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## Spiller v. State: Determining the Nature of Public Employees' Rights to Their Pensions

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# SPILLER v. STATE: DETERMINING THE NATURE OF PUBLIC EMPLOYEES' RIGHTS TO THEIR PENSIONS

## I. INTRODUCTION

In *Spiller v. State*,<sup>1</sup> a divided Maine Supreme Judicial Court, sitting as the Law Court, held that certain legislative changes to public employee pension benefits did not impair the employees' constitutional rights because there was no clear indication that the employees had a contractual right to their pensions. These changes were enacted as a reduction of state expenditures in reaction to Maine's fiscal deficit. The majority found that the changes were not unconstitutional and thus were permissible.<sup>2</sup> The dissenting opinion, however, found that a contract existed between the State and the employees and that it had been breached.<sup>3</sup>

Although the *Spiller* decision may have settled that no "contractual rights" result from the formation of public employee pensions in Maine, the disagreement within the Law Court clearly parallels the deep divisions among individual states concerning the nature of the rights that public employees have to their pensions. The United States Supreme Court has not issued a modern standard governing this issue.<sup>4</sup> A review of recent state court decisions shows a variety of approaches among the states in addressing pensioners' rights with no consensus toward a single uniform approach. Given the widespread problem of state fiscal deficits and the corresponding need to reduce state expenditures to shrink such deficits, this issue will surely be revisited frequently in Maine and elsewhere as public employees suffer under the multi-headed ax of fiscal restraint. The question now becomes: do either the majority or dissenting positions in *Spiller* adequately define the rights of public pensioners? If neither does, then what approach works best for Maine?

This Note considers the background of public pensioners' rights within the jurisdictions that have addressed the issue. It contrasts the approaches of different states and examines the limited attention given to public employee pensions by the United States Supreme Court. In particular, this Note examines the alternative approaches noted by the majority and dissent in the *Spiller* decision.

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1. 627 A.2d 513 (Me. 1993).

2. *Id.* at 514. The pension modifications were enacted in P.L. 1991 ch. 591, § EEE (codified at ME. REV. STAT. ANN. tit. 3, § 851 (West Supp. 1993-1994); ME. REV. STAT. ANN. tit. 4, § 1351 (West Supp. 1993-1994); ME. REV. STAT. ANN. tit. 5, §§ 17001, 17851-2 (West Supp. 1993-1994).

3. *Spiller v. State*, 627 A.2d at 517 (Wathen, C.J., dissenting).

4. John J. Dwyer, Note, *'Til Death Do Us Part: Pennsylvania's "Contract" With Public Employees For Pension Benefits*, 59 TEMP. L.Q. 553, 570-71 (1986).

This Note rejects the contract rights approach supported in the dissenting opinion and describes the profound and negative consequences that such an approach, giving the employees a vested right to their expected benefits, would have on the Maine Legislature's ability to reduce state expenditures. After weighing numerous considerations, it concludes that the Law Court correctly decided in favor of the State but did not sufficiently support its holding with a clear rationale. This Note contends that recognizing a property right to public pensions, which would allow due process protection prior to changes to the pension, would have been a preferable approach since it would allow the Maine Legislature more flexibility to make fiscally prudent changes to the pension system while holding its actions to a more consistent standard. The property approach would also call for less speculation as to what "rights" the pensioners have and would therefore be less burdensome on the courts. This Note explains the implications of a due process property right in the area of public pensions. In conclusion, this Note recommends that the Maine Law Court embrace the due process approach on the next opportunity it has to revisit the increasingly contentious issue of public pensioners' rights.

## II. DEVELOPMENT OF PUBLIC PENSIONERS' RIGHTS

### A. *The Federal View of Pensioners' Rights*

There is but minimal authority from the United States Supreme Court concerning the rights public employees have to their pensions. *Pennie v. Reis*,<sup>5</sup> decided in 1889, stands for the proposition that

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5. 22 P. 176, *aff'd* 132 U.S. 464 (1889). This case concerned "An Act to Enable the Board of Supervisors of the City and County of San Francisco to Increase the Police Force of Said City and County, and Provide for the Appointment, Regulation and Payment thereof." *Pennie v. Reis*, 132 U.S. at 465. This act included a mandatory local police officers' relief and pension fund in which the California legislature had placed part of the officer's salary into a life and health insurance fund. The plan established a \$1,000 death benefit payable to one officer's estate. The state repealed the death benefit ten days before the officer's death. James C. Pennie, the administrator of the officer's estate, demanded that C. Reis, the treasurer of the life insurance fund, pay the money to the estate. The treasurer refused to pay, and Pennie applied for a writ of mandate to compel the payment. The Supreme Court of California held that the latter act repealing the pension fund was valid and denied the prayer of Pennie and dismissed the writ.

The United States Supreme Court decided against Pennie. The majority opinion, written by Mr. Justice Field, noted that the pension fund, since it was created by state law, was "entirely at the disposal of the government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative." *Id.* at 471. The Court found that the state impaired no absolute right of property in the police officer and that there was no contract on the part of the state with a "disposition" to be followed as originally drafted. The officer's interest in the fund was "a mere expectancy created by the law" and "liable to be revoked or destroyed by the

public employee pensions are no more than expectancies subject to legislative revocation. This is commonly referred to as the "gratuity" approach. Despite harsh criticism of *Pennie* from scholars who have labeled the decision outdated,<sup>6</sup> the lower federal courts still support its holding, albeit grudgingly.<sup>7</sup>

Though *Pennie* has not been directly challenged or even questioned in subsequent Supreme Court decisions, its "gratuity" approach to public benefits, suggesting that employees had no legal interest in such benefits, has been challenged in several more recent decisions. *Flemming v. Nestor*<sup>8</sup> endorsed the right of legislatures to alter, amend or repeal retirement benefits, but the decision also noted that "[i]t is hardly profitable to engage in conceptualizations regarding 'earned rights' and 'gratuities.'" *Goldberg v. Kelly*<sup>10</sup> hinted that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" <sup>11</sup> The Court seemed

same authority." *Id.* The officer's fund was subject to the act repealing the fund because he had died after the repeal. *Id.* The money in the fund "could be transferred to other parties and applied to different purposes by the legislature." *Id.* at 472.

6. See, e.g., Deborah Kemp, *Public Pension Plans: The Need for Federal Regulation*, 10 *HAMLIN L. REV.* 27, 35-36 (1987) (calling for *Pennie v. Reis* to be overturned); Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 *HARV. L. REV.* 992, 994 (1977) (noting that *Pennie v. Reis* has been "justifiably" criticized); Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 *U. ILL. L. F.* 32, 35 (1968) (observing that *Pennie v. Reis* "is logically and analytically disquieting").

7. See, e.g., *Zucker v. United States*, 578 F. Supp. 1239, 1243 (claiming that court is "constrained" to follow *Pennie*), *aff'd on other grounds*, 758 F.2d 637 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 842 (1985); *Muzquiz v. City of San Antonio*, 378 F. Supp. 949, 958 (W.D. Tex. 1974) (describing the *Pennie* rule as "harsh"), *aff'd on other grounds*, 520 F.2d 993 (5th Cir. 1975), *aff'd on rehearing en banc*, 528 F.2d 499 (5th Cir. 1976), *cert. granted*, (the judgment was vacated and the case remanded) 438 U.S. 901 (1978), *aff'd on merits*, 586 F.2d 529 (5th Cir. 1978). See also Kemp, *supra* note 6, at 32-33; Cohn, *supra* note 6, at 34.

