three-fifths of the members of that governing body. For purposes of this subsection, the term "emolument increase" means the creation of a new or enhancement of an receives by virtue of holding office or employment,

amendment basically required a three-fifths approval vote by any governmental body wishing to increase employee pension benefits for participants in that body's pension plan. The measure, supported by both the House Speaker and Senate President, was vehemently opposed by an amalgamation of organized labor groups called the "We Are One" coalition.[176] The "We Are One" coalition raised over $500,000 in just a few days and commissioned "vote no" advertisements throughout the state.[177] Business and other proreform groups countered with "vote yes" advertisements of their own. In the face of massive spending by both sides, voters rejected the proposed amendment. Whether the legislature and voters would approve a similar measure now is unclear.

Setting aside the substantial political obstacles, the legal difficulties in amending or repealing the Pension Clause amendment could be insurmountable. The tallest hurdle among them is the United States Constitution's Contracts Clause. Similar to the state provision, the federal Clause provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver

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> including, but not limited to, compensated time off, bonuses, incentives, or other forms of compensation. An increase in salary or wage level, by itself, shall not constitute an "emolument increase" unless that increase exceeds limitations provided by law.
> (c) No action of the governing body, or an appointee or employee of the governing body, of any pension or retirement created or maintained for the benefit of officers or employees of the State, any unit of local government or school district, or any agency or instrumentality thereof that results in a beneficial determination shall be valid without the concurrence of three-fifths of the members of that governing body. For the purposes of this subsection, the term "beneficial determination" means an interpretation or application of pension or other law by the governing body, or an appointee or employee of the governing body, that reverses or supersedes a previous interpretation or application and either (i) results in an increase in the amount of the pension or annuity received by a member of the pension or retirement system or (ii) results in a person becoming eligible to receive a pension or annuity from the pension or retirement system. The term "beneficial" shall not include a beneficial determination mandated by a final decision of a court of competent jurisdiction.
> (d) Nothing in this Section shall prevent the passage or adoption of any law, ordinance, resolution, rule, policy, or practice that further restricts the ability to provide a "benefit increase", "emolument increase", or "beneficial determination" as those terms are used under this Section.

Id.

176. *See* WE ARE ONE ILLINOIS, https://www.weareoneillinois.org [https://perma.cc/969R-2VX9] .

177. Kurt Erickson, *Unions Spend Big to Fight Amendment*, S. ILLINOISAN, Nov. 1, 2012.

> Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.[178]

Despite language suggesting a literal and sweeping prohibition on "any" impairment,[179] various decisions of the United States Supreme Court have interpreted the Federal Contracts Clause as being subject to the "'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens."[180]

The Federal Contracts Clause applies to both private and public contracts.[181] Modern jurisprudence addressing the Clause has its roots in *United States Trust Co. of New York v. New Jersey*.[182] In the early 1960s, New York and New Jersey passed statutes restricting the use of toll revenue by the Port Authority (an interstate compact agency) to subsidize a railway service. These prohibitions were implemented to protect Port Authority bondholders and investors. Amid the 1974 energy crisis, New York and New Jersey removed the restrictions and permitted the use of toll funds to improve train transit. Following adverse rulings by state courts in New Jersey, United States Trust Company, as both a trustee for, and holder of, Port Authority bonds, sought review before the United States Supreme Court.

The Court in *United States Trust* was primarily concerned with two basic questions. First, the Court considered whether the repealing legislation "impaired" contractual obligations between the bondholders and the Port Authority, easily answering that question affirmatively.[183] The second question, whether the impairment was sufficient to violate the Federal Contracts

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178. U.S. CONST. art. I, § 10, cl. 1.

179. The Federal Contracts Clause states that "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST., art. I, § 10, cl. 1.

180. United States Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 21, (1977) (internal citation omitted) (Safeguarding of the citizenry's welfare also includes protections of its economic needs). Sanelli v. Glenview State Bank, 483 N.E.2d 226, 236 (Ill. 1985); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38–39 (1940) (all contracts are subject to the ultimate authority of the government to regulate health, morals, safety, and the economic needs of society).

181. Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 369 (2d Cir. 2006). The Federal Contracts Clause has a long and tumultuous history of tension with the concept of inherent police powers. *Compare* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (stating that a "party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state"), *with* Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. 398, 444-48 (1934) (upholding a Minnesota law providing for extensions on mortgage contracts amid a foreclosure crisis).

