

# CAN PUBLIC SERVANTS RETIRE?: ANALYZING THE ILLINOIS SUPREME COURT'S DECISION IN *KANERVA V. WEEMS*, 2014 IL 115811, 13 N.E.3D 1228.

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## I. INTRODUCTION

Close to the end of her life, Sarah McComb wrote a solemn poem on the back of a postcard that read, “And now . . . what wait I for? No home, no welcome, nobody who needs me; no love, to which in my loneliness I can turn. And now . . . What wait I for?”<sup>1</sup> She died shortly thereafter with no savings of her own, leaving her hospital and funeral bills to her family.<sup>2</sup> Sarah was a teacher at the turn of the 20th century, and while teaching provided her with a livelihood while she taught, like many public servants she was never paid enough to save for retirement.<sup>3</sup> By the 1920s, the problem of income for old-age teachers unable to work was severe.<sup>4</sup> In 1939, the Illinois General Assembly addressed this problem by creating the Teachers’ Retirement System of the State of Illinois, which provided retirement annuities and other benefits to state teachers.<sup>5</sup> Along with the Teachers Retirement System, the General Assembly created four other similar retirement systems for state employees, judges, assembly members, and university employees.<sup>6</sup> The main purpose of these retirement systems

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1. Linda Van Ingen, “*One Can’t Live on Air*”: *Sarah McComb and the Problem of Old-Age Income for Single Women Teachers, 1870s–1930s*, 54 HIST. EDUC. Q. 171, 172 (2014).
2. *Id.*
3. *Id.* at 179, 186.
4. *Id.* at 176.
5. *Evolution of the Teachers’ Retirement System of the State of Illinois Benefit Structure*, 1, 4 (2014), <http://trs.illinois.gov/pubs/history.pdf>. “The purpose of the Teachers’ Retirement System is to provide retirement allowances and other benefits for aged and disabled teachers.” Aubrey J. Holmes, *Handbook of Information*, TEACHER’S RETIREMENT SYSTEM OF THE STATE OF ILLINOIS 1, 4 (1948), <http://babel.hathitrust.org/cgi/pt?id=wu.89101995819;view=1up;seq=1>.
6. See Victoria M. Cosentino, *The Illinois State Pension Crisis: Secure Retirement for Public Servants at Risk*, 19 DCBA Brief 18, (2006) (the other systems are: the State Employees Retirement System, the Judges’ Retirement System, the General Assembly Retirement System, and the State Universities Retirement System).

was to provide economic security for the remaining life of public servants like Sarah.<sup>7</sup>

In early March of 1970, during Illinois' Sixth Constitutional Convention, University of Illinois retirees sought to constitutionally protect the pension benefits granted by the state legislature, in response to the State's failure to consistently fund the pension systems.<sup>8</sup> These efforts led to the adoption of the pension protection clause of the 1970 Illinois Constitution.<sup>9</sup>

In 2012, serious financial hardship by the state caused the legislature to pass Public Act 97-695, which eliminated the state's requirement to pay health insurance subsidies to members of a state retirement system.<sup>10</sup> Members of the various retirement systems brought four class action lawsuits challenging the constitutionality of the Act.<sup>11</sup> Upon dismissal of the complaints by the circuit court, the Illinois Supreme Court granted a motion for direct review.<sup>12</sup> The Supreme Court in *Kanerva v. Weems* held that health insurance subsidies were "benefits" under the pension protection clause, and were therefore protected under the clause. The court's decision thus preserved retirees' right to healthcare benefits.<sup>13</sup>

The court's interpretation of the pension protection clause of the Illinois Constitution was broad and properly covered all benefits arising from membership in a state pension system. This Note examines the Illinois Supreme Court's interpretation of the pension protection clause of the Illinois Constitution in *Kanerva v. Weems*. It argues the majority's decision was correct to hold that health insurance subsidies are benefits under the pension protection clause of the Illinois Constitution. Section II of this Note analyzes the history of pension rights in Illinois and other jurisdictions. Section III discusses the *Kanerva* Court's holding that the

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7. Eric Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of Illinois Constitution*, 48 J. Marshall L. Rev. 167, 175-76 (2014). Unfortunately, as of this writing, the Illinois Teachers Retirement System has \$58 billion in unfunded liabilities and is only 44.2% funded. COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY, SPECIAL PENSION BRIEFING 2 (Nov. 2014), available at <http://cgfa.ilga.gov/Upload/1114%20SPECIAL%20PENSION%20BRIEFING.pdf>.

8. Letter from Mary Lois Bull, Secretary of the University of Illinois Urbana Retirees' Interim Committee, to Samuel Witwer et al., Convention President (Mar. 5, 1970) (Papers of Henry I. Green Collection, Box 1, Folder 13 University of Illinois, Urbana-Champaign, Illinois History and Lincoln Collection); REPORT OF THE ILLINOIS PUBLIC EMPLOYEES PENSION LAWS COMMISSION, 32 (1969).

9. Madiar, *supra* note 7.

10. Ill. Public Act 97-0695 (effective July, 1 2012), available at <http://www.ilga.gov/legislation/publicacts/97/PDF/097-0695.pdf>.

11. MAAG v. Quinn., Ill. Cir. Ct., Sangamon County, case no. 2012 L 162 (order dated 03/19/13) (unpublished).

12. *Kanerva v. Weems*, 2014 IL 115811, ¶ 401, 13 N.E.3d 1228, 1240.