8. 363 U.S. 603 (1960). This decision upheld an amendment to the Social Security Act denying benefits to aliens deported for several reasons, including membership in the Communist Party.

9. *Id.* at 610.

10. 397 U.S. 254 (1970). This decision held that welfare recipients whose benefits were to be terminated were entitled to the safeguards of due process. *Id.* at 261-63.

11. *Id.* at 262 n.8. *Goldberg* quoted Charles A. Reich, a chief proponent of attaching property rights to entitlements:

[s]ociety today is built around entitlement. . . . Many of the most important of these entitlements now flow from government. . . . Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.

Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L. J.* 1245, 1255 (1965). Reich is particularly critical of *Flemming*. In another article he noted that under *Flemming* "[t]he public policy that justifies cutting off benefits need not even be an important one or a wise one—so long as it is not utterly irrational, the Court will not interfere." Charles A. Reich, *The New Property*, 73

to be moving away from this approach in *Richardson v. Belcher*,<sup>12</sup> which noted that *Goldberg* "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."<sup>13</sup>

Several Supreme Court decisions have suggested the need for some protection against legislative modifications that frustrate reliance on a wide range of expected public benefits.<sup>14</sup> These decisions seem to be motivated by the view that the Fourteenth Amendment<sup>15</sup> protects public employees from the government purporting to confer a benefit and then frustrating the reasonable reliance created by that benefit.<sup>16</sup> There is no modern Supreme Court decision, however, which would provide guidance for the states as to the rights of public pensioners.

### B. Treatment of Public Pensions by Individual States

*Pennie v. Reis* helped establish the "gratuity" approach to the rights of public employees to their pensions. This approach allowed legislative modification or elimination of retirement benefits to be made without regard to the employees' interest in those benefits.<sup>17</sup> The *Pennie* view became the dominant view among the states, with many state courts allowing state legislatures great latitude to alter or repeal public employee pension plans.<sup>18</sup> In recent years, the gra-

YALE L. J. 733, 769 (1964). He further compared the philosophy of the case to feudal tenure, under which wealth is not "vested" in its holders but is instead "held conditionally. . . . Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state." *Id.* at 769-70.

12. 404 U.S. 78 (1971).

13. *Id.* at 81.

14. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 572-75 (1975) (holding that students facing suspension from public school have liberty and property interests protected by the Due Process Clause of the Fourteenth Amendment); *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972) (finding that a public university teacher with implied tenure is entitled to a hearing to challenge grounds of termination); *Morrissey v. Brewer*, 408 U.S. 471, 484-87 (1972) (holding that due process requires a hearing before parole is revoked). *But see* *Paul v. Davis*, 424 U.S. 693, 699-701 (1976) (finding that damage to reputation by state invokes no "liberty" or "property" interests sufficient to invoke the procedural protection of the Due Process Clause); *Bishop v. Wood*, 426 U.S. 341, 347 (1976) (holding that public employee's discharge did not deprive him of property interest protected by the Due Process Clause).

15. U.S. CONST. amend. V and XIV.

16. See Note, *Public Employee Pensions in Times of Fiscal Distress*, *supra* note 6, at 992, 996-97.

17. See Note, *Public Employee Pension Benefits—A Promissory Estoppel Approach*, 10 WM. MITCHELL L. REV. 287, 287 (1984) (observing that pension benefits have traditionally been construed as gratuities by courts and legislatures).

18. See, e.g., *Bedford v. White*, 106 P.2d 469, 471 (Colo. 1940) (holding that there is no legally vested right to a pension and it is a mere gratuity and at most an expectancy); *Kinny v. Contributory Retirement Appeal Bd.*, 113 N.E.2d 59, 61 (Mass. 1953) (claiming that public pensions are subject to change by subsequent legislative enact-

tuity approach has fallen from favor in most jurisdictions that have dealt with this issue. The modern trend is for state courts to protect the expectations of pension plan members.<sup>19</sup> Currently, only Indiana and Texas openly adhere to the gratuity concept.<sup>20</sup> There are, however, other states which view retirement benefits as gratuities that vest only when the employee is eligible to retire and can be constitutionally modified by the legislature prior to that time.<sup>21</sup> For example, in *Florida Sheriffs Association v. Department of Administration*,<sup>22</sup> the Florida Supreme Court noted that the rights of a public pensioner "are not such as will prevent the Legislature from repealing or amending the [pension fund] statute, merely because the officer or employee has contributed to the fund." However, the Florida court further held that as soon as "a participating member reaches retirement status, the benefits under the terms of the act in

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ment); *Eddy v. Morgan*, 75 N.E. 174, 178 (Ill. 1905) (holding that the right to receive retirement pay is subordinate to the right of the legislature to abolish pension system).

19. Terry C. Capps, Comment, *Pensions: Public Employee Plans as Contractual Obligations Granted Constitutional Protection*, 20 WASHBURN L.J. 169, 171 (1980) (noting that the earliest California decision considering entry into a pension system as a contractual obligation was *O'Dea v. Cook*, 169 P. 366 (Cal. 1917)). See *infra* note 29.

20. See *Ballard v. Board of Trustees of Police Pension Fund*, 324 N.E.2d 813, 815 (Ind. 1975) (pensions under state compulsory contribution plan are gratuities creating no vested rights); *Cook v. Employees Retirement Sys.*, 514 S.W.2d 329, 331 (Tex. Ct. App. 1974) (holding that right to benefits of a pension fund are subordinate to the right of the legislature to diminish benefits or abolish the pension fund). But see *Board of Trustees of Public Employees' Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) (holding that Indiana judges have a vested contractual right in their voluntary pension plan).

21. See *Jones v. Cheney*, 489 S.W.2d 785, 789 (Ark. 1973) (holding that plaintiff's rights became fully vested when he fulfilled service requirements); *Petrus v. State Bd. of Pension Trustees*, 464 A.2d 894, 896 (Del. 1983) (asserting that no contractual right exists until pension vests, so plaintiff, who had completed only two years of service, had no vested right to pension); *City of Louisville v. Board of Educ.*, 163 S.W.2d 23, 25 (Ky. 1942) (noting that in no pension system is there a vested right until the participant has become an actual beneficiary); *Patterson v. City of Baton Rouge*, 309 So. 2d 306, 313 (La. 1975) (finding no vested right to retirement benefits prior to eligibility for retirement); *Rilling v. Unemployment Compensation Div. of the Employment Sec. Bureau*, 151 N.W.2d 304, 309 (N.D. 1967) (holding that individual must retire to gain vested right to trust fund for retirement benefits); *Herrick v. Lindley*, 391 N.E.2d 729, 733 (Ohio 1979) (observing that retirees have a vested right to receive retirement allowance at the time such a benefit is payable); *Baker v. Oklahoma Firefighters Pension & Retirement Sys.*, 718 P.2d 348, 350-51 (Okla. 1986) (finding that right to retirement and pension benefits becomes absolute when such benefits become payable); *Atchison v. Retirement Bd.*, 343 S.W.2d 25, 34 (Mo. 1951) (holding that pensioners' rights vest when pensions are granted); *Tait v. Freeman*, 57 N.W.2d 520, 522 (S.D. 1953) (noting that retirement brings into being vested right to pension); *Driggs v. Utah State Teacher's Retirement Bd.*, 142 P.2d 657, 664 (Utah 1943) (holding that pensioners have vested rights upon fulfilling all requirements).