182. United States Tr. Co. v. New Jersey, 431 U.S. 1, 21, (1977).

183. *Id.* at 17-20.

Clause, presented a thornier issue because the Contracts Clause, while appearing to literally proscribe "any" impairment, is "'not an absolute one and is not to be read with literal exactness like a mathematical formula.'"[184] Rather, the Court had to balance the clear dictates of the Contracts Clause with the "essential attributes of sovereign power"[185] (in other words, the police powers) maintained by the states.[186]

When the State impairs the obligations of its ***own*** contract, however, its reserved powers doctrine takes on a different function[187] because the State cannot be contractually bound to yield its sovereignty.[188] Accordingly, when the State seeks to modify its own obligations, courts initially consider whether the State had the authority to form irrevocable contractual rights in the first place.[189] While a State cannot bargain away its sovereign police powers or other inherent powers, such as eminent domain, it may constitutionally bind itself to financial contracts and debt obligations.[190] Consequently, the Federal Contracts Clause is not an absolute bar to a State seeking to modify its own obligations.[191] Indeed, the United States Supreme Court has stated:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[192]

Thus, to pass muster, an impairment of contractual obligations must be both reasonable and necessary to serve an important public purpose.[193] This may lead the Court to view an impairment as being "necessary" when it is essential to an important public policy purpose and "reasonable" when no

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184. *Id.* at 21 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. at 428).
185. *Id.* (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. at 435).
186. *Id.* (citing Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. at 434-40).
187. *United States Tr. Co.,* 431 U.S. at 23.
188. *Id.* at 23-24.
189. *Id.* at 23-24.
190. *Id.* at 23-24.
191. *Id.* at 25-26.
192. *United States Trust Co*., 431 U.S. at 25-26.
193. *Id.* at 28-32.

alternative and less drastic measures are available.[194] Applying these principles to the facts in *United States Trust Company*, the Court concluded that the impairment was prohibited by the Federal Contracts Clause.[195] In doing so, the Court made clear that the State's hurdle in avoiding its own financial obligations is high, stating that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."[196] The Court also noted that State's asserted purpose in enacting the legislation, promoting mass transportation, was not an unknown or unforeseen problem for New York and New Jersey.[197] Later Supreme Court rulings have followed a similar analysis.[198]

Even if Illinois were to successfully amend or repeal its Pension Clause, the change could violate the Federal Contracts Clause as to persons already in the pension system. One federal case involving a Contracts Clause challenge to a diminution of state pension benefits is *Parker v. Wakelin*, a Maine case that arose in the First Circuit.[199] In that case, a group of public school teachers alleged that amendments to the Maine State Retirement System violated the Contracts Clause. Most of the amendments were not unlike those enacted but later struck down in Illinois: increased employee contributions, higher retirement ages, and modifications to cost of living adjustments.[200] The First Circuit's analysis largely entailed consideration of whether Maine intended to bind itself to the pension promises made under the prior statute.[201] The court focused on a particular statute providing that "[n]o amendment . . . shall cause any reduction in the amount of benefits which would be due to the member based on creditable service, compensation, employee contributions and the provisions of this chapter on the date immediately preceding

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194. *Id.* at 28-32.

195. *Id.* at 29-32.

196. *Id.* at 29.

197. *United States Trust Co*., 431 U.S. at 31-32.

198. In Energy Reserves Grp., Inc. v. Kan. Power & Light Co., the Court synthesized its Contracts Clause jurisprudence as involving consideration of three factors. First, whether the legislative act substantially impairs a contractual right or obligation. Second, whether a significant and legitimate public purpose exists for the legislation. Third, whether the modification of rights and responsibilities among the contracting parties is based upon reasonable conditions and is of an appropriate nature. *See* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410-13 (1983) (discussing the factors to be applied in a Contract Clause analysis).

199. Parker v. Wakelin, 123 F.3d 1 (1st Cir. 1997). *See generally* Jack M. Beerman, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 45-63 (2013) (for a thoughtful discussion of *Parker* and the Contracts Clause).

200. Beerman, *supra* note 199, at 3 nn. 3-4 (discussing ME. REV. STAT. ANN. tit. 5, §§ 17001-B, 17701(13)(C), 17806(3), 17851(1-A) & (2-A), 17852(3-A), 17001(13)(B).