13. *Id.* at 40.

pension protection clause protects health care subsidies. Lastly, Section IV explains why the court correctly interpreted the pension protection clause and why the holding also covers cost of living allowances, but would not extend to the retiree income tax exemption. The *Kanerva* ruling protects members of any State of Illinois pension system from the diminishment of any benefit they receive as a member of a pension system.<sup>14</sup>

## II. LEGAL BACKGROUND

Prior to the ratification of the Illinois pension protection clause in the 1970 Illinois Constitution, the pension rights of most state employees depended on whether the employee participated in a mandatory or optional retirement plan.<sup>15</sup> “Where . . . the employee’s participation in a pension plan was optional, the pension . . . [is] enforceable under contract principles.”<sup>16</sup> Thus, an employee who participated in an “optional” plan received constitutional protection under the 1870 Illinois Constitution’s Contracts Clause, which like the Contracts Clause of the United States Constitution barred the State from impairing contracts.<sup>17</sup> Additionally, Illinois courts have held that the state legislature cannot diminish the pension rights of a pensioner enrolled in an optional plan once the pensioner began making contributions.<sup>18</sup>

However, under traditional contract theory, an employee who participated in a mandatory pension plan had no protection from the legislature diminishing or changing the terms of the pension plan, or revoking the pension and benefits entirely.<sup>19</sup> The reasoning behind this distinction is that the benefits an employee receives under a mandatory plan are considered mere gratuity, which can be taken away at any time.<sup>20</sup> Conversely, the pensions and benefits received in an optional plan are considered deferred compensation and enforceable under traditional contract principles.<sup>21</sup> An employee was considered to be in a mandatory

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14. *Id.* at 90.

15. Madiar, *supra* note 7, at 176.

16. Sklodowski v. State, 695 N.E.2d 374, 377 (Ill. 1998).

17. Bardens v. Bd. of Trustees of Judges Ret. Sys., 174 N.E.2d 168, 172 (Ill. 1961). Delegate Whalen suggested adding “or pensions” after the word “contracts” in the contract clause instead of adding a pension protection clause at the constitutional convention. Record of Proceedings, Sixth Illinois Constitutional Convention, Volume IV, 1, 2930 (July 10-31, 1970), <http://www.idaillinois.org/cdm/ref/collection/isl2/id/7417>.

18. *See* Borg v. Vill. of Schiller Park Police Pension Bd., 459 N.E.2d 951 (Ill.1984).

19. Madiar, *supra* note 7, at 177–78.

20. Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of Employee’s Rights*, 1968 ILL. L. F. 32, 51–56 (1968). (Under traditional gift law, a gift can be revoked at any time prior to acceptance.)

21. *Id.*

plan if the employee “was required, as a condition of employment, to make contributions to a pension plan that were automatically deducted from his or her salary.”<sup>22</sup> At the time of the 1970 Illinois Constitutional Convention, every retirement system except for the General Assembly Retirement System and the Judicial Retirement System were considered mandatory plans.<sup>23</sup> As a result, the majority of employees of the State of Illinois, including the employees that needed pensions the most, had no protection from the whim of the legislature.<sup>24</sup>

#### A. Other States’ Public Pension Laws

The traditional contract view that an employee who participated in a “mandatory” pension plan had no contractual protection was the majority view of the states at the time of the Illinois Constitutional Convention.<sup>25</sup> The New Jersey Supreme Court decision of *Spina v. Consolidated Police and Firemen’s Pension Fund Commission* demonstrated the consequences of the majority view.<sup>26</sup> In *Spina*, members of different police and fireman’s pension plans sued to enforce a provision of the original pension statute that entitled them to retire at the age of fifty after twenty years of service.<sup>27</sup> The New Jersey legislature had since amended the service and age requirements to twenty-five and fifty-one years respectively.<sup>28</sup> The court, taking a functionalist approach, held that the legislature could rewrite the pension formula when the fund could not meet fiscal demands.<sup>29</sup> The court reasoned that the pension provision rested in “legislative policy rather than a contractual obligation, and . . . may be changed except . . . as the State Constitution specifically provides otherwise.”<sup>30</sup>

However, there were at least two other minority views at the time of the Illinois Constitutional Convention.<sup>31</sup> In both Arizona and Georgia, pensions were completely protected from any changes by the state legislature regardless of whether they were mandatory or optional.<sup>32</sup> On the other hand, California, Washington and many other states followed a

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22. Sklodowski v. State, 695 N.E.2d 374, 377 (Ill. 1998) (citing *Bergin v. Bd. of Trustees of the Teachers’ Ret. Sys.*, 202 N.E.2d 489, 494 (Ill. 1964)).

23. *Arnold v. Bd. Of Trustees of County Emp. Annuity and Ben. Fund of Cook County*, 417 N.E.2d 1026, 1028. (Ill. 1981).

24. *See Madiar, supra* note 7, at 178.

25. *See Cohn, supra* note 20, at 29.

26. *Spina v. Consol. Police & Firemen’s Pension Fund Comm’n*, 197 A.2d 169, 170 (N.J. 1964).

27. *Id.*

28. *Id.*

29. *See id.*

30. *Id.* at 173.

31. *Madiar, supra* note 7, at 180.

32. *See Cohn, supra* note 20, at 33–43.

“limited vesting” contract approach to pension benefits.<sup>33</sup> Under this approach the state legislature could change or modify the pension rights to maintain financial stability of the pension system, with an employee given an offsetting increase in benefits for any reduction of benefits by the legislature.<sup>34</sup>

#### B. 1970 Illinois Constitutional Convention

It was in this national context that public employee groups lobbied Convention delegates of the 1970 Illinois Constitutional Convention to constitutionally protect pension benefit rights.<sup>35</sup> These lobbying efforts were a result of the Illinois courts’ view of mandatory pension plans, the *Spina* decision authorizing the reduction of benefits, and the fear that the state legislature would abandon the underfunded pension system in an economic crisis.<sup>36</sup> Harl Ray, Chairman of the Employees Advisory Committee to the State Universities Retirement System, sent a letter to all convention delegates calling on them to not deny state employees a constitutional right to receive the pension promised to them by the State Legislature.<sup>37</sup> Mr. Ray reasoned that protection was needed since “the State Legislature has failed to finance the pension obligations on a sound basis.”<sup>38</sup>

Delegate Green was first to address the convention regarding the pension protection amendment.<sup>39</sup> Delegate Green opined his concerns about the state’s ability to meet benefit payments and believed that the amendment should put the general assembly on notice that “memberships are enforceable contracts and that they shall not be diminished or impaired.”<sup>40</sup> The delegation went back and forth but eventually approved the Rules Committee’s proposal to advance the clause as a proposed amendment to the proposed Legislative Article to the Constitution.<sup>41</sup> After much debate and attempts to change the language of the proposed clause,

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33. *Id.* at 46–48.