22. 408 So. 2d 1033 (Fla. 1981).

effect at the time of the employee's retirement vest."<sup>23</sup>

Many states have fully rejected the gratuity theory as outdated.<sup>24</sup> Most of those states now use some form of a contract theory to enforce the rights of public employees to their pensions; however, the rationales for a contractual approach are not monolithic. Six states have provisions in their state constitutions guaranteeing that an employee's right to a pension "vests" at the time of employment and that the state legislature may not substantially alter those rights thereafter.<sup>25</sup> States that guarantee a contractual right absent a specific state constitutional provision fall into two categories. First, are those states that follow a "strict contract" theory under which all elements of the contract vest upon employment and are not subject to future change without consent of the employee. This approach has been adopted in several states.<sup>26</sup> In *Yeazell v. Copins*,<sup>27</sup> the Arizona Supreme Court held that the Arizona Legislature could neither alter the provisions of membership in a pension fund nor reduce the amount of the contributions to the fund even if the soundness of the fund is in jeopardy.<sup>28</sup>

A second contractual approach, a "modified contract" approach, is

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23. *Id.* at 1036 (citing *Voorhees v. City of Miami*, 199 So. 313, 315 (1940)).

24. *See, e.g.*, *Police Pension and Relief Bd. v. Bills*, 366 P.2d 581, 583 (Colo. 1961) (gratuity system made pensions "always subject to unilateral change of an adverse nature"); *City of Frederick v. Quinn*, 371 A.2d 724, 725 (Md. Ct. Spec. App. 1977) (trend is toward adopting contract theory); *Halpin v. Nebraska State Patrolman's Retirement Sys.*, 320 N.W.2d 910, 913 (Neb. 1982) (pension not mere grant of extra compensation); *Public Employees' Retirement Bd. v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980) (modern view of vested right to pension is preferable); *Taylor v. Multnomah County Deputy Sheriff's Retirement Bd.*, 510 P.2d 339, 341 (Or. 1973) ("Oregon has joined the ranks of those rejecting the gratuity theory of pensions.").

25. The state constitutions of Alaska, Hawaii, and Michigan all have provisions protecting those pension benefits which the employee has already accrued. ALASKA CONST. art. XII, § 7; HAW. CONST. art. XVI, § 2; MICH. CONST. art. IX, § 24. Their state courts, however, have allowed for legislative modification of conditions for future benefits. *See, e.g.*, *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981); *Chun v. Employees' Retirement Sys.*, 607 P.2d 415, 421 (Haw. 1980); *In Re Enrolled Senate Bill 1269*, 209 N.W.2d 200, 202-03 (Mich. 1973). Illinois and New York have constitutional amendments that protect employees' rights to retirement benefits from legislative tampering after hiring. ILL. CONST. art. XIII, § 5; N.Y. CONST. art. V, § 7. *Kraus v. Board of Trustees of Police Pension Fund*, 390 N.E.2d 1281, 1292 (Ill. App. Ct. 1979) and *Birnbaum v. New York State Teachers Retirement Sys.*, 152 N.E.2d 241, 245 (N.Y. 1958) have prevented modifications under the rationale that the amendments fixed the rights of employees at the time they entered the system. *See also Note, supra* note 4, at 573-74.

26. *Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965) (en banc); *Burks v. Board of Trustees*, 104 S.E.2d 225, 227 (Ga. 1958) (ruling that pension is contract and cannot be modified or repealed by legislation); *Association of Pa. State College and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984) (prohibiting unilateral reduction of retirement benefits by state legislature).

27. 402 P.2d 541 (Ariz. 1965).

28. *Id.* at 546.

followed by the California Supreme Court. Under this approach, the state legislature can make changes to public employees' pensions only to the extent that the resulting disadvantage to the public employees would be offset by a comparative new advantage to the retirement system. Also, the change must be necessary to maintain the system's financial integrity.<sup>29</sup> The California position has been adopted by state courts in Colorado, Idaho, Kansas, Maryland, Massachusetts, Nebraska, Vermont, and Washington.<sup>30</sup>

Two states have deviated from "contract v. gratuity" analysis in this area. The Minnesota Supreme Court in *Christensen v. Minneapolis Municipal Employees Retirement Board*<sup>31</sup> utilized the doctrine of promissory estoppel<sup>32</sup> to determine the constitutionality of a public pension modification.<sup>33</sup> The court evaluated whether a protected interest exists by examining exactly what had been promised by the state and to what degree the employer had reasonably relied on that promise. Then, to determine whether the alteration was permitted under the state's police power, the court applied the three-part balancing test of *Energy Reserves Group v. Kansas Power & Light*,<sup>34</sup> a recent Supreme Court decision. The balancing test ques-

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29. California has recognized a contractual right of an employee to his pension since its decision in *O'Dea v. Cook*, 169 P. 366 (1917). Its current law is best exemplified by *Betts v. Board of Admin. of the Public Employees' Retirement Sys.*, 582 P.2d 614 (Cal. 1978). In *Betts*, an elected officer who had expected an adjusted monthly retirement allowance reflecting his predecessor's salary petitioned for that allowance. He did not receive the promised amount because of a 1974 legislative modification which allowed only for an allowance reflecting the highest salary that he was paid while in office. *Id.* at 616-17. The Supreme Court of California struck down the modification because it offered no "comparable new advantages" to the petitioner to offset the detriment. *Id.* at 619.

30. See *Police Pension and Relief Bd. of Denver v. Bills*, 366 P.2d 581, 585 (Colo. 1961); *Nash v. Boise City Fire Dep't*, 663 P.2d 1105, 1108-10 (Idaho 1983); *Brazelton v. Kansas Public Employees Retirement Sys.*, 607 P.2d 510, 517-18 (Kan. 1980); *City of Frederick v. Quinn*, 371 A.2d 724, 726-27 (Md. Ct. Spec. App. 1977); *Opinion of the Justices*, 303 N.E. 2d 320, 328 (Mass. 1973); *Halpin v. Neb. State Patrolmen's Retirement Sys.*, 320 N.W.2d 910, 914-16 (Neb. 1982); *Burlington Fire Fighters' Ass'n v. City of Burlington*, 543 A.2d 686 (Vt. 1988); *Eisenbacher v. City of Tacoma*, 333 P.2d 642, 645 (Wash. 1958).

31. 331 N.W.2d 740 (Minn. 1983).

32. Promissory estoppel is "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and [that] does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

33. MINN. STAT. § 422A.156 (1982) codified a rise to age 60 in the age that a pensioner could receive retirement benefits. This adjustment adversely affected the petitioner who had retired from public service at age 38 and had been collecting a pension. *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d at 742.