201. *Id.*

the effective date of such amendment."[202] That provision raised the question of what, exactly, was "due" to the members.[203] If "due" meant actually due and owing, then the statute protected only pension recipients who were already retired because no monies were actually due and owing to a pensioner who is still working.[204] But, if "due" meant monies payable upon retirement, then the promise is contractually binding to all members.[205] Relying on a Maine Supreme Court case that rejected the notion of pension obligations becoming binding at the start of employment, the First Circuit found that the pre-amendment statute did not create a contractual obligation in favor of unretired employees.[206]

However, *Parker*'s application to Illinois is extremely limited. Indeed, the Maine court observed that the "law governing the rights of members of public employee retirement plans varies greatly from state to state."[207] The modern view among state courts—even those lacking a Pension Clause like the one in Illinois—embraces the idea that a state's promise of pension benefits represents an enforceable contract.[208] Where states diverge in their approaches is in when and how those contractual rights and obligations vest.[209] The Illinois Supreme Court has broadly declared that pension benefits represent an enforceable contract that vests at the moment the employee enters the pension system.[210]

Further, even if the Illinois Pension Clause is repealed, it does not necessarily follow that the State's pension obligations would lose their contractual validity. Black letter law in Illinois requires that contracts be construed in accordance with the parties' intentions at the time the contract was entered.[211] In that context, it would be odd indeed to suggest that parties could enter into a transaction that is, at the time of its formation, intended to be an enforceable contract, only to have that intent retroactively modified by voters.

Yet another obstacle to the repeal of the State Pension Clause is the Illinois Contracts Clause.[212] While the author is unaware of a case in which an Illinois court has expressly declared that the State Contracts Clause must be interpreted in lockstep with its federal counterpart, lockstep application

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202. *Id.* at 2-9 (citing ME. REV. STAT. ANN. tit. 5, §17801 (1989).
203. *Id.* at 8.
204. Parker v. Wakelin, 123 F.3d 1, 8 (1st Cir. 2003).
205. *Id.* at 8.
206. *Id.* at 9 (citing Spiller v. State, A.2d 513 (Me. 1993).
207. *Id.* at 6.
208. *Id.* at 6-7.
209. *Parker*, 123 F.3d at 7.
210. *In re* Pension Reform Litig., 32 N.E.3d 1, 16-17 (Ill. 2015).
211. Matthews v. Chi. Transit Auth., 51 N.E.3d 753, 776 (Ill. 2016).
212. ILL. CONST. of 1970, art. I, §16.

nonetheless appears to be the norm.[213] Moreover, as the Illinois Supreme Court noted in *In re Pension Reform Litigation*, "[w]hen . . . legislation has been directed at reducing pension benefits of State employees, this court has expressly . . . declared it invalid under the Contracts Clause."[214]

Moreover, some suggest that a move to strip pensions could constitute a § 1983[215] claim.[216] The Seventh Circuit has stated that "when a state repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contact; it is committing a breach of contract," and "[i]t would be absurd to turn every breach of contract by a state or municipality into a violation of the Federal Constitution."[217] According to Professor Paul Secunda, the key issue is whether the plaintiffs seeking to bring an impairment of contract claim can retain the ability to recover damages for the breach.[218] If the state's repudiation of its obligations extinguishes its duty to pay damages, then there may be an actionable impairment of its contractual obligation.[219] And typically, a pensioner could establish that the State's amendment of the pension plan is a bar to recovering damages.[220]

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213. *See, e.g.,* Am. Fed'n of State, Cty., Mun. Emp.'s, Council 31 v. State, Dept. of Cent. Mgmt. Serv.'s, 33 N.E.3d 757 (Ill. App. Ct. 2015); Nissan N. Am., Inc. v. Motor Vehicle Review Bd., 7 N.E.3d 25 (Ill. App. Ct. 2014); Commonwealth Edison Co. v. Ill. Commerce Comm'n, 924 N.E.2d 1065 (Ill. App. Ct. 2009). These cases all appear to apply the same analysis regardless of whether the court is examining a federal- or state-based claim. For example, in *Council 31*, the Court stated:

> A statute violates the Contracts Clauses of the state and federal constitutions when it operates as a substantial impairment of a contractual relationship. All contracts are subject to the police power of the state and, as a result, the state may infringe on a person's contractual rights in order to safeguard the interests of its people. To determine whether a law impermissibly impairs a contract, we examine: (1) whether there is a contractual relationship; (2) whether the law at issue impairs that relationship; (3) whether the impairment is substantial; and (4) whether the law serves an important public purpose. Additionally, when the state is one of the parties to the contract that is allegedly impaired, a higher level of scrutiny is imposed in our impairment analysis because there is a possibility that the state is acting out of self-interest.