34. *Id.*

35. Letter from Mary Lois Bull to Samuel Witwer et al., *supra* note 8.

36. Madiar, *supra* note 7, at 183.

37. *Id.* at 186.

38. *Id.*

39. IV Proceedings, *supra* note 17, at 2925.

40. *Id.* Delegate Kinney clarified that “[b]enefits not being diminished really refers to this situation: If a police officer accepted employment under a provision where he was entitled to retire at two thirds of his salary after twenty years of service, that could not subsequently be changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing.” *Id.* at 2629.

41. *Id.*

the delegation approved the clause and the voters ratified it.<sup>42</sup> This new clause became article XIII, section 5 of the new Illinois Constitution, and assured public servants, like teachers, police, and fireman, security for when they are no longer able to work.<sup>43</sup> The new clause, popularly known as the pension protection clause, provided 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.”<sup>44</sup>

### C. Intent and Purpose of the Clause

As mentioned *supra*, the debates at the 1970 Constitutional convention provide insight into the intent of the pension protection clause.<sup>45</sup> At the convention, Delegate Kinney stated that the meaning of the word “enforceable” is that the rights established by the clause “shall be subject to judicial proceedings and can be enforced through court action.”<sup>46</sup> Accordingly, the word “impaired” means that if a pension fund is in imminent danger of bankruptcy or default, an action can be taken to show that the “rights should be preserved.”<sup>47</sup> Delegate Kinney further stated it was also the intent of the drafters that an increase in benefits, like a cost of living increase, would not be precluded by the clause.<sup>48</sup>

Since the enactment of the pension protection clause, some courts have also attempted to interpret the intent behind the clause to determine its scope and purpose.<sup>49</sup> Most notably, in *Felt v. Board of Trustees of the Judges Retirement System*, the plaintiff, a judge serving on the bench, sued, challenging a change in the Pension Code.<sup>50</sup> The court, relying on remarks from the convention, held that the clause gave employees protection against abolishing or changing the terms of their rights and forbade the general assembly from diminishing these rights.<sup>51</sup> The court reasoned that a pension change “clearly effects a reduction or impairment” and is therefore invalid.<sup>52</sup>

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42. *Id.* at 2939.

43. ILL. CONST. art. XII, § 5.

44. *Id.*

45. Madiar, *supra* note 7, at 200.

46. IV Proceedings, *supra* note 17, at 2924.

47. *Id.*

48. *Id.*

49. Madiar, *supra* note 7, at 210–11.

50. *Felt v. Bd. of Trustees of the Judges Retirement Sys.*, 390 N.E.2d 1281, 1293 (Ill. 1979).

51. *Id.*

52. *Id.*

#### D. Other States' Pension Protection Clause Interpretation

Multiple other states have interpreted similar pension protection clauses in their constitution. Most notably, Hawaii and New York both have a provision in their constitution that is almost identical to the Illinois pension protection clause.<sup>53</sup> The Hawaii Supreme Court in *Everson v. State* held that statutory health insurance benefits for retired public employees were protected by the state's pension protection clause.<sup>54</sup> The court reasoned that Hawaii's constitutional provision applied to all benefits derived from, arising from, or conditioned on the status of membership in a public retirement system.<sup>55</sup> The court also held that in interpreting constitutional provisions, "[t]he general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as written."<sup>56</sup> This follows the approach of the Illinois Supreme Court, that if the language is clear, then the plain meaning should be ascertained without looking to other sources.<sup>57</sup>

Conversely, the New York Court of Appeals rejected the challenge in *Lippman v. Board of Education of the Sewanhaka Central High School District* and held that the protections afforded by article V, section 7, of the New York Constitution extended only to benefits directly related to the terms of the employees' retirement annuity.<sup>58</sup> The court reasoned that the retired employees receive subsidies for health insurance premiums "not as a benefit of membership in the retirement system but because he or she was an employee of the State of New York," and that the premium increase involved was within the amounts permitted by state statute.<sup>59</sup>

#### E. Public Act 97-695: Addressing a Crisis

By 2013, through decades of mismanagement, the State of Illinois was in debt by almost \$100 billion in unfunded pension liabilities.<sup>60</sup> Furthermore, it was estimated that twenty percent of the State's yearly spending went to pension obligations.<sup>61</sup> Illinois was in dire straits.<sup>62</sup> In an attempt to address Illinois' pension problems the General Assembly passed

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53. Madiar, *supra* note 7, at 182.

54. *Everson v. State*, 228 P.3d 282, 285 (Haw. 2010).

55. *Id.*

56. *Id.*

57. *Kanerva v. Weems*, 2014 IL 115811, ¶ 36, 13 N.E.3d 1228, 1239.

58. *Lippman v. Bd. of Educ.*, 487 N.E.2d 897, 898 (N.Y. 1985).

59. *Id.*

60. Scott Metzger, Note, *Making Sausage No One Wants to Eat: Options For Restricting Illinois Pension Debt*, 2013 U. ILL. L. REV. 1251, 1256 (2013).

61. *Id.* at 1251.