34. 459 U.S. 400 (1983). This decision concerned *Energy Reserves Group*, a natural gas supplier, which brought suit seeking a determination that it had the right to terminate two purchase contracts because of *Kansas Power & Light's* (hereinafter



tions, (1) Did the modification substantially impair the expectations of the parties? (2) If so, did the impairment serve a legitimate public purpose? (3) If so, was the change based upon "reasonable conditions" and of a character appropriate to the public purpose justifying its adoption?<sup>35</sup>

Another approach, one which rejects the gratuity and promissory estoppel approaches and all contract theories, is a due process view set forth by the Connecticut Supreme Court in *Pineman v. Oechslin*.<sup>36</sup> The Connecticut court, in examining the modification to the State Employees Retirement Act<sup>37</sup> found no legislative intent to create permanent contractual bonds and held that the legislature must be free to make laws without the fear that each new legislative enactment would create new contractual rights.<sup>38</sup> More importantly,

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KPL) refusal to redetermine price. KPL counterclaimed for a declaratory judgment that the contracts were still in effect. *Id.* The Supreme Court decided in favor of KPL. It held that KPL's price controls did not substantially impair Energy Reserve Group's contracts with the utility. Kansas has long taken an interest in regulating the price of natural gas. *Id.* at 413-14. That interest has been to protect consumers from the escalation of natural gas prices caused by deregulation. *Id.* at 416-17. The decision did not involve public employee pensions.

35. *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d at 750-52, (citing *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. at 411-12). In applying these principles, the Minnesota Supreme Court found that the legislative modification failed to pass the third part of the test because the legislature's objective, correcting inequalities, could be achieved less intrusively. *Id.* Minnesota is not the only state to use a balancing approach. The North Carolina Court of Appeals also remanded for reconsideration, using the balancing test of *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977), an adjustment of disability retirement benefits in *Simpson v. North Carolina Local Gov't Employees' Retirement Sys.*, 363 S.E.2d 90 (N.C. App. 1987), *aff'd without opinion*, 372 S.E.2d 559 (N.C. 1988).

36. 488 A.2d 803 (Conn. 1985).

37. *Id.* at 804-06, (citing CONN. GEN. STAT. ANN. § 5-162 (West 1988)). *Pineman v. Oechslin* concerned a 1975 rise in the retirement eligibility age for female public employees. Plaintiffs, employees of the State of Connecticut, brought a class action seeking a declaratory judgment establishing that the amended State Employees Retirement Act impaired the state's contractual obligations to the plaintiff under Article I, § 10 of the United States Constitution. The district court agreed and issued a permanent injunction "requiring the defendants to administer the State Employees Retirement Act in a manner which respects the plaintiffs' contractual rights." *Pineman v. Oechslin*, 494 F. Supp. 525, 554 (D. Conn. 1980). On appeal, the United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case to the state court to adjudicate the plaintiffs' contract claims as a matter of state law. *Pineman v. Oechslin*, 637 F.2d 601 (2d Cir. 1981).

The plaintiffs then brought their state action in the superior court seeking, *inter alia*, a judgment declaring that the Retirement Act created a contractual obligation regarding retirement benefits. The individual plaintiffs were granted a right to maintain the action on behalf of similarly situated state employees. The trial court concluded that, based on examination of the Retirement Act, the Connecticut Legislature never intended to create contractual rights to public pensions. *Pineman v. Oechslin*, 488 A.2d at 805.

38. *Pineman v. Oechslin*, 488 A.2d at 809-10.

the court noted, in dicta, that the employees might have a property interest in their retirement funds protected from arbitrary legislation under the Due Process Clauses of the Connecticut and Federal Constitutions. The court concluded that:

unlike the gratuity concept, the due process approach protects public employees from legislative confiscation of the retirement fund and arbitrary forfeiture of pension benefits. At the same time, a due process analysis provides the necessary flexibility that the contract approach lacks and avoids the strain on settled principles of contract law, statutory interpretation, and contract clause jurisprudence that the latter view entails.<sup>39</sup>

The opinions in *Christensen* and *Pineman*, through different analyses, question the feasibility of using contractual analysis to resolve public pension issues.

### C. Maine's Public Employee Pension Plan

The Maine State Retirement System was created in 1942 to encourage "qualified persons to seek public employment and to continue in public employment during their productive years."<sup>40</sup> All Maine state employees are required to contribute to Maine's retirement system; employees contribute at least 6.5% of their salaries to the pension fund.<sup>41</sup> State employees do not qualify to receive retirement benefits until they have at least ten years of creditable service,<sup>42</sup> and all employees are entitled to at least the return of their contributions together with interest if their service terminates for

39. *Id.* at 810. The court further noted that "[a]lthough the plaintiff employees alleged a violation of their due process rights in their complaint, this claim was not discussed in the federal or state trial court decisions, nor was it briefed or argued by the parties on appeal." It declined to rule whether the 1975 revisions constituted a deprivation of plaintiffs' property interests in the retirement fund without due process of law, and the modifications were upheld. *Id.* Due process is protected under U.S. CONST. amend. XIV, § 2 and CONN. CONST. art. 1, § 7.

Following this decision, the plaintiffs returned to federal court. The district court in *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn 1987), dismissed their claim. The dismissal was affirmed in *Pineman v. Fallon*, 842 F.2d 598 (2d Cir. 1988), which found no violation of due process and noted that Connecticut's retirement system was "likely, unless modified, to bankrupt Connecticut." *Id.* at 602. Judge Oakes noted in his opinion that this case had a "serpentine history." The United States Supreme Court denied certiorari. *Pineman v. Fallon*, 488 U.S. 824 (1988).

40. ME. REV. STAT. ANN. tit. 5, § 17050 (West 1989), provides:

It is the intent of the Legislature to encourage qualified persons to seek public employment and to continue in public employment during their productive years. It is further the intent of the Legislature to assist these persons in making provision for their retirement years by establishing benefits reasonably related to their highest earnings and years of service and by providing suitable disability and death benefits.

41. ME. REV. STAT. ANN. tit. 5, §§ 17701, 17701-A, 17708-17712-B (West 1989 & Supp. 1993-1994).

42. *Id.* § 17851.

any reason other than death or retirement.<sup>43</sup> Certain benefits, including life insurance and disability retirement benefits, are immediately vested and due regardless of length of service.<sup>44</sup>

The changes enacted in 1992 consisted of excluding unused sickness or vacation time from the definition of "earnable compensation," raising the minimum age at which one can retire without penalty from sixty to sixty-two and increasing the penalty for retirement before the minimum age.<sup>45</sup> The legislature made these modifications as a means of closing the gap between revenues taken in and expenditures; they applied only to state employees with less than seven years of "creditable service" as of December 1, 1991.<sup>46</sup>

Prior to *Spiller*, the Maine Supreme Judicial Court had not taken a definitive position on the nature of public pensioners' rights. In *Soucy v. Board of Trustees of the Maine State Retirement System*,<sup>47</sup> the Law Court was presented with the question of legislative modifications of employee pensions but declined to decide the case on constitutional grounds.<sup>48</sup> Similarly, in *Huard v. Maine State Re-*

43. *Id.* 17705(2). See also *id.* § 17157 (West Supp. 1993-1994) (providing that all interest and dividends earned on the funds of the retirement system shall be credited to the fund).