Council 31, 33 N.E.3d 769-70 (internal citations omitted).

214. *In re* Pension Reform Litig., 32 N.E.2d at 21 (citing Felt v. Bd. of Tr.'s JJ. Ret. Sys., 481 N.E.2d 698 (Ill. 1985); and Bardens v. Bd. Of Tr.'s of the JJ. Ret. Sys., 174 N.E.2d 168 (Ill. 1961)).

215. 42 U.S.C. § 1983 (1996).

216. *See* Paul Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 286 (2011).

217. *Id.* (citing Horwitz-Matthews, Inc. v. Chi., 78 F.3d 1248, 1250 (7th Cir. 1996)).

218. Secunda, *supra* note 216, at 286.

219. *Id.*

220. *Id.*

Of course, there is no question that Illinois can prospectively repeal the Pension Clause. The question of whether that repeal would make a practical difference for existing employees is a far more difficult case to make.[221]

B. TERM LIMITS

Increasingly, Illinois commentators are urging the adoption of legislative term limits. As discussed earlier, a civics group's 2014 voter initiative attempted to place a constitutional amendment imposing term limits on the ballot. Proponents of the measure sought to bypass existing case law requiring that those amendments relate to "structural and procedural" changes by grafting the term limit proposal onto a more comprehensive package of changes that included structural and procedural components. In *Clark v. Illinois State Board of Elections*, the appellate court rejected that effort,[222] and the Illinois Supreme Court declined to grant review.[223]

While the appellate court ruling in *Clark* seems consistent with existing Illinois Supreme Court precedent, the high court's refusal to weigh in on the issue leaves the door open to a package of voter-initiated constitutional amendments that, in some fashion, address structural and procedural elements of the legislature. After all, the Illinois Supreme Court's denial of a petition for leave to appeal cannot be deemed an implicit or tacit approval of a lower court ruling.[224] Rather, the denial of review merely means that fewer than four justices wanted to hear the case, for whatever reason.[225] The distinction may be a moot point, however, since gathering sufficient signatures to put a term-limit amendment on the ballot is such a massive and costly endeavor that few would be willing to undertake it so long as *Clark* remains good law.

Accordingly, any efforts to impose term limits would likely have to either originate in the legislature itself or be implemented as part of a con-con. And, as Professor Christopher Mooney notes, despite pressure from Governor Rauner and public opinion polls that overwhelmingly support term limits,

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221. Many observers suggest that there may also be a defense to pension reform under the Takings Clause. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Others, like Professor Beerman, assert a better argument that a Takings Clause argument adds little to a claim under the Contracts Clause. *See* Beerman, *supra* note 199, at 63-67.

222. Clark v. Ill. State Bd. of Elections, 17 N.E.3d 771, 779 (Ill. App. Ct. 2014).

223. Clark v. Ill. State Bd. of Elections, No. 118144 (Aug. 22, 2014) (order denying petition for leave to appeal).

224. *See In re* Leona W., 888 N.E.2d 72, 81 (Ill. 2008) (stating that denial of a PLA "cannot be interpreted as reflecting approval or disapproval of a lower court's action" and merely signifies that "four members of the court, for reasons satisfactory to them, have not voted to grant leave to appeal.").

225. *Id.*

"[i]t is a safe bet that the General Assembly will never pass a bill limiting its own members' ability to seek re-election."[226]

C. LEGISLATIVE REDISTRICTING

Another hotly contested issue in Illinois politics is legislative redistricting.[227] The Illinois Constitution addresses state legislative redistricting in art. IV, § 3, which provides that "in the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and the Representative Districts."[228] Illinois currently has 59 Legislative or "senate" districts, and 118 Representative or "house" districts; each senate district is composed of two house districts.[229] The constitution requires that those districts "be compact, contiguous and substantially equal in population."[230] The legislative map is enacted essentially like a statute, and the Governor maintains veto power over it.[231] If the legislature and governor are unsuccessful in finalizing a map by June 30 of the redistricting year, the state constitution requires formation of a "legislative redistricting commission" made up of eight members, with four appointed from each political party.[232] If the commission cannot approve a redistricting plan by majority vote, the Illinois Supreme Court is tasked with submitting the names of two persons not in the same political party to the Illinois Secretary of State.[233] The Secretary of State is then required to randomly draw one of those two names (typically out of an Abraham Lincoln-style stovepipe hat), with that person becoming the ninth, and deciding, member of the legislative redistricting commission.[234] At that point, the legislative redistricting commission has a political majority and the political obstacles to a final map generally fall by the wayside. Although some legal challenges based on fair representation, racial diversity,