62. *Id.* at 1258.

and Governor Pat Quinn signed into law Public Act 97-695.<sup>63</sup> The Act, which became effective July 1, 2014, repealed many parts of the Group Insurance Act (5 ILCS 375/3 and 5 ILCS 375/10).<sup>64</sup> This new law essentially reduced the State's obligation to contribute toward the cost of health insurance for state retirees.<sup>65</sup>

### III. EXPOSITION OF THE CASE

In *Kanerva v. Weems*, the Illinois Supreme Court considered the constitutionality of Public Act 97-695, which modified the State of Illinois' obligation, under section 10 of the State Employees Group Insurance Act of 1971, to contribute to the health insurance premiums of members of certain state retirement systems.<sup>66</sup> The *Kanerva* court held that the Illinois General Assembly was prevented by Article 13, Section 5 of the Illinois Constitution, from diminishing health insurance subsidies provided to state retirees because health insurance subsidies are considered "benefits" under the pension protection clause.<sup>67</sup>

#### A. Facts

In addition to the pension that public employees in Illinois receive as a part of membership in the pension system, they receive additional benefits such as subsidized health and life insurance coverage.<sup>68</sup> The State Employees' Insurance Benefits Act originally covered the life and health care benefits provided to state employees.<sup>69</sup> Pursuant to the Act, the State of Illinois was required to pay 50% of health insurance premiums for qualified employees and retirees.<sup>70</sup> These group life and health insurance benefits were in effect when the pension protection clause provision of the 1970 Illinois Constitution was proposed and ratified by the voters of Illinois.<sup>71</sup> In 1972 the State Employees' Insurance Benefits Act was repealed and replaced by the Group Insurance Act.<sup>72</sup> This Act, like the previous statute, also provided health and life insurance to members of the program, but increased the health insurance benefit from the prior statute.<sup>73</sup>

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63. Ill. Public Act 97-0695.

64. *Kanerva v. Weems*, 2014 IL 115811, ¶ 1, 13 N.E.3d 1228, 1230.

65. *Id.*

66. *Id.*

67. *Id.* at ¶ 40, 13 N.E.3d at 1240.

68. *Id.* at ¶ 3, 13 N.E.3d at 1231.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at ¶ 4, 13 N.E.3d at 1231.

73. *Id.*



The new statute originally mandated the State to pay the full cost of group health insurance for each eligible member.<sup>74</sup>

In 2012 the General Assembly passed and the Governor signed into law Public Act 97-695, which took effect in July of 2012.<sup>75</sup> This new law fundamentally altered the State's obligation to contribute toward the cost of coverage under the basic program of group health benefits for annuitants.<sup>76</sup> Under the new law annuitants, retirees, and survivors must pay a portion of the cost of their group health benefits.<sup>77</sup> In addition, each annuitant, survivor or retired employee with primary coverage under the State's group health insurance program must also pay an extra sum based on the annuity they are receiving.<sup>78</sup>

## B. Procedural History

After Public Act 97-695 took effect, four separate lawsuits were filed challenging its constitutionality and contesting the State's right to charge premiums under the new system.<sup>79</sup> All sought certifications as class actions pursuant to section 2-801 of the Code of Civil Procedure.<sup>80</sup> The Supreme Court, pursuant to Supreme Court Rule 384, granted the defendants' motion to consolidate the cases and all four cases were subsequently litigated in circuit court of Sangamon County.<sup>81</sup> Following consolidation, defendants filed a combined motion to dismiss all four complaints, challenging the sufficiency of the pleadings under section 2-615 of the Code of Civil Procedure, and seeking involuntary dismissal under section 2-619 of the Code.<sup>82</sup> The defendants argued that the plaintiffs failed to state a cause of action for violation of article XIII, section 5 of the Illinois Constitution, because that provision of the Constitution only protects traditional pension benefits and does not encompass the State's obligations to contribute toward the cost of health care benefits for retired state employees and their survivors.<sup>83</sup>

Following briefing and argument, the circuit court entered an order dismissing all of the plaintiffs' claims on the grounds asserted in

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74. *Id.* at ¶ 5, 13 N.E.3d at 1231.

75. Ill. Public Act 97-0695.

76. *Kanerva*, 2014 IL 115811 at ¶ 13, 13 N.E.3d at 1234.

77. *Id.* at ¶ 15, 13 N.E.3d at 1234.

78. *Id.*

79. *Id.* at ¶ 16, 13 N.E.3d at 1235. The lawsuits were: *Bauer v. Weems*, No. 12-L-35 (Cir. Ct. Randolph Co.); *Kanerva v. Weems*, No. 12-L-582 (Cir. Ct. Sangamon Co.); *Maag v. Quinn*, No. 12-L-162 (Cir. Ct. Sangamon Co.); *McDonal v. Quinn*, No. 12-L-987 (Cir. Ct. Madison Co.).

80. *Id.*

81. *Id.* at ¶ 25, 13 N.E.3d at 1236.

82. *Id.* at ¶ 26, 13 N.E.3d at 1236.

83. *Id.*

defendants' motion.<sup>84</sup> On March 21, 2013, the circuit court entered a "corrected order" that granted two plaintiffs leave to file amended complaints and dismissed those complaints for the reasons set forth in its March 19, 2013 order.<sup>85</sup>

### C. Majority Opinion

The Plaintiffs appealed the circuit court's ruling directly to the Supreme Court under Illinois Supreme Court Rule 302(b).<sup>86</sup> Plaintiffs alleged Public Act 97-695 violated the Pension Protection Clause of the Illinois Constitution because it diminished a retirement system benefit.<sup>87</sup> The Illinois Supreme Court analyzed whether health insurances subsidies qualified as a benefit of membership in a pension system under the pension protection clause.<sup>88</sup> The court began with a constitutional interpretation analysis.<sup>89</sup>

#### 1. Plain and Ordinary Meaning Analysis

The *Kanerva* court held that it has a duty to uphold a statute as constitutional "if such a construction is reasonably possible."<sup>90</sup> The court noted that the question presented in this case, of whether the pension protection clause applies to health care benefits of state employees, is a matter of first impression in Illinois.<sup>91</sup> The court reasoned that to answer this question and determine whether the statute is constitutional, it must determine the scope and protections provided by the pension protection clause, which raises "a question of constitutional interpretation."<sup>92</sup>

In interpreting article XIII, section 5 of the Illinois Constitution, the court applied the same general construction principles that apply to statutes.<sup>93</sup> The first approach attempted to determine the common understanding of the citizens who adopted the pension protection clause.<sup>94</sup> In doing so, the court looked to how the language was understood when the Constitution was adopted.<sup>95</sup> However, the court ruled if the language of the

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84. *Id.* at ¶ 29, 13 N.E.3d at 1237.