ME. REV. STAT. ANN. tit. 5, § 17801 (West 1989) provides:

No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick-up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

44. *Id.* §§ 17904, 18051-18061 (West 1989 & Supp. 1993-1994). However, § 17904(2) excludes workers with related preexisting conditions from disability benefits, and § 18055(2) allows for standards regarding inclusion and exclusion of employees from coverage on the basis of nature and type of employment or conditions.

45. P.L. 1991, ch. 591, § EEE (codified at ME. REV. STAT. ANN. tit. 3, § 851 (West Supp. 1993-1994) (concerning eligibility for retirement and guidelines for early retirement); ME. REV. STAT. ANN. tit. 4, § 1351 (West Supp. 1993-1994) (setting out guidelines for early retirement); ME. REV. STAT. ANN. tit. 5, §§ 17001, 17851-17852 (West Supp. 1993-1994) (concerning changes in "earnable compensation" definition and qualifications for and computation of benefits)).

"Earnable compensation" means "salaries and wages paid for services rendered in an employment position," subject to several inclusions, limitations and exclusions (in addition to the 1991 amendments). ME. REV. STAT. ANN. tit. 5, § 17001(13) (West Supp. 1993-1994).

46. *Spiller v. State*, 627 A.2d 513, 514 (Me. 1993). "The total savings to the State from these and other modifications not at issue in [*Spiller v. State*] are estimated at \$8,850,000 for fiscal year 1991-1992 and \$25,550,000 for the fiscal year 1992-1993. The precise savings from the particular modifications at issue are not specified in the record but constitute a substantial portion of the total savings." *Id.* at 515 n.4.

47. 456 A.2d 1279 (Me. 1983).

48. *Id.* at 1282 n.3. The court noted that it had been "urged to hold that the pension benefits provided for public employees is a part of the employment contract and is constitutionally protected from impairment." However, it stated that "[w]e have no occasion in this case to consider adoption of the *Betts [v. Bd. of Administration of the Public Employees' Retirement System]*, 582 P.2d 614 (Cal. 1978)] ration-

irement System<sup>49</sup> the Law Court avoided the same constitutional issue. These cases left the issue entirely open to the *Spiller* court.

### III. THE SPILLER DECISION

In *Spiller v. State*, a certified class of employees<sup>50</sup> of the State of Maine and their union, the Maine State Employees Association, sought a declaratory judgment from the Kennebec County Superior Court that the 1992 legislative modifications of their pension benefits violated the Contract Clauses of the Maine and United States Constitutions.<sup>51</sup> All of these employees were members of the Maine State Retirement System, and none had completed seven years of creditable service by December 1, 1991.<sup>52</sup>

With the parties stipulating to the essential facts and moving for summary judgment, the Kennebec County Superior Court construed the retirement statute to provide to the plaintiffs contractual rights. Those right had been substantially impaired by the legislative modifications.<sup>53</sup> The State moved for an immediate appeal claiming that

ale." *Id.*

49. 562 A.2d 694, 698 (Me. 1989).

50. Judges, legislators, and teachers were not included in the certified class of plaintiffs. However, their pension benefits were also modified by the Maine Legislature. *Id.* at 514 n.2.

Membership is mandatory for teachers; they are defined as state employees for purposes of the retirement system. ME. REV. STAT. ANN. tit. 5, §§ 17001(14), 17651 (West 1989). Judges are required to be members of a separate Maine Judicial Retirement System, ME. REV. STAT. ANN. tit. 4, § 1301 (West 1989). Legislators are required to be members of the separate Maine Legislative Retirement System ME. REV. STAT. ANN. tit. 3, § 801 (West Supp. 1993-1994).

51. ME. CONST. art. I, § 11; U.S. CONST. art. I, § 10.

52. Under ME. REV. STAT. ANN. tit. 3, § 851 (West Supp. 1993-1994), the modifications applied only to state employees with less than seven years of creditable service as of December 1, 1991. *Spiller v. State* did not address the rights of state employees who had qualified for retirement benefits.

53. *Spiller v. State*, No. CV-92-56 (Me. Super. Ct., Ken. Cty., Apr. 20, 1993) (Chandler, J.). The superior court held that, though the pensioners' rights do not "functionally vest" (i.e., the employee cannot collect benefits) until the set times of ten years of service or the age of 60 are met, the contractual rights of the employees to earn a pension according to the terms promised at employment will "legally vest" at the beginning of employment when the promises were made. *Id.* at 14. By following *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), the superior court determined that the impairment of the plaintiffs' contracts was not constitutionally permissible. It found that the modifications at issue failed the *Energy Reserves* three-part test and held that the contractual right to earn pension benefits in accordance with the state's promised formula accrues upon acceptance of employment and thus, since the plaintiffs "legitimately and reasonably" relied on the original pension promises, the impairment of the contractual relation was substantial. *Id.* at 10-16. Although the superior court held that reducing the state deficit was a significant and legitimate public purpose, it also held that other deficit-reducing alternatives, including a fifteen percent income tax surcharge and across the board appropriations cuts, were viable options that would not have impaired contractual rights, and thus in light of those alternatives the pension modifications were not "rea-

the superior court's decision could cause a "hole" of more than \$5.5 million in the 1992-93 budget that would expand to \$7.5 million in the 1994-95 budget.<sup>54</sup>

On appeal, the State rejected the gratuity approach<sup>55</sup> and contended that the Law Court should use the "balancing" test of *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*<sup>56</sup> rather than a traditional contractual approach to determine the pensioners' rights. Relying on the *Energy Reserves* test, the State argued that the impairment of the "contracts" was not substantial since the plaintiffs, who had fewer than seven years of creditable service, did not have a "vested" contractual right. The state argued further that the legislature did not clearly intend to bind itself contractually to the plaintiffs.<sup>57</sup> In addition, the State argued that its interest in altering the contracts was to keep the pension system fiscally sound during a period of budget crisis<sup>58</sup> and that the changes were reasonable, particularly in light of the remaining benefit package.<sup>59</sup>

In response, the plaintiffs largely reiterated the arguments at the core of the superior court's rationale. They claimed that the superior court's decision was not extreme but instead recognized a contractual relationship between themselves and the state while allowing alterations and the breaking of obligations "consistent with the reasonable expectations of the employees . . . when necessary to serve an important public purpose."<sup>60</sup> The plaintiffs also cited statistics

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sonable and necessary." *Id.* at 16-18.

54. Brief for Appellants at 9, *Spiller v. State*, 627 A.2d 513 (Me. 1993) (No. KEN-93-191).

55. *Id.* at 13. Quoting Note, *Public Employee Pensions in Times of Fiscal Distress*, *supra* note 6 at 984, appellants stated that the gratuity approach "fails to recognize any protected interest in an employee's legitimate reliance on his pension." *Id.*

56. *Id.* at 13-15 (citing the three-part test of *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. at 411-13).

57. *Id.* at 17-19. The State cited *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 465-66 (1985) (holding that there is a presumption that statutes are not intended to create contractual rights but instead to merely establish policies and programs alterable in the future).