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226. Brian Costin, *Illinois General Assembly Ignores Citizens on Term Limits,* ILLINOIS POLICY INSTITUTE (Oct. 26, 2013), https://www.illinoispolicy.org/illinois-general-assembly-ignores-citizens-on-term-limits [https://perma.cc/8D2T-8MSX].

227. For an excellent historical analysis regarding the legislative redistricting process in Illinois, see Paul M. Green, *Legislative Redistricting in Illinois: An Historical Analysis: A Background Paper for the Committee of 50 to Re-examine the Illinois Constitution,* ILLINOIS COMMISSION ON INTERGOVERNMENTAL COOPERATION, http://www.ilga.gov/commission/lru/Green.pdf [https://perma.cc/AD9J-NZZN]. For an exemplary source on redistricting procedures and issues in all fifty states, see Justin Levitt, *All About Redistricting*, LOYOLA LAW SCHOOL (LOS ANGELES), http://redistricting.lls.edu [https://perma.cc/7Y4Z-SMSK].

228. ILL. CONST. of 1970, art. IV, § 3(b).

229. ILL. CONST. of 1970, art. IV, § 1.

230. ILL. CONST. of 1970, art. IV, § 3(a).

231. *See* Hastert v. Ill. State Bd. of Election Comm'rs, 28 F.3d 1430 (7th Cir.1993), *amended on reh'g, cert denied,* 115 S. Ct. 426 (1994).

232. ILL. CONST. of 1970, art. IV, § 3(b).

233. *Id.*

234. *Id.*

and the like may arise, they often fail because courts are reluctant to become involved in an inherently political process.[235] Ultimately then, the right to draw the legislative map in Illinois may come down to little more than a randomly drawn raffle prize. Evidently, the idea behind this procedure was to encourage a bipartisan compromise, an opportunity to manage risk.[236] But in a state where political compromise can sometimes be a dirty word, democrat and republican forces have reached a compromise map only once under the Illinois Constitution.[237]

A new effort at legislative map reform is a key component in Governor Rauner's "Turnaround Agenda."[238] Although it is indisputable that the legislature has the power to initiate a constitutional amendment to address the issue, legislative self-interest makes it unlikely. Whether at the congressional level, the state legislative level, or even the local level, the party that draws the map invariably draws it in a manner designed to broaden and retain its power.[239] This reality is illustrated by the fact that truly competitive races up and down the ballot are relatively unusual, and often some elected officials have no opponent at all.[240]

Given the low likelihood that the majority party in the Illinois legislature would ever divest itself of its map-drawing privileges, the only practical paths for legislative redistricting are a con-con or a voter initiative. And, the ability to amend the Illinois Constitution's redistricting provisions via voter initiative is unclear because any redistricting amendment must satisfy Article XIV, § 3's "structural and procedural" requirement. Arguing that the requirement would be met, proponents of one redistricting amendment pointed to an

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235. *See* Campuzano v. Ill. State Bd. of Elections, 200 F. Supp. 2d 905 (N.D. Ill. 2002) (dismissing claims and approving map); Beaubien v. Ryan, 762 N.E.2d 501 (Ill. 2001) (finding that map complied with constitutional requirements); Cole Randazzo v. Ryan, 762 N.E.2d 485 (Ill. 2001) (same); League of Women Voters v. Quinn, No. 1:11-cv-5569, 2011 WL 5143044 (N.D. Ill. Oct. 28, 2011) (dismissing several claims); *summarily aff'd*, 132 S. Ct. 2430 (2012); Comm. For a Fair and Balanced Map v. State Bd. of Elections, No. 1:11-cv-5065, 2011 WL 5185567 (N.D. Ill. Nov. 1, 2011) (dismissing several claims); Comm. for a Fair and Balanced Map v. State Bd. of Elections, 835 F. Supp. 2d 563 (N.D. Ill. 2011) (dismissing additional claims). *See also* Radogno v. Ill. State Bd. of Elections, 836 F. Supp. 2d 759 (N.D. Ill. 2011) (granting summary judgment against plaintiff), and Radogno v. Ill. State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) (dismissing claims with prejudice), *both summarily aff'd*, 133 S. Ct. 103 (2012). *See also* ANN M. LOUSIN, THE ILLINOIS CONSTITUTION: A REFERENCE GUIDE 98-100 (Praeger Press, 2010) [hereinafter REFERENCE GUIDE] (collecting cases).