85. *Id.* at ¶ 30, 13 N.E.3d at 1237.

86. ILL. SUP. CT. R. 302(b).

87. *Kanerva*, 2014 IL 115811 at ¶ 32, 13 N.E.3d at 1238.

88. *Id.*

89. *Id.*

90. *Id.* at ¶ 34, 13 N.E.3d at 1238.

91. *Id.* at ¶ 35, 13 N.E.3d at 1238.

92. *Id.*

93. *Id.* at ¶ 36, 13 N.E.3d at 1239.

94. *Id.*

95. *Id.*

provision is unambiguous, the court would give it effect without relying on other aids.<sup>96</sup> In reviewing the clause, the court held it was clear that any “benefit” of membership in one of the State’s pension or retirement systems could not be diminished or impaired.<sup>97</sup> Thus, the analysis turned to whether a “health insurance subsidy provided in retirement qualifies as a benefit of membership” of a pension system.<sup>98</sup>

The court held the plain meaning of the pension protection clause was to include every benefit afforded by the State, including subsidized healthcare, as a benefit of a membership in a pension system.<sup>99</sup> The court reasoned that eligibility for every benefits is “conditioned on, and flows directly from membership in one of the State’s . . . public pension systems.”<sup>100</sup> Therefore, every benefit arising from membership in a pension system is under the protection of the pension protection clause.<sup>101</sup> The court noted that the text of the provision proposed and adopted by the voters used the broad term “benefits” as opposed to pension.<sup>102</sup>

## 2. Purpose Analysis

The court also briefly discussed the purpose of the clause and the relevance of the floor debates at the 1970 Constitutional Convention.<sup>103</sup> The court first noted the concern at the debates about the lack of protection traditional contract law provided the pensioners.<sup>104</sup> It further considered the fears the delegates had of the state abandoning its pension obligations.<sup>105</sup> The court reviewed the floor debate and finally concluded that the clause was “intended to eliminate the uncertainty that existed under the traditional classification of retirement systems” and guarantee retirement rights could not be diminished or impaired.<sup>106</sup>

Finally, the court concluded “under settled Illinois law” if there is a question to legislative intent, “it must be liberally construed in favor of the pensioner.”<sup>107</sup> Therefore, the court held all benefits, including health

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96. *Id.*

97. *Id.* at ¶ 38, 13 N.E.3d at 1239.

98. *Id.*

99. *Id.* at ¶ 40, 13 N.E.3d at 1240.

100. *Id.*

101. *Id.*

102. *Id.* at ¶ 41, 13 N.E.3d at 1240.

103. *Id.* at ¶ 43, 13 N.E.3d at 1241.

104. *Id.*

105. *Id.*

106. *Id.* at ¶ 48, 13 N.E.3d at 1242.

107. *Id.* at ¶ 55, 13 N.E.3d at 1244.

insurance subsidies, are considered benefits of a membership in a pension system and within the pension protection clauses protection.<sup>108</sup>

#### D. Justice Burke's Dissent

Justice Burke disagreed with the majority's holding that the pension protection clause protects more than pensions.<sup>109</sup> Instead of construing doubts in the language of the provision in favor of the pensioners, the dissent suggested consulting the debates of the constitutional convention to ascertain the meanings that the delegates attached to the provision.<sup>110</sup> The dissent looked at the title of the provision rather than the provision itself to discern what the clause covers and cited the U.S. Supreme Court's definition of pension as a "fixed sum paid under given conditions to a person following his retirement from service."<sup>111</sup> The dissent argued that subsidized health insurance premiums provided under the Group Health Insurance Act are not pension benefits and points out differences in subsidized health insurance premiums and pensions.<sup>112</sup> The dissent suggested that the majority should have followed the New York decisions on the matter because Illinois courts have repeatedly looked to New York decisions in determining the scope of protection under the pension protection clause since the clause was patterned on a similar provision in the New York constitution.<sup>113</sup> The dissent also attempted to point out the differences in the facts of this case and the Hawaiian decision in *Everson* the majority relied on.<sup>114</sup> Finally the dissent concluded that neither the plain language of the title, the constitutional debate, nor the case law of most jurisdictions supports the majority's position.<sup>115</sup>

### IV. ANALYSIS

The majority in *Kanerva* was correct to hold that health insurance subsidies provided to retirees are "benefits" under the pension protection clause of the Illinois Constitution.<sup>116</sup> The term "benefits" within the clause has a very plain meaning, and the court held that given its natural meaning there is no question that health insurance subsidies are in fact benefits under

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108. *Id.* at ¶ 57, 13 N.E.3d at 1244.

109. *Id.* at ¶ 65, 13 N.E.3d at 1245.

110. *Id.* at ¶ 66, 13 N.E.3d at 1245.

111. *Id.* at ¶ 67, 13 N.E.3d at 1245.

112. *Id.* at ¶ 70, 13 N.E.3d at 1246.

113. *Id.* at ¶ 77, 13 N.E.3d at 1248.

114. *Id.* at ¶ 84, 13 N.E.3d at 1250.

115. *Id.* at ¶ 87, 13 N.E.3d at 1251.

116. *Id.* at ¶ 57, 13 N.E.3d at 1244.

the clause. The *Kanerva* decision essentially encompasses every benefit that arises from membership in a state pension system and is not limited to just health insurance subsidies. This expansive holding not only gives the state retirees of Illinois peace of mind, but also effectuates the purpose of the pension protection clause. Part A of this section reviews why the majority's definition of benefits was correct. Part B analyzes whether a cost of living allowance is a "benefit" under the majority's holding. Finally, Part C suggests a limit on the scope of protection afforded by the *Kanerva* Court's holding.

#### A. The Meaning of "Benefits"

Several dictionary definitions and relevant case law suggest the *Kanerva* court correctly determined that health insurance subsidies are a "benefit" under the pension protection clause. Regardless of the method used to obtain the meaning of "benefit," the result would be the same. The court, without relying on dictionary definitions, determined that the plain and natural meaning of "benefit" in the pension protection clause includes all benefits flowing from a state pension system. Although the State contended that such benefits only include retirement annuity payments or "pensions," its argument is without merit.