58. *Id.* The State noted that, as of June 30, 1992, the Maine State Retirement System had been threatened by an unfunded accrued benefit liability in excess of \$1 billion caused in part by changes in benefits for System members without adequate funding; the liability was expected to grow as well. *Id.* at 22 n.16.

59. *Id.* at 26-27. In addition, the state argued that the accrual rate of two percent per year used to calculate retirement benefits was more generous than what most other state systems offered, and that Maine also provided for post-retirement cost-of-living adjustments, group life insurance, and health insurance. *Id.* at 26 n.20.

60. Brief for Appellees at 6, *Spiller v. State*, 627 A.2d 513 (Me. 1993) (No. KEN-93-191). The Brief for Appellees discussed in this Note was submitted by Carol Golubock, who represented the Service Employees International Union, and John Lemieux, general counsel for the Maine State Employees Association. An amicus curiae brief was submitted by Donald Fontaine and Kaighn Smith, representing the Maine Teachers' Association.

showing how great the financial costs to the plaintiffs would be as a result of the modifications.<sup>61</sup>

A majority of the Law Court decided in favor of the State. The majority opinion held that "a statute will not be presumed to create contractual rights . . . unless the intent to do so is clearly stated."<sup>62</sup> The court found that the retirement statute did not give a clear indication of such intent but instead stated policy principles unchanged by the modifications.<sup>63</sup> Furthermore, the court held that "[b]y implication, the language reserves to future legislatures the power to modify prospective service retirement benefits for employees to whom benefits are not then due."<sup>64</sup> None of the benefits were due to the employees bringing suit on the date before the statute's enactment.<sup>65</sup>

The Law Court reviewed the jurisdictions that have permitted a contractual analysis but found no consensus on when such rights arise and remained unpersuaded by contract theory. It expressed concern that the implication of finding a violation of contractual rights would not only prevent the legislature from amending its retirement plan but also "would unduly restrict the power of the legislature."<sup>66</sup> The court deemed the "gratuity" approach inadequate and noted that the "legitimate retirement expectations" of the employees might be protected either by the Due Process Clause, with employees' expectations constituting a property right, or by promis-

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61. *Id.* at 1-3. The appellees argued that an employee thirty years old, with five years of service as of June 30, 1991, earning an "average State salary," faced a benefit loss of \$14,458 per year of retirement while a similar employee with two years of employment faced an annual loss of \$14,229. Also, by eliminating sick and vacation leave from the calculation, an employee could have retirement benefits reduced by more than \$1,000 a year. The state disputed these figures and argued that they would only hold if the average salary increased by about 7% per year from 1991 to 2011, a "highly questionable assumption." Brief for Appellants at 7 n.5.

62. *Spiller v. State*, 627 A.2d at 515.

63. *Id.* at 516 (citing ME. REV. STAT. ANN. tit. 5, §§ 17050-17051, 17801 (West 1989)). See *supra* notes 40 and 43 for texts of ME. REV. STAT. ANN. tit. 5, §§ 17050, 17081 (West 1989). Section 17051 provides:

No law outside of this Part which provides wholly or in part at the expense of the State or of any subdivision of the State for retirement benefits for employees, or for the surviving spouses or other beneficiaries of those employees, may apply to members or beneficiaries of the retirement system or to the surviving spouses or other beneficiaries of those members or beneficiaries. A member may not receive service credit toward a benefit under this Part and under another system supported wholly or in part by the State for the same service.

*Id.* § 17051.

64. *Spiller v. State*, 627 A.2d at 516.

65. *Id.*

66. *Id.* at 517 (citing *Pineman v. Fallon*, 662 F. Supp. 1311, 1318 (D. Conn. 1987), *aff'd* 842 F.2d 598 (2d Cir. 1988), *cert. denied*, 488 U.S. 824 (1988)).

sory estoppel.<sup>67</sup> Ultimately, the court found no constitutional violation and upheld the modifications.

The dissent rejected the notion that the plaintiffs had no contractual rights to their promised benefits. The two dissenters<sup>68</sup> reasoned that an explicit statutory statement of intent to form a contract was not necessary to establish a contractual right.<sup>69</sup> While conceding the ambiguity of the statute, they concluded that the state's pension plan was intended "to attract and retain qualified employees" in addition to providing for retirement.<sup>70</sup> According to the dissent, the plaintiffs had acquired contractual rights by providing their services and deferred compensation. In addition, the state's ability to pay deferred compensation was assured by the employees' contributions and the state's obligation to contribute annually to the pension fund.<sup>71</sup> The dissenters also used the *Energy Reserves* test but found substantial impairment could exist without "total destruction" of contractual rights.<sup>72</sup> The state's modifications, according to the dissenters, were subject to "special scrutiny" to show that the changes were "reasonable and necessary" since the state was modifying its own contractual relationship.<sup>73</sup> Under such scrutiny, the State failed to show that the changes were "necessary" because, under the Contract Clause of the United States Constitution, "the choice to impair contractual rights is not an equal choice among other policy alternatives."<sup>74</sup> The dissent, however, did not address the "reasonableness" of the modifications, claiming that "the State has failed to demonstrate that the impairment of its contractual relationship with plaintiffs was necessary."<sup>75</sup>

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67. *Id.* The court cites *Pineman v. Oechslin*, 488 A.2d 803, 810 (Conn. 1985); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1307 (Ill. 1990); *Spina v. Consolidated Police & Fireman's Pension Fund Comm'n*, 197 A.2d 169, 175 (N.J. 1964) as supporting protection of "reasonable retirement expectations" by recognizing them as property rights requiring due process prior to being deprived by the legislature, and *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 748 (Minn. 1983) as authority for using a promissory estoppel approach toward changing certain retirement benefit provisions.

68. Chief Justice Wathen and Justice Glassman wrote the dissent.

69. *Spiller v. State*, 627 A.2d at 518 (Wathen, C.J., dissenting).

70. *Id.* at 518-19.

71. *Id.* at 520 (citing *Betts v. Board of Admin. of Pub. Employee Retirement Sys.*, 582 P.2d 614, 617 (Cal. 1978)).

72. *Id.* (citing *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. at 411).

73. *Id.* at 521.

74. *Id.* (citing *United Trust Co. of New York v. New Jersey*, 431 U.S. at 26 (holding that the Contract Clause would provide no protection if the State could reduce its financial obligations whenever an important public purpose arose)).

75. *Id.*

## IV. DETERMINING PUBLIC PENSIONERS' RIGHTS IN MAINE

Neither the majority nor the dissenting opinions in *Spiller* adequately addressed public pensioners' rights. The primary shortcoming of the majority opinion is that it failed to explain fully its pragmatic notion that, despite its holding that the legislative modifications are not unconstitutional, "state employees have legitimate retirement expectations . . . [which] are more than a gratuity to be granted or withheld arbitrarily at the whim of the sovereign state."<sup>76</sup> The opinion made note of the estoppel<sup>77</sup> and property<sup>78</sup> approaches as justification for their holding but neither examined those approaches in any real detail nor conclusively defined the nature of public pensioners' rights; instead, the Law Court merely cited the judicial decisions endorsing those approaches.