236. REFERENCE GUIDE, *supra* note 235, at 97.

237. *Id.* at 97-100.

238. *See* TURNAROUND AGENDA, *supra* note 2.

239. *See generally* Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006).

240. Jim Dey, *Rigged Election Maps Have Illinois on Life Support*, THE NEWS-GAZETTE (Jan. 24, 2016).

exchange between Louis Perona and Peter Tomei, both delegates to the 1970 Illinois Constitutional Convention. During this colloquy, Delegate Tomei inquired, "power, structure, composition, and apportionment . . . is that the kind of thing, also, that would be subject to initiative?"; Delegate Perona responded, "[y]es. Those are the critical areas, actually."[241]

During litigation in *Clark*, opponents of the remapping initiative cited *CBA II*[242] and argued that Article XIV, § 3 permits only initiatives that involve the structure of the legislature "as an institution" or the "process by which the General Assembly adopts a law."[243] The trial court judge rejected that argument, finding that *CBA II* is properly understood as providing examples of permissible voter initiatives rather than identifying all permissible subjects for an initiative. The trial court noted that Article IV (titled "The Legislature") contains fifteen sections, all involving the legislative branch.[244] Accordingly, structural and procedural changes to Article IV, § 3 (titled "Legislative Redistricting") could potentially support a valid Article XIV, §3 initiative.[245] The court also rejected other arguments made by initiative opponents, including claims that the remapping proposal divests the legislature's power to enact substantive laws, that the redistricting efforts usurp the Governor's veto power over legislative maps, that the initiative interferes with the Attorney General's authority to litigate redistricting issues, and that the initiative violates the Illinois Constitution's Free and Equal Clause.[246] Nonetheless, the trial court declared the remap initiative invalid because it contained certain other components (such as term limits, discussed *supra*) that were neither structural nor procedural. While *Clark* was indeed taken up on appeal, proponents did not appeal the portion of the trial court's ruling that involved the remapping initiative, choosing instead to focus on the term-limit proposals.[247] So, there is a dearth of case law on whether the Illinois Supreme Court—or even the appellate court or another trial court judge—would adhere to the position espoused by the trial court judge in *Clark*.

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241. *See* Clark v. State Bd. of Elections, No. 14-CH-7356 (June 27, 2014) (trial court order) at 9 (citing 4 RECORD OF PROC. 2712 (colloquy of Delegates Perona and Tomei)). The con-con proceedings demonstrate that the delegate treated the term "apportionment" to mean redistricting. 6 RECORD OF PROC. 1298-99.

242. See *Clark*, No. 14-CH-7356 at 9.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *See* Clark v. Bd. of Elections, 17 N.E.3d 771 (Ill. App. Ct. 2014). The remap initiative suffered from an additional, and more practical, problem. The State Board of Elections examined a random sample of the voter signatures collected in support of the remap amendment and found that less than 46% of the signatures were valid. *See* Rick Pearson, *Illinois Remap Ballot Question Could Be In Trouble*, CHI. TRIB. (May 20, 2014).

Most recently, a bipartisan group called Independent Maps sought to place a proposed "fair map" amendment on the ballot.[248] The group proposed an eleven member Independent Redistricting Commission to draw the legislative maps.[249] Persons wishing to participate on the commission would apply to a three-member panel, with the names of the 100 most qualified applicants being entered into a pool.[250] Each potential commissioner would be considered individually based on prior political experience, relevant analytical skills, and ability to contribute to a fair remapping procedure, with consideration being given to demographic and geographical diversity.[251] Then, two Democrat and two Republican legislative leaders would each be permitted to remove up to five of the potential commissioners for any reason at all.[252] Of the remaining individuals, seven would be randomly selected to join four others who had been preferentially chosen by the four legislative leaders.[253] Those eleven individuals would then draw the state legislative map.[254]