First, it is clear that the plain meaning of "benefits" includes more than annuity payments. When an employer advertises a job "with benefits," the common understanding is that the compensation for the job includes both wages and health insurance at a minimum.<sup>117</sup> Thus, construing the meaning of "benefits" in the pension protection clause to only mean "pensions" would exclude the other "benefits" of membership in a pension system that state retirees reasonably understood to be receiving. Moreover, *Merriam-Webster* defines "benefits" as "a service (as health insurance) or right (as to take vacation time) provided by an employer in addition to wages or salary."<sup>118</sup> Similarly, *Cambridge Dictionary* defines the same as "helpful service given to employees in addition to their pay. . . ."<sup>119</sup> Health insurance subsidies certainly fall under the scope of these definitions in the context of the pension protection clause. As the *Kanerva* court noted, if the drafters intended to include only pension payments under the clause they

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117. Oral argument at 2:22, *Kanerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228 (No. 115811), available at [http://www.illinoiscourts.gov/media/On\\_Demand\\_2013.asp](http://www.illinoiscourts.gov/media/On_Demand_2013.asp).

118. *Benefit*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/benefit> (last visited Oct. 6, 2014).

119. *Benefit*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/american-english/benefit> (last visited Oct. 6, 2014).

would have specified so.<sup>120</sup> They instead chose to use the broad term “benefits” as opposed to “pensions” or “annuities.”<sup>121</sup>

However, both the trial judge and Justice Burke raised interesting arguments against the majority’s definition of “benefits” within the clause.<sup>122</sup> The trial judge’s argument focused on two points: (1) that the terms of the Illinois Pension Code do not provide for health insurance subsidies, and (2) that the cost of health insurance premiums are not fixed at the time of retirement and change from year to year in accordance with changing knowledge and technologies.<sup>123</sup> In addressing the first point, although the pension code itself does not provide for health care subsidies, in similar language to the pension protection clause the pension code provides that the “retirement and benefit system is created to provide retirement annuities and other *benefits* for employees of the State of Illinois.”<sup>124</sup> Therefore, like the pension protection clause, the inclusion of health insurance subsidies turns on the definition of “benefits.” As shown above, several alternative dictionary definitions and the plain meaning seem to suggest that health insurance subsidies are in fact “benefits.”<sup>125</sup> The trial judge’s second argument undercuts the meaning and purpose of the pension protection clause and draws on policy and perception.<sup>126</sup> This argument is also flawed. If health insurance goes up in price in accordance with inflation like most services do, paying for the increase would just be an extension of the cost-of-living allowance that most retirees already receive with their pensions.<sup>127</sup>

Justice Burke agreed with trial judge’s arguments, and also argued that the title of the pension protection clause shows that only the “pension” should be protected. The title of the clause, which says, “pension and retirement rights” clearly protects more than just pensions. In interpreting the title of the clause, every word should be given effect (*verba cum effectu sunt accipienda*).<sup>128</sup> In other words, no word should be rendered meaningless.<sup>129</sup> Once again, had the framers of the provision intended to protect only “pensions” they would have simply titled the clause “pension

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120. Kanerva, 2014 IL 115811, 13 N.E.3d 1228.

121. ILL. CONST. art. XIII, §5.

122. MAAG v. Quinn., Illinois Circuit Court, Sangamon County, case no. 2012 L 162 (order dated 03/19/13) (unpublished).

123. Kanerva, 2014 IL 115811, 13 N.E.3d.

124. MAAG, *supra* note 121.

125. See 40 ILL. COMP. STAT. 5/14-101 (emphasis added).

126. See MERRIAM-WEBSTER.COM, *supra* note 117; Cambridge Dictionary *supra* note 118.

127. See MAAG, *supra* note 121 at \* 22-27.

128. See 40 ILL. COMP. STAT. 5/16-133.1.

129. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

130. See *People v. Lutz*, 383 N.E.2d 171, 174 (1978).

rights.” Instead, the title and clause covers “pensions” and any other retirement rights and “benefits.”

While both the majority and dissent argued that the floor debates at the convention supported their respective side, both recognized the debate itself did not address the meaning of the word “benefits” in the clause.<sup>130</sup> However, the debates taken together show the purpose of the clause.<sup>131</sup> This purpose supports the majority’s holding that all “benefits” arising from membership in a state pension system are protected from diminishment.<sup>132</sup>

The convention debates show that the rights to a pension can be judicially enforced, and the threat of bankruptcy or a budgetary emergency cannot be used to impair a retiree’s pension rights.<sup>133</sup> Further, Delegate Kinney’s remarks at the convention give light to the purpose of the clause. She stated the clause is “a means of giving them [(teachers, police, etc.)] assurance that these benefits will not at some future date be eliminated.”<sup>134</sup> The majority’s ruling, giving the fullest possible meaning of the pension protection clause, provided the assurance the drafters of the pension protection clause intended.

Moreover, on a policy level, the *Kanerva* majority arrived at the holding the drafters of the clause intended. Although the State has a compelling interest, it must be weighed against the severe implications the drafters of the clause sought to prevent. The legislature passed Public Act 97-695 to address the grave budgetary concerns facing the State. With retirement spending out of control, the State is in danger of facing insolvency or bankruptcy. However, as the *Kanerva* majority noted the convention delegates were “mindful that in the past, appropriations to cover state pension obligations had ‘been made a political football’ and ‘the party in power would just use the amount of state contribution to help balance budgets.’”<sup>135</sup> This fact undermines the State’s interest, in that the legislature created its own fiscal emergency. To allow the legislature to use an emergency it created to bypass a constitutional provision would create a slippery slope, in that the legislature could create emergencies in order to get around any constitutional provision.

Furthermore, the policy in favor of protection is great. In order to compete with private sector salaries the State must use pensions as a way to offset costs. State workers are dependent on pensions and the benefits that come with them to take the jobs they have. Many state jobs are not well

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130. See *Kanerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228.