The majority opinion was correct in rejecting the approach of the dissent,<sup>79</sup> which was based on the highly questionable notion that the plaintiffs had implied contractual rights in their pensions despite the lack of statutory language indicating such rights. Acknowledging that the governing statute is ambiguous,<sup>80</sup> the dissent tried to piece together a patchwork of commentary by individual legislators showing legislative intent to create a contractual right. Their analysis was both accurate to a degree and self-defeating, for that legislative intent was meant to apply solely to those whose rights had "vested" in contrast to the parties in the present case.<sup>81</sup> Still,

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76. *Id.* at 517. See also Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV., at 994-95.

77. *Spiller v. State*, 627 A.2d at 517 n.12 (citing *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d at 748).

78. *Id.* (citing *Pineman v. Oechslein*, 488 A.2d at 810); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d at 1307; *Spina v. Consolidated Police & Fireman's Pension Fund Comm'n*, 197 A.2d at 175.

79. The majority states that "[t]he contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification." *Spiller v. State*, 627 A.2d at 517 n.11 (quoting *Pineman v. Oechslein*, 488 A.2d at 808). See also *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d at 1306; Note, *Public Employee Pensions in Times of Fiscal Distress*, *supra* note 6 at 1002. Also, the majority opinion quotes language from *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. at 465-66 (holding that a statute will not be presumed to create contractual rights which bind future legislatures unless the intent to do so is clearly stated). *Spiller v. State*, 627 A.2d at 515.

80. *Spiller v. State*, 627 A.2d at 519 (citing ME. REV. STAT. ANN. tit. 5, § 17801 (1989)).

81. *Id.* at 518-19. The dissenting opinion cited a number of statements by members of the Maine Legislature to prove its point that the plaintiffs have a contractual right to their pensions. These statements do not prove that point. An example is Senator Collins's statement that "[t]hose people already in the system, in effect, have a lifetime contract as to the nature of their retirement system. They stay with what we have on the books." *Id.* at 4 (citing Legis Rec. 590 (1984)). Senator Collins's state-



the dissent cited the California case of *Betts v. Board of Administration of Public Employee Retirement System*<sup>82</sup> as authority for the modified contract approach and found that the choice to impair contractual rights is not an equal choice among other policy alternatives. Furthermore, the dissent urged that the impairment of contracts must be "necessary" and "reasonable" to be constitutional.<sup>83</sup>

According to the dissent, for a change to be "necessary," it must be the case that a less drastic modification or alternative would not have achieved the public purpose.<sup>84</sup> This definition raises the question of whether the Law Court is the proper judge of such necessity. The issue of whether retirement benefit modifications are more or less "drastic" than alternatives in light of the troubled pension fund (e.g., raising taxes on the whole state, eliminating retirement benefits for future employees, large cuts in other appropriations) is not specifically answered by the Law Court. The substantive decision on this matter is better provided by the Maine Legislature, which has the "power of the purse." The court should give appropriate deference to the legislature and subject their modifications only to an "arbitrary and capricious" standard of review.

The dissent also failed to address "reasonableness," defined as the appropriateness of changes in light of the circumstances and the degree to which the problem could have been anticipated.<sup>85</sup> While the dissenting opinion indicated that other jurisdictions have found similar modifications to be "substantial impairment,"<sup>86</sup> the dissenters gave no consideration to the severity (or lack thereof) of the pension changes and claimed that they "need not assess the reasonableness of the modifications because in our judgment the State has failed to demonstrate that the impairment of its contractual relationship with plaintiffs was necessary."<sup>87</sup> Under the dissenters' approach, the Maine Legislature would not be given a clear indication of whether its modifications were reasonable and whether similar future modifications might be reasonable.

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ment may well be correct, but it applies only to those employed by the State of Maine by or before 1984, none of whom are parties to this action.

82. 582 P.2d 614 (Cal. 1978).

83. *Spiller v. State*, 627 A.2d at 521.

84. *Id.* (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31-32 (1977)).

85. *Id.*

86. *Id.* at 520 (citing *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W. 740, 751 (Minn. 1983) (increasing the minimum age at which retirement benefits may be paid is substantial impairment)); *Opinion of the Justices*, 609 A.2d 1204, 1210 (N.H. 1992) (requiring state employees to take unpaid leave is substantial impairment); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 772 (2d Cir. 1991) (deferring employees' pay is substantial impairment); *Singer v. City of Topeka*, 607 P.2d 467, 476 (Kan. 1980) (doubling employee contributions to a pension plan without an increase in benefits is substantial impairment).

87. *Spiller v. State*, 627 A.2d at 521 (Wathen, C.J. dissenting).

Had the majority opinion embraced the dissent's contract analysis, it would have prevented the Maine Legislature from modifying the pensions as it did. More significantly, it would probably also send the message that any statutory promises made to any group that was dependent financially on the state government could not be modified so long as there was some semblance of legislative intent that such promises were contractual. The Maine Legislature cannot afford to have this analytical albatross around its neck at a time when the state is fiscally plagued by both recession and a budget deficit and must make difficult and unpopular choices to stabilize the Maine economy.

The shortcomings of contractual analysis applied to public employee benefits are widely recognized. Numerous commentators have lambasted the "strict contract" approach as too restrictive,<sup>88</sup> but California's "modified contract" approach has great flaws of its own. California's approach may adequately protect the legitimate expectation interest of the public employee while allowing the legislature to make changes in the system.<sup>89</sup> It may, however, prevent state legislatures from making changes that in the long run would significantly strengthen the pension fund, especially if every time one benefit is diminished another must be increased. The modified contract approach forces the court to decide issues that may be best left to the expertise of actuaries.<sup>90</sup>

The majority opinion was sparse in its discussion of both the estoppel and property approaches. It would have been useful to have examined these approaches in much greater detail to show their implications. There are strong arguments in support of rejecting the estoppel analysis. The major strength of the estoppel approach is its flexibility; it allows the state to modify pension plans when fiscal interests are crucially at stake while recognizing that public pensions were used as an enticement for attracting and retaining qualified employees who might otherwise work in higher-paying private sector

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88. See, e.g., Rubin G. Cohn, *Public Employee Retirement Plans—The Nature of the Employees' Rights*, 1968 U. ILL. L.F. 32, 42-46 (1968) (observing that cases endorsing this theory "exalt labels over substance, and in the process create or perpetuate dubious law."); Note, *Public Employee Pensions in Times of Fiscal Distress*, *supra* note 6, at 998-1000 (finding that the contract approach does not adequately accommodate reliance interests of employees with the fiscal health of the states); John J. Dwyer, Note, *Til Death Do Us Part: Pennsylvania's "Contract" With Public Employees for Pension Benefits*, 59 TEMP. L. Q. 553, 578-80 (1986) (strict contract approach precludes legislature from making even necessary modifications to pension plans).

89. See Copps, *supra* note 19, at 177.

90. See Dwyer, *supra* note 4, at 584. See also *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1371 (D. Md. 1984) (holding that courts lack the resources to second guess legislatures on what is necessary to ensure the financial stability of pension funds).

jobs.<sup>91</sup> Promissory estoppel, however, also injects considerable uncertainty into public pension law. If public employees were able to prevent modifications to their pensions based on "reasonable reliance," then a case could be brought against the state for any modification adversely affecting a state employee, and the subjective standards would require a case-by-case analysis for virtually every individual claiming reliance.<sup>92</sup> Another problem with case-by-case analysis is the likelihood of inconsistency between cases and the ability of the legislature to foresee, and prescribe methods for dealing with, the variety of actions inducing "reasonable reliance." The subsequent result of the estoppel approach might well be a flood of litigation so great that it would discourage any kind of modification of the pension system. As a result, the estoppel approach might actually prove to restrict the legislature as much as the "strict contract" approach.