Independent Maps' redistricting plan was rejected by a sharply (and politically) divided Illinois Supreme Court in *Hooker v. Illinois State Board of Elections*.[255] The majority (consisting of four Democrat justices) focused its attention on the role of the Auditor General in Independent Maps' proposal. Although the Auditor General had no role in the existing Illinois Constitution, the Independent Maps plan shifted substantial tasks to it that were critical to the success of the proposed redistricting plan:

> For the purpose of conducting the Commissioner selection process, an Applicant Review Panel comprising three Reviewers shall be chosen in the following manner. Beginning not later than January 1 and ending not later than March 1 of the year in which the Federal decennial census occurs, the Auditor General shall request and accept applications to serve as a Reviewer. The Auditor General shall review all applications and select a pool of 30 potential Reviewers. The Auditor General should select applicants for the pool of potential Reviewers who would operate in an ethical and nonpartisan manner by considering whether each applicant is a resident and registered voter of the State and has been for the

248. *See* MAPS AMENDMENT, www.mapamendment.org [https://perma.cc/ZU3M-F74B]. A copy of the proposed amendment is available at http://www.mapamendment.org/uploads/mapamendment/documents/petition.pdf [hereinafter Proposed Amendment].

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Proposed Amendment, *supra* note 248.

254. *Id.*

255. Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824 (Ill. 2016).

> four years preceding his or her application, has demonstrated understanding of and adherence to standards of ethical conduct and has been unaffiliated with any political party for the three years preceding appointment. By March 31 of the year in which the Federal decennial census occurs, the Auditor General shall publicly select by random draw the Panel of three Reviewers from the pool of potential Reviewers.[256]

Once the Applicant Review Panel was constituted, the Auditor General would request and accept applications to "serve as a Commissioner on the Independent Redistrict Commission."[257] The *Hooker* court observed that the Auditor General's duties are established in Article VII, section 3 of the Illinois Constitution; they are not referenced at all in Article IV.[258] Moreover, the Court found Independent Maps' ballot initiative imposed duties on the Auditor General that neither attacked nor altered the makeup or structure of the legislature.[259] Accordingly, the majority found that the Auditor General's proposed additional job duties were not a proper "subject" of the legislative article and, therefore, were not subject to amendment by ballot initiative.[260]

The three republican justices dissented, raising concerns that the court had "nullif[ied] a critical component of the Illinois Constitution."[261] In particular, Justice Thomas recognized a growing frustration among Illinoisans that "self-perpetuating institutions of government have excluded them from meaningful participation in the political process."[262] He opined that the court had an obligation to resolve any legal doubts in favor of the citizenry's right to have a voice in government.[263] Similarly, Justice Garman concluded that the court had failed in its duty to "ensure that the process that ultimately results in a redistricting map that will represent the people of Illinois . . . be 'equitable, balanced, and fair.'"[264]

In sum, while legislative term limits may be viewed by many as critical to successful reform in Illinois, practical realities and case law limitations constitute significant obstacles to their enactment. Nonetheless, the Illinois Supreme Court has not conclusively rejected all attempts at imposing term

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256. *Id.* at 828 (quoting the proposed constitutional amendment).
257. *Id.*at 835.
258. *Id*.at 838.
259. *Id.*
260. *Hooker*, 63 N.E.3d 824.
261. *Id.* at 840 (Thomas J., dissenting, joined by Garman, J. and Karmeier, J.).
262. *Id.* at 840 (Thomas J., dissenting, joined by Garman, J. and Karmeier, J.).
263. *Id.* at 841.
264. *Id.* at 840 (Garman, J., dissenting, with Thomas, J., and Karmeier, J.) (quoting Beaubien v. Ryan, 762 N.E.2d 501, 511 (Ill. 2001) (Garman, J., dissenting, joined by Thomas, J.)).

limits on state legislators, leaving the door open to voter initiatives that carefully circumscribe the flaws noted in previously rejected proposals.