131. See IV Proceedings, *supra* note 17, at 2935.

132. See *id.*

133. See *id.*

134. *Id.* at 2936.

135. *Kanerva v. Weems*, 2014 IL 115811, ¶ 46, 13 N.E.3d 1228, 1242.

paid and require strong physical abilities and acute senses to effectively perform them. Take for example the job of a prison guard. They work long hours in miserable conditions, have daily altercations with inmates, and have to stay alert at all times for their safety. Because of the daily beating they take, and because of the keen senses required for their job, most will be forced to retire earlier than a typical worker in the private sector. Having likely not made enough to save for an adequate retirement and no longer able to perform the job they qualify for, they are cast into the world without being able to provide for themselves. It is clear that the pension protection clause is to prevent this from happening. With a pension and all the benefits that come with it the prison guard is able to live a modest retirement.<sup>136</sup> This same situation applies to teachers, fireman, police, and countless other state employees. Thus, without the protection, qualified workers wouldn't take jobs, and the retirees would be left without a way to provide for themselves.

Finally, case law also suggests the *Kanerva* majority was correct in taking the broader approach in interpreting the pension protection clause. Both Hawaii and New York have almost an identical pension protection clause to Illinois.<sup>137</sup> In both of those states, the highest court has ruled on whether health insurance is considered a benefit under the respective clauses.<sup>138</sup> Both of the states' courts found that health insurance is a "benefit."<sup>139</sup> However, the New York Court of Appeals, the state's highest court, held in *Lippman* that health insurance was not protected under the New York pension protection clause.<sup>140</sup> This case, which Justice Burke heavily relies, is unclear and inconsistent.<sup>141</sup> The *Lippman* court held that health insurance is a benefit, but quickly concluded it is merely incidental

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136. See generally, Ted Slowik, *Taxpayers Need Way to Claw Back Excessive State-funded Pensions*, CHI. TRIBUNE (March 8, 2016), <http://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-sta-slowik-wyllie-pension-st-0309-20160308-story.html> for a view that state of Illinois' pensions may not be so modest.

137. See generally *Everson v. State*, 228 P.3d 282, 295 (Haw. 2010) (Hawaii's pension protection clause "states that it is those 'accrued benefits' arising from a state or county employee's membership in an [employees' retirement system] that 'shall not be diminished or impaired,' and not simply those 'accrued benefits' provided by an [employees' retirement system]" (see HAW. CONST. art. XVI, § 2)); *Lippman v. Bd. of Educ. of the Sewanhaka Cent. High Sch. Dist.*, 487 N.E.2d 897, 899 (N.Y. 1985) (New York's pension protection clause provides "after July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." quoting N.Y. CONST. art. V, § 7.).

138. See generally *id.*

139. See *Everson*, 228 P.3d at 297; *Lippman*, 487 N.E.2d at 900.

140. *Lippman*, 487 N.E.2d. at 899.

141. *Kanerva v. Weems*, 2014 IL 115811, ¶ 79, 13 N.E.3d 1228, 1248–49 (Burke, J., dissenting). See also *Lippman*, 487 N.E.2d. at 899–900.



to the pension system and therefore not protected.<sup>142</sup> The court did not follow the language of the provision and read in language that is simply not there. Incidentally, the Hawaii Supreme Court in *Everson*, which distinguished *Lippman*, followed the same constitutional construction rules as the *Kanerva* Court in reaching its decision that health insurance is a benefit.<sup>143</sup> Unlike the Hawaii decision, the New York decision was not based on an act by the legislature, but an administrative action, and was correctly discarded by the *Kanerva* majority.<sup>144</sup>

## B. Cost of Living Allowance

Although it is clear that health insurance subsidies are benefits under the *Kanerva* Court's holding, what else qualifies as a "benefit" is uncertain. The *Kanerva* Court held that any benefit that arises from membership in a state pension system is protected. Thus, everything that a retiree receives as membership in a state pension system must be analyzed separately to determine if such thing qualifies as a "benefit." In order to understand the *Kanerva* Court's holding a line must be drawn in the universe of things a retiree receives as a member of a state pension system to determine what is a "benefit" under the pension protection clause of the Illinois Constitution.

Most state retirees in Illinois receive a cost-of-living allowance upon retirement.<sup>145</sup> This allowance increases the pension payment that a retiree receives on an annual basis.<sup>146</sup> The increase is an attempt to stop the effect inflation has on retirees with a fixed income. The cost-of-living allowance is something that retirees receive as a member of a state pension system, but is it a "benefit" under the *Kanerva* Court's holding? Unlike a pension or healthcare subsidy, a cost-of-living allowance is an abstract "benefit" in the sense that a retiree actually receives a pension and health insurance subsidy, while the cost-of-living allowance is just an annual increase of the pension payment.

The pension protection clause protects "benefits" from being "diminished or impaired."<sup>147</sup> In following the *Kanerva* Court's analysis the first step in determining whether something qualifies as a "benefit" is to look to the plain meaning of "benefits." Given the context of the provision, the plain, obvious, and commonsense meaning of "benefits" includes a cost-of-living allowance. When retirees consider the numerous "benefits"

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142. *Lippman*, 487 N.E.2d. at 899–900.

143. See generally *Everson*, 228 P.3d 282. See also *Kanerva*, 2014 IL 115811 at ¶ 52–57, 13 N.E.3d at 1243–44; *Lippman*, 487 N.E.2d. at 900.

144. *Id.*

145. 40 ILL. COMP. STAT. 5/16-133.1.

146. *Id.*

147. ILL. CONST. art. XII, § 5.

they receive from membership in a pension system the cost of living allowance is one of the most important. Furthermore, Delegate Kinney's remarks at the constitutional convention show that a cost-of-living allowance was in mind when the provision was adopted.