Instead, the due process and property rights approach set forth in *Pineman v. Oechslein*,<sup>93</sup> though not widely followed in public pension decisions,<sup>94</sup> appears to set the best course for determining public pensioners' rights. More than any other decision on this issue, *Pineman* effectively drew a line in the sand between what should and what should not be constitutionally permissible when state legislatures modify public pension plans. This approach indicates that distinction by focusing on the employees' interest in the amount they have paid into the state retirement fund and the degree to which that interest is entitled to protection from arbitrary legislative action. For example, the amount in the fund would be protected from legislative confiscation and arbitrary forfeiture.<sup>95</sup> The dissenters in *Spiller* claim that this approach affords little protection from a significant reduction in benefits.<sup>96</sup> What employees have put into the fund would, however, be protected under the property approach. What money goes into the fund in the future and how the money already in the fund is administered may be subject to change if a property right is recognized.

The *Pineman* approach is preferred by at least one commentator, who noted that it would relieve the courts of determining whether one disadvantage would be offset by a new advantage, as in the Cali-

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91. See Note, *supra* note 17, at 294 (arguing that Minnesota's approach is enticement for employees who otherwise might not choose to enter the public sector).

92. See *id.* See also Dwyer, *supra* note 4, at 586 (arguing that expectations fostered by government promises are historically unenforceable through estoppel).

93. 488 A.2d 803 (Conn. 1985).

94. Though no other state has followed *Pineman*, New Jersey has recognized a property right for public pensioners. See *Spina v. Consolidated Police & Fireman's Pension Fund Comm'n*, 197 A.2d at 175 (public employee has property interest in existing fund which state cannot simply confiscate).

95. *Pineman v. Oechslein*, 488 A.2d at 810.

96. See *Spiller v. State*, 627 A.2d at 519.

fornia view, or whether some different alteration or budget cutback would have been less burdensome on the employee (as the *Spiller* dissent proposes).<sup>97</sup> Another commentator noted that the property approach "gives hope that legislative and judicial collaboration can produce constructive and realistic principles which are appropriately responsive to the legitimate need of both employee and government."<sup>98</sup> Even one critic of this property approach concedes that it addresses "what the government can do with the existing fund rather than . . . how the government can modify the employee's expected benefit."<sup>99</sup>

Thus, the critical difference between the *Pineman* approach and the *Christensen* estoppel approach is that the former protects the amounts that public employees have already paid into a retirement fund, while the latter protects, somewhat generally, their "expected benefits" which include more than that which is already in the fund. The differences in clarity and scope between these two approaches make it particularly frustrating that the Law Court recognized both as rationales for its holding in *Spiller*. The court failed to acknowledge that the two approaches call for very different analyses and produce very different results.

One significant problem remains with the *Pineman* approach. In both *Pineman* and *Spiller*, the changes to the pension system were fairly moderate and not such as would cause a major disruption for the affected employees. But, *Pineman* does not explain whether the property approach would be appropriate if legislative changes to the pension system included, for instance, a raise in the retirement age to eighty or the payment of the pension over one hundred years. In these rather extreme instances, the *Pineman* analysis seems inappropriate. Such examples call for an "arbitrary and capricious" standard of review. Changes that applied to state employees who had more than seven years of employment at the time the changes were made might also require such a standard. In the case of those changes, there might also be questions of breach of contract since that seven-year time period was mentioned in the retirement plan; that issue was not raised in *Spiller* because none of the plaintiffs had seven years of creditable service. For non-vested employees, however, changes found not to be arbitrary and capricious should have their constitutionality determined under the *Pineman* standard.

Were the Law Court to base its decision upon the *Pineman* property rights approach, the court would almost certainly still hold that the modifications did not violate constitutional rights of the pen-

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97. See *supra* note 4, at 586.

98. Cohn, *supra* note 6, at 50.

99. Note, *Public Employee Pensions in Times of Fiscal Distress*, *supra* note 6, at 1003.

sioners. Although the question of the effect on the employees' expected benefits might remain unsettled, the court would most likely find the changes in the definition of "earnable income" to be constitutional because they affected not what was in the pension fund already but instead what portions of the plaintiffs' income could go into the fund in the future. Also, while *Pineman* does not create a set standard for permissible changes in early retirement age requirements, the fact that it sustained Connecticut's decision to raise the early retirement age by five years indicates that Maine's raise in its retirement age by two years would likely be sustained if *Pineman* was followed. The critical difference with the *Pineman* view is that the Law Court would have a workable standard for future public pension issues: that legislative modifications must not deprive the pensioners of the interests they have in the existing fund.

One can be sure that the issue of public pensioners' rights will arise again in the near future. Even in the wake of *Spiller*, the Maine retirement system continues to come under fire as a fiscal cyclone spinning out of control. A recent study conducted by the Maine State Retirement System shows that the system is underfunded by \$1.25 billion.<sup>100</sup> That leaves the State of Maine with a Hobson's choice of either slashing benefits or raising taxes to pay for the system.<sup>101</sup> This debate will almost certainly continue out of necessity, and those who stand to lose as a result of modifications can be expected to seek legal redress.

With scant hindsight, it is difficult to know what economic and social costs these modifications will have for Maine's public employees. Quite possibly these costs will be of the proportions suggested by the pensioners in their Law Court brief.<sup>102</sup> The issue of whether modifications that are constitutional under *Pineman* cause more economic hardship than leaving the system unmodified should be open for vigorous debate. However, that debate should occur in the Maine Legislature. The Law Court should refrain from acting on economic policy which presents no constitutional violation. As Justice Black noted in his dissent in *Goldberg v. Kelly*,<sup>103</sup> "[h]ad the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost."<sup>104</sup>

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100. This study was commissioned by Robert A.G. Monks, who led a similar study in 1987. The study's recommendations will be presented to the Legislature this year.

101. See Nancy Perry, *Pension System Needs Big Change, Study Says*, ME. SUNDAY TELEGRAM, Oct. 31, 1993, at 1A.

102. See *supra*, note 61.

103. 397 U.S. 254 (1970).

104. *Id.* at 276-77 (Black, J., dissenting).

## V. CONCLUSION

*Spiller v. State* comes at a crucial time as Maine's legislature comes to grips with the tough choices needed to close its gap between expenditures and revenues. *Spiller* may have been correctly decided, but its holding does not present a specific course on which the legislature may steer the issue of public pensioners' rights in the future. The dissenters' views would present even greater policy problems. The best approach for the Law Court to take in the future, whenever they must revisit the issue of the pension rights of public employees, is to continue to reject the contract approach of the dissenters but also more fully embrace the property rights approach of *Pineman v. Oeschlin*. Using this approach, the Law Court would not base its decision on some tenuous relationship that may or may not exist between the state and its employees but instead would look at whether public employees' actual interests in the pension fund are protected.

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