V. CONCLUSION

In Illinois, constitutional reform efforts primarily originate in the executive and legislative branches. While some think that the citizenry should have no power to force constitutional change, others believe that the framers of the Illinois Constitution struck an appropriate balance when enacting options for textual amendment. Professor Ann Lousin, who served as a research assistant for Illinois's Constitutional Convention, reflected on the issue of voter-initiated amendments: "[i]nitiatives are, in the 21st century, the tool of political operatives who seek to obtain signatures on petitions; they then sell those signatures to candidates for office."[265]

Since he took office in 2014, Governor Rauner's state policy has focused on pushing his "Turnaround Agenda."[266] Several key aspects of the Turnaround Agenda are, however, arguably incompatible with the Illinois Constitution. Is state constitutional development a worthwhile endeavor to support the Governor's initiatives? When it comes to pension reform, constitutional development is not a likely option. Repealing the Illinois Pension Clause is probably not enough to divest pension benefits for existing employees, limiting its benefit to the state's coffers. Even if the Pension Clause is not a factor, common-law contract principles teach that when two parties enter an agreement, that agreement is enforceable, barring extraordinary circumstances. It is difficult indeed to imagine that repealing the Pension Clause could retroactively alter the parties' intent at the time the contract was formed. Further, merely repealing the Pension Clause, would still leave the Illinois Contracts Clause intact, and it would continue to provide strong

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265. Correspondence from Prof. Ann Lousin to Hon. John Christopher Anderson (March 3, 2016) (on file with author). Another individual closely affiliated with the Illinois Constitution of 1970, delegate Wayne Whalen, agrees with Professor Lousin. When asked whether he felt that the amendment process strikes the right balance between being amendable yet not too amendable, he answered:

> The 1970 Constitution appears to work properly. The "cut back" amendment which was a voter initiated amendment was passed reducing the size of the Illinois House of Representatives by 1/3 and abolished cumulative voting. The legislature may initiate amendments at any time. Also, it may place on the ballot whether to call a constitutional convention. The question of whether to call a constitutional convention is also automatically on the ballot every twenty years and in 1990 and 2010 the voters said no. The question will be presented again in 2030.

Correspondence from Wayne W. Whalen to Hon. John Christopher Anderson (March 7, 2016) (on file with author).

266. *See* TURNAROUND AGENDA, *supra* note 2.

protection for existing employees' pension benefits.[267] Finally, even if the Illinois Contracts Clause and Pension Clause can be successfully amended to affirmatively provide an exception for financial emergencies, the Federal Contracts Clause still poses a significant obstacle.

So what options are available to secure pension stability in Illinois? Most of the commonly discussed options go beyond the scope of this paper, which focuses on state constitutional development. But several ideas are circulating,[268] the most recent being Governor Rauner's expressed interest in seeking a change to federal law that would allow Illinois to file bankruptcy.[269] Or, given that Illinois has already raised revenue,[270] the State needs to tighten its belt to reduce unneeded expenses, and continue to satisfy its contractual obligation to pensioners.[271]

Constitutional development in the form of term limits is also improbable given that such an amendment would likely have to be initiated by the General Assembly rather than voters due to constitutional limits on ballot initiatives. Still, polls suggest that Illinois voters favor term limits, so only time will tell whether an effort in that direction could be successfully instituted.[272]

The most likely path for Illinois constitutional development involves legislative redistricting. However, without a more definitive ruling from the Illinois Supreme Court, it is unclear whether a redistricting voter initiative can ever pass muster under art. XIV, § 3.[273]

So, with all this mind, what is the most practical and effective option for constitutional development in Illinois? The legislative and executive branches will not act. Proper considerations of judicial restraint inhibit the judicial branch. The most viable option is a con-con.

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267. *See In re* Pension Reform Litig., *supra* note 148, at 21 (citing Felt v. Bd. of Tr. of the Judges Retirement Sy., 481 N.E.2d 698; and Bardens v. Bd. of Tr. of the Judges Retirement Sy., 174 N.E.2d 168 (1961)) (stating that "[w]hen 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").

268. *See, e.g.,* Scott Metzger, *Making Sausage No One Wants to Eat: Options For Restructuring Illinois's Pension Debt*, 2013 U. ILL. L. REV. 1251 (2013).

269. Kim Geiger, *Rauner Looks to D.C. Pension Powers*, CHI. TRIB. (Oct. 22, 2017).

270. Illinois raised income taxes, effective July 1, 2017.

271. The state's failure to explore these possibilities appeared to lead, at least in part, to the Court's ruling in *In re* Pension Reform Litig., *supra* note 148, at 22 (noting that the government could raise additional revenues). *See also id.* at 28-29 (stating "[o]bliging the government to control itself is what we are called upon to do today").

272. Doug Finke, *Poll Finds Illinois Voters Support Term Limits, Remap Reform*, STATE J.-REG. (Oct. 15, 2016).

273. ILL. CONST. of 1970, ART. XIV, § 3.