It might be argued that not increasing pension payments in accordance with a cost-of-living allowance is certainly not diminishing or impairing the payment retirees receive. However, relevant case law suggests that a cost-of-living allowance is a distinct benefit.<sup>148</sup> In *Firefighters of Los Angeles City v. City of Los Angeles*, the California Court of Appeals held that a cap on pension cost-of-living increases was an unconstitutional impairment of a vested pension "benefit."<sup>149</sup> However, the court acknowledged that a state had a legitimate interest in being able to budget for the future.<sup>150</sup> This reasoning supports the contrary holding of a Colorado district court.<sup>151</sup> The court in *Justus v. State* held "that a retiree has no reasonable, investment-backed expectation of a particular cost-of-living adjustment for the duration of his retirement," because the cost of living formula has repeatedly changed and has not been fixed at the time of retirement.<sup>152</sup> While it is true that protection can only be afforded to a "benefit" that can be reasonably ascertained, the formula for the Illinois Teachers Retirement System, unlike the Colorado System, is fixed at three percent per year.<sup>153</sup>

Moreover, as the majority pointed out, "to the extent there is any question as to the legislative intent and the clarity of the . . . pension statute, it must be liberally construed in favor of the rights of the pensioner."<sup>154</sup> Had the *Kanerva* Court intended to limit its holding to benefits similar to health insurance it would have done so. Instead, the Court held that all

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148. See *United Firefighters of L.A. City v. City of L.A.*, 259 Cal. Rptr. 65 (2d Dist. 1989).

149. *Id.*

150. *Id.*

151. *Justus v. State*, No. 2010-CV-1589, at 12 (Colo. Dist. Ct. June 29, 2011).

152. Gavin Reinke, Note, *When A Promise Isn't A Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees*, 64 VAND. L. REV. 1673, 1681 (2011).

153. 40 ILL. COMP. STAT. 5/16-133.1. The Illinois cost of living allowance has been codified since 1969. The cost of living allowance followed a fixed stair-step approach that increased 1.5% over a 10-year period, after which the annuity was to be permanently fixed at 3% per year beginning in 1978. For each member of a Tier 1 retirement system, with creditable service and retiring on or after August 26, 1969, the automatic annual increases in annuity equaled 1.5% of the originally granted retirement annuity or disability retirement annuity multiplied by the number of years elapsed, if any, from the date of retirement until January 1, 1972, plus 2% of the originally granted annuity multiplied by the number of years elapsed, if any, from the date of retirement or January 1, 1972, whichever is later, until January 1, 1978, plus 3% of the originally granted annuity multiplied by the number of years elapsed from the date of retirement or January 1, 1978, whichever is later, until the effective date of the initial increase. Thus, the Illinois cost of living increase has been a fixed, ascertainable, rate, unlike the Colorado cost of living increase, which has been based on different formulas. However, the cost of living formula has since changed for Tier 2 designated retirees. See *id.*

154. *Kanerva v. Weems*, 2014 IL 115811, ¶ 55, 13 N.E.3d 1228, 1244.

“benefits” of membership in a pension system are under the provisions protection.

### C. Drawing the Line

If a cost-of-living allowance is a “benefit” of membership in a state pension system, and therefore protected under the *Kanerva* Court’s holding, what is not a “benefit?” In Illinois all retirement income is tax-free. Thus, members of the state pensions systems do not have to pay state income tax on the “benefits” they receive. Therefore, is having a tax-free retirement a “benefit” under the *Kanerva* Court’s holding?<sup>155</sup> The Teachers Retirement System of Illinois (“TRS”) takes the position that a tax on retirement income does not violate the pension protection clause of the Illinois Constitution.<sup>156</sup> The TRS argues that, “in a practical sense, taxing pensions does diminish the retirement benefit. Legally, however, it would not be a diminishment.”<sup>157</sup> Although the TRS comes to the correct conclusion, its reasoning is unclear.

Under the *Kanerva* Court’s ruling, both the majority and dissent agree the clause undoubtedly protects the diminishment of retiree’s “benefits.”<sup>158</sup> However, “benefits” are only protected if they are “limited to, [and] conditioned on” membership in a State pension system.<sup>159</sup> Under the current law, all retirement income including 401ks, IRAs, and pension payments are excluded from state income taxes.<sup>160</sup> That is, anyone paying taxes in Illinois, not just members of a State pension system, will receive the same tax “benefit.” Under the *Kanerva* Court’s holding only “benefits” limited to membership of a State pension system are protected. Therefore, since the tax exemption on retirement income is not “limited to, [or] conditioned on” membership in a State pension system, the exemption is not a “benefit” within the meaning of the pension protection clause, and not protected by the clause.

## V. CONCLUSION

The Illinois Supreme Court was correct in determining that any benefit that arises out of membership in a state pension system, including

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155. *Id.* at ¶ 58, 13 N.E.3d at 1244.

156. Extending the Illinois Income Tax to Pensions and Retirement Income, TEACHERS’ RETIREMENT SYS. STATE OF ILL. <http://trs.illinois.gov/press/reform/tax.htm> (last visited Nov. 10, 2014).

157. *Id.*

158. *See, Kanerva v. Weems*, 2014 IL 115811, 13 N.E.3d 1228.

159. *Id.*

160. Social Security benefits and certain retirement plans, Illinois Revenue, <http://www.revenue.state.il.us/individuals/pension.htm> (last visited April 24, 2015).

health insurance subsidies, is protected under the pension protection clause of the Illinois Constitution. The plain meaning of “benefits” and the dictionary definitions clearly include health insurance subsidies. Moreover, the caselaw further demonstrates that health insurance subsidies should be considered a “benefit” under the pension protection clause. Similarly, the *Kanerva* Court’s reasoning that all “benefits” arising from membership in a state pension system are protected under the clause suggests that a cost-of-living allowance is also included. Therefore, the *Kanerva* Court’s definition of “benefits” is not necessarily limited to health insurance subsidies and similar “benefits.” Conversely, the *Kanerva* Court’s broad holding does not extend to the income tax exemption on retirement income because the exemption does not arise from membership in a pension system, but is available to any retiree. The Supreme Court’s decision to allow every “benefit” to be protected under the pension protection clause is promoted by public policy and common sense. This decision protects the pensions and benefits of more than 80,000 retirees statewide.